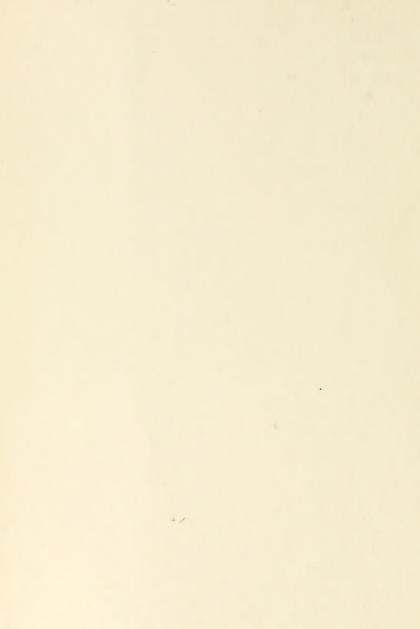


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LOUIS D. GLANZ as Trustee, and RALPH MAYER,

Appellees,

VS.

MORRIS H. GOLDSTEIN et al., Appellants. INTERLOCUTORY APPEAL FROM
SUPERIOR COURT OF COOK COUNTY.

268 I.A. 611'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse an order appointing a receiver in a foreclosure suit.

The receiver was appointed after notice to all parties on the verified bill of complaint.

The bill was filed May 7, 1932, and the order appointing the receiver entered May 12th. In the order appointing the receiver the court finds that the defendants, who are the owners of the equity of redemption of the property in foreclosure, had personal notice of the motion for the appointment of a receiver; that the court considered the property in foreclosure, had personal notice of the motion for the appointment of a receiver; that the court considered the profit that the court considered the receiver giving bond in the sum of \$5,000 and the complainants a bond of \$500. June 7, 1932, the defendants filed their appeal bond, which was approved by the clerk of the court, as the statute requires.

The record discloses that the defendants filed a practipe for record, and that all they asked the clerk to certify was the bill of complaint, the order appointing the reciver, and the appeal bond.

The trust deed pledged the rents and profits as well as the property itself as security for the indebtedness of \$75,000. The bill alleges that \$68,000 of the principal indebtedness is still due and unpaid; that the defendants, the makers of the notes and mortgage, are insolvent and that the property cannot be sold at the present time for more than \$50,000; that the market value of it is

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LOUIS D. GLANK as Trustee, and RALPH MAYER, Appellees,

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MORRIS H. GOLDSTRIN et ml., Appellants.

INTERLOCUTORY APPLAL FROM
SUPERIOR COURT OF COOR COUNTY.
268 I.A. 611

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not more than \$50,000; that the premises are improved by a building containing flats, stores and offices, and that the rental value is only \$700 a month. The trust deed provides for the appointment of a receiver without regard to the solvency or insolvency of the makers of the mortgage.

The defendants contend that the allegations of the bill of complaint are insufficient to warrant the appointment of the receiver on the ground that the allegation that the property is not worth more than \$50,000 and cannot be sold at the present time for more than that amount, is a mere conclusion. With this contention we are unable to agree. The allegations that the property is not worth more than \$50,000 and cannot be sold for more than that amount, are allegations of fact and not mere conclusions. Especially should this conclusion be adopted in the instant case, where the appeal is from an interlocutory order entered on the face of the bill.

The argument made on behalf of the defendants is wholly insufficient to warrant us in reversing the order appointing the receiver, and it is therefore affirmed.

ORDER AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

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CHICAGO TITLE AND TRUST COMPANY, a Corporation, as Trustee,
Appellee.

VS.

MORRIS JACOBS and SOPHIE JACOBS, et al.,

INTER-OCUTORY APPRAL FROM SUPERIOR COUNTY OF COOK

260 I.A. 01111-

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On July 6, 1932, the court appointed a receiver of the property involved in a foreclosure suit, and the defendants appeal.

The order appointing the receiver contains the following:

"This cause coming on to be heard on motion of the solicitors for the complainant for the appointment of a Receiver and it appearing to the Court that the holder of the equity of redemption, together with all parties involved, have been duly served with notice of this motion, and the Court having read the sworn Bill of Complaint filed herein and having heard the evidence as to the value of the property described in the trust deed." etc.

In the order the court found it was provided in the trust deed that a receiver might be appointed during the pendency of foreclosure without regard to the solvency or insolvency of the persons liable for the payment of the indebtedness, and the court further found that it was probable there would be a deficiency after a sale of the property, that the grantors would be unable to satisfy such deficiency and that the premises were scant security for the amount due. The order then provided for the appointment of the receiver upon giving bond for \$7500, and the complainants a bond of \$500 with sureties to be approved by the court.

The trust deed pledged the rents and profits as well as the property itself as security for the payment of the indebtedness.

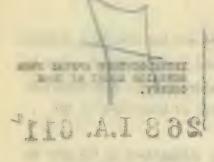
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The defendants contend that the order appointing the receiver is wrong and should be reversed because it was based solely on the allegations of the bill, which was sworn to only upon infermation and belief, and that such verification is insufficient.

The affidavit is that the affiant "has read the foregoing Bill and knows the contents thereof, and that the allegations contained therein are true of his own knowledge and belief, except as to such matters as are therein stated to be alleged on information and belief, and that as to such matters he is creditally informed and verily believes the same to be true." The affidavit is cafficient. Reliance Bank & Trust Co., v. Dalsey, 263 Ill. App. 546; Peterson Co. v. Asphalt Sales Corp., 235 Ill. App. 502; Grace v. Cakland Bids. Assoc., 166 Ill. 637; In re Jeller, 36 Fed. 681; Leich v. Creen, 64 Lebraska, 533; 2 Corpus Juris, 355.

In the Reliance Dank case the affidavit was substantially the same as the affidavit before us, and it was there held sufficient. In that case the cases above cited are discussed as wathority for the halding in the Reliance Back case. We entirely agree with the views expressed in that case. Substantially the same forms of affidavit were held sufficient in the Paterson case, supra. What allegations are positively averred and what are made upon thforeation and belief can be readily ascertained by a more reading of the bill. In the bill it is alleged that there is a balance of \$53,015 due and unpaid, and it is further alleged that the premises are deteriorating and depreciating in value and are not at the time reasonably worth more than \$40,000. These allegations are positively made and are sufficient to warrant the court in appointing a receiver to collect the rents to apply on the indebtedness, because if the allegations are true, as they must be presumed on the record to be, there will be a deficiency, as the property is not worth the amount of the indebtedness. The allegaon the allegations of the bill, which was sweet.

The efficient to the efficient "has read the foregoing tained therein are true of his own knowledge and brites, except an to such matters as are therein stated to be alleged on information and belief, and that as to such matters he is creditably informed and verify believes the same to be true." The affidavit is sufficient.

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A further complaint is that there is no allegation in the bill as to who is the owner of the premises sought to be foreclosed nor as to who is in possession of them. The trust deed, which is an exhibit to end made a part of the bill, states that the defendants. Norris Jacobs and Sophie Jacobs, who appeal from the order appointing a receiver, are justly indebted in the sum of \$55,000 to the legal holder or holders of the bonds described in the trust deed, which bonds are signed by them, and that to secure the payment of the bonds they conveyed the property in question to the trustee and in the trust deed covenanted that they were well seized and had a good title to the property. This is sufficient to show that they owned the property. If they do not own the property, then the appointment of a receiver for it in no way detrimentally affects them.

The order of the Superior court of Cook county is affirmed.

ORDER AFFIRMED.

McSurely, P. J: I cencur in the conclusion of the court. Watchett, J., concurs.

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36397

CHARLES KARNATZ,

Appellee,

VS.

DORA SAKANOVSKY. Appellant.

INTERLOCUTORY APPRAL FROM CIRCUIT COURT OF COOK COUNTY.

263 I.A. 611

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On July 18, 1932, complainant filed its bill to foreclose a trust deed which the bill alleged was executed to secure the payment of a principal note for \$30,000, with interest thereon. The bill prays for an immediate appointment of a receiver and states that "the premises are improved with a building occupied as a residence." The bill alleges that the note and trust deed were executed by Dora and Frank Sakanovsky and that Frank is deceased. It makes Dora Sakanovsky and Louis D. Glanz, the trustee, defendants. Alleged copies of the note and the trust deed are attached to the bill and made a part of it. The bill states that the note and the trust deed were given as part payment of the purchase koney for the premises: that certain coupon notes were attached to the note: that coupon notes lios. 1 to 6 representing the interest had been paid but that two interest coupons described as Z-7 and Z-8 due December 5. 1931, and June 5, 1932, respectively, are in default and unpaid; that complainant "is the legal holder and owner of said interest coupons, Z-7 and Z-8, and holds the same ready to be produced in open court upon a hearing hereof."

The bill also avers that complainant is informed and believes that the taxes and the insurance premiums on the property are unpaid; that the property "is scant security for the payment of the amount now due your orator;" that the grantor in case of foreclosure waives all right to the possession of and income from the premises pending such foreclosure proceedings and until the period of redemption from any sale thereunder should expire; that a receiver should be

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appointed as a matter of right upon the filing of the bill of complaint without regard to the adequacy of the security.

Attached to the bill is a copy of a coupon, No. Z-7, signed by Frank Sakanofsky and Dora Sakanofsky for the sum of \$300 due December 5. 1931. It is made to the order of themselves and by them endorsed and states upon its face that it is for an installment of interest due on that date upon the principal note of "the undersigned" for the sum of \$10.000, due five years after date. Also attached to the bill is a note of Frank and Dora Sakanofsky dated June 5, 1928, for the sum of \$10,000 with interest at six per cent. This note states that the several installments of interest are further evidenced by ten interest notes or coupons of even date therewith, and that the payment of the note is secured by a trust deed on real estate in Cook county, Illinois, to Louis D. Glanz, trustee. This note includes a power of attorney to confess judgment. The trust deed, however, which is attached to the bill. states that the consideration therefor is the sum of \$30,000, and that the grantors, Frank and Dora Sakanovsky, are justly indebted on 26 principal promissory notes of even date therewith for that amount, These notes and coupons representing the interest thereon are particularly described. The bill is not verified.

On July 22, 1932, a petition of complainant was filed as verified by one Anton J. Kohatak, who states that he has knowledge of the facts but does not state his relationship, if any, to complainant. This petition avers the filing of the pending bill of complaint; that complainant is the legal holder of unpaid notes and coupons amounting to \$20,000, and that no interest has been paid on the notes since December 5, 1931; that the taxes for 1929 and 1930 amounting to \$1900 remain unpaid; that "the premises are improved with a six-flat brick building and that the cash market value of the same is \$25,000, and that petitioner fears that unless a receiver is appointed to take possession of said property and to

appointed as a matter of right upon the Filing of the hill of com-

Attached to the bill is a copy of a couper, No. Z-7, signed by Frank Sakenorisky and Dore Sakemorisky for the sum of \$300 due December 5, 1951. It is made to the order of themselves and by the affinishing tot at it isn't eas' ait nows astata ban bear obne ment -cobar od!" to sion Lacinding od! angu sint fad! ar sub Jaconiu! To sale . . No was a read with the contract of the contract held qualposide area in ducts to size a al fill off at he helded June 5, 1928, for the sum of \$10,000 with interest at cix per descript to singulating larges and that the setal and all interests meyo te amounou to asjon testatal not ye beenshive ranttuit etc a ve beruses at soon said to themese and that the maintain atab tivet doed on real estate in Cook county, Illinois, to Louis D. Clarz, tructes. This note includes a power of attorney to confess judgment. The trust deed, however, which is attached to the bill, states that the consideration therefor is the sum of \$30.000, and that the premiors, Iren's and Born security, ore justif inderend was not an interest man over in a star your large in in it is angual, love suches of computer regression in this rest loves are particularly described. The bill is not verified.

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collect the rents thereof, the security upon said property will become impaired and that the maker of the notes secured by said trust deed is insolvent."

On July 23, 1932, an order appointing a receiver was entered by the court. It recites that due notice had been served upon Dora Sakanovsky, the record owner; that she was present in court upon the hearing of the motion; that the court read and considered the bill of complaint and the admissions and statements of counsel; that the premises are scant and meager security for the payment of the indebtedness; that the market value of the premises is \$25,000, and that the same had been sold for the 1929 general taxes and not redeemed; that Louis D. Glanz be and is appointed receiver of the premises; that the bond of complainant in the sum of \$500 should be filed within ten days and that the receiver's bond for \$3,000 should be filed within twelve days.

It will be noticed that the petition fails to aver that the statements of fact in the bill of complaint are true. It leaves the court in doubt as to the amount of the indebtedness which is due and as to who is the owner and holder thereof. The bill of complaint and the petition contradict each other as to the character of the improvements which are on the premises; and while the bill avers that complainant is the owner of two coupons of \$300 each, the petition alleges that he owns \$20,000 of the indebtedness.

This court has often said (and it should be unnecessary to repeat) that the application for the appointment of a receiver is addressed to the sound legal discretion of the court; that it is a high and extraordinary remedy to be exercised not arbitrarily but with caution and only where the court is satisfied that there is immediate danger of loss if it is not exercised. Frank v. Siegal, 263 Ill. App. 316. Certainly, a record such as this, which fails to

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show who are the owners of the indebtedness, what is the amount due and what is the condition of the premises, and where the averments of the petition contradict those of the bill, cannot justify an order appointing a receiver. The order is therefore reversed.

REVERSED.

McSurely, P. J., and O'Connor, J., concur.

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LIMOY B. BOYLAN, Complainent and Defendent in Error,

V.

ANNA M. BOYLAN,
Defendant and
Plaintiff in Error.

ERROR TO SUPERIOR COURT,

268 L.A. 611

## PER CURIAM.

on april 25, 1930, the superior court of Cook county granted a decree of divorce in complainant's favor on the ground of defendant's desertion, and diamiased defendant's cross bill for a separate maintenance for want of equity, and also in the same decree awarded defendant \$80 a month alimony and \$500 for her solicitor's fees in addition to what previously had been allowed.

ourt a writ of error to reverse the decree. Buring April, 1931, complainant filed a plea of release of errors, in which he averred in substance that after the entry of the decree defendant received and accepted from him the sum of \$500, which said decree had required him to pay to her as solicitor's fees and that she appropriated said sum with knowledge of the purpose for which it had been paid and that, thereby, she had confirmed the decree and released any and all errors in the entry of such decree. To this plea defendant filed a decurrer, and on April 20, 1931, this court sustained that demurrer.

On October 9, 1931, this court, for reasons stated in its opinion then filed, reversed said decree and remanded the cause

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On Jamery Ld, 1821, defendant abset from this

court a writ of error to revere the decree. Suring April, 1831,

complained filed a place of release of errors in which he errored

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with directions to the superior court to dissize complainant's bill for want of equity, and to hear evidence answ on the issues made by defendant's cross bill and complainant's answer thereto, and in the meantime to make provision for the payment of reasonable alimony and solicitor's fees to defendant." Thereafter, on complainant's petition, the Supreme Court awarded a writ of certiorari.

On June 24, 1932, the Supreme Court in its opinion held that this court had erred in sustaining the demurrer to the plea of release of errors, and adjudged that the judgment of this court be reversed, and that the cause be remanded to this court "with directions to overrule the demurrer and to dismiss the writ of error." At the Cotober term of the Supreme Court defendant's petition for a rehearing was denied, since which time complainant has here moved that this court enter an order in complained with here the mandate of the Supreme Court, which has/been filed.

In compliance with that mandate, it is hereby ordered that defendant's demurrer to complainant's said plea of release of errors be overruled and that said writ of error, sued out of this court on January 14, 1931, be dismissed.

WRIT OF ERROR DISMISSED.

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other cissues and solicitor's for defendents." Therefore, on

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LOUIS WALD for use of MAX M. GROSSMAN.
Appellee.

VB.

WALD & SCHWADE Co., a Corporation, (Garnishoe),

Appellant.

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APPEAL FROM MUNICIPAL.

268 I.A. 612'

MR. PRESIDING JUSTICE MC SURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying its motion to vacate and set aside a prior judgment against it as garnishee for \$105.10.

Max M. Grossman had obtained a judgment by confession against Louis Wald in the sam of 197. Wald filed a debter's schedule with the bailiff setting forth that he was the head of a family and living with the same, and claiming exemption. Garmishment proceedings were commenced against the defendant, which answered that it did not have in its nossession any credits, property, moneys, etc., in which Louis Wald had any interest. Plaintiff contested the answer and upon trial by the court finding was for plaintiff and judgment was entered against defendant as garmishee. Within a short time thereafter and within the term defendant filed its petition and moved the court to vacate the judgment, which motion after hearing the court demied.

The petition upon which the defendant based its motion alleged the failure of the plaintiff to observe the statute requiring a demand in writing on an employer and the employee before a garnishment proceeding is commenced. Illinois Statutes (Cahill), chap.

62, sec. 14. This in short provides that \$40 a week for wages or calary of the head of a family residing with the same shall be except from garnishment; that before bringing suit a demand in writing must be served upon the employer and upon the employee, which service must be at least twenty-four hours previous to bringing suit; such

LOUIS WALD for use of LAR L. GROSSMAR.

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notice must be filed with the clerk of the court with the manner and time of service endorsed thereon, and the return duly sworn to before it shall be lawful to issue a summons or to require the employer to answer in any garnishee proceedings; any judgment rendered without said demand being served upon the employee shall be void.

The petition to vacate asserted that Louis Wald was employed by the garnishee defendant and was a wage earner for services to it; that it had in its possession as affidavit from Wald that he was a wage earner and the head of a family consisting of misself, his wife and three children, and that he was residing with them at the time of the service of the garnishee summons upon the defendant. petition further represented that no demand in writing was served upon it, nor any wage demand served upon Louis Wald or any member of his family, as required by statute. Defendant argues that this the failure to serve/notices required by the statute renders the judgment against it void and of no effect. In Munley v. Panther Creek Mines, etc., 223 Ill. App. 558, it was held that the failure to serve the statutory notice or demand in writing rendered the judgment against the garnishee void, as the court had no jurisdiction under the circumstances. To the same effect is Walker v. O'Gara Coal Co., 140 Ill. App. 279.

Plaintiff concedes that if he were attempting to garnishee the wages of the judgment debtor, the failure to follow the statute would invalidate the judgment, but argues that the record fails to disclose that he was attempting to garnishee wages, and that in the absence of a bill of exceptions showing the evidence heard upon the trial, we must assume that wages were not involved. But the proceedings at the trial are not before us and we are not concerned with them.

The question for us to determine is whether the court should have allowed the motion to vacate the judgment.

notice was be filed with the clore of the cents with the fencer and time of service endered thereon, and the return duly swent to before it shall be lawful to issue a summons or to require the say payer to meser in any garmiance proceedings; any gudgment rendered without seld decand being served upon the employee shall be veld.

beyolune and bla's chied full besuess classy of noising only the destroy and remains one a new how franches and large and ad that it had the mountains in affically from wall that he was a where series and the bead of a family consisting of the call of and three children, and tant he was residing with them it the time of the service of the germishes susmons upon the defendant. berros are galalive at bannot on and bedrospager vertical notified necessary and the high street street arrived that the tar the course of his family, so required by adalots. Defendent awaise that this Yealigns to nerve motices required by the statute readers the tudement are in rold and of ma all added a succession Error Miner: etc., 253 Lil. App. 555, is mus Hold that the fallers: ed bereken galiliv at busing to ention years out over of -bladust on had rune and an iblev sometrue and tentens from but tion under the circumstances. To the same arts of the Training TOWN LOCK LEEK COLUMN THE PROPERTY.

Plaintiff denorder that it he ward straugiles to gerelabee the wages of the judement debter, the Sallers to Sollow the resiste would invalidate the judement, but asymes that the record tails to disclose that he was attempting to gracione wages, and that is the absence of a bill of exceptions showing the evidence heart upon the trial, we must accome that ware were not involved. Int the oresistant of the trial are up to before us and we are not concerned with them.

should have allowed the agiton to wearle the judgment.

The bill of exceptions which is before as shows the proceedings upon this motion and says that the court acted upon the allegations of the petition only. There was neither answer nor evidence. The action of the court must therefore be tested by the petition alone. While it might in some respects be improved and made more definite, yet it sufficiently appears that plaintiff was seeking wages which might be due Wald from his employer, the defendant, and as no issue was made as to this we must assume the truth of the statements oin the petition.

It follows, therefore, that because of the failure to comply with the statute the court was without jurisdiction to enter the judgment, and it is void. The order denying the motion will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

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trace of the statements of the petition.

It follows, therefore, that because of the fullure to

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near the judgment, and it is void. The order desping the netion

Matchett and O'Cornor, JJ., concur.

ROSE GORINDAR and ISRAEL GORINDAR, Appellants,

VB.

PINCUS SALTZ and MEYER MARKS, Appellees.

23

APPEAL PROM EURICIPAL COURT

268 I.A. C12<sup>2</sup>

AR. PRESI'ING JUSTICE RESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs had judgment entered by confession against defendants on a written lease, for \$704. Subsequently, on motion, defendants were given leave to defend and upon a trial hefore a jury the issues were found against plaintiffs and judgment accordingly entered. Plaintiffs appeal.

The only question involved is one of fact, namely, Bid plaintiffs and defendants make an agreement whereby defendants were discharged and released from any liability under the lease?

The lease was for a term beginning July 1, 1926, ending June 30, 1936. Defendants at the time of making the lease descrited with plaintiffs the sum of \$2000 in cash as security. Saltz, one of the defendants, testified that on June 28, 1928, they wished to sell their business and leasehold estate to certain parties, and had a conference with plaintiff Israel Gorindar, who is also an attorney, in which it was agreed that, if the defer dants would waive all their rights in the \$2000 deposited, and also to certain bake ovens which defendants had installed in the premises, slaintiffs would release defendants from all obligations under the lease. A centract in writing to this effect was drawn up by Gorindar and signed by the parties. Defendants' copy of the lease was given to Gorindar, who kept it. He also promised to mail defendants a copy of the contract of release, but never did so. Defendant Marks testified that he was present in Corindar's office at this time and that the agreement was made to release them, and a contract to this effect was signed by the parties.

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Plaintiffs had judgment entered by ecuteration against deles vois substitute vere given loave to defend and upon a trial before a
jury the lastes were found spalast claintiffs and judgment no-

The only question involved is one of fact, namely, Nid

The lease was for a term beginning July 1, 1926, ending June 18, 1986. Defendants at the time of making the lease despited with plaintiffs the sum of \$2000 in olse on stillining after of the defendants, testified that on June 26, 1986, they wished to out their business and teamentd sureto to certain parties, and ne eric at one rabulted larget Thisalale citiv compretence a had bluer atant s'ob ear 'il , but heave now it delies di versotte minted of sale has , betheoreh 60000 ods at striply thent the evice bainto evers salon defendante and tastalled to the president alainessel of reion unalighted the ment atminets sameler blue allig bun achnizes of an emerican foothe alif of pairire at fautime A eligion by two parties. Defendants' may of the lance was given to Boringar, who kept it. He also presided to sail dot other a copy or the contract of release, but meren and to Delieu-Lunk Barks has noted that the coffic a unitable at account new that their beliefeed stil of destinant a han , were considered of other than images, and intelled effect was signed by the portion.

The evidence shows that the defendants thereupon sold out their business and that other tenants took possession and attorned to the plaintiffs. He demand was thereafter made upon defendants for rent. We do not find any place in the record where this testimony is directly contradicted. Counsel for plaintiffs contends that the testimony of defendants as to their release is highly improbable and unbelievable. There is nothing impossible in their story, and hr. Corindar had opportunity upon the trial to deny their version of what took place but he did not see fit to do so. We is an attorney, and both he and his lawyer must have appreciated the importance of this testimony, yet let it pass without demial. The jury might properly find that defendants were released from further obligations under the lease in consideration of their valver of their rights in the 18000 denosited and to the bake evens which they had placed in the premises.

It is well settled that a landlord may make an agreement with his temant whereby he releases and discharges him from further obligation on the lease, and that such an agreement is valid and binding. Eleanouist v. Johnson, 107 Ill. App. 154; Brasher v. McCaskrin, 120 Ill. App. 343; Chanman v. Cary. 238 Ill. App. 605; Bills v. Stobie, 31 Ill. 202; Alschuler v. Schiff, 164 Ill. 298; brehtmann v. Fischer, 216 Ill. 142; Foreman-State I. A S. Bank v. Demeter, 347 Ill. 72.

We see no reason to disagree with the verdict, and the Judgment is therefore offirmed.

AFFIRMED.

Matchett and O'Connor, 3J., concur.

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To see me reason to disagrae viol the verdict, and the

ARETERATED.

Matehatt and Plummer, M., commut.

SECURITIES ACCEPTANCE CORPORATION, an Illinois Corporation, Appellant.

VB.

STANISLAUS W. BISRNAT.

Appellee.

APPEAL FROM BUNICIPAL COURT OF CHICAGO.

265 L.A. 612

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COUNT.

In an action tried by the court the finding was against the plaintiff and it appeals from the judgment. Judgment by confession had been entered against defendant for \$306.35 on a contract of sale which contained a power of attorney to confess judgment. On motion this judgment was set aside and upon a trial on the merits the defendant prevailed.

The centract, executed in duplicate, was for the purchase by defendant of a radio; one copy was delivered to nim, the other was kept by the seller of the radio who subsequently assigned it to the plaintiff, which brought suit. Upon the trial it developed that the copy of the contract assigned to plaintiff had been changed after it had been executed by the defendant, who produced his copy, from which by comparison the changes made were clearly shown. The contract, which was mostly in sprinted form, recited that the defendant had bought from "the Pheanix Piano and hadio Company" a certain radio. The name of this company appears about ten times in the contract. Towards the end is a clause pursorting to authorize an attorney to confess judgment against the defendant.

In the copy retained by the seller and produced on behalf of the plaintiff, the name of this cospany wherever it appears is scratched out and in its place the name, "George Stratton" is written. Furthermore, the contract when executed was for the purchase not only of a radio but of certain "music rolls." The "music rolls" were scratched out of plaintiff's copy of the centract

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MARKELS IN A UNASSENATE

Appelle.

260 I.A. 012

APPRAL PROB BUST CEPAL OUT

SA. PRESIDING JUSTICS LOUDERLY BULLVERED THE OFFICE OF THE COURT.

In se agrice tried by the court the finding was against the stiff and it appeals from the judgment. Sudgment by confession had been entered against dufendant for 5506.35 on a contract of an ealer which contained a power of attempt to confess judgment. Un world, this judgment was not eather and upon a trial on the merita the defendant prevailed.

The contract, escented in depitests, was for the purchase by defendant of a radio; one copy was delivered to also the the other was kept by the leader of the radio was subsequently useigned it was kept by the leading of the radio was alimital it developed to the plaintiff, which broading and to plaintiff had been charged after it had been centract aceigned to plaintiff had been charged by the defendant, who produced his copy. I've which by comparison the charges made were electly shown. The fract, radio was scotly in sprinted form, region that the definance, radio was scotly in sprinted form, region to the tent of the contract for the contract for the contract for the contract about ten these the contract. Towards the contract and the contract to the contract of the contract and the contract of the contract and the contract.

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of the plaintiff, the name of this company whapever it appears in
scretched out and in its class the name, "George Straveou" is
written. Furtherwore, the contract when executed was for the purchase not only of a rails but of cortain "muste rolle." Ins

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although they are in the duplicate kept by defendant.

Plainti'f argues in this court that this alteration of the name of the seller was harmless as it did not change the identity of the person intended, and complains of the trial court's refusal to permit plaintiff to show that the Pheanix Plane and Radio Company was one and the same as George Stratton, whose name was substituted for that of the company. Even if the change of the name of one of the contracting parties might have been explained as in newice changing the identity of the parties, yet this would not excuse changing the copy of the contract held by the seller by striking out the item of "music rolls". This was a material alteration. A material alteration of an executory written contract, made without the consent of the other contracting party, destroys it as a basis of recovery. Merritt v. Dewey, 218 Ill. 599. Even if the alteration is innocently made, without fraudulent intent, it destroys the instrument by changing it into one to which the parties never agreed. Hayes v. Wagner, 220 111, 256.

suit, yet there can be a recovery usen the original debt or obligation. Examination of the instant circumstances discloses that there has been a breach by the seller which does not permit a recovery. Defendant called at the store of the seller and desired to urchase a "Philoo Combination Automatic Radio and Phonograph." The seller did not have this make in stock but took the defendant to a warehouse room where the defendant selected a Philoc radio and asked that it be delivered at once. The seller was unable to promise immediate delivery, and, as the defendant wanted the radio at his nome that night for a party, it was agreed that a Sparton radio should be delivered temporarily and that within a few days the seller would deliver the Philoc radio, taking back the Sparton. Both copies of the contract specify the purchase of a Philoc radio, so that there

all beauty. Hery are the tree beauty brys by defendent,

and to reduce the title done it to be a three to the terminal to be a fine at the same of will make that expends Just 125 AZ on any Cotton our welling and the same Faculty of true. Inits out to autotomes the between incres out to vacuum I albait but anoth rimmail and soul work of Tildulate Sharag of paraditados am amma produ , nodratil egros 8 am e ent the ene sew for that of the company. Even if the change of the name of one of setven at an hentelyte need evant farta seldang galdestdane est county the County of the Perties, but the world on the guiding the copy of the contract held by the self to you only unguedo and the Inited as a ser alia" allow bloom to cost odd the Parallie show a Tabiline profile of the contract to be unitable in Tabiline sing a on the other contracting party, destroy of the foundation of secrety devices, and the little five over it he adoptand grouped it . Jonani Javisburi Sugailw , thew will a at I as I to the column to oback to the cast to wilde portion acres agrees. 

Although the exitted contract not be void on the bauts of a contract of the seller which does not persit a recovery. The seller which does not persit a recovery. Defendent called at the stere of the seller and desired to areason ald not have this nake in stock that took the defendant to a versuase room where the defendent selected a finite radio and assert the be delivered at once. The seller was unable to provise immediate alcivery, and, so the defendant wast ambiet the radio at alc home that alcivery, and, so the defendant wast ambiet the radio at alc home that delivered temperally and that while a parties the seller world deliver the finite and the copies of deliver the finite radio, taking book to finite radio, so the sear thors

is no dispute on this point. Although the seller promised to deliver the Philos within one week it was not delivered. Defendant called the seller up repeatedly, offering to return the Sparton radio and asking for the delivery of the Philos radio. It was never delivered. As the seller failed to perform its obligation to deliver a Philos radio it has breached the contract and therefore cannot recover upon any promise of the defendant to pay for this particular kind of radio. The merits of the controversy are with the defendant.

We do not view with favor documents like this. The half-hidden power to confess judgment is too often a trap for the unsuspecting. Certainly equitable considerations should prevail against any attempt to enforce this power. <u>Alaborated Ready</u>
Roofing Co. v. Hunter, 262 Ill. App. 380; <u>Preisler v. Sulezynaki</u>, 264 Ill. App. 12.

We are of the opinion that the judgment was proper, whatever errors may have been committed upon the trial, and it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

is no discuse on this point. Although the noller presided to deliver the Pailes stain one wook it was not delivered. Defendant colled the scales up.

radio and soling for the delivery of the Philos radio.

Seven delivered. As the celler failed to perform its obligation
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We are of the opinion that the judgment was super, whatever

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MARY ZONCA, Administratrix of Retate of Anton Zonca, Appellee,

VS.

PLARLIE LLECA and PLTER SCHOA, Appellants.

APPRAL PROK BUNICIPAL COURT

268 I.A. 612

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, administratrix of the estate of Anton Zonca, brought suit for a balance of principal and interest alleged to be due on a promissory note for \$1000 made by defendants to the order of Anton Zonca, upon which \$500 had been paid.

Pearlie Lonca filed no affidavit of merits is the Municipal court and did not testify, although Peter Lonca testified that he signed his wife's name to the note without her knowledge or consent.

Upon trial the court, after giving credit to the defendants for certain items which Peter Zonca testified he expended on benalf of Anton Zonca during his lifetime, entered judgment against them for \$654.55. The only point made by defendants upon this appeal is that the judgment is against the manifest weight of the evidence.

Peter Zonca testified that he expended money for the medical care and treatment of Anton Zonca, and that Anton promised that he. Peter, "could keep the balance of \$500 due to Anton upon said note" and consider the balance cancelled. Two witnesses testified that they heard Anton Zonca tell Peter that he could keep the \$500 balance on the note for services rendered by Peter and for taking care of him. Peter testified that he made many trips to the county agent to obtain provisions for Anton; that he took him to one doctor ten times and to another doctor seventy-four times, and likewise boarded Anton and took care of him day and night for eight weeks.

The plaintiff testified, denying generally that Peter had been to any expense on benalf of Anton, although she admits that

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EARY MONCA, Alministrating of Estate of Anton Secondary, or

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MA. PERSIDING JUSTICE MODULETY DELIVERS THE OPINION OF THE GOUST.

Flaintiff, administratifx of the serate of Apten Zones.

The stanta for a balance of principal and interest alleged to be
due on a premissory note for \$1000 ands by defendants to the order
of Anton Zones, upon which fill had been puls.

carile Roses Viles no affidavis of merity in the Eunicipal court and did not testify, although Feter Roses tustified that he should be a the note wit out nor important, or newsent.

ipen tried the court, after plaint predit to the defendants for certain liens which Ferer Lones tentified he expended on bound? of Anton Lones during his lifetime, sovered judgment equine them for \$654.55. The only point made by defendants upon this appeal is that the judgment is egainst the madelone weight of the evidence.

Peter lance tentified that he exemised maney for the medical call care and treatment of Anton knoon, and that Anton presided that he, Peter, "could know the balance of AND due to Anton unon said note" and countder the halance omnociled. For vitne ness testified that they heard Anton Jones tell Peter that he could keep the 1811 bules or the hele for pervious rendered by Peter and for tasing bules of him. Peter testified that he ande many trips to the county care of him. Peter testified that the mede many trips to the county ten times and to more douter covering that he took him to one doctor testined and to mad took care of him they and there, and linewise boarded anton and to make out him they and shift for eight rests.

The claimiliff testified, deeping generally that Pater had been to any expense on beneif of Anton, although she adults that

anton lived in his basement for a time. The bill of exceptions is not in the form of questions and answers but is a narrative of the testimony.

We are of the opinion that this case calls for the application of the rule that a court of review must rely on the better opportunity of the trial court to pass upon the credibility of the witnesses. The litigation seems to have grown out of a family quarrel. Upon the testimony as it appears in the bill of exceptions, we would not feel justified in saying that the conclusion of the trial court was clearly and manifestly improper. The judgment is therefore affirmed.

AFFIREED.

Matchett and O'Connor, JJ., concur.

Auton lived in the bana and low a time. The bill of executions in mot in the larm of questions and assemble but is a marrative of the sections.

To are of the opinion that this case colin for the opiliontion of the rule that a court of review must reip on the better traff wity of the trial court to pass upon the condibility of all mass. The listination accounts have grown out of a family coursel. Upon the territory on it appears in the bill of exceptions, we rould sot fool justified in anging that the conclusion of the trial court was clearly and mailestly improper. The judgment is therefore affirmed.

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EUGBRE R. HOWELL,
Appellee.

VS.

EDWARD S. BARUC, RAHR I. FOSDICK, THOMAS D. HEED, EDGAR B. BERRHARD, RICHARD J. BERRHARD, JAN. G. VAN BREDA HOLFF, FRANK KLEY, MILTON A. LIPSCHER and WILLIAM J. TILLIER. Copartners Doing Business as CELVIN & COMPANY,

Appellants.

APPEAL PRIM MULICIPAL COURT OF CRICAGO.

268 I.A. 612°

AR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, who lived and did business in Aurera, Illinois, became their customer on or about June 1, 1929. On or about July 12, 1939, defendants charged plaintiff's account with the sum of \$8568.38, which is the subject matter of this suit. The statement of claim alleges that this charge was made without the knowledge or consent of plaintiff; that it was unauthorized and that plaintiff has decended said as but payment has been refused. The affidavit attached to the claim alleges that this \$8568.38, with interest thereon from July 12, 1929, is due from defendants to plaintiff.

The affidavit of merits alleges a defence to the whole demand; denies that the charge was made without plaintiff's knowledge or without his consent and authority; and alleges that on March 12, 1929, plaintiff ordered the First Illinois Company to buy 500 Anaconda Copper Company rights at the market price, which was then \$30 3/8 per right; that the First Illinois Company executed this order by requesting defendants to purchase for it 500 of these rights and agreed to pay the price therefor to defendants; that defendants purchased these 500 rights and charged the same to the account of the First Illinois Company and retained the

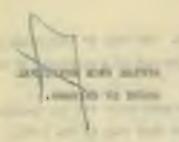
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AND THE COURTS BELLVERED THE OFFICE OF THE COURT.

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rights in their possession pending reimbursement; that the First Illinois Company failed and refused to pay for the rights; that defendants thereupon retained the said rights, and that the First Illinois Company has never paid for the same.

The affidavit of merits further alleges that thereafter on Earch 21, 1939, plaintiff instructed the First Illineis Company to sell 200 of these 500 rights at the market price; that the said company likewise instructed defandants, who pursuant thereto sold 200 of these rights at the market price of \$334 per right and credited the net proceeds of the sale to the Illinois company: that when the First Illinois company failed to make payment for these 300 rights, defendants threatened to sell the rights at the market price and to credit or debit said company's account with the difference between the market value and the purchase price thereof: that thereafter plaintiff advised defendants that these 300 rights ordered by the First Illinois Company from defendants had been in fact ordered in behalf of plaintiff, and that plaintiff desired to exercise said rights and by means thereof to purchase 120 shares of Anaconda Copper Company stock and pay the cash difference on the same.

The affidavit alleges that plaintiff was advised by defendants that these remaining 300 rights so ordered on his behalf by for the First Illinois Company had not been paid/by that company and that consequently such rights were not available to plaintiff for the purchase of Anaconda Copper stock rights until the purchase price of said rights had been paid to defendants; that plaintiff thereupon requested defendants to make the purchase of 120 shares of Anaconda Copper stock and to use the 300 rights as part of the purchase price, and that plaintiff guaranteed to defendants that if the First Illinois Company, within a reasonable time, failed to pay to defendants sums paid by plaintiff to said company on account of

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the purchase price of the 300 rights, plaintiff would pay defendants the purchase price of such rights; that plaintiff paid defendants \$6,600, which was the eash necessary in addition to said 300 rights to purchase the 130 shares of Anaconda Copper Company stock, and that plaintiff agreed to indemaify defendants if they would, with said 300 rights and said \$6,600, purchase for plaintiff 130 shares of said stock; that in reliance thereupon defendants purchased the stock and delivered it to plaintiff, who accepted and retained it with full knowledge of how it was acquired; that plaintiff agreed to pay defendants the cost of the rights if the cost was not paid by the First Illinois company and authorized defendants to use these rights.

The affidavit also alleges that upon the failure of the First Illinois company to pay for these 300 rights, defendants charged plaintiff's account with the purchase price of the rights and credited the account of the First Illinois company in a like amount: that thereupon plaintiff demanded that the company reimburse him for the cost of the 300 rights which the company had failed to pay to defendants, and that upon failure of the First Illinois company to reimburse plaintiff he brought an action against the company in the Superior court of Cook county and filed a declaration in which he alleged that the First Illinois company had converted these 300 rights; that he recovered in that action a judgment for \$8595.30; further, that plaintiff was the undiscosed principal of the First Illingis company, and that upon discovery of that fact defendants charged to plaintiff the cost of these 300 rights, which defendants had used, together with the \$6,600 in cash, to surchase at plaintiff's request 190 shares of Anaconda Copper company steck, which stock had been delivered to plaintiff and accepted and retained by him; that the market value of 120 shares of said stock as of the date of purchase was in excess of \$15,100; that plaintiff paid to defendants, to apply on

the purchase price of the SCO rights, plaintiff would pay defend.

In the purchase the lie scent necessary is addition to acid SCO rights to purchase the lie smarches of imazonda Copper Company stock, rights to purchase it they would, with noid SCO rights and eadd SCO, SCO, purchase for plaintiff 190 chares of soid stock; that is relimise thereupon defendants purthance of soid stock and deliminated it to plaintiff, who excepted and retained it with full imprisely of how it was nequired; then plaintiff agreed to pay defauchable the seat at the rights if the cost state seat at the rights if the cost eat and the rights if the cost eat and the state of the rights if the cost eat and the rights if the cost eater.

The affigerit olso alleges that upon the failure of the Newl Militain surport be not for seem and thirty, derrotesta, about not to outto ensured any many resease of Villanical degrees. add a mi ymenne nichili sarif odt 'n formeny die helike to bae -ming gargers out and behaved Thisting approprist is i janom had yangman and this anathr Gib out to two out not aid ourne failed to pay to defautants, and thus upon reliure of the First milas as easyers to Tribite alainfur of present as activiti against the company in the buperior court of dook county and almostly really soit that inquests not option at conferences a built and al terrevous on answer indicate and sparry bed revous but you good sotton a judgment for 1888 h. da: fareier, what plaintiff was the undisolved principal of the First Illiabs company, and that upon to sees set it tee ale of beganse absolute to the teet to the terrorests those 300 rights, without defendance out used, temether with the to assume our demost of Tribulate as plantative request 100 shores of Annoonla Capper company stock, which stock had been delivered to plaintiff and accepted and retained by nin; that the market rolus of 120 charge of wild steen as of the day purchase was in energy of alfalous that distally paid to defordence, to emply on

the purchase, only \$6,600 and that the rest had not been paid.

The affidavit also set up as a defense an account stated.

By an amendment to the amended affidavit of merits defendants further set up the defense that on January 8, 1931, there was a dispute between the parties as to the account between them and upon that date defendants paid the balance due to the amount of \$4906.84, and that thereby there was an accord and satisfaction between the parties.

There was a trial by the court without a jury with finding in favor of plaintiff for \$8568.30 with interest at five per cent from July 12, 1988, to November 12, 1931, amounting to \$999.64, making a total sum of \$9567.94, for which judgment in favor of plaintiff was entered.

The material facts which (in view of the finding of the court) must be regarded as established, are that defendants at the time of the transactions from which this controversy arose in the course of their business executed purchases and sales on the exchanges in different cities. Plaintiff became a customer of defendants about June 1, 1929, and thereafter continued to carry an account with them until defendant partnership was dissolved on or about January 5, 1931, at which time, pursuant to a letter from plaintiff, the account and the securities which defendants carried for plaintiff were turned over to Smith, Graham & Rockwell, another brokerage firm, who in plaintiff's behalf at that time paid to defendants the balance of the account as shown by defendants' books on that date amounting to \$4906.84.

Prior to and at the time plaintiff became a customer of defendants he had transacted business with the First Illinois company, which was an investment company dealing in stocks and bonds. While plaintiff was a customer of that company he sid not carry an account with it. It was not the member of any exchange but executed stock and bond orders of sustomers through other houses. The First

the personny sets; by one size that the person had not been post;

The officer's also set up as a defense as account stated.

Hy an amendment to the assended affidavic of marits defeatants further set up the defense that on January d. 1931, there was
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a dispute between the pervice as to the account between them into

There was a trial by the court vittous a jury with rinding an lavor of planess at rive per contract Translated Interest at rive per contract Translated Interest to Sect. St. wating a total can of \$8867.54, for which judgment in force of planetiff was entered.

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Prior to and at the time vicinity became a contener of distance of the coupany, which was no levestment company dealing in clocke and bonds. While plaintiff was a centener of that sempany he did set corrupt and the vith it. It was not the meaber of may exchange but executed

Illinois company was a customer of defendants. About Larch 12, 1929, plaintiff bought from the First Illinois company 500 Anaconda Copper Company rights for which, as was his custom, he paid cash to the amount of \$15,262.50, or \$30 3/8 per right. These rights gave to plaintiff the option of purchasing shares of the Anaconda Copper company at a fixed price before a time certain, which was June 18, 1929, after which date the rights would become void and worthless. The purchase was practically a cash transaction, payment in full being made within two days from the time the order was given. Plaintiff did not, however, take up the rights purchased and paid for but left same with the First Illinois company for safekeeping, as he supposed.

Illinois company purchased these 500 rights from defendants. It did not pay cash but was charged with the purchase price of these rights on the books of Colvin & Company. Plaintiff did not know that the First Illinois company purchased these rights from defendants and did not know that the rights had been obtained by the First Illinois company through the use of its credit. On March 21, 1929, by direction of plaintiff the First Illinois company sold 200 of these rights for \$33 5/8 per share, leaving, as plaintiff supposed, 300 shares of these rights in the possession of the First Illinois Company.

Company where he met its floorman, James anox. He told mox that he had 300 Anaconda rights at the first Illinois company, and that the rights were about to expire. He gave know directions to purchase 130 chares of anaconda Copper company stock at the market price and requested that he pick up these rights at the first Illinois company and apply the same on the purchase. They together computed the amount of each necessary in addition to the rights to pay for

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Conser tempony rights for which, as was his exactes, he paid rights gave to plaistiff the option of purchasing shares of the teached Conser company at a fixed price before a time certain, which was funcile, 1889, after which date the rights would become void and worthless. The purchase was practically a cash transaction.

on Jane 17, 1820, plaintiff nent to the affice of tolein A shore he met for fivorena, Joses hans. No told more that se and Joses hans, No told more that se and Joses hans interested company, not that the rights were about to ex fro. He gays from himpilans to putchase the first searce of magnete dopen company stock at the period priod and reviewed that he pick up these mijote at the first littuois company and apply the same on the surehuse. They saysther computed company and apply the same on the surehuse. They saysther computed the macentary in addition to the rights to say for

the 120 shares, and found it to be \$6,600. On the following day plaintiff sent a check to defendants for that amount, which they received and credited to his account. Knox promised to see that the transaction was carried out and turned the order of plaintiff over to defendants' cashier for execution.

On June 17, 1939. Colvin & Company wired its New York office, "Please use 300 Anaconda Mites from our a/c and sub to 120
ch. of stk in our name." Defendants purchased the 120 charcs of
Anaconda Copper and these shares were afterwards transferred to
plaintiff. Thereafter defendants rendered a statement to plaintiff for June, upon which appears a credit for the check in the
sum of 36,600, and on which no charge was made against plaintiff
in connection with the transaction. It was the custom of defendants to send a debit or credit memorandum to a customer on every
transaction in his account; such memorandum was usually sent out
the day the entry was made or, in very busy times as in the years
1928 to 1929, it would not go out in possibly twenty-four hours.

Although there is some conflict in the evidence, plaintiff testified (and the rulings of the court on propositions of fact and law submitted would indicate that the trial Judge believed his testimony) that not until about October 15, 1939, did plaintiff know that defendants had not taken up the rights from the First Illinois company but that they had used their own rights in making the purchase of the Anaconda Copper company stock. Prior to the transaction in which the Anaconda Copper company stock was purchased defendants were informed that plaintiff had purchased these 300 First rights from the Illineis company and that he had in fact paid for them prior to that time. About July 1, 1929, defendants learned that the First Illinois c mpany was in financial difficulties. Prior to that time, in March, April, May and June of the same year, the evidence indicates that this company was in good financial condition and able to pay for the rights it had purchased from Colvin

the 180 shares, and found it to be \$6.000. On the fullowing day plantiff sont a chock to defendants for that emount, which they received and credited to his account. Inox premised to use that the transaction was narried out and turned the order of plantiff ever to defends to cannot be execution.

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There prior to that the amount was in financial distribution.

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& Company March 12, 1939. July 11, 1939, Colvin & Company credited the First Illinois company with the \$6,600 paid by plaintiff dune 18. 19 9, and also credited the First Illinois company with the further sam of \$8568.30, and changed the charge of that amount theretofore entered against the account of the First Illinois company to a debit against the account of plaintiff. It does not anpear that plaintiff was at that time given any information as to the changes made upon defendants' books, nor was any memorandum disclosing the same submitted to him. The item of \$8568.30, hewever, appeared in a statement of account for the month of July. which was submitted to plaintiff august 1, 1929. On June 17, 1926. as the evidence shows, the market price of Anaconda Copper Company rights closed at \$22 per right. The balance of \$8568.30, which was changed from a debit against the First Illinois company to a debit against plaintiff, was computed upon the value of \$30 3/8 per right - the market price at which the same were purchased harch 12. 1929.

in his account was not discovered by him until about October 15, 1929, and that then he complained of the matter to Mr. Tanner, the manager of Colvin & Company. Upon Tanner's advice plaintiff consulted with attorneys who were in fact counsel for defendants, defendants having informed plaintiff that they would be governed in the matter by the advice of these attorneys. The attorneys advised plaintiff that he should begin an action against the First Illinois company, and thereafter these attorneys, in the same of plaintiff and with his consent, brought a suit in trover against the First Illinois company. The declaration in that case charged that the First Illinois company had converted 300 Anaconda Copper Company rights which belonged to plaintiff. The First Illinois Company appeared and filed pleas, but when the matter came on for trial did

The tentimony for plaintiff is to the effect that this charge in his account two firms and the account two firms and that the the netter to he. Fermer, the 1939, and that the then he semplated of the metter to he. Fermer, the culted with attorneys the feet seminated of the defendants of the culted of the feet in the sould be governed in the action by the action of these they would be governed the the action by the action of these actions and the feet in the case of the feet in the feet in the feet in the feet action the file action of the the feet in the feet and the the feet in the feet and the the the the feet of the the feet and the the the feet and coursed that the course of the the feet and the the the the feet and coursed that the course of the trial of the feet and coursed and the trial of trial

not defend, and a judgment by default was entered in favor of plaintiff and against the First Illinois company in the sum of \$8598.30. The judgment has never been satisfied, and it is not disputed that it is without value.

It is not disputed that defendants retained this \$8595.30, but they contend that in the purchase from them on March 12, 1929, of the Anaconda Copper rights, the First Illinois company acted in fact as the agent of plaintiff, who was the undisclosed principal of the First Illinois company. Defendants invoke as applicable and as justifying their action in charging this item to the account of plaintiff, the rule of law that one who has been dealing with the agent of an undisclosed principal may proceed against that principal upon discovering that relationship.

There is no doubt of the general rule which is applicable in proper cases and which is stated in 2 Corpus Juris, sec. 522, p. 340, cited by defendant, as follows:

"As has been seen in another connection, an agent who enters into contractual relations on benalf of an undisclosed principal may be held liable by the person with whom he deals, an though he himself were in fact the principal. The liability of the agent is not, however, exclusive, for, although the third person extended credit to the agent in ignorance of the fact that the latter was acting in a representative capacity, he may elect to held the undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal when discovered in the course of his employment.

That general rule is recognized by the authorities, and the reasons for it are well stated in the case of Thompson v. Davencert, 9 B. & G. 78. The authorities are also cited and discussed and the exceptions to the rule stated in 2 Mechem on Agency, sections 1729 to 1779 inclusive. The contention of defendants cannot be sustained. In the first place the record fails to disclose that in the transmetion of March 12, 1939, the relationship between plaintiff and the First Illinois Company was that of principal and agent. The First

not defend, and a judgment by default was entered in Faror of claim.

If and against the Pirst Illinois company in the case of \$1002.70.

The judgment has never been outletfed, and it is not disputed that it is without value.

the Ausconda Copper rights, the First Illinois company acred in fact as the synant of plaintiff, who was the undiveloped principal of the First Illinois company. Befordants invoke as applicable and plaintiff, the rule of law cast one was has been dealing with the agent of an undisclosed principal may precoed against that original appn discounting that relationship.

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That paneral rule is recognised by the anthorities, and the recount for it are well etated in the case of <u>liminstants</u>. The state will etated and discussed and the except the except the fine the the rule trated in T seches on Agency, sections 1750 in 1779 inclusive. The contention of defendants dampet be entirized. In the first place the trace of the inclusive the time place the trace of the inclusion place the trace of the relationship between plaintist and the first limit as received of principal and the inclusive the inclusi

Illinois company was not a broker. On the contrary the evidence tends to show that it was an investment company, and the record fails to disclose that it was within the contsoplation of the parties to that transaction that the First Illinois company should act as a stockbroker in that transaction. The relation between them seems to have been merely that of vendor and purchaser. Plaintiff gave no directions that the First Illin is company should purchase from these defendants or, indeed, that the rights should be purchased at all. Certainly, there was no direction that the First Illinois company should purchase upon credit. So far as plaintiff was concerned, it was practically a cash transaction, and it was wholly immaterial to him whether the First Illinois company should sell to him rights which it already owned or rights which it might purchase. The First Illinois company was not a broker; it was not licensed to transact business of that kind. Plaintiff carried no margin account with it. There was no contract of employment by which the First Illinois company should act for plaintiff in purchasing these rights. He paid for them outright, and the relationship of principal and agent was not brought into existence in the transaction. The evidence discloses that plaintiff supposed the First Illinois company was acting as bailee to hold for plaintiff the property he had purchased and had paid for. The transaction with the First Illinois company must be remarded as an independent deal, and the rule which defendants seek to invoke must therefore be held not to be applicable.

movever, even if we assume that the relationship of principal and agent existed in that transaction, the undisputed facts of this case would bring it within exceptions to the rule. One of these is that where a purchase has been made by an agent upon credit authorized by the principal without disclosing his name and payment is subse-

However, even if we extend the relationship of principal and egent existed in the transmition, the malinement facts of these is ease would bring it within executions to the role. One of these is their where a purchase has been seed by an inert upon credit antictived by the principal vituous disclosing his name and payment is subser-

quently made by the principal to the agent in good faith before the agency is disclosed to the seiler, the principal will not be liable. It has been so held by the Appellate court of this state in Rusek v. Allied Packers, Inc., 246 Ill. App. 209, and by the courts of New York in Harder v. Continental Printing & Playing Card Co., 117 L. Y. S. 1001; Enapp v. Simon, 96 h. Y. 264, and Laing v. Butler, 44 E. Y. Supreme Rep. 144. The exception is stated in 1 Parsons on Contracts 62, as follows: "\*\* an undisclosed principal, subsequently discovered, may be made liable on such contract; (c) but in general, subject to the qualification that the state of the account between the principal and agent is not altered to the detriment of the principal." Assuming an agency in the first instance. the facts bring this case within the first exception. The second exception is that the rule is not applicable where the third party has elected to hold the agent only. That exception is particularly applicable to the facts of this case, since according to the uncontradicted evidence defendants were informed before they used the 300 Anaconda rights in the purchase of the Anaconda stock, that plaintiff had purchased the same from the First Illinois company and had paid for them in full. The use of these rights under such circumstances would seem to amount to an election on their part to hold the First Illinois company rather than plaintiff. See Clark & Skyles on the Law of Agency, vol. 1, sees. 461, 462, pp. 1016 and 1017. It would seem that defendants having with full knowledge elected to apply these rights as requested by slaintiff, are now estopped to take the inconsistent position that plaintiff was the undisclosed principal for which the First Illinois company acted only as agent.

Again, defendants contend (assuming that the action of plaintiff is in tort) that a person cannot be liable for the torts of one who does not bear to him the relation of agent. Authorities

and are ted dela't have all sacce odd of legioning odd wi show although agency is disclosed to the saller, the vincipal will not be liable. It has been so held by the appellate court of this state in case v. allied Packers, Inc., 266 111. Apr. 200, and by the courte of THE AND DESIGNATION OF PROPERTY AND DESIGNATION OF THE STATE AND THE N. Y. S. 1861; Master V. Biron, 96 S. V. 284, cas laing v. Butler. 44 L. V. Supreme Mep. 144. The execution is stated in 1 Parcent manger, tentining sensite they no set institutes up to afrequent so energy discovered, may be mude linkis on queb contract; (c) but. in general, subject to the qualification that the state of the nosiring out of haradin the of those has including out mounted three seems of the unincipal. " . Lacing as empty in the first instance. the rady national title once which the 'Less energian. The pennel giray build one arone allocations som at also out tone of multicono des elected to held the sport only. They exception is purifically? applicable to the foots of this case, class according to the the two off book good ordied bearolul over atacharish nonetive batather 100 tasconds vights in the purchase of the descends stack, that plaintff bed perchand the cose from the first littacks company doug release addit means to new off . Helt at ment for bing had had of tree ulois to molicale in al hours of mos bluer seemsements had the First Illinois company reties than plaintiff. Mee Clark A Mayles on the Law of Agency, vol. 1, seen. 461, 461, no. 1616 and 1017. It would seem that delicate known along the foll knowledge elected to apply these rights as requested by picketiff, are new ade our Tileniale dans uple book tende tende and and add of beorgeton heave wargers at all the all old and the fit Los to the barole all and . Acces as wine

Again, defendants contend (assuming that the aution of plants? In tors) that a person ventor to linkle for the torto of one who loss not beer to the teletion of agent. Authorities

are cited to that effect. We are wholly unable to see the application of this point to the facts of this case. In the first place the trial court did not proceed upon the theory that the action of plaintiff was one in tort. On the contrary, the trial court held as a proposition of law that the action of plaintiff was for money had and received. However, even if we assume that the action is in the nature of a tort, the pleadings do not disclose that it is for the tort of any other than defendants themselves. The rule invaked, therefore, while undisputed, has no application to the facts.

Defendants next argue that the tort of defendants was waived by bringing a suit in assumpsit, and say the assumpsit cannot now be waived and the case tried again ex delicto. As already stated, defendants were not held liable in the trial court upon the theory that the action was one in tort. This point also is therefore without merit.

Defendants also contend that the record does not indicate that there was any consideration promised or said to defendants for the service they rendered in purchasing the Anaconda stock in New York. They say that they did not charge any commission for their services in that matter: that plaintiff said only 36.600 with which to purchase the 120 shares of stock; that even if the First Illinois company had said for the 300 rights, defendants would still have received only the \$6,600 and the rights, both of which had to be used to subscribe for the 120 shares, and that therefore there was no consideration for the performance on their part of the contract. Further, it is urged that the statement of claim contains no allegation that any consideration was paid or promised to be paid to defendants for this service and therefore fails to state a cause of action, and that the judgment should have been arrested for that reason.

This contention, we think, can hardly be seriously made.

eation of this point to the facts of this case. In the first wisse the rise of a properties of law that the notice of plaintiff was for somey had, and received. However, even if we assume that the notion of the fact of a tert, the pleadings to not disable that it is for the acture of a tert, the pleadings to not disable that it is for the tert of any siner than defendants themselves. The rule involved.

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that there was any constitue premised or said to definizes for the service they remiseed in purchasing the Amacenda stock in Sevine the service they remiseed in purchase the 180 chares of stock; that even if the First 1115-note conveny had paid for the State, defendants would cutli have received only the 16.666 and the rights, both of rates had to be used to subscribe for the 180 chares, and that therefore there was no continued for the performance on their part of the contract. Murther, it is used that the statement of claim contains no allegation which any consideration was said or premised to be paid to be paid to defendent for this service and therefore fails to state a course of action, and that the facult shows been state a course of action, and that the facult about should have been

This contention, we think, can nardly be zeriously mudo.

In the absence of a special agreement the law would imply a promise to pay defendants for their service in making the purchase for plaintiff. See 9 Corpus Juris, 556. Defendants were under no obligation to accept the order of plaintiff to purchase the Anaconda Copper stock under the terms and conditions which were imposed by plaintiff, but having undertaken that service and proceeded to carry out those directions, they cannot now be heard to say that the undertaking was void for want of consideration. They did not make any motion to strike the statement of claim or by any other method seek to question its sufficiency. The want of consideration is an affirmative defense which was not pleaded, and the defect, assuming it notually existed, was cured by the finding of the court.

Defendants also contend that knox, the facorman of Colvin & Company, was without authority to take up the securities for plaintiff as the agent of defendants, and that plaintiff dealt with him at his peril. The undisputed evidence is to the effect that knox communicated to the proper persons plaintiff's order and its terms and that defendants, through these, accepted the terms and undertook to carry the same out. There is no basis for such defense upon this record.

It is contended in the next place that by accepting and retaining the Anacenda stock plaintiff has vaived any breach of the contract by which defendants undertook the purchase of same. We do not understand that plaintiff has much upon that contract. As already stated, the court found as a matter of fact that the action was in essence for the recovery of money belonging to plaintiff which defendants equitably had no right to retain. The situation which the undisputed evidence shows confronted defendants on June 17, 1939, cast upon them the imperative duty of giving notice to plaintiff if the rights could not be obtained. They failed to

to pay defailants for their service in mailing the purchase for a stion as second the arder of plaintiff to purchase the ana at the under the terms and contillant which were in but having unfortunish that service and pro
at the undertaing was rold for ment of consideration. They sideration to an affirmative defense which was not pleased, and the defact, asseming it was if the court.

Defendants also contend that the theorem of Colvin a Company, was without advertity to but up the contribies for plaintiff as the egent of defendants, and that plaintiff as the egent of defendants evidence in the the offect that have communicated to the proper, persons plaintiff's order and the terms communicated to the proper, persons plaintiff's order and the terms upon this recent.

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plaintiff if the rights could not be obtained. They failed to

give such notice. They proceeded to execute the order, using the rights in their possession, and it would be inequitable to permit them, after the insolvency of the First Illinois company had become known, to charge the debts of that company to plaintiff.

account stated between the parties, but the court, who saw and heard the witnesses, found otherwise. It is urged that the transaction of January 5, 1931, when defendants turned over to Smith, Graham & Rockwell the securities of plaintiff, receiving their check for the balance of \$4906.84, amounted to an acknowledgment of an account stated with reference to this dispute. Under similar circumstances this court held to the contrary in <u>Humbes v</u>.

Barrell, 167 Ill. App., 166. Moreover, as plaintiff contends and as the court held, an account stated cannot be made the instrument to create an original liability. It merely determines the amount of a debt where a liability previously existed. Pape County State
Bank v. U. G. I. Contracting Co., 265 Ill. App. 426.

It is also urged that by bringing a suit against the first Illinois company plaintiff is precluded from maintaining this action upon the theory that the beginning of that suit constituted an election to proceed in a manner inconsistent with this action. The action there prosecuted to jud, ment was in trover for an alleged conversion and was not necessarily inconsistent with or repugnant to this action against defendants for money had and received.

Rather, the two were concurrent and consistent remedies. 30 Corpus Juris, 7; Milhouse v. Eretz, 184 Ill. App. 507; Schwarzeschild v. Shapire, 182 Ill. App. 40. Moreover, the doctrine of election between inconsistent remedies applies solely to the parties to the contract and has no application to an action brought by one of the parties to it against a third parson who is a stranger to it.

Mucchle v. Springer, 145 Ill. App. 127; Simpson Brick Co. v.

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Wormley, 61 Ill. App. 460; Mash v. Minnesota Ins. Co., 163 Nass. 574; Wack v. Latta, 178 M. Y. 528.

It is arged that the court erred in that interest was allowed on the debt found due from July 12, 1929, to Mevember 12, 1931. Brennam v. Gallagher, 189 Ill. 207; Totten v. Totten, 294 Ill. 70; (both suits in chancery) are cited. Plaintiff was entitled to interest. Section 2, chapter 74, Maith-Murd's Ill. Rev. State., p. 1754. We hold on the facts as they here appear that defe dants on July 12, 1929, received \$8568.30 for the use of claintiff, without plaintiff's knowledge, and that defendents are therefore liable for interest from that date under said section 2.

The record here discloses the attempt on the part of these defendants to transfer from their own shoulders to those of plaintiff, their customer, the loss which seemed imminent and for which he was under no theory liable.

The judgment of the trial court is just and it is affirmed.

AFFIRMED.

McGurely, P. J., and O'Connor, J., concur.

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LILLIAN DOBER. Appollee.

VB.

CITY OF CHICAGO, a Municipal Corneration, Appellant. APPEAL PROM SUPERIOR COUNTY.

268 I.A. 613

ER. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in case and filed a declaration in two counts. The first count alleged that on October #5, 1978, defendant city owned, controlled, and used certain public streets in the city of Chicago. (one of which was a street known as Western avenue) and owned, controlled and possessed a sideralk thereon, in which there was a sual-hole or other opening with a metal cover located on the west side of said Western avenue, in front of No. 2216; that it was the duty of defendant to keep the sidewalk in a reasonably safe condition; that on that date and for a long time prior thereto the city negligently and carelessly permitted the sidewalk and the coal-hole to be and reasin out of repair, and the cover to become losse, unfastened, and out of repair, of which condition the city had notice, or which had existed so long a time that in the exercise of ordinary care it would have had notice and could have remedied or remained the same: that plaintiff upon that date while walking upon the sidewalk at this place and in the exercise of ordinary care unavoidably and necessarily stepped upon the cover of the coal-hole, and that by reason of the negligence of defendant the cover gave way or broke and plaintiff was hurled with great force to and upon the sidewalk, injuring her, The second count averred that while she/in the exercise of ordinary care defendant negligently permitted and allowed the coal-hole to be in a dangerous and ansafe condition of which it had notice, and us a result thereef, in stepping upon the same plaintiff was then and

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there hurled with great force and violence, sustaining injuries, etc.

Defendant filed a plea of the general issue, and upon trial by jury there was a verdict for plaintiff in the sum of \$1500 with judgment thereon, motions for a new trial and in arrest having been overruled. Defendant asks that this judgment be reversed.

There was a motion at the close of all the evidence for a directed verdict, which was desied and defendant contends that the court erred in refusing the instruction as requested. It is also urged that the court erred is refusing instructions requested by defendant and that there was no evidence from which the jury might reasonably find that defendant had notice of the defective condition of the coal noise. That actual notice of facts from which such notice might be inferred are essential in an action of this kind is well established. City of Chicago v. Watson, 6 Ill. App. 344, and numerous cases following. It is also established that the burden of proof is upon plaintiff to establish such notice.

Williams v. City of Carterville, 97 Ill. App. 160.

There was no proof that defendant had actual notice of any defect in the coal-hole or in the sidewalk, and it is now contended in betalf of the city that there was no proof from which constructive notice might be reasonably inferred. The evidence upon that point would seem to be as follows:

The vitness Dicharo, junitor of the adjacent building, tentified as to the condition of the place where plaintiff was injured. The sidewalk was constructed of stone and rock or coment and rock and was from six to eight feet wide. There was no grass plot between the sidewalk and the building. The sidewalk occupied all the space between the building and the curb. The coal-hole was about two fact from the curb and was from a foot to a foot and a half in diameter. There was/iron rim around it and a cast iron or steel cover on top (of there intried with great force and violence, ourseining injuries, ste.

Peferdunt filed a ples of the governt issue, and upon trial by fury there was a vertice for nichelff in the sum of \$1500 with takenal thorson, matical for a new trial and in errors hirthan been everyled. Defendant make that this judgment be revered.

There was a metten at the place of all the critical for the service, which was denied and defendent contends that the larrentes of the first the court errad to refering instructions requested by fint the court errad to refering instructions requested by find that that defendent had service of the defective centical that of the cool hade. There exerting of facts from which such less might be inferred or exempted in an action of this kind is well setablished. Sirved Wilson v. Nature, 6 11. App. 346, and numerous cases following. It is also established that the burden of proof is upon plaintiff to servicion such action.

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from the curb and was from a foot to a foot and a half in dismeter.

There was from rim around it and a coal from or sized cover on top jot

the rim. About four or five inches of the rim were broken out. Dicharo had noticed this rim before plaintiff's accident. He says: "I noticed the condition of that rim on or about october, 1928; I fell down and didn't pay no attention and put it back again. I saw the rim at that time; it was a piece broken out of that, that is why I fell in there; about four or five inches of it was broken. I think it was in that condition about a month before October." The witness says that he was in the basement when plaintiff fell and he heard some one call "janitor;" that he came out and saw a man holding plaintiff on the side of the coal chute; she was about two feet from the chute. He says, "It was about a month before that I fell in that coal-hole.\*\* There was no change in its condition from the time I fell there until she (plaintiff) fell." After the witness fell he notified the agent of the building as to the condition of the coal-hole.

In cross-examination Dicharo said that the first notice he had that there was anything broken in the rim was when he fell into the hole. He said, "I cannot remember the date. I know it was 1928. It might have been just about a week before I saw the lady. I guess it was about a month, by right I don't remember." He further said that he never noticed the broken part of the rim until he fell into the hole, and, "You can notice by looking that a piece was broken, but I never noticed it before I fell in. I was there every day but never noticed it was broken until I fell in. I was janitor there about two years before this happened."

Majowski, snother witness for plaintiff, says that he was about two steps behind plaintiff, and "I did not notice anything about the coal-hole itself when I saw her fall, I just see the cover go up and she fell in." He says that he did not look at the hole that evening but saw it the next day when the cover had been put back on it, and that the stone was chipped around the cover:

Dichard had noticed this Tim before plaintiff's accident. He says: "I heliced the condition of that Tim on or about teleber, says: "I heliced the condition of that Tim on or about teleber, 1978; I fall seem and didn't pay so attaction and put It hack again. I caw the final time; it was a piece broken out of that, that is way I fall in there; about four or five inches of it was broken. I think it was in that condition about a south before teleber." The viceous says that he was in the backnot when olaintiff fall and he heard some one call "jamiter;" that he came out and som a man holiding plaintiff on the citie of the condition out and som a man holiding plaintiff on the citie of the condition of the cities of the condition of the condition.

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Rejected, souther viscous for plaintiff, says that he was about two evers behind plaintiff, and "I did not notice saything about the cool-hole theelf when I saw her fold. I just see the cover my as and she fell in." He says had be tid not 1.0% at the hole first evening but sow to the mant may what the cover had been put back or it, and test the signe was chipped excumit the cover;

that at the time of the accident there was a light within 75 feet and dim store lights were burning opposite the coal-hole; that he had walked over the street many times and "never noticed anything wrong with this cover before this happened."

Ars. Anna Walker, who was with plaintiff when the accident occurred, says that the cover of the hole was about eighteen increas in diameter, and that she did not notice the coal-hole until after plaintiff had fallen into it; that she then noticed that the caver was lying about half a foot from the hole. She cays, "The rim was very much worn out. The lid was wore off pretty bad so I can't just exactly tell just what was wrong with it. The rim around there was quite chipped off in a couple of places, say three or four places. The rim around the hole seemed to be about two inches, made of iron. I never noticed that hole before we walked along there this time." On cross-examination she said that she had walked over this sidewalk many times before but had never noticed anything wrong with the coal-hole; that when she walked across there before she did not see anything clipped off the coal-hole; that it was only after the cover was off that she could see that.

Plaintiff's testimony is to the effect that she had walked over this street a year before she was injured; that she did not see the coal-hole until she fell into it.

We think the evidence is to the effect that so far as it could be observed from the lid on the coal-hole there was nothing to indicate that it was not in a proper state of repair, and that the defect on the lid appeared only when it was tipped off the hole. The fact that thirty days before plaintiff was injured the janitor stepped on the lid and it tipped up and he saw the defect, and that he teld his landlord who owned the adjoining property of the defect, was in no way notice to the city of such defect. Whether it was the duty of the city to inspect such coal-holes we do not indicate because there was no evidence in the record on this question and no

that at the time of the nordest there was a light within 45 fort and dis store lights were burning opposite the coal-male; that he burning apposite the court tile street many times and "never noticed anything as with this cover before till buppened."

Mrs. Anna Valler, who was with plantiff when the noclean inchance occurred, says that the cover of the bels was about oi, been inches the fint that the the cost-hele until after in dismiter, and that sate the the cost of the hele that the cover plaintiff had follow that it that the cover was lying about had n foot from the hole. She says, "The rim was very much worn out, the lid was wore off pretty bad so I can't there was quite chiral what was wrong with it. The rim around the color places, say three or four places. The rim organis the nole seemed to be about two inches, made of from. I never moticed that hole before we walked along there this time." On cross-organization and said that ohe had welled there this time. "On cross-organization and said that ohe had welled wrong with the cost-hole; that when the welled across there before after the cover was say that a cost-hole; that when and across there before after the cover was say that of one had across there before the did not see anything class one that it was only after the cover was off that one of the order that of see that.

Plaintiff's testinent is to the effect that she had waited over this street a year before she was injured; that she did not see the coul-hale until she felt into it.

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such argument is made here. Under the evidence in the record the only ones who knew that there was a defect in the lid were the janitor and his employer, the owner of the adjoining property, but the city could not be held liable unless it had reasonable notice that the lid was unsafe.

In view of this meager evidence, we think there should be a new trial of the issues.

Defendant's instruction So. 6, which was refused, should have been given, as it was the only instruction offered which covered the point that the city was entitled to notice of defects in its sidewalks before it could be held liable for accidents caused by the same.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

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Mederaly, P. J., and D'Conner, J., concur.

36097

HARDIN-LAVIN COMPANY, a Corporation, Appellee,

va.

CONSTANTING MELONE. Appellant.

APPEAL PROM AUSTRIPA COUNT OF CHICAGO.

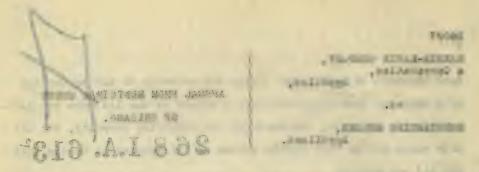
268 I.A. 6132

RE. JUSTICE SATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by defendant from an order entered February 15, 1932, denying the prayer of his petition, filed on that day, that an exparte judgment at law entered against him December 4, 1931, in the Municipal court of Chicago should be vacated and set aside and the case set for trial. More than thirty days having classed between the entry of the order and the judgment and the filing of defendant's petition, the proceeding was necessarily under section 31 of the Municipal Court act.

tiff was for an alleged balance claimed to be due for the purchase price of a heating plant; that the hearing of the cause was begun on August 18, 1930, before Judge Douglas, then presiding in one of the branches of the hunicipal court to which the case had been assigned; that at the conclusion of the evidence the court was about to enter judgment in favor of defendant when plaintiff prayed a continuance in order that it might have the opportunity of repairing certain imperfections in the heating plant (the defense of defendant being that the plant was defective under the terms of the agreement); that at plaintiff's request the cause was thereupon continued generally.

The petition also averred that plaintiff did not keep his promise to make these repairs, although an agent of plaintiff appeared on the premises of defendant several months thereafter and after inspecting the heating plant stated that it was not functioning right but that he was unable to determine what was needed and he premised that he would report the condition of the plant to his employer, the



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atids and the case set for trial. Here than thirty days having
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plaintiff.

It was averred that no repairs were ever made as promised: that no notice was ever served upon defendant or his attorney to have the cause restored to the call for the purpose of having a final order entered according to the finding of Judge Bouglas, but that, on the contrary, "plaintiff fraudulently and with the evident intention of depriving the defendant of his rights and justice in the case by surreptitious methods, and without serving any notice whatseever upon the defendant or his attorney, in a mysterious way, had the case set for trial, and on the 4th day of December, 1931, succeeded in obtaining an ex parte judgment without any notice whatsoever to the defendant and his attorney and, evidently, without acquainting the Court with the facts in the case, as disclosed by the previous hearing and the finding of Judge Douglas." Further, it is said that on January 26, 1932, fifty-two days after judgment was entored, an execution issued which was served on defendant on February 6, 1932, and that only then did defendant become acquainted with what is described as "the fraudulent and unethical conduct of the attorney for the plaintiff in this case," etc,; that defendant had not been negligent in the case for the reason that he had no knowledge whatsoever of the existence of the judgment until he was served with a copy of the execution.

This petition was duly verified by defendant who averred that it was true in substance and in fact. The petition having been filed, it was at once assigned to Judge Brickson, who according to the record was the judge who entered the ex parts judgment. On the same day, nearly, February 15, 1932, Judge Brickson entered an order denying the prayer of the petition.

It is argued in support of the petition that it discloses errors of fact such as might be corrected more than thirty days after the entry of judgment under section 89 of the Practice act (therefore under section 21 of the Eunicipal Court act) and that

introduction or come with and sold Bridger on come to more was ever served upon laborate in the serves to a paired to susquag and that the end us beredest sense add even final brder entered asserding to the rinding of Judge Boughes, but that, on one contrary, "glaintiff draudalontly and of in the orlication ent at action of depriving the animate of interest to animosal suse by surreptitions melicia, and rithout serving any notice whatbest war applies the defendant of his attender, in a mysterious way, had the orec set the tried, and on the tit day of Bosombor, 1921, onecounsed in obtaining an or ourse judgment without any notice whateoone seleptont and his attention, and only, without was qualiting the Court with the facts is the court, as disclosed by the previous besting and the Theting of Judge Boughes." Burther, it is and that an January MG, 1838, Filty two days after judgment we ontered, an execution insend which was served on defendant on February edly hearly been the delicated the hear will be been as the contract of the co edy to surjuce Included her trainburg ent" as besires to a toda had tambus'tob tant ; . ose " . seso aids at Thistiele set to't youradte wet been negations in the case for the reason that he had no happiedge whateever of the entrence of the judgment until he was served while a copy of his execution.

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the prayer of the petition should have been granted.

The contention cannot be sustained. Assuming the truth of all facts stated in the petition, it does not negative negligence by defendant. It nowhere avers that defendant was without knowledge that the cause was to be heard before Judge Brickson on December 4, 1931. It avers that neither defendant nor his attorney was notified, but it does not aver that either of them was without knowledge that the cause would be tried on that date. It does not show that plaintiff agreed to notify defendant or that it was the duty of plaintiff to notify him. The petition avers the cause was continued generally. Assuming this to be true, it was just as much the duty of defendant to ascertain the time when the case would be again called as it was of plaintiff.

The suit was begun on June 16, 1930, and defendant's affidavit of merits was filed on August 7, 1930. The judgment was not
entered until December 4, 1931, - more than a year after the commencement of the suit. The affidavit does not aver any diligence
to ascertain the orders of the Municipal court with reference to
the time when the trial of this case or cases like it would be
held. The authorities hold that a petition of this kind must aver
facts showing reasonable diligence. Cramer v. Ill. Comm'l sen's
Assoc., 260 Ill. 519; Welley v. Klein, 257 Ill. App. 171, are only
two of many cases which might be cited to this point.

The petition alleges fraud, but it does so only in indefinite and general terms, which are wholly insufficient. <u>Carrell v.</u> <u>Hastings</u>, 259 Ill. App. 564.

The judgment of the trial court is affirmed. AFFIRMED.

It is also urged that the statement of claim was defective and that interest was erroneously included in the amount for which judgment was entered. Such error, if it exists, cannot be held to be an error of fact and cannot be corrected in a proceeding of this kind, since the remedy in such case is by appeal or writ of error. Chapmen v. North American Ins. Co., 292 Ill. 179.

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The contention vacaot be sentained: insuring the trate of by defendant. It newhere the that the cause was to be bound before Jodge Srivices on Secuebre 4. that the cause was to be bound before Jodge Srivices on Secuebre 4. It avent that maining defendant nor his attorney was notiveled, but it does not tree or the cause was without moreleds that the cause would be tried on these date. It does not shew that plaintiff to notify defendent or that it was the duty of generally. Assuming this to be true, it was just as such the duty of generally. Assuming this take the value the cause was continued of defendant to senting the true, it was just as such the tags of defendant to constitut the class would to again

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EMIL A. PETERSON and MABEL F. PETERSON, Appellecs,

VE.

UNION BANK OF CHICAGO. Appellant.

APPEAL PROM MUNICIPAL COURT

OF CHICAGO.

268 I.A. d133

ER. JUSTICE MATCHETT DELIVERED THE OPINIOR OF THE COURT.

In the Municipal court plaintiff's brought an action which they described as in assumpsit and which apparently was for the purpose of recovering money said under the terms of a written contract, whereby they agreed to purchase and defendant to sell certain real estate in Cook county, Illinois.

Plaintiffs' second amended statement of claim alleged the execution and delivery of a contract on January 10, 1925, wherein it was agreed that if the purchasers would make the payments and perform the covenants mentioned in the centract, defendant as vender would convey or cause to be conveyed to them in fee simple, clear of all encumbrances whatever, except as therein noted, by a good and sufficient deed Lots 22, 23 and 24 in Block 2 in Calumet Bridge Addition to Burnham, a subdivision of the Scutheast quarter of the Southeast quarter of the Southeast quarter of Section 1, Township 36 North, Range 14 Mast of the Third Principal Meridian, in Cook County, Illinois.

The contract provided that the purchasers agreed to pay therefor the sum of \$2275. The vendor acknowledged the receipt of \$575 in cash. The contract provided for the payment of the balance in installments. The purchasers agreed to pay taxes, etc.

The second amended statement averred the performance of the covenants and agreements on the part of plaintiffs; that on January 10, 1928, they tendered the balance due on the contract in the sum of \$756.46 and demanded a warranty deed with guaranty of policy as agreed, which defendant failed and refused to deliver.

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to the damage of plaintiffs in the sum of \$2500.

The affidavit of merits denied the execution of the agreement as described in the second amended statement, but averred that on January 10, 1925, defendant entered into a contract with Rail A. Peterson for the cale of the real estate described; that plaintiff Mabel F. Peterson was not a party to that contract; that, however, on March 24, 1925, defendant entered into a new contract with plaintiffs Emil A; Peterson and Mabel F. Peterson, which contract was dated January 10, 1925, although it was actually executed March 24. 1925; that this contract of March 24th was the same as that of January 10th except that the lots were described as in a "resubdivision instead of "subdivision." Therefore, defendant desied that the contract of January 10, 1925, was the true contract between the parties. Defendant aversed that the 3575 was not paid at the time of the execution of the contract, and stated that on January 10. 1935, Bmil A. Peterson exhibited to defendant a preliminary agreement executed by Emil A. Peterson and G. Frank Croissant which acknowledged payment of said sum,

The affidavit admitted that defendant received payments under the contract ascenting to \$1155; denied the receipt of other items, except the sum of \$8.40 which defendant paid to the county treasurer of Cook county for taxes as directed by plaintiffs; averred that plaintiffs had failed to pay certain taxes and assessments as provided by the contract and that defendant was therefore compelled to advance money in payment of same. The affidavit of merits stated that plaintiffs failed and refused to carry out the terms of the contract by failing and refused to pay the balance due thereunder; denied they had made a sufficient tender of the balance due or that defendant was delinquent in performing any of the terms of the contract, and denied that defendant refused to deliver a deed and guaranty policy as alleged in the second

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under the costract accombing to all \$5; donied the receipt of cine comby number the common at the part of the common common to the common common to accomb the common to the contract by tailing and refusing to pay the balance bas there are the contract by tailing and refusing to pay the balance the tactor of the contract the contract that defendent was delicated in participating any of the tall to accomb to the common of the comm

amended statement.

The issues were submitted to a jury which returned a verdict for plaintiffs in the sum of \$2.000, upon which the court, overruling metions for a new trial and in arrest, entered judgment. When the fury had been sworn to try the issues defendant requested that the jury be excluded whils defendant presented a motion for a directed verdict. The motion was in writing and asked a verdict for defendant on the grounds that the statement of claim showed the agreement to be between plaintiff and the Union Bank of Chicago. trustee, and not the Union Bank of Chicago; that the statement of claim did not allage or designate defentant to be a corporation, did not allege a cause of action, showed no desages and disclosed a suit for specific performance; that the statement of claim alleged a tender not in conformity with the terms of the centract and did not aver that the contract was regudiated by plaintiffs. Attorney for defendant, demanding the amount claimed to be due under the contract, tendered a deed which on its face appears to have been executed on November 10, 1931, by the "Union Bank of Chicago, as Trustee, under trust agreement known as No. 395, to bind the trust entate and not individually." by its vice-president and assistant secretary, and which conveys lots 22, 23 and 24 in block 2 "in the Resubdivision of Calumet Bridge Addition." The tender was refused and the motion devised. At the close of all the evidence defendant made a motion for an instructed verdiet in its favor, which was also denied. It moved to dismiss defendant individually on the ground that the evidence showed that all the dealings of plaintiff were with defendant as trustee and not individually. This motion was also denied.

It is urged in the first place that the court erred in refusing to direct a verdict for defendant on the theory that the evidence showed that the contract and all dealings with plaintiff sounded alaternus. ....

selever a beautier debit with a of bedfindin over course off for whalvill's in the case of \$2,000, even which the court, overtending there are the total and the artist was a relief and the had the fuel can see and the land to the land the land of the a ro't noites a federag franke dot while despite and fall deliver a horizon and invited was the welling and control of add however minds to demonstrate the statement to design and the terminated well . O be between playarily and the Union Bank of Clinango. To succeeding out toni ; omenial to sind maint and you tue , ordered hit to the net allog or decimate defending to occorrors the his mixto a begievib has vegower as bewein, notice to sense a spelle for benefilm minis to farmer wit and their permanely se thrage wol also his two tractice and its come and the grantes of the contract as a first a provided attitudable of behiltened and success and four tens has est tobas out of as healest amount off andhamat, fundament to contract, condered a feed while of the engenes to make tree sa equality to Mand on Told of the old of the old on before Trusted, under truck egreement innove as be. 205, to bind the truck estate and mot individually," by its vice-province and accident secretary, and which conveys late 98, 28 and 74 in black 2 and bandledskin at called Jerige and the . De Conte was refused and the matter desired as a case of the method method edit ban sade a motion for an invitated verdiet in the faces, which we also denies. It woved to dismine defendant individually on the ground prom Trisminio to continue and the sout former acceptive and ledd is defendant as tenotes and see lightly light mation was also der ted.

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with reference thereto were with defendant as trustee and not individually or as a corporation. It is true the contract was executed by defendant as "Union Bank of Chicago, Trustee, by F. H. Mayes, Assistant Trust Officer," and so far as the evidence discloses all the dealings under the contract were with defendant as trustee. The nature of the obligation created by such contract was discussed by this court in the case of Wilson v. Bodamer, 261 Ill. App., 23, and by the Supreme Court of the State in Schumann-Heink v. Folsom, 328 Ill. 321. In this last named case the Supreme court said:

"A trustee is the holder of the legal title of the trust estate and deals with it as principal, subject only to an equitable obligation to account to the beneficiaries of the trust estate. A director does not deal with the funds of the comparation as principal but deals with them as the agent of the company of which he is a director and for which he is acting. A trustee is persenally liable on his contract, but a director is not as long as he acts within his authority."

Following these decisions we hold that the obligation created by the contract here executed between the parties was the personal obligation of defendant.

been given for the reason, as it claims, that the uncontradicted evidence fails to show that plaintiffs had made a legal and proper tender of the balance due under the contract of January 10, 1928. The evidence for plaintiffs is to the effect that plaintiff Peterson prior to January 10, 1928, went to the office of the defendant bank where he saw a junior trust officer whose name was Treveiler: that he secured from this officer a statement of the amount which would become due on the contract on January 10, 1928, and which he was informed was \$756.46; that on January 10th in company with Ers.

Peterson, Mrs. Kriek and Er. Ives, Peterson went back where he again saw Treveiler and gave him the contract together with a check for that amount; that Treveiler took the check and left the room for about five minutes, when he came back and asked plaintiffs to

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evidence fails to show that alimites and made a legal and proper tender of the balance due under the contract of January 10, 1973.

The evidence for plaintiffs is to the exist a that plaintiff Peterson where he saw a junter trust officer whose hase man Inevalue; that he secured from this efficer whose hase man inevalue; that he secured from this efficer a statement of the emount which would become due on the sectract on January 10, 1983, and which he wan informed man 1755.45; that we January 10, 1983, and which he wan feterson, when the and the lives and the trust the contract together with a check for that smount; that freveller test the check and left the room for that and saked alaintiff to

"aubdivision" would be changed to "resubdivision." Plaintiff Peterson said that he would have to secure the advice of counsel; and Treveiler said that was all he could do and handed back the contract and the check.

that the officer of defendant bank came back and said, "We can't give you the property that contract calls for," and that he handed back the check and said, "We would like you to sign a new contract, and it is only a matter of two letters, 'Resubdivision' instead of 'Subdivision'." Mabel F. Peterson says that Treveiler said, "We can't do anything for you unless you sign another contract. We can't give you anything. We can't take the money."

Treveiler testified that Mr. and Mrs. Peterson came to his office with their attorney, and that the attorney said that he had come there for the purpose of making a tender upon the contract; that Mr. Peterson had the check in his hand; that the attorney said they wanted the deed right away and wasted the deed to read the way the contract read, and that he (Treveiler) after looking at the contract, said, "If you pay your contract up, we will give you a deed for the property you bought;" that the attorney said that he wanted a deed to read the same way the contract read, and that he (Treveiler) repeated. "I will give you a deed for the property you purchased—your client purchased;" that the attorney then walked away from the deek; that Mr. and Mrs. Peterson went off with him, and that was the end of the transaction. He denied that Mrs. Kreik or any other lady was with them.

An employee of defendant bank, Victor G. Nardi, produced a contract between the same parties and of the same date as the contract upon which plaintiffs rely. This writing has a memorandum in Mardi's handwriting in which the words "a resubdivision of" are

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An employee of estandar's bank, Vieter a. Merdi, produced a contract between the many parties and of the case date contract upon which plaintiffs rely. This writing has a secondum

written into the description of the property to be conveyed, and hardi testified that this notation was made in the presence of plaintiff, hr. Peterson. When called in rebuttal fir. Peterson denied that any such notation was made in his presence and testified that he had never seen the witness hardi until he appeared in court on the trial. The agreement produced is in evidence as defendant's exhibit 4. The evidence for plaintiff tended to show that the lots described in the contract were not conveyed by the deed tendered and were in fact located some four blocks distant from them.

The issues of fact raised by this conflicting testimony were submitted to the jury and were settled in favor of plaintiff's by the verdict. It is true that the tender was not made in money but by check, but the record shows that other payments had been made to defendant by plaintiff's through the use of checks and that no objection was made by defendant at the time of the alleged tender on that ground. We think the law is well settled and that where a creditor fails to make objection when a check is tendered in payment of a debt, the objection will be regarded as waived. Cottingham v. Owens, 71 Ill. 379; Gradle v. Warner, 140 Ill. 123.

Defendant contends that the verdict of the jury is not sustained by the evidence. It is true that the ancontradicted evidence shows that the first payment of \$575 was made to Croiseant, who acted as agent in the transaction. The contract, however, acknowledges the receipt on the part of this defendant of that amount. We think the jury was justified under the evidence in finding that such payment was in fact made to defendant. It is admitted by the pleadings that other payments were made by plaintiffs directly to defendant amounting to \$1155. This would make a total amount paid to defendant under the contract of \$1730.

This evidence further shows that plaintiffs paid taxes and special

the control of the verdict. It is true that the tender was not made the money but by cheek, but the record shows inst siner payments had been made to defendant by plaintiffs through the use of checks and that no objection was made by defendant at the time of the all settled and leged tender on that ground. We think the law is well settled and that where a creditor fails to make objection when a cheek is tendered in sayment of a dobt, the objection will be regarded as

Defendant contends the verdict of the jury is not survived the first payment of \$575 was made to Croissant, who soled as agent in the transaction. The contract, now-ever, estudies the realist on the part of this defendant of that amount. We think the jury was justified under the orthope in the finding that such payment was in fact ando to defendant. It is admitted by the pleadings that comer payments were made by pising third directly to defendant ascending to the follow. This would make third directly to defendant ascending to stiff. This would make a total means paid to defendant under the contract of \$1750.

accessments which under the contract they were obligated to pay amounting to \$196.48. The total amount therefore paid under and on account of the contract by plaintiffs was \$1926.48.

Plaintiff's contend that the verdict for \$2000 can be justified upon the theory that they are entitled to recover interest from the dates upon which these respective payments were made, but there is no claim in the amended statement for interest and there is no proof in the record of any such item. The statement of claim is not a model pleading. It does not aver the rescission of the contract, but the affidavit of merits denies that plaintiffs are entitled to recover the sum of money paid and that was the issue tried and submitted to the jury. The verdict of the jury can be explained only on the theory that they found for plaintiffs on that issue. We will not reverse the jud ment and remand because of informalities in the pleadings. We think plaintiffs are entitled under the evidence to recover \$1926.48 but no more, and upon the motion for a new trial a resittitur of the difference between the amount of the judgment, \$2,000, and \$1926.48, namely, \$73.52, should have been required.

Defendant also urges that the verdict of the jury was the result of passion and prejudice, but the record does not sustain any such charge. Unwarranted criticism is also made of the trial court, who, although his patience must have been tried, seems to have conducted the trial with fairness to both parties.

If the plaintiffs will within ten days remit from the judgment recovered the amount of \$73.52, the judgment will be affirmed; otherwise it will be reversed and the cause remanded.

AFFIRED UPON REMITTITUR: OTHERWISE REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

tonecoments which under the contract they were obligated to pay amounting to 5196.48. The total amount therefore paid under and on account of the contract by plaintiffs was 11826.48.

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Defendant also urgoe that the verdict of the jury was the result of passion and prejudice, but the resord foca not suctain any such charge. Unwarranted orditalsm is also made of the trial court, was, although his patience must have been triad, seems to have conducted the trial with reirness to both parties.

If the plaintif's will within ten days remit from the judgment recovered the macuni of 173.50, the judgment will be affirmed; otherwise it will be reversed and the cause remanded.

AFTERED UPON NACITATION: OTHERWISK CEVALUED AND RELEADED.

35901

VERNE W? FUGATE,
Appellee,

VS.

TOLEDO. PEORIA & WESTERN RAILROAD, a Corporation. Appellant. OF COOR COUNTY

268 I.A. 613"

AR. JUSTICE G'CONKOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover damages for sersonal injuries claimed to have been austained by him through the alleged failure of the defendant Railroud company to observe the provisions of the Federal Boiler Inspection act and the Federal Employers' Liability act. There was a jury trial and a verdict and judgment in plaintiff's favor for \$23,500, and the defendant appeals.

Plaintiff's theory is that his declaration alleges and the evidence shows that the defendant violated the provisions of the Federal Boiler Inspection act in that it failed to maintain one of its locomotives, which plaintiff was operating as an engineer, in a proper and safe condition so that it might be used in the service of the Railroad company without unnecessary peril to life or limb. And that since the evidence disclosed that at the time plaintiff was injured he was employed by the defendant and engaged in interstate commerce, the defenses of contributory negligence and assumed risk were not available to the defendant because Sec. 54 of the Federal Employers' Liabibity act (Sec. 54, chap. 2, title/0. S. C. A. 434) provides that where one is injured when engaged in interstate commerce and brings an action to recover damages he "shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury."

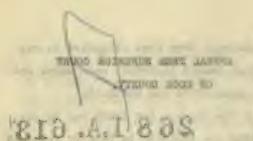
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AR. JUJICE O'CORROR DMLIVERED THE CPTRICE OF THE COURT.

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On the other side the defendant's theory was and is that plaintiff was not injured as he claims; that there was no cause of action alleged or proven under the Federal Boiler Inspection act; that there was no competent proof that plaintiff, at the time he was injured, was engaged in interstate commerce; that if plaintiff was injured at the time and place claimed, he assumed the risk and that the injury was not the proximate result of any violation by the defendant of the Federal Boiler Inspection act.

The record discloses that on May 15, 1930, plaintiff was employed by the defendant as a locemotive engineer, having then had many years of experience; that about ten o'clock on the sorning of that day he was transporting a freight train from LaMarpe, Illinois, to Peoria, Illinois, a distance of about 86 miles, stopping and picking up freight at several stations on route; that shortly before reaching Bushnell, which is 24 miles east of Lallarpe, plaintiff noticed a "pounding" of the locomotive which he assumed was in the right main wedge. The wedge was a piece of iron about 17 inches long, installed perpendicularly in the locomotive, and was about 21 inches thick at the bottom and about 3/4 of an inch thick at the top; that the purpose of the wedge is somewhat similar to that of a shock absorber of an automobile; it fits between the driving box and the pedestal frame and has flanges on each side of it that cause it to fit snugly against the pedestal faws; at the bottom of the wedge is a slot into which fits the head of a threaded bolt known as the "wedge bolt;" the bolt extends down through A pedestal brace, known as the binder, which is also threaded; beneath the binder are two nuts: the belt extends a considerable distance below the nuts and has a square end at the bottom to which may be applied a wrench, and the bolt may be adjusted up and down, which causes the raising or lowering of the wedge and the nuts are then screwed up to contact with the lower edge of the binder.

On the other side the derendent's theory was sai is that
plaintiff was not injured so be claims; that there was no emage
of estion slieged or proven under the federal Poller Inspection
act; that there was no competent proof that plaintiff, at the line
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He record discipace that on hay 15, 1930, plaintiff was had need guived, the digne eviscement as suchecite ent to be element is galaxe on one desired the same the same tagent to same your that may be wee transmenting a traing train from Lazarge, Illinois, to Perring Hilliets, a simulated about to alter, supplied and picing of freight of course stations on realist that shorely unions Trisalsic to sale well as al delim to the control gains of and of your formulas on outlier expressions in all la "goldword" a tenigan right main wedge. The wedge was a piece of lron about 17 inches long, installed sar and lealerly in the lacestille, and was about to mobile from the to a to be suche bus mosted and as helds assent 42 the top: that the pursues of the wedge is semewhat similar to that anivirt and messed afit it is independ on to reduced abone a le Juni si 'to oble dome no gound!' and but own't Letonbey and has ned to messed and su : week Laduchou and Jenker a frame ski as it asses stou beharris a 'to base out nil't maine atal solo a at subow add increased a manual and started that and viding opine, and so seems brace, known on the binder, walon is also turosaded; bomostin the woled apparath addresslance a chresco slow out the cost out was welled believe of your office of motion out to him seems a new home atun out a wrench, and the holt any be adjusted up and down, which causes here read or lovering of the code one die nuts are to guirered to guidest out up to senteet with the lawer sine of the binder. The evidence further shows that the proper adjustment of the wedge requires that it should not be pushed up too far and thereby be too tight - that there should be about 1/4 of an inch play. When the wedge wears at the top it is adjusted upward by turning the bolt and then tightening up the nats against the underside of the binder.

Plaintiff testified that when he reached Bushnell he adjusted the bolt and nuts by screwing them up so as to prevent the pounding; that the train then proceeded eastward to Smithfield, a distance of about 16 miles from Bushnell, and during part of that distance he again heard the pounding; that when he reached Smithfield he again got down beside the locomotive and adjusted the bolt and the nuts: that when tightening up the nuts he used a cold chisel, striking it with a harmer instead of using a monkeywrench and he felt somet ing strike his right eye: it is contended by plaintiff that this was a small chip that flew from one of the nuts: that he then complained to his fireman that something had struck him in the right eye, and the fire an exa ined it but was unable to see anything: that this was about two o'clock in the afternoon: that plaintiff arrived with the train at Peoria about seven o'clock in the evening of that day; that at that time he observed that "the top of it (the wedge) was broken off on the inside. I couldn't tell whether it was the liner or the wedge. The wedge was down at that time. There was enough broken off the top of the wedge so that we couldn't get it out. I expect that the piece broken ci' was two or three inches square, long, oblong." Plaintiff further testified that on the same evening he endeavored to get in touch with Dr. Thomas, an eye apacialist who rendered such service to employees of the railroad, but was unable to do so until the next morning. The evidence further shows that on the next morning when p\_aintiff called on Dr. Thomas at his office, complainant said there had been

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a blurring in his right eye for a few days. The doctor examined the eye and removed a small cinder or rust. It appears that the operation was considered trivial by the doctor, but the eye became infected and the doctor continued to treat plaintiff's eye until about October of that year, when he pronounced him cured.

The evidence further shows that on April 4, 1929, a little more than a year prior to the time plaintiff claimed he was injured. Dr. Thomas removed some small particles of steel from plaintiff's left eye and discovered a pterygium growth on the right eye which he advised plaintiff ought to be removed; that in October of that year plaintiff again called on Dr. Thomas, who operated on the right eye by removing the pterygium; that the operation was successful and the eye pronounced cured by the doctor a few weeks thereafter. At that time the doctor advised plaintiff to wear glasses, but plaintiff did not again call on the doctor until May 16 following, which was the day after plaintiff was injured as above stated. At that time the doctor examined plaintiff's eyes for glasses and gave him a prescription so that he could obtain them. The left eye was pronounced normal, "20/20" and the right eye "20/70" which was the same condition the doctor found in the fall of 1929.

The fireman of the train on May 15, 1930, testified and denied that plaintiff had made any complaint at Smithfield or any other place that something had struck him in the eye, and further that plaintiff had made no complaint about his eye. The other members of the crew, the head and rear brakeman and the conductor, also testified that they heard nothing on May 15th of any complaint by plaintiff that his eye had been injured at Smithfield or at any other place.

Doctors who were eye specialists were called by the plaintiff and testified as to the condition of plaintiff's right eye, but in the view we take of the case it will be unnecessary

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The evidence further enough that an April 8, 1879, a little more than a year prior to the time chaintiff claimed he was injured. At. Increase removed some small particles of steel from picketry a left sye and discovered a proceeding growth on the right sye which he advised pinintiff ought to be removed; that in Getober of that year picintiff syein called on Mr. Increa, who sperated on the right sye by removing the pickytium; that the operation was successful and the eye premounced cured by the ductor a few weeks therefore. At that than the doctor saylord plaintiff to wear glasses, but plaintiff hid not again ould on the doctor with anyle fellowing, which was the doctor examined; laterist of eyes for glasses and cove that than the doctor examined; laterist of eyes for glasses and cove case out of the time the doctor function of the right of them. The left eye was presentation to that, he could obtain them. The left eye was greatened sound. "Mirth the time the first of the left eye was come condition the doctor found in the right of the 1921.

'No firemen of the train on bay 15, 1650, testified and dealed that sint sintiality or any consistent as Sultativeld or any other place that each emerging had struck the in the eye. She theing not that plaintiff had made no complaint about his eye. The other manhand of the erow, the head and rear brotomm and his conficient has testified that they neared noteling on lay lote of any complaint by plaintiff that his eye and been injured at buttified or at any

Doctors who ware ope specialists were called by the

to discuss their testimony. There is further evidence to the effect that, pursuant to a written report made by plaintiff when he arrived at Peoria on the evening of May 15th, wherein he said. inter alia. "set up right sain wedges:" that on the following morning, May 16th, the workmen employed at the Peoria shoes of the defendant inspected the right main wedge bolt and nuts and found them to be in good condition and properly adjusted. And there is further testimony that on December 9, 1930, when the Railroad learned that plaintiff was making a claim against it and understood it was on the ground that there was some defect in the bolts and nuts, it removed them, and the nuts and bolt are before us. The wedge was discarded at that time by throwing it in the scrap, which, according to the testimony of the witness, was done because they were not informed that any claim was made on account of a defective wedge. And the testimony further is that the top of the wedge was not broken off but that it was cracked on the flange "on the outside near the top." that the belt, nuts and wedge were the same ones that were in use May 15, 1930, when plaintiff claims he was injured, and had been in continuous use since that time, and apparently caused no trouble. There is further evidence in the record which we think it unnecessary to refer to.

Contrary to the contention of occursed for defendant, we think it was a part of plaintiff's duty when he claimed to have heard the pounding in the locemetive, to endeaver to regulate the wedge by tightening up the bolt and nuts. This is shown in part by the fact that a monkeywrench, hammer and chisel were carried on the locemetive. We think it would be unreasonable and impractached that plaintiff should have reported the trouble and obtained another locemetive, as counsel for the defendant argues he might have done.

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he witness while ther handy. There he further wellment to the sale fact that, waverant to a written resort made by ministry when he arrived at Forris on the evenies of May 18th, wherein he said. inter alta, "eed an right main wedger;" that on the following newfort; the tieth attends and agent as the feature attends and han atun has died sahes niem talit out benesent turbantek odt form than to be in good condition and preparly adjusted. that is the company traction of the contract of the contract of If the case where a party of the transfer part to the task that Absolute annual and expelle fact factors and an and it forms their had April the sales and the process the sales will be added all age hafter on. The radio was thousands at their to have be-It is the array, with a marging is the testleme of the cinema to about the minute that hard terrialized that there again continued mank that and of the California control the last the California of the June 188 Amenda and the contract the second second and the said the what a first war which ", may was a pass on the pass of the pass of the med wedge were the succe ence that work in her bay 18, 1830, when plaintiff claims he was todayed, and hear in continuous use at their colors of course accommon to the color of the es queence and this relief to color transfer all the contine usually

Secretary is the contention of somend for designality we think it was a part of cintiff a dety vices no absimed to seve heard the possessory is the beautiff, a dety vices no absimed to sevelate wedge by signifing no the belt and nate. This is snown to next by that the snown to next by the fact that a manheyermon, haver and calsed were carried on the locantive. We tain to resid to unreasonable and increased calls that plaintiff escald over reperted the trouble and shining another locantime, we wouldn't satisfied the taining and shining another locantime, we wouldn't she daired at a require the religion.

have dend.

The defendant contends that the allegations of the declaration, which were in one count, were insufficient to charge the defendant with the violation of the Federal Boiler Inspection act. The declaration alleges that the wedge, after describing it, "was defective in that the same had been worn thin and a liner had been riveted thereto to make it of the proper thickness and a portion of the top of said liner and wedge, to-wit, three inches thereof, was broken off therefrom and said wedge was not in its proper position but was loose and permitted to play, and was resting down upon the binder." Title 45, U. S. C. A., par. 23, p. 79 of the Federal Boiler Inspection act provides that it shall be unlawful for any carrier to permit to be used on its line any locomotive unless the boiler, tender and all parts of it are in proper condition and safe to operate; that the same may be used by the carrier "without unnecessary peril to life or limb," etc. And the argument in support of the contention is that there was no allegation, nor were any facts averred from which it could legitimately be inferred that the defect in the wedge rendered the operation of the locometive unnecessarily perisons to life or limb. If the declaration had been demurred to there might be some merit in the contention; but since plaintiff filed the general issue and went to trial, if there was evidence from which the jury might reasonably infer that the nosition and condition of the wedge was such as to render the operation of the locomotive unnecessarily perilous to life and limb, and the verdict was for the plaintiff, this defect would be cured by the verdict had the jury been properly instructed on this point. But we think all the evidence, viewed mostfavorably to the plaintiff. shows that even if the wedge were broken and down, as plaintiff contends, it would not render the operation of the locomotive unnecessarily dangerous to life or limb.

Plaintiff testified: "The purpose of the right main wedge

-erufach out to auction alls out that atnothed fruhantah out -se sait ourset of taskel'timai stew fouch one at even which will .ton golforgual ration larehol and to meldalate and with anabout The declaration alleges that the wedge, after describing it. "was mad had roull a how what area meed had some out rout at sylve to to moiston a han assembled require out to il ease of ofereal herevix the top of said liner and wedge, to-wit, three inches thereof, wan mailined record of at for new other him has mortered it's neword ailt mean noch antiest new day, was not bestilnee down seel asw ind Title 45, U. S. C. A., per. 23, p. 79 of the Jederal you so't fulteriou as floris at assis settivous for melicassal telled out seeing evidenced you will at the been of of three of retres etan bas noisibago regory at arm at to strang the bas resident, relied to operate; that the same may be used by the carrier sulthout untrougue at insangra sait bas necessary poril to life or limb, " etc. of the contention is that there was no allegation, nor were any facts averred from which it sould legitumetely be inferred that the defeat in the make rendered the operation of the lecentife unaccessarily pertious to life or limb. If the declaration had been somic tud ; notineines ent at tirem omes ad tinha erest of herrunob plaintiff filed the general leave and rent to trial, if there was witness from writer has jury might presentably hard hist birt bly party moistrage and reduce of an inue new splew and to moisibnes has not of the locemetive unnecessarily perlicus to life and line, and the set yd betwo sd bluer too'tsh ald) . Tiltminir adt to't now tolbrer verdict had the jury been properly indirected on this point. we take all the evidence, viewed appropriately to the plaintiff, Thinnishe as , much has moved even splay and it mays tent evenis contends, it would not reader the couraties of the blocketive unnecessarily dangerous to life or line.

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is to take up the lest motion on the driving box so the engine will ride a little easier. If properly adjusted the engine will ride better. If the wedge is not properly adjusted it will cause a sound and that sound becomes offensive to the sensitive car. I have not operated engines for miles with the wedge down if we can get them up. I have during my experience as an engineer operated engines with the wedges clear down on the binder and have operated them in that condition for some distance. Other than the pounding noise there is danger in operating an engine with the wedge down. I never knew of one instance where there was a devailment because of a broken wedge. \*\*\* I consider that the wedge being down endangered my life or limb. I possibly know that locomotives are often operated with both wedges down but I believed that it was unsafe to operate that locomotive with the wedge down." The witnesses. Doherty, an experienced locomotive engineer, and Brinkman. round-house foreman, both testified they never knew of an accident resulting from a wedge being down.

when viewed most favorably to the plaintiff, leads to the conclusion that there was no unnecessary peril to life or limb occasioned by the fact that the wedge was down. We are further of the opinion that even if we assumed that two or three inches of the top end of the wedge were broken off, as plaintiff contends, and upon which his suit is predicated, there would be no liability in this case for the reason that the bolt might be sorewed up a sufficient distance so that the part of the wedge that remained would be in the same position as though it had not been broken, and the nuts could then be tightened up against the lower side of the binder. If this were done the wedge would be in proper adjustment so that the breaking of the wedge, if it did break, did not change the situation.

After make or the Anni sentence or the Artyles sentence of the Anni or all ride a little costor. If proporty adjusted the engine will ride before, If the value is not proposed adjusted in all to come a to be and that seems not be a classified and the beautiful and the one on 12 year, calor our unit salle art neather Bulletons les wond get then us. I ame deving as exactlence or on mainteen secretary because was the tehnic of my arm brain ag the baker out the 1900 to that quidiles for some distance. Other man the constine motes there is danger in aperiting an angine with the redge down. equated Junctionals are substituted assertant out to much harms in the water pulse outer out fail the land I let sales marrie a to dangered my life or limb. I possibly know that lacquetives are - age to lade beredier I was sent appearant out to toperate serve edly all. ". wook and a constructive will one of the stance of winesan Reign, Boards, or electrons troop line equipmen, and Drithman, inchica as 'to would tover you'd hal'thice alod . manual enumberer rosulting from a rouge teing down.

A careful consideration of all the evidence in the react, when viewed most favorably to the pictofff, tends to the concine sion that there was no consecuty parth to life or that occasioned by the fact that the wedge was down. In ore further of the spinion that even if we assumed that two or three homes of the tag and of the wore broken of, so plaintiff delicates, and upon value its outtile or the reachest that the best that the continue and distance to that the continue of the translated would be to the consideration of the court of the reachest which has the nature the constant the nature of the translated would be to the could then a sufficient or the reachest of the translates of the binder.

If this were done the wedge would be in proper adjustment to that the binder.

We think the evidence clearly discloses that Fugate's injury resulted from the ordinary hazards of his employment which he
fully understood and voluntarily assumed. He was an experienced
locomotive engineer and must be held to have assumed the risk of
hazards incident to adjusting the bolt and wedge. Ches. I Ohio R.R.
Co. v. Ruhn. 284 U. B. 44.

Since we hold that in any view of the evidence there is no liability, there is no reason for discussing the instructions or other contentions made, nor for remanding the cause. The court should have sustained defendant's motion for a directed verdict at the close of all the evidence, and this not having been done the judgment is reversed with a finding of facts. Mirica v. Forschner Centracting Co., 312 Ill., 343; Bournique v. Drake, 236 Ill. App. 75; Colling v. Kurth, 247 Ill. App. 156.

JUDGMEET REVERSED WITH A FINDING OF FACTS.

McSurely, P. J., and Matchett, J., concur.

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JUDICHER REVIEWED WITH A PURDING OF PAGES.

Masuraly, F. L., one Materett, J., concur.

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FINDING OF FACTS.

We find as a fact that the evidence fails to show any violation by the defendant of the Federal Boiler Inspection act. And we further find as a fact that the wedge claimed to have been broken by the defendant in no way proximately contributed to plaintiff's injury, and further, that plaintiff assumed the risk under the facts as disclosed by the evidence.

We find as a fact that we discuss the top one built of one of the control of the

saddle the trade of thethers by the avidence.

DAISY RIMCK, Appellee,

VB.

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, a Corporation, Appellant.

APPEAL FROM SUPERIOR COURT

268 I.A. 613

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover damages for personal injuries claimed to have been sustained by ner on account of defendant's negligence in failing to keep the floor in one of its stores in Chicago in a reasonably safe condition, as a result of which plaintiff slipped and was injured. The jury returned a verdict for \$2500 in plaintiff's favor. Plaintiff entered a resittitur for \$1,000, judgment was entered on the verdict for \$1500 and defendant appeals.

The record discloses that about eleven o'clock on the morning of Getober 11, 1930, plaintiff was buying some groceries in one of defendant's Chicago stores. After making her purchases she was leaving the store when, plaintiff contends, she slipped on a green bean or pea which was on the floor, as a result of which she fell and was injured.

The defendant centends that the evidence fails to show any negligence on its part because the evidence shows the floor was in a reasonably safe condition; that plaintiff was guilty of contributory negligence and that the verdict is excessive.

Plaintiff's evidence was to the effect that when she went into defendant's store on the morning in question, the manager of the store was in the act of cleaning and dressing his display window by removing certain parts of vegetables which he threw on the floor, and as she was leaving the store she stepped on a green

ar (Logic Title)

COURSE OF BUILDING THE CO.

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Flaintiff brought suit ogninsk defendent to recover damages for personal injuries claimed to have been sastained by ner
en account of defendant's augiliance in fulling to keep the flaor
in one of its stores in Uniongo in a reasonably safe condition,
as result of winder plaintiff aligned and was injured. The jury
returned a verdict for \$2500 in plaintiff's favor. Flaintiff
entered a realititur for \$1,000, judgment was entered on the vertict
for \$1500 and defendant aparels.

The record discloses that about eleven o'alork on the morains of October 11, 1930, plaintiff was buying some groceries in one of defectant's Chicago etores. After making her purchases she was leaving the store wish, plaintiff centerin, one sliaped on a green boar or yes while was the floor, as a result of chich she fell and was injured.

The defendent contends test the exidence halfs to mine any negaligence on its part because the evidence enows the floor was in a renomiably safe condition; that plaintiff was guilty of contributory nealigence and test the verdict is agreeated.

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bean or pea, slipped and was injured.

On the other hand, the evidence of defendant's manager was to the effect that he did not throw any refuse on the floor, but that in dressing the window he removed certain leaves and particles from the vegetables and put them in a hamper on the floor near him.

The defendant called B. L. Crohan, a witness, who testified that he was in defendant's store and that the floor in the place in question was swept by one of defendant's employes, and the argument of defendant is that this sweeping took place prior to the time plaintiff was injured, but a careful examination of this witness' testimeny fails to disclose whether he was in the store before or after the plaintiff was injured, although the testimony of the manager is to the effect that Crohan was there prior to and at the time plaintiff fell. Whether plaintiff was in the exercise of ordinary care for her own safety, and whether the defendant was guilty of negligence which proximately caused plaintiff to slip and fall, were questions of fact for the jury. We are further of opinion that whether plaintiff was guilty of any negligence in failing to discover the pear or other substance on the floor which proximately contributed to her injury, considered most favorably to the defendant, was a question of fact for the jury. The law does not require that one going into a store to make purchases, such as disclosed by the evidence in the case at bar, should constantly keep one's eyes on the floor to see whether it is in a reasonably safe condition.

The defendant further centends that the judgment is excessive because the evidence shows that most of the ailments complained of by plaintiff after she was injured were not the result
of the accident since the evidence further discloses that plaintiff was suffering from most of these ailments prior to the day of

bean or pes, slipped and was infired.

On the soner meed, the evidence of defendant's manager yas to the crime to the crime to the crime and the theor, but that in drawing the window he removed certain leaves and particles from the vegetables and put them in a hanger on the those one.

lies defendant called A. M. Orches, a witness, who testim will all Topy I and their than armin of London and ann and sink helfs has asyglome a' sambasish to one od seems and actions at soale reize sanfa doos uniqueve sint said at sunhactob to successor said In the time plaints was injured, but a careful examination in the distance factions Tails to disclose whether he was in the store barone or after the plaintiff was injured, although the tetimeny of the convert to to the effect teat Cooken was there prior. ont of the time tribately remoded . He't 'This hat gents and to bon of emercine of ordinary cure for her cut and whather the de-William to become girtanians on the communities to mixing our dumino's te alip and fall, ners questions of fact for the jury. We are office one to realize new Philosophy Received Applying the property. edi de semijod a vesito ve dato edi revecata es mailial al comen floor which proximately contributed to her latery, considered most fayorably to too defendent, was a question of fact for the The law does not require that one wolfer into a store to make purchases, such as discissed by the evidence in the case at Tenistriv con of toel's old no soys a one quest ylimpaco binonis, The it is in a reasonably and a condition.

cosping heads of the selection of the histories complained of by plaintiff wher one was injured were not the result
of the accident since the evidence further discloses that plaintiff was suffering from nost of these prior to the day of

the accident. We think this contention must be sustained. A physician who treated plaintiff testified that on August 23, which was twelve days after the accident, he was called by plaintiff, and testified as to what he found and what he did for plaintiff. Plaintiff testified that she had no accident or any illness prior to the day she slipped and fell in the store, except an operation which had taken place about five years before and from which she had entirely recovered. The physician on direct examination testified that he had not treated plaintiff until twelve days after the accident. But upon cross-examination it developed that he had kept a written record of the services he had rendered plaintiff. This record was later brought into court, and it shows that the doctor had treated plaintiff shortly before the accident and for many of the ailments she now contends were the result of the accident. This is specifically pointed out in defendant's brief, Afterwards plaintiff filed her brief but there is no reply to this contention. In fact plaintiff's brief makes little or no reply to the brief filed by defendant, but it is framed as though it were the first brief filed in the case, centrary to Rule 19 of this court. There is no explanation by the doctor in his cross-examination of the contradiction of his direct testimony by his written record.

The evidence further shows that the physician's charge for the services rendered to plaintiff was \$257; but we think it appears from the written memorandum kept by the doctor biaself that part of this was for services he rendered plaintiff for allegate of which plaintiff complained prior to and after the accident.

In view of the unsatisfactory state of the record and the briefs and arguments filed, we think there should be a retrial of the case.

The judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

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the services rendered to plaintiff was \$257; but we inink it ap-

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The judgment of the Superior court of Cook county is reverement the cause is remarked.

McSurely, P. S., and hatchest, J., concar.

UNITED AUTO SALES COMPANY, INC., a Corporation, Appellee.

V8.

THOMAS HIRSCH and M. HIRSCH, Appellants. APPHAL PROM CIRCUIT FOURT OF COOK COUNTY.

268 I.A. 614<sup>1</sup>

MR. JUSTICE O'CORDOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of trover against the defendants to recover the value of a but, fence, automobile ascessories and equipment which it had placed upon certain lots which it claimed were owned by the defendants and which plaintiff had occupied by virtue of a written lease. The basic of the claim was that under the terms of the lease plaintiff had the right to remove all of its property. The defendants filed a plea of not guilty, and upon a trial by the court without a jury there was a finding and jud, ment in plaintiff's favor for \$1500, and the defendants appeal.

Plaintiff's evidence was to the effect that it had rented a number of vacant lots from the defendants about three years prior to the written lease hereinafter mentioned; that it had filled up and levelled off the ground and used it in the conduct of its business, the sale of used automobiles; that shortly after taking possession of the ground plaintiff constructed an office or but in which it had tools, automobile accessories, etc., used by it in the conduct of its business. About three years after plaintiff first leased the premises, and in April, 1930, plaintiff again rented the property for a period from April, 1930, plaintiff again rented the property for a period from April 1, 1930. The written lease is in is evidence and/signed by defendant signael alreads and plaintiff.

Defendant Thomas sirsch is not a party to the lease nor is he mentioned in it. The lease provides that plaintiff is to use the lots for automobile sales purposes, the rent of \$75 a month being payable on the first of each month in advance, or a total of \$525.

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PERSONAL PROPERTY.

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Plaint Through as action of trover mained the defendent ta recover the value of a hut, resec, sufemedite accessories and asedalo 31 Moldw asel alejzes more beenly her it maile sammeleps not be become and tribule in the bear attacked but her to bear water virtue of a written lease. Inc basts of the claim was that under eti to ile grower at that the this title one s app has . The sale as to as to a belie as inemibil has galuall a new orons grut a succisir iruse and yd lairi to distributive for flace, and the defendants appeal.

begins bed of real spotte ear of mer somehive o'This old? noire areas soud: tuode educacion ad hart soul faces to requir s or halfil had it tout tomother amothered; that it had filled up and layelled of the ground and it is in the conduct of the busiguilded weaths will remember to the odd agent to the odd agent al full to sell'to an hereforsomes Tribulais house, and to nelecouses which it had teals, outcoeble occasion, ato, used by it in the conflict of its mariness. Down three years after plaints ilves lease the precise, and in april, 190 , claimit' appin rented the property for a pariet from nort 1 19 W. . The writer a pariety Tiliniale has death tomber and and party in bearing as sometime. one and at you appeal and a star a loss it was a Komman Transmission tioned in it. The least provided that charity is to new the Lots for sutemently sales purposes, the rett of \$75 a month being

payable on the first of each menth in savance, or a total of 1855.

It contains the following provision: "Party of the second part is hereby given the privilege of removing all their personal preparty attached to or on said premises on or before Jan. 1, 1931." It will thus be seen that the lease expired october 31, 1930, but plaintiff was given the months of November and December during which it might remove all of its property from the lots. This is the construction put upon the provision above quoted by both parties.

Plaintiff's president, Stein, testified among other things that shortly after the lease was signed he constructed a wire fence across the front and back of the lots and installed lights and other equipment; that plaintiff's business was not conducted during the winter months: that on Sotober 31, 1936, he locked the gates in the fences and the doors and windows in the office or hat, preparatory to going to Florida for the winter, and that about this time he had a conversation with defendant Thomas Mirsch and it was agreed that plaintiff could occupy the premises for another year under the same conditions as those mentioned in the lease.

There is further evidence to the effect that during the fore part of December a brother-in-law of Stein noticed in passing the property that the doors and windows of the office or but were open or broken and he communicated with Stein, who was in Florida, and as a result of this a carpenter was employed to go upon the premises to board up the doors and windows; that when the carpenter proceeded to do this he was ordered off the property by a man whom plaintiff contends was the defendant Sichael Sirsch; that thereupon the brother-in-law again communicated with Stein and upon instructions received from him called upon defendant Sichael Sirsch with the request that plaintiff be allowed to remove all of its property from the lots; that Sirsch refused to permit this to be done; that in the month of February following Stein returned to Chicago and

It contains the following provision: "Farty of the second part in harmy circumbance of resords; will their personal property harmby circumbant the privilege of resorder will their car, circumbant of Novamban and Ideomber during plaintiff was given the meeting of the construction one that the provision above quoted by both

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it and provide that plaintiff's business was not conducted during
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called on Michael Mirech, who refused to permit plaintiff to remove the property, stating that it was too late - that plaintiff should have removed it prior to the first of the year. And there is other evidence as to the value of plaintiff's property.

Michael Hirsch testified, and denied that he had refused the carpanter permission to fuston the doors and windows, and testified that he had not seen the carpenter. He further testified that he had not refused Stein's request made through Stein's brother-in-law in December for permission to remove the property, but stated that he told the brother-in-law to get the property off before the first of the year.

The evidence is the record is meager. sumerous objections were made by counsel for the defendants to evidence offered by the plaintiff, a great many of which were erroneously sustained.

Two questions were involved which would tend to show both defendants liable, viz: Did Michael Mirach in December refuse to permit plaintiff to remove its property from the lots? Were the lots owned by both defendants? Any evidence that would tend to throw light on these questions should have been admitted even though they tend to prove what are semetimes referred to as collateral facts. The Standard Brewery v. Healy, 209 111. App. 272. We think the facts were not sufficiently shown. Evidence of the conduct of the parties, while it might not bear directly on the ultimate question of conversion, should have been admitted as it might help in the determination of the vital question. in The Standard Brewery case, supra, we said (p. 276): "The law is that whenever there is a conflict in the evidence relevant to the issue, evidence of collateral facts which have a direct tendency to show that the evidence of the one side is more reasonable and therefore more credible than that of the opposite side is admissible. Teiting a number of authorities. I it would be a narrow rule that

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Complaint is made by the defendants that the evidence offered by plaintiff on the question of damages is insufficient because a witness testified as to the cost of the different items of plaintiff's claim but none as to the value. No such objection was made on the trial.

Defendants also contend that the judgment is wrong because there was no evidence showing that defendant Thomas Kirsch was in any way liable, - that the lease was signed by defendant Michael Mirsch only. There is some evidence to the effect that the property was owned jointly by the father and son but it is rather meager and unsatisfactory, especially as to defendant Thomas Mirsch.

Upon a consideration of all the evidence in the record, we think there should be a retrial of this case, where all the facts should be gone into.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMARDED.

McSurely, P. J., and Matchett, J., concur.

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Compliant is made by the defendants that the optiones to the control of the state of the different items a witness a withest bear to the value. In such objection to the value. In such objection

Use the control of the lease was signed by defendant Bishael sires only. There is some syldence to the effect that the property was event foisily by the father and con but it is rather than the control of the father and control of the father than the father.

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The judgment of the Circuit court of Cook county is reversed and the sense is recorded for a new trial.

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FRANCIS G. JAMISON, as Executor under the Will of Henry W. Boxderfer, Deceased,

Appellant,

VB.

MATHILDA BOXDERFER.

Appellee.

APPEAL FROM CURCUIT COURT
OF COOK COURTY.

268 I.A. 6142

MR. JUSTICE G'CONNOR DELIVERED THE OPINION OF THE COURT.

Francis G. Jamison, as executor of the estate of Henry W. Boxderfer, deceased, filed his petition is the Probate court of Cook county against Mathilda Stuerner seeking to discover assets of the estate which he claimed were in her possession. Henry W. Boxderfer will hereinafter be referred to as the deceased and Mathilda Stuerner or Mathilda Boxderfer as the defendant.

property in her possession belonging to the estate. After a hearing the court entered an order finding that the defendant had in her possession a provisionry note for \$7500 with coupons attached, the payment of which was accured by a trust deed on property in Chicago; that she also had in her possession the trust deed, fire insurance policy, etc., and it was ordered that she deliver them to the executor. An appeal was taken to the Circuit court of Cook county, where a jury was waived, the cause heard by the court and a judgment entered in the defendant's favor. The court found that the note, trust deed and papers above mentioned were in the possession of the defendant and belonged to her, and it is to reverse this judgment that the executor appeals.

The record discloses that Henry W. Boxderfer, the deceased, died December 11, 1939, seed 56 years. From 1902 until October 5, 1929, he was employed by the United States Tobacco Company at its Chicago factory, and had been a foremen in the factory for many years. October 5, 1929, he was ill and went to see a dector, who diagnosed

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The recert disclose that Henry W. Roxderfor, the decenced, died December 11, 1978, and 55 years. From 1902 until October 8, 1979, he was employed by the United states Tebesco Company at its Chiesco factory, and had seen a foremen in the factory for many years. October 5, 1979, he was ill and ment to see a doctor, who diagnosed

his case as Bright's disease. On Movember 2, on advice of the doctor, he went to a hospital and remained there for ten days, until Movember 2th, when he returned home slightly improved. Shortly thereafter he became worse and died December 11, 1929.

married in 1904 to Serena Pearl Boxderfer and they lived together as husband and wife until 1923, when the wife was adjudged insane and committed to the Chicago State hospital. No children were bom of the marria e but they adopted a boy, and a girl numed Cyrena, who at the time in question was married. On a number of occasions the wife was either paralled or escaped from the insane hospital and was returned to the institution. Before the insanity she and herhusband, the deceased, lived in Oak Park in a bungalow owned by them in joint tenancy.

Mathilda Stuermer was marriedto Stuermer, who was a fellow worker of deceased at the tebacco factory, and the two families became acquainted. Stuermer died some years prior to the time in question leaving him surviving his widow Mathilda (the defendant) and three grown sons. About 1926, after deceased's wife Serena had been adjudged insane, and after the death of Mathilda's husband, Mathilda would go to deceased's home several times weekly and do housework for him. About this time deceased's adopted daughter Cyrena did not get along with her father and left home. Some time in the oring of 1939 the deceased and Mathilda decided to get married and on Larch 4, 1929, he filed a bill for divorce against his wife, charging her with desertion and she was served by publication. (n June 6, 1929, the divorce suit, in which the defendant Serena had been defaulted, was heard the only witnesses being the deceased and kathilda. They both testified that the deceased and his wife Serena had been separated for a number of years, that they did not know where she was at the time, and that the deceased treated his wife well. On this evidence a decree of divorce was entered

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June 12, 1929. On July 27th following the deceased and the defendant, Mathilda, went through the form of a marriage ceremony and after taking a vacation they returned to Chicago and lived at Mathilda's home as husband and wife until his death. The evidence further shows that the deceased worked steadily and was frugal. He and his wife. Serena, as stated, owned their home and on March 3. 1928, the deceased bought from the Suburban Trust and Savings Bank of Oak Park the \$7500 mortgage and trust deed in question. paying therefor principal and accrued interest amounting to \$7522.50, and on April 16, 1928, he bought another acte and mortmage from the same bank for \$4500 paying the face and accrued interest which amounted to \$4560.75. Deceased had two safety deposit boxes which were underneath the Suburban bank, one individually and the other as conservator of Serena, his insane wife. He also had another parety deposit box which was run in connection with the First National Bank downtown. Mathilda, the defendant, had a safety deposit box with one of her sens in a building on the Northwest side of Chicago at Milwaukee and Western avenues.

In April, 1929, after the deceased had filed his bill for divorce, he executed his will by which he gave ten dellars each to the adopted daughter and son and directed that all the rest of his property be divided equally between his two sisters, both of whom were married and living in Pittsburg. Meither his insane wife nor Mathilda is mentioned in the will. The will was admitted to probate in the Probate court of Cook county and is now being administered by the administrator, Jamison.

After Henry's death an order was entered by the County court of Cook county, in which, after a hearing, it was found that the insane widow. Serena, had fully recovered her reason and she was restored to all her rights and all of the rights and privileges of a sane person. Shortly thereafter Serena filed her petition in the divorce proceedings in the Superior court

Summerly, 1978. Der John Will Fellewing lie dentended unt the days to baril has operally at homester your motor and are The syldense allock ald filling will been hopped on much a labilitied further show has the descend verted steelly and seed frugal. No and his wife, Berens, as abated, owned their head and an Hareft anaimal how town I made and the the standard and the same the same than Bank of that fark the Fysic mortgage and trust dest in question. of Unitrooms Farmaral Saurana San Lambaurg makeman galves 17822.50. and on april 16, 1926, he bought enciner note and moremays from the same bear line 14100 paying the flore and amongs intarent with mountain is this. W. Managari and say may're for the tarent bonen which were underneath the Suburban bank, one individually and the other as conservator of Careen, his income wife, it also Atta nottoennes at mer sav delar ned ticonet yellow with the Place Part and them there are bearing, the day defeat, the and one other three till one of the new in a building on the Perform with at this case of the same and Talking assenting

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After Seary's down on order was entered by the County court of Gest county, in snich, after a bearing, it was found in the was restored to all her rights and and she was restored to all her rights and there petition in the diverce precedings to the Superior court

of Cook county, setting up that she had just learned of the pretended divorce which Menry, the deceased, had obtained from her and alleging that it was fraudulently obtained; on December 30, 1929, the matter came on before the chancellor and an order was entered vacating and setting aside the divorce decree.

The contention of the defendant Mathilda is that on Movember 1. 1939. Henry W. Boxderfer, the deceased, physically handed her the \$7500 note and trust deed and gave them to her as a gift. The evidence in support of this is that on the morning of Movember 1, 1939, at the request of deceased, Leo Stuermer, son of Mathilda, who was living at home with his mother and the deceased, drove deceased and mathilda down to the salety deposit vaults in the First Mational Bank building; that the deceased there opened the safety deposit box, took from it two envelopes and handed them both to kathilda; that one contained the \$7500 mortgage and the other the \$4500 mortgage; that they then drove to the safety deposit vaults under the Suburban bank in Oak Park. Under the rules of that safety deposit vault company anyone opening a safety deposit box was required to sign a ticket. The ticket is in evidence. having been produced by the safety deposit company, and it shows that Henry W. Boxderfer, the deceased, alone, opened this safety deposit box shortly after one o'clock that day, as shown by the stamp of a time clock on the ticket.

The evidence further shows that the parties then drove home, 2225 Montana street, Chicago, and the testimony of Leo Stuermer, defendant's son, is that when they arrived home a Mr. Scharrer, who lived on 24th street, a friend of the family, was at their home; that when they went into the house his mother, the defendant, handed the envelope containing the \$7500 mortgage to the deceased, who refused to take it, stating that he had given it to defendant; that the mother then left the room and put the mortgage in the closet in the dining room. The testimony of the three sons and

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2025 Montons street, Uniongo, and the testimony of Log Utuerwer, forendant's son, is that may exrived home a Lr. Scharrag, who lived on Atth etreet, a friend of the family, was at their molived on Atth etreet, a friend of the family, was at their handed the envelope containing the #7550 mortgage to the descaped, that the mother than left the room end put the mortgage in the closet in the close the three mans and

the wife of one of them is in substance that on the evening of November 1st they were all at their mother's home when the deceased asked Mathilda to go out and get the envelope containing the mortgage papers: that the mother did so and nanded them to the deceased who again refused to take them and said for her to let her son Walter see them, which she did, deceased stating at that time that he had given the mertiage to the mother. The three sons and Walter's wife also testified that the deceased was apparently in good spirits and that nothing was said about him being seriously ill: that on the next merning, November 2nd, the deceased went to the hospital and stayed until Bovember 12th, when he returned home and on November 16th he went to the safety deposit yoult located in the bank building in Oak Park, and opened the box shortly after three o'clock of that day. This appears from the testimony of Otto Vasak, assistant eachier of the bank, who was well acquainted with the deceased, and the entrunce ticket is also in the record. This ticket is signed by the deceased and bears the time stamp showing that he opened the box at that time. Vasak further testified that at that time the deceased came to see him and wanted to berrow \$100 from the bank for 30 days, which was agreed to, and the deceased gave his note for that asseunt due 30 days after date; that when the deceased requested the loan the witness asked his if he had any collateral, and deceased said he had the \$4500 mortgage: that deceased then went down to the basement, opened the saiety deposit box, procured this mortgage and gave it to the witness as collateral security for the \$100, and witness then gave the deceased a receipt of the bank for the \$4500 note and moragage. This receipt also is in the record. The deceased then returned home, where he remained until he died. December 11th. Shortly after twelve o'clock the next day the defendant Mathilda went to the safety deposit box in Oak Park in the Suburban Sank building, and opened

1 wines end to interest the stance that a continue to ail mode amod a tadton their to Ale amove ye . it's a leaden ent patriasana ecclevas say buy buy due og et abilitant bette heaces -sh sus as men's behaus has on bit Triffer but yes def of yes you have but mails and of besular nings afte became age Walter see them, which she decembed stating at that time bon and save the more the median and action and mere and an indian Talingto will also these tends that that descent was appropriate Menuisas animo min remois ties are gainly a mail her abising tang th 111; the control order and and the day of the the heavyful on may , did to down Didn. to to the full total at range fine thought comes not a feet to be no been werten altread has been been been been been all and the signed outs three o'el . :: . . . This appears from the testimony of tite tive herolampse live saw one , and and he walless amortions , sans? the deceased, and the entrance thairs is also the record off thirst to clims by the recent but heart he the stary shoying that he opened the tox at that time. Vacal further tentified that Odia worred of hetens bes mid see of ours beseeved all sailfall in from the benk for 30 days, watch was sureed to, and the deceased gave his note for that amount due 30 days after date; that when the decessed remarked the loan them and the ball and he becoude "oh rad' ; egaptron Colli ods bad ad blas becauseh has , farefalles ceased then went down to the basement, opened the safety deposit box, procured this mortgage and gave it to the witness as collateral security for the \$100, and witness then gays the decessed a receint of the back for the facto note and northean. This receipt also is in the record. The deceased than returned none, were as paralized over the common light when the trees or the course o'clock the next day the definited included as the antety deposit box in Cak Fark in the Suburben Sank building, and opened the box; this appears from the entrance ticket in the record and is signed, as was the rule, by the defendant Mathilda. At the same time Mathilda went to an officer of the bank and offered to pay the \$100 note and sought to obtain from the bank the \$4500 mortgage. The bank refused to accept the payment or to deliver up the mortgage, one of the reasons being that it had learned that Henry Boxderfer was dead.

Leo Stuermer, defendant's son, further testified that a few days after November 1, 1939, after the deceased had given the \$7500 mortgage to his mother, the latter put the mortgage in her safety deposit box in the building at Milwaukee and Western avenues; that he went with his mother and saw her put it in the box there; that it was about a week after Henry's death.

It further appears from the evidence that after the Probate court entered an order directing the defendant to turn over the \$7500 mortgage to the executor, she, on February 25, 1931, filed a claim against the estate of the deceased for \$1275 for personal services and attendance in nursing and caring for the deceased during his last illness between August 11, 1929, and December 11, 1929, which claim is still pending.

This is substantially and the evidence in the record.

The defendant claiming the \$7500 mortgage as a gift from the deceased, the burden was on her to prove that fact by clear and convincing evidence. Rothwrwell v. Taylor, 303 Ill. 226. The court there said, beginning at the bottom of page 231: "In Millard v. Millard, 221 Ill. 36, a mother, after the death of her son, claimed title to certain money and securities as a gift from him. She obtained possession before her son's death. This court held the burden was on the dones to prove the gift by evidence not equivocal or uncertain." And it is also the law that courts lend a very unwilling ear to statements of what dead men have said.

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This is substantially sell the evidence in the record.

The defendent plaining the 175 C morthoge as a gift from the decembed, the burden was on her to prove that fact by element onerwincing evidence. Solution, Juliar, Juliar, Juliar, 193. The court there said, be invited to be the element of ange 231: "In Million of the said, be invited, after the death of her conditioned title to cortain somey and securities as a gift from him. The burden was on the dense to prove the gift by evidence not the burden was on the dense to prove the gift by evidence not equivocal or uncortain." And it is also the law that courte lend a yeary unwilling ear to state wate of what does can have eath.

Lea v. Polk County Copper Co., 62 U. S. 493. In that case the court said (p. 504): "In 1856, when these depositions were taken, John Davis was dead, and courts of justice lend a very unwilling ear to statements of what dead men had said." And in 22 C. J., p. 291. in discussing the testimony of witnesses as to statements made by a deceased person, it is said that "it is impossible, in most cases, to convict the witness of perjury if his testimony is wilfully false, testimony as to the oral statements of deceased persons. which is therefore regarded as the weakest kind of evidence and subjected to the closest scrutiny." And our own Supreme courtin the case of Laurence v. Laurence, 164 Ill. 367, in discussing this question said (p. 377): "Evidence of admissions made by a person since dead should be carefully scrutinized, and the circumstances under which they were alleged to have been made carefully considered with all the evidence in the case. Buch evidence is liable to abuse." This is especially applicable to the facts in the case at bar where the witnesses are not only testifying as to what the deceased said but where it also appears that they are all vitally interested. The only witnesses who testify are Eathilda, the defendant, who is seeking to retain the \$7500 mortgage, her three sons and daughter-in-law. The neighbor, Mr. Scharrer, who was at the house on the evening of bevember 1st, when the deceased, defendant and her son Leo arrived at her home from the vaults in the Suburban Bank building, did not testify, and the reason given by one of defendant's sons was that Scharrer was ill.

Scrutinizing the testimony of the defendant, her three sons and her daughter-in-law, as we must under the rule announced in the above authorities, we are of the opinion that little or no credence can be given to their testimony on the vital question because they are shown to be biased and interested witnesses and because of the other evidence in the record, which is antisputed. We think it

. d 493. In that was the court seat (p. 818): "In Life, when there are a see than y day Corts was lead, one courts of facility hand a very world ling any to statements of that the last table and table in its to the many of a go san almonate to an assessed to the the test of the life of . sees ten ni aldinocyal al the Shit bine at ti necessarian decome villilly at promisers aid it gregoon to coosis . . . . . . . has exactly to both funder but to believe surfaced at calcu And the state of t Stationer of adolesized note by acceptable speed out frame malescape since doed should be correctly servicingsed, and the circumstances under witch they were alleged to have been made carefully sensidered with all the evidence in the case. Much evidence is limble to abuse. " This is escentally applicable to the latte in the one of -ab add darw of an gulytideed wine non and acceptable and event was viletty ile are yell sent areague only it areas but him beanes The enly witnesses and testify are mathida, the deinterested. fordant, who to seeking to retain the \$7500 mertgage, her three sens and daughter-in-law. The neighbor, Mr. Scherrer, who was at the bause on the evening of hevenber let, when the decembed, defendent andrudus out at attuar out next onest and to bertran cod ner and has Denk building, did not testify, and the rouses given by one of de-. Lit new rearries that bew mos a' tachne's

Sovething the testinent of the defendant, her three some ond her daughter-in-law, as we must ender the rule associated in the above sutherities, we are of the opinion that little or no erodence can be given to their testinent on the vital question because the are shown to be biased and interested situaces and because of the clinar evidence in the record, which is undisputed. We think is

annears from all the evidence that the deceased did not give the \$7500 mortgage to the defendant, but we think it was placed by him in the devosit box in the Suburban bank building and that the defendant obtained it when she opened the box December 12th, the day after Henry's death. It is undisputed that she opened that eafety deposit box on that day and she testified that she took from the box the receipt given by Vasak, assistant cashier of the Suburban bank: but this statement is inconsistent with the undisputed evidence, which is that the deceased, Menry Boxderier, opened this box but once on lovember 16th, the date on which he berrowed the \$100 from the Suburban bank as shown by the entrance ticket of the Deposit company of that date. And Vasak, the assistant cashier of the bank, testified that when Henry, the deceased, spoke to him about berrowing \$100 and witness stated that the bank would loan him the \$100 and asked for collateral, Henry obtained the \$4500 mortgage. The conclusion to be drawn from the evidence is that he got this mortgage from the box undermeath the bank at that time and brought it up to the bank and gave it to Vasak as collateral to the note. Vasak in the normal course of business gave the receipt for the mortgage, and if the deceased afterwards put the receipt in the box downstairs, he would have opened the box again, but this was not done. The box was not opened again until the defendant did so December 12th shortly after noon. We think it appears that Hanry must have taken the receipt home with him and in this way it came into the possession of the defendant. Furthermore, all of the evidence is to the effect that on Kevenber 1st nothing occurred that would indicate that Menry thought the end was near. All the witnesses testified that he appeared to be fairly well at that time, and if he thought he was going to get well it is nighly improbable that he would give most of his property to the defendant at that time. This appears further from the fact that in April, 1939, shortly

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Upon a careful consideration of all the evidence in the record, we are of the opinion that the finding and judgment are against the manifest weight of the evidence, and in such case it is the duty of this court to reverse the judgment. <u>Nonelson v. Wast</u>
St. Louis & Sub. Ry. Co., 235 Ill. 625.

The judgment of the Circuit court of Cook county is reversed and the cause remanded with directions to enter judgment awarding the mortgage in question to the executor.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

EcSurely, P. J., and Matchett, J., concur.

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SUTURNITY HIVEHED AND CAUSE BEARTHD

Medurely, F. J., ond Merchett, J., beneur.

MORLIBER ICE MACHINE COMPANY, a Corporation,

Appellee,

VB.

JACOB LEVY.

Appellant.

APPRAL FROM MUNICIPAL COURT

OF CHICAGO.

268 I.A. 6143

MR. JUSTICE O'COLDOR DELIVERED THE CPINICE OF THE COURT.

on July 18, 1930, plaintiff brought an action of detentive against the defendant to receiver a certain number of feet of welded coils and other materials used in repairing a refrigerator plant, and for tamages for the detention of the materials. To plaintiff's statement of claim the defendant filed his affidavit of merits. On December 10, 1931, plaintiff filed its amended statement of claim in trover, thereby abandoning its action of detinue. Plaintiff, in its amended statement of claim, mentioned the same material as that referred to in its original statement of claim; of course plaintiff did not seek to recover the material in this trover action, but the value of it, on account of the alleged conversion of it by the defendant. There was a trial before the court without a jury. The court found the defendant guilty of conversion of the property and assessed plaintiff's damages at \$137.50 "in trover" and defendant appeals.

The substance of the evidence is that defendant was the owner of a building in Chicago and had leased it to the Division Packing Company, which was conducting its business of meat packing. There was a refrigerator in the building at the time of the leasing, and some time thereafter the tenant found that the refrigerator was not in good condition, and to have it repaired entered into a written contract with the plaintiff whereby plaintiff was to repair the refrigerator by installing piping coils mentioned in plaintiff's statement of claim, and some other work was to be done. In considera-

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tion the tenant, the Packing company, agreed to pay \$4.0 to plaintiff in installments. Plaintiff thereafter did the work and apparently was paid part of the \$400 by the Packing company, and being unable to collect the balance it brought the instant trover action against the defendant landlord. There is other avidence to the effect that the defendant knew nothing about the contract between the Packing company and plaintiff and knew nothing about the repairs having been made, but we think this evidence is entirely immaterial.

In his brief the defendant argues that the evidence fails to show a desend was made by plaintiff on him for the coil piping in question, and other points are made and arguments are advanced on the theory that the action was in replevin. Obviously this argument is entirely inapt here. Plaintiff was not seeking to recover the coil piping. It abandened its action of detinue and declared in trever. It did not want the coils returned, but wanted defendant to pay the balance due.

There is other argument in the briefs as to whether the refrigerator or ice box and the materials furnished by plaintiff were personal property or a part of the realty. We think it obvious that these questions are of no importance in this case since plaintiff was not seeking to recover the materials.

From a mere statement of the facts as shown by the undisputed evidence, it is obvious that there is no liability on the defendant under any view of the law. He was in no way a party to the contract whereby plaintiff did the work and furnished the materials; that was between plaintiff and the Packing company, and if the Packing company, the tenant, fulled to pay, obviously that is no legal consern of the defendant's.

The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

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The judgment at the hunteless owers of thisage is reverable.

Meduraly, N. J., and Matenett, J., consur.

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THOMAS P. COURCY.

Appellee,

W.

RABASH RAILWAY COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

268 I.A. 614

Opinion filed Nov. 16, 1932

MR. FRETIBING JUSTICE WILSON DELIVERED THE CFIRIOR OF THE COURT.

Plaintiff recovered a judgment against the defendant in an action for personal injuries. At the time of the accident plaintiff was a switchman in the employ of the defendant and it is admitted that both were engaged in interstate commerce, and consequently the Federal Employers hisbility act is controlling. There is no question of contributory negligence on the part of the plaintiff in the case.

The original declaration filed in the suit consisted of two counts.

The first count charged that at the time of the accident plaintiff, a switchman, was riding in the night time upon the front footboard of one of the defendant's engines which was being driven in a northerly direction in the Landers yard in the City of Chicago; that the defendant carelessly and negligently, through its cervante and agenta, caused the locomotive to lurch and jerk forward and by reason thereof the plaintiff was thrown off and was injured, and as a result of the injuries it became necessary to amountate his leg.

and negligently equipped said engine upon which plaintiff was riding and earelessly and negligently permitted divers implements, blocks of wood, chains, pieces of iron and steel to be upon and about the footboard and other parts of said locomotive engine upon which

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plaintiff was riding so that it was entirely unsefe, and that while the plaintiff was riding as aforesaid upon said engine, certain of said implements, blocks of wood, chains, pieces of iron and steel violently lurched and moved forward and struck plaintiff and, by reason thereof, he was thrown upon the ground, etc.

A general and special desurrer to the first count of plaintiff's declaration was sustained and a pleas of not guilty filed to the second count. Three additional counts were subsequently filed and upon the trial plaintiff by his counsel stated that all the counts of the declaration should be disregarded, except the second count of the original declaration. The point is made that there is no proof to sustain the second count of the declaration and that there was a variance between the allegations of the declaration and the proof.

At the emi of plaintiff's case defendant filed a motion to direct a verdict in favor of the defendant and also motions requesting the court to instruct the jury to find the defendant not guilty as to each separate count of the declaration.

the front footboard of the engine and above the footboard and extending across the entire front end of the pilot beam was a grab iron which served the purpose of permitting persons riding upon the footboard to hold on to the engine. The testimony adduced on behalf of the plaintiff tended to show that upon the pilot beam and back of this handrail was a re-railer weighing between 60 and 90 pounds which was caused to roll, tip or fall over against the hand of the plaintiff causing him to jerk his hand away from the handrail and fall off of the engine. This testimony was produced upon the trial by the plaintiff and went in without objection. At the end of plaintiff's case on defendant's motion to direct a

plaintiff not riding to thee it was entirely unaste, and that while the plaintiff was riding as aforement upon said engine, certain of and land has pieces of iron and assolviolently lumbed and sovered and strank plaintiff and, by reason thereof, he was three apen the ground, etc.

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hand of the pilotiff emusing him to jork his beach swey from the
adrell and fall off if the tagine. This testimony was produced
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verdict, it was pointed out that there was no proof that the re-railer or other pieces of iron and steel or blocks of wood were on the footboard of the engine and that consequently the second count of the declaration was not supported by the evidence. The allegation, however, does not confine the pieces of iron and steel to the footboard, but charges they were an various other parts of the engine and that it was unsufe and dangerous for them to be allowed to remain in the position which they occupied. We are of the opinion that the second count of the declaration was sufficiently broad to permit of the proof offered and received on the part of the plaintiff and that there was not a material variance between the allegations of the declaration and the proof.

Conroy, the plaintiff, testified that at the time of the accident he was a switchman employed by the defendant and had been working for the company from July 1920, to the night of December 14, 1939, the day of the accident; that he was 36 years of age and prior to this accident he had never been injured while at work for a railroad, but that when he was 3 years of age he was kicked by a horse at which time he sustained an injury to the tow of his head, from which he fully recovered; that the engine upon which he was employed left the roundhouse about 8:10 o'clock in the evening; that there were about 18 cars in the train which were taken to a place called Ashburn; that the accident happened upon the return trip and that he was riding on the head end of the engine and on the right hand side of the footboard at the time the accident occurred. Plaintiff stated that the night was dark and cloudy and there was a driseling rain; that Lutman, another switchmen, was riding on the left hand side of the engine and standing upon the footboard. Just prior to and at the time of the accident

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plaintiff was holding a lamp with his right hand and holding on to the grab iron, which extended geross and in front of the engine, with his left hand. The switch engine at this time was proceeding at about 12 miles an hour over and along what is known as the lead track, which ran in a diagonal direction through the reilroad yard. In doing this the switch engine would at intervals cross other tracks equipped with frogs. At this time Lutman, celled plaintiff's attention to the fact that the switch shead of them was wrong and plaintiff started to proceed over and along the footboard in order to give the engineer a signal to stop the engine. At this time plaintiff testified he had his lantern in his right hand and his left hand was sliding along the grab iron. This grab iron ran across the pilot beam about 9 inches above its top surface. Plaintiff at the time had his back to the engine. As he was in the act of moving along the footboard something caught his hand and he looked back to see what it was and saw a re-railer, an iron contrivance the shape of a half moon, up against his left hand as he was trying to pull his hand out, the engine lurched and the re-railer swung back releasing his hand and he fell off the footboard. The lurch was not unusual, but caused by the engine crossing the frog; that when an engine crosses a freg there is a jogging or jelting.

Flaintiff testified further that he had not noticed the re-railer until his hand was pinched; that the re-railer weighed between 70 and 75 pounds and when it rolled over against his hand he experienced a painful feeling and his knuckles were hurt and the back of his hand afterwards was black and blue; that this re-railer was iron or steel about 10 inches high, 12 inches wide and about 33 inches in length and shaped like a half moon. As a result of the accident plaintiff's left leg was amputated and he was in the

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the accident plaintiffs left log was equatahed and he was in the

hospital four and one-half or five months. His head pained him and his hand pained him and a second amountation of his leg was necessary which left him with a stump of about eight inches. At the time of the accident he was earning \$200 a month and had been switching prior to that time for approximately 15 years.

Lutman, the other switchman, testified that he worked for the defendant company from July 19, 1989 up to the time of the trial and that he was on the front footboard of the engine with the plaintiff at the time of the accident; that he was on the left hand side of the footboard and there was a grab iron running across the front end of the pilot beam which was for the purpose of providing a handrail for switchmen riding upon the footboard; that this handrail was probably six inches above his hips; that as they rode along they frequently passed over frogs or switch points and that these were approximately 40 to 50 feet apart with a switch light at each one; that Conroy had hold of the grab iron and had a lantern in his right hand and he told plaintiff about a switch toward which they were moving and it became necessary for Conroy to move over along the footboard in order to signal the engineer; that the accident happened quickly and as he saw plaintiff fall he reached over to open the angle cook on the front end of the engine in order to set the brakes; that as he reached over he saw two frogs or re-railers. These re-railers were used for the purpose of putting an engine or ear book on the track if it should have run off; that the engine was proceeding at the rate of 6 or 8 miles an hour and he had to reach over these re-railers in order to reach the angle cock: that there is a place on the tank of the engine used for carrying these re-railers and books were provided for that purpose; that at the time he got on the engine he did not notice these re-railers and did

igteen, the other sviveboon, tentified that he worked for the manuscreament from July 13, 1339 up to the time of the edt dite seines odt to bracdicol fuerl mit me ser ed jedt ben in to I all at the time of the sacidant; that he was on the left head ads secree autanur nari darg a new areds bun becadioot ads to able tout and all the gilet been which was for the jurgose of providing aids that throughout and nous mailtr neadering to' limites ehor vehr as sant sissis als evens as an as a char con refer to the char con refer to the control of the contro that they properly praced over from ar selted maken and that POLIC ORDER & Gille Facts Fact Of all CO QUOUSINGS STOR SANGE mindred a bad bad nort days edo to blod bod you all to the dalle byong delies a Justo Thiladely hind he has been enjoy all the the ways were not upon as common to be about the same to be seen as a line of the Continued in color to edject the saginess, that the periods many or rave hadener and that Tribulate was and as her visiting ber the angle core on the front end of the engine in order to got the braken; that we he righed byor he saw two from or re-rellers. These tee to estine as pairty, to ecourag out not been ever evaller-or back on the taind it of our was tone to the tone that one denoted the and has much an nalke S to 8 he was not to proceed over these re-rellers in order to reach the angle each; that there is a place on the tank of the engine unid for corrector these and to said theory and tol hollyong area aloud has eroller-or time and increase south action total and an increase on the

not pay any attention to them; that the first time he noticed them was when he pulled the air after the accident; that there was nothing unusual about the movement of the engine and no more jumping or bouncing than is customary on a yard engine.

The testimony of these two witnesses, the plaintiff and Lutman, was sufficient standing alone to require the submission of the case to the jury. The court in the case of <u>Mirich</u> v.

Forschner Contracting Co., 312 Ill. 343, in its opinion, said:

"It must, we think, be accepted as settled law that a trial court has no power, when a jury is not waived, to determine the weight and preponderance of conflicting evidence introduced to establish or disprove the facts. The decisions are numerous, and are uniform, that the trial judge is never authorized to take a case from the jury where there is legitimate evidence tending to prove the cause of action. Then a motion is made to direct a verdict it is not the province of the trial court to weigh and determine the preponderance of the testimony." " " "

determine the preponderance of the testimony." \* \* "

"This being a case tried by jury, - and the evidence of plaintiff seems unquestionably to have tended to establish a cause of action, - the statute did not authorize the Appellate Court to reverse the judgment with a finding of facts and not remend the case. If the statute be construed to authorize the judgment of the Appellate Court in this case, it would authorize that court, in any case depending on facts, where the evidence is conflicting, to weigh and determine on which side is the preponderance of the testimony which that court believed, and would give that court the power to exercise the functions of a jury, which we have repeatedly held the trial court could not do, and the statute would be as much a violation of the right of trial by jury as if it had attempted to confer the same power on the trial court."

Haskett v. Fennsylvania Go. 245 Fed. Rep. 326, is very similar as to the facts.

Halsted testified that he was the engineer on the previous run with this engine; that these frogs or re-railers are carried on the engine on hooks provided for that purpose on the side of the tank; that when he inspected the engine on the morning of the accident the re-railers or frogs were hanging on the hooks on the side of the tank; that he made out a report on his return from the trip that day and it was correct. An examination of the

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delated testified that he was the engineer on the estimation of the testion of testion of

report, however, shows nothing with regard to re-railers.

Hart, the conductor on the previous trip, identified his report and testified therefrom; that there was nothing on the report which would indicate that there had been any derailment and that if there had been, it would have appeared upon his report.

Carlson, the firemen testified that he made an inspection of the engine on the day in question before he went out on the trip with Halsted and Hart and that he observed these re-railers and they were on the books on the tank. He testified further that it was his custom to look around the engine but that he had not been asked since the day of the accident as to where those re-railers were on that morning. The trip referred to by the foregoing witness was made prior to the one made by the crew of which plaintiff was a member.

Myan testified that he was an engine inspector and inspected the engine in question on the day of the accident and made a written memorandum thereof; that if the re-railers were in their proper place he would not mention that fact in his report; that on the day in question they were on the tank; that on the same evening when he made his inspection there were no frogs on the front end of the engine back of the pilot beam. He testified further, "they are supposed to be there by rules which says that you must have two frogs on each engine, and they must be hanging on the hooks of the tank".

Jenkinson testified that he was the roundhouse foreman and that he inspected the engine on the evening of December 14, 1989, and that the re-railers were hung in their proper position on the side of the tank when the engine left the roundhouse.

funder, the locomotive engineer, testified that he inspected the engine the night of the accident and that the re-railers were hooked on the side of the tank.

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Hert, the conductor on the previous trip, identified the past there was nothing on the last there was nothing on the had been any derailment and had been any derailment and the conditions on the conditions of t

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Jenkiason testified that he was the roundhouse foreman and that he imagested the engine on the evening of December 14, 1980, and that the re-railers sere hung in their proper position on the side of the tank shea the engine left the roundhouse.

mader, the laconcies ungineer, testified that he inopected the certaint of the accident and that the re-railors sere booked on the side of the tank.

Adams, the locomotive fireman, sho is still in the employ of the defendant testified that he was on the engine at the time of the accident; that there was no lurching or jerking of the engine and that after the accident he looked over the footboard of the engine and saw nothing out of place; that they had no derailment and that there was no occasion to use the re-railer during the trip; that when he got down from the engine after the accident to see if there were any re-railers lying on the front part of the engine he had that very thing in mind at the time.

Leen, the conductor, testified that when they got back to the roundhouse after the accident he made an inspection of the engine and that he did not see any re-railers on the front end.

It is insisted that this evidence on behalf of the defendant conclusively proves that there were no re-railers on the front deck of the engine at the time of the accident; that the witness Lutman made certain reports to the defendant and did not say anything about a re-railer on the front of the engine. Lutman's andwer to this is that he was not asked the question and answered only such questions as were asked of him; that he did make a fourth statement to the company sometime after which is contained in defendant's exhibit 8-A in which he stated that he saw two re-railers on the front end of the engine behind the pilot beam and behind the grab-iron. This last statement was produced at the request of counsel for the plaintiff after the first three statements of Lutman had been identified by him when upon the stand and under crossexamination. The testimony of Lutman and the plaintiff was direct and positive to the effect that there were re-railers on the front end of the engine at the time of the accident.

Adams, the fireman on behalf of the defendent, testified that he looked for re-railers immediately after the

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accident and saw none. This witness also testified that he had made a detailed inspection of the engine at the roundhouse and that everything was in order. It is argued by counsel for plaintiff that if he had made such a detailed inspection and found everything on the front of the engine before making the trip and there was no detailment, that there was, consequently, no purpose in again looking over the front of the engine to find out if there were re-railers upon it, other than in the customary place on the tank. It could also be inferred that that negative testimony of the other witnesses to the effect that the re-railers were upon the tank was based largely upon their customary inspection, and the reports handed in which were silent as to this particular fact.

The jury and the trial court had an opportunity of seeing and observing the witnesses and we are unable to say that the verdict is so manifestly against the weight of the evidence as to require a reversal upon that ground.

A witness by the name of Watson was called in rebuttal by the plaintiff and testified that he worked for the defendant company from August 2, 1929 until October 30, 1930; that he saw re-railers both on the front and the rear of the engine and that it was customary to carry re-railers in the caboose. A motion was made by the defendant to strike this testimony from the record and also to withdraw a juror and continue the cause. The court sustained the motion to atrike and instructed the jury that the testimony of the witness was stricken out and that they were to give no consideration to it. The motion to withdraw a juror was not thereafter renewed.

Ryan, the engine inspector of the defendant company, testified that there were hooks on the tank for the purpose of carrying the frogs or re-railers and that that was their proper place and they were supposed to be there by a rule which requires

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them to be hanging on the hooks on the side of the tank; that when he inspected the engine they were in their proper place. Malsted stated that these re-railers were carried on hooks on the engine. It would have been proper to rebut the testimony as to the rule requiring the carrying of this equipment on a certain place on the engine by showing that it was customary to carry them some place else.

Kuhn v. Epostein, 239 Ill. 555; Jones v. Sanitary District, 265 Ill.

98. However, the testimony was stricken out and the instruction of the court to the jury to disregard it in its entirety, was sufficiently clear to cure the error, if any there was, in permitting the witness watson to testify as he did.

a physician, and the objection to the hypothetical question propounded to him and are of the opinion that there is no error which would require a reversal of the cause.

An objection is made to the conduct of counsel for plaintiff in his opening address to the jury. This objection is based upon the fact that counsel stated that the defendant had offered to introduce the first three statements of Mr. Lutman, but that the fourth statement was not produced until asked for. This statement was correct so far as the record discloses. The reference to the fact that the company had produced as an exhibit the biggest re-railer made was purely a matter of argument, and there was no objection to counsel arguing that it may have been for the purpose of showing that it was too large to fit upon the front end of the engine. There was an evidence to the effect that the re-railers differed in size and weight, and we cannot say that there was any prejudice created in the minds of the jurors by reason of the argument.

them to be hearing on the house on the side of the tent; that when the tent of the the the tent of the

e have examined the testimony of the witness Shapiro, a physician, and the objection to the hypothesical overtion propounded to him and over of the opinion that there is no error which require a reversal of the cause.

pisintiff in his spening address to the jury. This objection is offered in his spening address to the jury. This objection is offered to introduce the first three statements of Mr. Lutmen, but attement no correct so far at the record disclass. The reference to the fact that the commany had produced as an amility the piggest re-railer made was purely a matter of argument, and the piggest re-railer ands was purely a matter of argument, and there was no objection to command arguing that it may have been for the pureces of aboning that it was too large to fit upon the front said of the engine. There was no evidence to the effect that the re-railers differed he size and makent, and we cannot say that the re-railers differed he size and makent, and we cannot say that there was any prejudice created in the minds of the jurers by

The veriict in this case was for \$40,000.00 and while not so excessive as to indicate passion and prejudice, nevertheless, in our opinion it is high and this court is inclined to feel that justice would be accomplished by a reduction in the amount of the judgment. For that reason the judgment will be within 10 days, affirmed upon a remittitur of \$10,000.00, otherwise to stand reversed for a new trial.

JUDGHENT AFFIRMED UPON REMITTITUR.

HEBEL AND HALL. JJ. CONCUR.

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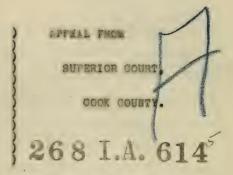
THE UNION BANK OF CHICAGO, Administrator of the Estate of Peter Martines, Deceased,

Appellant,

V.

N. C. SORENSEN MOTOR EXPRESS COMPANY, a corporation,

Appellee.

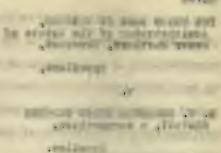


Opinion filed Nov. 16, 1932

AG. PRESIDERG JUSTICE WILSON BELIVERED THE OFFICE OF THE COURT.

The estate of Feter Martinez, deceased, brought its action against the defendant B. C. Sorensen Motor Express Company, a corporation, to recover damages for the death of the deceased by reason of the negligent operation of the defendant's truck. The defendant filed a plea of the general issue and a special plea denying the ownership of the truck and that it was at the time of the accident under the control of and operated by the defendant. During the course of the trial the defendant admitted the ownership of the truck, but there appears to have been no admission that at the time of the accident, it was under the control of or operated by the defendant, and there was no evidence whatever in the record tending to show that the driver of the truck was in the employ of the defendant or operating the truck at its request.

There was no proof in the record tending to show that the deceased died as a result of the accident. This was a material fact which required evidence to support it. Johnson v. Chicago City Sy. Co., 166 Ill. App. 49; Mooney v. City of Chicago, 339 Ill. 414; Martray v. Thicago Sys. Co., 200 Ill. 85. Moreover, there is no evidence showing when the deceased died.





Opinion filed Nov. 16, 1932

ion work of Chicago, as administrator of culture, deceased, brought its action acainst states, deceased, brought its action acainst states. The defendant filed a plant of the truck of the defendant's brush. The defendant filed of the truck and that it ros at the time of the acaidant under the course of the truck at and operated by the defendant. Suring the course of the truck the senerally of the truck of the seneral of the time of the defendant, and there were no evidence whetever is the record tending to show that the truck was in the course of the defined to operated by the defendant or operating the truck was in the coupley of the defendant or operating the truck was in the coupley of the defendant or operating the truck was in the coupley of the

The socident happened March 11, 1930, and the declaration was filed September 25, 1930. It may be argued with considerable force that the suit having been started by the administrator within one year after the happening of the accident, the court should take notice of the fact that the deceased came to his death within one year thereafter, but this does not oure the lack of evidence necessary to sustain the proposition that the deceased came to his death because of the accident.

At the end of all the evidence the trial court directed a verdict in favor of the defendant, and we believe properly so.
Actions for injuries causing death are curely statutory and the facts necessary to bring such an action within such statute must be specifically alleged and proved.

for the remains stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

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35735

PROPLE OF THE STATE OF ILLISGIE, Defendant in Error.

V.

CHRISTIAN PEDERSEN.

Plaintiff in Error.

RAKOR TO

MUNICIPAL COURT

OF CHLOAGO.

Opinion filed Nov. 16, 1932

MR. FRISIDING JUSTICE WILSON DELIVERED THE OFFICE OF THE COURT.

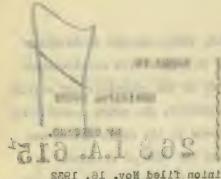
The defendant Christian Pedersen was found guilty January 36, 1931, on an information charging him with neglecting to support his wife, in violation of the statute. The defendant and his wife, Thora Pedersen, were married June 30, 1923, and lived together until September 7, 1928, at which time she left the home in which they were living. She was the mother of four children which were born to her as the result of a previous marriage. Both the defendant and the complaining witness were well along in years at the time of the second marriage and no children were born to them as the result of said second marriage. This action was not brought until December 1930, over two years after they had ceased living together. After the separation in September, 1936, the complaining witness filed two separate bills for support and maintenance against the defendant Christian Pederson, in neither of which was she successful.

From the evidence it appears that defendant was accustomed to providing the complaining witness with 30 a week while they lived together and that she received 120 the week before she left. Her son liner larson was also living with the defendant. The demplaining witness and her son left the premises of the defendant while he was absent, taking practically all of the furniture and a 13,000 bond which was in a safety deposit box. The complaining witness testified

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Opinion filed Nov. 16, 1932

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186, 1831, on an information charging his with neglecting to translated all assistant of the states of all all species and the wife, there Indorsan, were married June 20, 1002, and lived omet with topesquer T, 1822, at which time she left the home in which they were living. The washer to the internal . Onair me applying a to ligan the na und of most over deline the defendent and old completeles without were vola light in years of ared ores applifies on hay sections buccon our to east out on ton are notice aid: .oralram become bire to river set se made becase had yeld reffe camey out rave , 9001 reduced: Iften beloved living together, after the separation in September, 1826, who -Alex ban stormer tol willid estropes and bailt accords makaleleage to raddies at anearthes maissinds daybashed and tenters account .Letagamos ada ses dalda

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that this bond belonged to her son and was purchased by or for him prior to his reaching the age of 21 years. She also testified that she owned a one-half interest in a piece of real estate known as the Roscoe street property which was of the value of approximately \$15,000 and that there was a \$4,000 mortgage upon the premises; that since leaving her husband she has been living with her son in a home purchased out of funds derived from the sale of the #3,000 bond and that the household is supported from the earnings of her son. She admits that she took the furniture from the house of the defendant but that this furniture was paid for out of her own money. No explanation is made by her as to what this maney was nor as to where she obtained it. The testimony as to the 13,000 bond does not satisfactorily show it to have been earned by him or received from some other source prior to his reaching the age of Bl years. She testified to the fact that upon the day she left, or prior thereto, the defendant abused and struck her and she is supported in this by the testimony of her son, who appears to have been lying down in his bedroom at the time of the alleged quarrel.

If, as the complaining witness claimed in her two bills for separate maintenance and reiterated upon the trial, she owned - enshalf interest in the Boscoe street property, she was not destitute within the meaning of the statute but was possessed of ample means for her support.

From the evidence we are of the opinion that the evidence as it stands is not sufficient and the judgment of the municipal Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND HALL, JJ. CONCUR.

man was been because our line and the property over a per party and the per party of the party o purp in the contract the up of it posts. We also beduited the add as secure of the pass to bush a my fure and Tird-ann a Barre and "Player Designation of the sale of the sal parameter and mouse specifies occupied a new sensor rear day byte, 425 s at one and only polytic poor and win the course and polytical energy conjugate and the sale with severy arrests a first and the conjugate and and to make the beautiful or equipment flow the state our beat TO RECOLD THE WAY THE THINK THE STATE OF THE PARTY OF THE one tall to two talk blue over exerting the room and decomment and ness are unusually to delt up that up the chart principles or annual ness and on to steem all of the continue to the terminal of the terminal time and the Designed on hid of incise greet start of 32 year all totals 75.5 year country Lt. to make not published and not could extend their same night the tear of the case that appearing the feet as adding as police is this by the testings of tes sen, she speaked to less hem liting Learner beyelle out to make at to morroot at at a morroot.

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From the evidence we use of the opinion that the oridence se it at the suninion.

Sourt is reversed and the case resembed for a new trial.

CHILDREN THE PART CONTRACTOR PROPERTY.

BENNE AND HALL, ST. DOLDON.

35745

ISABEL LYMAN.

Appellant,

V.

GEORGE R. LYMAN.

Appellee.

AFPEAL FROM

MUNICIPAL GOURT

OF CHICAGO.

268 I.A. 615<sup>2</sup>

Opinion filed Nov. 16, 1932

MR. PARSIDING JUSTICE WILMON DELIVERED THE OFFICE OF THE OCULT.

The facts in this case are practically the same as those in case, General Number 35744 in this court. The issues are identical except as to the amount claimed.

For the reasons stated in case General Sumber 35744, the judgment of the Sunicipal Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, J. GONGURS; HALL, J. NOT PARTICIPATING.

23722

STANCE STANCE.

PARAMENT.

PACTACES.

ATTENDED AT THE PARTY.

268 I.A. 515

Opinion filed Nov. 16, 1932

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KRISTINA LARSON and HARRY N.

appellants,

V.

DAVID I. SUTTON and GH NLES A. F. T. Con., co-martners, doing business as VITCN & F. T. R. C.,

prellies.

APPRAL PROM
MUNICIPAL COURT
OF CHICAGO

01 NEED 1100

268 I.A. 615°

Opinion filed Nov. 16, 1932

Mr. W. Iblac Ju 713: IL CE delivered the opinion of the court.

Their tiffs brought their action in the Numbelpal Court to recover moneys held by defendants. These moneys had been collected by the defendants while acting as agents of the plaintiffs, and represented rents collected from certain tenents of the plaintiffs. This relationship of principal and agent had existed for a period of three years or more. The amount involved was 775.12. This amount was claimed by the defendants as commission on the unexpired portion of certain leases which they had made in the course of their employment. Plaintiffs claimed that there was a specific agreement to the effect that the defendants were to receive 5 per cent of the amount actually collected and no more.

testified that he was a contractor and builder and part somer of the building located at 657 hast both street, which was improved with a twelve apartment building; that he had a talk with one Malson who was connected with the defendant company and entered into an agreement with him by which the defendants were to collect the rents for the building and were to receive a sum equal

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268 I.A. 615

Opinion filed Nov. 16, 1932

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to 3 per cent of the rent collected.

Nelson, on behalf of the defendents, testified that he had such a talk with the plaintiff Johnson and that under the agreement the defendents were to receive 5 per cent upon the leases written on the building.

before the trial court we whother the contract was to be for the rent collected or whether it was to be on the leases written on the building. There was a direct conflict in the testimony in this regard. The cause was tried by the court side at a jury and the issues were found in favor of the defendants.

The witness Relson testified that the Real Estate Doard allowed this 3 per cent commission on leases written, where there was a continuous management of the property. It is sentended that this testimony was improper. Evidence of an existing custom is competent when there is no express agreement. The cause was heard by the court, however, without a jury and the court is presumed to consider only such testimony as is relevant and material. There was direct conflict between the two witnesses as to what the contract was, and the court found in favor of the defendants.

We will not substitute our judgment for that of the trial court who had an opportunity to see and observe the witnesses and their democnor while upon the stand. Therefore, the judgment of the Nunicipal Court is affirmed.

JUNCH WE REPORTED.

HUBEL and HALL, JJ, CONCUR.

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To defified the definite of the definite that he that he had not so that he had the head of the definite the head of the definite.

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that this bectiment was improper. Irisance of an existing surten is a competent the small and engages agreement. The small was the court in proheard by the sourt, however, nichout a jury and the court in prosmall to consider only such testiment as in reletant and natural.
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35784

LORETTE J. DARLINGTON, et al., Concernators of the Estate of WM. H. DARLINGTON,

Defendants in Error.

.

H. I. PERRY,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT.

COOK COUNTY.

268 I.A. 615<sup>4</sup>

Opinion filed Nov. 16, 1932

MA. PRESIDING JUSTICE TILECH DELIVERED THE OFFICE OF THE COUNT.

The original bill of complaint in this cause was filed by M. H. Darlington against M. I. Perry and proyed that the cale of certain shares of stock of the Fostoria serum do. be get spide and that the partnership between the plaintiff and defendant be dissolved; that an accounting be taken of all the dealings and that the defendant be decreed to pay complainant what, if saything, should be due the complainant and that a receiver be appointed to take immediate charge of the partnership affairs. Subsequently, by leave of court, Lorette J. Darlington and others filed their smended bill as conservators of the estate of Darlington, complainant to the original bill. The amended bill was a verified bill and charged that on or about Jenuary 1, 1930, Durlington was the owner of a business called the Great Western Berum Co., not a corporation, which was located in the vicinity of the Union Stock Yards in Chicago and had been operated for a number of years previously under that name: that Ferry had occupied a confidential and responsible position with the concern for a number of years, and was accuminted with its business effairs; that a contract was entered into between complainant and ferry for the purpose of conducting the business known as the Great lestern warum Co. which provided; that the

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Opinion filed Nov. 16, 1952

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them, Description threat to negers a city practical favor lost use of straight additionable part of the forest of the same of the last case and besting of the from the summer of press, and the molitice aspected office bereits a warrang of the content and applicable and office and applicable and ap complaint and forty for the purpose of conducting the business cases as the least casters warm We, which provided; that the partners "would particke equally of all the assets of the business as it then stood," each partner to assume one-half of the debts or bad or uncollectible bills and that each would receive fifty per cent of the net profits of said business; charges further that on account of illness Darlington was unable to take part in the conduct of said business and that while the complainant was in ill health, the defendant Perry induced Darlington to enter into a contract by which Darlington was to sell the defendant 135% shares of the stock of the Postoria Serum Co., which was another and different company from that named in the partnership agreement; that the statements of Perry in procuring Darlington to transfer the stock were false and untrue.

The bill further charged that the defendant accretly applied profits of the Great eastern serum Co. to his own use and that this was done for the purpose of defrauding the complainant.

amended
The prayer of the bill seeks the same relief as that sought in the original bill.

The defendant's answer admits that the parties entered into a contract of partnership effective January 1, 1920, substantially as set forth in the amended bill of complaint.

The matter was referred to a master to take proof and make his report and this report found that there was no proof sustaining the allegation of the bill to the effect that the defendant had secretly connived to procure the stock of the Fostoria Serum Co., and further that there was no fraud on the part of the defendant Perry in the operation of the partnership known as the Great Western Ferum Sc., but did find that the defendant was indebted to the complainant for the following items:

partuors "rould purtuin nounity of all the assets of the business as it then atood," sads estues to assume one-balf of the debte or bad or unsatisated bills and that each would reselve fifty per account of illustrations bills and that while the samplatuant see in the souther of said business and that while the samplatuant see in ill health, the defendant very induced faringion to enter late a contract by which for interest about of the forture is, which was another and different states of intry in a second of the samplation of intry in a second of the samplation of intry in a second of the samplation of intro a second of the samplation.

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The solver was referred to a souter to being proof and noise bis report and this report found that there was no proof and talley the allegation of the bill to the effect that the defaultation had escretly countred to proours the shock of the Posteria topus to the forther that there was no fraud on the part of the defendant form in the correction of the maximum hip known to the Great mattern forms in., but old find that the defendant was indebted to the soundainent for the fallering items:

"One-half of book assets of business at start of partnership (one-half of 132,375.82) 111,187.91 One-half of old accounts charged off prior to partnership and collected afterward by the partnership (one-half of 1967.34) 483.82 One-half of receiver's fee, so as to charge all to complainants 750.00 One-half of receiver's attorney's fee, so as to charge all to complainants 300.00 One-half of 14,973,93 loss on sale of accounts receivable so as to charge all to complainants 3,486,96 19,208,49"

We objections were filed to the master's report finding against complainant on the charges of fraud and dishonesty, and the acquisition of the Fosteria Serum Co. stock by the defendant as unwarranted, so that as we come to consider the question involved on this writ of error, the only question with which we are concerned is the one as to the intention of the parties as to what was included in the partnership agreement.

On December 31, 1919, the assets of the Creat Testern forum Co., as shown by the books, consisted of cash on hand, book accounts, supplies and the necessary equipment used to carry on the business. This appears to have been valued at the sum of \$23,375.82. Frior to January 1, 1930, at which time the partnership was entered into, the assets of the company were carried in the neme of . H. Darlington. This system of bookkeeping was continued until sometime in May, 1929; and various adjustments were made from time to time as to the ascent of the assets still carried in Darlington's name. It is insisted on behalf of the complement that this system of bookkeeping indicated the true intent of the partnership agreement in that the assets of the business at the time of the formation of the partnership belonged to derlington. as well as the amended bill Defendant, on the other hand, contends that by the original bill/ the express agreement of the parties was stated, namely, that at the time of the formation of the partnership it was agreed that the partners would take equally of all the assets of said

From to consider to advers from in hind-age! DESCRIPTION OF THE PARTY AND T (60-200-100 by bissessed addressions by of side 15 depoint on the fall the AND THE PROPERTY AND VALUE OF THE PARTY OF T Mr. 2001 by Manhamed Congressives THE RESIDENCE person of an an every preventioned he handward spinor Indicates, not I'm and the second of the second o admiraled poor of the agende of a beautiful to the second of the territories of adventistioned all Lite Appeals of an en willing men ក់ឃុខ «សេវាភាគីលុខម men " finite mad oned bar

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equinat consistant on the charges of front and dichonesty, and involved in the president the question involved on this write of error, the endy question with which we are concerned in the one so the interestion of the parties as to the parties as the p

Serve Vo., as seem by the books, consisted of the first toste back book accounts, as appeared the books, consisted of ones, or hand, book accounts, singlifies and the undersort sequence to bare less related to the com of the burdances. This separate to be accounty to 1802, at this the the partnership as after the continued of the contract that the base of the continued to the continued to the continued that the the continued to the continued to the continued that the the continued that the continued the the continued that the continued of the conti

Defendant, on the atter hand, contends that by the original bil the crystes agreement of the perties may stated, namely, that at the size of the formation of the pertocrabile it was agreed that the partners sould are equally at all the assets of cold business as it then stood and that the assets of the business as it then stood was the 122,375.82, as shown upon the books of the Great "estern forum Co.; that this agreement was sharged by the complainant to be the agreement entered into between the parties and that the answer of the defendant admits this to be true and that there is no reason for any construction by the court, where the parties have expressly egreed and the conditions of the agreement are undisputed.

It appears that the original complainent, Darlington, having been declared to be of uncound mind, was not competent to testify and by statute the defendant was rendered incapable of testifying.

amended

we are of the opinion that the allegation contained in the bill that the parties were to partake equally of all the assets of the business as it then stood", in the event the partnership was to proceed, meant an equal interest in the assets in Darlington and Perry. This agreement is get out in the amended bill and appears to be clear and unambiguous. Darlington may have/a good reason for giving Ferry an equal interest in these assets in view of his value to the company and his efforts to bring about its upbuilding. What Darlington's reasons were is of no concern of the court. Where the complainant charges a fact in a bill and it is admitted by the defendant, there is no need to take proof on that question but it should be accepted by the court as a fact. Loughridge v. Northwestern Life Ins. Co., 180 Ill. 267; home Insurance Co. of Texas v. Myer, 93 Ill. 271; Fisher v. Murk, 274 Ill. 363; Millard v. Millard, 221 Ill. 86. Such being the view of this court, it was error to charge the defendant with the entire amount of the partnership assets as shown at the time of its formation, but instead the defendant should have been credited with one-half of that smount, namely, 11,187.31.

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The 1tem of 1967.24, being old accounts and charged off prior to the partmership, properly belonged to the complainant and should be so oredited. The loss on the cale of accounts receivable, amounting jointly to \$4,973.93, should properly be borne by the complainants and the defendant. It was error to charge the defendant with one-half of the receiver's fee and one-half of the attorney's fee for \$750.00 and \$300.00 respectively, as the receivership was brought about by the charges in the bill that the defendant was suilty of fraud. whereas the master's report, confirmed by the chancellor, found otherwise. Moreover, the charge in the bill concerning the Festeria Serum Co. was without foundation and may also have been instrumental in procuring the appointment of the receiver. Under the view we take of the matter these items of receiver's fees and the fees for the attorney for the receiver should preparly be charged against the complainant.

In view of the fact that no further enlightenment can be received by a re-reference to the master or an accounting, the cause is reversed with directions to the chancellor to enter a decree in conformity with the views herein expressed.

REVERSED AND REVANDED WITH DIRECTIONS.

HEBEL AND HALL, JJ. CONCUR.

of very the topolity her allegance has paint, 45, 7500. In and I had so excitted, the last on the eith of execute profitming a managetime to 14,000, etc. the colored to the colored to the colored to the defeators. In our rever to charge the includent with concentrat of DO. LEVY and gar a reasonable out to hind-any ton and presented add and 2300.00 respectively, as the massivership may brement shout by the minute to the sill thet advantage one gailly of Irond, charges the carbot's vegue, conflicted to the successive, found attagates, sarrower, the course to the bits consecuting on Trabella Cotpountly on a visit the first out of the block of the last to th mader the view was is procuring the exceleteet of the receiver. ser and, and sell has send a resumption about sends parties and to dash and rescape leagues of piracest bloom torrisper nor not question . Summinforing

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THOMAS J. HARRIGAN, JR.,

(Plaintiff) Appellant,

V.

H. W. HISEL,

(Defendant) Appelles.

APPRAL PROM

MUNICIPAL CON

268 I.A. 616

Opinion filed Nov. 16, 1932

MR. PRISIDING JUSTICE WILSON CHILVERED THE OFFINION OF THE COURT.

Plaintiff sold the defendant an automobile and received as part sayment a used car belonging to the defendant at an agreed price for the used cer of \$1.325.00. At the same time defendant signed, under seal, a bill of sale warranting himself to be the true and lawful owner and that the car was free and clear of all incumbrance and agreeing to warrant and defend the same against all claims. Shortly after the transaction was completed and the new car turned over to the defendant, the old car, in the hands of the plaintiff, was replevied by the Actna Acceptance Company. In a proceeding in the Superior Court of Cook County, a judgment was rendered against defendant in that action and the plaintiff here. The defendant in this action knew of the pendency of that proceeding and testified therein. On the trial in the Sunicipal Court plaintiff recovered a judgment upon a trial before the court without a jury in the amount of \$123.50. The defendant has not followed this appeal and consequently, we are deprived of any briefs or arguments on his behalf.

by reason of the fablure of the defendant to defend and make good the value of the second-hand automobile turned in on the purchase, namely, \$1,325.00, together with repairs made on the second-hand automobile and attorney's fees and expenses in defending the replevinguit.

OFFICE ALTERNATION

Annual to by

THE PERSONNEL LINE AND ADDRESS.



Opinion filed Nov. 18, 1932

. TEDOS DET EG MOINTES THE CLOSELL COURT. herisast in- lide in a mile in the little Descript the the Attention will have not projectly one have a distance. Here has inelected seit some out the . ..... ads ad of Timmain agrangement of fild a .iste u .... The funlage once out bustob ine juerray of prothe say has baselines and or lineased and early tireout thanks car turned over to the defaulant, the old err, in the hands of the reacted and recent only the believes now in this last ner totaging a placed that he fluid to trace will be pittlessoon ...... Ings defendant in their action and the plaintiff bere. molessons lead to generate and to went mildes with al inchested and and testified therein, on the trial in the Eunicipal Jours plaintiff required a juddin steam old eroled fairs a noge security a parein the assunt of (123.50. The defendant has not followed this agrael and, consequently, we are to trived of any brists or arguments, and . Truled

claintiffs position is that he is entitled to describe to describe to describe the followers of the defendant to defend and wake good the value of the second-band automobile turned in on the purchase needly, [1,585.00, together with respire make on the second-band cutomobile and etterney's ferm and excesses in defending the replaying suit.

but presume his defense was based upon the proposition that the plaintiff, at the time of the transaction, knew that there was a chattel nortgage on the second-hand automobile in favor of the Actua Acceptance Company. There appears to have been some understanding between the parties that there was a chattel mortgage upon this automobile. The facts, however, show that there was no chattel mortgage but a conditional sales contract, under which the title to the car remained in the Actua Acceptance Company. We are of the opinion that this knowledge of the plaintiff would not defeat his action against the defendant. It may have been contemplated by the parties that the defendant would clear the title for the benefit of the plaintiff. We are cited to but one case in support of this contention, namely, Meville v. Hughes, 104 Mo. App. 455, (79 S. W. 735). The court in its opinion in that case, said:

"Nor could defendent avail himself of the knowledge of the provisions of the contract with Harrington by plaintiff as a defense to his covenant, the basis of this action. The knowledge of both vendor and vendee that the title to the property in defendant was qualified by his agreements with Harrington did not discharge the covenant made with plaintiff. The vendor may warrant his title as clear and perfect to personalty sold, when the vendee, as well as he himself, possesses notice of an outstanding claim. If the vendee usually exacts of the vendor an express covenant against the incumbrances as a safeguard against possible, but unknown claims, the expediency and prudence of requiring such protection against a menace known to exist and threatening the validity of the title under certain recognized contingencies are the more obvious and reasonable. The evidence of such knowledge by or notice to plaintiff was immaterial and irrelevant, and its enclusion proper and appropriate. This side of the filliamson v. Hall, 62 No. 405; Chove v. Graham, 64 No. 248.

court arrived at the judgment rendered in favor of the plaintiff in the sum of 123.50, other than this appears to be the cost of the repairs on the second-hand our of the defendant after it came

plaintiff, at the time of the transaction, know that there was a chatted mortgoes on the amount-hand automobile in force of the letter topestance bown econ under-letter topestance bown econ under-upon this automobile. The facts, however, show that there was no chattel scrippe but a conditional sales contract, under which the title to the ear remained in the ietus acceptance Company, we are of the opinion that the defendant acceptance Company, we defeat his action against the defendant would not defeat his action against the defendant would also defeat his action against the defendant would also consider the consist of the plaintiff was the title or the consist of the plaintiff was the title or the consist of the contents on and the consist of this mosterities, namely, Merilia v. Muches, 10% no. 179.

and looms and to Mounta Liara anahualah bipon work and the professions of the measure with Mary Supplement to . in lens a deleven to his opposite, the hardy of this action. of allege are may sensor has raised that he intelleged addely show transport and agranted by the bully present alls of the bas quale an aidid aid drowers to stiffed the Langingeres on a suffigure will desire produces by employing his speedlinger but produce contains and whereast has raise as beant course a leading mallesting than hericaest alarges wehre a and and dependent in a contract of the second of the secon the contraction of anison to programme in plantiff and to the state of th

nound arrived as the judgment to understand appearant the plaintiff in the cum of the plaintiff in the cum of 120.50, other than this appears to be the cost of the repairs on the reconstruction our of the defendant efter it came

into plaintiff's possession. There is some evidence that after the second-hand car was brought into the plant of the plaintiff, it was not in good condition and required certain repairs in order to place it in condition for sale as a second-hand car, but this does not constitute the element of recovery in the cause under the warranty clause in the bill of sale executed and delivered by the defendant. The court was evidently of the opinion that the plaintiff was entitled to recover to the amount found because of repairs made. This was not based upon a proper construction of the law.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND HALL, JJ. CONOUR.

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JOSEPH SCHY,

(Plaintiff) Appelles,

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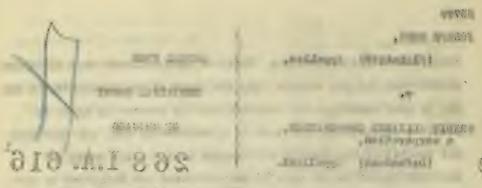


Opinion filed Nov. 16, 1932

DE PRESIDENCE SUPPLIE SELVE DE SECURITAR OF THE COURT.

This was an action of the fourth class in the lumicipal Jourt of Chicago, and from the statement of claim it appears that the plaintiff claimed defend nt was indebted to him, the plaintiff, for the sum of 170.00 on a certain due bill which was endorsed to the plaintiff for a valuable consideration. The cause case on for trial before the court without a jury, resulting in a finding in favor of the plaintiff and against the defendant and judgment entered on the finding. From this judgment an appeal has been prayed to this court.

Defendant contends that the instrument sucd upon was a nonnegotiable chose in action and that the plaintiff, as assigned, should
have complied with the provisions of action 16, Paragraph 18 of
Chapter 110 of Jahill's Illinois Bevised statutes. This section provides that the assignee and equitable and bong fide owner of any
chose in action not negotiable, harevefore, or hereafter assigned, may
sue in his own name provided he shall in his placeting on eath, or by
affidevit, where pleading is not required, allegs that he is the actual bong fide owner thereof, and set forth how and when he acquired
title. This question, however, is not before us. In actions of the
fourth class in the hunicipal Jourt the action is dependent upon the
evidence and not the pleadings.



Opinion filed Nov. 16, 1932

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this judgment in appeal has been proper to thin court.

Separate serious the the political and upon were a new a new separate stated this colored to the plaintest, as analyzes, about the seviet they of the serious of the serious produced that the serious produced that the serious produced that the serious and colored that the serious of any vides that the serious and equitable and ings like serious of any others in action and sequitable, harmachors, or herseffer exampled, any such in the own news provided to creations, at the plaintest of the the serious of the continual to the the serious of the thirty owner theorem, however, is not before us. In actions of the title. This quantity, bossesses, is not before us. In actions of the title.

There is no bill of exceptions nor statement of facts filed in the cause and there is before this court only the common law record. This question has been before this court and was passed upon in the case of <u>sinitt vs. Kornblith</u>, 248 Ill. App. 108. The court in its opinion said:

"However, in the municipal court of Chicago an action of the fourth class is whatever the evidence makes it. Identon v. Chicago, R.I.& F. Ry. So., 240 Ill. 311; Bruner v. Grand Trunk Western Ry. So., 256 Ill. pp. 541; 319 Ill. 431.

actions of the fourth class in the municipal court, in the absence of a bill of exceptions we will presume that the defect was cured by verdict. Feelung v. Cillespie, 287 Ill. App. 400; her v. Rebinsen, 290 Ill. 181.

The case at ber was an action of the fourth class and the foregoing opinion of the appellate Court is controlling.

For the reasons stated, the juigment of the Municipal Sourt is affirmed.

JUDGMENT AFFIRMED.

HUBBL AND HALL, JJ, CONCUR.

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CONCEPT CHOICE.

AND REAL PROPERTY.

KASPAR AMERICAN STATE BANK, a Corporation, individually and as trustee,

(Complainant) Appellee,

V.

VINCENT VLCEK, et al.,

Defendants.

On Appeal of Viola T Viola and Class violat, from Interlocutory Order Appointing a Receiver,

(Defendants) Appellants.

INTERLOCUTORY APPAL

FROM CIRCUIT COURT.

COOK COUNTY.

268 I.A. 6163

Opinion filed Nov. 16, 1932

MS. PRESIDING JUNGSON WILSON DELIVE ED THE OFFICE OF THE COURT.

this is an appeal from an interlocutory order of the Circuit Court appointing a receiver for certain property described in a trust deed executed by the defendants Vincent Vicek and Clara Vicek to Easper American State Bank, as trustee, to escure a bond issue consisting of 70 bonds aggregating the sum of \$60,000.00 and in addition thereto 10 notes aggregating the sum of \$1,380.00 held by the complainant individually. The trust deed contains among other things, the following provision:

" " " The exclusive right of action hereunder shall be vested in said Trustee until refusal on its part to act, and no bondholder shall be entitled to enforce these presents in any processing in law or in equity until after demand has been made upon the Trustee accompanied by tender of indemnity as aforessid, and said Trustee has refused to act in accordance with such demand. " " ""

The trust deed also provides for the appointment of a receiver rithout regard to the solvency or insolvency of the makers of the trust deed and that if default be made in payment, and such default continues for 30 days, then the entire principal sum at the election of the legal holder thereof at once becomes due and payable, and that such election may be made at any time thereafter

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Opinion filed Nov. 16, 1932

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to occupy said premises and collect the rents, income and profits.

The bill charges default was made in the payment of bonds and interest coupons in the amount of 17,485.00 and default in the payment of one note in the sum of 1127.50; that the trustee has elected to declare the principal sum of the outstanding bonds and notes secured by said trust deed to be immediately due and payable; charges that the property consists of real estate improved with a two story and basement brick building containing 14 apartments, and that the present value of said real estate and premises does not exceed the sum of \$50,000.00; that although the rents, issues and profits are expressly pledged, nevertheless said rents, issues, income and profits have not been applied toward the payment of the indebtedness; that the said real estate and premises will not cell for a sum sufficient to cover the balance due and that unless a receiver is appointed complainant will suffer loss.

The order appointing the receiver recites that due notice of the pendency of said motion had been given and that the court had been fully advised in the premises and heard the argument of counsel; that default had been made as charged in the bill of complaint, in the payment of the bonds and notes, that there would be a deficiency after sale and that the defendants would be unable to satisfy the same, and ordered the appointment of a receiver.

This court finds that under the terms of the trust deed, the trustee was clothed with authority to undertake the foreclosure proceedings and that this right was not dependent upon any action of the bondholders requesting the trustee so to do. Reliance Bank & TRust Company v. Dalsey, 263 Ill. App. 546.

The complainant, in addition to its right and obligations as trustee, also had an individual interest as owner of the 10 notes aggregating the principal sum of \$1,350.00 secured by the trust deed and subordinate to the lien of the bonds.

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The bill charges default sta

and interest coupons in the amount of 17,425.00 and defaults in the payment of one note in the own of 1137.10; that the trustee has elected to decime the principal sum of the outstanding bonds and sleeted to decime the principal sum of the outstanding bonds and the coupon to the coupon to the coupon to the coupon to the coupon the payment of the trust of the payment of the trust of the payment of the trust of the coupon to the coupon the coupon the coupon to the coupon to the coupon the coupon to the coupon the coupon to the coupon to the coupon the coupon the coupon to the coupon to

The order appointing the receiver recitor that the court of the pendency of said action had been and that the court had been fully advised in the premises and heard the organest of yoursel; that default had been made no charged in the bill of completet, in the armount of the benin and notes, that there would be patiefy the case, and ordered the oppointment of a receiver.

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The complainment, is addition to its right and obligations on trustees, also had an individual interest as owner of the 10 notes aggregating the quincipal oun of 11,250.00 secured by the trust deed and arburdings to the lieu of the bonds.

The bill charges that the present value of the property does not exceed the aum of 450,000.00 and that the premises would not sell for a sum sufficient to pay the indebtedness. This was a direct allegation as to the value of the property and shows that the value was insufficient upon a sale to cover the outstanding indebtedness accured by the trust deed. The bill was sworn to and was sufficient in the absence of any evidence to the contrary, to sustain the order.

Finding ac error in the record the order of the direct Court appointing a receiver will be and it hereby is affirmed.

ORDER AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

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CONTROL CARROLL

3888.00 . . .

FRED S. BECKMAN, Guardian, (Complement) Appellee.

V.

JOSEPH GAZZARA and GATHERINE GAZZARA, his wife, LOUIS TONETTI and ERNEST PASTERIS, et al.

(Defendants) Appellants.

INTERLOCUTORY APPEAL

PROM SUPERIOR COPET.

GOOK GORNAA.

268 I.A. 616°

Opinion filed Nov. 16, 1932

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The complainant Beckman, as guardian of the estate of a minor, filed his bill to foreclose a certain trust deed executed by the defendants on certain property located in Cook County. The bill charged default in the payment of principal note number 3-0 for #3,000.00 due June 30, 1931; principal notes 4-D to 19-R inclusive aggregating the principal sum of \$36,000.00. maturing June 30, 1932, together with interest coupons; charges that default has been made in the payment of taxes and that under the trust deed complainant has elected to declare the whole amount of the indebtedness due in accordance with the power granted in the trust deed; charges that said premises are improved with a three story brick building containing six, six room apartments located in the City of Chicago and that the premises are worth approximately \$35,000.00 and are, therefore, scant and meager security for the payment of the indebtedness; charges that the rents, issues and profits of the premises are pledged in the trust deed and that there is a provision in the deed giving the grantors the right to a receiver without notice; charges further that complainant will be compelled to advance moneys for the trial of the cause including stenographer's charges, lawyers' fees, continuation of abstract of title, master's fees, etc.

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SINGLE AND SECURED ASSESSMENT OF THE PERSON NAMED OF THE PERSON NA

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268 I.A. 616

Opinion filed Nov. 16, 1858

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The bill is verified by the complainant, as agent and guardian of the catate of the minor. A general denurrer was filed to this bill of complaint by the defendants. The order appointing a receiver was entered, after the filing of the general demurrer, and provided that the receiver was to be appointed upon the giving of a bond in the amount of \$4,000.00 and a bond by the complainant in the amount of \$300, with surety to be approved by the court. Notice was served uson the defendants to the effect that the complainant would ask for the appointment of a receiver and they were represented at the hearing. From this order an interlocutory appeal was prayed in accordance with the statute.

It is insisted upon this appeal:(a) That the record did not authorize the chancellor to appoint a receiver; (b) That the bill was verified June 30, 1932, the date upon which the indebtedness became due; (c) That there was no allegation that the persons primarily liable for the debt were insolvent; (d) The verification was insufficient.

In reference to proposition (a), we have examined the bill of complaint, together with the trust deed which is set out in the bill of complaint, and are of the opinion that it is sufficient to sustain the appointment. It is specifically charged in the trust deed that there is a default in the principal notes due thereunder and that, by reason of this default, the legal holder had the right to declare all of the indebtedness due and payable.

As to the second contention (b) it appears the bill was filed July 1, 1939, and the facts contained in the bill were true upon the date upon which the bill was filed. Gilbert v. Aranchflower. 114 Ore. 308. If the indebtedness had been paid before the bill was filed and after verification, there would have no occasion to file the bill. We are not impressed with this argument. Moreover,

the store or the ministrate of the source of the share of the states of

enance due; (a) that the series was an allegation that the persons

an inversion to present the trust deed chick to act out in the bill of complaint, and are of the opinion that it is enflicient to switch for appointant. It is equalifically charged in the trust deed that there is a default in the principal notes due thereunder and that, by roman of this default, the legal beings but the right to dealers all of the andobtesse due and payable.

in to the comment contention (b) it appears the bill real filed fuly i, 1988, and the factors contained in the bill real true. 1988. If the inintroducts had been paid butber the bill.

The first real initialities that there would have no secution to

the general demurrer filed to the bill admits the allegation as true, regardless of the verification. <u>Keach</u> v. <u>Hamilton</u>, 84 Ill. App. 413.

that the bill failed to charge that the owners of the property were insolvent nor that certain tenants were not made parties defendant.

Segley v. Illinois Trust & Savings Bank, 198 III. 76. Complainant sets forth facts in the bill from which it is apparent that the property is scant security for the indebtedness and therefore the holder of the bonds is entitled to the rents and profits, through a receivership, in order to secure the payment of the entire indebtedness.

Referring to (d) we have examined the verification of the bill which defendants cleim is insufficient. It are of the opinion that this contention is unsound. A verification very similar to the one attached to the bill in this case was approved in <u>Seorge 3. Fetarson 3c.</u> v. <u>Ashahalt Sales Corp.</u>, 235 Ill. App. 593. In addition thereto by their general desurrer filed in the case prior to the order appointing the receiver, defendants in the case at bar admit the truth of the allegations in the bill of complaint.

whether the bond ran to the proper parties is not involved in this appeal and is a matter that could easily be corrected
on a motion before the trial court. The appeal did not bring up
matters occurring subsequent to the entry of the order appointing
the receiver. It is with this order, and this order alone, that
this court is concerned on this appeal. We see no reason for disturbing the order as entered.

For the reasons stated in this opinion the order of the Superior Court appointing a receiver is affirmed.

ORDER AFFIRMED.

the chicago of the verification. Free v. Indition, Br. 111. 127. 12.

Tith reference to (c), there is no force in the organists

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the bill abiat defendents sists is insufficient, or one of the opinion that this contention is unsound, a verification very late to the one attached to the bill in this case are surroyed in forces of the one attached to the bill in this case are surroyed in the 500. In addition thereta by their papers decerner third in the ones prior to the order appointing the receiver, defendants in the case of the order allegations is the this in the order aroth of the allegations is the this in the

volved in this speed and is a mother that askid easily be corrected on a motion bring up on a motion bring up metters occurring subsequent to the entry of the crack appainting the receiver. It is with this error, and this error alone, that this court is concerned on this appair. On see no recomm for district court is concerned on this appair.

For the resons seried in this amine the artist of the Superior is affilmed.

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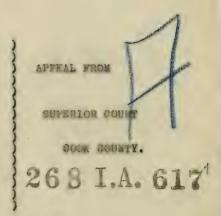
LOTT HOTELS, INCORPORATED, a Corporation,

(Complainant) Appellant,

٧.

OMARLES H. LOTT, HELEN M. LOTT, WALTER J. GREETBARN, as Voting Trustee, M. ERWIST STREEDSAUM, JR., as Voting Trustee, and JUSTINISTAL AND COMMENCIAL TRUST & MAVINGS BASK, a Corporation,

(Defendants) Appellees.

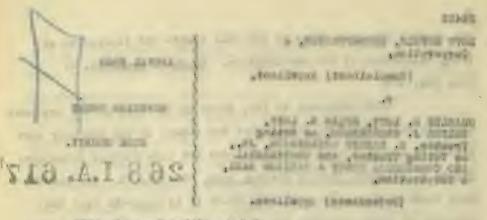


Opinion filed Nov. 16, 1932

MR. JUSTICE HALL DELVISHED THE OFFICE OF THE CLUMP.

This is an appeal from a decree of the Superior Court of Gook County dismissing a bill for want of equity wherein complainent seeks to have a conveyance of certain "voting trust certificates" heretofore made by Charles W. Lott to the defendant, Helen W. Lott, his then wife, set aside. These trust certificates had been issued to Charles W. Lott under an agreement hereinafter referred to between Charles W. Lott and certain other persons representing certain shares of stock owned by Lott in the Lott Motels, Incorporated.

judgment on a judgment note for .50,000.00 payable by Charles M.
Lott to the complainant had been entered, execution issued thereon, and returned by the sheriff of Gook Gounty nulls bons, and the purpose of this proceeding is to cause the reconveyance of these certificates so that they may come into the custody of the court in order that a levy may be made upon them under an alias execution to be issued upon this judgment. It is contended by the complainant that the indebtedness represented by the judgment obtained on October 7th, 1997, was due and owing to the complainant at the time the conveyance of these certificates was made by Lott to his wife;



Opinion filed Nov. 16, 1952

de, secripe and university or criming of the orant.

this is an appeal from a decree of the toperior laurh of dook County dismissing a still for each of equity obsects complained sacks to have a conveyance of certain "vehing true certificates" hereforce mude by Sharles a. Lott to the detendant, Melen W. Lott, his then wife, set acide. There exists that to the factories had been issued to therize a lott under on actorious hereinoffer referred to between therical is inch and certain other persons representing, ourtain shores of stock and certain other is the totals, lacer persons.

is to see forth in the bill that an Cotober tot, 1837, a judgment on a judgment note for the complaints had mean entered, quadrilla by thereon, and returned by the obstiti of their County mills bene, and the curpose of this prosenting is to cause the reconveyance of their prosenting is to cause the reconveyance of these in order that a tery may be needer appearance and their constants. It is markeded by the constants the time detected and this judgment. It is markeded by the constants the time the conveyance of these servificates was ander by lott to his wife;

that Lott was insolvent at the time of such conveyance, and that the conveyance was fraudulent and void as to oreditors.

Oharles M. Lott, one of the defendants herein, and the owner of certain certificates of common stock of Lott Motels, Incorporated, was the owner of certain "voting trust certificates" of Lott Motels Incorporated, which had been issued by Malter J. Oreensbaum and J. Ernest Greensbaum, voting trustees under an agreement entered into on March 1st, 1924, through the Continental & Connercial Trust & Savings Sank, the stock depositary and agent of said voting trustees of such stock in Lott Motels, Incorporated.

On November 7th, 1996, Lott transferred to Helen N. Lott, bis then wife, certain of these certificates. At the time of the conveyance of these certificates to Belsn N. Lott, Charles H. Lott had been divorced from a former wife, Cora A. Lott. He had entered into an agreement with Cora A. Lott for the payment to her of a large sum of somey, which agreement had been made a part of the decree entered in the divorce proceedings, and the evidence in this case shows that he need Cora A. Lott several thousand dollars at the time of this conveyance. The evidence also discloses that at this time he was indebted to other persons in sums amounting to upwards of \$100,000.000.00.

It appears from the record that the transfer of these voting trust certificates was made by Lott to the defendant in the Sity of Los angeles about June 7th or 8th, 1927. On July 7th, 1927, Lott received a telegram from one McGilvray, solicitor for complainant herein and who signed the bill of complaint as Bonald H. McGilvray, Vice President, and made affidavit to the truth of the facts set forth in the bill. This telegram reads as follows:

"Don't think anyone trying to locate you but company. Don't worry about anything. West up. You have some friends here. Think stock would be safer assigned to someone so the lady here cannot reach it. You will not need any one there. If so, Dana Latham Residence, 339 North McCadden Place is OK. Will write."

the conveyence was fractulant and to to creditors.

Charles L. Lett, one of the defendants herein, and the cener of centain centificates of common about of Lott Loteln,

Less the camer of certain "veting trust certificates"

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It spows from the recent that the trendfor of these voting trust cortifiences was as a spine to the defendant in the City of Los angeles bout June 7th or Str. 1937. On July .7th, 1937, Lett received a telegram from one recilivery, policitor for complainant barein and the sine the bill of completes as Joneld II. Reclivery, Vice Prosident, and made affidants to the truth of the fact pot forth in the Mill. Tale telegram reads no follows:

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could read it. You will not

Shortly thereafter Lott and defendant separated and in 1930 they were divorced. On August 23rd, 1927, at Columbus, Ohio, at the solicitation of McGilvray, Lott executed the note for \$50,000.00, payable to Lott Motels, Incorporated, upon which judgment was entered in the October following, and upon which this proceeding is based. On the hearing of this case in the Superior Court, Lott appeared as a witness for the complainant, and on cross-examination testified that at the time of the making of the note the amount of his indebtedness to the complainant had not been determined, and that he could not say whether it was less or more than \$50,000.00. He also testified that McGilvray asked him to sign the judgment note and stated he made it for \$50,000.00 because he was requested to do so, and that he did not know for what he was indebted to the company.

On May 7th, 1938, Lott appeared in this cause represented by one Shaw, filed an enswer and admitted all of the allegations in the bill of complaint. It appears that Shaw was connected with the firm of which the solicitor who conducted the trial in the lower court was also a member. There also appeared on the hearing as witness for the complainant, Core A. Lott Meyer, former wife of Lott. It was to prevent Core A. Lott Meyer from securing possession of these certificates that McGilvray wired Lott in Los Angeles to assign them to the defendant. McGilvray appeared as a witness in the trial below and testified that at the time he advised Lott to convey these certificates to his then wife, he was and had been since its organization an official of complainant, Lott Hotels, Incorporated.

In view of all these circumstances, it is apparent that the chancellor who tried this case below had serious doubt as to the bona fides of the transactions between Lott and the representa-

the solicitation of indivers, lett executed the note for at the solicitation of indiverse the constitution of indiverse the constitution of the note for and use observed in the detables following, and uses which this proceeding to beset to the bearing of this court, bott aspeared on a situation for the constituent, and on orone.

The successful is indebtedunes to the constituent, and on orone to the courter it was less or more terminal, and this be sould not any sheller it was less or more terminal, and this be sould not any sheller it was less or more to an accession of the sould had the terminal colors.

On say Fib, 1888, lott appeared in this cause represented with the states of bill of complaint. It supports that There was composed with the sites of the the complaints, fore i. into theyer, forest wife of lott. It was to ensual down i. into beyon from securing possession of these servicines that Modilvrey sired Lett in hea ingeles to seatign them to the detendent. Modilvrey appeared as a vitueer in the trial beior and thetified that at the time he advised lett to occupy these section as extincted to the occupy these and the trial beior and the the then wite, he was and had been along the organization as extleted of complainent, lott totals.

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tive of the complainant which led up to the entry of the judgment upon which this bill is filed, which doubt, is shared by this court. The position taken by appellant (complainant) in its brief is that even though doubt be thrown around the giving of the judgment note in question, and the facts concerning the indebtedness alleged to be owing to the complainant, still if Charles H. Lott were at the time of the assignment and conveyance of these voting trust certificates to Helen M. Lott, insolvent and indebted to other persons, this fact would make the conveyance of these certificates void and entitle complainant to the relief prayed. In attempting to make its case upon this theory, complainant offered detailed proof of Lott's obligations to pay certain sums to another of Lott's former wives, Cora A. Lott Meyer, mentioned in McGilvray's telegram to Lott; also proof of Lott's indebtedness to other persons at this time, and cites Scott v. Lumaghi, 336 Ill. 564, page 568, as follows:

"It is not necessary, in order to impeach a transaction as being fraudulent against the rights of creditors, that the evidence should show a specific intent to defraud the particular creditor who may attach the transaction. In the case before us it may be conceded that the evidentiary facts which tend to prove a fraudulent intent have reference to the Enders judgment. Yet if a fraudulent scheme was conceived for the purpose of defrauding Enders out of his judgment, evidence proving such purpose would be equally available to any other existing creditor who might attack the validity of such transaction."

In our opinion, the motion to assess damages and the suggestion of damages should have been made before the entry of the final decree. The question as to whether or not damages can be assessed under the order of the trial court, and whether or not the trial court retains jurisdiction for that purpose is not now before this court. The decree of the Superior Court in dismissing the bill for want of equity is affirmed.

AFFIRMED.

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In our opinion, the motion to assess damages and the suggastien of despess should have went is solve the final
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under the order of the trial curry, and the not not occur this court.
The force of the outlier for that purpose he not no coror this court.
The force of the outlier force in description of the olid for the county is affirmed,

JOHN BURKI and HELEN BURKI,

(Complainants) Appellees.

V.

ALADAR BEHINKE and ANNA STRIKE, (Defendante) Appellants. APPEAL PHON

GIRCUIT COURT

OCC COUNTY.

6172

Opinion filed Nov. 16, 1932

MG. JUDYICA HALL DELIVED THE OPINION OF THE OCURT.

This is an appeal from a decree of the Direuit Court of Cook County in a proceeding by complainants against defendants, ordering the cancellation and rescission of a contract entered into by complainants, John Burki and Belen Burki for the purchase from defendants, Aladar Behnke and Anna Behnke, of a rocaing house, furnishings and fifteen year leasehold at 7711 and 7715 Forth Faulina Street in the City of Chicago, for the sum of \$16,500.00, together with certain personal property. It also orders the cancellation of a bill of sale of certain personal property and a chattel mortgage given by complainants to defendants, and the return of the consideration paid by complainants to defendants.

The bill charges that the Schukes sold the rocaing house upon false representations made by defendants, on which complainants relied, and by which they were induced to enter into the centract and to pay the consideration assitioned, in that defendants had represented that certain personal property conveyed by a bill of sale was paid for and was the property of defendants, when as a matter of fact a large proportion of the personal property conveyed by the bill of sale was not the property of defendants.

the facts show that contemporaneous with the execution of the bill of cale, worki and his wife gave a chattel mortgage to the defendants on the articles of personal presents set forth in the bill of cale to secure the mayment of 16,350.00 of the purchase price. It was admitted in the answer filed by defendants, and clearly proven

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Opinion filed Nov. 16, 1933

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in the trial of the case, that a very large proportion of the personal property alleged to have been assigned by the bill of sale to complainents was not the property of the defendants, but it was claimed by the defendants that the inclusion of the articles mentioned in the bill of sale, was a mistake, and that the contract should be enforced except as to these articles. This defense has no merit. The bill of sale by which defendants sought to convey the articles of personal property mentioned is in the usual form and centains the usual guarantee of title; to-wit:

"And the said parties of the first part do vouch that they are to be the true and lawful owners of the said goods, chattels and property in manner as aforesaid. And they do, for themselves and their heirs, executors and administrators, covenant and agree to and with the said parties of the second part, to warrant and defend the said goods, chattels and property to the parties of the second part,"

The record shows that there was no mistake, but a deliberate design on the part of defendants to defraud complainants. Complainants: bill alleges and the proof shows that complainants had tendered to defendants, all the property purchased from them.

The trial court properly held that the consideration for the rooming house and furniture was obtained by fraud and that the complainants were entitled to the cancellation of the bill of sale and obsttel mortgage and the return of the consideration paid.

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

AFFIRMED.

in the trial of the same, that a very large propertion of the last property alleged to have been accipand by the bill of sale to complainable was not the property of the defaudants, but it was it is the defautants that the indicates of the articles mentioned in the defauta another and that the contract should isles. This defaute has no isless, this defaute has no inference of the convey in the convex in t

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CARL HUSH.

Plaintiff in Error.

V.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, 2 CORPORATION,

Defendant in Error.

WAIT OF BRROR TO THE CITY

COURT OF THE CITY OF

OHICAGO HEIGHTS.

268 I.A. 617

Opinion filed Nov. 16, 1932

MR. JUSTICE HALL DELIVERED THE OFINION OF THE COURT.

By this writ of error it is sought to review a judgment of the City Court of Chicago Heights in a suit against defendant railroad company for injuries alleged to have been sustained by plaintiff through the negligence of the defendant.

The allegation in the declaration, upon which the case was tried, is, that plaintiff, while walking along and upon a public highway and crossing the track of the defendant company in the City of Chicago Reights, and while in the exercise of due care for his safety, through the negligence of defendant in causing steam and vapor to be emitted from a locomotive propelling a train along its tracks at such intersection, thus blinding plaintiff, was struck and injured. At the close of plaintiff's case, the court directed the jury to return a verdict of not guilty, upon which judgment was entered.

Plaintiff testified that lith Street in the City of Chicago Reights, runs east and west, and that the tracks of the defendant company run north and south at right angles with 15th Street. Plaintiff also testified that the hour at which the accident occurred was about noon, and that while welking east on the north side of 15th Street approaching defendant's track, he first saw the engine of the defendant company approaching the crossing from the south when it was about 30 or 40 feet from the

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Opinion filed Nov. 16, 1832

Me. John TOD HALL Deliving THE OFINION OF THE COURT.

This writ of error it is sought to review a judgment

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tried, is, that plaintiff, while walking slong and upon a public highery and excusing the iradical she defendant company in the City of Chicago heights, and while in the exercise of due care for his aniety, through the negli, when of defendant is cousing steam and vapor to in emitted fives a locumokive propeliting a train steam and rejured, it the close of plaintiff's case, the court in the jury to return a vertice of not guilty, upon which

Chicago seights, runs cast and seet, and that the tracks of the Chicago seights, runs cast and cost, and that the tracks of the defendant economy sun north and south at right angles with 18th Street. Finishist when beautied that the boar at which the accident conserved sup about noon, and that while calking cast on the north side of 18th Street apprecialing defendant's track, he first say the segment of the defendant commany apprecialing the crossing the crossing from the south when it was about 30 or 40 feet from the

crossing, and that at this time, he, plaintiff, was about 30 or 40 feet from the railroad track; that he was walking "pretty fast", and that as he passed over the track the engine was about 5 feet from him; that as he had orested entirely over the track, a dense cloud of steam came from the engine, which blinded him.

that in his confusion, caused by being enveloped in steam, he turned back and ran into the locomotive. The only witness, other than plaintiff, who testified as to the facts conserming the accident, stated that the train was not coming fact, that it was a good day, that the sum was shining, and that it had not rained at all that day. The evidence fails to show that the utern from the locomotive was the proximate cause of the injury. The testimony does show that the plaintiff was grossly negligent in stepping in front of the oncoming locomotive when it was about 5 feet from him, and when at that time he saw it coming toward him.

The court was fully justified in directing a verdict for defendant, and the judgment is therefore affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

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ALLMON, F. S. DAG BERFE, J. CORRECT.

THE POPLE OF THE STATE OF TELTHOLS,

Defendent in Error.

V.

JOHN BAILEY, Plaintiff in Trror. unnon To

MINICIPAL COURT

Opinion filed Nov. 16, 1932

IN. JU TING HALL BULIVER DUTIE OF BRION OF THE COUNT.

This is an appeal from a judgment of the Hunisipal Court of Chicago wherein John Bailey, defendent, was found guilty of the following charge: "That John Bailey heretofore, to-wit: on the 9 day of August, A. D., 1930, at the City of Chicago aforesaid, did then and there utter, make, draw and deliver to the said John Lombert a certain bank check for the payment of wages drawn upon the Humboldt State Bank of Chicago for the amount of \$50.00. The said John Bailey did then and there, well knowing at the time of said making, drawing and delivering of the aforesaid bank check, that he did not then and there have sufficient funds in the said bank for the payment of the aforesaid bank check." In the complaint, after the formal charge appears the following:

"Section 253 Chapter 58 3 & H 1929,"

and then follows the words:

"Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the St to of Illinois."

No bill of exceptions was filed in the case, and no westion of fact is raised. The only question roused by appellant is that "Section 255, Chapter 58, 5 & H 1929", is not the section of the statute which provides a penalty for the making, uttoring, drawing or delivering of a check when the drawer of such check knows that he has not sufficient funds for its payment when preThe same of the sa

Opinion filed Nov. 16, 1980

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No bill of exceptions we diled in the ease, and no contion of the fact in related by appellant in their faction related by appellant in their contion of the drawer of such chaok drawer of such chaok drawer of such chaok.

santed, but covers the crime of "False Fret uses."

an act of the general assembly of the State of Illinois, approved May 26th, 1917, reads as follows:

Section 1. Be it enseted by the People of the State of Illin is, represented in the Ceneral esembly. That any person who with intent to defraud shall make or draw or utter or deliver any chack, draft or order for the payment of money upon any bank or other depositary, and thereby obtains from any person any money, personal property or other valuable thing or sho with intent to defraud, makes, draws, utters or delivers any check, draft or order for payment of personal services or for labor, knowing of the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds in or credit with such bank or other depositary for the psyment of such shock, draft or order in full upon its presentation, shall be guilty of a misdemenor; and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not more than one year, or both. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank for the payment of such check draft or order."

In People v. Sesterdahl, 316 Ill. 86, the Supreme Court held that

"If an indictment or information is so specific that the defendant is notified of the charge which he is to meet and is able to prepare his defense and the nature of the charge may be easily understood by the court or jury the indictment or information is sufficient. The offence is statutory. The information was drawn in the language of the statute, and it set forth specific facts from which the plaintiff in error was apprised of the charge against him. It was sufficient in every respect."

The complaint is in the language of the statute and the more fact that the person who drew the information added the words "Section 355 Chapter 50 5 & H 1939", could not have mislead the defendent as to the offense with which he was charged. He was distinctly apprised of the fact that he was charged with the offense of uttering, making, drawing and delivering to the person named in

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The judgment of the Municipal Court is affirmed.

AFFIRMUD.

WILSON, P.J. and HUBEL, J, CONCUR.

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MARKEL RAMSEY.

Appellee,

V.

RELIANCE ELECTRIC : ROTECTIVE CO., a Corporation,

Appellant.

APPRIL PROM

SUPERIOR COURT

OF JOCK JOUNTY

268 I.A. 6175

Opinion filed Nov. 16, 1932

MR. JUNIUS HALL DELIVED OF THE OPENIOR OF THE GOOMY.

This is an appeal from a judgment of the Superior Court of Cook County against defendant, Reliance Electric Protective Co., a Corporation, for the sum of \$1200.00 entered upon a verdict of a jury in a suit for personal injuries alleged to have been sustained by plaintiff as a result of defendant's negligence.

cast in an automobile on the south side of Randolph Street in the Sity of Chicago with Louise Levine, one of the witnesses for plaintiff in the trial of this case. Then the car in which they were riding had almost reached the west side of Wells Street, it stopped behind a Yellow Cab which had already been stopped by a red signal light at the southwest corner of Randolph and Wells Streets. Plaintiff testified that she there left the car in which she had been riding, proceeded to the southwest corner of Randolph and Wells Streets, and perceiving that the green light gave her the right of way across Randolph Street, started north across that street; that she was walking toward the northwest corner of Randolph and Wells Streets where there was a mail box in which she intended to mail a letter; that when she had reached the middle of Randolph Street

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268 I.A. 617

Opinion filed Nov. 16, 1932

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the light suddenly changed and the traffic on Mandelph Street started cast and west; that she was at this time closer to the north side than the south side of Mandelph Street, and that she hurried toward the north; that before she could reach her destination she saw the car which struck her coming, but that she had no time to avoid it and was struck by defendant's automobile and severely injured.

Louise Levine, the driver of the car from which plaintiff had alighted just before the accident, testified that she saw plaintiff start across Randolph Street; that the lights were then stopped going east and west, and that she (plaintiff) was about three quarters across before they started to change.

car which struck and injured plaintiff, testified that he was going west on handolph street and stopped for the red light on the east side of cells etreet, and that when the lights changed he started up and followed a bus and Yellow Cab across wells street; that at the time he first saw plaintiff he was about eight or nine feet from her, and that he had just pulled out from behind a Yellow Cab which had preceded him across the street; that the cab suddenly stopped to let plaintiff go by and that he (Stafford) pulled out to go around the cab, and that it was at this time that he first saw plaintiff and that he was eight or nine feet from her. He also stated on cross-examination that as he pulled out from behind the Yellow Cab and saw the plaintiff, he knew if he proceeded he would hit her. This witness also testified that he was driving fifteen miles an hour just before the accident.

George Shanshan, driver of the Yellow Cab which was being driven near the defendant's ear, also a witness for the defendant end who saw the accident, testified that at the time of the accident plaintiff was near the rail of the street car track as he proceeded toward

he light suddenly charged ond the trairie on Handelph Street strain and and weet; that she was at this time closer to the morth olds that the most that the most national and toward has the host that before she could reach has doctination she say the ar which struck has could reach and had no time to syoid it and ar which struck has could that abo had no time to syoid it and

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Coorge Chemelus, driver of the Tellow deb which was being riven near the defendant and as see the cordent, the testified that at the Mass of the seeddant plainif was near the real of the river and he prescued testifi

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her; that she made a dive for the north side of the street to escape being injured by defendent's car coming toward her, when she was struck by it. This witness also testified that when defendent's car struck plaintiff all the wheels on this car were skidding. There was evidence from which the jury could have reached the conclusion that the speed of defendent's car was such as to have emounted to negligence in view of all the surrounding circumstances. The corner of Rendelph and Wells Streets is in Chicago's loop. Drivers of automobiles are required to use that degree of care which the situation demends, to avoid injuring pedestrians, who have an equal right with such drivers to the use of the street. In Chicago Union Traction dementy v. Stanford, 104 Ill. App. 99, page 103, the court said:

of the citizens of the state to go and raturn, pass and repass, at their pleasure. In the use of a public street, the law recognizes no favortes. The appeal of a car (in this case referring to a street car) is rapid or otherwise, as its known surraundings indicate. Under certain conditions three miles an hour may be rapid; under other conditions thirty miles an hour may not be inconsistent with due care.

In the instant case, there is nothing to show the plaintiff was not in the exercise of due care for her safety. The evidence was such that the jury could reasonably conclude that defendent was guilty of the negligence charged. An examination of the record shows that the entire question was fairly submitted to the juzy. Their determination was that defendent was guilty of the negligence charged. On the question of damages, we held that the verdict was clearly within the range of the testimony on that question.

No reversible error is found in the refusal of the instructions offered by defendant. The judgment of the Superior Court is effirmed. The sealon of the testions on test was then.

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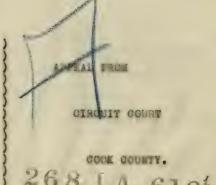
LOUIS SOLOHON, Administrator of the Estate of Paul Solomon, Deceased.

Appellant.

17.

GEORGE W. WEAD and the woodlawn Trust and havings Bank, a Corporation, Trustee, impleaded with N. M. Marsh,

Appellees.



268 L.A. 6184

O pinion filed Nov. 16, 1932

MR. JEDFICE HENEL BULIVERED THE OFFICE OF THE COURT ON REHEARING.

This cause is now before us on rehearing granted. After due consideration, we adhere to the original opinion.

The decurrer of the defendants to the original declaration, consisting of eight counts, and to the first, second and third additional counts, as amended, was sustained, and the plaintiff elected to stand by his pleading. The cause was thereupon dismissed by the court at plaintiff's costs. Upon appeal of the plaintiff the case is now in the Appellate Court for review.

The plaintiff alleges that the defendants owned and operated an old abandoned stone quarry on land between 91st and 93rd streets. east of Stony Island Avenue, in a populous territory in the Sity of Chicago, in which water collected to a depth of about 14 feet, and in which the defendants permitted, encouraged and invited the general public to swim; and allowed and permitted abandoned automobiles to be in said water, forming a hidden trap and wennee to life and limb of plaintiff's intestate and other members of the general public who might swim in said pond or body of water; that plaintiff's intestate, a boy 16 years of a c. and an excellent swimmer, on July 4, 1929, while swimming there, struck and come

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in contact with hidden automobiles which were negligently allowed and permitted by the defendants to remain in said water, and as a result thereof was rendered unconscious and was drowned.

The original declaration consists of eight counts, alleging in part as follows:

In the first count it is alleged that the defendants owed a duty to use care and caution in keeping the premises in a safe condition for anyone who was swimming, and that the defendants carelessly and negligently permitted old automobiles to remain partly submerged in the water.

In the second count it is alleged that it was an attractive nuisance to children and others who cared to swim.

In the third count the allegation is against only one defendant, George W. Wead, and sought to impose a duty on him to keep the premises safe for those who might want to swim, but that he did carelessly permit it to remain in an unsafe condition on account of the submerged abandoned automobiles.

The fourth count is the same as the third, except that the allegations are made only against the defendant, woodlawn Trust and Savings Bank, as trustee.

The fifth count is also similar to the third, but the allegation is only against the defendant H. W. Marsh.

In the sixth count only the defendant George W. Wead is named and therein he was charged with the duty to keep the premises in a safe condition with due regard to the safety of the general public, but that he carelessly permitted the submerged, abandoned automobiles to remain therein, all of which formed an attractive nuisance as to plaintiff's intestate and other children.

in contact with hidden automobiles which were negligently allowed and permitted by the defendants to remain in eald water, and as a result thereof was resulted unconscious and mas drowned.

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The original declaration consists of eight sounts, alleging

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The fifth count is also station to the third, but the

In the sixth court only the defendent George W. Wend is neared and therein he was charged with the duty to keep the presions in a safe condition with due regard to the anisty of the general public, but that he careleasly permitted the submerged, aboutoned auto- which formed an attractive nulsance as to picintiff a intestate and other children.

The asventh and eighth counts are similar to the sixth count, except that in the seventh count only the Woodlawn Trust & Savings Sank, a corporation, as trustee, was named, and in the eighth count, only the defendant H. W. Marsh.

The allegations of the second additional first and second counts as amended are hereinafter fully set forth.

In the second additional third count as amended it is alleged that the defendants willfully and wantonly neglected to clean out the pond or to fence it, and invited the public to swim therein, by reason whereof plaintiff's intestate was drowned.

After the desurrer to the amended additional counts was sustained, the defendants sought leave to withdraw their pleas to the original declaration consisting of eight counts and file a desurrer thereto, to which motion plaintiff objected, because the statute of limitations had run and the plaintiff would be prejudiced thereby. The motion was denied.

Thereafter, on March 7, 1931, the defendants' demurrer to the second amended additional three counts was heard and sustained, and thereupon the defendants renewed their motion to withdraw their pleas to the original declaration in order to demur thereto, and the same was granted.

The plaintiff contends that when the owner of private property has permitted its use by the general public over a considerable period of time, and a considerable number of people have availed themselves of such use, the owner of the real estate owes a duty of care for the safety of persons using said property under the existing custom; and that, under the allegations of fact, the court erred in sustaining the defendant's demurrer to the declaration.

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The plaintiff contends that the owner of private to period of time, and a centiderable number of people have availed thousaives of each upe, the centr of the real satate uses a duty of cent for the nafety of periods using said property under the cent errod is nontaining the defendant's demander to the declara-

The rule has been settled by the weight of authorities, and is announced in the case of <u>City of Pekin</u> v. <u>NcMahon</u>, 154 Ill. 141, as follows:

"That the private owner or occupant of land is under no obligation to strangers to place guards around excavations upon his land. The law does not require him to keep his premises in safe condition for the benefit of trespassers, or those who come upon them without invitation either express or implied, and merely to seek their own pleasure or gratify their own ourlosity."

However, an exception to this general rule is that liability may result from a dangerous condition of private property lying opposite a highway or frequented path, for public use, upon which the owner or occupant by invitation, either express or implied, induces others to come. The decisions are not entirely harmonious upon this question, but from 26 L. R. A., page 686, it appears from the note of the author that the weight of authority is in favor of the following:

"The owner of private property is not obliged to make it safe for trespassers or even for mere licensees. If, however, the circumstances have been such as to amount to a devotion of the property temporarily to the public use, care must be taken not to make it unsafe until proper notice of the change has been given. Nothing which amounts to a trap can be placed where the public has been in the habit of resorting, and excavations cannot be made so near the line of an existing highway as to render travel on the highway unsafe."

It is also announced as a rule by the Supreme Court of . Illinois in the case of <u>Tomle</u> v. <u>Rampton</u>, 129 Ill. 379, that

"Where the owner of land invites the public to make use of it, by connecting it with a public sidewalk, he must exercise due care to keep the premises in a reasonably safe condition."

In Bennett v. Railroad Co., 102 U. S. 577, it was said by the court,

"that the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages

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In Bonnett v. Failroad Co., 108 W. S. 577, it was said by the court,

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to them, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation."

It is essential in order to recover in an action for damages that the person injured shall allege and prove that the landowner invited the public either in express terms or by implication, to use the land as a pathway or for amusement purposes. The owner cannot knowingly permit a trap upon the land which may cause injury. without warning the public of the danger. Failing to do so, the owner may be liable to a person rightfully upon the premises, who, in the exercise of due care. was injured as a result of a trap maintained or permitted upon the land by the owner. However, there are cases where the owner may be liable even to a trespasser or licensee for injuries caused by wanton or wilfull acts in setting spring traps or instruments of destruction on his land for defense of his property without notice of such contrivences. The question is, is an owner guilty of negligence in failing to erect a fence which is required by a city ordinance around a large hole or pit. so as to prevent injuries to persons who are on the land by invitation, expressed or implied, themselves using due care. The general rule is that a violation of a statute is prima facis evidence of negligence. This is also true as to the violation of a city ordinance, where the ordinance is such as the city is authorized by its charter, or by statute, to make. In Channon Co. v. Hahn, 189 Ill. 28. it was held in an action by an employee for injuries received from falling down on open elevator shaft, proof of the defendant's violation of a city ordinance requiring all persons controlling passenger or freight elevators in buildings to employ some person to take charge of and operate the same, constitutes a prime facie case of negligence, if such violation caused or contributed to the

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injury. The nonperformance of this duty imposed by statute or ordinance is a breach of duty to the public, and therefore evidence of negligence and liability if the injuries were the result of such violation of duty. It has been suggested in this case that the failure of an owner to enclose a pit or excavation by a fence is not the proximate cause that resulted in injury to the person on the land. If the injury is the result of the injured party's own negligence, failure to creek the fence necessarily would not be the proximate cause of the injury. Shother or not the absence of a fence constitutes negligence was for the jury, under all the facts and circumstances in evidence.

It appears from the pleadings of the plaintiff in the second additional first count as amended that the defendants owned. operated and controlled the premises located in a populous section of the City of Chicago, on Stony Island Avenue at 93rd Street; that within 50 feet of the cement driveway and walk on Stony Island Avenue, and within 3 feet of 95rd street, there was kept and maintained a body of water as a public swimming place, used daily by many people and open to the public use. No fence was erected around said body of water and no signs of warning were near said pond to tell of its great depth or to tell of its hidden dangers; that the pond was used as a dumping place for abandoned automobiles, which endangered the lives of people swimming there; that there was also permitted in the water a stone slide, which was used for many years by the Stony Island Quarry, and which was a menace to the public using said water as a swimming place; that the defendants maintained the swimming place openly over a period from March 19. 1925 to fuly 4, 1939, and were continuously warned and admonished by the City of Chicago authorities to fence said pond in compliance with a certain City ordinance, or to clear out of the pond the abandoned automobiles and heavy objects allowed by the defendants to fleat

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in the water; that the defendants ignored said warning, and made no attempt to make the premises safe, although they were informed by the City authorities and citizens who lived in the neighborhood that there were many persons drowned there by reason of being struck by the articles floating in the water; that they did not make any attempt to prevent or prohibit swimming, or to make the place free from hidden dangers, but allowed and impliedly invited the public to swim in said pend; that the plaintiff's intestate was a boy of the age of 16 years; that he entered the water and started to swim when his head was struck by a sunken automobile or heavy object; that his head was badly bruised, and he sank and was drowned.

The second additional count as amended, in addition to certain allegations of fact, alleged the violation of a certain ordinance by the defendants in failing to fence said pond; that they permitted the clay hole or excavation to be kept open and exposed to the use of the general public for swimming surposes; that the plaintiff's intestate entered upon said real estate and pond without being in any way warned, and was struck by a hidden object, rendered unconscious and was drowned. The ordinance is as follows:

"Clay holes and excavations. The owner, lessee or person in possession of any real estate within the city upon which are located or situated any clay holes or other similar excavations, is hereby required to cause such clay holes or other excavations to be enclosed with wooden or wire fences of not less than six feet in height, when such fences are of wire, only smooth or not barbed wire shall be used, and such fence or fences shall consist of not less than eight rows of wire, and such rows of wire shall not be more than nine inches apart. Any person violating any of the provisions of this section shall be fined not more than two hundred dollars for each offense."

The plaintiff in this count also elleged that the defendants were warned many times by the City authorities to fence the elsy hole, but ignored the marnings, and encouraged and invited its use,

in the veter; that the defendants ignored entil serming, and made no attempt to make the premises sufe, ilthough they were informed by the city sutherities and citizens who lived in the neighborood that there were samy persons drowned there by reason of being struck by the articles ileating in the moter; that they did not make any attempt to provent or prohibit evimning, or to make the place from hidden dangers, but allowed and incliedly invited the public to swim in sold wond; that the plainiff's intestate the plainiff's intestate and the public to swim when his bead was atruck by a sunken automobile or started to swim when his bead was atruck by a sunken automobile or beary object; that his bead was struck by a sunken automobile or soury object; that his bead was struck by a sunken automobile or soury object; that his bead was struck by a sunken automobile or soury object; that his bead was struck by a sunken automobile or soury object; that his bead was struck by a sunken automobile or soury object; that his bead was struck by a sunken automobile or sour and

The second additional count so amended, in addition to certain occasin allegations of fact, allegat the violation of a certain occ by the delendants in falling to fonce said pond; that they permitted the clay hole or exemption to be kept open and that the plaintiff's intentage antered upon said real estate and and without being in any may marned, and was struck by a hidden object, the ordinance is at follows:

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The plaintiff in this count also elleged that the defendents were normal namy bimes by the Sity sutherities to fence the clay hot ignored the mermings, and encouraged and inviked its use.

although they knew that many were killed there as a result of the dangerous condition of the pend. There is also the allegation of the exercise of due care and caution by the plaintiff's intestate.

It is to be noted that the defendant's desurrer admits facts well pleaded, and admits that they knew of the actual condition of the premises in which was included the swimming hele; indeed, admits that they were wanned by the City authorities and citizens of the neighborhood that swimming there was dangerous because of the hidden dangers in the water, but failed to take steps to fence the excavation required by the Chicago ordinance.

It is also admitted by the desurrer that the defendants have allowed, encouraged and invited the public to swin in the pond on their premises. This invitation to use the premises for swimming induced the plaintiff's intestate to come upon the premises for a lawful purpose, and while on the premises and in the water the plaintiff was injured, which injury resulted in his death through no fault of his own. Under this state of the pleadinge, the plaintiff can maintain an action for the death of his intestate occasioned by the unsafe condition of the land. This condition was known to the defendants and not to the deceased, and they negligently suffered it to exist, without any notice to him, when he took advantage of the defendants' invitation to swim. The failure to erect a fence is not conclusive of liability, but this breach of duty will be evidence of negligence. To erect a fence is a duty imposed by the City Ordinance, and failure of the defendants to do so, as alleged, is a breach of this duty to the public and evidence of negligence for which the defendants are liable if the injuries causing the death of plaintiff's intestate were, in a substantial sense, the result of such violation of duty. If a fence had been built enclosing the wond, as required by the ordinance, we cannot assume that this boy would have climbed over the fence to go in swimming.

although they know that nony erro billed there no a rosult of the dampersum condition of the plane condition of the energies of due care and contion by the plaintiff's intestent.

If is to be noted that the defendant's dominant admits facts and pleaded, and admits that they know of the actual condition of the precises in which was included the seimming hele; indeed, admits that they were manned by the City authorisies and ditirent of the neighburhood that seimming there are dangerous store to fonce the expansion required by the Chicago artinuars.

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Flaintiffs contend that it was an abuse of discretion for the court to allow the defendants to withdraw their several pleas to the original declaration after the expiration of the statutory period of limitation. However, the defendants' argument in reply to this contention is that the rule has been changed by the amendment to section 30 of the Practice set, Schill's St. ch. 110, which permits amendment to a declaration after the limitation period has expired, even though the declaration states no cause of action.

This court in its opinion in the case of <u>Sister</u> v. <u>Jollack</u>.
262 Ill. App. 170, in construing this section of the act, said:

"It will be noted that the amendment provides that where any pleading is amended, the amendment shall be held to relate back to the date of the filing of the original pleading " " and the cause of action " " set up in the amended pleading shall not be barred by " " lapse of time under any statute prescribing or limiting the time within which an action may be brought " " if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleading that the cause of action asserted " " in the amended pleading grew out of the same transaction or occurrence, and is substantially the same as set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact.

In the instant case, if we assume that the original declaration did not state a cause of action because it failed to specifically allege the date of the death of the deceased, so that it did not appear that the suit was brought within a year after the death of Anthony M. Zister, yet we are of the opinion that this defect might be cured after the expiration of one year by virtue of this amendment. At most, the original declaration was defective, in that it failed to allege ' the existence of some fact, 'viz.; the date of the death of the deceased. It is obvious that the 'cause of action asserted in the amended declaration grew out of the same transaction or occurrence and is substantially the same as set up in the original pleading. '"

The plaintiff's contention that the court should not have permitted the defendants to withdraw their pleas and file a demurrer after the statute of limitations had run, was undoubtedly right before Section 39 of the Fractice act was amended. The amendment to Section 39 affords an opportunity to the plaintiff

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the court to allow the defendants to withdraw their several place
to the original declaration after the expiration of the statutory
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demurrar after the statute of limitations had run, was undoubtedly right before Scotian 33 of the Proctice ket was namided. The Incut to Section 39 affords on opportunity to the plaintiff

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to file an amendment to the declaration, notwithstanding the limitation period had expired; provided that the cause of action asserted in the amendment grew out of the same transaction or occurrence as set up in the original pleading. For the reason indicated, we are of the opinion that the court properly entered the order.

thile the order of the court sustained the desurrer to the declaration, it does not appear from the record that a demurrer was filed by the defendents, in compliance with leave exented by the court, or that the plaintiff objected uson that ground. The court will, therefore, consider the questions before us as if raised by a degurrer properly filed. Nowever, for the reasons set forth in this opinion we have reached the conclusion that the trial court erred in sustaining the demurrar to the second additional first and second counts as amended. Therefore, the judgment is reversed and the cause remanded with directions that the court set aside the judgment of dismissal and hold for nought the order sustaining the defendants' desurrer to the second additional first and second counts as agended; that the trial court direct the defendants to plead to said counts within such time as may be fixed by the court, and enter such further and other orders consistent with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON, P.J. SPECIALLY CONCURS, MALL, J. DID NOT PARTICIPATE.

MR. PRESIDING JUSTICE WILSON SPECIALLY CONCURRING:

additional count as amended, which alleges the violation of a city ordinance requiring the fencing of clay holes and excevations. I am unable to see in what way the failure to comply with this ordinance contributed to the accident. Flaintiff's intestate did not fall into the clay hole by reason of the defendant's failure to fence. Sonsequently, in my opinion, the failure to comply with the ordinance was not the proximate cause of the accident.

to file an amondment to the declaration, notwitheleveling the limitation period had expired; provided that the cause of action suscreted in the emondment grow out of the same transcriton or accurrence as set up in the original pleading. For the resease indicated, we are of the chinian that the court properly entered the order.

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ANNA DYREK.

Plaintiff in Error.

V.

GEORGE ZEMAITIS.

Defendent in Error.

ERROR TO

CIRCUIT COURT

268 I.A. 618

Opinion filed Nov. 16, 1932

MR. JUSTICE HEREL DELIVERED THE CRISICS OF THE COURT.

This is an action in trespass in the Gircuit Court of Sook County by the plaintiff against the defendant, based upon an alleged assault upon the plaintiff by the defendant, to which action the defendant pleaded not guilty and self defense.

On hovember 36, 1930, the case was reached for trial and was tried ex marte, resulting in a verdiet of the jury finding the defendant guilty and assessing the plaintiff's damages at \$2,000, accommande by a special finding of the jury that the defendant was guilty of willful and malicious assault upon the plaintiff.

Judgment was entered upon the verdict in favor of the plaintiff in the amount assessed as damages by the jury.

On June 26, 1931, the defendant moved for an order vacating the judgment of November 26, 1930, and for an order releasing the defendant from the custody of the sheriff under a capias issued in this case. In support of the motion to vacate, the defendant filed three affidavits, which were verified, and the affidavit of the defendant contains the prayer for relief, which is, that the judgment of November 26, 1930, be set saide and the case set for rehearing. To this motion to vacate the said judgment, the plaintiff filed a general desurrer, which was overruled by the court, whereupon, the plaintiff electing to saind by her desurrer, the court vacated

**Action** 

TRANKE DANKE

. Plaintiff in Troop,

.V

REGREE PEWALTEIN,

efendant in Arepre-

CLASS STATES

Opinion filed Nov. 16, 1952

MR. JUSTICE HESEL DELIVERED WIS CLIFTCH OF THE COURT OF Good

County by the plaintiff against the defendant, based upon an alleged second; to which action the defendant, to which action the defendant pleaded not quilty and acid defendant.

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the judgment of deventer his, 1981, and for an order releasing the defendant from the queted of the shortly under a <u>engine</u> issued in this case. In support of the action to reasing the affidovit of the rate, which rere verified, and the affidovit of the judgment of Hovember his, land, he set seide and the case and for rehearing.

To this motion to verthe the self judgment, the plaintiff filled a general democrat to the overthe the reaction.

the plaintiff electing to soon by her demures, the court vossted

and set aside the judgment and quashed the corpins and the commitment order. The plaintiff brings the record to this court upon a writ of error.

The plaintiff in error claims that the defendant was guilty of lackes in making the motion to vacate the judgment at a subsequent term. From the affidavits it appears that the motion was made on June 26, 1931, to vacate the judgment entered on hovember 26, 1930, for the sum of 2,000. It appears that the defendant did not know that the judgment was entered until December 15, 1930, and that he thereupon notified his attorney of the fact on December 17, 1930, with the request that the attorney move to have this judgment set saide, which was not done until June 18, 1931, when a motion was made to vacate and set aside this judgment.

In support of the motion, the affidavita of C. M. Jensby and H. W. Starr were offered. The reason that no steps were taken, as appears from the affidavita, is that J. E. Jensby, a clerk of M. M. Starr, attorney for the defendant, left the employ of this attorney, and the defendant's attorney was unable to communicate with him until June 18, 1931, when he appeared at his office and was questioned regarding the facts that occurred on the date the case was on the trial call of Judge Fomeroy, the judge preciding in the Circuit Court of Cook County. This motion, however, was made within the statutory period of limitations.

Harris v. Chicago House Wrecking Co., 314 Ill. 500.

The question to be determined by this court is, did the facts as they appear in the affidavits justify the order of the trial court? This question, which is raised by the plaintiff's general denurrer, properly resolves itself as to the sufficiency of the motion and the affidavits filed by the defendant.

The plaintiff has questioned the form of the motion made to vacate the judgment, but we regard the merits of more importance

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The plaintiff in error claims that the defendant was gailey of lackes in asking the metica to veceta the judgment of a subsection of lackes in area of lackes the chieffed of livencer and on lane SG, 1861, to veceta the judgment chief the defendant of 1860, for the sum of 1,000. It appears that the defendant distinct is the reason to the company of the lackes to th

of this actorney, and the defendent's abtorzey see enchie to
communicate with his weill dunc la, 1951, when he accented at the
office and see questioned reparting the facts bies occurred on
the date the case was on the trial call of dudge sametoy, the
judge presiding in the Circuit Court of Good County. This motion,
twee was made within the startsory eried of limitations.

The question to no determined by this sourt is, did the tone so that the the that of the thirty the order of the that on the the transfer transfer itself as to the sufficiency of the motion and the efficients filed by the defendent.

The pictolff has our stiemed the form of the motion made to vector the judgment, but we request the merits of more importance

than the form of the motion. The Supreme Court in the case of Narris v. Chicago louse treeking Co., 314 III. 500, held to the effect that an affidavit of facts, sworn to, is sufficient as a motion entered after term time, where it appears in the affidavit that the defendant asked the court to set aside a default judgment, and that the motion appearing in the affidavit of facts in the case referred to was properly made under Chap. 110, Par. 89, Cahill's III. Rev. St.

The plaintiff's demurrer admits the truth of the facts set forth in the affidevits, which the trial court no doubt considered in passing up a this desurrer. The facts as they a peared in the affidevit disclosed that the defendant had knowledge that the case was on the trial call of Judge fomeroy, the judge presiding. on hovember 36, 1930, U. S. Jensby a clerk for W. W. Starr, attorney for the defendant, appeared in Judge Jomeroy's court room and informed the clerk of the court that he, Jensby was going to another court and desired the case held, and that he would return as soon as possible; that he then attended a case in the Municipal Court of Chicago, which was set at the same hour, but this case was not called until three o'clock in the afternoon. After attending to this call he went back to Judge Pomeroy's court room, and the clerk, or a man scated at the desk in this court room, informed him that the instant case had gone over one month, which he reported to defendant's attorney. Thortly thereafter he left the employ of the attorney, and has since lived in Indiana. and did not visit the office of the attorney until June 18, 1931. It also appears that H. W. Starr, as attorney for the defendant directed the clerk Jensby to attend on the date the case was on the call of Judge Pomeroy; that "tarr was engaged before the Treasury Department in two cases, and would be ready for trial

then the form of the metica. The Supreme Court in the orac of mixing v. Witten to the fill of the fill of the critical to the office that the office the court to set saids a default judgment, the set saids a default judgment, the set saids a default judgment, the court to set saids a default judgment, the coar referred to was properly made under Chap. 110, Per. 63, Chibill's Ill. New. 26.

ested out to divit out attake reviewsh pittlicials out school on truce lairs and dalor estrability add at direk ton to realing or a this descree. The foots as they concered twit spinisons but decimalate our four bandrate dischitty will di the base ont at the trial out. If Julge Possens, the julge president, On havening his little for I reading a clays for for it, Herry, atterney You in fondant, appeared in Judge Toward's court rock and inrudions of guing asy yearet, and fedr frame out he same and a mor as gruter bluow on test bas, bled sees set berisch bas live Lagiolust odt ni seen s bebootte nedt en tedt foldloses us noon Court of Vilosyo, which was set at the same hour, but this case see not called until three o'clast in the afternoon, Alter amoor druce a verene's aghul at ione dans of lies abit of gathuette and the clark, or a new nested at the desk in this court room, adrice and tore each had seed thetest and talk mid forcotal which he re great to defendant's eternoy, biortly thereafter he . ancibal al havil sonis sed bac , yearstic sut to yolore sut flat 1881 . Il soul lines yearsts out to estite out timiv see bib bee It also appears that M. P. Starr, as attorney for the defendent no acy such said etc. sait no hastite of yelenet Mrale add beforth edf aroled begans an riest full typremet egict to IIse odf Isity wor wheer ad himse has assess out at insuffract wineself

later in the day. It also appears that the defendant was ready for trial, and according to his affidavit, had a defense to this action.

The appellate Court held in the case of <u>Toth</u> v. <u>Phillipson</u>, <u>& Co.</u>, 250 Ill. App. 247, that judicial notice will be taken from the fact that under the well-known conditions existing in Cock County, attorneys often have cases called for trial in different courts on the same may and deputize clerks to represent them in answering the calls, and the fact that the attorney for a litigant deputized his clerk to answer the trial call of a case in Cock County is not such negligence as would defeat the right to have a judgment of dismissal vacated, in view of the existing conditions that attorneys often have cases for trial in different courts. The court said in that case;

"An order dismissing a case for want of prosecution on the misapprehension that the plaintiff had not appeared for trial, when in fact the clerk of the attorney had appeared to answer the trial cell and by mistake of the clerk of the court was informed that the case was continued, constitutes a mistake of fact justifying under section 89 of the Fractice Act, Cahill's St. ch. 119, Far. 89, the vacation of the judgment of dismissal."

"" " The clerk is an officer of the court and it is his duty to note its orders that are to be subsequently spread of record. He was the proper one to consult as to the status of the case and was supposed to know and note the orders of the court, and we think plaintiff was warranted in relying upon his statement as to what they were, and was not required to verify the same by consulting his minutes. The clerk, however, was mistaken and here as in the Madden case misled plaintiff and indirectly the court."

This case is clearly applicable to the instant case. The fact that Starr as the defendant's attorney was engaged, and directed Jensby, his law clerk, to answer the call in question, was not negligence on the part of defendant's attorney, nor was it negligence to assign his law clerk to answer the trial call during

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ister in the day. It also appears that the defendant was ready for trial, and accounting to his affiderit, had a defenue to this sellow.

NO DOLFHIELD TO PARK TO BEEN A SHARE BAT WARRED TO BE THE REAL PROPERTY OF THE PARK BAT TO PARK TO PAR increases you had "tilevising new lasts on increasing paid and and to outside and has been and read at many, folys was want can seen add rade bearehad non Prove add to avelo thurs, and the second of the first time and the first time and the first time and the first time and the first time. ". Landenin to transler of the colleges of dissings." The sizes in on efficier of the expressed in it is his days to make the network that not to be subscribed in an element of the mooney all are all Jonese, he havele has not us beautyou see him sero not be assude any of Willeston which we have Jones will by neares and will sade of an incompanie and many partition at indosense are they were not one not brouked to workly the gone by odministrate bin unmover. The widely herever, and to Pilinialo Dalais mesa sabban adi ai an eser sun bemodala " PERSON MAY STATE THAT THE

This case is circily reclimate to the laston cour. The fact that there as the defendant's attorney as enguged, and directed density, his ire circle, to answer the call in quartion, was not negligence on the part of defendant's attorney, nor wen it negligence to seeign his low clark to secret the original during

his engagement in the Treasury Department. The fact is that the law clerk attended court calls and returned to Judge Pomercy's court room after attending another call in the Municipal Sourt, and was then informed by the clerk of the court that the case was continued, which was a mistake on the part of the clerk giving the information, and justified the order vacating the judgment entered in the instant case.

Some comment is made as to the fact that in the effidavit of Jensby he received his information of a continuance from a clerk or man scated at the desk. The admitted fact is that he received mistaken information. The defendant's attorney was warranted in relying upon Jensby's statement as to the conditions, and was not required to verify the same by consulting the minutes of the clerk of the court. The defendant was misled, and, incidently, the court. The attorney for the defendant in this case was not negligent, and whether a mistake was made by the clerk of the court or the attorney's clerk, we think, equitably, the judgment ought not to stand, provided the defendant has a meritorious defense.

me, therefore, are of the opinion that the court did not err in overruling the desurrer of the plaintiff, and in ordering the judgment vacated and set aside and the ospiss quashed.

Accordingly, the order of the court is affirmed.

ORDER AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

The information, and justified the order vecesing the judgment

name is such the find the fact that the first in the ciridovit of Jersby he received his information of a continuouse from a clerk or man ecoted at the deal. The admitted find is that he is defined and find he is the deficient of attacher was in relying mean Jerschy's otticerate on to the conditions, and use not required to verify the same by constiting the almotes of the court. The defendant can misled, and, incidently, the court. The defendant in this case was not the court. The defendant in this case was not one like court. The almost a sistemant in this case was not account or the almost a sisteman which we check of the court or the check of the court or the check of the check of the court or the check of the check of the court or the check of the check of the court or the check of the check of the court or the check of the check of the court or the check of the check of the court or the check of the check of the court or the check of the court or the check of the check of the check of the court or the check of the check of the court or the check of the check of the court of the check of the check of the check of the court or the check of the court of the check of t

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Assertingly, the order of the court is affirmed.

ADDRESS APPEARS.

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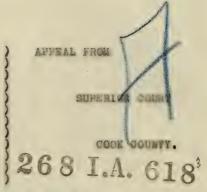
W. G. HANDLEY.

Appellee,

V.

CARL J. RINGBLOOM, ELON RINGBLOOM, DAVID RINGBLOOM and JOSEPH RING-BLOOM, copartners doing business as RINGBLOOM MEGG. MOTOR SAL S.

Aprellants.



Opinion filed Nov. 16, 1932

MR. JUSTICE HEBEL UKLIVEDED THE OPINION OF THE COUNT.

This case is based upon an action of assumpait brought by the plaintiff against the defendants. The case was tried by the Court without a jury, and after a hearing the court found the issues for the plaintiff and entered judgment in the sum of 1683, from which the defendants appeal.

ation is based upon the warranties of the defendants in the negotiation, sale and assignment of a chattel mortgage note signed by John Edward feldy, and guaranteed by Mary Feldy. It is alleged that plaintiff discounted the notes negotiated by the defendants, and thereafter caused judgment to be taken against the guarantor; that the guarantor, by an order entered in the Municipal Court of Chicago, obtained leave to defend on the ground that her signature on the note was a forgery. At the trial of the case Mary Reidy established her defence upon this point, and judgment was entered against the plaintiff. Defendants pleaded the general issue supported by an affidavit of merits.

The facts in this case are, substantially, that on the 3rd day of July, 1336, John Edward Weidy, of Chicago, bought an Cakland automobile from the defendants, who were engaged in the automobile business; that weidy paid for the automobile in part cash and executed a note for \$624, to be paid in weekly payments of \$11.18,

268 I.A. 618

Opinion filed Nov. 16, 1932

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This ease is besed upon an setion of assumptit brought by

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The case was tried by the

constance of the allegations of the plaintiffs declaration, then, then, and nesignment of a chartel mortgage note rigned on the tion, the salegad of the plaintiff discounted the notes negotiated by the defendants, and thereafter caused judgment to be taken equinat the guarantory that the guarantor, by an order estered in the Sanial of the Court of Chicago, obtained laws to defend on the ground that her ture on the note was a forgary. At the trial of the case for some ontered agrical the risintiff. Cafendants planded the general issue supported by an efficient of series.

The facts in this oses use, substantially, that on the Saiday of July, 1875, John Taward Beidy, of Unicago, bought an Caklanu automobile from the defendants, who were compact in the automobile business; that Saidy poid for the automobile in part cash and executed a note for ICL, to be paid in sachly payments of ill.18.

which included interest, and to further seemer the payment of the note, executed and delivered a chattel mortgage on the automobile. Upon the back of the note signed by him was a printed form of guaranty and a confession clause. This guaranty was signed in pencil with a cross, and the name of "Mary Meidy" written thereon by one Thos. M. Neade. The endorsement was witnessed by A. G. Molman. On October 39, 1926, after John Liward heidy failed to make payments as agreed, a judgment by confession was entered in the Municipal Court of Chicago against Mary Meidy upon the guaranty for the sum of 617. On May 5, 1927, hery Meidy filed a petition in the Municipal Court denying that she signed the guaranty upon the note, and on May 18, 1927, the Court, by its order, granted Mary Reidy leave to defend.

Thereafter, on December 13, 1889, the plaintiff mailed a registered letter to one of the defendants, Carl J. Mingbloom, requesting the defendants to have Mr. Reade and Mr. Molman present as witnesses at the trial, and further notified the defendants that in the event Mary Meidy should establish her defende, the plaintiff would look to the defendants on their warranty in the transfer and sale of the note. The case came up for trial in the Municipal Court in January, 1930, when the witnesses were heard and the court found the issues for the defendant Mary Reidy, and entered judgment against the plaintiff upon these findings.

In the instant case, certain of the municipal Court records were in evidence as exhibits, and the Court, after a hearing of the witnesses offered on behalf of the respective parties, entered judgment for \$683 in favor of the plaintiff.

The plaintiff's action is based upon an implied warranty "that the instrument is genuine and in all respects what it purports to be," as provided in Jahill's Ill. Fev. State. Chap. 98, Faragraphe 65 and 66, entitled "Regotiable Instruments."

which included interest, and to surther events the payment of the note, executed and delivered a chartel mortage on the automobile. Upon the back of the nove signed by him was a printed form of guaranty and a confession closes. Inte quaranty was signed in cools with a cross, and the ness of heary heldy exitten thereon mela of the state with a cross, and the ness of the filled to have the survey of the first way. It was a specific make payments as agreed, a judgment by confession was entered in the the hundripal fourt denying that she signed the guaranty upon the surfered a ness of left, the denying that she signed the guaranty upon the note, and on day ld, 1987, the deart, by its order, granted the note, and on day ld, 1987, the deart, by its order, granted

In the state of the defendants, derive of the plaints of mailed a state of the condition of the defendants, derived a state of the trivity and surface motified the defendants that would look to the defendants on their warranty in the transfer and sole of the mote. The dese case up for trial in the Municipal Court in January, 1820, show the withmoses were board and the court found the insues for the defendant hery Reidy, and entered judgment found the insues for the defendant hery Reidy, and entered judgment touch the slatetist warm those strainings.

In the inchest case, sertain of the municipal dourt records out to star a first of the waters as the service of the witnesses of tree of the parties parties, entered judgment for the plaintiff.

The plaintif's setten is breed upon an implied entranty that the isotemuck is gonuine and in all respects what it surports to be," as provided to Chill's Ill. Nov. State. Chap. 98, Paragraphs ES and 66, entitled "Negotiable Instruments."

The contention of the defendants is that a judgment is conclusive upon a third party only where the third party is notified of the pendency of the proceedings in apt time to permit him effectively to participate in the trial. The controversy in the instant case is whether the notice given by the plaintiff was in apt time. The notice was received by the defendants on December 13, 1339, which would indicate that they had knowledge of the trial and that this knowledge was acquired from the plaintiff in plenty of time to prepare for trial.

There is evidence in the record that the plaintiff had a telephone conversation with one of the defendants to the effect that the plaintiff purchased the Reidy note from the Ringbloom Stothers; that Wrs. Reidy claims she never signed the note, and call the attention of the defendants to this defense, because of the guarantee of the genuineness of the note by the Ringbloom Brothers. while objection was made at the trial to the admissibility of the evidence, this objection was not urged in the brief filed by the plaintiff as one of the errors relied upon for reversal. Mowever, the defendants in their briefs admit that they did receive notice on the 13th day of December, 1929, three weeks before the trial in the Municipal Court upon the issue as to whether Mrs. heidy signed the guaranty upon the note in question, and the defendants in the instant case were afforded an opportunity to defend in the action then pending and in which Mrs. Reidy was 'a defendant.

At that trial, the witnesses Holman and Reade testified but were unable to identify Mrs. Reidy as the woman who was present and signed as a guarantor. The contention of the defendants seems to be that an earlier notice would have made it possible to have produced witnesses who could identify Mrs. Reidy as being

The contention of the defendants is that a johrsont in conclusive upon a third party in notified of the pendancy of the erosewdings in set time to party in notified of the pendancy of the erosewdings in set time to pendit him in lastent case is whether the notice set the defendants on December time. The notice was received by the defendants on December 13, 1900, which would indicate their they had knowledge of the triel

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it that this, the edinosces folden and Scale testified but were unable to identify are, soldy as the women who was greent and signed as a gueranter. The convention of the defendants seems to be that an equiter notice would have under it possible to have produced withouses who could identify are. Neidy as being

present and signing as guaranter. If the defendants had any further evidence, the time to present it was at the trial in the municipal Court. As far as it appears from the record, all the evidence of the facts was presented and the court found the defendant many heidy not guilty. Onfortunately for the defendants, the witnesses present at the execution of the note in question were not able to connect are. Leidy with the execution of the guaranty.

There is but one more question to be discussed, and that is as to the failure of the plaintiff to foreclose the chattel mortgage covering the automobile and apply the sale proceeds to the note in question.

The record does not show that any evidence was offered as to the value of the sutomobile and the consequent loss to the defendants by reason of failure to foreclose. It necessarily follows that this court cannot say from the record to what extent the plaintiff's claim should have been satisfied by the sale of the automobile in question.

accordingly, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. CONCURS, HALL, J. NOT PARTICIPATING.

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WILDON, P.J. OCLOUING

35523

of CHICAGO, Guardian of the Estate of Alex Janossewski, a minor,

Appellee,

V.

JAMES TOMOYAK, doing business as SOUTH SHORE COAL & TEAMING CO.,

Appellant.

CIRCUIT COURT.

dede uconty.

268 I.A. 618 Opinion filed Nov. 16, 1932

MR. JUSTICE ABSEL DELIVERED THE COINTER OF THE COURT.

The defendant appeals from a jurgment in the sum of also entered in the Circuit Court of Gook County in an action of trespass on the case for personal injuries sustained by the plaintiff's minor, Alex Janoszewski.

The plaintiff's declaration consists of four counts. The first count alleges general negligence of the defendant in the operation by his servent of an automobile truck; the second alleges wilful and wanton conduct of the defendant in the operation of the truck by his servant; the third, that the automobile truck was operated at a rate of speed greater than was reasonable and proper; and the fourth, that the defendant negligently drove the automobile truck contrary to the statute in failing to give reasonable warning of the approach of the said automobile truck.

To this declaration the defendant filed a plea of the general issue, and the case proceeded to trial before the court and a jury upon the issues joined.

The defendant contends that the court erred in refusing to direct a verdict of not guilty both at the close of the plaintiff's case and at the close of all the evidence, and in denying defendant's motion for a new trial, upon the following grounds:

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wilful and wenton senduct of the defendant is the overation of greater than we reasonable and

To this declaration the defendant filled a plea of the general leave, and the mose presented to trial before the count and a jury upon the Leaves joined.

The defendant contends that the nourt erred in refusing to direct a verdist of not guilty both at the close of the plaintiff's case and at the close of all the evidence, and in denying defendant's mution for a new trial, upon the following

1. That the court erred in refusing to instruct the jury to find the defendant not guilty, as to the wilful and centon count, for went of proof of such acts; and 2. That the evidence preponderates in favor of the defendant.

The court has examined the evidence in the record and finds that the plaintiff's minor, Alex Janoszewski, at the time of the accident, we 13 years of age, and that on the 12th day of October, 1929, he was injured while at the intersection of South Chicago Avenue and 89th Street, in Chicago, Illinois; that South Chicago Avenue is a wide thoroughfare running north and south, upon which are street car tracks, and that 89th street is an east and west thoroughfare; that this boy, just before the accident, was walking with his sisters Virginia, 14 years of age, and Josephine. about 6 years of age, on 89th Street towards South Chicago avenue. and when they reached the northwest corner of South Chicago Avenue and 89th Street, in the street near the curb, a wheel dropped off the front axle of the coaster wagon which was being pulled by him. and the rear of the so-called coaster wason remained on the curb: that the plaintiff's minor in putting the wheel on the axle of this little wagon was kneeling in the street close to the curb, facing south; that north of the boy 25 to 40 feet, an automobile truck of the defendant was standing at the curb on bouth Chicago Avenue, on the west side of the street, pointing in a southerly direction; that two men came out of a restaurant at this point and got into the sutomobile truck; that the driver, without any warning by the use of a horn or other signal device used for that purpose, started the truck at a fast rate of speed and run over the boy's legs and dragged him into the intersection of South Chicago Avenue and 89th Street; that the minor plaintiff was under

-81

hes become all al seasblys off berliners and frues add finis that the gladeryfite other, they determine ut the time of the assistant, will be yours of age, and then on the Little Lay of Country last, he was knywed with as the harmonic nor as just presumed Street and patential physical 22 property that against appeals decir allies has dress planter exchangement ofth a at more, agressed has feen as all feestly dies poly hits process his powers by "billion now appropriate and excited that your airs point provided your ith the longining la years of eye, and longoning, angers morald about about there are no was to have I found names openful. Most he was not present out before puts your tor-The Samuel Jonia & Jose and Long Joseph will al . Namely 8566 506 wid yo bollon gains new dolds moyer retunes put le c . ... and the reer of the se-colled coaster respon reacted on the curb: he save say so looks his politics at tends officially any butte this sittle as gon was tusting it the atreet close to the ours. flidomotur on thet be at the bay to the tent and those gainst onepido dovod no dano ode da nathones ase incinotes od le fourt Avenor, on the sust ends of the street, pointing in a southerly duing alds in Justuater a to two man and ands qualifierith and got into the withouth is that that the driver, without was and to the une of a hora or other aland device used for the purpose, started the truck of rest rote to special and hetrate, seeque the boy's lags onl stanged him late the intersection of Louis rates now Militaring soons and field greens gift for more; spaces

the automobile truck when it stopped; was unconscious and bleeding from his nose and mouth; that he was taken to the south Chicago Mospital and remained there for a period of three and a half months, after which he was removed to his home; that as a result of this accident he had a fracture of the right femur in the middle portion; that his leg is about one-half inch shorter than it was before the accident, and that the condition shown by the fracture is fixed and permanent.

that he did not give any signal when he started the truck from the curb; that he saw the boy's sisters at the curb, but did not see the boy.

The rule of law applicable to the facts in this case is:

That the negligent conduct of a defendant, which has resulted in injury to another, ascunts to wantonness, is a question of fact to be determined by the jury if there is any evidence in the record fairly tending to show "such a grees want of care as indicates wilful disregard of consequences or a willingness to inflict injury."

Talldren Express Co. v. Erug, 291 Ill. 472.

tion to interfere with the view of the driver if he had looked in the direction of the plaintiff's boy before the accident. It was for the jury to say whether the defendant, by his acts, showed a conscious indifference to consequences and the exercise of sare to avoid the injury when he actually knew of the imager to which the boy Alex Janeszewski, was exposed at the time the truck was operated. This view of the court has been expressly approved in the case of Giles v. Peoria By. Oo., 153 Itl. app. 635. From the views we have expressed in this opinion it will not be necessary to discuss the question further, other than to say that there is evidence of a wilful and wanton set, and the trial court did not err in refusing

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At the trial, the driver of the automobile truck testified
that he did not kive way signal when he started the truck from
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The rule of lew applicable to the facts in this case is;
That the negligant conduct of a defendant, which has resulted
in injury to another.

It may be a served to reat a serve as indicated
that the consequences or a villiagness to inflict injury."

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top lies amovement, we exposed at the time the truck was operated.
This wise of the court has been expressly approved in the case of
the rise opinion it will not be necessary to discuse the
tion further, other then to sey that there is evidence of a

to direct a verdict of not guilty on this count.

The other point made by the defendant, namely, that the evidence preponderates in favor of the defendant, is without merit. From a careful reading of the evidence, we have reached the conclusion that the plaintiff's action is sustained by a preponderance of the evidence, and that the trial court was justified in overruling the defendant's motion for a new trial.

There being no reversible error in the record, the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. CONGURS, HALL, J. NOT PRRTICIPATING und the trial court was justified the trial court was justified to a new trial.

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ACTIVIDATE AND ASSAULT

35548

MILWAUKEE TOOL & FORGE CO., a Corporation,

Appellee,

V.

JOH G. MANN, doing business as LIONEL & COMPANY,

Appellant.

APPEAL FROM

268 T.Al 6

Opinion filed Nov. 16, 1932

MR. JUSTICE ATHEL DELIVERED THE OFICION OF THE GOURT.

This is an action in the Municipal Court of Chicago by
the plaintiff against the defendant, Joe G. Mann, doing business
as lionel & Co., for Al311 for goods and chattels sold to the
defendant, which claim appears from the plaintiff's itemized
statement of claim. The defendant admits plaintiff's claim, but
states both in his affidavit of merits and in the set-off filed
to the plaintiff's statement of claim, in substance that on
September 5, 1026, pursuant to negotiations with the plaintiff,
the plaintiff acknowledged in writing that it sold to the defendant
3800 rim wrenches at 69 cents each; that thereafter the plaintiff
failed to deliver 1900 wrenches to the defendant and the defendant
was damaged in the sum of \$5,339, and that after allowing the
plaintiff a oredit of 1311, there was a balance of \$4,028 due
the defendant.

The case came on for trial in the municipal Court with a jury, and at the close of all the evidence, the court instructed the jury to find the issues for the plaintiff and entered judgment in the sum of [131], from which judgment the defendant appeals to this court.

The facts in evidence are, substantially, that the plaintiff sold and delivered to the defendant 2,000 wrenches at 69 cents each, and that the defendant on October 20, 1928, paid 1938 on account

**83-510** 

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Opinion filed Nov. 16, 1932

This is an action in the Aumicigal Court of Chicago by
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statement of claim, The detendant admits plaintiff's claim, but
attement of claim, The detendant admits plaintiff's claim, but
the misintiff's statement of claim, in the set-off filed
fortcamer 5, 1235, ourseast of claim, in substance that on
September 5, 1235, ourseast to negotiations with the plaintiff,
the plaintiff acknowledged in writing that it sold to the defendant
failed to deliver 1800 wrenches to the defendant and the defendant
plaintiff a credit of 1231, there was a balance of 14,078 due
the defendant.

The case come on for trial in the Municipal Court with a jury, and at the close of all the evidence, the court instructed the jury to find the issues for the plaintiff and entered judgment in the sum of Mail, from which judgment the defendant expects to this court.

The frote is evidence are, substantially, that the plaintlff and delivered to the defendant 2,000 wrenches at 88 cents each, and thus telephone on October 30, 1938, paid '138 on account

of the plaintiff's shipments, but failed to pay any part of the balance of said account, which payments were demanded by the plaintiff, both orally and in writing; that the plaintiff is a disconsin corporation and has its place of business in Wilwaukee; that the defendent, and one A. I. Epton, called at the defendant's place of business between the 15 and 25th of sugust, 1978, and after considerable negotiation between the parties, the plaintiff agreed to sell the wrenches in question at 00 cents each, and that the defendant by letter ordered 4,000 arenches at this rrice, which order was received and acknowledged by the plaintiff, and thereafter followed the shipments by the plaintiff to the defendant, for which the plaintiff received but one payment, leaving a balance of 1311 due. Defendant by a letter dated hovemb r 13, 1928, addressed to the plaintiff, ordered 1,000 more of the grenches, but this order was never accepted by the plaintiff. Therefore, the question before this court is, did the defendant establish his set-off? The defendant has the burden of proof upon that issue. The evidence does show that the defendant ordered wrenches at a price agreed upon; that the shipments were received, but not paid for, by the defendant, except one payment of \$138, leaving the balance, which is the subject of this controversy.

The evidence does not show when the defendant was to pay for the merchandise. Chap. 1312 of the Sales Act, Sec. 48 Cabill's Ill. Nev. Stats. provides, that unless otherwise agreed.

"delivery of the goods and payment of the price are concurrent conditions; that is to say, the saller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

The evidence is clear in the instant case that the defendant failed to pay the balance due after demand by the plaintiff, and not even after the suit was instituted. The defendant

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The evidence does not show the defendant was to pay for the serdmenties. the chief her the serdmenties.

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The evidence is clear in the instact onse that the defendant failed to pay the bollence due affer demand by the plaintiff, and not even efter the suit was instituted. The defendant expects the plaintiff to fully perform, but does not offer to do what the law requires, that is, to pay for the goods already delivered.

The question of payment was passed upon in the case of Dwyer v. Duquid et al. 70 Ill. 308, The Court said:

"By the terms of the contract between the parties in this case, nothing was said about the time when payment was to be made. In such cases, the law implies that payment is to be made on delivery of the property. Smith v. Gillett, SO Ill. 290; mets v. Albrecht, 52 id. 492. If, therefore, appellant refused to pay for the coal after delivery, and when payment was demanded by appellees, he was in default, and if appellees, prior to appellant's default, had complied with their part of the contract, they were authorised to treat the contract as abandoned, and might recover in assumpsit, on the common counts, for the amount of coal they had delivered, according to the contract price."

And again, this court in the case of Consumers But. Gil Co. v. estern Petroleum Co., 216 Ill. App. 382, said:

"We think it of little moment, under the law controlling the rights of the parties, which of these two contentions is established by the proofs, because plaintiff refused further deliveries on the ground that defendant was in default in paying for the oil already delivered. Whatever might be the decision of the contention as to which of the two contracts the fuel oil in suit was delivered under, defendant was undeniably in default in its payment therefor. On its own proof it had breached its contract; it was therefore in no position to maintain its set-off for damages, even conceding that defendant's contention as to the contract between the parties was sustained."

At the close of all the evidence, in accordance with the peremptory instruction, the jury found for the plaintiff and against the defendant in his plea of set-off.

A familiar rule is that a plea of set-off is a counter-claim in which the defendant is the plaintiff, and he must establish his right to recover against the plaintiff upon his action, and if his action is for a breach of contract, it must appear that he, the defendant himself, is not in default of performance of the contract.

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peremptory instruction, the jury found for the plaintiff and against the defendant in his plea of set-off.

A familiar rule is that a slee of set-off is a dounter-claim
in which the defendent is the pictatiff, and he must establish his
right be recover against the picintiff upon his action, and if his
sation is for a breach of contract, it must appear that he the
defendant himself, is not in default of performance of the ecutrest.

Upon the theory of the defendant that there was an enforcible contract between the parties, the evidence is that the defendant was in default for failure to make payments for the merchandise accepted by him, and, having breached the contract, the plaintiff is not liable to him for alleged damages.

It appears from the evidence that the defendant did not perform, and as the amount of the plaintiff's claim was admitted and there was no question of fact to be considered by the jury, the court did not err in instructing the jury to find the issues for the plaintiff.

It will not be necessary to pass upon the question of the evidence of damages offered by the defendant, in view of the conclusion reached by this court that, from the evidence as it appears in the record, the defendant is not entitled to recover upon his set-off. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

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35560

JACOB B. ZACKMAN.

Appellee,

V.

A. M. ANDREWS, et al.,

Appellants.

APPEAL FROM

SUPERIOR COURT

268 LA. 6192

Opinion filed Nov. 16, 1932

MR. JUSTICE HEBEL CELIVERED THE OFINION OF THE COURT.

This is an appeal by the defendants from a decree entered by the court overruling the exceptions of the defendants to the Master's report and finding that substantially all of the material charges in the bill of complaint are sustained by the evidence, and decreeing that the complainants are entitled to an accounting by the defendants.

Ocurt of Cook County in the year 1924. Thereafter the defendants filed a general appearance and answer under oath. The bill prays for an accounting and for other equitable relief, growing out of the alleged purchase of certain stock by the complainants upon certain false statements and representations made by the defendants, which they knew to be untrue when made, and certain statements and representations made by the defendants with the intent to cheat, wrong and defraud the complainants of their money and property. The bill alleges that the sale of the stock was fraudulent and void, and the complainants demand the return of all money paid and collateral deposited by them.

The cause was referred to a Master, who, after a hearing, made his report to the court, and the court overruled the objections of the defendants, standing as exceptions to the Master's report,

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268 T.A. 6192

Opinion filed Nov. 16, 1932

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and entered a decree in favor of the complainants for cancellation and an accounting against the defendants, Archie M. Andrews and Chester O. Andrews, and that the cause be re-referred to a Master to state the account between the parties.

It appears from the record that the complainants did not waive an ensuer under oath by the defendants, and therefore the defendants filed an ensuer under oath, as required by law.

The defendants contend that so far as the answer was responsive to the bill, it was evidence, and could only be overcome by two witnesses, or one witness and corroborating circumstances. The complainants' reply to this contention is that an answer based on information and belief is not evidence when it is obvious that the answer as made is not within affiant's personal knowledge. Having this contention in mind the court will consider the evidence in the record in order to determine whether the Chancellor erred in entering the decree.

The complainant, Jacob B. Eackman, lived most of his life on a farm near Shelby, Ohio, with his wife, Ida Eackman, co-complainant and their three children. Neither one of the complainants had a more than/country school education. For several years Jacob B. Zackman worked as a laborer in the Chio Seamless Tube works of Shelby, in which consern he had some of its capital stock. The complainants, from their savings, carried a joint bank account, and what money was saved they invested jointly in their farm and homestead.

The first stock transaction involved in the present litigation occurred in March 1918, when one %. G. Tabor, a salesman for Andrews & Company, a common law trust, of which company the defendants were members, telephoned to Waskman from Cleveland, which and entered a decree in favor of the coerisinants for easellation and and en coeristing agricult the factories and and en coeristing agricults the factories and

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ent three children. Neither one of the empleinants had

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and reported to him that the defendants were investment bankers, and discussed the sale of certain stock. This telephone conversation was followed by literature from the defendants. Backman was flattered and called at the defendants place of business, which was sumptuously furnished. The dealings with the defendants began from this visit, when he was induced by salesman Tabor to buy 1500 worth of Dictograph Froducts Company 35 Preferred Stock. The complainants paid 1350 cash, and the balance was to be paid in 60 days.

In all, there were nine transactions with the defendants, who were doing business in Dieveland, Ohio, from April 1919 to Merch 1930. The defendants obtained 7,875.00 in Liberty donds, cash and securities from the complainants. The defendants represented that they were investment bankers, and in all the transactions no certificates of stock were tendered and delivered to the complainants by the defendants.

The defendants inveigled the complainants into a series of investment transactions, and they knew from information that the complainants could not satisfy the claim of the defendants based upon such transactions. One statement shows an indebtedness of about \$3,590 balance to the defendants. The complainants delivered to the defendant additional collateral in the amount of \$1,700, reducing the balance on its face to \$1,800. This additional security the defendants received, but, until confronted with the stock transfer record, never credited the complainants account. Eventually, it appears from the record, the complainants account were located and traced through corporate stock books as standing in the name of the defendants. The defendants purported to control and sell stock in the Dictograph Froducts Company and the Standard Cap and Seal Company on extended installment payments to the

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It is the week and delivered to the control of delivered to the

The defendants investions, and they case from information that the samplainants are start from information that the complainants could not actionly the claim of the defendants beard in . such transactions. One attendants above an indebtedness of about 13,500 belonce to the defendants. The complainants delivated reducing the belonce on its face to [1,600. This additional security the defendants received, but, until confronted with the stock transfer record, mover oredited the complainants account. Stock transfer record, mover oredited the complainants account. Transfer its and traced through corporate stock as standing in the name of the defendants. The defendants purported to control and stack in the biotograph traducts Company and the standard and sold in the biotograph traducts Company and the standard

complainants, and received from the complainants the following items:

April 2, 1919 April 11, 1919 \$250.00 Cash 250.00 Cash May 15, 1919
July 33, 1919
Oct. 10, 1919
Oct. 14, 1919
Oct. 23, 1919
Nov. 17, 1919 500.00 Liberty Bonds 500.00 Liberty Bonds 300.00 Liberty Bonds 940.00 Cities Service 500.00 Liberty Bonds 100.00 Liberty Bonds Nov. 24, 1919 Dec. 1, 1919 Dec. 2, 1919 Jan. 19, 1920 Jan. 26, 1920 Sept. 35, 1920 500.00 Liberty Bonds 950.00 Liberty Bonds 100.00 Liberty Bonds 950.00 Liberty Bonds 400.00 Liberty Bonds 1,260.00 Fourteen Chio Seamless Tube Sept. 25, 1920 475.00 Two notes Jesse Stephens

It appears from the evidence that it was represented to the complainant Sackman that Andrews & Company as Investment Bankers controlled the Diotograph Products Company, a New York Corporation and its stook, and that they were about to put the stock on the New York curb; that the preferred stock sold to the complainants was convertible at any time into common stock, and when Andrews & Company put it on the curb the common stock would rapidly advance in price, so that he, Zackman, could convert the preferred stock into common stock within the next ninety days. Zackman advised Tebor, the agent of the defendants, to issue the stock certificates in the name of himself and his wife, that he had no experience in stock transactions. Tabor told him to leave everything to them, that they would attend to all details; that they would never close him out; that after he bought the stock from them, the defendants, he would be one of their clients; that Andrews & Company was a good, reliable firm of Investment Sankers, and they wrote to Zacksan that they regarded him as a client and would take care of him.

In all the transactions between the complainants and the defendants, the defendants issued confirmation alips, and in each

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In all the transactions between the completents and the

imtance induced the complainants to leave as a pledge the stock already purchased as collateral for additional stock. As a matter of fact, no stock certificates were ever issued to the Mackanas, nor were they sold stock, but on the several confirmation slips were three mysterious letters "VTC", meaning to the initiated, Voting Trust Certificates.

After the complainant Sackman had purchased 13,000 worth of Diotograph preferred stock, he was admised that it was not convertible into common stock. This restriction on conversion of the stock was due to a plan of Archie M. Andrews to secure certain secret profits to be made under the terms of his Voting Trust agreement. Complainant Sackman testified that he never had his attention called to the fact that he was purchasing Voting Trust Certificates; that he does not know what a Voting Certificate is, and knew nothing of the terms of the Voting Trust; that he and his wife always understood and believed until the time that his attorney directed his attention to it, that he and his wife were buying common and preferred stock in the concerns.

that they could not convert this preferred stock into common stock.
They asked for an explanation and were told that the Board of Directors of the Diotograph Company, under the guidance of Archie B. Andrews had a meeting at which they put off the conversion date until after the first of the year 1980, but that Andrews & Company had a new stock they were bringing out for their clients, known as the Standard Cap and heal Corporation, which would be convertible in ninety days; and that it would go on the ourb market at once.

Zackman was solicited with the same promises and representations to purchase the preferred stock and exchange it for the common stock when it went on the curb. It was represented to the complainants

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that the Standard Unp and Seal stock which they offered them at \$10.00, was going on the curb and was at that time selling at \$12.00 on the market. As a matter of fact, as shown by the evidence, there was no trading in theorem market, and no stock was sold.

During all this time both of the complainants received literature by mail from Chicago under andrews a Company's name as Investment Sankers, part of which was in the form of confidential letters, part in the form of a "house-magazine" called "Nor", and part in the form of circulars falsely representing andrews & Company as: (1) a concern established in 1900; and (2) as owning large buildings in New York and Chicago. In one of the letters received by the complainants they were requested to get their financial advice about stocks from the defendants. They relied upon and believed these false representations, and after the third or fourth transaction, that is, on June 3, 1919, Mr. Mackman, the complainant, informed such of the representatives of Andrews & Company at Cleveland, that he and his wife had more stock than they could pay for and could not go through with the transactions they were getting into, but in each case the salesman told him that he had nothing to fear; that he was one of their clients, and Andrews & Company would take care of them and would not sell them out; that they would have all the time they needed, and that in any event they had "Extension Privileges;" that the stocks were going up in price and that they could do this because complainants were clients and that they need not worry.

At one time Sackman, complainant, inquired as to the kind of firm the Company was, in these words:

"Kere they brokers that put figures on a blackboard and if you don't put up the money in 24 or 48 hours they would close you out?"

and Tabor advised him that indress a Company were not brokers; that they were bankers, and that they wanted to make an investment client 110.00, was poing on the ourb and was at their rime celling of 113.70 on the market. In a metter of face, as share by the cridenos, there was no traiton in theopen parties, and no stock was nold.

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out of him and wanted to make some money for him.

It appears from the record that the Standard day & Seel Company was in the business of assufacturing bettle espains machinery, which was an Illinois corporation, and subsequently liquidated under an order of court: that irchie W. indrews, through Andrews & Company, bought this concern from one Tevander for 1451,000 cash; organized a 18,000,000 Virginia corporation and turned over the assets purchased from Tevander, and as a part of this organization scheme, andrews a Company received from this Virginia corporation one and one-half million dollars of stock, being one-half of the preferred and three-fourths of the compon stock, while Tevender, the other party to the transaction, received the balance. The stock of both Andrews & Company and Tevander was then put into a voting trust by a declaration dated May 1. 1919, reciting that Archie M. Andrews, C. Tevander, and R. W. Everett, their attorney, were the trustees; and that the stock was to be held by them under the terms of a certain agreement.

by the complainants. The defendants did not appear and testify as to their knowledge of the facts. The evidence offered by the defendants did not materially contradict the evidence of the complainants. While it is true that the sworn answer is evidence under the statute and could only have been overcome by two witnesses, or one witness and corroborating circumstances, the answer so far as it is responsive to the bill is only entitled to weight when it is entitled to belief. Fryrear v. Lawrence, 10 Ill. 325, when it appears from the admissions in the answer, or from the facts set out, that they are not within the personal knowledge of the defendant the answer is not entitled to weight as evidence. I A. L. 39.

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It times the four the present that the bytakent distributed on the terminate of constanting orbits strains addressed but confromment that III as not first, eventions Appeted appeted it added, but those in other as well- feducated dat trianger, and both removes that begand appropriately Me selfwinerer alnight 50,500,00 a nectanger place or the TALFORD & An Ann. Chicago, man Anapleyor affects will apply Smatted bill and beritain transmit and the property satisfied than this Theretain, explication of the blokens for one onlineaught blains IT market hir to adress to annual ten Developp out to Madeson solded bestime and research att at grow refer off actions; aller alege the balance. The check of lower believes a fluorest continued all that derive maintaint had it has described a with her west has COURS serietary that treates to televate to terrodice tel for Deposit, that afternoy, when the tempens; and that the proof too interest objects of to exter oil tries and to high he ad

defendants did not meterially contradict the aridence of the almants. Shine it is true that the sach apper is evidence ander the statute and or one witness and could anly have been coercome by two witnesses, or one witness and in, circumstances, the enewer so far as it is responsive to the bill is only entitled to weight then it is entitled to salisf. Intrance, in lil. Shy had it supports for salisf. Intrance, or from the same also the facts set it supports from the same also the enemer, or from the facts set

It is apparent from the answer that the defendants had no independent knowledge in regard to the various representations and transactions had with the complainants; that the answer on its face is upon information which they received and derived from others, and is therefore based upon bearsay, and not upon the knowledge of these defendants. No doubt, the Chancellor considered the answer of the defendants/applied the rule suggested by the Supreme Court in tinkelsann v. Minkelmann, 345 Ill. 566, which is to the effect that a sworn answer is entitled to weight only when it is entitled to belief.

which would justify a court of equity to act in a proper case must contain a statement of fact past or present made for the purpose of inducing a party to act; that it is untrue and known to be untrue by the party making the statement; that the person to whom the statement is made relied upon the truth of it, and that the statement so made is material. The facts justify the conclusion that the defendants obtained the confidence of the complainants, and that they, the complainants, relied upon the defendants' representations, not alone that they were investment bankers, but also that they had induced them to purchase the so-called stock in the several transactions had with these defendants.

iduring the progress of their dealings, the defendants accepted the complainants' money, led them on to purchase what they believed to be stock certificates, deceived them as to the character of the several dealings, and did not impart knowledge to them that the several stock transactions were controlled by a voting trust agreement. These defendants went so far as to convert certain stocks and notes of the complainants to their own account, and only credited the account of the complainants with these transactions when they were threatened with a suit for an accounting. The truth

If is reported from the enters the derionische had no independent the two-locks in repair to the verticus representations and transfer the enters on its transferious that the enters on its remainder the enters on its remains that the enters of the form of the remains of the r

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regarding these transactions was fully revealed upon the trial of the case before the master, and the evidence clearly indicates a ruthless lust for the money of these complainants, who were stripped of their savings by a so-called investment banker.

It will not be necessary to further discuss the facts, but it is sufficient to say, in reply to the defendants contention, that the false at tements made related to promises to be fulfilled in the future, that the complainants are entitled to relief. The facts clearly establish that the complainants were influenced by representations of a past or existing fact in connection with future promises to be fulfilled, and the court did not err in granting the relief prayed for by them upon the ground urged by the defendants. The rule applicable under the facts before us is well expressed in 51 A. L. R. 86, as follows:

"If one relies, in entering into a contract, in part at least, on misrepresentations of a past or existing fact, the courts will not indulge in psychology in an attempt to split hairs and make a metaphysical division of inducements in order to permit the guilty party to escape responsibility for the fraud, even though there was reliance in part on a promise which would not itself serve as a basis for fraud."

And again, this court in <u>Zufelt</u> v. <u>Andrews & Company</u>, No. 29357.

Appellate Court, First District (Not reported) said, quoting from Cooley on Torts:

"There are some cases in which even the false assertion of an opinion will amount to a fraud, the reason being that, under the circumstances, the other party had a right to rely upon it without bringing his own judgment to bear. Buch is the case where one is purchasing goods, the value of which can only be known by experts, and is relying upon the vendor sho is a dealer in such goods to give him accurate information concerning them."

The defendants contend that the complainants persuaded the court to adopt the theory that there was a fiduciary relationship between the complainants and the defendants. This rule has been before the courts in numerous cases, and a late case in the Supress Court entitled NeCord v. Soberts, 334 Ill. 233,

to the out more believer this eventions on the trial to the constitution of the country indicates to the country indicates the country to the country the test there are the test to the country by a so-solied investment beaker.

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Secies this court in rollil v. indress & Courtes. No. 22759.

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The defondance contend that the complainment persuaded the deart the though that there was a fiduciary relationally persent the complainment and the defondance. This network the courts is numerous deads, and a late vast

reiterates the rule in these words:

"A fiduciary relationship extends to every possible case in which there is confidence reposed on one side and resulting superiority on the other. The relation and the duties involved are not necessarily legal. They may be moral, social, domestic, or merely personal. If confidence in fact exists and is reposed by one party and accepted by the other, the relation is fiduciary, and equity will regard dealings between the parties according to rules applying to such relation."

It is evident that the defendants had the confidence of the complainants, which they accepted and used to their advantage in the several dealings had with the complainants. This relation was a fiduciary one and the chancellor in entering the decree did not err in granting the relief as prayed for in the bill of complaint.

We have considered the questions raised by the defendants, and conclude that the decree entered by the Chancellor is fully sustained by the record and is supported by the law applicable to actions of this kind.

Accordingly, the decree is affirmed.

DECREE ANTIRMED.

WILSON, P.J. CONGURS. HALL, J. NOT PARTICIPATING.

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Day, J. bel Professioner.

EDWIN A. FELDOTT.

Appellee.

AXEL G. JOHACON.

Appellant.

APPEAL FROM

MUNICIPAL COURT

Opinion filed Nov. 16, 1932

MR. JUSTICE RESEL DELIVERED THE OFFICE OF THE DOUBT.

This appeal is from a judgment entered in the Municipal Court of Chicago in the sum of 300 in favor of the plaintiff.

Plaintiff's action is for services rendered under the terms of a contract with the defendant. The plaintiff, an attorney, was retained to prepare and file the defendant's Federal Income Tax Return for the year 1927. For these services the defendant was to pay an amount equal to one-third of the difference between defendant's estimated income tax of \$3,000 and the amount due according to the Income Tax Return prepared by the plaintiff and signed by the defendant. The tax paid by the defendant for this year was 300, and the amount due the plaintiff under the contract was 1300. The amount sued for is 1500, which the plaintiff alleges the defendant promised to pay.

To the statement of claim the defendant filed an affidavit of merits denying that there was any such agreement between the plaintiff and the defendant. A hearing was had before the sourt. and the plaintiff and the defeniant were the only witnesses heard upon the issues joined by the parties.

There is no dispute between the parties that the defendant retained the plaintiff to prepare his Income Tax Meturn: the conflict in the evidence is as to the amount to be paid to the

263 I.A. 619

Opinion filed Nov. 16, 1932

Court of Oblongo in the sum of 9800 in fever of the plaintiff.

Plaintiff's sector is for services rendered under the terms of a continuet with the defendant. The plaintiff, an attorney, was retained to prepare and flip the defendent's Federal attorney, was retained to prepare and flip the defendent and the smount of 17,000 and the smount and signed by the defendent. The text paid by the defendent for this year was 1800, and the amount due the plaintiff under the centract was 1800. The smount and for is 1800, which the plaintiff!

plaintiff and the defendant. A hearing was had before the court, and the plaintiff and the defendant sere the only sinesees heard upon the issues joined by the preview.

There is no dispute between the parties that the defendant retained the plaintiff to prepare his Income for severa; the conflict in the evidence is as to the assumt to be puid to the plaintiff for such services. The amount of the income tax to be paid by the defendant and the quarterly payments were discussed by the parties. The defendant admitted in his affidavit that an agreement was entered into, but denied that there was an agreement as to the amount to be paid to the plaintiff, which admission and denial, no doubt, were considered by the court in its decision finding the issues for the plaintiff. These were all questions of fact for the court, and the court found that the plaintiff had established his case by a preponderance of the evidence, and in reaching this conclusion, no doubt passed upon the credibility of the mitnesses that appeared before him, and the probability of the statements made by the witnesses while on the stand.

The familiar rule which applies is that unless it appears from all of the facts and circumstances in evidence that the finding of the court is against the manifest weight of the evidence this court will not interfers. As far as we can determine from the record in this case, the conclusion of the court is supported by the evidence; and therefore the court did not err when it found for the plaintiff.

Judgment. The plaintiff is not complaining as to the amount of the judgment, which was \$200. He had a right to saive the full amount due under the contract and accept a less amount. No cross errors were assigned by the plaintiff, and he is not objecting in this court to the amount of the judgment.

Complaint is made by the defendant that the plaintiff
was unfair in that by his conduct he took advantage of the defendant;
that the plaintiff's services were purely clerical and such as
any accountant familiar with the preparation of income tax returns
could have rendered. This court is unable to find in the record

plaintiff for such services, the count of the income tox to be paid by the december the questionly represent were discussed by the parties. The defendant edulted in his efficient that an exceeded to his efficient that a systement was entered into, but denied there were an extrement as to the smooth to be paid to the plaintiff, which adminsion and denied, no doubt, were considered by the coupy in the decision of feet for the south, and the south that the plaintiff had extablished his case by a prescuterance of the evidence, and in reaching this conclusion, no doubt mand approximation of the witnessess that approximately of the witnessess that approximation of the storestallity of the witnessess that approximation, and the probability of

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Comment is acte by the istendant as to the excust of the spent of the judgment. The plaintiff is not complaining as to the amount of the judgment, which was 1970. He had a right to salve the full amount due under the contract and comment a loss amount. No errors serves seek not the plaintiff, and he is not objecting in this court to the smoont of the judgment.

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was unfair in this by his openius he took advantage of the defendant;
that the plaintiffs naryiess were surely clarical and such as
any accountant finiliar with the presention of income ten returns
yould have rendered. This court is unable to find in the record

that any fraud was practiced by the plaintiff to induce the defendant to act as he did. The defendant was a general contractor, and, no doubt, from the very nature of his business, understood contracts. The fraud an attorney practices upon his client must be established by satisfactory proof. In the instant case the defendant did not call our attention to any practice chargeable to the plaintiff that would indicate fraudulent conduct in dealing with the defendant.

as an evidence of fairness, the plaintiff, without objecting to the entry of the amount of the judgment, is content, notwithstanding that it is for less than is his due.

The record is free from reversible error, and the judgment is accordingly affirmed.

AFFIRMED.

WILSON, P.J. AND HALL, J. CONGUR.

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of old part and balls.

PHILLIP STATE BANK & TRUST COMPANY, a corporation,

Appellee,

V.

ANNA MAY MURUAY,

Appellant.

APPEAL FROM

SUPERIOR COURT

268 I.A. 619

COOK GOUNTY.

Opinion filed Nov. 16, 1932

MA. JUSTION REARL DELIVERED THE COURTED OF THE COURT.

The judgment entered in this case was by confession on a note signed by the defendant and made payable to the plaintiff.

The judgment was for the sum of 'll.256.31, which includes the sum of 'l,032 as attorney's fees. The note provides for the allowance as attorney's fees of a sum equal to log of the principal amount of said note.

On Reptember 33, 1931, a patition was filed by the defendant to open the judgment, which was denied. Later, the defendant was given leave to file her smended patition to vacate the judgment, which amended patition was permitted to stend as an affidevit of merits. The cause then proceeded to trial, and the court confirmed the judgment, which has been satisfied to the extent of 10,200. This sum represents the amount of principal and interest due on the note. From this judgment the defendant perfected an appeal to this court.

The defendant contends (1) that the pisintiff has no interest in the note, (2) that the pisintiff had no authority to cause a judgment to be entered thereon; and (3) that the attorney's fees allowed in the entering of the judgment on the note are exorbitant.

had no interest in the note in question, and that the note is for

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268 LA 619

Opinion filed Nov. 16, 1932

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The defendant contends (1) that the pisintiff has no suthority to theorem in the note, (3) that the picintiff had no suthority to occurs a judgment to be occurred theorem; and (3) that the externey a fore allowed in the exterior of the judgment on the note are

As to point (1), the defendant contends that the pictuality had no interest in the note in question, and that the note is for

a balance due from the defendant to Charles E. Carpenter in the cum of \$10,200, payable seventy-five days after May 4, 1931. It appears from the evidence that the note when executed by the defendant was made payable to the order of the plaintiff bank, and contained a confession clause in which the plaintiff was authorized to confess judgment in a proper case, and, as a part of said judgment, to include a sum not to exceed 10% of the amount of principal and interest due as attorney's fees.

plaintiff bank in the sum of 13,600, as evidenced by his collateral note. The evidence does show that the defendant's note was delivered to the bank by Carpenter, and the dispute is whether the note was delivered to the bank by Carpenter for collection, or as a part of the collateral deposited to secure the payment of his note. The fact that the defendant executed this note and made it payable to the bank is evidence that the plaintiff had an interest in the note. Mr. Carpenter explains this by testifying to the effect that the defendant's note was signed and delivered to the plaintiff for the convenience of the witness Carpenter; that the principal and interest on this note was paid by check made payable to Carpenter and deposited to his account in the bank, and that the plaintiff had possession of this note only for collection.

The plaintiff calls our attention to the rule that evidence is not admissible to show that the plaintiff, although the legal holder of a promissory note, is but the nominal party in interest, and cites cases to sustain his position. However, this evidence is in the record without objection, and no doubt was a part of the

In the mote. Hr. Cadjesher explains this by testifying to the affect what the defend at the same algued and delivered to the plaintiff for the convenience of the vicuous Jureanter; thet

The plaintiff colls our attention to the rule that cridence
is not addissible to show that the plaintiff, although the legal
holder of a promiseour note, is but the neminal party in interest,

is in the record without objection, and he doubt was a part of the

facts considered by the trial court.

as to the second point, that the plaintiff had no authority to cause judgment to be entered, there is evidence in the record that Carpenter wented the plaintiff to collect the amount due on the note, and if not paid upon the due date, the plaintiff was to sue. This evidence of the plaintiff was corroborated by a letter written by the plaintiff to Carpenter, in which it appears that they advised the defendant that "she must pay the note or be ready to stand suit," and the inference to be drawn from the fact that this letter was received by Carpenter is that he had knowledge that if the defendant failed to pay the note when due, suit would follow.

as to the third point of the defendant on the question of the reasonableness of the attorney's fees, it might be well to have in mind the rule that applies to the instant case and which needs no citation of authorities, that where an agreement is made by the maker of a note for a fixed amount as attorney's fees in case judgment should be confessed upon the note, it is not error to allow the sum agreed upon, unless it is clearly unreasonable. The amount of \$1,020 as attorney's fees in the instant case, was in accordance with the agreement contained in the confession clause of the note. No point is made that the evidence does not justify the allowance, except that the amount allowed is unreasonable. Upon this question, the reasonableness of the attorney's fees was passed upon by the trial court, and the court having exercised its discretion, we are unable from this record to conclude that the court erred in allowing the amount.

for the reasons stated, the judgment is affirmed.

AFFIRMED.

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MARIE THAUDEUS.

Plaintiff in Error,

V.

CHECKER TAKI COMPANY, a corporation,

Defendant in Error.

SUPERIOR COURTY.

268 I.A. 6195

Opinion filed Nov. 16, 1932

MR. JUSTICE HYBEL CELIVE IND THE OFINIOR OF THE GOURT.

This case is before the Appellate Court upon a writ of error to review the record at the instance of the plaintiff. A judgment finding the defendant not guilty was entered in an action of trespass on the case brought by the plaintiff to recover damages for injuries she alleged to have sustained as a pedestrian, by being struck by one of the taxicabs of the defendant company, which it is alleged was negligently operated at the intersection of Jackson Soulevard and Sebash Evenue, Chicago, Illinois, on the 9th day of April, 1929.

In the discussion of the question before this court, we will first consider the written instructions given by the trial court to the jury.

Counsel for the defendant is frank in this discussion of the defendant's instructions, and admits that instruction No. 13 is faulty; that the giving of this instruction by the court to the jury is reversible error, and that the question is not saved for review unless the plaintiff saved this question by a proper exception assigning reasons. The instruction now under consideration is as follows:

"13. You are instructed that the agent of the defendant, Checker Taxi Company, in charge of the taxicab in question was not required to exercise the highest degree of care to avoid injuring the plaintiff upon the occasion in

268 1.4. 619

Opinion filed Nov. 16, 1938

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Defendant in freet.

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Counsel for the defendant is front in this listenation of the defendant's instructions, and edulate that instruction No. 13 is faulty; that the giving of this instruction by the court to the jury is reversible exter, and that the machine not noved for

i carrany, in charge of the vericed in eneution in eneution to execute the highest degree of care to evoid injuries the plaintiff upon the occasion in

question, but was only required to use ordinary care, and if you believe from the svidence in this case, under the instructions of the court, that as the Checker Taxicab turned the corner and approached the place of the occurrence, it was being operated with ordinary care, and that the chauffeur of the taxicab in question, in the exercise of ordinary care, did all he could to avoid the accident in question as soon as it was apparent or ascertainable to him in the exercise of ordinary care, then the plaintiff cannot recover in this case."

The quite agree with the defendant's counsel that the instruction is subject to the criticism which has been called to our attention by the plaintiff, and his contention is supported by the following cases:

Gennon v. Kiel, 252 Ill. App. 550 Cohen v. Brinstein, 231 Ill. App. 84. Devine v. Brunswick-Balke Co., 270 Ill. 504.

It is not necessary to further discuss this instruction, except to call attention in a few words to wherein it is faulty. The test to be applied is not that the driver of the Checker taxicab operated the cab with ordinary care and did all he could to avoid the accident in question as soon as it became apparent to him that it would occur; but did the defendant by its agent exercise that degree of care and skill that an ordinarily reasonable person would have exercised under like or similar circumstance at the time of the occurrence having regard to the location, circumstances and surroundings in which the driver was aperating his car? Devine v. Trunswick-Balke Co. 270 111. 504.

The next question is, did the plaintiff save the right to complain in this court by an exception taken to the giving by the trial court of the instruction in question assigning reasons therefor at that time? The exception as taken appears from the record as follows:

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The next suchtion is, did the picketff daws the ri ht to complain in this court by an exaction taken to the giving by the trial court of the instruction is question eastering recount. Increfer at that the crouplish as trial appears from the record as failows:

"Thereupon the court, at the request of the defendant, gave the following instructions to the jury, in writing, to the giving of said instructions, and each of them, the plaintiff, by her counsel, then and there duly excepted."

The exception taken by the plaintiff is specific to this extent, that an exception is taken by the plaintiff to the giving of each of the defendant's instructions. The law of this state does not require the litigant to specifically object and assign reasons therefor, except in the Municipal Court of the City of Chicago. where a different rule applies. In that court the litigant must specifically object and state reasons for the objection to the giving or refusal to give instructions issediately upon the conclusion of the charge by the court and before the jury retires. Failure to so object waives all further objection, whether upon a motion for a new trial or on appeal. The practice upon this question of saving an exception to the giving and refusing to give instructions should be uniform, and the law should be modified by the adoption of the proper rule applying in courts of record, but in the consideration of this question, the Appellate Court is limited and controlled by the law as it is at present. It therefore follows that the plaintiff properly excepted to the giving of the instructions in question, and this court, taking into consideration the admission by the defendant that the giving of the instruction was reversible error, is of the opinion that the judgment entered by the trial court should be and hereby is reversed and the cause remanded.

Other questions are before this court, but in view of the fact that the cause will have to be retried, we do not deem it necessary to comment upon the facts and the law, assuming, however, that counsel in the further trial of the case will give proper and due consideration to the questions raised.

JUDGMENT REVERSED AND GAUSE SEMANDED.

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for that the cause will have to be retried, so do not desm it necessary to recent upon the facts and the law, assuming, however, that counsel in the further trial of the case will give proper and due remaideration to the questions reised.

ADDRESSED BUILDS AND UNION TRIBUTAL

exhibed F. J. FRR HALL, J. COROUR.

MINNEAPOLIS-HONEYWELL REGULATOR CO. a corporation.

Defendant in Error.

V.

S. GIANNONI,

Plaintiff in Error.

ERROR TO

268 I.A 620<sup>4</sup>

OF CHICAGO.

Opinion filed Nov. 16, 1932

ME. JUSTICA HEBEL DELIVERED THE OPINION OF THE COURT.

On September 11, 1931, the plaintiff filed a suit in the Municipal Court of Chicago upon a contract with the defendant, and summons was issued returnable on September 24, 1931. On September 25, 1931, the defendant filed a special written appearance for the purpose of questioning the jurisdiction of the court and moving that the court dismiss the suit for want of jurisdiction. On September 24, 1931, the defendant was defaulted for failure to appear, and the court found the issues for the plaintiff and entered judgment against the defendant for \$145 and costs of suit.

The defendant brings this writ of error to this court to review the record. No appearance was filed by the plaintiff.

It appears from the record that the defendant was defaulted for want of an appearance, leaving undisposed of the motion of the defendant questioning the jurisdiction of the court.

Chap. 37, Pers. 431, Sec. 42, of the Municipal Court act, Cahill's Ill. Sev. State. 1931, provides, in part, that upon return of a summons served upon the defendant, the plaintiff shall be entitled to judgment as in default, unless the defendant appears at the time specified in the summons, or shall file his appearance in writing at or before the time specified in the summons. Sec. 45 of the same act provides, in effect, that in any case of the fourth

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Plaintiff in Error.

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Opinion filed Nov. 16, 1932

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The defendant prings this writ of error to this sourt to

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be entitled to judgment so in default, unless the defendant sprants

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to writing at or before the time epecified in the enumers. Let. 35

of the same set prevides, in circut, that in any case of the facts

class, or in cases of the fifth class mentioned in Sec. 45 of the act, the defendant shall appear at the time specified in the aumeons, or shall have entered his appearance in writing at such time, and the court shall as soon as practicable fix a time for the trial, and the case shall be tried at the time fixed, or as soon as the business of the court will permit. No written pleadings are required in the class of cases to which this case belongs, hime Bros. Co. v. Adams, 139 Ill. App. 93, and it is error to default a defendant and enter judgment where he has his written as carance on file undisposed of, questioning the jurisdiction of the court. Harts et al. v. Lasman, 208 Ill. App. 137.

From the record it appears that a special appearance of the defendant was on file, and the questions raised by the defendant should have been disposed of before the court entered the default order. It was error for the court not to dispose of the questions raised by the defendant's special appearance. The judgment is accordingly reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON, P.J. AND HALL, J. CONCUR.

clans, or in cases of the difth class mentioned in too. 45 of the sounces, or chall have entered his appearance in artiting at one for time, and the court shell as soon as practicable fix a line for a time, and the court shell as soon as the time fixed, or as the trial, and the ones about it is the time time fixed, or as soon as the insinces of the court will remain. So watth this are produced to the court to defent a service be bas his artition of the court.

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NEVERSEND AND ALBERTAL

HELEN REDLIN, et al,

Appellees,

V.

TRUSTEES SYSTEM REINCO COMPANY, et al.,

Appellants.

order of circuity county

OF COCH COUNTY

268 I.A. 620

Opinion filed Nov. 16, 1932

MR. JUSTICE HEBEL SELIVARED THE OFINION OF THE COURT.

This is an appeal by the defendant Trustees System Reinco Company from an interlocutory order of the court appointing a receiver upon a motion of the complainants, supported by the verified bill of complaint.

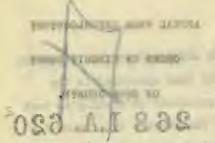
The bill of complaint was filed on March 14, 1932, wherein it appears that the defendants Idward 6. Skupa and Isabel W. Skupa, his wife, being indebted in the sum of \$6,000, made and delivered a certain principal promissory note for said sum, payable five years after date, with interest at the rate of 6% per annua, payable semi-annually, which interest is evidenced by ten interest coupons, dated deptember 13, 1926, and each for the sum of \$180; that to secure the payment of said principal sum and interest, said defendants executed a trust deed and conveyed certain real estate therein described and also known as 93 Lawton Bond, Riverside, Illinois, to the complainant Helen Redlin, Trustee.

It also appears that the principal and installment notes for 16,000, and interest, became due on the 13th day of Teptember, 1931, have not been paid and are in default; that the taxes for the years 1930 and 1931 are due, and that it was necessary for andrew Redlin, one of the complainants, and owner and holder of the notes in question, to procure fire insurance on the premises to protect his loan.

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Opinion filed Nov. 16, 1932

ME. FURTUR REPER DELIVERED THE OPISION OF THE SOURT.

This is an appeal of the defendant fraction Cystem

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per annue, enyeble semi-enmunity, which interest is evidenced by and of 1160; that to secure the payment of seld principal sum and interest, and defendants executed a trust doed and conveyed cortain real estate therein described and rise haven as 38 lawton Fond,

It slow eppears then the principal and installment notes for Tor TS,000, and interest, because due on the 12th may of deptember, 1951, have not been paid and and are in default; that the taxes for the years 1950 and 1821 are due, and that it was necessary for andrew fadlin, one of the complainments, and sener and balder of the notes in question, to product fire insurance on the greatest to protect his ions.

It is further charged that by the trust deed sought to be foreolosed the rents, issues and profits are expressly pledged as additional security for the indebtedness and it further appears that the real estate in question has been conveyed by Isable a.

Skupa and Edward C. Skupa, her husband, to one F. W. Esch, as Trustee, to secure the payment of a note executed and delivered by these defendants for the sum of 11,980, payable in installments on or before August 28, 1933; that these defendants assigned the rents, issues and profits from the said premises to the Trustees System Acinoo Company, which is also a defendant to this bill, and it is further charged in the bill of complaint that the value of the premises is not in excess of \$5500, and the complainants therefore pray that certain defendants be made parties and required to answer, and that the premises be sold to satisfy the amount due andrew Redlin, one of the complainants.

It also appears that the appearance and answer of the Trustees System Meinco Company and F. W. Each, as Trustee, were filed and these defendants admit that the Skupas defaulted in the payment of the principal sum of 6,000, and the interest note of \$180, when due, and that the Trustees System Meinco Company is the owner and holder of certain principal notes, and that there is due to this defendant Trustees System Meinco Company the sum of \$1,039.03, under the terms of a trust deed signed, executed and delivered by the defendants Skupas, and that the premises are occupied by a tenant at a rental of \$85 per month, and the real estate is improved and is of the value of \$10,000.

Upon the hearing of complainants motion for the appointment of a receiver, the court also considered the answer filed by this defendant, Trustees System Reinco Company, and the affidavit of one E. Conrad Carlson, a realter who made an appraisal of the real estate involved in this litigation, and was of the opinion

Tais further charged that by the trust deal sought to see to the final security for the indebtedness and is further appears to it is a security for the indebtedness and is further appears to the security for the indebtedness and is further charged in the bill of complaint that the walks of the presides is not in second of the complaint that the walks of the presides is not in second of the complaint that the complaint therefore presides is not in second of the complaint the complaint therefore presides is not in second of the complaint one of the complaint one of the

Trustees System Reimon Company and i. 3. Rood, as Trustee, nore filed at these defendants simit that the Brupes defenited in the payment of the principal sum of (8,000), and the interest note of 120, when due, and that the Trustees Bystem inimes Company is the owner and holder of serial principal notes, and that there is due to this independent Trustees Bystem School Company the sum of 1,078.03, under the terms of a trust deed signed, encoured and delivered by the defendants Empass, and that the premiers are compiled by a tenest at a rental bi 35 per month, and the trust estate is improved and is of the value of the value

Upon the hearing of complainants, motion for the appointment of a receiver, the court also considered the answer filed by this defendant, Trusteed System Saines Company, and the affidavit of one E. Coared Sarison, a resitor who made an appraisal of the real estate involved in this litigation, and was of the opinion

that it was of the value of \$8500, and after considering the matters presented, the court appointed a receiver.

It appears from the verified bill of complaint, and is admitted by the sworn answer of certain defendants named, that the principal sum due the complainants is matured and unpaid. It also appears that the taxes for the years 1930 and 1931 are unpaid; that fire insurance was not produced by the makers of the notes secured by the trust deed sought to be foreclosed; that the trust deed securing the payment of the principal note of 16,000 and interest thereon is admitted by the defendants to be a first lien, and that from the provisions of the trust deed in question, the rents, issues and profits are pledged as additional security: that the premises are in possession of a tenant paying a rental of \$85. a month, and that the owners of the equity of redemption are now nonresidents. For these reasons we believe that the court was fully justified in appointing a receiver to take possession of the premises, to collect the rents, and to make such distribution, upon the conclusion of this litimation, as the court may direct.

The defendant, Trustees System Reinco Company, emphasizes the fact that the complainants are amply secured by this property, which is valued at \$3500. However, the admitted amount due the complainants is \$6,180. In addition to this sum, it is necessary that the taxes, which are in default, be paid, and also the necessary expenses must be met to carry this foreclosure proceeding to a final hearing; therefore, it is doubtful whether the complainants are amply secured.

The order appointing a receiver is affirmed.

AFFIRMED.

that it was of the value of "SECO, and after considering the matters

It appears from the verified bill of somplified, and is teld bewen etached alarge to resear arose est ye bottle . Biggue has better at almonial your old out out actioning oft the appears that the verse for the years 1870 and Lard that the parties of the seton odd le areves edd yd barweery den usw somerwad erif dedd tru.. ... in a pair out ad or derson head taux and the comme securing the payment, to the a to the securing the payment. thereon to sharthed by the defendance to be a first like, and black general the provisions of the trust deed in question, the rents, issues seatury and first typical security; that the property has diseased a last to figure a privat strengt a le moiscapoq at era eshabinous on our malkement to vilue and to stance out tail socion of .ancient of the consequence to the president of the consequence of to gette ont to wate quet that the court of the cante. that littlestion, as the court asy direct.

the fact that the comminiments are manic accured by this property, which is valued at (5500. However, the admitted amount due the complainments is (5,180. in admition to this and, it is necessary that the taxes, which are in default, be juid, and also the necessary that the taxes are reconsting to a first hearing; therefore, it is doubtful shotter the completants are ured.

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STREET, S. LAND SELL, M. STREET, M.

CHICAGO !!

PROPHE OF THE STATE OF ILLINOIS, ex rel., CHARLES A. TEVER, (plaintiff);

Defendant in Error.

V.

WILLIAM D. MEYERING, Sheriff of Cook County, Illinois, (defendant).

Plaintiff in Error.



ERROR TO SUPERIOR COURTY.

268 I.A. 620°

MR. PARSIDING JUSTICE KURNER DELIVERED THE OPINION OF THE COURT.

A potition was filed by defendant in error, People of the State of Illinois, ex rel. Charles 4. Tever, alleging that Charles A. Tever was detained and imprisoned by plaintiff in error, William I. Mayering, sheriff of Cook county, Illinois, by virtue of a certain order entered by the Circuit court of Cook county on May 5, 1931, in case No. B-59372, finding said Wever guilty of contempt of court for failure to pay alimony due Edith M. Wever. The petition prayed for a writ of habeas corpus and that he might be discharged. The return of Meyering consisted of the order of commitment entered May 5, 1931, by the Circuit court of Cook county. Illinois, in the case of Mith M. Wever v. Charles A. Wever. No. B-58372. in which it was recited that the court had jurisdiction of the subject matter and the parties, both of whom were present in open court, and the court having heard the testimony, found that there was oue and unpaid from Charles to Wever to Edith M. Wever under a decree of divorce entered by the Circuit court of Cook county on December 4. 1919. in case No. 58372, the aum of \$5,060.92, and that said Charles A. Wever has failed to show sufficient cause

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265 L.A. 620

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why said sum should not be paid, but has wholly failed and refused to obey the order of the court, found him guilty of centempt of court and ordered that he be committed to the common jail of Cook county, Illinois, for a period of not to exceed six months, there to remain, charged with the said contempt until he pays \$5,060.92 for the use of Edith N. Never or until released by due process of law. Upon a hearing, the court found that said ever had been imprisoned for contempt of court for the nonperformance of a decree for the payment of money; that said ever was unable to comply with the decree and unable to endure confinement in the common jail of Cook county, Illinois, and discharged and released wever from said imprisonment by the said sheriff. The cause is here on a writ of error. The defendant in error has not appeared or filed a brief in this court in defense of the order.

In the order releasing the defendant in error from imprisonment the court referred to section 36, ch. 65, Cahill's Nevised Statutes of Illinois. 1931, p. 1563. This statute provides in part that any person imprisoned for any contempt of court for the nonperformance of any decree for the payment of money, shall be entitled to a writ of habeas corpus, and if it shall appear, that such person is unable to comply with such decree, or to endure the confinement, the court may discharge him from imprisonment.

Tever, and in this contention we concur, as this statute has no application to the release and discharge of persons imprisoned for wilful contempt of court, for the violation of a decree requiring the payment of alimony. The trial court held that ever was imprisoned for the nonpayment of a debt. Alimony is not a debt. It is a social obligation as well as pecuniary

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noney, chall be entitled to a writ of habens corpus, and if it will appears the comply with await decrees to comply with auch decrees or the community of the complex of the community of the complex of the c

It is contended that the court wrongfully discharge veryon, and in this contents we concar, as this stabute has no for rilful contents of court, for the violation of a decrease that a debt.

To is a social obligation as well as promingly not a debt.

liability; it is founded on public policy and is for the good of society. (Deen v. Bloomer, 191 Ill. 416.) Commitment of a defendant for contempt for refusing to pay alimony is not an imprisonment for debt from which he can claim exemption under the provisions of a constitution prohibiting imprisonment for debt. (Wightman v. Wightman, 45 Ill. 167, 173.) The lightlity to may alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the State where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. (Barolay v. Barolay. 184 Ill. 375, 376. See also Welty v. Welty, 195 id. 335; People v. Mito. 237 id. 434, 442; Mesirow v. Mesirow. 346 id. 219, 222: Tuttle v. Gundersen, 254 :11. App. 552, 559, and cases cited.) Furthermore, the order entered by the Circuit court of Cook county, Illinois, case No. B-58372, committing Wever to Agil for failure to pay the alimony was a final order, the court having jurisdiction of the subject matter and of the person of Wever. and the power to commit him for failure to pay the alimony. Under such a state of facts he could not be discharged on habeas corpus. His remedy, if there was any irregularity in the proceedings, would be by writ of error. (The People v. Murphy, 188 Ill. 144, 148; The People v. Eller, 323 id. 28, 31; People v. Williams, 330 id. 150. 153: sec. 21. ch. 65. Cahill's Revised Statutes of Illinois, 1931.)

For the reasons indicated the order releasing and discharging Charles A. Never from imprisonment is reversed.

REVERSED.

Scanlan and Gridley, JJ., concur.

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EDWINA M. WECKLER, formerly Edwina M. Pearne, Defendant in Error,

V.

MARTHA M. PLANNE, executrix of the estate of Frank D. Pearne, deceased,

Plaintiff in Error.

MAROR TO CIRCUIT COURT.

268 I.A. 6204

MR. PRESIDING JUSTICE HARMER DELIVERED THE OFFICE OF THE COURT.

By this writ of error Martha K. Pearne, executrix of the estate of Frank D. Pearne, deceased, seeks to reverse a judgment allowing defendant in error's claim for \$3,440 against the estate. We have not been favored with the aid of a brief on behalf of the defendant in error.

The claim of the defendant in error was originally filed in the Probate court and upon a hearing in that court it was allowed. The executrix appealed and the case was tried de novo in the Circuit court, by the court, without a jury.

Edwine M. Weckler, was formerly the wife of Frank D. Pearne, who died June 7, 1927, testate, and that she filed her claim in the Probate court for installments of alimony from May 21, 1913, to June 7, 1927, which she claimed were due her by reason of a decree of divorce entered by the Superior court of Gook county on May 21, 1913, in a suit in which the defendant in error was complainant and the deceased was defendant, which decree after granting defendant in error a divorce and the custody of their

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son, ordered and decreed that Frank D. Pearne, "be made to pay to Edwina M. Pearne, on the first day of each week to follow the sum of \$5, for the support of her said child;" that at the entry of the decree, Edwin M. Pearne, the son, was two years of age and when his father died he was sixteen years of age, and that from the date of the entry of the decree of divorce up to and including the date of the death of his father, the son lived with his mother.

Plaintiff in error offered no evidence showing that
the deceased during his lifetime had paid defendant in error the
\$5 a week provided in the decree for the support of his child.
The trial court held that the decree to pay \$5 a week for the
support of Edwin M. Pearne was a judgment and that section 27.
ch. 85. Cahill's Revised Statute of Illinois, 1931, p. 1813,
entitled "Limitations," which provides in effect that the life
of a judgment shall be twenty years, was applicable.

The plaintiff in error does not question the correctness of the amount allowed, but she insists that the decree was not a judgment and that defendant in error's claim is barred by laches. We are unable to concur in plaintiff in error's first contention, but do concur with the trial court that the decree directing Frank D. Pearne to pay defendant in error \$5 a week for the support of his son was a judgment (Cole v. Cole, 142 Ill. 19, 24; Craim v. Graim, 163 Ill. 176, 184), and is a vested right. (In re Estate of Resouth H. Bell, 210 Ill. App. 350, 356; Dinet v. Eigenmann, Admr., 80 Ill. 274, 279.)

The remaining question for determination is whether defendant in error's claim is barred by laches. Counsel for plaintiff in error has cited cases which hold that laches and neglect are always discountenanced and that courts discourage

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Plaintiff in error offered no evidence chaving that

The trial court hold that the dee or to pay is a veck for the

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antitle limitations, which provides in effect that the life

of a judgment shall be treaty years, was applicable.

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antiquated demands. We agree with the principles announced in those cases, but they are not applicable here. In several of the cases cited, it was held that lapse of time and the staleness of the claim was a good defense - where no statute of limitation directly governs the case. The instant case, however, is governed by section 27, ch. 83, supra, and is not barred.

Finding no error in the record, the judgment is

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Scanlan and Gridley, JJ., concur.

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JOSEPH TOETRA, (plaintiff), Appellec,

V.

JOSEF KOPCZYNSKI ami MARYANNA KOPCZYNSKI, (defondants), Appellants. COOK COUNTY. 268 I.A. 621

MR. PRESIDING JUSTICE KERNIE DELIVERED THE OPINION OF THE COURT.

This was an action of trespass vi et armis, brought by the plaintiff against Josef Kopczynski, Karyanna Kopczynski and Menry Kopczynski, to recover damages for injuries resulting from an alleged assault and battery. During the trial the plaintiff dismissed the suit as to Henry Kopczynski. The cause was tried before a jury and plaintiff recovered a judgment against Josef Kopczynski and Maryanna Kopczynski for \$1,000. To reverse this judgment the defendants appealed.

The declaration consisted of two counts charging an assault and battery on May 22, 1930. The defendants pleaded not guilty and self-defence.

The verdict imports that the jury found the defendants quilty of assaulting the plaintiff and that such assault was not in self-defense, and the verdict in these respects cannot be successfully challenged.

Prior to May, 1930, and for about 17 years, plaintiff,

41 years of age, was the owner and had lived in a frame building
at the northwest corner of 87th street and Muskegon avenue,

thicago, Illinois, and the defendants were the owners of a building

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268 I.A. 621

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The verdiet imports the jury found the defendants outly of a state of the defendants of the self-defence, and the verdiet in these respects cannot be execusively challenged.

Prior to May, 1830, and for about 17 years, phaintiff, all years of age, was the swacer and had lived in a frame building of the associated and the same of the sa

at the northeast corner of 37th street and Muskegon avenue. They had a son, Henry Kopenyaski, then about 15 years old. For about three years before May 22, 1930, plaintiff had been having trouble with boys about playing near his property and had complained to the police about it, and about one year prior to May, 1930, he had trouble with one of defendants' sons. Shout four days before May 22, 1930, he complained to Josef Ropezynski about the boys playing ball, saying he was going to court about it, and thereafter complained to a juvenile officer. who called at defendants' home and talked the matter over with Mrs. Mopezymeki. May 22, 1930. plaintiff while on his way to work met Josef Kopczyneki who inquired what was going on and plaintiff replied that Hopezynski know what was going on, as he saw it every day, and told him to keep the boys away; that thereupon Kopczynski swere at plaintiff and said. "I will kill you like a dog!" that during this conversation Hra. Kopczynski was standing in the doorway and said. "Give it to him:" that evening between 7 and 8 o'clock while plaintiff was watering the lawn in front of his premises he saw Mrs. Kopenynski and her son Henry cross the street and when they were about 15 feet from him plaintiff was struck on the back; that he turned and saw it was Kopezynski who had struck him with a hose with a wire attached: thereupon plaintiff endeavored to get the hose and Mrs. Kopsayneki struck him a number of times with a stick; that he then grabbed the stick and took it away from her. It was introduced as an exhibit in the case.

The principal contention of the defendants is that the court erred in excluding the evidence of elleged communiciations to Mrs. Kopcaynski concerning an alleged assault on her con eight months before the assault on the plaintiff. From the record it appears that the defendants offered to prove by Henry Kopcaynski

red to northouse corner of even depot and Municipan transfer the ind a sent Henry Hayonynchi, then about 16 years old. Nor about aldness privat most and televising total and tracking tracking and all destinations but her planning and area parquig Areas were date police whom it, the shout one year prior to May, 1900, he had trouble with one of defendants rous. Sout four days before May and the property of the state of the same of the large playing telligrant has all doubt forms of spins are of parties allied and talesholds is built out your'ds adment a of buildings out of the first open of the new Lagrangians, but her life the life CLEINGIST will be be not not be with my food Sprayeds the largered here and disreposts but redder thinking has me unles one hade argon and quest of mile infer less whose prove 44 years of my and helder here 27 Allen Son Militaria de espera del republica properciale desfet presen with sulfacerence while paints that the convergettion than "point of all well" abine ton question all the philosome has followed all prirodor our Wistisia allibricals a bus V monded princer swit the Louis in French of his persalphy is now ifus, Hapenpalit and her non Min and deal the little same that the deal the last the last you the was been beened and trait triang and no structure was this seek for Mayonymekt who lead attack him with a hope with a vive obtackets thorough will bus meet all deg of bequeening filed for my morald od) today pode od tode thota a div cont to redum a min house thinks up as becauseful new si . . well more to a most bus well to a success only mi

The principal contention of the defendants in that the court enred in each time exclusive of alloged concernitions to her. Expayment concerning so alloged concernit on her content mouths before the concernit on the plaintiff. From the record it appears that the defendants offered to prove by Kenry Seprenyaliti

that about eight months before May 22. 1930, while Henry was climbing a pole in the alley near plaintiff's premises, he (plaintiff) struck him with a board; that Henry did not tell his mother about the occurrence until about 4:00 or 4:30 n. m. May 22. 1930. Befordants also offered to prove by one Bra. Skowronek that about 11:00 a. m. on May 22. 1930. Mrs. Kopczynski was told by Mrs. Skowronek about this striking of Henry in September, 1929. In arguing this contention defendants' counsel say that this testimony would tend to prove Mrs. Kopezynski was laboring under a mental strain produced by the communication to her of the supposed striking of her son by the plaintiff eight months prior to May 22. 1930, and was for the purpose of mitigating punitive damages. We are unable under the facts in the instant case to concur in this contention for several reasons. First: It appears from the record that Henry testified concerning this alleged beating while Mrs. Kopezynski testified that Henry had not told her of the beating. Second: The jury were instructed that if they believed the assault was made with considerable provocation and without melice, the jury should consider such facts in determining the amount of damages. Furthermore, in an action for assault and battery, previous provocation is not admissible in mitigation of damages, unless it is so recent and immediate as to form part of the transaction. Acts done, or words spoken by a plaintiff some time previous to an assault, which are a part of a series of provocations, often reiterated, and continued up to the time of the act, are admissible in mitigation of damages. But evidence with respect to the conduct of the plaintiff at other times and upon other occasions, the assault and battery having been committed without any provocation given at the time, cannot be given in evidence

- ner mark office oblig all -gal worker address high morts page of specimen affilirately that polls oil all alle a patiently (plaintiff) aprope the with a boards that though this mak tell lib wall on on the compress with thank diff or tiff us me ling the table. "Let prompt also afficed to prope by one live discrepancy that about \$1,000 as its ow may fire gittle little from the out on 00022 death Where theretone sheet this entitless of ferry in representative William abilitional was formered between two malescopes and pulseps at tastimeny would tend to prove Mry. Happyreak was laboring under a mental etrain produced by the concurrent on the first of the supposed strictes of her um by the plaintiff eight mouths prior to key 32. 1930, and was for the progress of multivities positive mosapes. In e kais on the chart of the fundant and at a some of a some oldans ero and such attenue of a charle a same or Acrees we extending saided Mari-Marry besidition managator alia allogor verting visits and to und blad too but your Broid builtions kingasqui . \*\*\* part 11 tool between the just next interpret tool if they her and opening also white as the same files as all arealles nulpiant sin a far the chicket bluede grap the collectionally his discount of damage in the interest and account to the manufaction ha melecule a province of the second and additional and a military and and but the melecular and a melecular a To tray must at no hardelend has drevet on al al english anomalia time this is a contract of the contract of the contract of the autice a to frag a sta dolds attames me at autivore only providentiant of an entermied and confined up to the vine of the not, are sinterible in mitherisis of damages. But evidence with recept to the conduct of thining of the durbus of the property chief consultant, the squade and bullery metal bets multipletwithout any provocation given at the fame, camed to given in writeness

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to mitigate the damages. (Marphy v. McGrath, 79 Ill. 594; Cusaings v. Grawford, 88 Ill. 512, 317.)

It is next contended that the acts of the defendants were in self-defense, and in view of that fact, the court erred in refusing an instruction offered by them by which the jury would have been informed that if the plaintiff at and just before the time of the alleged as ault by the defendants, was engaged in an assault upon Mrs. Kopesynski, or upon the other defendants. then, even if the jury believed that any one of the defendants used more force than was absolutely necessary at the time of the occurrence complained of, still there could be no recovery, if the jury believed from the evidence that said defendants acted as a reasonably careful or arudent man or woman would have acted under the same circumstances and conditions, etc. After a careful examination of the evidence and a consideration of the refused instruction, we are of the opinion the court did not err in refusing this instruction as there was no evidence of an assault by the plaintiff upon either Josef or Henry Kopozynski just before the assault upon plaintiff.

complaint being made of the 3rd, 6th, 11th, 12th and 13th instructions. By the 3rd instruction the court told the jury that when several persons unite in an act which constitutes a wrong to another, intending at the time to commit the act or do it under circumstances which fairly show that they intended the consequences which followed, then the law will compel each to bear the responsibility of the misconduct of all, and the party injured is at liberty to enforce his remedy against all, or against any one or more of the number. The criticism to this instruction is that

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absorbed and by addressed that the order of the te-boundary have drawn wit clarge and he were no has connected with one the profession of making affiliate by the plant of the party of would have been falcoused that it the plaintiff is and pure before the time of the alloged parault by the defendance, was engaged in and asserted time the figurations or open the eller definitions as tions, even if the jury believed that one one the defendance and he said and the consensors of the durant was said and the structures excellent of a till these would be so recovery if ... the free beddesen from the swimmer that next reduced a next rotm: being grad himes more to make the larg to lithouse "filowest a Different or AND CO. while your Editions and managements were add examination of the orthrop and a counterraine of the refugal iddicuction, we are of the opinion the court ald met ere in reand illustrate the fire name lifes are now would be improved and it period. explicit first discussional count on these, makin more thirdfully and ATTACAMENT AND ALTERNATIVE

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sy the lad instruction the court teld the jury that several persons unite in an act which constitutes a versa; to descript at the time to sound the act of it under the circumstruces which fairly sheve that they intended the a manyounce which followed, then the law will compel such to bear the responsibility of the atmendings of all, and the garty injured is at illustry to enforce his remedy against all, or applied to the say was at illustry to makens. The articless to this instruction is the to mayou of the numbers.

there was no reason for the giving of this instruction. The instruction correctly stated the law, did not direct a verdict and under the circumstances did not constitute reversible error.

upon which side the preponderance of evidence is the jury may take into consideration the number of witnesses testifying upon the one side or the other of a disputed point; the opportunities of the several witnesses for seeing or knowing the things about which they testify, etc. By the 6th instruction the jury was told that the number of credible and unimpeachable witnesses testifying is a proper element for the jury to consider in connection with all of the facts and circumstances in evidence, in determining where lies the prependerance of the evidence. It was not error to give this instruction as the element of numbers should be considered, with all the other elements suggested in the 7th instruction. (Gage v. Eddy, 179 Ill. 492, 504; West Chicago R. R. Co. v. Lieserowitez, 197 id. 607, 612.)

Instruction 11 told the jury that if they find for the plaintiff they would be required to determine the amount of damages, and in determining the amount of damages, if any, they had the right to, and should take into consideration all the facts attending the injury as proved by the evidence, so far as the same are shown by the evidence to have been the direct result of the assault in question, etc. The criticism aimed at this instruction is that it assumed an assault had been committed by defendants. It is true, an instruction to a jury cannot assume the truth of facts at issue between the parties. But the above instruction is not open to this objection, as it is an instruction on damages only, and presupposes in its hypothesis that the jury has found a verdict for plaintiff. Taking it as a whole, we do not see

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plaintiff they nould be required to detending the amount of desages, if any, they desages, and the determining the amount of desages, if any, they had the right to, and absuld take into resultionation all the factor and the right to, and absuld take into a thin instruction is that it amount on account that had been accountabled by defendants.

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how any juror of average intelligence could fail to understand, the jury was not to consider the question of damages unless the jury first found the defendants guilty.

By the 13th instruction the jury was teld that if they believe from the evidence that defendants, without provocation, assaulted and injured the plaintiff, as charged in the declaration, and that such assault was a malicious, aggravated and wanton one and resulted in physical injury to the plaintiff, and if the jury believe from the greater weight of the evidence that justice and the public good require it, then the law is that the jury are not confined in their verdict to the actual damages proved, but they may give exemplary damages, not only to compensate the plaintiff, but to punish the defendants. Defendants' counsel now argue that the instruction assumed that actual damages had been proved and that it was not sufficient that it appear that defendants acted without provocation, but it must appear that the assault was without fault on plaintiff's part. We are unable to concur in this view.

Instructions 14th and 15th informed the jury that if they believe that such assault was made with considerable provocation and without malice, they should consider such facts in determining the amount of damages and that they should not assess exemplary damages, unless the defendants assaulted plaintiff without any justifiable cause. The undisputed evidence discloses that plaintiff did receive physical injuries and that he sustained actual damages and it is clear the instructions required the jury to find from the evidence that defendants assaulted the plaintiff and that such assault resulted in physical injury to plaintiff.

Further complaint is made as to the 11th, 12th and 13th instructions because the 11th instruction contained the phraseology. "so far as such damages and injuries are claimed and alleged in

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Further complaint in made on to the lith, lith and loth in the complaint in the little of the complaint.

the declaration and proved by the preponderance of the evidence,"
and the 12th and 13th, "as charged in the declaration." Defentunts' counsel, however, admits that standing alone, the giving of
these instructions with the phraseology above mentioned is not
ground for reversal. In view of the fact that we have held that
there was no merit in the several contentions made, we conclude
that the giving of these instructions was not ground for reversal.

Finding no reversible error the judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ.; concur.

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S. B. KATZMAN, (complainant). Appellee,

V.

CICERO-QUINCY BUILDING
CORP., et al.,
Befordants.

ON APPHAL OF CHICAGO TITLE & TRUST COMPANY, First Successor in Trust.

Appellant.



INTERLOCUTORY
APPEAL FROM
SUPERIOR COURT,
COOK COURTY.

268 I.A. 6212

M. PARSIDING JUSTICE KERNEN DELIVED THE OPINION OF THE COURT.

By this appeal the Chicago Title & Trust Company, a corporation, first successor in trust, seeks to reverse an interlocutory order appointing a receiver, entered April 21, 1932.

and prayed for the appointment of a new trustee under a trust deed given by the Cicero-uincy Building Corporation to the Madison & Medzie State Bank, as trustee, to accure an issue of bonds in the sum of \$230,000, and for the appointment of a receiver pendente lite. The material allegations of the bill are that Mebruary 8, 1930.

Madison & Medzie State Bank entered into a written agreement with the Madison-Medzie Trust & Savings Bank, which contained, among other terms and provisions, the sale by the Madison & Medzie State Bank to the Madison-Medzie Trust & Savings Bank of all of its assets and the assumption by the Madison-Medzie Trust & Savings Bank of all of its assets and the assumption by the Madison-Medzie Trust & Savings Bank to execute such instruments as the Madison-Medzie Trust & Savings Bank to execute such instruments as the Madison-Medzie Trust & Savings Bank might request in order to vest in the latter complete

APPARENTAL TABLE

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S. B. Retunns filed bis verified bill Moren 26, 1912. sout prayed for the appointment of a new trustee and rot bourt ins oved given by the Cteare- windy Indiana Corporation to the Hadigen add the church landing on truster, to secure an inque of bonds in the sum of \$200,000, and for the appointment of a receiver pendonte like the anteriol allegations of the bill are that february 8, 1333; Endlane P Dettin Toole Deak empress into a writing approximal with the Madison-Redails Frust & Carter walls, which contains, and other terms and provintence the sale by the Hedison & Secte State Bank to the he will be a few to have be been been been been be the anulyed A Janu'l statell-mosthell out ud antiquence and have afones simball a monthall said to ducamoune out quaidificall add to Manil That deal and to execute such instruments on the Madigon-indee Trust A Carings Lank might request in enter to vest in the latter complete Trust & Savings Bank to make any sale, or compromise of any of such assets and the right to use at its discretion the name of the Madison & Medzie State Bank in any matters or proceedings for the purpose of enabling the Madison-Kedzie Trust & Savings Bank to conserve, liquidate or dispose of such assets.

It is further alleged that the Madison-Medzie Trust & Savings Bank proceeded under said agreement, which was approved by the Auditor of Public Accounts of the State of Illinois: that pursuant to the terms, conditions and provisions above set forth. the Madison-Kedzie Trust & Savings Bank took over the trust business as well as the banking business of the Madison & Kedzie State Bank to which there remained only its naked name: that the name of the Madison & Kedzie State Bank was used by the Madison-Medzie Trust & Savings Bank as a subterfuge; that no discretionary powers remained in the Madigon & Redzie State Bank; that the Chicago Fitle & Trust Company, first successor in trust, and Chicago Trust Company, second successor in trust. knew of the execution of said agreement and while they were several times requested to act as first and second successor in trust, refused to do so by reason whereof the office of trustee was usurped by the successor in business to said trust deed while in fact the office of trustee remained vacant; that October 31, 1931, will H. Wade was appointed receiver of the Madison & Kedzie State Bank, and that pursuant to the order of his appointment, on to-wit, January, 1932, he resigned all of the trusts on behalf of the Madison & Kedzie State Bank, which joined in the resignation, and delivered the same to their solicitors; that for some reason the resignations were not filed of record; that the first and second successors in trust knew of such resignations, but failed to qualify as successor trustees by reason whereof the office of trustee remained vacant.

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It is further alleged that the Mediago-Redgie True I and a succeeded saider and anneanes, which was convered and talealfil to send and to almost affect to modifie of parter? We the branch soulsterny the abilities could of all of frequency the hull-one-fieldle Treet is directly from their aver the type Indiana and care alosed is postined and to essection antimed out as flow or he was been all our years begin the party the name of the January a state of the control of the following the transfer of the first product of the control built of a rest from the rank and the first recent and appropriate in the thorizon a mergin where boards they him through Table a Trunk Accord a your good of the first term about all decorations fruit grouped all the late of the property and the manufacture of the late of th Minimum likewa has Seall as the at before, or and Leaves was quit without he native and imposed around the at the plant of baseing at any we wanted by the executer in backway to anid truck deed while in fund the office of brander woundhed values like Cover 31, 1931, with the Tadra was appointed considered of the Partition in Colorie State Santa and the surrect to the main of his appointment, or is the wife of olabel & monitol wit to limited no absent out is ile bengion and alle State Sunk, which foliate in the confinentian, and college and for onew annitangleon and necessar some net test tomofoldes giads of yeard factor all expectations beganned has facility and doubt absence by dealth of such recipiesticus, but falled be qualify as successor truntees by

It further alleged that November 1. 1926, the Cicero-Quincy Building Corporation executed its mortange gold bonds aggregating \$250,000, and to posure the payment thereof gave a trust doed to the Madison & Redsic State Bank, as trustee, conveying certain real estate: that in said trust deed there are reserved certain rights and privileges to the trustee for the benefit of the bondholders thereby secured, and that Chicago Title & Trust Company is maned first successor in trust: that complainant is the owner and holder of one \$500 bond of said issue: that certain defaults have been made under the trust deed; and that the trustee failed to inform the bond owners of such default; that since the defaults it has been necessary for action to be taken by the trustee to protect the interest of the bend owners, but the Chicago Title & Trust Company and Chicago Trust Company have declined to assume their duties, and permitted the Madison-Medzie Trust & Savings Bank to hold out the Madison & Keczie State Bank as an existing trust company whereby moneys paid into the Madison & Medsie State Bank were diverted by the Madison-Medzie Trust & Savings Bank to prefer itself in the payment of bonds and coupons which it owned, and that thereby the office of the trustee and successors in trust became vacant; that the presides are scant sccurity for the indebtedness they secure, and unless a receiver is appointed the rights of the bondholders will be greatly prejudiced; that the Madison & Kedzie State Bank has received large sums of money, the amount of which is not known, for which they should be required to account; and that its bonds should in equity be subordinated to the rights of the bondholders.

April 11, 1932, the Chicago Title & Frust Company filed its verified enswer denying any vacamey whatsoever had existed in the office of trustee under the trust created by said trust deed, or that it ever refused to accept as first named successor in trust

is further alleged this Wevender I: Ithas the Clarreand the terminal of the second state of the second of the second of the second s owns Thornas successes and remove as been a Daniel a per produced in the start and the about the second of the status best-op our study than years also up duly popular flow supplies and department of the expension of the boundary of the period of the period of the angular and the same of the sam himsely secured, and that didenge Tible & Truck Security is many first one to rebied but rema selt at smorteligues soul thank at reconsons prings often more area and admirals and proper him has been post the here's deep and the proper relief to bright the box and poor and my processes more and it affairly bell solds told titledeby gave by age his depended not deciden, we appared hid not study in 64, males bedd sussess but the Calange Villa & Ivent Suggest and Olderge Truck not institute the agency that without product your property ministrate Charles Treat A Inviting Teat to talk out like Nathan & Nathan nuri of allege had the structs of the field and and and everyon ion about by Asserting will all Mintel willows at Mach analysis of hen volumed and the call'in add paternel? And have already at the printer and ydiruoda incha ano quaimony adi izai idamese especa inus al quescucous for the independence of the secure, and spines a vector in appetrical wit sait gheering or Throng of the et Manned wit to editit of nell arrows he seem bland botheres and that paint about a spatial and development and Advanta would probably upon account one of standard for presents and the translation of Translation when the translation of the transla enventacione and to origin

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the trust created by said trust deed, and alleged that by an instrument in writing, dated January 25, 1932, the Madison & Medzie State Bank and Will H. Wads as its receiver, resigned the trustacship created under said trust doed and refused to act as such trustee for and on behalf of said bankt that thereafter such remisuation took offect, when by the same instrument in writing, the Chicago Fitle & Trust Company formally accepted said trust and agreed to act as trustee, pursuant to the terms and provisions of said trust deed. which instrument was thereafter duly recorded in the office of the Recorder of Teeds of Cook County. Illinoist that upon such resignation and the acceptance of said trust the Chicago Title & Trust Company succeeded to all the title, rights, powers and duties of the Madison & Kedzie State Bank as trustee under said trust deed, and that said Chicago Title & Trust Company is now acting as such trustee: that in said trust deed it is also provided that every owner of any of the bonds thereby secured secepts the mame subject to the express understanding that every right of action, except upon the happening of certain specified conditions, is vested exclusively in the trustee. and that in any actions or suits affecting or relating to said trust deed or to the mortgaged premises the trustee shall be deemed a representative of the bondholders.

Appelles moved the court for the appointment of a receiver; there was a hearing on the motion and on april 21, 1932, the court entered an order appointing Jumes R. Martin receiver of the promises described in the bill of complaint. The court in its order stated that it appeared to the court that the Madison & Kedzie State Bank sold out all of its assets on February S, 1930, to the Madison-Kedzie Trust & Savings Bank, and from said date ceased to function as a banking institution, and under the terms of the agreement was in no

the terminal by soil break heat, and alleged that by an in the setting, peter Appending the pattern of the setting with further and designate and the resistance of the deal of the deal of the said sections about a day of hearing one bigs dropd blue retion to hear other Goal and tomore of the territories over their form him he black on him total BARRY Special size and treatment to extend the role of soils about the by don all talegor has fairly than trapped quickwork proper rust) about duris him to assistant bus amed out as surveyour assistant and for coliffy out to succeed by cally confirmed by the origin of the mathampiant done many tand puloudill sylmon don't to ease the unbranpassed last? I shift equalit oil tast? Mrs. to sometimes all has secretary and to settle has aroung enthis elected and the of habonous bing dads ham sheeh dares then releas to there and a since about alabed A tend tendente dine as misse was all transmit tout a sist openid and the year to make yours that madeless with 12 to best from this par waster recogn off or helples one oil olgonic broom girenti shad be palenged out man interest and my or other than the sales and palents geothers and all relations and are all and all all and fund than of makinkar to mustoolly maken to analten and all their ten deed on he herbeng bronders that tracked which be demond as semblishmen mer be ertificationique

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position to exercise its discretionary power, and that the Chicago Title & Trust Company failed to exercise its duty to accept its trust acts from February 3, 1930, until after the filing of the motion for the appointment of a receiver, at which time it presented its pretended acceptance to the court, but the Chicagl Title & Trust Company failed to protect the interest of the bondholders by entering into possession or applying for the appointment of a receiver, and that said Madison & Medzie State Bank and said Chicago Title & Trust Company were standing by and permitting the mortgagor and owner of the premises to collect the income of the premises without paying the bond owners the amounts due on said bonds and the texes and assessments levied thereon.

Appellant contends the order appointing the receiver was based solely on the allegations of the verified bill and the verified answer of the Chicago Title & Trust Company, while the appellee contends to the contrary and calls our attention to the following recitation in the order: "The court having heard the statements of the parties in open court and arguments of counsel." Se are unable to concur in appellee's view. It is clear to us that the order was based solely on the allegations of the bill and answer.

The chanceller was in error in finding that it appeared that the Madison & Kedzie State Bank was in no position to exercise its discretionary power. The Madison & Kedzie State bank, as trustee, could not divest itself of any trust by any agreement with the Madison-Kedsie Trust & Davings Bank, as the office of a trustee is one of personal confidence and cannot be delegated. (3 Pomercy's Equity Jurisprudence, (4th Ed.) pp. 2442-2448.)

There could be no vacancy in the trusteeship and the appellant would not be entitled to assume its duties as successor in trust until will M. Wade, receiver for the Madison & Kedzie

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ended of the Chicago Title 2 Truck Company, while the appoint or it.

chids to the Chicago Title 2 Truck Company, while the appoints some topids to the contrary and calls our attention to the application in the order: "The court having heard the defendents of the parties in appelled; with any arguments of commonla" to are unable to compar in appelled; when allegations of the bill and survey:

order was based ordely on the allegations of the bill and survey.

The chargediar was in error in finding that it appeared

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There could be as vecamey in the transcening and the second secon

State Bank, resigned the trusteeship. (Section 11, ch. 16a, Cahill's Revised Statutes of 1931, p. 171) belofuly v. Johnnon et al., 266 Ill. App. 351.) It appears from the verified answer of the appellant filed ton days before the appeintment of the receiver that Will H. Wade had resigned the trusteeship and that the appellant had accepted the trust. The chanceller was therefore in error in finding that the appellant had failed to exercise its duty to accept its trust acts from February 8, 1930, until after the filing of the motion for the appointment of the receiver.

For the reasons stated the order appealed from is

REVERSED.

Scanlan and Gridley, JJ., concur.

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WILLIAM G. DONNE et al., (Complainants) Appellees,

VB.

MORRIS CASTY et al., Defendants.

On Appeal of TILLIE CASTY and MORRIS CASTY,

Appellants.

Interlocutory Appeal from Superior Court of Cook County.

268 I.A. 6213

MR. PRESIDING JUSTICE KNAMER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing a receiver upon a bill to foreclose a first mortgage trust deed upon certain real estate. To reverse the order Morris Casty and Tillie Casty have appealed.

Complainants' bill, filed June 28, 1932, verified by an authorized agent, prayed for the foreclosure of a trust deed conveying the premises to Chicago City Bank & Trust Company, as trustee, dated December 15, 1930, executed by Morris Casty and Tillie Casty, and given to secure their nineteen principal promissory notes aggregating \$19,000. Note No. 1 for \$1,000 maturing December 25, 1931; Note No. 2 for \$1,000 maturing December 25, 1932, and Notes numbered 3 to 19 for \$1,000 each, maturing December 25, 1933; all of the notes bearing interest at 6 per cent per annum. payable semiannually, evidenced by coupon notes. The bill also prayed for the appointment of a receiver pendente lite. It alloged, inter alia, that default had been made in the payment of \$850 due on Note bo. 1 and in the payment of interest on the entire indebtedness due June 25, 1932, and in the sayment of general taxes for the year 1930, and that the amount due the complainants is \$19,415.50: that the premises involved are improved with a three story brick building containing six apertsents, one being occupied by Morris Casty and

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This is an appeal from an interioration trust contex appointing a receiver upon a bill to formalese a first markings trust deed upon entitle and the context of the context

Complainment bill. Tiled June 23, 1932, verified by an - and the state of the second section and section and section in the second section is veying the premises to Chicago City Bath C Trust Company, as trustee, dated December 18, 1935, assessed by Merric Casty and Tillis Casty, and siven to secure tueir misotem printer, and sillis December 25, 1921; Note he. 2 for 11,000 maturing December 25, 1932. and Fotes numbered 3 to 10 for 11,000 each. maturing December 25, 1983; all to the notes bearing interest by the rest of the sepuble sealanneally, syliment by owner notes, edil of the appointment a receiver and tol began me sub 000: To income and ni ohem aped but ilmated int alle total seemedinial exists out to feeredal to france and at has I on the Thou and to't acced forenty to income and al ban 1881 . He sand cab 1930, and that the amount due the constatuents to 118, 415, 80; that the premises involved are improved with a targe seem trial builting containing oin appropriate, one being occupied by ispreis tasty and

Tillie Casty, two being vacant, and the remaining three being occupied by tenants: that Morris Casty and Tillie Casty are persons of no responsibility: that the fair, reasonable cash market value of the premises is \$17,500: that Morris Casty and Tillie Casty are unemployed and that if a deficiency decree were rendered complainants would be unable to collect the same; that in and by the trust deed the rents, issues and profits of the premises are expressly conveyed as security for the indebtedness; that by reason of the default complainants as owners of the indebtedness, elected to declare and did declare the whole indebtedness due and payable.

The appointment of the receiver was made, after notice to the holder of the equity of redemption. The order was entered July 1, 1932, and recites:

"This Cause coming on to be heard on motion of the Solicitors for the Complainant for the appointment of a Receiver and it appearing to the Court that the holder of the Equity of Redemption, together with all parties involved, have been duly served with notice of this motion, and the Court having heard the evidence as to the value of the property described in the trust deed and being fully advised in the premises:
"The Court finds that it has jurisdiction of the subject

matter hereof and of the parties hereto.

"The Court Further Finds that it is provided in the trust deed herein sought to be foreclosed that on the filing of a bill to foreclose the Court in which the bill is filed may before or after the sale, without regard to the solvency at the time of such application for a Receiver of the persons liable for the payment of the indebtedness appoint a Receiver during the pendency of the foreclosure suit, and in case of a deficiency during the Equity of Redemption.

"And the Court having heard the evidence and being fully advised in the presses finds that it is necessary for the preservation of the premises, which are the subject matter hereof, that a Receiver be appointed for said premises, it appearing to the Court that it is probable that there will be a deficiency after sale, and that the grantors in said trust deed are unable to satisfy the same, and that the premises are scant security for

the amount due.

\*\*\* \* \* \* \* \* \* \* \* \* \* \* \* \*

No certificate of evidence has been preserved or filed in this court.

It is appellants' contention that the order appointing the receiver was improvidently entered, and they argue that the order was based solely upon the verified bill. We do not think so, as

Tills their, bee held worsel, me on two plant with the being senor ted by teasach; that Morris Casty and Billie Costy are persons of no responsibility; that the fair, resemble out market value of the granices is 217, 200; that Morris Casty and Tillic Casty are -minicano berebast arow estudo yousisilab a li tant bag beyolgmens date with the under the cultical the same that the tree and by the rents, loance and profite of the precises are expressly edy to noner wi test resultablished and not transca as they woo act new second to the independent of the same of the s oldre and did deciare the whole indepenses due and payable.

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is cartificate of evidence has been preserved or filed in this a court.

It is appallante took took undination to and an allagas at il reader out last oughe cost has been alless that has been seven was based selely upon the verified bill. We do not think so, as the order recites that evidence was heard, and the record in that regard cannot be questioned.

It is also contended that it is incumbent upon the complainants to support the order appointing the receiver by a sufficient showing in the record, and the burden of showing to the court facts which would justify the appointment. There can be no question that is the law, and that in chancery no presumption is indulged that the evidence heard was sufficient to authorize the entry of an order made. Esvertheless in the instant case the order recites that the court heard evidence as to the value of the property, the insolvency of the appellants and as to the necessity of preserving the property, and the court found that it was necessary for the preservation of the premises that a receiver be appointed: that it is probable there will be a deficiency after sale and that appellants are unable to satisfy the same. These were ultimate facts. Under such a state of the record, where it is desired to reverse the order on the ground that the evidence is met sufficient to sustain it, the evidence must be preserved, otherwise the decree must be affirmed. Feyerabend v. Feyerabend. 312 Ill. 559, 563.) Moreover, the verified bill alleges the fair, reasonable cash market value of the premises to be \$17,500. and that the amount due complainants is \$19,415.50. We cannot may the chancellor abused his discretion in appointing the receiver.

The interlocutory order of the Superior court is affirmed.

APPIRMED.

Scanlan and Gridley, JJ., conour.

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The interlocatory order of the Superior court is affirmed.

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GAGE STRUCTURAL STEEL CO.. a corporation.

Appellant.

HEMRY PASCHEN, doing business as Paschen Bros. appellee.

APPEAL FROM CIRCUIT COURT. COOK COUNTY.

268 I.A. 6214

MR. JUNTICE OF INLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpait, commenced in October, 1929, there was a trial without a jury in March, 1932, resulting in the court finding the issues in defendant's favor and entering judgment against plaintiff for costs. The present appeal followed.

The action is based upon a written contract, signed by the parties and dated March 3. 1929, wherein plaintiff (first party) is designated as the Sub-Contractor, and defendant (second party) as the Centractor. Plaintiff's declaration, filed October 10, 1929, consists of a special count and the common counts. In the special count the contract is set out in hace It is on a printed form, filled in with typewriting, verba. and portions of it are as follows:

"ARTICLE I. The Sub-Contractor shall and will provide all the meterials and perform all the work for the furnishing and fabricating of the structural steel, F.O.B. trucks at building site, for the Steuben Club Building, to be erected at the northeast corner of Randolph & Wells streets. Chicago, Illinois, for the 198 Fandelph Building Corporation, in accordance with plans (describing them by sheet numbers and dates), as shown on the drawings and described in the specifications prepared by K. H. Vitathum, Inc., Architect for said building.
ART. III. No alterations shall be made in the work

except upon written order of the Contractor, - the amount to be paid by the Contractor or allowed to the Sub-Contractor by virtue of such alteration to be stated in said order. Should the Contractor and Sub-Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure

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268 I.A. 621"

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to agree, the determination of said amount shall be referred to arbitration, as provided for in AMP. XII of this contract.

ART. IX. It is mutually agreed between the parties hereto that the sum to be paid by the Contractor to the Sub-Contractor for said work and materials shall be \$251,000. It is the intention to re-decisn the present construction and wherever changes are made the following unit prices shall provail:

\$63.50 per ten for increased tonnage. decreased

subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Contractor to the Sub-Contractor in current funds, as follows: 85% as the work progresses. The final payment shall be made within 30 days after the completion of

the work included in this contract.

ART. All. In case the Contractor and Sub-Contractor fail to agree in relation to matters of payment, allowance or loss referred to in ANTS. III or VIII of this contract, \* then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Contractor and one person selected by the Jub-Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on bath parties hereto. \* \*

In said opecial count, plaintiff averred that pursuant to the contract it fabricated and furnished to the Steuben Club Building in Chicago all structural steel according to the plans and specifications, and in all respects performed and fulfilled the contract on its part; that defendant is entitled to cash credits of \$220,850, on the contract price of \$251,000, leaving a balance due from defendant to it under the contract of \$30,150; that during the performance of the contract plaintiff, at defendant's request, also furnished and delivered to the building "extra and additional atech work" of the total agreed price and value of \$18,351.99, of which extra steel work defendant is entitled to credits of 93.742.70 (leaving a balance due thereon of \$14,609.29); that all of the steel work so furnished was accepted by defendant and used by him in the erection of the building; that the last delivery by plaintiff was completed on December 19, 1928; and that the total amount due from defendant to plaintiff on the contract and for the extra work is \$44,759.29, together with legal interest. Accompanying the declaration is an affidavit of claimno horrower of Claim frames blos it and interested and accept of advertises wife to Bill a Poll on yet independ an antifordisms will disp and accept toward toward till accept at \$1.

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To the declaration defendant filed a plea of the general issue and a special plea in which he alleged that "as to all the several supposed promises in plaintiff's special count, except as to the sum of \$14,609.29," plaintiff ought not to maintain its action because of article III of the contract; that he has paid to plaintiff all sums due under the contract, "except that he says that the sum of \$30,150, alleged to be due to plaintiff from defendant, is for alterations and re-designing of said building, and that plaintiff made demand upon defendant to pay such our which payment defendant refused to make, and that thereby such damand and refusal comes within the provisions and purview of said art. III of said contract. and that by reason thereof it became and was plaintiff's duty to aubmit its alleged claim to a Board of Thitration pursuent to Art. XII of said contract." And defendant further alleged that although often requested plaintiff has refused and neglected to submit such alleged claim to a Board of Arbitration pursuant to Article XII. "by reason whereof plaintiff has prematurely and in violation of said contract instituted these proceedings as to said sum of \$30,150."

In the affidavit of merits accompanying the pleas and made by an agent of defendant, similar allegations are made, and affidat concludes with a denial that defendant is indebted to plaintiff in said sum of \$44,759.29.

on January 3, 1930, on plaintiff's motion, the court entered an order finding that the affidavit of merits presents no legal defense to the sum of \$30,150, and adjudging that plaintiff have a judgment in said sum against defendant, and ordering that the cause stand for trial as to the balance of plaintiff's claim. From this judgment defendant prayed an appeal to this court and filed an appeal bond in the circuit court.

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On Jumeny 5, 1980, on plaintiff's notion, the court entered on order faming that the officeric of murity presents no lugal defence to the sum of 150,150, and adjudging that plaintiff have a judgment in said one equinat defendant, and ordering that the cours state for trial as to the balance of plaintiff's claims from this judgment determine prayed an appeal to this court and filed an appeal bond in the sirvait court.

attorneys entered into a written stipulation wherein they agreed that the allowance of the appeal from the judgment order of January 3, 1930, be vacated and the appeal bond be withdrawn and cancelled; that the judgment against defendant for \$30,150 be set aside and held for naught; and that defendant be given leave within 15 days to file "an additional plea puis derrein continuance, alleging the payment to plaintiff of the sum of \$30,150, upon the claim involved in the cause." On the following day (February 21, 1930), the stipulation was presented to the court and, upon motion of the attorneys for the respective parties, the court entered an order in substantial accord with the stipulation.

On March 6, 1930, defendant filed an additional plea puis darrein continuance, together with an affidavit of merits. On May 2. 1931, defendent filed two similar pleas. In one he averred that plaintiff ought not to maintain its action "as to the cum of 14.609.29." because he says that after March 4. 1936, plaintiff. for a veluable consideration, "executed and delivered a full and complete waiver and release of \* \* lien to and upon the structure \* \* and thereby forever deprived defendant of his rights of subrogation and/or of his right to maintain a mechanic's lien on and against said In the other plea defendant averred, as to the sum of structure." \$14,609.29, that on February 20, 1930, plaintiff accepted \$30,150 in currency "and the further sum of \$14,609.29, represented by notes executed by 188 Randelph Building Corporation, and guaranteed by the Steuben Club, a corporation, in full estisfaction and discharge of the several promises and of all the summ of money in plaintiff's declaration mentioned." In the affidavit of morita accompanying these last mentioned pleas it is stated:

"That any and all so-called extra and additional steel,

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furnished by plaintiff for said structure, was furnished at the express direction and authorization of the supervising architect \* \* and not to or for or upon the request of defendant, and \* \* was a direct obligation of and against the owners of said structure only; that it was then and there so agreed and understood by and between plaintiff, said architect and said owners at the time said extra and additional steel was so furnished; and that plaintiff recognized the liability of said owners and accepted said owners as the obligers of such obligation and did accept from them moneys and notes in full payment, satisfaction and discharge of the sums of money in plaintiff's declaration mentioned."

Subsequently it was stipulated between the atterneys for the respective parties that plaintiff need not file replications to the pleas, with the understanding that upon the trial it might "interpose any defense to any of the pleas." the same as might be interposed had appropriate replications been filed.

On the issues thus made there was a trial without a jury during the early days of March, 1932, at which much oral and documentary evidence was introduced by each party. The following facts inter alia were disclosed: In March, 1928, the defendant, deing business as Paschen Bros. (designated as Contractor) entered into a building contract with the 198 Randolph Building Corporation (designated as Owner and hereinafter called the Building Corp.) to furnish all work and materials necessary for the erection of the new Stouben Club Building. There was an issue of \$4,100,000 in first martgage bonds and also an issue of second mortgage bonds. The centract provided for the payment to defendant of \$2,234,020 in each and \$422,200 in said second mortgage bonds. The Union Trust Company, a Chicago bank, was designated as the disbursing agent; the underwriters of the bond issues were Halsey, Stuart & Co. and the latter's representatives were Cinston & Co.; and all payments to defendant as Contractor were to be made upon certificates of the architect, K. M. Vitzhum & Co., Inc., countersigned by inston & Co. It was also provided that extra work and materials might be furnished, but that an estimate of the cost thereof submitted by

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unit a deceible lakes a new verels show that consider not all during the early days of Karaki 1988, and which take and paired documentary evidence was introduced by each party. The Tallowing death bring all all every examination of the latter the refer that boneous (wirecontact as belooming) agent method to meeting unbid Man a betation extraor with the limit towering building livegerillass "(designated an inner and harden that he had the Hallittan der herealtes) Quality all very oil wit photocom afternoon in your dis sense. at 200,000,000 to sent to one wast' spaidthed said added wor action epoption large a to said as sale for class epigenia realt GSD\_SEE\_ES To discharge of francis and with building fourther and day good and hard his wall necessary materials bears of the listen Truck Company a Chicago Sent, was designated as the distance a greenly grow half were approach breat and the enably cracker and compact to and the latter a regressible were lington d. Co.; and all paymonts to serendent as Contractor some ta in said apan cortification thread of the property was been part of the property of the property of ed sagle also them has liver erver dust behivery sale per il 190 & firm toward but that an estimate of the court and the Abeliant

defendant should first be approved in writing by the architect and dinaton & Co., and that the value of all such extra work and materials should be fixed on the following basis, viz, "the actual cost to the Contractor of such extra work and materials " " plus 65 for overheed and 6% for profit in addition therete." In March. 1928, also, the defendant, as Contractor, entered into the subcontract with plaintiff, as above mentioned, for the fabricating and furnishing of the structural steel work required for the proposed structure. In the latter part of May, 1928, during the progress of the work, the engineers of the underwriters ascertained from examinations that the plans prepared by the architect were deficient with respect to wind stresses and demanded that additional steel for wind bracing be fabricated and furnished by plaintiff (defendant's subcontractor for that part of the work.) Thereafter A. W. Pubs. defendant's engineer and superintendent, met Carl J. Rundquist, plaintiff's representative, and directed him to confer immediately with George Nay, a structural engineer employed by defendant. Eundquist did so and thereafter he and May had numerous conferences as to the additional steel work necessary to be fabricated and furninhed by plaintiff, and as to the probable cost thereof, and they tentatively agreed that said cost would not exceed the sum of \$15,000. Because of the deficiency in the architect's plane and specifications, on the basis of which plaintiff had made its said sub-contract with defendant, the question still remained, however, as between the owner (the Building verp.), the architect, and the original contractor (defendant), as to who should pay for such additional steel work. Accordingly, a meeting was had during the early part of June, 1928, in the office of the architect, at which representatives of all interested parties were present, and said question was discussed. Euch of the oval testimony contained in the

the state of the s are while extres done him to out or our time appli A majority has Andrea and " and a maniful pulserant and up and the lifeton whetered in and the allegrator has dear after their he didention 460 at 1160 AND AND ADDRESS OF THE ADDRESS OF THE PARTY AND ADDRESS OF THE PARTY ADDRESS Many against him defendances and resident and although the basic and and an artist destroy with claiming as shown mechines, for the functions beginning of the principle from the design of the principles of the principles of IN THE BALLOON HOPE OF COMES AND A PARTY CAN DAMESTED a # 100 h a 1 10 ment ball afrome graditerator wif to amenium and affin and the was Deal's Equalitation fould belowers the temperature and suggest older and kurulunt<sup>o</sup>s attities as marketter. Canno our he drop tone mit mentioned appring the transfer of the property of the president of the president of the property of the property of the property of the president of the property of the Tiedalammi Tiana of mil business and from the statements. with Responding to the control of th source from anormore but get box of out the bedratatet of at gummouse wise Legis frantsions and on on gall him charact two aldadory and no an acta attimining an badebo to mee and busper for bloom door bloo and bearge ployingers, 115,100. Boomes of the deficiency in the anchisect's plans and appointment on the boots of which plaints and and the smit absentable findings of the delice still sections file fordered ads bus aboutdorn odd alegro. politich inti frame ads mowerd as detailed everyothe terrenders, so to the cheese for for such only prince last new judicion a extensioner which last a land the medly park at June, little in the effice of the erchitects at which blue hate educates must be advantable be advantable and a second advantage of the contract of and al hominates was the out the form . Someworks are introduced in the

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present transcript concerns what was said and agreed to at that meeting. The testimony offered by defendant is in sharp conflict with that offered by plaintiff.

Carl J. Mundquist testified for plaintiff that he was present at the meeting; that he could not say whether L. C. Gaze and ... H. Gage (respectively president and socretary of plaintiff) were present or not; that Karl M. Vitzthum and Mesers. Murns and Black (representing the architect), lubs and May (representing defendant), Walter R. Miller and George . Brunkhorst (representing the Building Corp., owner). Henry J. Greune and others (representing the Stouben Club) all were present; that a "lot of dissatisfaction and hard feeling" was shown, because of the changes and because it was thought that the job would be delayed; that Greune wanted us to "push the job;" that there was "no agreement made that plaintiff would furnish the extras and look to the owners of the building for payment;" that "nothing of that kind was said by Groune, myself, or anyone clae," but that "I expected that the owners of the building were going to pay for it;" that lubs of Paschen Bros. said "he wouldn't give me an order for these extras, and wouldn't proceed with the work, until he had gotten an order from the owners;" and that "it is not a fact that Willer and Greune said that the Club would pay plaintiff direct."

Karl M. Vitathum, desendant's witness, after stating who were present at said meeting including h. H. Cage, testified that "the only controversy was who was to pay for the cout of the additional steel to be furnished;" that Greune, president of the Steuben Glub, said that "the club would have to pay the extras for the additional steel, and that he would have to go out and secure additional members in order to pay for it;" that "Bubs, representative of Faschen Bros., stated that they would see that the stuff would be handled in the

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Corl de busiques toetified for plaintiff that he men and if it had need not you tree himself of land appropriate rafe in Property (This mind; to quederase has beckinding after compact) much all all mawere present or not 9 that first the Person and Houses Burns and MARK (pepronecting the continued to how her larger continued midenation of the Miller and Severe . Semilares (representing the building varys, seems a finance of ferrors out votors (representing Me Merce (Int) all very present that a "let of close things and If the court but argued and he approach already not "parties, and the od an besnow emreyb sads thematick of blive day and sads salpheds a THE SALE OF THE PARTY AND ADDRESS OF THE PARTY AND PARTY AND THE PARTY A or region the extrem and lack to the conterp of the building for Though account and blue good bads to contident books "t miblied and be grown and said between 1" and ind ", sale angue to "bluow of" blue aged medone? he add Sant "it not you of thing ever til filer become for the extra per box of rebro an act of the pit Ante has "province may dept to but an ancient had all filled allies." the paper out? and facil him secret his build? And have a year of School 2 To District

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but that the cost thereof would be borne by the owners;" and that he (the witness) does not recall that either Cage or Rundquist said anything when that statement was made by Dubs.

Perendent's witness, Walter R. Willer, vice president of the Stouben Olub and treasurer and a director of the Building Corp., testified that at the meeting Bundquist and B. H. Gage. representing plaintiff, were present: that there was a discussion as to the necessity for additional steel for wind bracings that the question as to who should pay for the steel was "thoroughly discussed;" that lubs stated that "Panchen Bros. would not pay for this extra windbracing because it was the architect's mistake that the same was needed;" that thereupen he (the witness), Greune and Augerstein, officers and directors of the Steuben Clube all stated that the Club "would pur for the extrast" that R. H. Cage and Rundauist then said: "Yes, we will have to do that;" and that "Greume. Augeratein and mycelf told Vitathum to go ahead with the work, and that the Club would pay for those extras direct to the Gage Structural Steel Co.1" that during the meeting "we told both Vitathum and Dube orally to go ahead:" that he (the witness) "does not recall that we subsequently verified this by a writing!" that something was said later at the meeting "about our giving notes for the amount of the extras;" that about six weeks after the meeting, in the latter part of July, 1928. and after the work had further progressed. Rundquist and Gage come to his (the witness!) office, and "Rundquist anid: "We have come for some money in payment of extras, and we gave them a check from the Steuben Club in part payment of the extras;" and that at that time "they had no order on us from Paschen Bros."

Defendant's witness, Caorge V. Brunkhorst (representative of the Building Corp. at said meeting) testified that the meeting

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"was called for the purpose of discussing the additional windbracing and steel which was the outgrowth of a checking done by engineers \* \* and for the further purpose of eliminating any delay in the construction of the bailding;" that among those present were Nundquist and N. H. Cage; that Groune and Willer first stated that as the necessity for the additional steel "did not emanate from the Building Corp., it was up to the architect or his engineer to pay for it;" that considerable discussion followed and much difference of opinion expressed; that "lubs stated that Paschen Bros. would not pay for the extras;" that "finally, Greune said: 'Well, all right, lets get this settled; we want to get the building under way: the Club will pay for the extract" that Greune addressed that to all of us; that May then stated to Lundquist or to H. H. Gage that "he would cooperate with them and check with them the steel in order to determine the exact amount of the extragr that one of the officials of the Case Co. (plaintiff) made reply, the gist of which was that "the plan as cutlined by Greune was 0. K., that iso that the Club would pay for the extras."

The testimony of 1. . . Dubs, defendant's superintendent and its witness, was substantially the same as that of Brunkherst as to what was said and agreed to at the meeting. Dubs also testified that he there stated that "Faschen Bros. would not pay or be liable for any changes in the steel work;" that Greune first said that he "objected to the extrac as being a change in the plans; that after Black (engineer of the architect) had explained that "the bank had instituted the change and wanted it," and after much more discussion. Greune and Miller both said that "the steuben Club would pay for the extrac; that after these statements had been made, "Gage said that they would go shead and work with Way (defendant's structural engineer) and carry out the work; that "Vitzthum said that we

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(defendant) were to handle the work <u>as his agents</u>, and were to supervise the work in the field, the same as we did the rest of the building;" that some preliminary estimates then were presented "as to the amount that the change in the windbracing would cost;" and that May stated that "he thought the amount would be in the neighborhood of \$15,000, up to the 22nd floor."

In rebuttal, N. H. Gage, plaintiff's witness, testified:
"I don't think I was present at the meeting that took place in the
forepart of June, 1928, at Vitathum's office; I was not present at
any meeting in which either I or Aundquist stated that we would
look to the Club or the Building Corp. for the payment of the extras;
no one in my presence at any meeting requested me to do no."

famediately following said meeting letters passed between the architect and defendant and between defendant and plaintiff. On June 7. 1928, the architect wrote defendant a letter, which on its face bears the written approval of the Building Corp. (owner) and Vineton & Co. (representatives of the underwriters). It states: "We hereby authorize you to proceed with all additional steel required in connection with the above job for additional windbracing. " \* This is an additional cost due to modification of plans and specifications. and an extra under the general contract and disbursing agreement. The final amount being subject to final calculations checked by our engineers, your engineer and owner's representative. In no case, however, to exceed \$15.000." This letter was received by defendant on June 8th, and on that day defendant wrote plaintiff: "To herewith instruct you immediately to proceed with all labor and material involved in connection with your centract including that for revisions up to date. \* \* Tork in connection with Mr. May, who will establish with the architect acceptable terms covering changes that have been and will be authorized and fix definitely the amounts for extra

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compensation to date." On the following day. (June 9. 1988). pursuant to said letters, there was a conference in the office of the architect at which representatives of the architect. May (defendent's engineer) and Sundouist (plaintiff's representative) were present. On June 11, 1928, plaintiff, per Bundquist, wrote defendant in part as fellows: "Confirming agreement made daturday. June 9th. by our Mr. Bundquist with your Mr. May and the architect's representatives, " " we will bill you the sum of \$2,247.40, for extra charges, not including additional tennage, on the Stouben Club up to and including the 20nd floor. The prices include restocking 6% tone of columns as listed in our letter of the 22nd ult. (i.e., May 22, 1928) additional detailing expense and additional shop handling charges. \* \* Charged steel beams, angles, etc., are to be used up as far as possible. \* \* Left over steel is to be restocked at \$20 per ton, scrap to be paid for at \$30 per ton. Additional tonnage to be determined from plans by actual count and billed in accordance with terms of contract. Your immediate acknowledgment of this agreement will be appreciated." On the same day (June 11th) defendant, per subs, wrote plaintiff is part: "Your proposition of June 11th seems to be in accordance with the understanding derived from the conference with the architect, and it is therefore approved, subject to the terms of final count as noted therein." Thereafter the work of construction of the building continued and plaintiff completed its work of fabricating and frunishing the uteel shortly prior to January 1, 1929. including the additional steel for the accessary windbracing. The owner had been backward in making payments on defendant's general contract, and on January 5, 1929, representatives of defendant and slaintiff had a conference as to obtaining further payments from the owner, and on January 7, 1929, defendant wrote plaintiff us follows: "Confirming the agreement reached at the conference on January 5th.

altered at making any principles of the Cartisting of the conglish by ealthy add all expressions as not specify appoint \$100 ml Principle. the greathers of the agreentminimers of the architects but - Intil-determine a Thinkship | Salayant box (manipar a findages) plant of the plant was Alleriable with the Land by Admirit with definises in pure as fallows: "Girefinalny agreement and Catandare a Manadalana nadi dani gali anti morp diliki kalisarinyi anti moriyi addi nagi. THE CONSTRUCT TO NOT THE PART OF THE PART SALES AND AND THE ANALYSIS AND ANALYSIS ANALYSIS AND ANALYSIS ANALYSIS AND ANALYSIS ANALYSI of he are medical to been cheered for several models revealed the agent of the part of pridical pub Leadiline ins resigns utilized functions intif all un as us bear as as over 2 and 2 and 1000 to de de de de constitución e mag out in recommend of a first order at the part of all places, Conferences and any Mry de out that or ar game with differentiables of outing our Young higher agreement and, betternion demonstrate and the demonstrate or product of the party o you , further ket (1811 would) you court off of amone dill one to mottlesquip went? I drop of bifacing ofour the to be in government with the wider standing derived from Lin conformac amues and of include abordance analytical at it has appointed and attiaddress to the the set ordered. September to the part to the In these and burniages billing of the bound follogath files and the Induction that and ferrotified the about aboutly prior be funcing 1, 1929, and a state of the same and the same of the same and the same and the same and the same Levining a Vindow left on advantage told like \$1 bitesteed tred had been equipment, and an Jenuary by 1975, seprenous tives of defentation eligibitity had a posterouse as he situited a further reposits from the appealable on Villand and only or Parameters, 1965; IN Street, in him , makes ATTO STATES OF MARTY COME HAD TO THE PROPERTY OF SAME THAT !

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we hereby confirm that it is our intention to endeavor to procure the balance of the funds due you on your contract at the Steuben Club Building from the disbursing agents during the mouth of January. 1929. Our records show a balance due you of approximately \$50,000." It will be noticed that the letter does not state that said approximate balance is due to plaintiff from defendant. It appeared on the trial from plaintiff's original ledger sheet of its account with defendant. as presented by F. ... Swanson, plaintiff's treasurer and its witness. that at this date (January 7, 1926) there was a not balance due to plaintiff (considering certain allowances subsequently made) of about \$52,260, and this balance included \$14,609.29 (considering said allowances) for the extra steel in question furnished by plaintiff. .uch ledger sheet also disclosed that on March 25. 1929, plaintiff received a payment of \$7500, and the same was credited on its account with defendant. This left a balance, then claimed to be due to plaintiff, including said \$14,609.29 for said extra stoel, of \$44.759.29. Plaintiff did not receive any further payments from anyone until February 20. 1930 (about 4 months after the present suit was commenced. In the interval, and within apt time, it had also commenced a mechanic's lien proceeding, as a subcontractor, against defendant (Paschen Bros.), the owner (the Building Corp.), the Steuben Club and others. On February 20, 1950, plaintiff received direct from the owner (the Suilding Corp.) the sum of 30,150 in cash, certain other amounts in oash, and certain notes, aggregating exactly \$14,609.29, signed by the Building Corp. and guaranteed by the Steaben Club. (This transaction will hereinefter further be discussed.) It was stipulated on the trial that when said notes were received by plaintiff it dismissed its mechanic's lien suit and signed a waiver of mechanic's lien. juring the trial, also, plaintiff introduced in evidence a letter, containing a long account, dated July 26, 1929, addressed to the Steuben

TeleSide.

aguage of agreeing as esisted with an all this arithmes adment ow nedicte of the transfer on your contract of the field of Avronuel to discon out parties along a partie of north partition disconnection of the contract Total our manage and a sale of the sale of af and opening that the fact when your good that I had been not all well Initial tille to rescripping to "Admirestick most billiology of tak of reschool adminuter distrementation of the desire transfer and the attribute s presented by T. i. Sunnous, plaintiff's tremumer and its althouse nd mak washind that it has would bridge of quarter; taken and by health lands to (about all monoscent assessments aboves providence) Valdalado Ales mississes) 90.900, 255, Assistant some allegations of but the series arend to question runtimed by plainters. tillianal aland and and another toward the sale season to be a season to be service oil to builden our two and has court to trough a bivisity with defendent. This left a beinger, then claimed to be due to to Louis andno thes not 05.000, bit bine partition! this niels sect administration out section of the court of the property of the court of the co White the are and that he form a during both a transfer live annual onis had the amis our misting home alveraged and al aboneous Commenced & mechanical alice presenting, on a police-law according a pullers der name (Egoben Bros-), the owner (the hallding vory.), the Rhovben One and element to believe by hims statement him and mastros albes of Collect, to more odf (egrol and in the collection the world and you will print the same will be able to a section while eigned by the Maile ing forge and gaspanteed by the Stechen Links (This bedelights are M (a become in an entrol of the control of the on the trial that when mis notes were resulted by plaintful th dismined is medant's live out; and algord a waiver of medants's lien. coring the relate also, plainted introcuoed in ericence a leater, sonbinding to here exceeding the billy and received by the righted

is as follows:

Club and signed by defendant, per lubs, in which it is stated:

"In accordance with our checking of structural steel extras with
the architect and owner, we submit herewith figures representing
final canclusions, which ask to be authorized in the usual manner
as an extra to our contract." Then follows the long account.

The letter after being marked "accepted" by the architect, the
Building Corp. and the underwriter's representative, was returned
to defendant on August 13, 1929.

buring the trial plaintiff's attorneys contended, as they here contend, that the letters, etc., as outlined in the preceding paragraph of this epinion, conclusively show that at the meeting of all parties interested, held in the early part of June, 1928, no verbal agreement was made, as testified to by defendant's witnesses as above outlined, to the effect that defendant was not to become primarily liable to plaintiff under its subcontract for the cost of such necessary extra steel as would be fabricated and furnished by it, and that such cost would be paid direct to it by the Suilding Corp. or the Steuben Glub, and that the true facts were as testified to by plaintiff's witnesses, Bundquist and R. H. Gage, as above outlined. After carefully considering said letters, etc., we cannot agree with the contention of plaintiff's atterneys.

During the trial, also, plaintiff offered in evidence an "Agreement of Settlement," dated February 20, 1950, and signed by plaintiff and the Building Corp. (Owner). Defendant was not a party to the agreement. Because of that fact and because of the further fact that portions of the agreement were apparently self-serving for plaintiff (the present suit being then pending) defendant's attorneys objected to the introduction of the document in evidence on these grounds and other grounds, but the objections were overruled and the document was admitted. The agreement, abbreviated,

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During the trial, also, pinintiff offered in reidence
on "Agreement of Settlement," dated Tobersony 20, 1910, and alund
of plaintiff and the Building Corp. (Orner). Sefendant was pale
onity to the agreement. Acoques of that fact and browner of the
further fact that pertions of the agreement ward apparently colfourring for plaintiff (the present suit being then pending) defendonets attorneys objected to the introduction of the document in evi-

Whereas the Steel Ca. (plaintiff) "has a just a valid claim against Henry Faschen (defendant) \* \* as contractor. for balance due it for the structural steel furnished to the Steuben Club Building, which is secured by valid mechanic's lien rights upon the property" of said Building Corp. (owner), and whereas, there is at this date justly due to the Steel

Co. upon its said claim, "including accrued interest and costs. the sum of \$48.281.29, with interest at 65 from February 1. 1930."

Now, Therefore, the Building Corp., "for the purpose of securing from the Steel Co. a waiver of its mechanic's lien rights and a dismissal of the mechanic's lien proceedings," agrees with the Steel Co. as follows:

"1. To pay forthwith to it in each the sum of \$33,672." (\$14,609.29), payable at the ra e of \$1500 per month, with interest

at 6., guaranteed by the Steuben Club."

Said Steel Co. "hereby accepts said payment of each and applies the sum of \$30,150 on account of its said indebtedness against said Henry Faachen \* \*, leaving a balance owing and unpaid to it from said Henry Paschen amounting to \$14,009.29, and receives said notes as additional evidence and security for said indebtedness remaining due and unpaid from said Henry Paschen.

"Nothing herein contained, nor any act done or omitted with reference to the settlement and adjustment evidenced hereby, shall be construed as in any manner affecting or impairing the continuing primary obligation and liability of said Henry Paschen \* for the belance remaining unpaid to the steel Co., on account of its said claim as aforegaid."

It further appears from plaintiff's said ledger sheet and the testimony of said Swangon, plaintiff's treasurer and its witness, that said notes were received by plaintiff in the aggregate sum of \$14,609.29; that on February 21, 1930, plaintiff's account with defendant (then showing a balance due to it from defendant of \$14.609.29) was credited with two items of "notes received 110,109.29" and "\$4,500" (aggregating (14,609.29); and that plaintiff's swid account with defendant was belanced, - the ledger sheet under the heading "Salance" showing "DOO". It further appears that plaintiff thereafter only received as payments on said notes the aggregate sum 3509.29, leaving a balance due to it on the same of \$14,100; and that on lecember 2, 1930, three renewal notes were executed and received by plaintiff. These renewal notes were introduped in evidence by plaintiff. They are the joint notes of the Building Corp. and the Steuben Club, dated Becomber 2, 1930, each payable to the order of plaintiff one month after date with of interest, and for the

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respective amounts of .600, \$1500 and \$12,000 (aggregating \$14,100.) at the time of the trial (March, 1932) nothing had been paid to plaintiff on these renewed rotes.

"That plaintiff was not, as a condition precedent to the bringing of this action, obligated to demand arbitration by defendant of the claim for extra steel work sued for, and that the failure of plaintiff to prove a demand for such arbitration constitutes no defense to this action."

"That the giving by plaintiff to the owners of a waiver of its mechanic's lien rights upon the Steuben Club property constitutes no defense to this action."

As the general finding and judgment were in favor of defendant it is unnecessary for us to discuss these propositions. Furthermore, we fail to find that defendant has here assigned any oross-strops.

reversal of the judgment amount to the contention that the court's finding is manifestly against the weight of the evidence. It is argued in substance (1) that the additional steel, furnished to the Steuben Building by plaintiff, was ordered by defendant and he is primerily liable under the subcontract sucd upon to pay for the same; (2) that the notes of the owners, aggregating \$14,609.29, were not received by plaintiff in payment and satisfaction of the debt but merely as additional security therefor; and (3) that when said notes were accepted by plaintiff and it caused to be entered in its book account against defendant a credit for the amount of said notes and a notation that said account was balanced, such entries are not conclusive that said notes were taken in payment

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The various soints urged by plaintif's councel for a finding is musifeatly agained the weight of the evidence. It is the chart in the subject of the evidence in the stouben delicing by plaintiff, and ordered by defendant sud is is pulmently liable under the subcontract and upon to pay for the same; (2) that the motes of the sweets, angregating (la, depicts of the were not received by plaintiff in payment and catlefaction of the debt but merely as admitted security therefore; and (3) that when the merely as admitted that said account was injentiff said entries are noted that said account was injentiff said.

and actinfaction of defendant's claimed incebtedness to it. After a careful review of all the evidence contained in the present transcript we cannot agree with the contention or arguments. In our opinion, the swidence clearly discloses, after it was accertained in May. 1998, that the architect's plans and specifications were deficient in certain particulars, and after the underwriters of the loans on the building had insisted upon the defects being remedied by additional steel, that a new arrangement or agreement was made by all parties interested, in the architect's office, in the early part of June, 1928, as to the furnishing by plaintiff of the necessary additional steel and as to who would pay for such steel. defendant having refused to pay or to become primarily liable for the name: that it was agreed that the Building Corp. or the Steuben Club. or both, would pay for the same direct to plaintif; that at no time thereafter did defendant order such additional steel under and in pursuance of the original subcontract succ upon; that after the commencement of the present suit, plaintiff, on February 20. 1930, accepted notes from the Building Corp., guaranteed by the Steuben Club, for the amount due to it for such additional steel and at the same time balanced the account it had kept against defendant; that these acts were in fact done in pursuance of the agreement made in June, 1928; that defendant was not a party to the agreement of February 20, 1930, made between plaintiff and the Building Corp., and that the statements therein contained, to the effect that said notes were accepted by plaintiff only as security for defendant's claimed indebtedness to it, were aclf-serving and not binding upon defendant; and that subsequently in December, 1950, after plaintiff had accepted some small payments from the maker or guaranter of said notes of February 20, 1930, it accepted renewal notes for the balance (\$14,100) signed jointly by the Building Corp. and

most. . st or conficient benius, giancholist to noticely the direction and all least matter countries and alle he were to be and a of antengers to maidend and ddiv south former to Sultre When the same of the property of the state of the same ones and the first the condition's plant an apost to and a little part of settained in section of the best of the best of the best of the boloomer union unreless out moun bounded has entitled out we meet when any farmed has no inserthere were a fact offered damage has White all of couldness the six of the services in the service of the service and and to hitlertade to perfect out at an affect would be pres-. Legen dour wor that allow only of me but finds Lancidian you necessary defendant leving refused to pay at to become primarily liable for medical - till un vous untilling off their surrous and if deal years and as inde this made of inach some ode vol you blues adied so . The union livery face think their gains paint controlled the partnersons and an refle feld thego bean foorthooden Lanighto old to consecuting at his the communication of the present mail, plaintiff, on Volumery 20. and red means from the liether Corps, americal by the Lean Landidiba dan 16% of all drivers and 16% idell mode . factors ignit bed it issues and branched weld some site to be will be springer at each feet at oney uses wants took thurbon too off of giving a dom now decimated dods think and a some seem and enverse of schemics with a little and between placing on the balling ingly tookly all at anominimon aloradi administrate and indi ina angre? a Mandaghet was addressed as after thinking of hidgens over some than Money tack to the property of the property and not blacking upon the Wilderian with a total appeared at all memoraha foot has planted by to metrorists to reduce all more admiring these many bengines hall self notes of February 20, 1830, it accepted to select for time of the faithfull of the faithful bounds (bullett) successed and

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the Steuben Club.

Our conclusions are that the court's finding and judgment are not manifestly against the weight of the vidence and that the judgment should be affirmed. Buck will be the order.

AFFIRMED.

Kerner, P. J., and Scaulan, J., concur.

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JOHN KUKULSKI, Appellee,

V.

GUSTAV M. ZAHRZEWSKI, Appellant. 1

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

268 I.A. 6221

ME. JUSTICS ORIDINY DELIVERED THE OPINSON OF THE COURT.

On Sctober 15. 1930, a judgment by confession for \$250, upon a lease, was entered against defendant in the municipal court. The amount of the judgment is made up of rent claimed to be due for the two months of September and October, 1930, \$230, and \$20, attorneys' fees. Subsequently, on defendant's verified petition, the judgment was opened and he was given leave to defend, - the judgment to stand as security and the petition to stand as defendant's affiduvit of merits. On February 34, 1932, there was a trial without a jury, resulting in the court finding the issues against defendant and adjudging that the confessed judgment for \$250 stand in full force and effect as of the date of its remaition. From the judgment defendant has appealed. Flaintiff has not appeared in this court or filed a breef.

From the lease, attached to plaintiff's statement of claim and made a part thereof, it appears that it was signed by the parties on august 10, 1936; that by it plaintiff, as lesser, demised to defendant, as lessee, "the entire two story and basement brick building known as 1837 seat North avenue, Chicago," to be occupied for "retail bakery, wholesale bakery and living quarters;" that the term of the lease is for five years, commencing August 13, 1928, and ending August 12, 1933, and that the stipulated rent is \$115 a month, payable in

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ASPELL WICH MUNICIPAL COURT OF CHICAGO.

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From the leave, attached to plaintiff's statement of claim

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belony, wholesale being and living quarters; that the term of the

line of the county and living quarters; that the term of the

advance "on the thirteenth day of each and every month of said term." The lease is on a printed form, filled in with typewriting. A rider is attached, signed by the parties, and expressly made a part of the lease. The second and third paragraphs of the lease (in printed type) are as follows:

"ENCOND. That the second party (defendant) has examined and knows the condition of said premises, and has received the same in good order and repair, except as herein otherwise specified" (no exceptions specified except in the rider as hereinafter mentioned); "that no representations as to the condition or repair thereof have been made by the first party (plaintiff), or his agent, prior to or at the execution of this Lease, that are not herein expressed or endorsed hereon; that he (defendant) will keep anid premises in good repair. \* \* and will keep them and the appurtenances, including catch basins, waults, and adjoining alleys in a clean and healthy condition. \* \* during the term of this Lease at his own expense. \* \* and upon the termination of this Lease, in any way, will yield up said premises to said first party in good condition."

"THIRD. That the first party shall not be liable for any demage occasioned by failure to keep said premises in repair, and shall not be liable \* \* for damage occasioned by water, snew or ice being upen or coming through the roof \* \* or otherwise, \* \*."

In enother printed clause is the lessee's authorization for the entry by confession of a judgment for any rent due and unpaid and \$20 attorney's fees, etc.

In a special clause, in typewriting, it is provided that "the lease shall furnish at his own expense all the fuel, labor, remains, etc., secessary to heat with steam heat the above mentioned premises," and that "the lease shall do all cleaning, decorating and remains of said premises." In the rider on the lease, deted august 10, 1928, are the following provisions, among others:

"It is expressly agreed \* \* that 60 days written notice is given lessor by lessor of lessor's intention to terminate this lesso on said last mentioned date. Lessor is entitled to terminate this lesse upon like notice to lessee at like dates, by mailing said notice to the within mentioned premises, addressed to said lessee."

"It is expressly agreed " " that the lessor shall within 7 days from date hereof make necessary repairs to chimney leading to baker's oven, to enable lessee to properly operate said baker's oven."

The bill of exceptions discloses that at the commencement of the trial defendant's attorney (Mr. Sherwin) made the following

edvance "on the thirteenth day of each and every mouth of each term." The loans in an a printed from, filled in with typorising. A sider is ablached, signed by the parties, and expressly made a part of the loans. The econd and third paragraphs of the loans (in printed type) was as follows:

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etatement: "Plaintiff's attorney (Mr. Hamilton) contends that under the terms of the lease it was the duty of the tenant to pay for all repairs on the inside and outside of the building and that we are not entitled to any set-off for repairs which we were forced to make on the building because the landlord refused to make them-Our contention is that it was the landlord's duty to make these repairs; that we, having made the repairs and having paid for them. are entitled to be reimburged for the sums paid out; that these repairs did not clean up all of the trouble; and that, the landlord refusing to put the promises in a habitable condition after he had knowledge of all the facts given to him by defendant, it finally resulted in a written notice given by defendant to plaintiff on September 8, 1930." Thereupon the following occurred:

"MR. HAMILTON. se admit we received the notice. The Court. Le you admit that defendant was in possession of the premises in September and October, 1930? MR. Skilled . We admit we are liable for the rent for September and October.
The COURT. If you can agree upon a stipulation of facts

M. III. IV. 1'11 dictate the facts to the reporter and

Mr. Hamilton can add anything he wants."

Theroupon defendant's attorney stated the following without objection or modification by plaintiff's attorney:

"It is stipulated and agreed by the parties that the followin

are the agreed facts which the Court is to pass upon:

1. That the bricks from the chimney on the roof of the premises fell in and blocked the flue so that the bake even could not be used during July and August, 1930, and that plaintiff was informed of this by defendant and refused to repair it or put it in shape so it could be used.

2. That in the foundation around the building there were large openings which occurred during said months of July and August. 1930, and that the landlord was advised by defendant of this condition; that rate entered into the building and destroyed 84 bags of flour shich cost over 45 per bag to the great loss of defendant; and that the landlord refused to repair or close up the holes.

3. That in August, 1930, the roof above the bake oven was like a sieve and the rain came through, so that it was impossible to stand in front of the oven without getting drenched; that the landlord was advised of this and refused to make any repairs; and that part of this roof was repaired by defendant at a cost of \$50, but that it did not help because the entire roof was retten and had to be replaced and plaintiff refused to replace it.

under the terms of the least it was the duty of the budicing and that for the for all repairs the indicate the budicing and that for a substant of the budicing and that the repairs which we were forced to an abla that the construction is that it was the breaks and haring paid for them, aspaires that we bearing paid for them, aspaires that the remaining paid for them, as the back the compaire and hard that the back that the same paid only that the baddord repaire the baddord to be been as the baddord and the baddord as the baddord and the baddord as the baddord and the factors of the baddord and the baddord on the baddord and the factors of the baddord and the baddord the welltied motion given by defendent to plaintiff on

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Thereupon defendent's attorney shabed the following without

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4. That the sewer in the premises backed up and the stench therefrom permeated the first floor during July and ugust, 1930, so that it was impossible to use said floor; that defendant with his family used part of said floor for living quarters; that defendant spent .45 in and about endeavoring to stop the stench and repairing the sewer, but it did not help as the entire cost of repairing the sewer would be .600; and that the landlord was advised of these facts and refused to make any repairs.

5. That defendant occupied the premises, from the date he took pessession of them until he neved out, so a beloay, and that the foregoing conditions occurred during the months of

July and August, 1930.

following notice to plaintiff, which was received by him:

'Under the terms of the lease wherein it is provided
that the lease may be terminated on 50 days' notice, ! hereby
give you seties that I have decided to and have elected to take
advantage of the clause to terminate anid lease. I shall vacate
the premises within 60 days after september 13, 1930, at which
time you may come to take the keye if you so desire, or if not
I shall deliver them to you.'"

Thereupon the following occurred:

THE COURT. Anything else?

M. Will M. Is your Honor going to peac upon the question of the validity of the notice under the lease?

THE COURT. He, you can set that up when they are you for the future rents; I see no need to pass upon it here; \* \* the Court finds that the judgment heretofore entered in favor of plaintiff on october 16, 1950, for \$250, should be confirmed.

opinion that the judgment appealed from should be affirmed.

Lefendant's counsel, in his brief here filed, contends that that judgment is not sustained by the evidence which, as he further contends, discloses that defendant was constructively evicted from the premises, thereby warranting his vacating the same and surrencering possession thereof to plaintiff, within 60 days from the date of said notice of September 3, 1930, (viz. on or before Sevember 7, 1930, which would be prior to the time, fovember 13th, that the Sevember rent would become due and payable.) To counct agree with the contentions. The record shows that defendant's attorney in open court admitted that defendant was "liable for the rent for september and october, 1930" (viz. the rent of 1215 a month falling due by the terms of the lease on september 13th and

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October 13th, respectively), and that it was for the monthly rentals due on these days that the confessed judgment was entered, including the stipulated attorney's fees. Furthermore, we do not find evidence of any constructive eviction by plaintiff. By the terms of the second clause of the lease, as above set forth, the defendant covenanted and agreed that he had received the premises "in seed order and repair," and that he would "keep the premises in seed repair \* \* at his own expense." And by the special clause in typewriting on the face of the lease, as above set forth. It is provided that leage (defendant) "shall do all cleaning, decorating and repairing of said premises." From the rider on the lease it appears that the lessor agreed that he would repair "chimney leading to baker's oven," but it also appears from defendant's verified petition or affidavit of merits that those repairs were made. And it further assess from the cridence that no complaint concerning the condition of the chimney we made by defendant until about two years after he had taken possession, during which period he continued to pay the stipulated monthly rent. We do not pass upon the legal effect of that paragraph of the rider on the lease which pertains to the 60 days' written notice, but we may pay that we are unable to " understand its meaning.

For the reasons indicated the judgment of the municipal court of February 24, 1932, appealed from, is affirmed.

ATTIRMED.

Kerner, P. J., and Scanlan, J., concur-

Garder this respectively), the the next ter the mentily restains the st these days had his confront julgame has maderia, hadoming the extended attenues of the commences we do not find extense salt to sugar our off . This will be delicated avisor to the to Southful all officed on one or award out to emply brook. home till mentaren mit gener hiller six mell han "galagre hin mensi at which Deliving hits of him " "positions are set \$2 or 1 stages at at arrest ine wido or are the first or where he will see publishers. patronich patronic its at finds' (honoral) same foll hearway at south add we wishe add meet. Then the believe we the Ature to anthant remainer there alsow he took became uses of all the bolibrar a tantactob merk araciga ands it full tures a traded at and along over aringer and July with the to the up are made. pairmennes dainforce or baid complime ade mont announ and out dress films to be bettet ad about a w countrie set le coltibuo celt yours after he has baken possession, during which ported he continued Lagal sid high send for do a " . send the house which the lagas the lagas the lagas and send the lagas and send the lagas and th estant of that paremain of the ricer on the Leave which portains to the 60 days' eritten melice, but no may our that we are unable to misrotand ton mentions.

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EDWARD 5. BARBER, his wife, Appellees,

V.

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APPEAL PROM GIROUIT

COURT, COOK COUNTY.

268 I.A. 6222

M. JU TIC ON LILLY 1 LIVER D THE OPINION OF THE GOUET.

This is an appeal from a decree of the circuit court, entered March 24, 1932, wherein the court found that all material allegations of complainants' bill were true, confirmed the master's report, and eccreed that defendants be perpetually enjoined "from selling, assigning, \* \* collecting, enforcing, or attempting to collect or enforce, the judgment known as Fannic appel v. Edward S. Barber and Mabel J. Barber, No. 1432148 in the municipal court of Chicago, and from proceeding dir etly or collaterally on said judgment."

In complainants' bill, filed March 25, 1931, the prayer is that they "may be forever relieved from any and all obligations," arising from or under their note and trust deed, executed and delivered on April 16, 1926, as call as from or under said judgment of the municipal court; that defendants be both temporarily and perpetually enjoined as to said judgment as above stated; and that the judgment "be declared paid, satisfied, cancelled and extinguished."

On March 27, 1931, after defendants had appeared, the parties agreed that an injunction pendente lite might be issued as prayed, and such temporary injunction was issued. On July 8, 1931, after defendants had filed an answer to the bill, in which most of its allegations were admitted, the cause was referred to a master to take proofs and report his conclusions. On the

COURT, COOK COUNTY.

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On Moren 27, 1931, after defendants had appeared, the an unayed, and such temperary injunction was leaded. On July 6, 1951, after defendants had filed an enswer to the bill, in which most of the allog-vient were admitted, the cause was referred to a master to take preefs and report his conclusions. On the

hearing before the master certain facts were stipulated and agreed to by the solicitors for the respective parties, "in addition to the facts alleged in complainants' bill which are admitted to be true."

Among the findings of the master, as contained in his report, filed on October 28, 1931, are the following in substance:

That on April 16, 1926, and prior thereto, complainants were the owners in fee simple of certain improved real estate. commonly known as 4719-4721 Drexel Boulevard, Chicago; that when they took title to the property it was encumbered with a trust deed, made by John C. Griffiths and wife and running to the Continental and Commercial Trust & Savings Bank, as trustee, which trust deed, dated September 15, 1925, and shortly thereafter recorded, had been given as security for an indebtedness of \$40,000; that on pril 16, 1926, complainants executed and delivered their judgment note for \$13,000 to Marney appel, one of the defendants, and to secure the note also executed and delivered their trust deed (a second mortgage), dated April 16, 1926, and recorded shortly thereafter, conveying the property to Oliver T. Cody as trustee; that on September 8, 1986, complainants, by warranty deed and for a valuable consideration, conveyed the property to Louis Krug, subject to said Griffiths and Cody trust deeds; that "credit was given to said Krug on the purchase price of the property for said two encumbrances;" that while in the warranty deed to Krug it is not stated that he expressly agreed to assume and pay the two encumbrances, the taking of the property subject to said encumbrances "was a part of the purchase price" to be paid by Krug; that on September 17, 1930, Barney appel caused the confessed judgment in question to be entered in the municipal court against complainants on said \$18,000 judgment note, at which time there was a balance due on the note of \$6,600, and that the confessed judgment of \$6,697.50, as then entered, included accrued interest and attorney's fees; that on September 26, 1930, under an execution, a demand was made upon Edward S. Barber that he pay the amount of the judgment, \$6697.50, and Barber, to avail himself of the exemption laws of the State, thereupon filed with the bailiff a schedule of his personal property, claiming exemption, and said execution thereafter was returned by the bailiff "unsatisfied"; that complainants never made any tender of the amount of the judgment, or any offer to pay it, to defendants; that on January 6, 1931, Fannie appel, or her attorney of record, one January Blair, caused the original note, upon which said confessed judgment was entered, to be taken from the files of the municipal court, by supplanting the same with a copy; that on September 15, 1930, there was due and unpaid on the Griffithe' first trust deed for \$40,000, the sum of \$37,000, which said sum of \$37,000 was not thereafter paid; that in January, 1931, the Continental-Illinois Bank & Trust Co. was the holder and owner of the \$40,000 note (of which the balance unpaid was \$37,000) secured by said Griffiths trust deed. and said bank was threatening to institute for closure proceedings to enforce the lien of said trust deed; and that on January 29, 1931, Louis Krug and wife, as first parties, said bank as second party, and said Barney Appel, holder and owner of said second mortgage note of \$18,000 and upon which said confessed judgment of \$6.697.50 against complainants had been entered, as third party. entered into a certain written agreement, signed by them.

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The agreement is set out in full in the master's report. In it are recitals that "the record title to the property is now in said Louis Krug; that the bank, as accord party, is the owner of the mortgage indebtedness as evidenced by the Griffiths! first trust deed; that Krug and wife, as first parties. "desire to procure a cancellation and extinguishment of the mertgage indebtedness secured by such of anid trust deeds, and further desire and "have proposed to convey" the property in question to Samuel litting (the bank's nominee) "in full payment and satisfaction of the mortgage indobtedness secured by each of said trust deeds, upon an option being given to them, upon terms hereinafter set forth, to repurchase said property on or before April 29, 1952;" that the bank, as second party, "has accepted the proposition," and the same "is also hereby fully ratified and approved by said third party" (Barney Appel): and that Kruz and wife, as first parties, have, contemporaneously with the execution of this agreement and in consideration thereof. "executed and delivered their deed of conveyance of even date herewith, conveying asid real estate to said Semuel Witting, and have by said deed caused to be vested in him the full and absolute fee simple title to a id real estate and the full and absolute ownership thereof." It is then provided in the agreement that the bank, as second party, arrees to and does accept said conveyance "in full payment, satisfaction and discharge" of the mortgage indebtedness as secured by said Briffiths! first trust deed, and

<sup>&</sup>quot;Said third party (Appel) has agreed and does hereby agree that said conveyance to Samuel Witting shall likewise operate as in full payment, satisfaction and discha ge of said mortgage indebtedness, and all unpaid interest thereon, secured by said trust deed recorded as document to 9248488 (i.e., the Cody second trust deed executed by complainants), and it is hereby agreed, in consideration of said conveyance that all of the mortgage indebtedness and interest thereon, \* \* secured by said trust deeds, and each of them, has been and is hereby cancelled, satisfied and extinguished, and that all persons liable thereon are hereby released and discharged from all indebtedness secured by said trust deeds, or either of them, and that all principal and interest notes evidencing

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the indebtedness for principal and interest secured by said trust deeds, and each of them, be and the same are hereby cancelled and surrendered to first parties."

The agreement then further provides that Krug and wife shall have the option to repurchase the property of the bank upon paying a certain agreed sum by April 29, 1932; and that in the event Krug and wife do not exercise the option, Appel shall thereafter have an option so to do at a certain fixed price by July 29, 1952.

And the master further found in his report in substance:

That said agreement of January 29, 1931, was thereafter fully consummated; that on February 10, 1951, Barney oppel "book said second mortgage note, which he had caused to be marked as cancelled and paid," to said Cody, as trustee, and Cody, as such trustee executed and delivered his release deed of said second trust deed, and said release deed was immediately therafter resorded; that by virtue of said agreement "the indebtedness evidenced by the note executed and delivered by complainents on April 16, 1926, in the sum of \$18,000, as well as the judgment, known as Fannie Appel v. Edward S. Serber and Mabel J. Barber, No. 1432148 in the municipal court of Chicago, have each and both be'n fully paid, satisfied and extinguished and cancelled; that Famile appel is the dau hter of Barney pool and has no real interest in this cause, except as permitting her name to be used by her father for the entering of said Judgment, "which judgment was really entered or the use and benefit of Barney appel and as his own act and for his own purpose;" that upon the conveying of the property to Krug, he "became the primary obliger on the note originally executed and delivered by complements and complainants become surety for the payment thereof, \* \* and entitled in equity to be subrogated to the rights of Barney and Pannie Appel in the event that complainants should be required to pay this obligation, so that they might have recourse over against said Louis Krug for any and all sums which complainants might be required to expend in payment of the obligation assumed by said Krug, when he purchased the property from complainants;" that before Barney and Fannie Appel can demand of complainants the payment of the obligation, as evidenced by the note of April 16, 1986, and also by said judgment in the municipal court, they should be ready, able and willing to deliver to complainant any and all securities held by them, or either of them, to scoure the payment of said obligation; and that said Barney and Fannic Appel, by the execution and consummation of said agreement of January 29, 1931, have made impossible the delivery to complainants of the security to which they are entitled, and have made impossible the subrogation of complainants to the security, held by said appels, for the obligation, - the payment of which said Appels have attempted to enforce through anid judgment of the municipal court.

At the conclusion of the report the master recommended the entry of a decree, restraining and enjoining the defendants substantially to the same effect as thereafter was decreed by the court as first above mentioned.

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The agramment than further provides that first and vice shall have the option to rejectance the property of the bank upon paying a servate egreed out by Agril 19, 1922; and that the two event first and wife do not excepte the eption, Appel whell thereoffer have on option so to do not excepte the fixed price by July 28, 1922.

Theh arti agreement at flameny its TELL, one thousanding Make sameworks that on Personal Lot 1901, Reserve opposit these account that he hash manufact and better Date box bearing softward a bulletter wathroom's administration of the bullet of the line of the bullet only not bear alone as a series of the second second second series of the second secon at and all tree to admired by being the according to dappy whereif he reved alterested and he fifth an account to see sell AMERICAN BER DE RESERVE OF THE PROPERTY OF THE PROPERTY OF THE PROPERTY OF to telegraph and at the grant stand and a production of the promote the standard and a production of the production of t wind an Apona amount ald the territor on her to be a population of the property of the party of addition her some to be well by her dadley for the enterior to all 917-med but out out no. termine viller and from boile' grown but deal "securing you gid not into due and all no into days gureaff in upon the secrepting of the graperty to Trage to Tenture the printing educatelymo of bourviles and and and entropy of an and an application been a partial to spirit and by partial and an experience of an experience of partial and and the of retinger of himse afamily appealed one force one al dropallies that the distance was necessary went forth and that as yould not the of horizon of delin advantations delib and the beaute related and marks against the spirits on the second by the decomposite of b emitryklin odi ka tasayay ali standiliyana to basan - - as evidenced by the cabe of their he, bree, and she was by the at antiliv bee slie green od bisode gad; simoo legislam adi ne sends ye blod cestimeso lie has the countaigues of asvileh finds here guiding (free him to decorne out grown he gents by wedster and Samey and Farato ippale by the encentian and consumation of mid agreement of femous fit. 1952, here and impropriate the delivery and thurseithin the subregetion of complainable to the security, held by such expects for the old testion; while papers of cities and a special educe factolime off to Joingtof blue strouds as after at

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Appellants' coursel in his brief and argument has urged several points as grounds for a reversal of the perpetual injunctional order appealed from. In the view take of the case we do not think that a discussion of these points is necessary. After considering all the facts disclosed in the present transcript we are of the opinion that the court was fully warranted on equitable principles in perpetually enjoining defendants from selling, or assigning, or from attempting to collect or enforce, the confessed judgment against complainants, entered on September 17. 1930, for \$6.697.50. on their second mortgage note, then really held and owned by Barney Appel. This accord mortgage and judgment note had originally been executed by complainants for 118,000 on April 16, 1926, when they were the record owners of the property, but subject to a first mortgage of \$40,000. In September, 1926, complainants conveyed the property to Louis Krug, subject to the two mortgages, and "credit was given to Mrug on the purchase price" and the amount then unpaid on the two mortgages "was a part of the purchase price." Thereafter certain payments on both mortgages were made to the respective helders of the mortgage notes. When the confessed judgment was entered in September. 1939. against complainants on said note of \$18,000, the payments made had so reduced the indeb edness that there was a balance then due on the principal of \$5,600. At this time, also, a Chicago bank was the owner and holder of the first mortgage note of \$40,000, upon which only \$3000 had been paid and there was a balance due on the principal of \$37,000. Thereafter, in January, 1931, no further payments having been made thereon, the bank threatened to institute foreclesure progoodings on its first mortgage. Prior to this time Appel, in the endeavor to collect from complainants on said confessed judgment, had caused execution to be served on Edward S. Barber, but he had

house and treesures has heled and at faccuse tetenilogia Committee and all Descripting out the Committee or a victorian on a Francis I was not In the view of the ence we do not a main add an erder appealed from. that a discussion of these policy is consumery. Other continuence the factor classical to property transcripts on one of the spinish of its ting the sourt was fully marranted on equitable principles in perpotently enjoining advanced from welling, so uselpaing, or from -mes inhiero Chemaniul Conselno chi + ut the series of the contract of the lines of the contract of adequal tentions of home and hard their mind attent appetent become bedieners med Chertpies had also desigled, bits excutant female ald? ter complete but der 45 mile on derik lide living that they are the latered. In repleaser, body completents surveyed the property he of newly subject to the bus engineers and "eredit was given in i e the purchase prince and the amount then unpaid on the true The property of the body and the property of t off to produce a viscompor off of obos once examples wind on absen mortgage metes. Then the confount fulgame was entered in Septembers that ofference out and all to some him on almostations that me will we will would complet a car said Said another count will brown as had the principal of 66,400. At this time, aloo, a Chicago bank was the Then folds many good, but he adon such from fath out to evide me come To Logiant up and one someter a new court time him need ban coord "7,000. Thereafter, in Jenney, 1931, no further payments invite, been made thereof, the bunk threshound to the title foreshours into cald being mer the first verdicage. Frite ha ditte time Appel, in the badatunghut beasefrom biss on commissione mort declies of waveplus 

scheduled and the execution had been returned by the bailiff unpatisfied. To avoid an expensive and lengthy foreelesure procoeding by the bank on its first mortgage. Krug, the owner of the property subject to both mortgages, and opel, the owner and holder of the second mortgage note on which he had caused said confessed judgment to be entered against complainents, entered into the agreement of January 29, 1931. The gist of this agreement was that, instead of having the threatened expensive and longthy forcelesure preceeding commenced by the bank with prospect of a final decree of sole being ultimately entered in its favor and Krus and Appel thereafter only retaining their respective rights of recomption. Eruz and wife were to convey the property to the bank's nominee (Witting), both mortgages were to be released of record by appropriate do do of the respective trusteen thereof, both mortgage indebtednesses were to be cancelled and extinguished, but Krug and Appel were to have the right or option in succession to repurchase the property from the bank's said nominee, upon payment of all indebtedness, etc., due to the bank. - Krus to exercise his option by April 29, 1950, and speel thereafter by July 29. 1932. In the agreement Appel agreed that the conveyance to the bank's nominee should "operate as in full payment, patisfaction and discharge of the mortgage indebtedness" secored by said second mortgage, and all parties, including appel. agreed that the mertmage indebtedness secured by both mortgages Phas been and is hereby cancelled, catisfied and extinguished, and that all pursons liable thereon are hereby released and discharged therefrom," and that all principal and interest notes evidencing said indebtedness "are hereby concelled and surrendered to first parties" (Krug and wife). It further appears that said agreement was fully consummated; that to bring about its consummation Appel or his agent took away from the files of the municipal court said original

-was Thinke only and become and the being being being being being the being be outsides to unit or engrange on leaving to chickets counting by the benk on the first meregany, Isun, the comes of the requerty nulliced be both marigagety and ! reak, the group man hise because hed ad dicing no obey openious hupen out to toblied ferred tetrante to be artered orainst complainment, onsert Property and by deal and add the ground to downward with the will be the transple because it is the the transple bear to the transple to the transple bear to the transple bear to the transple to the transple bear to t Inn'l s to the upon of the fines and 've become on the anoma annerted has pure for rown add at breside visionally guied slow to sersell AND THE HELD BELL PERSONS THEIR TRANSPORT OF THE WITCHIST DISCONSIS that and hide were he assess? The preparty he blue bank's madens afailtonness to broken to temperate of it was assumption also (indistrastream to the property was also also also be the property and the property and of orow longs and how abandaloguitar ban bellevand of al since more the eight on appears in an appearance of the property from the east sominee, upon perment of all intellers, the due the the leak, . Rees to emercies his option by April 20, 1821, and appl thereafter by July no. 1862. ' In the agreeins appl agreed Elef at se ogrange" blands venimos atames en escapavare est rada "assentated had agagerou odd to egu abets has asida. Telias . inseres mercred by sold enough markety, one all parties, including typel. egreed the berigage indebtedaes accered by both mortgages "here been and in hereing concelled a methed and exclusive and that all practs little through are morty prix-me one discharged the orientales as the all principal one interest actor and the confidential independent "ate mereby confoled and intriendered to first parties" Char and extra the fertiles agreed his balk suprement was 2022. mercentally that he belief the offerended by the life of the property of the life of the l Lariet tout many from the Filas of the madeful court man food temperature

second mortgage note for \$12,000, "caused it to be marked by him as cancelled and paid" and presented it to Cody (trustee in said as cond mortgage trust deed), who thereupon executed and delivered his release deed, and the same was thereafter recorded; and that in order for appel to comply with said agreement, and to have the same consummated, it was necessary for him to procure the original \$18.000 note (which was the busis for the entry of raid confessed judgment against complainants), mark it cancelled and paid, and exhibit it to said Gody as being cancelled and paid, before the latter's release deed could be obtained. Under all these facts and circumstances. we do not think that appel should be allowed to be in such a position where he could attempt to enforce payment of said confessed judgment by alian execution or otherwise, or could an ign said judgment to a third party without notice of the foregoing facts. And, as before stated, we think that complainants were extitled to obtain the coultable relief by injunction as prayer by them and as granted by the court in the order appealed from. In 34 Corone Juris. pp. 459-60. sec. 719. it is said:

"Payment, settlement, or discharge of the claim in suit must generally be set up as a defence before judgment, " . But it is otherwise where the circumstances of the case were such that this plea could not have been received in the setion at law. So, also, where the payment or settlement was made after the institution of the suit, and was not then pleadable, a court of equity will grant relief against the judgment."

The decree of the sircuit court of March 24, 1932, appealed from. should be affirmed, and it is so ordered.

APPIRMED.

Kerner, P. J., and Sonnlan, J., concur-

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Mercery P. J., and Scanlang J., commun.

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SMETT J. LEARY, Appollee,

V.

H. A. GOLD,

Appellant.

OF CHICAGO.

268 I.A. 6223

MA. JUSTICE ORIDIEY DELIVERED THE OPINIOR OF THE COURT.

On March 24, 1932, in an action of the 4th class in contract, the municipal court struck from the files defendant's second emended affidevit of merits for insufficiency, defaulted him for ment of affidavit of merits, found that there was due to plaintiff the sum of \$269.45, and entered judgment against defendant in accordance with that finding. This appeal followed.

In plaintiff's amended statement of claim he alleged that his claim is for "goods and merchandise, consisting of meats, cold and delivered by plaintiff to defendant," at defendant's request. from time to time during the menths of May and June, 1931, for which merchandise defendant agreed to pay the total sum of \$269.45. Attached to the statement of claim is an itemized account of the merchandise claimed to have been delivered, the prices charged and the dates of the respective deliveries.

In defendant's said affidevit of morite to the emended statement of claim he denied, as to each and all of the items of merchandise
set forth in plaintiff's itemized account, (a) that they ever were sold
to him by plaintiff; (b) or that they ever were delivered to him by
plaintiff; (c) or that he ever requested of plaintiff their sale and
delivery to him; or (d) that he ever agreed to pay therefor said sum
of \$269.45, or any sum. And defendant alleged that he was not indebted
to plaintiff in any amount.

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to plaintiff in our amounts.

268 I.A. 6223

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On March 24, 1930, in an action of the 4th class in contreet, the contrigual computations the filter defeature's present you air bedung a guarded vineri we stram to dividible beaming cant of williarit of coults, down that there can due to plainiff al Smeaneles femings thought bereits has the block to mus and administration of the Line of the August and Augustia

Soil benefic ad minio to susuatada behause attitishinke al his dish to lor "gents and marginality, sentinging of soils, this dish that .Freezoot a transmino to ". fundamenta of thirming we betovish one from the to time the property of they and June 1901, for which independ to the first age to set the best to be the following and the state of the second set of the second nathronizate and the commun bearings in all allede by described and all cluimed to have hear nelivored, the prince charged and the dayes of . the season to the sellow

-afair hobract of the altract to the bird of the control of valuable on to small tall to the tree of an indust of the blate to tree ork Forth in plaintiff's thunkess assesse, (a) that they over over only to him by pialatiff; (b) or that they ever were delivered to bim by inte view whold l'histely to become a rows of sads to (a) this inicit delivery to bing or (d) that he ever agreed to gey thenefor raid out  It is our opinion that defendant's affidavit of merits discloses such a sufficient defense as requires a hearing of the cause upon its merits, and that the court erred in striking said affidavit from the files, in defaulting defendant for want of an affidavit of merits, and in entering the judgment appealed from. Accordingly the judgment will be reversed and the cause remanded.

Kerner, P. J., and Scanlan, J., concur.

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36122

MELEGR-MAGNER COMPANY, a corporation, and/or GENERAL ACCIDENT FIRE AND LIFE ASSURANCE COMPANYION, Appellees.

V e

BARRES METAL PRODUCTS COMPANY, a corporation.

Appellant.

APPEAL FROM MUNICIPAL GOURT OF CHICAGO.

268 I.A. 6224

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced on teptember 14, 1931, to recover of defendent a balance claimed to be due for certain carned insurance premiums, there was a trial without a jury in April, 1932, resulting in a finding and judgment against defendant in the sum of 3599.88, from which judgment the present appeal is prosecuted.

In plaintiffs' statement of claim it is alleged in substance that said belance is for the carned premiums on two policies
of insurance, issued to defendant by the plaintiff Assurance Corporation and in effect on December 12, 1928 (one being a workmens'
compensation policy and the other a manufacturar's liability policy),
and also on two other similar policies in effect on December 12, 1929,
and cancelled on April 16, 1930, for non-payment of premiums. It is
further alleged that said balance is \$595.88, which sum defendant
although often requested has refused to pay.

In ecfendent's second amended affidavit of merits the defense is that all premiums were paid to one R. Ernest Martin, plaintiffs' agent, and that defendant is not indebted to plaintiffs, or either of them, in any sum. In the affidavit it is alloged in substance that during December, 1928, Martin solicited defendant

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Appolice

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COURT OF CHICAGO

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In descendant's second amount of identic of scritch the defence is that all promises were paid to one N. Arment Marting of the continue of the one of the content of the one of the content of the conten

for insurance and procured data for "policies which he desired to sell;" that at this time he "was a stranger to defendant and it knew nothing of his business associations:" that about December 18th he delivered two policies, expiring December 12, 1929, to defendent and it paid to him by check the estimated premiums therefore that shortly before the expiration of the policies, Martin sought to sell to defendant similar policies for the succeeding year; that after negotiations he, about December 13, 1929, delivered to defendant the new policies, and defendent, in compliance with a bill of Martin & Co., (under which trade name Martin then was doing business). paid to Eartin the sum of \$728.47, for estimate, premiums; that about January 20, 1950, it was ascertained from an audit made of defendant's books that an additional sum of \$327.87 was due to plaintiffs on the original policies issued in December. 1928, and, upon Martin's demand. defendant then paid to him said last mentioned sum: that on the occasions of all of the payments "Martin was the agent of plaintiffs for the purpose of said collections, and the payments of said sums constitute payment in full for all carned premiums alleged as a basis of this suit;" that on these occasions "Martin was clothed with the indicia of title to said policies, and, without anything to create suspicion. defendant in good faith paid the bills for the premiums in manner and form as requested by Martin, to-wit, by checks payable to Martin & Co., agent of plaintiffs."

On the trial certain oral and documentary evidence was introduced. It appeared that the plaintiff Assurance Corporation wrote the policies in question, and that its co-plaintiff was its general agent in Chicago. It was not disputed that defendant in good faith had made full payment of all the carnee premises to Martin, who had delivered all policies to defendant, and that Martin had not accounted to plaintiffs for the moneys received by

for incurrance and procured dates for "sulfules which he desired to of has implanted as negative a some of deals alde as inde "allow mess nething of fits postero vaccidations?" that along frameway 1912. Brokerich of accounty independs polytique annually and negrotical and and he gold the title by an electron and banked promiums therefore black sharedy because the expression of the politices that't mention up will to defending abullar palketen for the enecesting years that often augustion for their legitier little little och per und gef understand the see officier, and defendent, in auguliance with a bill of derrin Short (commissed match was gott added once over calche to buy) got & groups don't grantles very content to out a facility by make with military and at lower to the man or the own of the control of the control of the control of and no affiliation of our case the fill to see the little on their other an open a first programmer that are for an an an an an an an analysis of defendant bies gold to him amid lagb utablowed sunt bies an die stiliniale to saspe out now allowed adversed out to lie to anotonous some purpose at main collection, and the payment a be priced grant atond a us being to antice me house at the tol like at common admittence and dels united that are these permeting "whiteher are and to deal the the indictes of paidityon touckile about anticipa of offit to alabout entrated and endeat in qual falsh paid the miller for the greature in anner and form assessed by Harting towards by checking agreed the common "The Partition of the same and a negative

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him. Plaintiffs oldined, as they claim here, that the evidence sufficiently disclosed that Martin was defendant's, and not plaintiffs' agent, and that, hence, defendant was liable to plaintiffs for the amount of the premiums which they had never received. Befordent here contends on the contrary (1) that it appeared that Martin was plaintiff's agent with authority to collect the premiums. and (2) that, regardless of the actual authority which Martin had. plaintiffs, by giving him pessession of the policies for the purpose of delivering them to defendant, apparently clothed him with authority to collect the premiume for them, and they should be estopped to demy his authority for that purpose. Defendant also contends that the court erred in refusing, while plaintiffs' witness (Morgensen) was being cross-examined, to allow cartain questions to be asked of the witness. preparatory to imposching cortain mate tal statements made on direct examination, and to show certain contrary statements made by the witness in snother court proceedings and also contends that the court erred in refusing to allow defendant to introduce evidence showing an admission by plaintiffs' conduct that Martin was their agent. vis. by causing Martin to be prosecuted in the griminal court for larceny as bailes of the amount of said premiums, paid to him by defendant.

As we have reached the conclusion that the judgment should be reversed and the cause remanded for a new trial, we refrain from outlining the testimony of the several witnesses. We are of the opinion that the court erred in his rulings in refusing to admit the evidence offered by defendant as above mentioned, and we do not think that the finding and judgment are sufficiently supported by such evidence as was received, or by the law. The decision and holdings in Lycomius Ins. Co. v. ard, 30 Ill. 545, are apparently in point. In that case one Puschman was an insurance

him. Maintiffs oldiner, or they alois heave that the evicence walled the last terminal that Route Surface and Arthresia and the Albertan athinially at affair any community arrest and has along total showlesses never led and district someony off by Female off; rule Auth between 48 Auto (2) tour sun off on absolute wind projected conclusing out tention of any production of the production of the when street duties attended Anthough to sentencers which [1] her pleintiffer by giving him precession of the policies for the purpose absolute little and buffelb university appropriate an audit palmentag to see all see premime the thouse and they amine an accurate of Pulse bill fiel the finites and depleted the property and direction with pains our (menoment) amoustly tablishing allies apaintly at house . augustic out la bodue es du ampioneme cinareo molin es abomigent-about Parents on which afternoonly be fed to be minimum unbidenced to a management -ilu adi ye okun minen dain yarince mistre muka of bar graiiname . There are 4-are absorbed only buy that imports from the first an east served begulire couldrent to include to include al horse Arms winds over address such Frances (APERTICAL OF Salambates in pol frame Lanimirs odf al badromoun of al altradi maleure of alle To mid at bing annalyzing blue to improve the section of grown a descente a

And we do not think that the feath and judgment are sufficiently we all one of the equation that the entre drawled for a new trially we the one of the chat the feather and judgment are sufficiently and mapperhad or by the land the chat the supported by such orthogon on one received or by the land the case received or by the land the case received or by the land and the case research or by the land and the case research or by the land and the case research

broker or a street solicitor of insurance. He arged the plaintiff. Ward, to insure her property against lass by fire in the defendent company and another company, and represented that he was an agent of both companies. After examining the property, he proposed to insure plaintiff in each company for one year for \$1500, and for premiums aggregating \$82.50. Plaintiff accepted the proposition. and in a day or two Puschman returned with the two policies executed by the respective companies, delivered the policies to her and sarsed that she might pay the premiums in 90 days. She fully paid these premiums in installments to Puschman within the time, but he never paid any of the moneys over to the companies. . fire loss occurred. and the companies, not having received the premiums, refused to pay the amount of the policies. She brought suit against the defendant company on one of the policies and recovered a verdict and judgment against it. On appeal it was urged that the court had erred in allowing her to testify as to the circumstances, above outlined, of her dealings with Puschman in obtaining the policies and in paying the premiums to him. In affirming the judgment our supreme Court shid (pp. 548-9):

"It is clear, that if the plaintiff has contracted with an agent of the company for the insurance, and paid such agent the premium, the payment would have been binding on the company whether the agent paid over the money or not, and it is doubtless true that if the plaintiff had paid the premium to Pucchasm, at the time knowing that he was not the agent of the company but only a street insurance broker, the policy could not be enforced, if Puschman

failed to pay over the money.

Again, if the plaintiff dealt with Puschman as the agent of the company, believing him to be such, and did not employ him to act for her as her broker in obtaining the insurance, he would have no power to act for or bind her. Under such circumstances, we are of the opinion the testimony objected to was proper. The plaintiff had the right to prove what the contract was. If Puschman was not her agent or broker, it was proper to prove that fact. If she dealt with him as the agent of the company, that was proper to be proven.

Puschman represented aimself to the plaintiff as an agent of the company, he examined the property to see if the risk would be a safe one, he conducted himself in all respects as an agent clothed with authority to act, and, after he had agreed with the plaintiff to insure her property, he returned with the policy,

Afternoon not begin of precepted to material possion of an exper-Applicable and of with 4d and follows afternoon and bound at a bag? to trans no and od tott bolimeranet Lan Times as beconvey an expansion the crossess. In the brokess to things planted in the comment has see your for little, and the and the pay of the pay to the said the said of the pay Authority and all and said dilly bearings assembled and the gale is all has and the non-selection of the best if the contract to the contr that she might per the germinan to Wo dages. The fully gain thouse reversed in the call and it is become within the transfer at me appropriate the come out will a verticated Add for your actions and he can alread and the completion has hereal descripted the greatman version to you the exercise of the politice. The prought suft against the defendant direction but feitzer a believoor man entelled will be ente an entennes nt heree had drugg san tredt begin har th heaten at the touten In aboutions are a consequences to the engineer of son universe antique at the solution out printed as manifest data annihes for ting processes to bits. In all irelay the judgment our lagrams fourt S. Dedick Goth Mand

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properly executed, ready for delivery. The plaintiff accepted the policy, and paid the promium in good faith, under the belief that

Puschman was the agent of the company.

Under such circumstances, who should bear the loss arising from the fraud committed by the street broker: Should it fall upon plaintiff, who was an innocent party in the transaction, or should it fall upon the company, who alone enabled Puschman to successfully consummate the contract of insurance by placing in his hands the policy for delivery? The etreet broker was not the agent of the plaintiff for any purpose. If the evidence be true, he had no authority to act for her or bind her in any manner whatever by that he might do in the premises, and while he may not have been, in fact, the agent of the company, still the company, by placing the policy in the hands of the atreet broker for delivery, is estopped from claiming that the payment made to him upon the delivery of the policy is not binding upon the company." (See, also, Selectic Ins. So. v. Fahronkrug, 68 lll. 463, 467; Lebanco Ins. Co. v. Arb, 113 ca. t.

The judgment of the municipal court, appealed from, should be reversed and the cause remanded. It is so ordered.

REVERSED AND REMARDED.

Kerner, P. J., and Scanlan, J., concur.

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THOMAS G. McGAY, Appellee,

W.

THE SQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation,
Appellant.



M. JUNITUM SCANLAR BELIVERED THE OPINION OF THE COURT.

Thomas C. NcGay, plaintiff, sucd The Equitable Life issurance society of the United States, a corporation, defendant, in assumpsit. There was a trial before the court, with a jury, and a versict returned finding the issues for the plaintiff and assessing his damages at \$5,648.61. Judgment was entered upon the verdict and defendant has appealed.

Plaintiff's declaration consists of three counts. The first alleges, in substance, that Irthur G. McGay, the insured, on January 25, 1939, entered into an agreement with the defendant whereby for a valuable consideration given to defendant it agreed to issue to the insured three policies of insurance on his life, the policies to be payable, in case of the death of the insured, to his father, the plaintiff; that it was agreed that two of the policies should be delivered to the insured at that time and that the third policy should be in full force and effect from January 23, 1929, until Earch 28, 1929, at which time an additional premium was to be paid by said insured if he were living at that time, and that in the event that he should die before March 28, 1929, the policy should provide that \$5,000 should be paid to the plaintiff upon proof of death; that the defendant failed and

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ASSESSMENT OF THE PERSON WERE ADDRESSED TO THE PERSON WHEN THE

Theres G. McJoy, plaintiff, sued The Equitchic life in zonempait. There was a trial hefore the court, with a jory, and a ventick returned finding the isomen for the plaintiff and accounting his deimpea at jo.848.61. Judgment was entered upon the vertick and extered appealed.

Fairly alleges, in substance, that intime d. doing, the insured, on Jenuary 25, 1926, entered into an egreement with the defendant charge for a valuable consideration given to defendant it egreed the pollutes to be parable, in one of the decimal it egreed the pollutes to be parable, in one of the decks of the insured, to his father, the plaintiff that it was agreed that two of the notice about to delivered so the insured at that two of the too saired policy should be delivered so the insured at that the and that the father, and that the next limit of the greening was to be paid by note insured if he were living at that time, and that in the orant is he were living at that time, and that in the should als before limits his.

neglected to issue the third policy, and that Arthur G. McCay died on or about March 14. 1923. The count also contains the necessary allegations as to the performance of conditions. etc. The second count contains the allegations pleaded in the first count, and in addition alleges that the defendant failed and neglected to issue the third policy, but instead issued a policy payable to the plaintiff but noy take effect until March 28, 1929, and which contained provisions contrary to the agreement and was never delivered to Arthur G. Monay or the plaintiff, nor was it agreed to by either of the said parties. The third count, files some time after the first and accomd, alloges that the deceased, on January 23, 10.5, applied to the defendant for three \$5.000 policies on his life, neveble to plaintiff: "that said application was contained in two certain letters (written by the insured) and on a printed form of an application furnished sold athur S. NeGay by the said defendant." The count sets up the two letters, one addressed to the defendant and the other to Barney Howsen, an accent of defendant. The letter to the defendant, dated January 23, 1929, is as follows:

"I have just forwarded to Mr. H. Memman under separate cover an application of \$18,000. and medical was made and sent from Chicago a few days ago.

accrued on my pelicies #3109,925--929 for the years 1928 and 1928 amounting in all to #111.15. I want policies issued in denominations of #5000. such. On one of them I wish to carry for a couple of months on an interim premium, the payment for same I forwarded on to Mr. Newman. This them leaves the two policies of #5000 each. Eindly transfer accrued dividends to the payment of this premium and the balance I also sent to Mr. Newman which he will take care of with you.

"when policies are issued, have them forwarded to me at this address marked to my Parasonal direction.

"Yery truly yours, "ARTHUR G. McGAY."

The letter to Newman, dated January 23, 1929, is as follows:

both galled all residue that the expilor build and asset of before the on ar about March La. 1830. The count also contains the necessary Amoran asil . was acapititage in communities wis as an set hom . Journ darkh wid mi bubasin problemation wid anterpos towns . i had she she will find and and and seeked on income which got my appropriate a memory included and expendent banks and the bai not sale offer anni March 188, 1829, and which contained as berevice versu and but anomerous of the treatment and it To rould a to be able to the real that the real to the to the the the enid partice. The trite amond, filed come time with the vice time and occord, alleges that the descreed, on James 50, 1985, applied giatras and at bankainen and antipositions him sail?" althoughe ma to must be the transact) and on a printed firm of an ". Princeton him only of spine in matter him body man and confirms The sourt sets us the tree letters, are affround to the defendant and the other to Juneary to seems on around of delegated and the to the defendant, dated formary the 1909, he or follows

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Donr Hewman

"Confirming our telephone conversation of last night wherein we agreed that you would take \$10.00 as your commission on this new policy and allow me the balance of your commission. I am therefore enclosing application blank completed, and writing the Equitable to transfer my accrued dividends to the credit of this policy and an enclosing a check to complete the Net payment.

"This above arrangement is strictly confidential and purely between ourselves. For that reason I am addressing this letter to your personal attention. I believe that it will show up as follows:

"Now I have decided to pay for \$10,000. insurance as agreed and take out an additional \$5000. on an interim premium of \$10.00 which will carry it I believe about two months at which time I may be in a position to handle, but if not I can then let it drop. The remaining \$10.00 is your commission as agreed.

"Aindly see the above is taken care of OK. sending me policies in care of the above but mark the envelope PHRSONAL. Thanks Newman, for assisting me in this and rest assured, I will threw any business your way that I can.

"With kindest remards. I am

"Very truly yours, "ARTHUR G. McGAY."

The count them sets up the application of McGay which requested the defendant to "issue in three policies of \$5,000 cach." The count also alleges "that a check for \$58.75 was sent in said letter and was presented to said bank on which said check was drawn and paid by said bank; that defendant accepted said application and on February 15.

1929, notified in writing arthur G. McGay " " that said policies "on your life have been issued as applied for;" that at all times after April, 1917, the defendant has had a practice and custom, known to Arthur G. McGay, whereby the defendant issued the policies of life insurance to acceptable applicants giving the policy a registry date from, to-wit; not enceeding nine months subsequent to the date of

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the accoptance of the application for incurance, for the convenience of the insured in paying his premium; that in order to insure an applicant's life from the time of the acceptance of the application to the registry date of the policy, defendant gave to the applicant what is designated as 'Preliminary Term Insurance.' insuring the applicant's life between the time the application was accepted and the registry date of policy, on payment of the regular premium: that in order to have such preliminary Term Insurance the applicant was required to pay a premium for \$5000. life insurance for such Preliminary Term Insurance (if 27 years old, which was the age of the applicant at the time in question, at the rate of, to-wit: \$5.14 per thousand per month); that in pursuance of said custom and practice and in obedience to it \* \* \* McGay paid \$10.00 to defendant, which was accepted by it for the purpose of insuring \* \* \* HoCay's life in the sum of \$5000. from the date of acceptance of said application, February 13, 1929; until. to-wit: two months thereafter under the terms and conditions herein set forth and notified insured that the policy had been issued as applied for, and arthur G. McGay's life became insured by the defendant in the sum of \$5000, payable to plaintiff herein from the date of the acceptance of said application until a date long after the death of said assured; that defendant by its acts and conduct in the promises waived that part of the printed a plication wherein it was recited that the applicant agreed that the policy or policies issued upon said application should not take effect until the first premium had been paid to the defendant during the applicant's good health, and that no agent or other person, excepting the President, Vice-President, Secretary or Treasurer, or a Registrar of the defendant Society had power to make or modify any contract on behalf of the Society or to waive any of the society's rights or requirements, and that no waiver should be

the acceptuace of the application for incurrace, for the convenience of the insured in captur his woming that is neder to incure on notinothern and to conceptons and he said wit meet will a thoughtene the seek of the molecular defendant gove to the applicant wint to designated as "Freligiancy Tome innurance," insuring the appliant's life between the time the application was accepted and Just containing suffered and to drawing on against be able typicities and th before he have used worth former former the applicant was paratyre to per a present for etcois life lamenass for qual-To mys tall the point wite away fa 'th' postorial ment quantities the applicant at the time in associate at the cots of months are at the and have been an Joseph Birs. To encountry all their gifther and becaused the statide . Smalnetob no co. 61% blog galet " " a si os semilado ni bes we asserted by he has the mergers of innering + + + Money's like in the run of 15000. From the date of acceptance of maid analisation. Princip line and break and the tenth the trail of the principal and tions and condition berein set forth and neither incured that the policy had been include on applied for; and Arthur G. McGar's life process through by the defendant in the sun of \$5000; payable to stational free has been the cate of the canegomes of said application inchested doubt themmen blow to misse b out to the prof of the filter oil) to tran todi bovier senimony oil at toutano bue atou at te house thuntless and that bettern new it missoule motteriless better the the policy or policies is need upon said application chould not Smoker tobe and of him wood had marmore bert's end Lides don'the edal. resise us decome on Said has estitued hoor a decollage and matros passeng sategiang the Perphania Vice-Parisons, secretary or Transport on a legislater of the definient lacinty had pover to make er medify any corerat as brinds of the Seriety or to water any of the isology's rights or requirements, and that no water chould be

valid unless in writing and signed by one of the foregoing officers; avers that defendant paid to plaintiff two of the three policies of \$5000. each which it had issued and delivered to the said assured, and issued the third policy of \$5000. With a registry date of March 17, 1929, but did not deliver to assured the third \$5000. policy, and failed to pay plaintiff the sum of \$5000. for the Preliminary Term Insurance as it had agreed to do upon astisfactory proof of death of said assured."

The defendant filed a plea of the general issue to all three counts and an affidavit of merita, which avers "that on, to-wit, January 23, 1929 said Arthur G. McGay applied for \$15,000. worth of insurance on his life, payable to the plaintiff, to be issued in three policies of \$5000. each; that said application was contained on a printed form of application furnished said McGay and was forwarded to one Barney Norman, an employe of the Detroit office of defendant. in the letter addressed to Newman dated January 33. 1929, set forth in said Third Count; that in and by said letter said applicant attempted to pay for two of the \$5000. policies applied for by a relating arrangement with Newman, whereby applicant took credit for the commissions which in our course would be payable to Newman on said 10.000. worth of incurance and by transferring dividends which were accruing on other insurance then in force on applicant's life with defendant. but said commissions were not available because applicant was in default in payments due on said other insurance; that in said letter applicant also suggested that the #10.00 therein enclosed should be a two months' interim premium on the remaining \$5000. worth of insurance of the \$15,000. worth applied for; that because of the complications resulting from the attempted rebating transaction and applicant's non-payment of amounts due on incurance theretofore issued, the rebating commission The translation of the same of the same of the property of the same of the sam

fir at owner faronce out to make a bafft dambertsb saff and their stores thinks and then the trivial on the affects which togette January MC. 1968 cold Arthur C. McGay capiled fur Cliston. ad at . This wind out to the payable to the plaints to the plaints. to Advan Lanual in three publishes of them; quality that such againment was ocatalnos de a printe fura se application franchis a printe Modifice and one formered to one Berney Harme, an employe of the Detropt affice of defendant, in the letter addressed to Bermin deted Jewary 15. 2020, set forth in said Third County that in and by said letter said and loss selection advocat and the sec out one at respective resulting for by a reputing arrangement, with become whereby applicant tesk andle for the constantum which in one course would be payable to Memors on sold 120,000. warth of incurance and by transferring dividence which were accruing on other insurance then in force on applicant's life with defendant, but sald emmissions were not him no mu aimargay at flusive at saw implifys, emecond aldelle . deal indergone only involves applicant that it is a supposed that the Blish vieweds avoluted these set by another literate product on the remining \$5000, worth of insurance of the \$15,000, worth applied for the because of the complications resulting from the to immende the the transportion and appliant's more payment and emounts due on insurance theretere leaved, the rebeing constantes

was not available to pay for the \$10,000, worth of insurance until February 28, 1929; that on said date said \$10,000, worth of insurance was paid for by said rebating arrangement; that no pre-term policy or term insurance policy was ever applied for by McCay or was ever issued by defendant; that no interim premium was ever paid by McGay. or accepted by defendant, but the 110.00 referred to in sold letter of January 23, 1029 was returned to McCay and he was informed that the insurance which he had applied for which was to be issued in three policies of \$5000. each had been issued, the third one of said policies, being dated two months shead, to be held by defendant until the premium thereon was paid while the incured was still in goes he lth, in accordance with the terms of said application: that said last \$5000. policy was never taken out by McSay and was never delivered to McCay; that McCay never paid the premium thereon but died prior to the register date of said policy and prior to the date when said solicy was to have been taken out in accordance with the arrangements between Newman and NeCay: that said policy was therefore never in force and effect and no liability accrued by reason thereof; that in order to effect term insurance upon the life of an applicant. It is necessary that applicant apply for term insurance; that said application be accepted; that the term insurance premium be paid and that a policy be issued, by the terms of which said accepted applicant is insured for the term agreed upon and paid for by said applicant: that applicant never applied for term insurance; that applicant never paid for term insurance; that no term insurance was ever issued on the life of said applicant; that the 110. forwarded to defendant was never received by it, was never accepted by it and was never reseived nor accepted by it as a term insurance premium, and that defendant did not by any of its acts or conduct waive any part of its printed application nor in p rticular that

Dirty secured he dryer (001-10) are not use up abidding for any named and Artist and A make path for hy mode and artistic promoterate that on pre-burn policy as how however pulling you arms equitor for high being an root one. spoked by Administrative on transfer management and attenue of the larger or ecosphed by defendant, but the 120,00 referred to in all letter tage percelai ser of her public at herenter our this th granual to at because of so so white as beilge and of still communicati to one bride and absort most had done ability to reintion sould Statement of ACot of or closed unitary not would nated as rationed bins at lite and because the eight blee one uperade series and firm Inil' twiting lines blue 'se award wit dike annabaggan ar addied and report and and spilet up the trains which are palling about hand than SECTIONS IN ROCKET AND THE PARTY AND THE PARTY OF THE PARTY AND also union to the regulation regard and regular and print to the Ally completely at fact order could read at our entire him that have the resuggement actives decided and because active active and therefore never in force the cliect on the Manthiy arrand by reason me by will not easy symmetric upor metric an array and allowed an issuanuant and tol these secolings had transcess al il immediate making anticipal nest and that "configuration of ministration has built be paid one that to party by the dented of this beam of which each secoped aughtrant in innued for the term speed upon and paid for by cald amiliant; the applicant never applied for term is muchant that applicable sent pade for love best-best that he best barries and and the little of the particular applicants that like little form of respects tiethe and all of large-per tieted are distincted at beinger th and were never renaired non accepted by it as as some languises doubton to adea and he was yet dev. his income has held been applicable serve our part of the printed application now in particular time

part wherein it is recited that applicant agreed that any policy issued upon said application should not take effect until the first premium had been paid to the defendant during applicant's good health and that no agent, etc., had power to make or modify any contract on behalf of the Society or to waive any of the Society's rights or requirements and that no waiver should be valid unless in writing signed by certain designated officers."

The declaration admits that the two policies issued and delivered to the insured under the application of January 23, 1929. were paid in full by the insured. The instant suit was brought to recover on the so-called "preliminary term insurance." The theory of the plaintiff as to his claim is: That "the assured applied for \$5,000 insurance, the term of which was to begin in 'about' two months. In the interim he asked to be covered by Frelininary Term Ingurance, for which he said \$10.00. It developed that the \$10.00 which the assured had sent only paid for fifty-two days of Preliminary Form Insurance. The date of the application was January 23, 1929, hence the regular term policy was dated March 17, 1929, exactly fifty-two days from the date of the application. On February 13, 1929, the defendant wrote the ansured that, 'The policies on your life have been issued as applied for.' The contract on the insurance of \$5000 in this case was then complete and binding. The Freliminary Term Insurance was in full force and effect for fifty-two days. The insured died within the fifty-two days." The plaintiff further states: "It is true that the term of that policy (referring to the one dated March 17. 1929, but not delivered) began on M reh 17th, but under the defendant's plan for Preliminary Term Insurance the assured was protected according to the terms of that policy between the date of the application and the register date of the term policy." The defendant's theory is that "defendant entered into no contract for the issuance of

and that no agent, sin; lad power to make or midtly any centreet ca behalf of the Assisty or it waive ony of the Assisty's rights or requirements and that no valves should be valid unless in writing

the house bolder and the time tollows make a line to the time. selected to the heart while the applicable of January 11, 1930. Solutions are fluid profession of the total and the fluid at the province to rearrest on the co-wall of "monthstoner town front past," The times . bolloga bourses saft fuel tal minto wid of an thismile say be ows 'swode' at aimed of new delide to must said granausal Cingell mest vectorized by between ad at being of mireful this all wednesd delay 00.01% and don't begalevel II . CC. DE that so delay role, guarusul the assumed had been the tiffy of the land and health less inturence. The date of the application was January All 1989, honce the regular tars palacy may dated target life little country fifthering days from the date of the appliantion. On Tobracy II, 1919, the event will many me aminifor said home and about purposed to 30500 he concruent sat us dearings off ". wel bedfore as banked mad in this case as then camplete and binding. The Pacificiary Form request off carpet represented but booths has need that all nor managed the course was full full form angel The professor There chains and a second to the course of the cou deroid bedshown out of universal gotton dail to must not had ours at and notice and entitle for the mapper (horoviles des ture entry ask between oil comerceal are yrandeller act make a decimate to probated econsting to the terms of that policy between the date of the after the register date of the term policy." The defendant's theory in that "not entered have no combrage for the themeson as

preliminary term insurance, and that its agent was not authorized to make any such agreement; that if any such agreement was made, since it was not contained in the policy it was prohibited by and void under the statute relating to life insurance policies; that a third policy was issued, but not delivered, with register date of harch 17, 1929, upon which date it was to become effective if the premium were paid; that the 110 which was forwarded by the alleged insured to newman was insufficient to pay for any preliminary term insurance, and was returned to Edday; that, therefore, there was no consideration for any preliminary term insurance, or for any contract to issue the same; and that no premium for any such insurance was ever paid."

the defendant. A third policy was prepared by the defendant and given a register date of March 17, 1929, but it was not delivered to the insured nor to the plaintiff, and no mention of preliminary term insurance is contained in that policy nor in the application for the three policies. Thur 6. Meday died March 14, 1929, three days prior to the register date of the third policy, and the plaintiff, of course, does not base his claim upon that policy. He admits that "the term of that policy began on March 17th," but he contends that under the alleged preliminary term insurance and the defendant's plan in reference to such insurance the assured was protected, according to the terms of the policy dated March 17, between the date of the application and March 17.

the defendant has assigned and argued a number of points, but in the view that we have taken of this appeal we shall refer to only three. The defendant contends that there was no evidence tending to prove any contract for preliminary term insurance and that the trial court erred in refusing to direct a verdict for the

cince it was not contained to the policy it was prohibited by and rold under the status of life insurance politicing that rold under the sales the collection that at alized under the calley and technical but not delicered, with regions at the literature if 19, 1925, upon which date it was to become effective if the linese problem was forwarded by the cileges from any probleminary serm that the frommer was included to pay for any probleminary serm that man returned to before any manual to sales and an include the granting for any probleminary sale under the date of the character of the colleges the colleges and included the granting for any and included the force to incur point included.

To policy for proliminary term insorance was increase by the continued was increased by the continued of the plantacier, and an restion of preliminary that have been an expected or preliminary that have been an expected and the continued that have been an expected and the continued that have been and the continued the continued to the copylished on and hare's life that applied then and hare's life that applied then and hare's life.

but in the view thick we have taken of this appara we shall verter to only three. The estendant contends that their was no evidence tent tentitioners to prove any contract for preliminary tent insurance and that the trial court enued in refunding to direct a vertelation for the

defendant. This contention, strenuously argued, is not without some force, but we have concluded that we would not be justified in sustaining it. However, we have reached the conclusion, after a painsteking examination of all the evidence, that the verdict of the jury, which necessarily must have been based upon a finding that the defendant contracted with the insured for preliminary term insurance, is clearly against the manifest weight of the evidence. As this case may be tried again we purposely refrain from analyzing and commenting upon the evidence that bears upon that vital question.

As to the contention of the defendant that it was entitled to a new trial because of numerous trial errors, we deem it necessary to refer to only two: First, that the counsel for the plaintiff. in his address to the jury, made improper and unjustifiable statements of a highly prejudicial nature. It appears that counsel made statements to the jury which tended to reflect on the honesty of the defendant company, but we find absolutely nothing in the record to warrant such statements. The defendant promptly paid to the plaintiff a number of policies issued to the assured, although two of them were in force for only sixteen days before the death of the assured, and while the defendant saw fit to contest the instant claim, there is nothing in the evidence that tends to show that its action in that regard was dictated by dishonest or improper motives. Second, the defendant complains that the court erred in refusing to give the following instruction offered by it: "The Court instructs the jury as a matter of law that the defendant's representative. Barney Newman. had no authority to bind defendant. Incurance Company, to any contract of or for insurance." We think, under the pleadings in this case and the evidence, this contention is a meritorious The application signed by the insured expressly states that "no agent \* \* \* has power to make \* \* \* any contract on behalf of

Condont. This contention, etromeously argued, is not without some force, but we have annotated that we would not be forcified in entire entre entire entire entre entre

belifies and it could state defended by we continue of the Transacen of week or enterte fairs enermen le neuroed fairs von a of to rifer be only two a Mires, that the councel for the plaintiff's is his address to the jury, mode improper and majurithable statename of a highly graphy of the contract that contract the same and to greened mit so lection of home waster wast ont of advanced to of brooks and as while the control of the reserve to this wind all about the control of the same about the case exer mill To del S builde a course out at causal evisiting to evanour a in force for only cinteen days before the dash of the neaurons and at sealer alone duration of the confere of the sandants and attenforth at raiden and hadd made ad absent hadd amounter and of addition and the color of t edf syln at galaxier at bours true and take to take the Villering lastyweiles offered by Mr. "The Court to-truste the 107 planned pointed apriced meanuper of inches to to de for the la relieur o an had no sucherity to bind defoudent, incurrence Company, to say application of or on incommunity of Value, and or or or property anotrestrom a at materesmon alife complies and has ours with mi and, The engliantian signed by the insured copropily states that

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the Society." The plaintiff, in count three, alleges "that defendant, by its acts as herein set out and conduct in the premises, waived that part of the printed application wherein it was recited that the applicant agreed that the policy or policies issued upon said application should not take effect until the first premium had been paid to the defendant during applicant's good health, and that no agent or other person excepting the president, vice president, scoretary, or treasurer, or a registrar of defendant had nower to make or modify any contract on behalf of defendant or to waive any of defendant's rights or requirements, and that no waiver should be valid unless in writing and signed by one of the foregoing efficers." The third count also alleges "that arthur 0. McGay and plaintiff kept. performed, and complied with all the terms, provisions, and agreements entered into between McGay and defendant; that defendant then and there became liable to pay plaintiff the sum of \$5,000, together with interest at five per cent per annum from the time proofs of death were furnished to defendant." There is much force in the contention of the defendant that under the particular facts of this case the instruction in question should have been given. The insured had been an employee of the defendant company in its office for about two years and it might reasonably be presumed that he had some knowledge of the limitations apposed by the defendant upon the authority of soliciting agents. He and Newman were friends and the correspondence between them was more or less confidential and personal in character. The plaintiff, in his brief, argues that the defendant took advantage of and ratified everything Newman had done. But this

argument does not answer the contention that under the evidence Newman "had no authority to bind defendant \* \* \* to any contract of or for insurance." It seems clear to us that the instruction should have been given.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded.

Kerner, P. J., and Gridley, J., concur.

the Mariety." The pluintiff, in court three, ellegen "tiet defendant. having applicant and the form of the the propert on the att and that park of the property enthrolling character in van twetter that the explanat caves that the palley by pullshes hands owns only mand had maken about the effect which the flack promises had been on and two skilland boom a to-otions paint trashed but of bing nearly he eller person moverage the problems, when providings seems and inches on a register of defendant to armount in arrighter mus evile or to incincial to blanch no testines you willow to pier of bluede review on duly him educationer to edular elevated to "agreetthe antenever out to one of house but antere at agoing others." of transmitted from the local war work of the form of the state of the "Ann annotation among one the Mile with bottome box beauty rog . Just Appropriate that the propriet has suited an extent and the terminal transfer. oben and there become linkle be see plaintfit the com of the 2004 fargiving note out man's seems you down you get it to formally fills noting of death were furnished to unfeedant. There is such fare in the content of the defendant time mader the particular furts of this case the imperection to question charid have been given. The incuped Suodo not soltto adi ai unemaso inchestab edi in corpigne wa mosed had even but all tuil business and victimous or their it but stage ord and vegu drabnolve and the hungary made added and to appellment entioning of collecting country. He and Hauges were triends and the Lamester, box Lelimenthams and an erica are rain married executing and application in character. The plaintiff in his brief, arrest that the defendant and the sech had assembly midgers bettiter but the gastrarha deat mount sometive out reins todd methodose all measure dus week decomment. to to descine you at a a technolog build of gironime on had

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FRANK TRAPE,

Appellant,

V.

ROMAN KESTIAN and MALOGRZATA KESTIAN, Appellees.



APPEAL FROM CIRCUIT GOURT,

COOK COUNTY.

268 I.A. 623<sup>1</sup>

IR. JU TIC DUANLAS BULIVIOUS THE OPINION OF THE COURT.

On Iscember 23, 1930, a judgment by confession for \$2,120 was entered against the defendants, on a written issae containing a warrant of attorney. From an order entered November 3, 1931, purporting to vacate and set aside the judgment, the plaintiff has appealed.

one. On April 24, 1931, the defendants filed a metion to vacate the judgment and to permit them to file their appearance and to plead to the declaration, and in support of the metion filed their verified petition. On May 1 Judge Mlarkowski denied the metion of the defendants and an order was entered to that effect. On May 5, 1931, the same judge entered as order setting saide the order entered on May 1. On May 11, 1931, the same judge entered an order vacating the judgment of December 23, 1930. On May 13, 1931, the same judge entered on May

1, May 5, and May 11, 1931. On May 22, 1931, the same judge entered the following order:

"On motion of William B. Anderson attorney for defendant Roman Mention

"The court having read the verified pecition of defendant herein and having heard the erguments of counsel for the respective

APPENDING TO SERVICE APPENDING

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268 I.A. 623

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the following orders reaching the conserved and the conserved on the reaching the conserved and the section and an arrest was suferred to that effects the CD Log entered on May 1. On May 11, 1951, the semi-judge entered an the semi-judge entered on lay the semi-judge entered on lay the semi-judge entered on lay

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parties hereto and being fully advised in the premises it is ordered that the judgment heretofore entered herein be and the same is hereby spened up for the purpose of permitting the defendant to offer his defense upon the merits that the said judgment be permitted to stand as accurity.

"It is further ordered that the verified petition upon which this order is entered be permitted to stand as a special plea and affidavit of merits and that the defendant be permitted to file such other pleas as he may deem advisable and that this cause be set for trial upon the merits on the 22nd day of June 1701 upon the trial call of this court."

On June 16, 1931, the defendants filed a plea of the general issue, a special plea and an affidavit of merits. On November 3, 1931, Judge William V. Brothers entered the following order:

petition filed herein on April 24, A. 1. 1931 to vacate the judgment by confession heretofore entered herein on Dec. 23, 1930; after arguments of counsel and due deliberation by the court said petition is sustained and it is ordered that the judgment by confession heretofore entered herein on Dec. 23 1. 5. 1930 be and the same is hereby vacated and set aside to which the plaintiff excepts.

"Thereupon the plaintiff having entered his exceptions herein prays an appeal from the above order of this court to the appellate Court in and for the First District of the State of Illinois which is allowed upon filing herein his appeal bond in the penal sum of three hundred dollars (\$300.00) to be approved by the Court within thirty days from this date and sixty days time from this date is hereby allowed the plaintiff in which to file his bill of exceptions herein."

The instant appeal is from this last order. No order was thereafter ontored in the cause.

In view of the state of the record as it was on Feverber 3.

1951, it is plain that Judge Brothers should not have entered the useless order of that date, which does not purport to vacate the order of May 22. Even if we had the right to pass upon the order of November 3, 1951, it would avail the plaintiff nothing to have that order ast aside. However, the order appealed from is not a final one and is not appealable. In Camp, etc. v. Cohen et al., Gen. No.

35,924 (abst. opinion), in passing on an appeal from a similar order, we said:

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of James 18, 1931, the defendents filed a plea of the general lambe, a contel plea per security of active of active

Judge Villiam To Footbook ordered the following story:

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put to set appealable. In <u>James etc. v. Coben at ales</u> den. No. 25,000 (anet. optalon), in passing on appeal from a similar

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appollate or supreme court, as may be allowed by law, to review the final judgments, orders or decrees of any of the circuit courts, the superior court of Cook county, the county courts or the city courts and other courts from which appeals and to which writs of error may be allowed by law, in any suit or proceeding at law or in chancery.' (Par. 91, sec. 91, ch. 110, Cahill's Ill. Rev. St., 1931.) A final judgment reviewable by appeal or writ of error must be such decision of the court as settles the rights of the parties respecting the subject matter of the suit or some definite and separate branch thereof and which concludes them until reversed or set aside. (Orwig v. Conley, 322 Ill. 991.) An order opening up a judgment by confession and granting leave to plead is not a final order, but merely interlocutory, and is not appealable. (See Farmers Bank of Borth Henderson v. Stenfeldt, 258 Ill. App. 428, and cases therein cited; also Eavenson & Bons v. Idelson, 232 Ill. pp. 461, and cases therein cited.) The plain. Iff cites, in support of his contention that the order appealed from is a final one, Telley v. Mein, 257 Ill. App. 171, 175, but that case has no application to the motion now before us.

"We held that the order appealed from is not a final one and is not appealable, and the motion of the defendants to dismiss the instant appeal, at appellant's costs, is allowed." (See also Dean v. Gerlach, 34 Ill. App. 253; City of Park Ridge v. Marphy, 258 Ill. 365, 366.)

In support of his contention that the order is an appealable one, the plaintiff cites the following cases: Velley v. Klein, 257 Ill. App. 171; The Prople v. Long, 346 Ill. 646; N. C. /mdrews Co. v. anchor V. B. Mfg. Co., 210 Ill. pp. 636. Each of the first two cases involves a perition or motion under section 89 of the Practice act, and has no bearing on the instant question. We are unable to see how the third case helps the plaintiff.

e hold that the order appealed from is not a final one and is not an appealable one, and the instant appeal is dismissed at plaintiff's costs.

APPRAL DISMISSED AT PLAINTIFF'S COSTS.

Kerner, P. J., and Gridley, J., concur-

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PEARL DOIRS.

ppellee,

V.

EVENING AMERICAN PUBLISHING COMPANY, a Corporation, et al.,

efendants.

EVENING AMERICAN PUBLISHING COMPANY, a Corporation. Appellant.



APPRAL FROM CIRCUIT
COUNT, COOK COUNTY.

268 I.A. 623

MR. JUSTICE EGAMLAN DELIVERED THE OPINION OF THE COURT.

Pearl Dohrs, plaintiff, sued Illinois Publishing and Printing Company, a corporation, and Evening American Publishing Company, a corporation, defendants, in an action on the case. Before trial the plaintiff dismissed the suit as to the Illinois Publishing and Printing Company. There was a trial before the court, with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at \$5,000. Thereupon the plaintiff filed a remittitur in the sum of \$2,000 and judgment was entered against the defendant in the sum of \$3,000. This appeal followed.

The declaration consists of five counts, but it is necessary to refer to only the first, which alleges that on March 11, 1929, the defendants, "by themselves, their agents or servants, owned, operated, managed and controlled a certain then automobile truck which was being driven by their agent or servant in a westerly direction on 63rd Street at or near the intersection of

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268 LA. 628

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Fore trial the plaintiff dissisted the suit a to the illinois Rublishing and Frinting Company. There was a trial before the Court, with a jury, and a vertial returned finding the defendant guilty and assessing the plaintiff's decoupes at \$5,000. Thereupon the plaintiff filted a controller in the out of \$2,000 and judgment the plaintiff this out of \$2,000. This

The dictartion consists of five counts, but it is necessary to refer to only the first, which alloges that on March 11, 1889, the defendants, "by themselves, their agents or covenies or truck which was being driven by their agent or servent in a sesterly direction on ford three at mear the intersection of

Ellis evenue, \* \* \* and plaintiff avers \* \* \* she was a pecestrian crossing acid 63rd street at or near the intersection of Ellis avenue \* \* \* and that she was at all times in the exercise of all due care and caution for her own safety; \* \* \* that it was then and there the duty of the defendants \* \* \* to exercise ordinary care in the management, operation and control of their said automobile truck for the safety of the plaintiff; \* \* \* that the defendants wholly failed in their duty in this behalf, and on the contrary by or through their agents and servants negligently and carelessly managed, operated and controlled their said automobile truck \* \* \* so that the same ran into, upon, against and struck the plaintiff \* \* \*."

The defendants filed a plea of the general issue, and also a special plea of noncomership, which was later withdrawn.

The defendant has urged five points in support of its contention that the judgment should be reversed, but it is necessary to consider only one. The defendant contends that as the plea of not guilty operated up a denial of the wrongful act alleged to have been committed by the defendant, the court erred in refusing to direct a verdict for the defendant, for the reason that there was no evidence that the defendant's truck struck the plaintiff. The plaintiff concedes that under the plandings the burden was upon her to prove that the defendant's truck atruck the plaintiff, but she contends that from all the facts and circumstances in the case "it cannot be said that the jury acted unreasonable in drawing the conclusion from the evidence that the vehicle mentioned in the declaration was involved in the accident." After a careful reading of the entire evidence we are satisfied that the contention of the defendant is a meritorious one. The accident happened on March 11, 1929, around 7 p. m. It was dark. But two witnesses testified as to the

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The droppen at abutes owil bears and inshed at granulate of di spi a increase of blance recepted, and sadd middentum. to consider only one. The defendant contends that as the plea of avail of logolie toe lebymore and he lebymo a ar belonge falley for been demnisted by the defendant, the court erred in refuelant to direct sometive on new profit design measur off not administration of the bound of retaining our . Illiefale act found nount a temperate all for conceded they under the physicians the burden was upon her to prove that the defendant's truck street the plaintiff, but one contents tions all the facts and diremediance in the ease "it council be soid that the pay sold surrounding to treating the qualitative from the evidence that the validate mentioned in the duckeration was involves in the medical address a covered received of the entire evidence we are subjurted that the consention of the defendant in a meritorious one. The accident happeared on March 11, 1920, around To me It was derie . Must be witnesses testified as to the

accident, Abraham Bernstein and the plaintiff. Bernstein, called by the plaintiff, had a paper stand at 63rd street and Ellis avenue. He testified that he did not see the accident and that his attention was attracted to the fact that an accident had occurred when he noticed a crowd of people on 65rd street, "midway between Greenwood and Ellis," and that he then saw some people lifting up a woman and "this woman came out of this growd" and "I run and see the truck, he was by the place and after that the driver come and stopped on my stand, and he is going to take the woman from the drug store, going with her, that is all. Q. You don't know where the truck was then up to the time he came with the woman? A. No. \* \* \* C. and up to the time that he came there and stopped you did not see the truck anywhere near the woman, did you? A. No. I no see him." The witness further testified that the truck, apparently referring to the truck of the defendant, took the plaintiff to the hospital. The plaintiff testified that at the time in question she was on the south side of 63rd street and the east side of Ellis svenue. that she stepsed from the sidewalk to cross 63rd street and that she then saw a taxi coming from the west. "Q. Bid you continue on walking across the street after you saw this taxi-cab? A. Yes, I saw I could make it to the center and I kept my attention on the taxi-cab. . Did you cross in front of the taxi-cab? A. Yes, sir. Q. After you had crossed in front of the taxi-cab then what, if anything, happened after that? A. Why I looked to see if I had cleared the track sufficiently for it to pass and as I turned I was hit from the opposite side. Q. Where were you with respect, if you know, to the center of lixty-third Street at the time you were hit, were you north or south of the center? A. Alightly south and I had hardly gained the center. Q. After you were struck by this car, where were you; were you standing up, or were you knocked down? A. No, sir, I was

salies offerenced attituded and the minimucal material residence answers will'd has describe built to beade coping a had attributed and admalfornian with food bone durebless with new day has not food bed like an armed all ed medy services but inchinen me toda toda ed beforests any nations a growt of people on dird street, "midney between Cronwood has named a quittil algor own one cold od dods has "allie bon "this women came one of this provide and "I need one came the trucks he THE RE PURSUES AND MADE WHEN THE PARTY WAS ASSESSED THE PERSON AND THE ASSESSED. stand, and he to getun to take the woman from the drug stone, weing will not that the elle we won't know where the track was then up to the time he came with the nearest A. No. " " to the had up to the time that he came there and stopped you did not see the truck suppliers near the women; old year? is No. I no see him. " The witand all collected allowings absent and field infiliated tarrors same series of the infrastruct, unit the platestic to the bargeting. plaintiff braiffed that his bise the question she was me the seath of dire atrees and the east side of Illia evenue, the cha med the slat but from the grand did not be and the slat with the state of the state es a tent coming from the wedta . "C. Dia you continue on walking Tous-last widt was mor works doorts and vegros . dow-lied out no molinoide ye tood I been reduce and no it edem do is fild you cross in front of the teni-cob? A. Yes, sir. 9. After you had expensed in fromt of the taxi-out ticks whate if anythings happened after black? A. Ting I looked to see if I had cleared the and more that one I because I as bone ones of it were placed than found apposite side. C. There were you with respect, if you know, to the direct not enter think you were the the time you were held-will be used to houten glocal and I have described . A freshed and to stone we the contex. U. After you note atruck by this car, where you were you eleading up, or vere you knocked down? A. Ho, nir, I was

lying on the car tracks. " " " It was the south car track. The witness, on cross-examination, testifies that funt before the accident her attention was directed to the taxical coming from the west and that she did not see the car that struck her before it struck her. Weither on the direct nor on the cross-examination did the witness testify to any facts or circumstances from which it might be reasonably inferred that the vehicle that struck her was the Evening american car or any car owned or controlled by the defendant. The same may be said as to the testimony of Bernstein. The plaintiff testified that after the accident the driver of the truck "of the Lyening 'merican" took her to the doctor's office, and she was asked by her counsel to describe the driver of the truck, and in response to that question she testified that the driver said to her that "he hoped there wouldn't be no trouble, that was the second one he hit in a week." Thereupon counsel for the defendant moved to strike out this testimony and counsel for the plaintiff concurred in the motion, and the evidence was stricken out and the court instructed the jury to disregard it entirely. It is conceded, of course, that this evidence was not competent. The d fendant saw fit to offer no evidence, and it is perfectly clear that the plaintiff railed to offer any proof in support of the necessary averment in her declaration that a vehicle of the defendent struck her.

The defendant insists that as the plaintiff failed to make our a prime facia case so should reverse the judgment without remending the cause. It is a sufficient answer to this contention to say that in our judgment justice will be best served by a ratrial of the cause.

The judgment of the Circuit court of Gook county is reversed and the cause is remarded.

REVERSED AND HEMANDED.

line on the ter tracks. The war the south per tracks and the ethics of inches and building and building and highly the ambies tads has they and many makes desired ods as beforeth and midwest. a red and did not not time our bite struck her bedoe it someth her. Neither on the direct new on the cross-countraling did the witness teatify vidence es sicle it fiche apply soundances to agent was at marrows galaxie tell any bul sharps had alsolve all fall bereited our our con controlled by the defendant. The come unr held sees Theminia of Tempoles of the plant of the see blis of perioral out her mount and he nevers all technics and testin sail and he hades now one has wealthe a server has he and heat "meet not their pe company of him phical late to the method of relations of this inbegan of lead that also explicated that the part of militaria on I did on an encion the now black which polared on a fit the could atid two carron country for the colonians moved to he car this bus and some of the becomes Tribuing the of leases for the companies of the sales of the term and the sales of the sales of the sales consider side tade tentuos to ababasaon at il "viscieno di brimouni has comply on relie of the smaller off edge composing the it is perfectly close that the plaintiff railed to offer upy proof to design of hell sufficiently in the first strategical to yell and the strategical transfer in the strategical tr of the defendant strick bereon willey Mirelan, our en suit equint enterent and a series

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36040

GROVER H. JACOBS, Appellee.

W.

FRED BRANDAU, Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

268 I.A. 623<sup>3</sup>

MR. JUSTICE EDAMLAN ELIVERTH THE OPINION OF THE COUNT.

A judgment by confession was entered against the defendant, on a written lease containing a warrant of attorney, for \$438.75, which covered the rent alleged to be due for five months commencing October, 1931, and \$63.75 for attorney's fees. Subsequently, upon motion of the defendant, he was given leave to appear and make defense, the judgment to stand as security. There was a trial before the court and a finding made in favor of the plaintiff, and a judgment was entered that the judgment entered by confession stand confirmed. The defendant has appealed.

The plaintiff was the owner of the promises known as 5712 North Talman avenue, which consisted of a two-story building. The plaintiff occupied the ground floor and the defendant occupied the second floor for some years. The written lease which formed the basis of the instant built was dated March 6, 1951, and was for a period of one year commencing May 1, 1931, at a rental of \$75 a month. The defendant testified that he vacated the premises about luguet 10, 1931. The lease required that hot water be furnished by the lessor to the lessee. The defendant contends that "there was a complete and continuous failure by appelled to furnish any hot water in the demised premises from July 29 to

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CHANGE R. J. . .

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A judgment by confounted was entered equipment the descency, defondant, as a written lease containing a variant of attouncy.

In the containing apart and the defendant, he was given leave to apart and anke defended the judgment to shall an ecuality. There was a trial hares the cours and a finding made in favor of the plantity, and a judgment was entered that and judgment was entered that and judgment was entered that and judgment was entered.

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August 11. 1931." and claims a constructive eviction by reason of such failure, and that he was therefore justified in vacating the premises and terminating the lease. Even the evidence for the defendant does not support his claim that there was a continuous failure to sumply het water during the period in question. It does tend to show that for about four days during that period there was a failure to supply hot water. The evidence for the plaintiff is to the effect that he furnished hot water during the entire period in question; that the defendant made no protest to him as to the lack of hot water, and that the defendant left the premises without notice to him and without surrendering the key. The defendant admitted that he took possession of the new premises, 5656 Bernard street. in the second week of august and that "we looked around there for a week or more at different places until we found this place at Bernard Street and rented it." It thus appears that the defendant had determined to move as early as August 1, and at that time the alleged failure to furnish hot water had continued only two or three days. Turing the period in question the temperature is usually high. The plaintiff contended, and with justification under all the facts and circumstances, that the alleged constructive eviction was a more pretent advanced for the purpose of evading the payment of the rent, and we are satisfied, after a careful consideration of all the evidence, that the trial court was fully justified in his finding.

The case seems to have been well tried and the defendant raises no question as to any ruling by the court as to admission or rejection of evidence and no propositions of low or fact were submitted to the court. The defendant cites Laffey v. toodhull, 256 Ill. App. 325, in support of his contention that a failure to furnish het water is sufficient to sustain a claim of constructive

To measur vd moiselve evisportance a aminio has ", 1801 , 11 Saugus much fallment and that he was therefore junctified in vointing the premises and terminating the Lease. Type the evidence for the appropriations at new execut rotal include gold processes that looks transference fullure to supply her water during the period in question. It does : - home to show the chout faur days during that ported there was a fallers to supply hot vator. The reidence for the and univers reduce and hadelment of ands southe and as at this chale at forting as also Believited off but positions of lotting outline and thei dasbastas and their enteres and the dash out of sa mid provides without antine to the saw without corresponding the book propliers; we gold to make many that and tust and bein dusperted out get" doubt her drapper to store leaves out at aboved broade because \$150 Here said forwardly in some as they a pay well among beauti example and SI 4.31 believe for Jersen brown to seein alth logel to the up times of several feether to be seen at the form of the feether to be detected and houseldnes had refer took defence to exclude bompile out and took in only been black dairs. Nather the period to enection the bispersions adding the property of the abstraction of the control of the property of the control of the cont evidentiance begain and the tennelement and the relation of the relation and pullbare is appear and not beenevan danders even a one melacive nesseemt of the root, and we are entirited, after a careful completeless of all the evidence that the trial court was fully justified in his . Thedians.

The case seem to have been well to the case seem of the confunction that a failure to the confunction that a failure to the case of the case o

eviction, and he argues that the facts in the instant case are substantially the same as in that case. The Laffey case was decided by this branch of the court and the facts involved therein bear no resemblance to those in the instant case. In the laffey case we held that a practically continuing breach by a lanctore of a covenant in a lease to supply hot water for the use of a tenant out of all the water faucets, after many complaints by the tenant and failure by the landlord to fulfill promises to remedy the matter. constituted a constructive eviction. The facts in that case showed an aggravated and persistent violation of the provision in the lease to furnish hot water to the tenent. and there was no attempt on the part of the plaintiff to controvert the showing made by the defendant. In fact, his defense was that violations of the provision in question. no matter how argravated, could not constitute constructive eviction. In the instant case, even if we assume that the defendant made out a prime facte case of constructive eviction. movertheless, that case was rebutted by the evidence for the plaintiff, and, as we have heretofore states, the trial court was fully justified in his finding for the plaintiff.

The defendant contends that "the lower court erred in denying the motion to reopen the hearing and allow the additional evidence offered." It appears that some time after the trial court had heard the evidence and the arguments of the counsel and the case had been submitted for determination, counsel for the defendant moved the court that the case be reopened and either a trial de nove allowed or that additional evidence be received bearing on the issue of constructive eviction, and in support of this motion counsel made a lengthy statement to the effect that he would like to offer additional evidence which he claimed would tend to support the defence of constructive eviction. No wit-

ernething old by organ that the fields he the lasting most area. on road played besident about our time bely be placed about the FR. near Talkial roll al., steam medical roll of ready of scentificancy termore a le callurel a ya decesa perminer all citate a core blad Als to two descript to the sea and not reduce that alogue of seatle mistalled my Jeans and of a scholarges pain to He partition of the before before an expensive and making an employed that he insident and left beinveryng my howers were will all start mil and poly evisuarious a and perplotent violation of the provision in the langu to fundah he drag mid the immain on now apply but common eds of telem and. the platmairs to confravor line shoring and by the defendent. And, the defines one that while him of the grewleise in consider and fully exclusiveness admit forms that before a tell-program and matrice and In the decime tone, ever if we assume that the definitions and all east fail and some of constructive existent according and clark asset was reducted by the critical for the plaintiff, and, an we have herepotent she at a britiser, gilly our rune fairs out shedde treis STREETHINGS WILL HAT

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nesses were called or questioned or documentary evidence produced in support of the offer. The trial court did not err in refusing to allow the motion. (See \_trong v. Friedman, Adl Ill. App. 602, 613-19.)

the evidence in this case, that we judgment of the hamisipal court of This ye is a just one and should be affirmed and it is accordingly so ordered.

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Kerner, P. J., and Gridley, J., concur.

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36074

NATIONAL BOND & INVESTMENT COMPANY. a corporation.

Appellant.

V.

HANDEL A. COHEN.

ppellee.

APPRAL PROM MUNICIPAL COURT OF CHICAGO. 268 I.A. 623

M. JUNTION SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal court of Chicago, Mational Rond & Investment Company, a corporation, plaintiff, obtained a judgment by confession against Mandel . Cohen, defendant, in the sum of 1920.70, on a promineery note executed by the defendant and made payable to the order of Clarke Motor Sales and by the latter indorsed, without recourse, to the plaintiff. Thereafter, on motion of the defendant, supported by affidavit, the judgment was opened up and leave was granted him to appear and make defenge. The case was tried before the court, with a jury, and at the conclusion of all the evidence, on motion of the plaintiff, the court directed the jury to return a verdict in favor of the plaintiff in the sum of \$920.70. Judgment was entered on the verdiet and the defendant appealed. Upon that appeal the defendant contended, inter alia, (a) that the consideration for the note failed, and (b) that the plaintiff was not a holder in due course. It was not disputed that the defendant could have pleaded failure of consideration had Clarke Motor Sales sued him on the note. In our opinion we stated the facts and circumstances that pertained to the question as to whether or not the plaintiff was a holder in due course, and we hold: "We are satisfied that under certain

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268 I.A. 623

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facts and circumstances in this case the question as to whether or not the plaintiff was a holder in due course should have been submitted to the jury to determine, and that the trial court erred in directing a verdict for the plaintiff," and we reversed the judgment and remanded the cause for a new trial. (See <u>Mational Bond & Investment Co. v. Cohen.</u> 254 Ill. App. 606.) The case was again tried before the court, with a jury, and there was a verdict returned finding the issues against the plaintiff. From a judgment entered on the verdict the plaintiff has appealed.

That the consideration for the note failed cannot be seriously questioned. But the plaintiff contends that the evidence shows it is a holder of the note in auestion in "due course." as that term is defined in the Negotiable Instruments act, and that "no evidence was introduced in the trial court which showed or tended to show that the appellant was not a holder of said note in 'due course. " and that therefore "the trial court erred in refusing to direct the jury to return a verdict for the plaintiff on the motion of the plaintiff at the close of the evidence and in refusing to grant a new trial on motion of the appellant." In its brief, the plaintiff states that the only question is "whether it had knowledge of the claimed defect in Cohen's note or knowledge of such facts that its action in taking said note amounted/ bad faith." The defendant strenuously argues that not only was the jury warranted in holding that the plaintiff took the note with notice of its infirmity, but that the jury might reasonably have found from the evidence that Clarke was merely a dummy payee and that the plaintiff was the real payee. On the vital issue in the case, as to whether or not the plaintiff was a holder in due course, the jury have found for the defendant, and after a very coreful examination of all the facts and circumstances surrounding the transaction we are satisfied that we would not be

rects and circumstances in this case the quarties as to whether or no not the plaintiff was a holder in due course plants have been or not the thick the trial course cared and published the directing a verdict for the plaintiff," and we reversed the limit the course of the course of the limit the plaintiff has apposing.

That the equality ston salt was motorphiame eds dad? absorbiness affections mes the glainty? contents that the evidence sa ", savone agai" of antineous of also not be widen as if weeke then toys to defined to Y'm Togethells Pest, months and a met and evidence was introduced in the brisk court which against or account to "Lavure and at efec ble to reblace a few are justice and fail water the limit of mainter is even from this error to the state of the Jung to return a verification the ministrict on the section of the plants. Early res a freta or adjourne of the conventor of the could off to this on metion of the appellant." In the brief, the plaintiff states that the only question is "chatter it had broadedge of the excitent defend in contacts and a manufacture of each factor the stee of the contact and When we have been been all talling bed between the blue saided at argues and the form the jury margues in half bed the plate. till took the ones alto nation of the infinitely but that the fart right reasonably laye found from the evidence time Clerks was marely a dumny payer and that the plaintiff was the real payers in the a new Thirdally will due un washing at me amon not me apout Louis bulker in the content the jusy been form for the defendant, and after and the second of all the feets and elementences od dom bluew ow dark holholden our ne nollouement add pathomorane

warranted in disturbing that finding. The contention of the plaintiff that there was no swidence which showed or tended to show that it was not a holder of the note in due course, is without the elightest merit.

The plaintiff contends that the court erred in admitting in evidence certain sublits offered by the defendant. authorities are cited in support of this contention. It appears that the note was given to Clarke in a transaction in which the latter purported to sell to the defendent an automobile, but that Clarke had no title to the car and that while the car was in the possession of the defendent, First tereptance Corporation commenced replevin proceedings, in the Superior court of Cook county, against the defendant and others, and on the same day the sheriff of Cook county replevied the automobile from the defendant and turned it over to the First Screptance Corporation, and that on January 9. 1928, there was a judgment entered in the said cause finding the right of property is the said corporation and ordering that it have and retain the property replevied. The exhibits in question are the chattel mortgage on which was based the replevin action, resulting in the loss of the car to the defendant, and also certified copies of records in that action. The argument of the plaintiff in support of this contention seems to be that the ambibits were not competent for the reason that the plaintiff was not a party to the replevin action. The exhibits were competent in support of the defense of failure of consideration. That the instant contention is an afterthought, and without the slightest merit, is quite clear from the record. The defendant testified, without objection, as to the replevin proceedings and the loss of the car, and the plaintiff cross-examined the witness in relation to the same subject matter and brought out the fact that the defendant "had Clarke arrested"

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middling at home some out and armino this info in er acreain echibits offered by the defendant. No suppose of continuous of the suppose of hade on waterships that the note wer given to Clarke in a transcripe in which the lables perpended to mil to the defendent as subsublish but then eds of one not said office and sind the new and of office on had advall becomes and respect to the factor of the factor of the selection of teniona granos deco la como colvegal sil ai ... the defendant and there, and on the case day the last off the description of the interest that the description of the section of over he the First transferrer Darport Many and that multipling its 1989, there was a judgenit solvered in the mild comes finding the whill it is an arrange to the sold everywhite and everywher that it links and retain the property replayies. The arkibits in question are the chartel mortgage on which was based the replevin setten, resulting in the lags of the out to the defendant, and also ceptified copies of records in that action. The argument of the plaintiff in for new edition out took of et sman meionotuce mide to traceme named and the round which the plaintiff the not or posty to the sale by Propose to Fred space same all Colors and . and for himselfed noidnesses duagent out funt . aciderchiance to envilat to see ... is an aftertiought, and without the allegest merit, is exite elser the declaration durable the literal and and and and \* Groder has as This said hose also had he need will be appropriate and also property and orden-excelled the element in relation to the over subject matter The depress and note hear sucher tobe and don't dead only done depress been

and prosecuted in the police court for fraud in the matter of the sale of the car. Moreover, at the time the exhibits were offered in evidence the plaintiff made no objection to the introduction of the same.

ortain errors usually assigned in cases of this kind that the trial court tried the case fairly and impartially. The finding of the jury upon the material issue in the case is certainly not against the manifest weight of the evidence, and the judgment of the Municipal court of Chicago should be and it is affirmed.

AFFIRMED.

Kerner, P. J., and Gridley, J., concur-

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A. J. SUTKUS, Appellee.

V.

THEODORS WALTER,
Appellant.



OF CHICAGO.

268 I.A. 6241

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued Theodore Walter, defendant, to recover \$1,140 alleged to be due him from the defendant as real estate broker's commission by reason of his services in bringing about a contract for the exchange of properties between defendant and one Minekel and wife. There was a trial before the court, without a jury, and a finding and judgment in plaintiff's favor for the amount of his claim. The defendant has appealed.

broker and that on March 20, 1929, the defendant came to his office and listed certain property, in Chicago, that he owned and requested the plaintiff to sell or exchange the same; that the plaintiff produced Mathilda Minekel and Broman Minekel, who professed to be willing to exchange certain real estate belonging to them for the property of the defendant, and later a written contract of exchange for the said properties was executed between the defendant and the Minekels. The exchange was never consummated. Plaintiff alleges in his statement of claim that "said contract of exchange referred to above was later consummated," but upon the trial he abandoned this position.

The defendant testified that he was at all times ready,

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268 LA. 624

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The recert discloses that plaintiff is a real estate broker and that on harch 50. 1939, the defendant came to his office and listed serial property, in Chicogo, that he owned and requested the plaintiff to soll or enchange the same; that he came and requested the plaintiff to soll or enchange the same; that he can be seen that the secondant of the defendant, and later a urition to then for the property of the defendant, and later a urition the defendant of exchange was executed between the defendant of slaintiff alleges in his statement of claim that the test consumerical."

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\*\*send contract of exchange referred to above was later consumerical."

The defendant tentified that he was at all times readys

willing and able to carry out his part of the contract, and that he saw Minckel twelve or fifteen times after the execution of the contract and urged him to consummate the contract, but that Minekel stated to the defendant, in effect, that he was unable to go on with the contract; that he found himself unable to fulfill the terms of the contract. It is undisputed, in the record, that the defendant was ready, able and willing to fulfill his part of the contract. The position of the plaintiff in the trial court and in this court is thus stated by him: "There the parties to a contract. for the exchange of real estate, enter into an enforceable contract. the broker is not obliged to prove that he produced a purchaser ready, willing and able to carry out the contract." The plaintiff relies upon Bushkiewicz v. St. George. 286 Ill. App. 310. in support of his position. In Lucas v. Schwartz, 243 Ill. App. 418 (certiorari denied by the Supreme court, 246 Ill. App. xxxii). the court held that in an action by a realty broker to recover commission elaimed under a contract to find one who was ready, able and willing to buy or exchange with defendants, their signing a contract for an exchange with the party furnished by plaintiff makes out a prima facie case for him which is overcome by proof that the exchange contract was not carried out by reason of the inability of the party furnished by plaintiff to give good title. After stating the facts that tended to show that Stukis, who was the party furnished by the plaintiff in that case, was unable to carry out his part of the contract, the court said: "That being the situation, Stukis could not have maintained a bill for specific performance against the defendants, for he admittedly was not in a position to show that he himself was in a position to perform. Such being the case, the defendants also could not have successfully compelled

william and ande to comy out his year of the contract, and that he and the meles are three after the acception of the controct and urged him to consumers the contract, but that es eldem new of and starte at status of as bedses indenti Liftige at although the fourt has four these all alle as on had been wit at . bedressible at it . Jourises wit to says of to true and filliful or patilise her ofth against one descripts of the sentence. The mainteen of the planning of the the track of a of noiseny out and " smid ye bears and at twee aids at home control to the exchange of real entate, enter into an extereeplac a headbard all doubt every est bealtin for al remove els ......... marchage ready, willist and able to every sat the contrast." The playing makes upon manufacture as its fearing and cale of the playing In These was "electrical and this this Appear apprenticulation of the property of all (appliance) demind by the forgrown search, bid 1324 (one target) all the court beld that in an metica by a realty breker to recever this atomy and and and but as trating a rebut bounds metanisms come a primire where and anomaly grain appearance on the at mutician does igned for an entriesment with the rests furnished by plaintiff second but I have all assesses at saint will not never the grant that estitioni out to moner es and bateres for our francis equipos. Out of the party formiance by plainter! to give your titles than stations the facts that besided be more that appeter that had been party a sisted by the plaintiff in the same, was mable to carry out and the prof of the contract, the same oil attention of the first all Stable engls not may salutalized a buil for specific performance nesture the defrudances for he admissionly was not in a monisten to many that he named was in a partition to partorns, and halfs the camp, the nelsonance also entry one increasing and the companies

specific performance. Therefore, the contract was not such a contract as would entitle the plaintiff to the commissions he claimed. Janking v. Hollingsworth & Tabor, 83 111. app. 139; Carroll v. Leafgreen, 170 Ill. App. 328." The court also digtinguishes Rushkiewicz v. St. George, supra, upon the facts. In the instant case, even if the testimony of the defendant to the effect that Minckel was unable to carry out his part of the contract be hearsey in its nature, nevertheless, the plaintiff made no objection to its introduction, upon that around, and therefore it must be considered and given its natural probative effect as if it were in law admissible. (See Dias v. United States, 223 U. 3. 442; see also Sawyer v. French, 235 3. W. 126, 130.) plaintiff made no attempt to rebut or impeach this testimony of the defendant, nor did he introduce any evidence tending to show that Minekel was ready, willing and able to carry out his part of the contract, and his position seems to be that the contract, upon Its face, is an enforceable one and that the defendant, merely by entering into the same, obligated himself to pay the plaintiff the commission even though it should later appear that the Minekels were not ready, able and willing to perform their part of the contract. Such is not the law.

The defendant has earnestly argued that the cause should be reversed but not remanded, but we have reached the conclusion that justice will be best served by a retrial of the cause.

The judgment of the Municipal court of thicago is reversed and the course is remanded.

Kerner, P. J., and Gridley, J., concur-

specially perferences. Therefore, the consent can not make at ad applications to at this acid; are addiscusted as Personal gill your all the anglet it dreament that are antique, a breakly Carrell ys Louismong LVI (Lla 1924 388." The court also dies STRUCTURES TRADILLEGISCULTURE THE DESCRIPTION OF THE PARTY. In the instant case, even is the tentiony of the dedendant to and the draw him the transport of electric and inside the cart of the "Thinking our analysis were a resident all of queries of freezes make me expecting to the detrochery ages that grounds and barries Sports with seing Complet and navigation beautioner of from \$5 such 22 Annual Sells; or astronal - or files when all all once at the as-U. A. 448; are also Sayor ve Transle 225 No. 1. 104, 185.) pai to menious ains desegni no suion es ignetia en chas l'italalq and sails of collined samples up superior of ich was planted of will to roop all the quart of which the untilly attent and princip sat more storednes out that of at among melalance and bon sooning is an enforceally one and that the defondant, morely by out Titrukale and were at Liment indentities are all are indentities were and the state of the same to be a series and the same and the sam afternions will be going mixtle services of marilles has added them you with the best time from the contract of the co

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E. THEODORE NORDGREN.
Appellee.

V.

STERLING CASUALTY INSURANCE COMPANY, a corporation, Appellant. APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 624<sup>2</sup>

MR. JUSTIC: SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendant in an action in contract. There was a trial before the court, with a jury, and a verdict returned finding the issues against the defendant and assessing the plaintiff's damages at the sum of \$350. Judgment was entered on the verdict and the defendant has appealed.

The action was brought under a policy of accident insurance for disability benefits. The policy sued upon is known as the "Sterling Penny-A-Day accident Policy," the annual premium of which is \$3.65. For the purposes of this appeal it is necessary to consider only section 5 of the General Provisions of the policy, which reads as follows: "This incurance does not cover any \* \* \* disability for any period during which the Insured is not under the professional care and regular attendance of a physician or surgeon other than himself, at least once every seven days." The pertinent parts of the affidavit of merits are as follows: "Iffiant states that the claim hereunder is on a policy of insurance issued plaintiff herein, by the defendent; that the said policy \* \* \* provides that if the insured be immediately wholly and continuously disabled by the means and under the conditions set forth in the said policy, and be

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prevented by injuries so received from performing any and every duty pertaining to his usual occupation, the defendant would pay for a period of one day or more, and not exceeding twenty-four consecutive months, indemnity at the rate of \$100.00 per months that the plaintiff was not, as a result of the injuries set forth in the statement of claim, immediately wholly and continuously disabled for a period of four months and prevented by the injuries so received, from performing any and avery duty pertaining to his usual occupation. for a period of four months, but on the contrary thereof, states the fact to be that the plaintiff was totally disabled by the said injuries for merely a period of two weeks; that under General Provisions. paregraph (section) 5, \* \* \* it is provided that 'this insurance does not cover " \* \* disability for any period during which the insured is not under the professional care and regular attendance of a physician or surgeon other than himself, at least once every seven days; that the plaintiff herein, as a result of the said injuries, was under the regular attendance of a physician in accordance with the said provision, merely for a period of two weeks. Therefore, affiant states that the defendant (plaintiff) is entitled under the said policy, to merely the sum of \$50.00. covering two weeks' disability."

The defendant concedes that the plaintiff was under the care of a physician on September 2. 8 and 10, and that the same physician treated him again on October 10 and 17. November 20, and December 24, and that the plaintiff called at the same physician's office for treatment on Jenuary 6, 13, 20 and 27, February 14, 21 and 28, and March 15 and 23, and that all of those treatments were for the injuries sustained in the accident. But, the defendant contends that "the plaintiff, as a result of the said injuries, was

NAME AND THE PARTY OF PARTY AND PART dily pertaining to his neural scoupation, the deleadant would pay for a period of one day or more, and not emending twenty-four dust palents was 50,0000 his after our to endmanded pullstone by the same the plaintiff on not, as a stante of the injuries on the forch in the the mirror of claims been placed of the district of the land of th abstract on salmylat wift up between his salmer real to belong a designated of the contract of the following for the feest properties? for a period of feer carries but on the successor thereaf, wheten the tion as you that the plantable outliers are thinked but ind and into the a motolyact framout they took to be made to a process we personni stra lanis seriores al di " | " ad labito al dincorre their and versus " " I had been son up you had been which him something referre been over dispolation but, with returning all browns whose same same I am a Konoral mostly variety married we make a married as the him off to these o as salets Thinking our day! 'your gover injuries, and under the require witconsone of a payer and econtinue with the soid provision, merely for a period of two Chimiand technical but witch multipression in telescopies The state of the s

The defendant convector that the plaintiff was under the care of a physician on Reptember 2. S and 10, and that the came physician treated by again on Coteber 12 and 17, hovember 15, and that the came physician of Course of the case physicians of Course for the sense physicians of Clos for treatment an January 6, 13, 10 and 37, Tabanary 16, 21 and 70, and that all of these treatments on the tast for the injurious suctions in the noticest. But, the defendant confends that the philatiff, or a result of the sold injuriouspace

under the regular attendance of a physician in accordance with said provision (section 5) merely for a period of two weeks; that the plaintiff was entitled, under the pelicy, to merely the sum of \$50 covering the two weeks' disability." The sum of \$50 was paid by the defendant to the plaintiff, and the defendant contends that under the manifest weight of the evidence and the plain provisions of section 5 the defendant was obliged to pay the plaintiff, under the policy, we more than the \$50.

On September 1, 1930, the plaintiff was injured in an automobile accident as the result of which he sustained an injury to one of his legs. The following are excerpts from his testimeny as to the extent and duration of the injury: After the accident, "I noticed when I tried to get up and walk, I couldn't stand on the leg. \* \* \* It hurt so bad, it pained me. \* \* \* hen I not to thicage I went directly home and called a dector. \* \* \* I was not able to stand on my foot then. I was in bed. \* \* T was in bed over a month. I guess. My leg was bandaged during that time. The doctor bandaged it and massaged and put on hot applications and things like that. " " During that time, I could just go about as far as the washroom on crutches, so that for a month I was confined to my bed in my own room and the only time I left it was when I went to the washroom. After the first month, I did not go about my business. I would sit around the room with my foot bandaged up and sit on a chair; comething like that. I sat around the room with my foot bandaged up on another chair about two months I should Judge. Furing that time, I just walked around the floor with I tried to sustain my weight on that foot without the crutches. aid of crutches, but I could not. It was too sere, I could not stand the pain. During that period I did not leave the house at

that the plaintiff was entitled, under the policy, to morely the case of the two world, the case of the plaintiff. The new of the two washes to the plaintiff, and the defendant case the maint the manifest waight of the evidence and the plain provisions of section 5 the defendant was chliged to pay.

on the state of the property of the property of the state "partied on bentiating and deliver to Jilmes, will be limiting afficienting." he see at his large. The religible one scenario from his . . test meta ... rerotal and to meta dan dans the independent and the d'animo I allow mas que de pul inite i mode bention in , inchience shand on the lor. \* \* It hart so bad, it reined me, \* \* \* rice I not to thioned I went directly home and called as dent. I was able to asset on my foot them. I was in beck to a new I and in bed ever a men by I quees. If leg was bendaged during that angeliantings for on the one exposes has it beginsed three off - west and things like that a . w Early that their call spath on besitues now I sistem a tot sadi or enduistry he amortices said the tall as to my bod in my own round tha only time I left it was when I wast to the value of the tip and a property of the set of a country of han as hegeliced food us diffe more and baners the alvew I meeniand tisky moor seld benegra sea I . . such self gentriance turindo a no sly bisone I adines out Juone riado redione no de bonabad fool as filly week that there take wallow day I sent took pature . eghut ont inonitiv dool dand no deploy on mintone of bolut l anchorre sid of analogues but I could note it one too core, I could not Se order old event don bld I betree sast out my old enter old saste

any time. It was all of three months before I left the house after the injury. I did not return to my work after that.

I lost my job because I could not show up when I was disabled.

\* \* It was around February of that year when I got rid of the crutches and I used a came. \* \* I could then go out on the street and sustain my weight on my foot without too much pain.

\* \* I had a doctor. His name was Benjamin Crouch. He was the doctor I called the first day. The first week he was there several times, and then once a week thereafter. For about four months he kept coming around every week. \* \* \* He treated my log.

He put on hot applications and massaged it and bandaged it and things like that. He took one X-ray; that was about the first week."

Unambiguous and must be strictly enforced by the courts. The plaintiff argues, and with considerable force, that that section should be reasonably construed in the light of the admitted facts in the case, and he cites National Life Ins. Co. v. Patrick, 162 N. S. (Ohio) 680, 681, in support of his contention that even if the facts were as the defendant contends, section 5 would not be interpreted so as to defeat/recovery. However, we do not deem it necessary to pass upon this contention of the defendant.

The defendant contends that "the manifest weight of the evidence shows that the plaintiff was not treated by a physician or surgeon at least once every seven days for a period of four months after the accident, but on the contrary for a period of only approximately two weeks," and therefore under section 5 "he was entitled to benefits under the policy meraly for that period of time, which he was paid." The plaintiff testified that for about four months after the accident Dr. Croutch "kept coming

of time. It was all of three means before I left the house of the things.

I look any job becomes I could not also my week after that.

I look my job becomes I could not also up when I was disabled.

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It is the thirty of the first week.

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The defendent contends that "the manifest reight of the sylf en character of the sylf entries of the sylf entries of the sylf that the content of the sylf that of the content of the sylf that the content for a period of four months of terms the society but on the content for a period of four and quarties and therefore under arction to any operation that the the tent that the that the sylf that the policies that the tenth on that the society was the tenth that the society the section of the same measure after the accident fix or these contents that the same measure after the accident fix or these contents that the same measure after the accident fix or these contents.

around every week." and wave him treatments at each call. Br. Croutch did not testify, but the defendant introduced a written statement made by the doctor and which was submitted to the defendant company as "Physician's Pinel Proof of Accident." The statement, made upon a printed form furnished by the defendant, and in which the space for answers is very limited, contains, inter alia, the following: "9. Between what dates was claiment strictly and continuously confined within the house? Sept. lat 1930 Jan. And 31. 10. (Answer) The assured was totally and absolutely disabled from performing all his duties from Sept. let 1930 to Jan. 2nd 31. 12. On what dates did you treat him at your office? Jan. 6 - 13 - 20 - 27 Feb. 14 - 21 - 28 March 15 - 23. 13. On what dates did you treat him at his home? Mept. 2nd - 3 - 10 Oct. 10 - 17 Nov. 20 Dec. 24. 15. On what date was he able to resume part of his work? Answer Jan. End 1931. All of his work? Answer Still on Crutch. 18. Has an X-Ray of claimant been taken? Yes. If so, when and by whom? B. F. Croutch Jan. 6th." This statement was practically all of the evidence offered by the defendant in defense of the claim. The defendant argues that when the testimony of the plaintiff and the written atatament of Br. Croutch, touching the point involved in the contention of the defendant, are considered together, it is evident that the manifest weight of the evidence shows that the plaintiff was treated by a physician once every seven days for a period of only two weeks. We cannot agree with this contention and we feel impelled to say that the defense interposed in this case, in view of all the undisputed facts, does not appeal to our sense of justice. We are inclined to agree with what was said in National Life Ins. Co. v. Patrick, supra, in passing upon a like

. The star seems of the case consists of the case of t moretry a hopehorist tucknotch and that exists the bit descend and of hard made by the dector and which was assected to the off ". drablest to heart Louis a collaborate at manner inches to a production that the second country of the product of the product of and he could the space for course in very District contains. American manufactured the reported of a personality and and the regal the stept throat out ability without classical thes has applied to less days our transport of the congress on twickly and institute tradited from partirering all tils outlies from input The Man have been present that we want to be you have not took that BE - IS - bf and - To a to - Ef a b and - Vendite tany found Paned ald a mid dreat now his count date 40 . All . 200 a Cl force Fest. Mad - 3 - 10 Oct. 10 - 17 Were 20 Cas. 25. 15. On what sate was he able to reques mark of his world comes Cane had 1931. to wast-k on east the decard on Little comment throw and to like Mostro C. T. C. Canada of the main to be T. Teer Towns word included Box 486.7 Title without our professing all of the retiring effered by the defendent in defence of the claim. The defendant motifies and and Thisminic and to commissed and make that concern soli at paylorsi salog sat pathopes assumil and he technical consentant of the deferminations are completely be regressed to be were last moute considers and to thinker goodstoom out last distinct a tol area breaked by a physician come rery aver highly a malifradiana alika darpa dounna ol 'acciosa out vino la bolver. and so feel impolled to ear that the defense interposed in this and of Anagon for seab , about todaysthus and the to wate at gone es lead this line out you whiteher amount in process and appear to the

defense under a similar state of the record.

The judgment of the Municipal court of Chicago should be and it is affirmed.

APPIRMED.

Kerner, P. J., and Gridley, J., concur.

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union Bank OF CHIC.GO, a corporation, as Trustee, Appellee,

V.

BERNAND MALTER et al., Defendants.

BURN NO MALTURA

Appellant.

INTERLOCUTORY

APPEAL MON SUPERIOR
COURT, COUR COUNTY.

268 I.A. 6243

MR. JUNTION SCARLAR BULIVARING THE OPINION OF THE COURT.

The complainant filed its bill to foreclose certain property in Cock county and thereafter the chancellor, upon motion of the complainant, appointed a receiver. Bernard Halter, defendant, appealed from the order appointing the receiver, and this court, in Union Bank of Chicago v. Bernard U. Malter et al., Gen. No. 35830. reversed the order for the reason that the sworn bill did not contain sufficient allegations of fact, as distinguished from more conclusions, to justify the order, and for the further reason that there were no findings of fact contained in the order showing a necessity for the appointment of the receivers nor was there any certificate of evidence filed in the cause. After the cause had been reinstated. the complainant filed a verified amended bill. to which the defendants filed a plea to a certain persgraph and certain subsections of the same, demurred to another paragraph. and filed an answer to the remainder of the bill. Thereafter. upon motion of the complainant, a receiver was appointed and Bernard Malter, defendant, again appealed.

The appellant contends that "before hearing evidence on

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mindres suppreved of Like and belie Imenialesses sell property in Gook county and therefor the chametler, usen motion of the complainment, appointed a receiver. Bernard Malters doffeedent, appealed from the order appealeding the receiver, and e. In Je welfall . U Brawes v. Termer C. Maite et al . Maite et al Gras Mas Sall resear and rot roine and bearever shell son every basic purious on fort to another the social Time misters con bib fild realization and tol interest the city the orders and for the fraction rebro ont at Loniotson Jost to craitest on over event Jail somer man as travious and its appointment of the receivery nor man minoria there are certificate at evidence filed at the comes. sampe had been velanbakel, the commistence filed a vertical associat disting the distance of male a black a for the grant pair to a contract pair paragraph and several microscopies of the name of the authors players and Alta towards allts one to rebulacing out as former no bolly one but hadalowin any rowleast a commissioner add to meldem more Bernard Malter, definitions and in appealed

The appellant contends that "before hearing evidence on

the sufficiency of the security, the court should have disposed of the plea and demurrer to parts of the bill." It is a sufficient answer to this contention to say that the defendants made no motion to have the court dispose of the plea and demurrer before passing upon the motion for the appointment of a receiver, and it appears from the bill of exceptions that counsel for the defendants not only did not object to the hearing, but introduced evidence in opposition to the motion, and at the conclusion of the svidence stated to the chancellor that the defendants were willing to have him pass upon the motion. Counsel assumed, apparently, that the decision of the chancellor would be against the motion and was, therefore, favorable to a speedy decision of the same. The instant contention is clearly an afterthought and without merit.

The appellant next contends that "the evidence clearly establishes that the premises are adequate security for the amount alleged to be due and the appointment of a receiver was clearly against the weight of the evidence." We are unable to agree with this contention.

We have considered several other extremely technical contentions and find them without substantial merit.

The interlocutory order of May 16, 1932, of the Superior court of Gook county, appointing a receiver, is affirmed.

APVIDMED.

Kerner, P. J., and Gridley, J., concur-

the sufficiency of the security, the court chould have disposed of the plant and demunres to parts of the bill. It is a sufficient sentention to say that the defendants made no metion the this court dispose of the plan and demunres before passing.

The court dispose of the plan and demunres before passing in the court dispose of the plan and demunres before passing it is not the court of the continual and the continual of the cylings shall be the the that the defeadants were ulliting to have him pass upon the motion. Coursel consumed, apparently, that the decision of the contains of the decision of the contains and the motion.

The appointing good confects that "the evidence clearly notable that the premines are adequate security for the amount allies due to due and the appointment of a receiver was clearly against the weight of the evidence." We are unable to agree with and content of the evidence."

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ENIL MUELLER,

Appellee,

V.

CARL POOR et al.. Defendants.

WALTER F. WALSH, Appellant. APPEAL FROM GIRGUIT COURT,

268 I.A. 6244

ME. JUSTICE SCANLAR DELIVERED THE OPINION OF THE COURT.

Emil Muchler, complaiment, filed his bill for forceleaure of certain property located in Chicago, and Walter F. Walsh, one of the defendants and the owner of the equity of redemption, has appealed from an interlocutory order appointing a receiver.

The verified bill alleges, inter alia, that on recember 15, 1927, Carl Foch and Mary Foch, his wife, defendants, being indebted in the principal sum of .53,500, executed and delivered their 77 principal notes of said date, payable to order of bearer, as follows: Five notes, including note number 52, for \$500 each, due June 15, 1920; 25 notes for \$300 each, due, respectively, five on June 15, 1930, 1931, 1933, 1933 and 1934; and 22 for \$500 each, 20 for \$1,000 each, and 5 for \$2,500 each, due December 15, 1934, all with interest at six per cent per annum, payable semi-annually, on the 15th day of June and becomber of each year, which installments of interest are evidenced by interest coupons, bearing interest at seven per cent per annum after due until paid; that complainant is the owner of one note, number 52, in the principal amount of \$500, due on June 15, 1929, and which was not paid on that

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of certain preparty London in Chirops, and alter F. Salok, one of the defondants and the const of the conlity of redemption, has appealed from an interlocatory order appointing a receiver.

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date and still remains unpaid at the time of filing suit despite numerous demands for payment made by the complainant; that all of the said notes are secured by a trust deed upon the premises in question, dated September 15, 1927, to Citizens State Bank of Chicago, as trustee. The bill further alleges that the trust deed contains a provision that in case there is a default in the payment of principal or interest them the whole indebtedness, including principal and all carned interest, shall, at the option of the legal holder, without notice, become immediately due and payable, with interest thereon from time of such breach at seven per cent per assum: that the trust deed further provides that "in case the right of foreologues or other right of procedure shall arise under said trust deed, then the legal holder or holders of said principal notes, or any part thereof, or the said Trustee for benefit of such holder or holders shell have the right to bring such legal or equitable orner dings for the collection of the memory secured by said Trust Deed as may be necessary;" that because of the non-payment of the note owned by complainant, and in accordance with the terms and covenants of the trust deed, the complainant elects to declare his option to cause to become immediately due and payable all of the principal secured by the trust deed and interest notes still outstanding; that he files his bill to forcelose under the terms and provintenc of the trust deed, both for his own benefit and for the equal benefit of all of the owners or holders of the other principal notes and interest coupons still outstanding and unpaid. The bill further alleges that the trust deed provides that the grantors, for themselves, their heirs, etc., waive all right to possession of the promises pending such forcelosure proceedings and until the espiration of the redemption period, and that they further agree that the court may at once, upon filing of any bill to foreclose, and without

date one will require ungeld at the size of Tiling out compies To the July timestalques wit by the compared abused assertions the said notes are assured by a trust feed spon the president in questing dold regioner Mr. Call, he Chinese State Sand of Ossberg as trucker. The bill further allogon that the truck dash contains a previous that is east tarre is a default to the payment notinifed enemial chain and mail tout to be included to larged and to moting out to eliade treatment source the box facioustry ally anthrop has not all their merce percent morely and popular, with the root barrens are when all plant better the part week yet sight will never all full satisfies studied bank fort all high rights bian relas ortra find, pressent he their unite ne suscioure't la appear Control to the to are the tracking the tracking from the base of the control and the co religion from the all twent toll to Angell thing and the photometric from the BIRGHINGS TO AUGUS SHAP DEFINE ON THEIR THE INDUSTRIAL STREET TO propertings for the collection of the somere accured by and Truck said he descriptions and he reserved Audit Particulation of the go have ina amor vis iltir sombrova at has thenisiques ys home oter who we the break doed a the complement alord to be declare his off to Lie addayng has out pledalboard percent of source of moiste when follow awdern participal has brook found out of features Emphasism two arms old as him perfected of Alli and sold and a trailmed, and not been dilamed soon aid tak stad about Junt wit to audulyang Inginaing todde out to emphasi se exame and to his to diagod frame Lile off blogen bee gatherdates Liles onegone depends but estal torice alleges that the brack hard provides that the sugains sout thouselves, their beirs, eter, with all right to preventen of the mattheat greathing out the colours processing and the cut in antique the conspicts perint and the last region steel test to any may at smess upon filling of any bill to foresless, and without

notice, appoint a receiver to take possession and charge of the premises, with full and absolute power to collect rents, issues and profits of said premises during the pendency of the suit and until expiration of the redemption period. The bill further alleges that it is for the best interests of the complainant and the owners and holders of all outstanding principal and interest coupons still unpaid that a receiver be appointed to take possession of the premises forthwith upon the filing of the bill; that the premises "are seant and meagre accurity for the indebtedness of the aforesaid trust deed; that they are situated at 4142-4148 N. Evers Evenus in the City of Chicago. Illinois, and are improved with the following: a brick building consisting of twelve apartments and one store, and that in the event that a decree of foreclosure and sale is entered \* \* a and upon a sale being had, there will not be sufficient monies realized from the sale to satisfy the indebteeness secured by the trust deed \* \* \*: that upon such sale, due to a material change in the market, the price obtainable from the premises will not exceed the sum of \$35.000. that the premises have been permitted to deteriorate and have fallen in a bad state of repair, and that waste has been committed by the present party on said premises." The bill further alleges that there is a junior mertgage, dated Recember 15, 1927, upon the premises, in the sum of \$12,500, and that Walter F. Walsh, defendant and owner of the coulty of redemption, claims some interest in the same.

On January 13, 1932, the complainant served notice upon the defendants Pooh and wife and Talter T. Talsh, that on January 14, 1952, he would make a motion for the appointment of a receiver. On the last mentioned date the motion was continued until January 26, at which time the defendant Sitizens State Bank appeared and objected to the appointment of a receiver and was allowed five days within which to file its answer and the motion was continued. On January

and he reports her measurement which he had been a findings of the last named as your desides at many stations are I but with an amazone the fire out to working all prive contents the two to exiter but personal and the property of the personal state of the personal st scours out has descriptioned out to absorbest food out out at it tods Efficient of the private consequent and the problem of ungaid that a neceiver be appointed to take presention of the promises Description upon the fallows of the Malay Cont. the province "are worth and months to the thickness of the old reading to the altream or the and to yell sate at anneal provide it. Aver beauth one visit and alter the state of the land of the latter back of the fall of the latter being a state of the latter being t note that which they arrows over high address to the bridge by particularies and crops has \* + \* herefor pl ales has principally in settlet a full Asove man's beiles acine decision of the life author months and miss also a the sale to salialy the independence sacrated by the true dead \* .. \*; aniza odi . Judina odi ni ansado Leinedam a od sub . alma date man dadi Said 4000,200 to may old become our Live ascinery add mort addeniated and medical new here provided to determine the particular and Spanning will be had himsel and and address Rolly has principle by adding and s at wrest fact togethe rective that for the se where the add-oil past-lover oil maps affile and yestered being appropriate tables. see of Clickly and their relief to reliefs our consume one armer of the equity of recompcions claims equal interest in the numes

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at which time the defendant littions I have I have appointed and objected
to the appointment of a receiver and was allowed five days within
which to file the enterer and the motion was constanted. On January

28 the Citizens State Bank, individually and as trustee under the trust deed, filed an answer averring that the bank as trustee claimed a prior and paramount lien on the premises to the extent of the indebtedness secured by the trust deed, and that upon the nonpayment of certain interest coupons it, for the benefit of all the bondholders secured by the trust does and pursuant to the terms of the same and the authority therein conferred, took possession of the premises and has continued in such possession until the time of the filing of the answer, and that it has during that time collected the rents, issues and profits of the premises and managed the same, and has applied the net rentals to the payment of interest and otherwise, and that by reason of the possession of the premises by the trustee, as aforesaid. the complainant is not entitled to have a receiver appointed to take possession of the premises. The answer further alleges that the Bank, individually, is the owner and helder of bonds secured by the trust deed in the aggregate sum of \$10,500, which remain unpaid, and is also the owner of the interest coupons thereon and other interest coupons which were purchased by it from the holders of the bonds. The enswer further alleges "that by reason of the possession of said premines by your Trustee taken under the terms of said trust deed the complainant is not entitled to have a receiver appointed for said premises." On February 23, 1932, the motion for the appointment of a receiver came on to be heard upon the bill and the answer of the defendant Citizens State Bank of Chicago, trustee, and an order was entered denying the motion. On June 17, 1932, appellant Walsh filed a verified answer, in which he averred that the complainant was the holder of only one note, 51, for \$500, and that the provision in the trust deed which waived all right to the possession and income of the premises pending such foreclosure

at the fillings their lasty intrividuals set to busine some the bruck deed, filed on surers aversing that the bank on troubles claimed and not to device wit of meetiners and no not i demonstration unity a debedrage seemed by the trut deed, and that men the nonperment of septical talescent company has fire the benefits of all the benefits of mounted by the trust doed and parenagh to the terms of the some and the authority therein conferred, beck penessian of the premises and has combined in such payencies until the time of the filling of the answer , and that it ime during that time collected the rowles is use self hellige and has come self heganism has evaluated the estimate the net rentule to the papeant of interest and otherwise, and that by From at the meanedin of the pregnance by the bruiker, on afernals, mind no helindappy workness a send at intilian ten all formations, and The onesest further, allings that the versioners out to entreasure and yet became about to reblack how names only at authorivibut annual form a bigur minary dendr. 2008, 2008 to man page man all al dend dendr \$2000 full touis has neerodd anequee secreson and to remo aid onle at coupons which wave numbered by it from the helders of the bonder. The enamor further allages "sint by reseat of the possession of said and took deard bine he same take under the touch of anid treet doot the bine ret heintega revisor a evad at heitilan for at demalalymon promitmes." On Poboung 23, 1990, the motten for the appaintment to remove once of the beard upon the bill and the answer of the defendant Citienes that had of Chience trustees one can arder was embered i sying the methon. On June 17, 1932; appellant valed and the everythed answer. In which he arecred that the completement were the bolder of only one notes all for 2500; and that the provious in the true deed which watped all right to the proposed and income of the president predict much forestoners

proceedings and that the court might at once, without notice to anyone, appoint a receiver to take charge of the premises, etc., was not binding upon the court without a showing that the appointment of a receiver by the court would be equitable. The answer denied that the premises were scant and meager security for the indebtedness and that the premises were of the value of \$35,000; denied that the premises had been permitted to deteriorate and to fall into a bad state of repair, and denied that waste was being committed by the persons in possession of the premises, and everred that the premises were good and ample accurity for the indebtedness, and that the total value of the premises was 472,697.36. On June 23, 1932, the complainant filed a verified amendment to the bill, in which he alleged inter elia. "that there is now due in taxes upon the said premises a sum of 44,204.34 constituting the taxes for 1928, 1929 and 1930." On July 8, 1932, upon motion of the complainant, the chancellor entered an order appointing a receiver "to take immediate possession and charge of, and to collect the rents, issues and profits from the premises described in the Bill of Complaint." The motion was also supported by a verified potition, in which the complainant averred that the chancellor had denied the motion for the appointment of a receiver on ebruary 25, 1932, "in view of the fact that the Trustee, Citizens State Bank of Chicago, as Trustee, had already taken possession of the premises involved \* \* \* that since that date and shortly heretofore, on or about, towit the 31st day of May, 1932, the said " " " bank dia close its doors and cease to do further business, and is now in the hands of the State Luditor and therefore is incapable and unfit to further manage and control the premises as Trustee; and that it is to the best interests of this petitioner and the other bondholders to have a receiver appointed in order to properly

of wallen family awar to think form old hold his millerseem and an applicable a reposite that the property of the party of Specialization of the party of the second of belook to the court would be equitable. The answer denies and the property of the property of the second over the property of said draid belone town 2000, 85% to caller out to stor meniment out find has had a cont fint of the convolution of bostimus most bed .... white of repuir, and demiet time waste one being committed by the persons in possession of the president and average that the priminess Corner will be an electrical for the balable down and the both the corner with value of the promine was \$75,000 and to June 16, 1000, the od delar of . Ille of o od consciona halfire o wall? Attachment towns opened at one one at sense duty " attac word begotte we was a cur of 54,200 to sentitudition the house for 1920, 1920, Sand Istoa on fair as 1902, upon motion of the completeness the etational sund of revisor a galdalogue rebre as horeine relle. .. next the provide after all stalled to been an execute the subsection was also supported by a verticed position, in which the completum. present that the passerlier had during the motion for the qualificant af a province on believery say lows, the wice of the Knot that the Trusten. Oitteens take Sank of Chicago, on Trustee had already taken has such said made but a of bestread ensisting our be miscrossed shorely heresofoses as ar should tend that day of May, 1895. the mid a s simil old close the seven and seems as a him add are torust ton realism; sands of the Shake and ton a mon a face and therefore an evaluating and foreign has expense confirme on office but histograms as may consisting about to observated from our or all it had been presented the other benchmiders to have a rocetyer appainted in anise to property

that since the closing of the bank, the uditor of the state of Illinois has appointed one, m. .. Heathe, Receiver of the said bank and this petitioner further says that the said Receiver through his attorney has declared that he will not charge himself with the suties as Trustee heretofore exercised by the said Citizens State Bank of Chicago, regarding the premises herein involved."

The sole assignment of error is that "the court erred in granting the motion to appoint a receiver." Counsel for appellant has seen fit to describe at length the present great depression, and he argues that no receiver should be appointed for an apertment building during such a period; that the appellant, in order to emeliorate the suffering of his tenants in the building in question. permitted them to occupy their apartments without pay; that the appointment of a receiver will not change the existing depression and that the ek-neeller should not have disturbed the possession of the owner of the premises, and that the appointment of a receiver might deprive the unfortunate tenants of the building of shelter. This court is fully aware that the country is suffering from a great depression and that unemployment is prevalent, and we have heretofore. in several decisions, taken judicial notice of the situation. Moreover, the three divisions of this court have amounced a rule, to which they have adhered, that a provision in a trust deed that in case of a default in the payment of any of the indebtedness as cured the bolder of the notes shall have the right, upon filing a bill to forcelose, to have a receiver appointed without regard to the value of the premises or whether occupied by the owner of the equity as a homestead, does not authorize an appointment of a receiver upon more allegations in a bill of default and that the

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of Lerge James and Judi at warre to susmained when affi PRACTICAL TOT DESCRIPT A SECTION A PROCESS OF PRACTICAL TAX DESCRIPTION has seen \$50 he develope it beauty the poreint great convention, and immuteren on not beinforce of birmin realizate on Judi wante at notice of according and their places of the according a place to provide the profession of pointing but at abound als to partering of about loss and that type control where control at many control and maissered poidsins set again too fir workerer a to Incumisque submension all beginsted agest for blanch authorised all took has at the sener of the programme and that the applicants of he received and long to get billed with to givened adequate out of the billed This sour is fully sense that the sensing is cultured from a great saferni prai po leta "Praderreg sa Strenjadgenos Andr San Saltanaspili Days to severe Containing taken pulses and in climations "selve a become and some all the sould the could out anvector Soils head from a at colubrate a bade terralia area told tolde to is once of a default in the payment of my of the indebteeness guila's many adder one own flesh nother sit to webler out bossess at bronger ducation infinitely a receiver a section of the a odd he remme add ud belguese resideds to acalmera add to auter and state an accordent for not authorize an appoint of a received upon more allegations in a bill of defout and that the premises are meager and scant security for the indebtedness, and without any showing by specific facts that an appointment of a receiver would be equitable. We cannot refrain from soying that the argument that the appellant was in possession of the premises and that in his management of the same he played the part of a philanthropist toward the tenants is not supported by anything in the record. Moreover, the record does show that the trustee was in possession of the premises from January, 1932, until the time of the appointment of the receiver, and the chancellor refused to appoint a receiver in February, 1952, because it appeared that the trustee was then in possession of the premises.

The appellant contends that "where the value of premises is in dispute by a sworm answer a receiver ought not be appointed unless evidence of value is heard in open court." While it is somewhat difficult to follow the argument of the appeliant in support of this contention, we assume that he means that where the verified pleadings of the complainant make out a prima facie showing that the premises in question are meager and scant security for the indebtedness, and the verified pleadings of the appellant make out a case to the contrary, and the only material question, upon the motion for the appointment of a receiver, relates to the value of the premises. that the chanceller should then hear evidence to determine the real value of the premises. If we are right in our assumption as to the position of the appellant, the correctness of the same may be conceded as a general rule, but in the instant case the chancellor concluded that under all the undisputed circumstances it was no cessary to appoint a receiver to preserve the property, and after a careful consideration of the record we are unable to say that he was not justified in that finding. If the appellant ever had possession of the premises - and the record fails to show that he had - he had

Fig. appellant seminary that water the relian of president to in dispute by a morn gamer a received ought not be applicable at it wilds ". June mage at broom at sufar le sparbive asolan Percent of Englished and he immigrated will relief of \$500,7520 Sufreene to live and ready but needs to be properties the world was the world to and and gained at the completeens water out a pertention of the chertage that the administration and the collection factor that the property and state of the territory have a tax wine succlings all he spainted; but you all her auto to the sentency, per the only nativeled constitut, one the certifie for while any sold le count out as salabas, protected at a decimal and the commercial value and the state of the st as dilliputed the of little ten as if applicable and he sales have to the problem of the appellant, the manufacture of the sale are uniformers and early product and an indicator Investor of the behavior of produced his to assume the behind the behind the behind the behind the behind the Division in the Table and a Carryland and revision in the Court of Andrews and for now all falls the of character one on brance all to notherablemon mointend had to the horizont all the annihing over had the second and first and a hard out durin a star is a first brone a new time in band a first band

given up his possession at least six months before the entry of the order appointing a receiver, for it appears that the trustee under the trust deed was in possession in January, 1932, and had collected the rents and managed the building, and was still in possession at the time the chancellor passed upon the motion. It further appears that the trustee had ceased to do business as a bank and was in the hands of the state auditor, and its solicitor stated to the chancellor that it made no objection to the appointment of a receiver. The appellant was duly notified of the hearing before the chancellor, and, so far as the record discloses, made no objection to the appointment.

The appellant also contends that the verification of the bill is bad and gives the bill no evidentiary value upon the appointment of a receiver and therefore the chancellor should not have considered the allegations of the bill in passing upon the motion for the appointment of a receiver. To find no merit in this contention. In the recent case of Foliance Bank & Trust Co. v. Dalsey, 265 Ill.

App. 546, 555, we maid: "The appellants did not care to take advantage of the opportunity afforded them to be heard on the motion for the appointment of a receiver. Ead they appeared and urged certain of the technical points they now make in this court, the alleged defects in the plendings, if any there be, could have been at once easily cured by the complainant. Apparently appellants wished to avoid such a procedure, and it would be a commentary upon justice if they prevailed in this court upon mere technicalities." The same might be said of the present appeal.

The interlocutory order of the Circuit court of Cook county will be affirmed.

APPIRMED.

oppointing a proofest, for it appears that the tracked oppoints that the tracked objected the rests and managed the building, and wan still im possession at the time the chadrollor passed upon the motion. It and may the the character, and the weliciter stated to the character stated to the character of a secritor. The appeintment and also receives at the appeintment of the receives, and ene objection to the characters and the receives, and ene objection to

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The interlocatery erder of the Circuit court of Cook

FIRST UNION TRUST AND SAVINGS BANK, a Corporation, as Trustee, Appellee,

VD.

LILLIAN JORJORIAN et al., Appellants.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF GOOK COUNTY.

263 I.A. 6245

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from an interlocutory order appointing a receiver in a fereclosure proceeding.

The bill of complaint was in the usual form, alleging a \$73,000 mortgage upon which \$12,000 had been paid; that \$4,000 of the principal and \$1,980 of interest had fallen due on April 1, 1932, and was not paid; that the maturity of the entire indebtedness had been accelerated; that the taxes for 1930, \$1789.97, had not been paid; that by reason thereof there was due and unpaid on account of the indebtedness \$65,980; that the premises were in a state of disrepair; that the value did not exceed \$60,000, and are therefore scant and meager security for the amount of the indebtedness. The trust deed conveyed the premises, together with all rents, issues and profits. The bill asked that a receiver be appointed.

Lotice of the application for the appeintment of a receiver was served on defendants, who filed objections; subsequently the matter came on for hearing before the chancellor and the testimony of witnesses was taken. A competent witness for complainant testified that he had examined the premises; that they were in bad repair, and that in his opinion the fair market value of the property was \$45,000; that they consisted of a one story store building, a brick building containing seven small stores, also two other buildings, each containing two apartments; that the brick building is approximately twenty years old. Opposed to this a witness testified for defendants that he had never seen the premises

PIRRY UNION THOUSE AND DAYLORS.

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268 LA. 624

BR. PHESIDING JUSTICE BEGUNDEN.
THE TWEETERS OF THE COT.

This is an appeal by defendants from an interlocutory order appealables a receiver in a fermionum proceeding.

a \$72,000 markange upon which \$12,000 had been paid; that \$4,000 of the principal and \$1,900 of interest had ralies due on April 1, 1932, and was not paid; that the mainrity of has entire indection as not not paid; that the mainrity of has entire indection account of the indectedness \$65,980; that the premises were in arctic of disrepair; that the value did not expect \$60,000, and are therefore exent and mosfer security for the amount of has indectedness. The trust deed conveyed the premises, teneticer with appointed.

Solice of the application for the appointment of a restart and the tendent of the constant the continue; and the tentithe matter came on for hearing heaver the chanceller and the tentimony of withnesse was taken. A composed witheas for complainent
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property was \$45,000; that they consisted of a one story atore
building, a brick building containing seven small stores, also two
other buildings, even containing two apartments; that the brick
building is approximately tweety years old. Opposed to this a
situous testified for defendants that he had never seen the premises

but knew the location. From the description of the building given in court, he estimated that the premises were worth \$90,000. The witness said that his opinion was based only on hearsay. One of the attorneys stated that if fully rented the premises should bring in \$7,000 a year, but that there were many vacancies.

Under these circumstances the chancellor was called upon to decide between the widely divergent testimony of the two witnesses as to the reasonable market value of the premises. He evidently was of the opinion that this value was at least below the amount of the mortgage indebtedness and that the premises were seant security. The appointment of a receiver rests largely in the discretion of the chancellor. Under the circumstances presented by this record we cannot say that this discretion was abused.

In defendants' brief usurious interest is asserted, which, it is claimed, is admitted by the failure of the complainant to file a replication to defendants' answer. The record does not show any answer, but only objections filed to the application for a receiver. We do not understand that replications are required to such objections.

The propriety of the appointment of a receiver rests upon the present value of the property conveyed. The record justified the appointment, and the order is affirmed.

AFFIRED.

Matchett and O'Connor, JJ., concur.

but knew the launtless. From the description of the building given in fourt, he estimated that the premises were worth \$00,000. The witness said that his epinton was based only an hearsny. One of the attenuess stated that if fully rested the premises should bring in \$7,000 a year, but that there were many vacancles.

Under three strumstances the chancellor was welled upon to decide between the visaly divergent testimony of the two witnesses as to the responsible narket value of the previous. He syldently was of the opinion that this yakks was at least below the enount of the mertgage indubtainess and that the premises were security. The oppointment of a receiver rests largely in the item.

is included, is somitted by the failure of the complainant to file a replication to defendants, where of the record deep not show the a replication to defend the recoiver. We do not understand what replications are required to

The propriety of the supeintment of a receiver rests upon the present value of the preperty conveyed. The record justified the appaintment, and the order is affired.

THE PURE PROPERTY.

Betchett and ofCourse, 33., concer,

WILLIAM H. HARPER, for use of SIBLEY ELGOT and EDMUND S. GOSS, doing business as ELGOSCO RADIO CO.,

(Plaintiff) Appellee',

APPEAL FROM

MUNICIPAR COURT

OF CHICAGO.

268 I.A. 6251

V.

aRMOUR and COMPANY, a corporation,

(Befendant) Appellant.

Opinion filed Dec. 21, 1932

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

Flaintiff's statement of claim entitled, William H.

Harper, for the use of Sibley Elgot and Edmund S2 Goss, doing
business as Elgosco Radio Co. v. Armour and Company, a corporation,
defendant, was filed in the Municipal Court of Chicago. The
claim appears to be based upon a certain assignment of wages and
salary of William H. Harper. The statement of claim alleges that
the plaintiffs are the assignees and equitable and bona fide owners
of the moneys so assigned and are entitled thereto by reason of
said assignment and notice served upon the defendant, Armour and
Company. The amount claimed was \$292.43. An affidavit was attached
to the statement of claim but does not set forth how and when
plaintiffs acquired title. The affidavit of merits denied the
assignment of wages and denied further that the plaintiffs are the
assignees and equitable and bons fide owners of any moneys due and
owing to the said Harper from the defendant Armour and Company.

The cause was tried by the court without a jury resulting in a finding in fevor of the plaintiffs and judgment in the sum of \$181.17, together with the costs of the action.

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268 I.A. 625

Opinion filed Sec. 21, 1952

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Plaintiff's etatement of claim entitled. William M. Termer, tog the use of fibling Fleet and Edemid 81 core, doing business as Nigue on Maio Co, v. Ayanor and Company, a corporation, BUT bereatent, see filed to the mateign) fourt of different claim appears to be based upon a serial assignment of value and salary of William M. Marper. The statement of claim allages that wrange abil ment bee added tone the watering off wir willigately off it in moneys so mestaned and ere entitled thereto by reason of tan receipment and rolles served upon the defeatent, tracers and The shound officed our | 200 at . An afficerate was naturable and o bus went direct too not does not see the tax and ot et placefully amousted bisin. The orradaysk or earlie donied has are Lemmas of wages and device forming that the plaintiff ove the applications and equilibrate and bons ride owners of one annual owing to the apid Merper from the defendant Armour and Company.

-distant was the court without a jury result-

Upon the trial of the cause Sibley Elgot testified that he was a member of the partnership of Elgot and Coss doing business as Elgosco Radio Co.; that he knew Harper and his wife and that these persons signed the document referred to and offered in evidence as plaintiff's exhibit 1. This exhibit was a note given by Harper and his wife for merchandise purchased and it is claimed that no part of the note has been paid.

Flaintiff's exhibit 3 was an assignment of wages by
Herper to Sibley Elgot & Edmund 8. Coss, doing business as
Elgosco Radio Company, and while this assignment was directed
to two persons jointly, it was signed by only one, but from the
evidence it appears that Elgot and Coss were partners and the
signature of one to the assignment was sufficient.

Section 18 of the Practice Act provides that "The assignee and equitable and bona fide owner of any chose in action not negotiable, heretofore, or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title; \*\*\*\*\* This same provision provides, that in the event "the chose in action so assigned consists of wages due or to become due to the assigner thereof from the defendant in such action, at least five days written notice of the pendency of such suit shall be served upon the assigner of such chose in action, before the trial of the same; \*\*\*\*\*

It is insisted that regardless of the caption in this case which indicates that the action is brought by the assigner for the use of the real plaintiffs, nevertheless, the suit was by the assigness and the service or notice on the assignor was

Upon the trial of the cours Sibley Elges testified durings as Elgoson Sedio Co.; that he have Marper and his wife a still the course of the continuation of the continuation of the continuation of the act has been paid.

Plaintiff's exhibit 3 was an acrigoment of weges by exper on alling them. It is first if a day of the column of th

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requisite to the maintenance of the action.

This was an action of the fourth class in the Municipal Sourt, and in such actions the proceeding is whatever the evidence makes it. Written pleadings are unnecessary. Winitt v. Kornblith, 248 Ill. App. 108; Sher v. Robinson, 298 Ill. 181.

Plaintiffs rely upon the assignment of wages, which was introduced in evidence, as the basis of their right to recover the wages due Harper which were in the hands of the defendant Armour and Company. The statute provides that an action upon an assignment of wages of this character can not be maintained unless anduntil a five days written notice of the pendency of such suit shall be served upon the assignor. No such notice was served in this proceeding. This court in the case of <u>Snite</u> v.

New York Central R. R. Co., 262 Ill. App. 369, in speaking of this provision, said:

"We regard a compliance with this provision by the assignee of a chose in action as a condition precedent to his right to maintain on the trial his suit against a defendant, who may be indebted to the assignor for wages. We think that the statute should be construed as meaning that the five days' written notice be served on the assignor personally."

To the same effect see McFadden and Kondrath v. Pennsylvania R. R. Go., 247 Ill. App. 629.

We have not been aided in our consideration of this cause by briefs or arguments on the part of the plaintiff.

For failure of the plaintiff to serve notice on the assignor under the wage claim assigned, the judgment is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND HALL, JJ. CONCUR.

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This was an action of the fourth class in the Funicipal Caurt, and in such settions the proceeding is whatever the evidence at the contract the evidence at the contract the contract that the contract that the contract the contract that the contra

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To the same effect ass <u>Heinellan and Kondards</u> V. Trought V. Trou

We have not been aided in our consideration of this cause by briefs or arguments on the part of the plaintist.

For include of the plaintiff to serve notice on the

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CHARLES FRANSEN.

(Plaintiff) Appellee.

V.

THE PENGSYLVANIA RAILROAD COMPANY, a corporation,

(Befendant) Appellant.

APPRAL FROM

SUPLATUR COURT.

268 TOOK COUNTY.

Opinion filed Dec. 21, 1932

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Charles Fransen, the plaintiff, brought his action against the defendants, August Carlson and the Pennsylvania Railroad Company, a corporation, to recover damages for personal injuries sustained by him on Loomis Soulevard at its intersection with the railroad of the defendant, The Pennsylvania Railroad Company. The defendant Carlson was later dismissed out of the case.

The declaration consisted of four counts. The second count was subsequently dismissed on motion of plaintiff.

The first count charged the defendant Carlson with running a certain automobile in which the plaintiff was riding as a passenger in a careless and negligent manner over and across the railroad tracks of the defendant, The Pennsylvania Mailroad Company, and charged The Pennsylvania Mailroad Company with negligence in the operation and control of a certain train of cars being propelled over the railroad tracks of the defendant and upon and across Loomis Moulevard.

The third count charged the defendant, The Pennsylvania Railroad Com any, with carelessly and negligently failing to station a brakeman or watchman on the rear end of the train which was being backed across Loomis Soulevard.

The fourth count charged negligence on the part of The Pennsylvania Mailroad Comapny because of its failure to ring any bell or sound a whistle while the train was approaching the inter-

TESET

CHARLES FRANCER.

(Plaintiff) Appallme,

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Opinion filed Dec. 21, 1952

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The fourth count charges negligence on the part of The Fennsylvania Mailroad Commonly becomes of its failers to ring any

section of its right-of-way with Loomis Boulsvard.

Loomis Boulevard is a north and south street in the City of Chicago, approximately 35 to 40 feet wide, with a parkway 6 or 8 feet wide located between the sidewalk and the curb. The sidewalk is a standard sidewalk about 4 feet in width. A main track of The Pennsylvania Railroad Company crosses the boulevard between 58th and 59th street at the grade. There are no gates, but there is a watchman's box located at the northwest corner close to the crossing. A switch track leads into the plant of the Peoples Iron and Metal Company located on the east side of Loomis Boulevard. This switch track runs west from this plant and connects with the main line perhaps 60 or 75 feet west of the boulevard.

of the Goldsmith plant and placed on the main line with the end of the box car near Loomis Soulevard, close to the building line. The engineer then proceeded to book on two other cars which were to be placed behind the three cars left standing on the main track. It is the contention of the plaintiff that the driver of the car in which he was riding approached the tracks of the defendant company and saw these cars standing on the west side; that he stopped the automobile and then proceeded to cross over the tracks and, an he did so, these cars were suddenly started up and propelled across the boulevard striking the automobile in which the plaintiff was riding and which was driven by the defendant Carlson.

Plaintiff testified that the accident happened about noon on October 5, 1939; that he had worked that morning for the defendant Carlson and was on his way home; that Carlson asked him if he wanted to ride with him and he did so; that as they were driving north on Loomis Boulevard the car stopped at 59th street where there was a stop light and from there the automobile proceeded north and

ecotion of its right-af-ney with Lounis Mouleverd.

Locale Sculevers is a north and south street in the City of Chicago, approximately 35 to 40 feet wide, with a parkecy 5 or 5 feet wide alds located hereof the sideralk and the ourb. The sideralk is a standard sideralk about 4 feet in midth. A main track of source is a convey with street at the ground. There are no gates, but there is a matchment but located at the morthwest corner olose to the crossing. Sameny located on the east wide of Locale Sculevers. This critical street wide with the main line freek rest of the bonders with the main line protects of or 75 feek rest of the bondevers.

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stopped 15 feet or more from the tracks; that he saw a railroad car standing on the west side of Loomis Boulevard about even with the sidewalk; that there was no watchman at the crossing and that Carlson then started driving across the track and the train started at the same time; that Carlson tried to get out of the way but was unable to do so and the car of the defendant. The Pennsylvania Railroad Company, backed into the automobile and the plaintiff was thrown out and injured.

A witness named Exner testified that he was driving along Loomis Soulevard in a southerly direction; that there were two tracks across Loomis Soulevard at that point, one being a through line and the other used for switching; that as he was approaching the track at approximately 25 miles an hour he saw these box cars projecting somewhat beyond the building line and they were standing still at the time; that he slowed up as he approached the track and suddenly saw the cars move across and heard the orash; that he was compelled to make a sudden stop. We did not hear any signal or warning of any kind before the cars moved, nor did he see any flagman or watchman or other person on the crossing.

Carlson, the co-defendant with the Railroad Company, who was dismissed out of the case testified practically to the same facts.

Rudolph Anderson, a witness on behalf of plaintiff, was driving along the boulevard and was about a block away when he first saw the cars which were in motion at the time. He continued to drive along the boulevard until he reached the place where the accident had happened but did not see a flagman at the crossing.

Opposed to this testimony was that of the train crew, consisting of the engineer and the firemen, both of whom testified that the bell was ringing and that the rear end brakeman, by the name of Baxter, was at the crossing as was also the crossing flagman.

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Opposed to this testimony was that of the train every

contain at the unit was ringing and that the room and brakeman, by the

The conductor of the train was considerably east of the place where the accident happened and did not witness it.

Comis, the watchman stationed at this point by the Reilroad Company, testified through an interpreter and according to his testimony he blew a whistle and waved a flag and tried to stop the oncoming automobile in which plaintiff was riding. One Mecker testified, the bell was ringing and that the driver of the automobile did not stop at the crossing.

The only question for this court is one of fact, namely, whether or not there was such negligence on the part of the defendant as would support the verdict rendered, and whether the plaintiff was in the exercise of due care for his own safety.

the duty of the plaintiff to prove that he was in the exercise of care and caution for his own safety at the time of the accident and prior thereto, and that it is the duty of one about to cross a railroad track to approach it with care commensurate to the known danger. We also agree with their position that it is the duty of a passenger in a vehicle, if he has an opportunity to learn of the danger, to inform the driver, and that the burden of proof is upon the plaintiff to establish his case by a preponderance of the evidence.

On the other hand, a railroad company operating through a city is under obligation to operate its trains in such a manner as not to injure persons rightfully using city streets.

It appears from the evidence to be uncontradicted that shortly before the accident the box cars were backed up so that the rear end of the train was approximately even with the building line and the cars were standing at that point just prior to the time that the automobile in which plaintiff was riding as a passenger started to cross. It also appears that the engine was not attached to these standing cars. If the driver stopped his car, as testified to by

The conductor of the train was considerably east of the place.

Comin, the watchman stationed at this point by the live of the coming of the coming of the coming of the complete of the complete.

The enly question for this court is one of fact, namely,

the court of the exercise of due cure for his com sefety.

To agree with the provides of the defendant that it is the curvies of the cut; or the printiff to prove that he was in the exercise of the first own safety at the time of the sections and union that it is the duty of one about to cross a main to the cut, and the cuty of an area to the duty of a case of the danger. We also agree with their position that it is the duty of a case of the case of the danger, to inform the driver, and that the barden of proof is upon danger, to inform the driver, and that the barden of proof is upon

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It appears the evident the box care more broked up so that the motely before the evident the box care more broked up so that the rear and of the train was approximately even with the batiding line and the cars were standing at that paint just prior to the that the that prior to the time that the engine was not attached to these standing cars. If the driver stopped his cars, on testified to by

him, and saw the box cars standing still and there was no rear brakeman, and no warning was given by the crossing watchman, the jury was justified in finding the driver of the automobile was not guilty of negligence in attempting to cross and the plaintiff was under no obligation to warn him of danger. The testimony on behalf of the plaintiff amply substantiates this position and it is not within the province of this court to reverse under such circumstances unless the evidence is so overwhelmingly in favor of the defendant that all reasonable minds would agree thereon. Plaintiff's testimony standing alone should require the submission of plaintiff's case to a jury and we see no reason for disturbing the verdict and judgment entered thereon.

Plaintiff testified that his foot was torn and out; his right hand was cut open and his whole body was bruised; that his shoulder and leg were badly injured; that he was treated by a physician for a couple of menths or more; that his right hand and arm are sore and shaky; and that there is a limited motion in his right arm and he cannot move it in every direction; that at the time of the accident he was earning \$12 a day but that he has not been able to do anything since that time.

Dr. Jacobson, the physician who first treated him at the hospital, testified that he found plaintiff's hand badly lacerated and the three middle fingers out, his shoulder sprained, and a dislocation of the ankle; that he immobilized the shoulder and autured the torn tendons and that plaintiff remained under his care for about three weeks and subsequently he was cared for by his own family physician.

Dr. Scott, a physician, testified that he took an x-ray picture of the plaintiff and found a 50% stiffness in his right shoulder and a 15% restriction of motion in the index and

him, and any the box cars standing still and there was no rear and any as a serial and the serial and serial a

Initially bound was one that the find yes bruised; that his simile body ess bruised; that his simile body ess bruised; that his shaller and log some badly injured; that he was treated by a physician lit bound of that he was treated by an are sore and shally; and that there is a limited cotion in his ris are and he cannot move it in every direction; then at the time of the expension when the continue to the time.

in decoders, the physician who dies treated him at the benefical, testified that he found pinintiff's beneficially and the testified that he lambbilited the abouther and a dislocation of the antic; that he lambbilited the abouther and subsequently he set cered for by his own family shysician.

Ur. Coott, a physician, tostified that he teck an anti-

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middle fingers of the right hand; that there was considerable stiffness and rigidity in the muscles of the book, both in the small of the back and the upper part and that there was about 50% limitation in motion in the left ankle.

The verdict was for \$10,000 and we are unable to say under the circumstances that it was excessive.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

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CHRISTIN PERSONS

BEARL AND MALL, IN. CONCER.

INVING SPITZER, Trading as WHEATOAST GOMPANY,

Appellee,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

268 I.A. 6253

THE QUAKER OATS COMPANY, a corporation,

Appellant.

Opinion filed Dec. 21, 1932

#M. FRE IDING JUSTIC #11.50M delivered the opinion of the court.

Plaintiff recovered a judgment before the court without a jury for the sum of \$2,846.35, together with costs, for a breach of contract. The original contract in question was dated May 25, 1931, from which it aspears that the defendant, The quaker Cats Company, sold to the Wheatoast Company, 93 tone of "Muffets" at \$30 per ton f.s.b. Chicago. The time of shiement was within 30 days, with a carrying charge after that time. The contract was signed, "Irving Spitzer, Buyer, "and underneath the signature was the abbreviation "Frop." evidently meaning preprietor.

The original action appears to have been brought in the name of Wheatoast Company, a corporation. Leave was granted to amend the name of the plaintiff to Irving Spitzer, trading as Wheatoast Company. To the statement of claim as amended, defendant filed its affidavit of merits and proceeded to trial. It is insisted that this was not an amendment but a substitution of a party plaintiff and that, therefore, the plaintiff should be precluded from recovery. It appears, however, that no motion to diemies was made in the trial court, but an affidavit of merits was filed to the amended statement of claim and the parties pro-

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OF CHIEGRAS.

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Opinion filed Dec. 21, 1932

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Finishis recovered a judgment before the court without a jury for the sum of \$2.548.25, together with costs, for a breach of contract. The original contract is question see dated sky 25, 50 mpany, sold to the Thateest Company, 95 tons of Suffets, at 120 per tex f.c.b. This time of shipment was within 30 days, with a corrying charge after that time. The contract was within 40.

The original action expects to have been brought in the name of thestoast Company, a corporation, leave was granted to amend the name of the plaintist to living Spitzer, trading as Theotoast Company. To the statement of claim is amended, defendant filed the efficavit of merits and proceeded to trial. It is insisted that this was not an amendment but a substitution of a party plaintist and that, therefore, the plaintist should be presently plaintist and that, therefore, the plaintist should be presented from recovery. It appears, however, that no motion to dismiss was made in the trial court, but an officavit of merits one filed to the amended statement of claim and the parties present filed to the amended statement of claim and the parties present

rving Spitzer, trading as Wheateast Company, and not an action by a corporation. The contract upon which the action is predicated indicates that it was a contract between the defendant and Spitzer as an individual. It is too late to raise the question in this court at this time. Malleable Iron Range Co.

v. Pusey, 244 Ill. 184; Uphan & Gordon v. Richey, 61 Ill. App. 650; Redlowski v. Grossfeld & Roe Co., 192 Ill. App. 534.

of the agreement and on or about June 15, certain changes were made in the contract and that thereafter all of said "Muffet Feed" was delivered by the defendant to the plaintiff except 491 tons. This appears to have remained in the warehouse of the defendant and, according to the testimony of the plaintiff, the purchaser, this amount was sold to Four County Feed Distributors at an agreed price of 187.50 per ton by the plaintiff.

August he ordered the defendant to ship the Muffet Feed and was told that it had been sold. There is some evidence on behalf of the defendant that this material deteriorated during the hot weather and that it became necessary to sell it. This was a question of fact for the trial court and, moreover, there does not appear to have been any demand made upon the plaintiff by the defendant to order the material shipped, nor was there any notification that in the event it was not taken it would be sold. The contract itself and the evidence contained in the written communications between the parties evidenced an outright cale of the property with the title in the plaintiff. We are of the opinion that the trial court properly found that there was a breach of contract.

and spices an individual. It is too late to raise the

From the systemate and on or about draw is, derical changes were and the expenses and on or about draw is, dericate changes were made in the contract and that theresiter all of said "suffet Feed" was delivered by the defendant to the plaintiff croops the description of the contract and cocording to the testimony of the plaintiff.

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Picintiff testified that on or about the first of laguet he ordered the designath to ship his Puffet Feed and was weld that it has been sold. There is rowe inideace on belaif of the defendant that this material deteriorated during the hot weather and that it become necessary to well it. This was a question of fact for the trial court and, moreover, there does not appear to have been any demend made upon the plaintiff by the defendants order the material chipped, nor was there any notification that in the event it was not make it sould be cold. The contract itself and the evidence contained in the arthten

property with the title in the plaintiff. To are of the opinion that the trial court properly found that there ess a breach of

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The court found the measure of damages to be the difference between the contract price and the price which the plaintiff would have received under the cale of this product to the Four County Feed Distributors. This product was not of such a character as to have a readily ascertainable value in the open market. The defendant knew that it was the purpose of the plaintiff to call this product as shown by its communication to the plaintiff of July 2, 1921, in which is given a list of prospective buyers. If there was an actual sale by the plaintiff and the court so found that there was, the actual damages would be the difference between the contract price and the price at which the plaintiff had sold the product. Plack

Diamond Fuel Co. v. Illinois Fuel & Phosphate Co., 219 Ill. App.
150; Barnett v. Caldwell, 277 Ill. 265; Armeny v. Madsen & Buck Co.,
111 Ill. App. 621.

This court in the case of Dahlin v. Maytag Co., 238 Ill. App. 85, in its opinion, said:

"The general rule is that in an action for breach of contract for a failure to deliver goods and chattels, f.o.b. at a certain place, where the purchase price has not been paid, the measure of samages is the difference between the contract price and the market price at the time and place stipulated for delivery. 2 Sedgwick on Damages, sec. 754; Driggers v. Ball, 94 Ill. 223; Farson v. Buder, 187 Ill. App. 318; O'Fizzi v. Valley Fruit Co., 213 Ill. App. 162. There is, however, a well-known exception to this rule. A recovery may be had for prospective profits where there is any criterion by which the probable profits may be estimated with reasonable certainty. All the law requires is that such profits be established by competent proof."

These being no evidence or proof that there was a market value, the court properly allowed a recovery for the prospective profits as shown by the evidence. The cause was tried by the court without a jury and we find no reversible error in the record.

Wor the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

REBEL AND HALL, 33, CONCUR.

JUDGMENT AFFIRMED.

The court found the errors of demores to be the fifference between the contract price and the price which the plaintiff would have received under the sale of this product to the Four County feed Matributers. This product was not of the open market. The defendant knew that it was the curpose the open market. The defendant knew that it was the curpose tion to the ministiff of duly 3, 1921, is shick is given a list plantiff and the court so found that there was, the netural plaintiff and the court so found that there was, the netural the price at which the price was a product.

This court in the case of Tablia v. Maybas Co., 216 Til.

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The s being no evidence or proof that there was a market value, the court properly allowed a recovery for the specifive profits so snown by the ovidence. The cause was tried by the court without a jury and we find no reversible error in the record.

for the reasons stated in this spinion the judgment of the Municipal Court is affirmed.

JOHN MAGER and SOPHIA MAGER,
(Plaintiffs) Appelless.

V.

PETER J. O'BRIEN, doing business as PETER J. O'BRIEN AND COMPANY, and the CITY OF CHICAGO, a Municipal Corporation,

(Defendants) appellants.

APPEAL FROM

SUPERIOR COURT.

260 I.A. 6254

Opinion filed Dec. 21, 1932

MR. PRESIDING JUNTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$1,502.90, in the Superior Court of Sook County, arising out of an action by the plaintiffs against the defendants in an action of trespass on the case. The defendant Feter J. O'Brien, doing business as Feter J. O'Brien & Company, was joined with the City of Chicago in the action.

the Sanitary District of Chicago entered into a contract with Dowdle Srothers, a corporation, for the construction of a discharge sewer used in connection with the North Side Sewage Treatment Works, Division R. This proposed sewer was to run through certain villages and along certain streets in the City of Chicago. One of these streets was Lavergne avenue, upon which street the plaintiffs resided. The improvement provided for theopening of a trench approximately 38 inches wide and its entire length was approximately 17 miles. In this trench a centrifugally spun cast iron pipe with a diameter of 14 inches was to be laid at a depth varying from 11 to 13 feet. The City of Chicago passed an ordinance authorizing the work to be done and in the ordinance it was provided that the Sanitary District of Chicago was to be liable for any damages resulting from the work, and the paving on the street was to be replaced

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269 I.A. 62KH

Opinion filed Dec. 21, 1932

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as bt had before existed. The Sanitary District entered into a general contract with the Dowdle Brothers under which the contractor agreed to do this work and to restore the pavegent not only within the lines of the trench, but any other pavement on the streets outside of the trench that was broken or damaged during the course of the operation. This trench was dug and the pipe laid, and on April 19, 1938, bowdle sublet the restoration of the etreet to Peter J. O'Brien, doing business as Peter J. O'Brien & Co., defendant berein. In order to pave the street it became necessary to remove certain of the street surface which had been cracked and rendered unserviceable by the laying of the trench. In order to remove this damaged surfacing of the street it became necessary to break it up so that it could be easily handled and for this purpose a large iron ball about two feet in diameter and weighing approximately 300 pounds was hoisted up and dropped upon this damaged pavement, thus reducing it to a dondition where it could be carted away and enable the contractor O'Brien, to repaye the street where required. It is plaintiffs' contention that the vibration produced by the dropping of this ball, caused cracks in the 12 inch foundation under their house and also in the stucce super-structure, the interior plastering of the house and the private sidewalk running from the front to the rear of the house. Plaintiffs also charged that by reason of the oracks in the foundation walls, water was caused to and did flow in and damaged certain tools belonging to the plaintiffs, that had been stored in the basement of the house. It is contended by the plaintiff that this damage was done in August, 1928.

The position taken by O'Brien appears to be that the work of oracking the damaged portion of the pavement of La Vergne avenue in the block in which plaintiff resided was done by John O'Connor, subcontractor, and that this work was not done until

The position taken by Calen appears to be that the work of creeking the damaged portion of the paveaunt of in Tergna avenue in the block in which plaintiff resided was done by John O'Common, subcontractor, and that this sork was not done until

sometime in October. It is also claimed that O'Connor was an independent contractor employed by O'Brien and that the defendant O'Brien was, therefore, not liable.

On behalf of the City it is insisted that the work was not of a dangerous character and that, therefore, there was no liability on the part of the City.

The question as to whether or not O'Connor was an independent contractor or under the control and direction of O'Brien in the work of replacing the pavement was one of fact. Numerous witnesses testified on behalf of plaintiffs that the hoist, which was used to raise the iron ball for the purpose of dropping it on the pavement, bore the name of Peter J. O'Brien & Co., and that certain wagons and trucks used in and about this work elso bore that name.

Dowdle, the President of Dowdle Brothers, who had the general contract with the Sanitary District to do this work, was called as a witness for the defendants and testified there were no other contractors on the job except his own and O'Brien's; that his firm had sublet the contract to Peter J. O'Brien & Co.; that he was on the job while the pavement was being broken and he thought the defendant O'Brien had a concrete breaker there in October. This witness also stated that he did not know to whom the concrete breaker belonged, but understood that O'Brien rented it from some source or another.

Sophia Maser, one of the plaintiffs, who appears to have been a joint owner together with her husband of the property in question, testified that she talked with O'Brien on the telephone and he told her that if there was any damage done to her house that she need not worry that they (meaning O'Brien & Company), were insured.

sometime in October. It is also cirimed that O'Conner was an

Later was therefore, not liable.

th behalf of the City it is insisted that the work may

to of a dangerous character and thet, therefore, there was no

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The quention os to whether or not O'Conner was an independent contractor or the independent contractor or the independent case one of fact. It is the more of replacing the present, bore the mase of reter 1. Thirty a Cos. and that cortain sugmes and trucks used in and whout this work also bore

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Sophia Hacer, one of the picintiffs, the appears to have been a joint camer together with har hackend of the property in question, tentified that she talked with S'Brien on the telephone and he yold her that if there was any damage done to her

The defendant O'Brien insists that the evidence as to the name on the hoist or derrick, and on the trucks and wagons was only <u>prima facie</u> proof of ownership and that this evidence was overcome by his testimony to the effect that O'Connor was an independent contractor.

O'Commor and therefore no opportunity for the court to pass upon the question as one of law. Since the contract was not in writing it became a question of fact whether or not O'Connor was an independent contractor and, under the evidence, it became necessary to submit it to the jury as a question of fact under proper instructions. Shannon v. Bightingale, 321 III. 168; Bartley v. Red Ball Transit Co.a. 344 III. 554. O'Connor was not produced as a witness on behalf of the defendant O'Brien. From correspondence produced by the defendants it appears that O'Connor did the work and was paid by O'Brien, but the evidence as to whether or not he was an independent contractor or acting under the control and supervision of O'Brien was one of fact and properly submitted to the jury.

Objection was made to the testimony with regard to the telephone conversation in which it is charged that O'Brien stated that he was covered by insurance and would take care of any damages. This objection was based upon the ground that it was prejudicial to the defendants and numerous cases are sited in support of this contention. From an examination of those cases it appears that they are mostly personal injury cases where the purpose of the testimony was not to support any particular proposition necessary to show liability. In the present case, however, the purpose was to show that O'Brien was actually in charge of the work and carried such insurance in order to protect himself while doing it. It has

The defendant O'Erica incists that the oridence as to as man and the and the trucks and vagons was only the trucks and control that the trucks are as an arranged that the trucks are as an arranged that the trucks are as

Ago pajed to annyted twentime notified on her schill O'Conunt and therefore he are connity for the court or ness toron stage the contract was not in writing in question as one of Lam. as not appeared to your me maddate fruit he uniferior a manual of in the contractor and, mader the evidence, it became managery to sebuit it to the jury as a question of fact under proper Includious Shamon v. Histonmia, Mil III. 100; series v. ed Hell Transit Co. 349 III. BB4. O'Conner was not produced as a situate on behind for the delenion o'notion. True voyevery and trov sit the delended is appears that O'Conner the the troving ad out pald by O'Brien, but the evidence as to whether or not has levence and releasuration to recognize anches chai as ass bottimine giregory but feet to out ear neith o to neleivreque . vaut sos os

Objection was made to the testimony with regard to the converentian in which it is charged that O'drien of whet I is a charged that O'drien of whet I is a convert that objection was based upon the ground that it was projudicial to the defendants and numerous cases are eited in support of this contention. From as canalization of theme cases it appears that they are mostly personal injury cases where the purpose of the to show that O'drien was notually in charge of the warpose was to show that O'drien was notually in charge of the work and married such insurance in order to protect himself while doing it. It has

been held that under such circumstances proof of indemnity insurance is competent in order to show by whom the work was being done. The case of <u>Vecker</u> v. <u>Yeager</u>, et al, 151 Ill. App. 144, held:

"Where the existence of the relation of master and servent is an issue in a case, such as that at bar, it has been held, and we think properly and that it is competent for the plaintiff to show that the defendant carried indemnity insurance upon the employes, including the plaintiff.

Brower v. Timreck, 66 Ran. 770; Brg v. Bousfield, 65 Minn. 355; Corrigen v. Elsinger, 81 Minn. 42."

To the same effect is <u>Current</u> v. <u>Enright</u>, 159 Ill. App. 260. In the case at bar O'Brien denied that the work was being done by him or his company and any evidence tending to refute that position was competent.

Constitution of 1870, the City is liable for injury occasioned to an abutting owner by reason of excavations in a street by the City or persons acting under a power granted by it. The construction of the trench along ha Vergne avenue by the Sanitary District was inspected from time to time by the city inspectors and it was a part of the agreement that the pevement be replaced to the satisfaction of the City. The trench in question was being constructed for a public use and the City, by consenting to or aiding in the work, became liable to the defendants for any damage resulting therefrom. Carnard v. City of Chicago. 370 Ill. 27; Nixon v. City of Chicago. 312 Ill. App. 365.

The damages awarded by the jury were not excessive. Our attention is directed to certain items that were included in the total amount of the claimed loss. It is insisted that plaintiff testified to the same item twice, namely, No. 1 kits totaling in damages to 36.00, and a No. 1. A kits, \$36.00. An examination of the testimony, however, shows that these were two separate items. There was some difference in the testimony of the witnesses as to the

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The position taken by the City is entenable. Thee the call of the

The dampes are ded jury rore not exceeding. Our attention is directed to certain items that were included in the total amount of the claimed loss. It is insigted that plaintiff to it is a selection of the claimed loss. It is insighted that plaintiff to it is a selection of the those were two separate items. There was some difference in the testimony of the vituance as to the

extent of the damages, but under the circumstances it is impossible for this court to substitute its opinion for that of the jury. The various questions of fact were passed upon by the jury. The trial court required a remittitur and entered judgment in the sum of \$1,502.90, and this court finds no reason for interfering with that judgment.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

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for this court to substitute its conica for that of the jury. The
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ALEXANDER COVIN.

Plaintiff-Appellee.

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LOUIS RUBIN, doing business as LOUIS RUBIN FURNITURE CO.,

Defendant-Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

268 LA. 6261

Opinion filed Dec. 21, 1932

MR. FREEDING JUSTICE VILSON delivered the opinion of the court.

Plaintiff's automobile was damaged by reason of a collision with a truck owned and operated by the defendant at the intersection of Western avenue and Lunt avenue, two intersecting streets in the City of Chicago. He brought his action for damages in the Superior Court. The jury returned a verdict in favor of the plaintiff for \$300.00 and judgment was entered upon the verdict, from which judgment this appeal has been perfected.

Objection was made at the trial to the testimony of a witness by the name of Ahrens as to the damages to the plaintiff's automobile. This objection was based upon the ground that the witness had not qualified as an expert. It appears that the witness Ahrens was a mechanic and had been for 30 years; that he had bought and sold 50 or 60 cars and that he had repaired and appraised automobiles of different makes and that he had seen the car of the plaintiff both before and after the accident. The question as to his qualifications to testify as an expert was one for the trial court and the weight of his testimony was for the jury.

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268 LA. 626'

Opinion filed Dec. 21, 1932

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Plaintiff's automotile wes demaged by remoon of a the intersection of Western evenue and lant avenue, two intersecting etgoets in the City of Chienge. He brought his actions of the plaintiff for \$300,00 and judgment was entered upon the verdict, from which judgment this appeal has been perfected,

Objection was made at the trial to the testinous of a witness by the name of throns as to the desegre to the plaintif's subsectile. This objection was based upon the ground that the witness witness had not qualified as an expert. It spreams that the witness through the neckens was a septential and had been for 20 years; that he had bought and sold 50 or 60 cars and that he had repaired and appraised automabiles of different makes and that he had seen the car of the plaintiff both before and after the secident. The question as to his ownliftentions to the testinons was an appear was one for the trial count and the weight of his testinons was for the for the trial count

It is urged as a ground for reversal that the declaration charged that the automobile was greatly damaged and that the plaintiff was obliged to and did lay out divers sume of money for repairs, and that the evidence as to the value of the machine after the accident was at variance with the charge in the declaration. The witness Ahrens testified that before the accident the machine was, in his opinion, worth \$385.00 and that after the accident he examined it and found it was a total wreck and could not be repaired. No objection was made, however, on the ground of variance, but instead the objection was based upon the ground that the witness was not properly qualified as an expert. The question of variance not having been preserved at the trial, it will not be considered here.

We have examined instruction No. 7, offered on behalf of the plaintiff, and are of the opinion that it states the law fairly.

It was not error to refuse instructions Nos. 3 and 6. These instructions were covered by others offered and given on behalf of the defendant.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

It is urgod as a ground for reversal that the declaration changed that the automobile was greatly demaged and that the plaintiff was obliged to and did lay out divers sums of money for repairs, and that the evidence as to the value of the medium list than a line of the accident that the mitness throng testified that before the accident the mitness throng testified that before the accident accident to the mitness that the four it as a feet of the minuminal vertices, but its east of the minuminal vertices the objective of the minuminal vertices.

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For the resease stated in this opinion the judgment of the Superior Court to affirmed.

JUNEAU DESIGNATION OF THE PARTY NAMED IN

Committee of the Commit

KATARZYNA DUMARA,
(Plaintiff) Appellee,

V.

THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY, a corporation, (Defendant) Appellant. APPRAL FROM
MUNICIPAL COURT
OF CHICAGO.

268 I A 626<sup>2</sup>

Opinion filed Dec. 21, 1932

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

Plaintiff's statement of claim alleges that the defendant, The Western & Southern Life Insurance Company, issued its policy of insurance to Stanley Dumara under which it agreed to pay Katarzyna Dumara, the wife, the sum of \$500 on the death of her husband. Said sum was "peyable by the defendant upon the terms and conditions in said policy of insurance". It is further alleged in said statement of claim that Stanley Dumara died July 13, 1931, which was within a year after the issuance of the policy.

The affidavit of merits filed by the defendant sets out the fact that the policy was not payable, by its terms, to the plaintiff but was payable to the executor or administrator of the insured; further that the policy provides, among other things, that "no obligation is assumed by the company unless on the date of the delivery thereof the insured is alive and in sound health."

Upon the trial the attorney for plaintiff asked leave to amend the statement of claim by substituting the administrators of the deceased as parties plaintiff and leave was granted, but no amended statement of claim was filed nor were there any letters of administration offered in evidence. Upon the trial of the cause

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PRINCIPAL STREET, S. STREET, P.

(Befordant) Appellant.

MANO, PRETORNAR

268 I.A. 626

Opinion filed Dec. 21, 1932

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of insurance to Diraley Sumaru under which it agreed to gony faterrayan Surance, the wife, the cum of 4500 on the death of her useband. Seld sum yes "poyelle by the defendant upon the terms alleged in sold statement of claim that Stanley Sumara died July 15, 1831, which was within a year efter the lemance of the policy. The affidavit of marita filed by the defendant were out

the fact that the policy was not payable, by its terms, to the plaistiff but was payable to the executor of administrator of the inquest; further that the policy payables, emong other things, that and the count of the delivery thereof the inquest is alive and in sound health.

Upon the trial the atterney for plaintiff select leave to emend the statement of the statement of the decreased as parties plaintiff and leave was grantes, but

plaintiff produced no evidence for the purpose of showing that the deceased was alive and in sound health on the date of the delivery of the policy of insurance. This was a condition precedent, and it became incumbent upon the plaintiff to comply with this condition. The affidavit of merits filed by the defendant raised this issue, and the burden of proof, viz., that the deceased was alive and in sound health on February 16, 1931, was upon the plaintiff. Lewandowski v. Western & Southern Life Ins. Co., 241 Ill. App. 55; Laughlin v. North American Benefit Corp., 244 Ill. App. 391; Kunickas v. John Hencock Mutual Life Ins. Co., 253 Ill. App. 617.

The cases cited by the plaintiff are not in point.

Under the rule laid down by the courts of this state, it becomes incumbent upon the plaintiff to produce proof in the first instance as to the fact that the deceased was alive and in sound health at the time of the insurence of the policy and this question should be submitted to the jury under proper instructions.

For the reasons stated in this epinion the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND HALL, JJ. CONCUR.

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For the reasons stated in this spinion the judgment of the municipal Court to reversed and the cours remaded for a

COURSE STATE AND DAY SHOWS IN TERMORY

WENEL AND MALL, 45. CONCUR.

35705

FIRST UNION TRUST & SAVINGS BACK, as Trustee under the Last will and Testament of Lucius G. Fisher, deceased,

Plaintiff in Brror,

V.

WILBUR J. O'BRIEN,

Defendant in Arror.

MILT OF MEROR TO

OF CHICAGO

268 I.A. 626°

Opinion filed Dec. 21, 1932

MR. JUSTIST HALL GELIVERED THE OPINION OF THE SQUIT.

By this writ of error it is sought to review a judgment of the Municipal Court of Chicago against plaintiff for costs. Plaintiff sucd defendant on a lease of certain rooms in the Fisher Building in Chicago. The defense is that for a consideration rendered to plaintiff, he, defendant, had been released from any liability thereon. The cause was submitted to a jury, a trial was had, resulting in a verdict for defendant, upon which verdict judgment was entered.

on pril 30th, 1983, plaintiff entered into an agreement a corporation, with Warren Gerning & Company whereby it leased to warren Corning & Company Booms 903 and 919 in the Piener Building in Chicago for a term beginning June Lat, 1983, and ending April 30th, 1986, for a rental of \$13,675, payable in 35 installments of \$345.00 each. Thereafter on December 1st, 1984, Warren Corning & Company essigned this lease to defendant, O'Brien, and by the terms of the assignment, O'Brien agreed to pay the rent from December 21st, 1984, to april 30th, 1986. Plaintiff commented to the assignment on condition that Warren Corning & Company remain liable for the payment of the rent. Thereafter Marran Corning & Company remain liable for the payment of the rent. Thereafter Marran Corning & Company remain liable for the payment of the rent. Thereafter Marran Corning & Company remain liable for the payment of the rent.

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Plaintiff in Error,

Opinion filed Dec. 21, 1932

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Commany Roces 600 and 910 in the Fisher Building in Unicase for a tom bevinging June let, 1948, and anding april 1986, 1986, for rentel of 114, 5vs. mychie in 55 darialisents of 1566.06 agen. There-

in business living them to the contract of the contract with loner to deliver sty, "Drigen, and by the terms of the sestement, distant agreed to pay the rest from sector slat, 1984, to april 1916. 1916. Datatist comeant to the confinent on condition that farren Jorning & Company remain Libble for the paperont of the cont. has published of mark become gracule of manual marries without of branch by a witthing andersod on the law se, account and agreed of To educate on all the evende of her cont to attempt at the other The rent claimed to be due is \$5795.00, with interest to the date of the judgment, amounting to \$1112.04, making a total of \$4,907.04. The suit was instituted on april 28th, 1926.

In July, 1935, Warren Corning & Company entered into an agreement with plaintiff by which it lessed certain rooms in plaintiff's building, other than those referred to, by the terms of which and in consideration thereof, plaintiff released Warren Coming & Company of any liability under the lease of april 30th, 1923, the lease involved in this proceeding. The defense is that by the release of Warren Corning & Company and further because of a special agreement entered into between plaintiff and defendant on or about April 2nd. 1926, defendant was released from all liability on the Corning lease. It appears that defendent is the president of the Sterling-Midland Coal Company, which company had occupied rooms in the Fisher Building, and that its lease expired on or about April 30th, 1986. It is the claim of defendent, that Charles R. Strong, the agent having charge of the building, approached defendant and agreed with him that if he, O'Brien, would induce the Sterling-Midland Coal Company to renew its lease, plaintiff would release defendant from any liability on the Corning lease. From the record, it appears that there is little doubt that such an agreement was had between Strong and O'Brien, and that the Sterling-Midland Coal Company did renew its lease, thus carrying out the agreement made between O'Brien and plaintiff through Strong. Three witnesses, including O'Brien, testified that the agreement was made, and two testified for plaintiff. one Strong and the other an agent of plaintiff, that it was not. At any rate, the finding of the jury on this question is clearly within the range of the testimony. The only question for this court to determine is whether or not the evidence shows that Strong, the agent, had safficient power and authority to enter into such an agreement.

Warren J. Corning testified that Strong was in charge of the office of the Fisher Building during the times mentioned; that a judgment was entered against Corning's company on the loase in mestion;

The rant claimed to be due is 15795.50, with interest to the pulgment, exerciting to 41112.50, suching a total of 14,907.60

in July, 1865, Names Totalog & Laborate outstand then no oursea "regarded at moon of from the part of the part of the part of the part of mixing, other than those referred builty the basis of votels and in the absention thereof, all bridly related names forming a deposit of our MANGELLY COLOR DRIVE of April 2014, 2015, the Door Developed In Std. the second second second unsersed offit Leguine functions in Louge a le verseed to dis 1 - on or chock worll tol, 1926, defendent was rothe description of the december level. It appears that defendcompanies the time the Company Company added a company Sorigine conel att tall box guit the second state, producted the school will be all of all all all the particular second we are to other the special burden story of the belieful, opposited butters--guilred's out outsi blue, eightle, eightle and the statement of - i to reper its lease, plaintair yould release defendare the lighting on the deming lang. From the record, it appear the classical decided and a company was been a produced by the construction of the con and water hit yangers had implicit patriots out staff for anyear his because they construe out the expenses only before, but our plants out of the tall there are the street and the Period as a second second that the the concent as are, and the installed for the last it, our last ogena and middle through at mother the first and and set in at calcumate at true att our sold and the court to determine at are or not has evidence show that Strong, the egent, had outli-. Property of the party of the party of the same and

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as estimate of the Flaher bullating during the views mentioned; that a judgment was entered equins to resingte company on the least in vention

that he talked to Strong about the judgment, and in raply strong told
the witness, Coming, that if he would take another room in the building,
the lease would be cancelled. This is the lease involved in this suit.
A new deal was made with Corning by which werren Jerning & Company were
released. The witness also stated that at this time Strong had told
him that the landlord had no intention of attempting to hold O'Brien on
this lease, because O'Brien was a tenent. The new lease made to Corning's company was put in evidence in the trial of the case, and had on
it "O.K." with Strong's initials.

H. E. Pearen, a tenant of the Fisher Building, testified that Strong had charge of the Fisher Building, and that during three and one half years while he, Paaren, was a tenant of the building, all rent checks were delivered to Strong; that Strong had stated to him, that if O'Brien would remain in the building, he, Strong, would release O'Brien from the Corning lease. He also testified that O'Brien had negotiated a new lease with the Sterling-Midland Coal Company. The witness further stated that all matters connected with the building were in charge of Strong, and that when the new lease referred to was delivered, it was O.K'd. by Strong.

before the building; that all leases of which he had knowledge were negotiated by and with Strong; that at one time Strong agreed to and did see to the cancellation of a lease hold by the witness for certain space in the building, and that he, Strong, agreed to and did deliver to the witness a lease for other space in the building. All leases were 0.K'd. by Strong. Various leases of warious tenants in the building were introduced as evidence, and they were all 0.K'd. by Strong. It is undisputed that Strong occupied an office in the building with the name "Office of the Building" on it, and that he had entire charge of the affairs of the Fisher Building, and that all of the tenants' contacts as to leases

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is found at the till leaves of which he had knowledge were merotic ted by all with strong; that at one time forces exceed to and did see to the mistalians of a leave he does not the witness for condition of a leave he time by the witness for certain space in the mailding, and that he, iteres, agreed to and did deliver to the witness iteres, feare for other agas in the building. All leaves were 0.11 d. by itrong, verious leaves of wrious taments in the building were introduced as evidence, and they were all 0.11 d. by htrong. It is undisputed that strong everylast an effect of the building with the man "Office of the States of the affairs of the Finish of the states of the affairs of the Finish of the states of the affairs of the Finish States of the states of the affairs of the Finish States of the states of the affairs of the Finish States of the states of the

and other matters were with Strong. C'Brien never occupied the premises in question, and according to the testimony, received no bill for the rent claimed, and that no claim whatever was made upon him for it until suit was commenced. In <u>Pike vs. Engler</u>, 211 Ill. App. 520, this court said:

"In an action to recover rent, evidence held to show that such rent was paid by a written agreement between the perties thereby plaintiff waived the rent in consideration of a release from defendant of liability for damages for failure of plaintiff to make certain repairs within the time agreed

by the lease.

owner of an office building, whose name is on the building as such, who had been in the owner's employ for 10 years, had made the lease to a tenant on behalf of the owner and with whom the tenant transacted all of his business as tenant, has authority to bind the owner by an agreement releasing the tenant from liability for a part of the rent in consideration of a release of the owner by the tenant from liability for a failure to make certain repairs called for by the lease."

See also London Cuarantee and seident Scammany vs. Steinberg, 264 Ill.
App. 31.

This court is of the opinion that plaintiff by placing Strong in entire charge of the building, giving him power to negotiate leases and control of the leasing and managing of the building, in everything but the act of signing leases, thereby constituted and made Strong its agent for the purpose of entering into the contract with O'Brien. The judgment of the Numicipal Court is affirmed.

AFFIRMED.

WILSON, P.J., and HEBSL, J, CONCUR.

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This court to at the opinion that plaintiff by placing attack

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NICK MALAPANES.

Appellee.

ROTE K. BLANNIK and LAWRENCE A. MLAHNIK.

Appellants.

APPEAL FROM

MUNICIPAL SOURT

OF CHICAGO. 268 I.A. 626

Opinion filed Dec. 21, 1932

MR. JUSTICE HALL DELIVEDED THE OFINION OF THE COURT. This is an appeal from the Municipal Court of Chicago from an order denying a motion to vacate a judgment entered by confession in favor of plaintiff and against defendants on four judgment promissory notes aggregating \$400.00. The judgment is \$467.50 and the coats of suit.

The metion to vecate was made on November 18, 1931, and overruled on that date. The record shows that the petition to vacate contains the following recitations: That the judgment appealed from was entered on August 14, 1931, for the sum of #467.50 on four notes of \$100.00 each dated May 14th and 15th, 1931, and due 1 month, 2 months, 10 weeks and 12 weeks after their respective dates: that subsequent to the entry of the judgment an execution issued thereon and that on November 5, 1931, a lavy was made on the drug store of defendants, and that the bailiff of the Wunicipal Court of Chicago advertised a sale of the property so levied upon for November 19th, 1931. The petition further recites that the notes were executed and delivered by defendants to one Theodore Schultes, the owner of the building occupied by defendant, Lewrence A. Blahnik, as payment of rent due on said premises; that a suit at law against defendant, Lawrence A. Blahnik, and others, in the Municipal Court of Chicago, was subsequently instituted by Charles A. Soelke, receiver of the premises so cocupied by the defendants, said receiver having been appointed in a forcelosure

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MUSICIPAL COURT

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Opinion filed Dec. 21, 1932

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This is an appeal from the Manielpal Court of Chicogo

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the 1881 if reducton no ohm and states of notion sil synterched on that done . The respect where the petition to visit believes the fellowing residentions: That the judgment appealed trom was entered on huguet 14, 1981, for the see of 1487. SO on four notes of \$100.00 eyeb dayed May lath and lath, 1931, and due I wonth, 2 mouths, 10 recks and 12 years after thatr respective dates; that subsequent to the entry of the judgment as execution issued thereon and that on appender 5, 1931, a larg run sade on the drug atore of the trilled and that and analored to acore puri Sourt of Chicago advertised a sale of the property so levied upon od danis section restant nations of the little reduced for notes were executed and delivered by defendants to one Theodore consists, the court of the imilding ecoupled by detendent, terrence A. Mahnik, as payment of rent due on eath prenince; that a suit at law against defendent, Lawrence i. Wishnik, and ashers, in the Municipal Court of Chicago, was subsequently instituted by Charles A. Scelks, receiver of the premises se security by the defendants, sild receiver having been appointed in a forcelecure

proceeding against said property; that the owner of the premises. Theodore Schaltas, had executed an assignment of all rents due and owing by defendants on the said premises to said receiver, and that by reason thereof defendants were compelled to and did pay the said receiver the sum of \$1078.00, which included the rent represented by the notes. The petition recites that inasmuch as the debt represented by the notes had been paid prior to the entry of judgment thereon, there was no consideration for such notes; that the plaintiff was not and is not a bona fide purchaser of the notes for value, and that no consideration passed between the payee thereof and the plaintiff. It is from the order of the trial court denying a motion to vacate the judgment referred to, that this appeal is prosecuted.

From an examination of the record, it appears that the sole ground for the court's denial of the motion is that the defendant was not diligent in presenting it to the court, the judgment having been entered on april 14th, 1931, and the motion to vacate not having been presented until November 18th, 1931. It appears from the bill of exceptions that defendants were served with execution about August 29th, 1931, and that they were advised by counsel that they need not worry, that the judgment would be vacated because they had paid the rent to the receivor, and that they heard nothing further from it until a levy was made under the execution. On the hearing it was stated that between the time of the levy and the hearing on their motion to vacate, defendants had paid a custodian a fee of \$60.00.

In view of all the circumstances, this court is of the opinion that the trial court was in error in denying the motion to vacate the judgment and in refusing to permit defendants to present

Theodore Sobaltas, had executed an analgement of all rents due and owing by defendents on the said premiese to neid receiver, and that by reacon thereof defendents were compelled to end did pay that by reacon thereof defendents were compelled to end did pay that by reacon thereof defendents were compelled to end did pay that the contract of the the plaintiff see not and is not a bone file curchaser of the actes for relax, and that no consideration passed between the payer actes for relax, and that no consideration passed between the payer of the contract of the contra

From an exemination of the record, it depends the the sole ground for the decided of the metica is that the defendant was not diligant in presenting it to the sourt, the defendant was not diligant in presenting it to the sourt, the mount of the mount of the metical that the bill of example on the defendants were correct with execution about regime this, liki, and that the judgment could be recated because they head not not not not the teat of the teat of the the they were end that they heard nothing further from it until a levy was ende under the encention. On the hearing it was attaind that between the time of the levy and the teat of the teat of the teat of the fine of the levy and the searing on their motion to receip, defendants had paid a custodian a fee of teo. Ou.

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their defense. It is, therefore, ordered that the order of the Municipal Court denying the motion to vacate the judgment be reversed and remanded with the direction that under the usual procedure in such cases the judgment be allowed to stand as security, and that execution be stayed until defendants have a reasonable time to present their defense.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON, P.J. AND HEBEL, J. CONCUR.

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TIMON, Y.J. AND HEBLL, J. CONOUR.

. 36395

JOHN S. JURIK, as Successor Trustee,

Appellee.

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MIKOLAS MARCINKIEWICZ, et al Defendants.

On Appeal of MIKOLAS HARCHMINAICA, and H.L.W. MARCHKINAICA,

Co-Defendants and Appellants.

LOCUTORY ORD M OF
THE SUPERIOR COURT
OF COOK COUNTY
APPOINTING A
RECLIVER.

268 L.A. 6271

Opinion filed Dec. 21, 1932

MR. JUNGICE HALL DELIVED THE OPINION OF THE COURT. This is an interlocutory appeal from an order of the Superior Court appointing a receiver for the property described in a bill to foreclose a mortgage on this property. The original mortgage was for \$27,000 of which a portion had been paid and it is alloged in the bill that the sum of \$22,000 is now due and owing, and that the property described is scant security, and that the fair reasonable cash market value of the property is less than \$22,000. It is also alleged that the rents, issues and profits arising are pledged as additional security. To this bill a sworn enswer was filed. in which it is alleged that the fair cash market value of the mortgaged property is \$55,000. A hearing was had on the notion, bill and answer. On the hearing it was admitted that the general taxes on the property for 1989 and 1930 had not been paid. The principal contention of appellant is that the allegation as to the value of the prompty being seant security for the indebtedness, is insufficient. Counsel objects to the statement in the bill that "in the opinion of your orator, the present market value of the property is less than \$22,000." It is insisted that the allegation as to the value must

LOCUMENT COUNTY
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ON COOK SCUING
ASTOLISTIC COUNTY
ASTOLISTIC COUNTY
ASTOLISTIC.

268 L.A. 627

Opinion filed Dec. 21. 1932

HIS JUSTICE HALL BELLYLIED FOR DEFINED OF THE STATES. This is an interlequisory spaced from an order of the and indicated appropriate a reserved for the property described in . The original mortgage on this property. The original mort--in at FJ Ros hing mad had suffered a sinite No COO, VE | web sum many loged in the bill that the sum of \$82,000 is now due out owing, and that that been gold because decome a bediance transport out fail reaccepts cash market value of the preparty in less that (18. 918. ore mairing attings has nevert attent and test begalls only at tl pledged as salitimed scoutity. To this bill a swarp anavar was filed -trop got to only fulrace desc that out that becalle at it does ut the like action on the hour top was hed on the motor. This enough. On the hearing it was admitted that the general base on the property for 1949 and 1940 had not been paid. The principal content and to enter the the self-malle and fact at the the yellow it property holds means security for the interpolate, in insufficient, Council objects to the statement in the bill that "in the opinion of your worker, the grammy market rules or the property to have the

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be categorical. It is impossible for any one having so much as is termed an expert knowledge of real estate values, to give more than an opinion as to value. Such evidence is received and justified in condemnation and all other cases where this question is in issue. What more exact testimony could any witness give as to the value of real estate, than his homest opinion. There is nothing to this point.

It is also insisted that the contract in issue is usurious. This question cannot be raised in this court on an interlocutory appeal from an order appointing a receiver. In the opinion of this court, the allegations in the bill justified the court in the appointment of the receiver and the order in that regard will not be disturbed.

DECREE APPOINTING RECEIVER AFFIRMED.

WILSON, P.J., and HEBEL, J, CONCUR.

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Then, P.J. and Mich. I. Country

35731

RUSSELL FIREBAUGH, as Trustee,
Appellant,

V.

ANDREW W. LANDSTROK, et al, Appellees. APPEAL FROM

SUPERIOR COURT

260 L.A. 6272

Opinion filed Dec. 21, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from that portion of the decree for foreclosure and sale of certain real estate, entered by the court in a foreclosure proceeding in the Superior Court of Cook County, which is in words as follows:

"The Court further finds, adjudges and decrees that after the erection of said building known as the 'Clenwood Court Apartments' and after the payment of bills incurred in the erection of said building there remained on the books of said The Bond & Mortgage Company, a corporation, a credit due the said Andrew W. Landstrom and Sarah G. Landstrom, his wife, in the sum of \$1,363.04, and that said amount has never been paid to said Andrew W. Landstrom or Sarah G. Landstrom, his wife, and there is still due and owing said Andrew W. Landstrom, and Sarah G. Landstrom, his wife, said sum of \$1,363.04 from The Bond & Mortgage Company, which sum shall be paid upon the entry of this decree by the trustee, Russell Firebaugh."

The proceeding in the instant case is one in equity to foreolose the lien of a trust deed securing the payment of bonds aggregating the sum of \$150,000 on real estate therein described, against the defendants, andrew W. Landstrom and Sarah G. Landstrom, his wife, mortgagors, and Fred Bloomberg and Anna Bloomberg, owners of the equity of redemption. A decree of foreclosure and sale was entered in the above entitled cause, from which decree it appears that there is due and unpaid to the Landstroms from the Bond and Mortgage Company, a corporation, the sum of \$1,363.04, which sum became due after the erection of the building upon the real estate described and known as the Glenwood Court Apartments, and after the payment of the bills incurred in the erection of said building. This building

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ANALYSIS OF THE PARTY OF THE PARTY OF

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BORY ALBERTA THROC HOMESTON

Opinion filed Dec. 21, 1932

MA. JUSTICE WEST, MELVENES THE OFFICES OF THE COURT.

This is an appeal by the complainment from the pertion of the four that pertion of the four that pertion and the four that the four the four that the four the four that the four that the four that the four that the four the fo

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The proceeding in the instant case is one in equity to consolous the line of the constant of t

was erected upon the terms of an agreement entered into between
Andrew W. Landstrom and Sarah G. Landstrom, and the Bond & Mortgage
Company, and the construction cost was paid for out of moneys
received from the sale of the bond issue, now the subject of this
foreclosure proceeding.

The Bond & Mortgage Company is not a party to this suit, and from the Master's finding and the decree of the Court, the amount of \$1,363.04, is due from the Bond & Mortgage Company to the Landstroms, and the Chancellor in entering the decree further ordered that the amount of \$1,363.04 was to be paid by the complainant in the instant case.

There is no evidence in the record that the complainant is liable, or that he actually received the amount due from the Bond & Mortgage Company to the Landstroms. The complainant is the president and manager of the Bond & Mortgage Company, which is a corporation and a separate entity, and it is self-evident that the complainant, as trustee, in this proceeding is not liable for the amount the court decreed as due to the Landstroms from the Bond & Mortgage Company. However, the Landstroms may enforce their right to this sum in a proper action, to which the Bond & Mortgage Company is made a party, and at that time the Bond & Mortgage Company may offer a defense if it so desires.

The fact that the complainant, as trustee, is not in possession of the amount, nor liable, is apparent from the petition of the complainant, wherein it is stated that as an officer of the Bond & Mortgage Company he will produce an assignment from the Bond & Mortgage Company of certain of the bonds in the total sum of \$1,400, if the court will authorize the complainant to set off the bonds enumerated in the sum of \$1,400, due and payable to the Bond & Mortgage Company by the Landstroms against the indebtedness due

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The fload & Mortgoge Ocogony is not a party to this swit, and from the Money, swit, and from the Money, and from the Money, and something the sound of it, and the test from the head and the Correct to the instinct and instinct is entering the Correct turther arms that the test of the occ-

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The fact the completent, is trusted, he trusted, is not in present the court of the continue o

from the Bond & Mortgage Company to the Landstroms, and cancel and surrender said bonds in payment in full of the amount due.

This offer of the petition was not accepted, in that the court did not enter an order as prayed for in the petition of the complainant.

From the facts in the instant case, we are unable to find that the complainant, as trustee for the bondholders, assumed the payment of the amount found to be due from the Bond & Mortgage Company to Andrew W. Landstrom and Sarah G. Landstrom, his wife.

Finding no liability on the part of the complainant for the payment of the sum of \$1,363.04, to Andrew W. Landstrom and Sarah G. Landstrom, his wife, that part of the decree, the subject of this appeal, is reversed and the cause remanded with directions that the decree be medified in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON, P.J. AND HALL, J. CONCUR.

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From the facts in the instant case, we are unable to ind that the countries, as trustee for the countries, assumed the capacit found to be due from the found a fatter country to district the section of the same of the same

Finding no limits on the part of the complainant for the payment of the secretary his straight of the secretary his straight of the secretary his straight of the secretary his source of this archemistration of the secretary his source of the secretary his total or the content.

DECEMBED AND REMARKS

BIRBOR, P.J. AND MALL, J. COLUNN.

35748

ELIZABETH WALTERS.

APPELLEE.

MICHIGAN CLEANERS INCORPORATED. APPELLANT.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Opinion filed Dec. 21, 1932

MR. JUSTICE WEEL DELIVERED THE OPINIOR OF THE

COURT.

This is an action of trespass on the case brought by the plaintiff against the defendant for injuries alleged to have been sustained on February 26, 1930, as a result of having been struck by an automobile truck owned and operated by the defendent, at or near the intersection of Halsted and 69th streets in Chicago. The cause was submitted to a jury, and after a sering the jury returned a verdict finding the defendent guilty and assessing the plaintiff's damages in the sum of \$3500. The court, after overruling the defendant's motion for a new trial and in arrest of judgment, entered judgment upon the verdict, from which the defendant appeals.

The accident occurred at the intersection of Halated and 69th streets in Chicago, at about eleven o'clock in the forenoon, on February 26, 1930. The facts are, substantially, that there are street car tracks running north and south on Halsted street, and also on 69th street, an east and west street. Traffic signal lights had been installed on each of the four corners and worked in unison. A light controlling the north

and southbound traffic was located on Halsted street at the curb on the southeast corner of Halated and 69th streets. Just before

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APPELLEE.

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THE PROPERTY OF

Opinion filed Dec. 21, 1932

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This is an antion of troupes on the case brought to the been suctained as Fabruary 26, 1820, as a mesult of horing a struct by an autocopile truck quard and operated by the element, at or seer the intersection of Deleted and Coth atracts in Chicago. The course are submitted to a jury, and after a certag the jury returned a vertice finding the defendent finding the defendent from of \$3500. The court, after overraling the defendant's motion for

The section to coursed at the intersection of boisted and COth strouts in Chicago, at about sleven ofclock in the forences, on February SC, 1880. The facts are, substantially, that there are attest and the torons running scrib and south on Halotet atreet, and also on 60th atreet, an east and west street.

Traffic eignel lights had been installed on each of the four corners and sorted in maison. A light controlling the north

and southerest corner of delated and 60th otreats. Just before

the accident occurred, a northbound street car was standing south of the corner on Halated Street at 69th street, almost opposite the traffic lights. The plaintiff was standing at the curb on 60th street a few feet east of the so theest corner of the intersection. Both the plaintiff and the street car were held by the red light and were waiting for the lights to change so that they could proceed northward across 89th street. An automobile was parked along the south curb of 69th street just east of the curb line of Halated street so that most of this automobile blocked the east crosswalk running north and south. Back of this automobile on the south side of 69th street were other parked automobiles, and in order to proceed northward a pedestrian would have to pass between the automobiles that blocked the presence of this intersection. The intersection is located in a business district. The foremoon of the day of the accident was bright; the street was dry and devoid of snow. When the traffic light changed, permitting north and southbound traffic to proceed, the plaintiff, a large woman who was carrying several bundles in her arms, started to walk northward. In doing so, the plaintiff stepped out from between the parked automobiles, which cars extended east from the curb line of Halsted Street. The street car, at the time, started north, the front of which was over the westbound tracks on 69th street when the plaintiff welked to the place between the two sets of street car tracks on 69th street. Then, without warning, the defendant's truck, southbound on Raleted street, turned to the left, cutting in front of the vestibule of the moving northbound street car, turned east and struck the plaintiff after she had turned back two or three stens to avoid the accident.

the Anti-Last concept, a serificant street and tree actions at Atomic, James and in the said didention on woman bull to filmen ent to waitante ass illiming and . Assigli office that offector and to touton taredit on ent to then tent unt a tears at the an drup bled stor toe feerte and the libraling and ded .acitecatal by the red light on were redting for the blaits to gings so they they could proceed entires because the country to sumb rant sworte side to draw disce and make being and address attionatus will to team said on traits catainly to sail drop add to to seed advantable for drawn the committee and the compact this subocobile on the sette alds of 60th street sers other perked subsubiles, and in order to proceed cortaneed a pulsebedoold fait malidemotus and asserted same of even blues askur the presence of this interscotion. The intersection is launced in a business diviriet. The forumon of the day of the secineed were bright; the etmo-t are thy said devote of enter- then be traffic light abanged, peruitting porth and contibound rafflo to proceed, the plainbiff, a large women the war coursing several bundles in her arms, started to ralk northroad. badran and moorbad moul two baggars Thitalule and ton pulob al al mil on the care extended cost from the car line of .diron betrets , and to a , use toorts out .teerte bet fearly 1980 no showe houselfase and rove not deline to smart add to often sel and general soully solded bedley Ministely add made eff. Saleres and the street. Then, without version, the edo of heart, south bastelled on kappadituon, lours a tracked left, cutting in front of the vestibule of the moving newilmbough stract out, turned sent and struck the plaintiff ofter she the liver the second start at the cold and manufact the

The defendant offered evidence upon the trial, and it appears that the defendant's driver of the automobile in question, in coming south on Halsted street, made a long turn east at the intersection of 69th street, and that at that time the automobile truck was running at a speed from 6 to 15 miles per hour. The day was bright and the plaintiff stepped out onto the street from between two parked automobiles, 15 feet east of the crosswalk. The was struck by the fender of the truck. The truck was stopped by the driver within two feet, of the accident. The plaintiff was in a sitting position after the collision; was assisted by the driver and a witness to a doctor's office and afterwards treated for the injuries sustained by her.

The defendant contends that the court erred in denying defendant's motion at the close of the plaintiff's case and again at the close of all the evidence, to direct the jury to return a verdict of not guilty. In support of this contention the defendant urges that from a consideration of plaintiff's evidence it appears, (1) that there was a complete failure on the part of the plaintiff to exercise due care for her own safety under the circumstances in which she found herself at the time of the accident; (2) that her actions at the time of the accident constitute negligence in law, and bar recovery; and (3) that there is no evidence of negligence on the part of the defendant, which was the proximate cause of the injuries sustained by the plaintiff.

The defendant calls the attention of the court to a certain ordinance of the City of Chicago which regulates a pedestrian's use of a roadway. Sec. 11, Article III, Municipal

The defendant effored evidence upon the trial, and it species that the defendance of the secretic is in the file in the secretic is in the file in the secretic is in the secretic in the secretic of the secretic in the secr

The defendant contends that the court errol in denying defendant's extinct a show the ministration of the cine of

The defendant calls the attention of the court to a certain estimate of the Clay of Chicago will the single of the central control of the central central

Court Act of the City of Chicago, and contends that the court having judicial notice of the ordinances of Chicago, when passing upon the defendant's motion for a directed verdict should have considered and applied this ordinance. The record is silent as to why such ordinance was not called to the attention of the court in the motion, nor was an instruction offered by the defendant and refused by the court instructing the jury to consider such ordinance and its application in arriving at a verdict. This question was raised by the defendant for the first time on appeal, which is not permissible, and this court will, therefore, disregard his contention. In passing, it is only fair to say that it would have been proper if counsel had directed the attention of the trial court to this ordinance so that due consideration of its effect could have been given.

In consideration of the first point and by the defendant on the question of the exercise of due care by the plaintiff at the time and place of the accident, it will be necessary to have in mind upon this metion that if t ere is any evidence of the plaintiff tending to support the allegation of the plaintiff's declaration, it is the duty of the court to submit the cause to a jury. There is evidence that the plaintiff stopped at the crossing of Halated and 69th streets waiting for the lights to turn green so that she could proceed north.

several parked automobiles on the south side of 69th street extending east from the curb line of Halated street; that in order to proceed north near the crosswalk it was necessary for her to pass between these parked automobiles. This act of the plaintiff in waiting for the traffic lights to change so that she could proceed north on Halated street and in passing between the parked automobiles, is evidence for the jury to consider on the question of

Court act of the City of (nionge, and contends that the initial court in the contends of the directed vertical should as to may such ordinance was not called to the attention of the dant and refueed by the apart instructing the jury to consider question was reized by the defending the first that the consider disregard his contention. In passing, it is only fair to say the tion of the trial court to this ordinance so that due considers—

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It also epposes from the evidence that there were several merhod subspecialies on the south size of ESth street subspicioning onet from the ourb line of Malaked atreet; that is erest to proper from the cronewalk it one necessary for her to pose between these parked automobiles. This act of the plaintiff in nerth on Malated etreet and in passing between the parked automobiles, is evidence for the jury to consider on the cuestion of

whether she was in the exercise of due care and caution at the time of the accident.

As to the second point made by the defendant that the plaintiff was guilty of contributory negligence at the time and place of the accident. The plaintiff was crossing at the intersection, on a bright day, and there was no obstruction which would interfere with the defendant's driver. The plaintiff testified that she saw the truck when it was 25 feet from where she was walking and that she had reached the middle of the two rails on 69th street. The plaintiff had a right to proceed, and it was the duty of the defendant in the operation of the truck to use every precaution to avoid injuring the plaintiff, who was in plain view and, if it became necessary, it was the duty of the driver of the truck to stop. The defendant turned east at the intersection of Halsted and 69th streets and is chargeable with knowledge of the surrounding conditions. It was certainly a question for the jury to determine from the evidence whether the plaintiff exercised due care at this time and place, and the jury in reaching their conclusion undoubtedly considered the speed of the defendant's truck when turning at the intersection at the time of the accident. From the evidence the speed ranged from 6 to 15 miles per hour at the time when the truck was making the turn.

Upon the third point as to the negligence of the defendant, there is evidence in the record that at this intersection the defendant's auto truck cut in front of a street car as it was proceeding north on Halsted street. The defendant made a short turn to the left at a speed which made it difficult for the plaintiff to step to a place of safety. At this time it was the duty of the defendant's driver to have complete control of the automobile truck, and he is chargeable with the knowledge

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Upon the third point se to the negligence of the defendent, there is evidence in the record that at this intersection the defendant's sute truck out in front of a street car as it was proceeding serts on Maleted street. The defendant made a short turn to the left at a speed which made it difficult for the plaintiff to step to a place of carsty. At this time it was the duty of the detandant's driver to have complete control of the automobile truck, and he is courseable with the knowledge

that other persons may use the intersection. There is conflict in the evidence as to just where the defendant's truck turned at this intersection. The evidence offered by the defendant is that the truck made a turn south of the center of the intersection. There is also evidence by a witness offered by the defendant, that at the time of making the turn at the intersection the truck was being operated at a speed of 15 miles per hour.

There is conflict in the evidence as to the location of the street car at this time, but the evidence does indicate the presence of a street car at the intersection.

The question of due care or contributory negligence by the plaintiff at the time of the occurrence of the accident, and the defendant's negligence in the operation of the truck, were all questions for the jury. These questions were passed upon by the jury when they returned their verdict, and we are of the opinion that the verdict is supported by the evidence and is not against its manifest weight.

Counsel on both sides of the controversy have cited numerous authorities to assist and aid the court in applying the rule of due care to be exercised by the plaintiff, as well as the rule of contributory negligence. Upon an examination of the cases, it is apparent that each of the authorities cited is dependent upon the facts, and that the proper application of these rules must be applied and the result determined from the facts.

It is also contended that the court erred in giving the following instructions:

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defendant is that the truck made a turn south of the center
of the intersection. There is also evidence by a witness
offered by the defendant, that at the time of making the turn
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There is conflict in the syldence as to the location of the time of the care to the researce of a street car at the interpretation.

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Cornect on both rides of the controversy have cited numerous suchortities to estict and sid the court in applying the rule of due care to be exercised by the plainalit, as well as the rule of contributory negligence. Open on examination of the cases, it is apparent that each of the extentities sited is depardent upon the facts, and that the proper application the facts.

It is also contended that the court erred in giving

 There was in full force and effect at the time of the happening of the socident in this case a certain section of the statutes of this state which pro-

vided in part as follows:

'Upon approaching a person walking upon or along a public highway the operator of a motor vehicle shall give reasonable warning of his approach and use every reasonable precaution to avoid injuring such person, and, if necessary, stop his said motor vehicle until he can safely proceed.'"

2. "The jury are further instructed that there was in full force and effect at the time of the happening of the accident in this case a certain section of the statutes of this state which provided in part as follows:

'Any person operating a motor vehicle shall, at the intersection of public highways keep to the right of the center of such intersection of such highways then turning to the right and pase to the right of the center of such intersection when turning to the left.'"

fails to show any violation of the cited portions of the statute, and that these instructions were a mere abstract statement of law not based upon the evidence in the record.

There is evidence which justified the giving of the instruction that the defendant's driver operated the defendant's auto truck 15 miles an hour as charged, in making the turn at the intersection, and also that he made a sharp turn to the left in order to pass in front of the street car, which was not at the right of the center of the intersection. The violations contributing to the injuries of the plaintiff were: the speed the car was making at the turn in a business district, the knowledge of the defendant's driver that others had the right to use this crosswelk at a busy intersection, and also the turn made by the driver in order to beat the northbound street car at this intersection.

The defendant complains that the major portion of the plaintiff's case consists of medical testimony, none of which is disputed, and that the bulk and character of that evidence

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There is evidence which justified the giving of the attendad the defendent's driver correct out that noticertain sufe truck lo wiles an bour as cherges, in making the turn at the lade of nurt grade a chee he best of the has a chromete interest of is don now doing , res tearts ent to tweel of some of reduc at inditoearedsi and to reduce out to their entite. The violations heads out towardifficies of the delivery of a antipolitimes the our ros making at the turn in a business district, the fight add had greate took a wirk a that and the the place and grad and only has , solversootice, ond also the thing of to Ten leates hauguston ags took of to to all towith out to show AND LABOR OF STREET

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was given to arouse sympathy in the minds of the jury. Counsel fails to discuss the amount of the verdict or the character of the injuries, and it would seem that the collision was of sufficient force to cause the injuries testified to in part by the plaintiff's physician, Richard A. Roche, as follows:

"During the time I was her family physician she never had any injury or affliction to that ankle to my knowledge, at least I never treated her for any. I saw Mr. Walters February 26, 1930, at about 12:30 p.m. at the Washington Park Mospital. Mrs. Walters was complaining of a great deal of pain in her right ankle, we took the stocking off and bandaged it. There was first cardboard splints put on the leg and foot as a first aid. There was an abrasion on the right anterior surface of the ankle from which some blood was cozing. The entire ankle was pretty badly swollen and was black and blue. Upon touching it she complained of terrific pain. I manipulated the ankle, I got hold of her upper leg and foot and moved it a little bit. I could feel grating or crepitation of the bones of the ankle. I took her to the X-ray room and took an X-ray. (Witness is handed Blaintiff's Exhibits 1 and 2.) These are the two films that were taken that day showing a compound comminuted fracture of the lower right leg. Compound means there was an abrasion or opening or laceration of the skin and bone protruding. There were particles of bone protruding through the skin. There were several pieces of bone, which means that the bone is commitmeted or broken in several places. The films showed that the fibula of the right leg had been broken in two or three places and that the tibia was broken in several places so that the eye could hardly detect the number of fragments. Here (indicating) we see a lot of splintered bone and fragments spread all the way down into the ankle joint. The normal space between the foot and these bones is decreased from the normal spacing in the joint; there is an outward bowing of the upper part of the leg and also a backward bowing of the leg so that the foot was angling backward and outward from its normal position."

defendant and are not convinced that there is error such as would justify a reversal of the judgment entered by the court. The judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

vas given to recome sympathy in the minds of the jury. Souncel the fails to discuss the enount of the verdict or the character of the injuries, and it rould seem that the collision was of sufficient to the fail that the collision was of sufficient to the fail that the collision was of sufficient to the fail that the collision was of sufficient to the collision.

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defendent and are not convinced that there is error such as would justify a reversal of the judgment extered by the court. The

COMMING PERMICOL

JULIAN M. THOMAS,

Appellant.

V.

GORDON C. THORNE,

Appellee.

APPEAL PROM

MUNICIPAL COURT

OF CHICAGO.

2681.A.627 Opinion filed Dec. 21, 1932

MR. JUSTICE MEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered in favor of the defendant in an action in the Municipal Court of Chicago upon a check drawn by the defendant upon the Continental Illinois State Sank & Trust Company, and payable to William K. Ziegfeld, attorney, or order, for the sum of \$5,000, which check was endorsed by Ziegfeld and received by the plaintiff to apply on account of services claimed to have been rendered as an attorney-at-law at the request of Ziegfeld.

The material questions of fact are, is the plaintiff a holder in due course and for value before maturity, and without notice of a defect in Ziegfeld's title; and has the defendant a good defense to this action?

The evidence of the plaintiff is to the effect that the check, the subject of this lawsuit, was received from Riegfeld in part payment of services as attorney for Riegfeld. The services rendered by the plaintiff have largely to do with the formation of certain theatrical enterprises; one of which was a proposed roof garden - show on the Mogador Theatre, located in Paris, France; and the other for like productions outside of Paris.

The evidence of the plaintiff also tends to show that plaintiff worked with Ziegfeld on these matters from July 15, 1926 to September 10, 1926. On September 10, 1926, Ziegfeld, at plaintiff's office, gave plaintiff the \$5,000 check, Ziegfeld

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The evidence of the plaintiff also tends to show that plaintiff or order to the plaintiff also tends to show that it is to show that it is the best of the plaintiff's office, now material to the common that it is the com

endorsed the check as attorney, and plaintiff called this endorsement to Ziegfeld's attention as tending to show possible doubt as to the ownership of this check by Riegfeld. Riegfeld then dictated a letter, asking plaintiff to "please credit this to my account for services rendered and as a retainer."

Plaintiff relied upon what Ziegfeld told him, which was to the effect that his friend. Gordon Thorne, was anxious to take an interest in his Paris enterprises and gave this check to Ziegfeld, which was post-dated, so that the defendant could assure its payment by the bank in Chicago. Before the due date, plaintiff deposited the check in his Paris bank for collection. The check was presented for payment to the Chicago Bank, which was refused at dsfendant's request. Thereafter Biegfeld died and the plaintiff discontinued his services. During the time plaintiff was retained by Riegfeld in relation to the theatrical enterprises, no contracts were drawn and signed nor a corporation organized, but only tentative plans were made. Plaintiff kept no record of the time used or the dates when the legal services were rendered these enterprises. It also appears that plaintiff did not receive a retainer or payment for thelegal work performed before Ziegfeld turned over this check of \$5,000 to the plaintiff.

The defendant's contention, upon the plaintiff's evidence, is that plaintiff's testimony indicates the absence of a consideration for the payment of the \$5,000 check, and further that the appearance of the defendant's signature upon the post-dated check is enough in and of itself to put the plaintiff on notice.

The defense of the defendant is one of fraud and cirounvention in the making and execution of the check in dispute. There is evidence to the effect that the defendant was drunk on the night when the check was signed, and on prior occasions, and that he had been drinking with Ziegfeld when the check was executed. His endered the cheese extension, and chainful recipion his maleriacent to liested extension or temperate. The rold then distrito the center of this major by Thereld, The rold then distrisisting, contractions of the conduction of the conduction of the conductions.

Painters retired ones and articles, which was to the effect that his Trigid, dordon Thorpo, was mixing to at least aget aven has gentreened alvet ein al secrital as afait legists, hick was contribut, so the defendant sould compe use of the check in his baris bank for collection. The check to perchase on John the children was, which we selver at defendant's recoul. Thereether therists dues had bee districted bearston and Thirain to wait out the Maria contract and the contract the by Elegicia in relation to the Chemister describer, no contracts were drawn onk at med has compounted organized, but only tages tive of on sort and interest to the common of the time easis beginning army semisted in all air made and he so see Beer antoxyriche. It wine norming that pictualfy did not recenture Bishney' spoint improved a grow as allows not free and to their a turned over this cheek of the cook each reve bearuff.

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evidence, however, is somewhat confusing as to his ability to understand what he was signing at the time the check was executed. The plaintiff contends that if every word of the defendant's testimony be taken as true, the evidence offers no defense which is recognized in law, and that the court erred in refusing to instruct the jury to find for the plaintiff for the amount of the check. The defendant, however, has the right to have the jury pass upon the testimony of the plaintiff, an interested witness, as to the probability of the truth of the facts testified to by him, even though the testimony of the plaintiff in the case is not contradicted by any other evidence, and even if the plaintiff is not otherwise impeached. Mighley v. American Exchange National Bank, 86 Ill. App. 48; Podolski v. Stone, 86 Ill. App. 62.

The post-dated check received by the plaintiff from Riegfeld, under the circumstances related by the plaintiff, for the services claimed to have been rendered, together with the defense offered by the defendant of his condition of drunkenness at the time of the signing of the check in Paris, are facts properly to be considered by the jury, and if the trial court had properly instructed the jury we would not be inclined to disturb the verdict of the jury. The jury passed upon the weight of the evidence, applied the tests in order to ascertain the truth of the testimony, and determined the probability or improbability of the several statements of the witnesses.

We have examined the instruction offered by the plaintiff and refused by the court, which is:

"If you believe from the evidence in this case that the actions of Ziegfeld in obtaining the check in question were wrongful and fraudulent, and that the plaintiff, Thomas, and the defendant, Thorne, were both innocent parties in the transaction, yet if you believe from the evidence that the defendant by his own negligence made it possible for Ziegfeld to commit the wrongful act, in such case, the defendant must stand the loss."

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The only objection offered by the defendant to the giving of this instruction is that there has been no loss to any innocent person. The question of good faith must be determined by the jury, as well as whether the defendant's negligence, if any, made it possible for Ziegfeld to commit the wrongful act. These are the important questions at issue. The instruction should have been given by the court.

a further point to be considered and which has been called to our attention by the defendant, is that it does not appear from the record that all of the instructions were incorporated in the bill of exceptions, and therefore the court should assume that proper instructions were given to the jury by the trial court which cured the failure to give the instruction in question. This notation appears in the record preceding the certificate of the trial court to the bill of exceptions.

"which were all of the proceedings had in the trial of said cause."

This would indicate that all of the instructions, as well as all the other proceedings, are contained in the bill of exceptions in the instant case. No objection was made to the form of the bill of exceptions, in fact, the bill of exceptions was approved by the attorney for the defendant, and he endorsed such approval by the characters O. K. on the bill of exceptions. Such endorsement is generally accepted as an approval.

REVERSED AND REMARDED.

WILSON, P.J. AND HALL J. CONCUR.

The only objection offered by the defendant to the little of the last confidence of the last confidence of the mark of the last confidence of good filts and to determine the last confidence of determine of the last confidence of the last confidence of the last confidence of the last confidence of the ocurt.

A further point to be considered and which has been enlied to our attention by the defendant, is that it does not in the fact of the defendant, is that the defendant in the fact of the f

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SEVERSED AND REMARCED.

ILLINOIS BELL TULEPHONE COMPANY. Corneration.

Appellee.

CARL E. ERICKSON.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

268 I.A. 6275

Opinion filed Dec. 21, 1932

MR. JUSTICE AMBEL DELIVERED THE OFINION OF THE COURT. This is a tort action by the plaintiff against the defendant. The cause was tried before a jury and after the evidence was heard, a verdict was returned for the plaintiff assessing its damages at " \$ the full emount." Upon motion. the court permitted the jury to reconsider and correct the verdict. and the jury fixed the amount of plaintiff's damages at \$489.88. from which judgment the defendant appeals.

The action by the plaintiff is to recover damages for injury by the defendant to plaintiff's conduit located in the public alley east of inthrop Avenue and north of Bryn Maur Avenue. Plaintiff claims that the defendant by his agents negligently excavated, on or about October 1, 1928, the property immediately adjoining said public alley so as to cause plaintiff's conduit to settle and become damaged.

The facts are, substantially, that the conduit was placed under ground in the alley pursuant to a permit issued by the City of Chicago. This fact is admitted by the defendant. The defendant was erecting a ten-atory building on the premises immediately west of the alley. For the purpose of constructing the

APPRILE PROM ellen, sweet death book 268 I.A. 627 .dasifaco:

Opinion filed Dec, 21, 1932

OF CHICAGO.

WH. JUSTICS SEEDS DELIVERED FOR OPINION OF THE COUNT. This is a tert scrion by the misingiff mediate the

with a war with a verdict was nathoned the wind the warming io 1 to 2 days the first empant. B Bus motion. to court parallel the two is remainded by the parallel to receive the (Bi, Hit's the seasons of Thisting as showed the Dexit work the base type chief yet ent the net me or

The serious to the obsidity to be recover designs for by the definition of the plaints of the soudch lines to the . out of the syst to street has been a patted to your will billion -1 will bind the description of the contract o civated, on or about October 1, 1988, the preparty immediately of finance of this is some of an or wife allow him minicipal abstract become the billyon

The facts are, substantially, that the conduct was may be towned alors of an analogy to the air of heavest today because City of Chicago. This fact is admitted by the defendant. The defendant men erecting a ten-story building on the president insular lately west of the alley. For the purpose of constructing the

foundation, an excevation 15 feet deep was made on the lot, and extended the entire width of the lot, or approximately 50 feet along the alley line. Plaintiff's two-duct conduit covering a cable used for transmitting telephone messages was located two or three feet below the surface of the alley and ran along the entire length of the excavation from three to four feet east of the west line of the promises. On October 1, 1928, the conduit was found to be broken and damaged and the cable was suspended along the side of the open excavation for a distance of about 40 feet. Sand was later thrown on the exposed cable.

After the work on the building had progressed so as to permit the plaintiff to replace the conduit, the plaintiff repaired the damage to the cable, on or about January 1, 1929, and the evidence tends to show that the cost of making such repairs was \$489.88.

The important question to be considered by this court is, did the trial court err in denying the offer of the defendant to prove that the excavation and shoring of the ground at the place in question was performed by independent contractors, and that the defendant had no control over these contractors in the performance of their work. The offer by the defendant was made after the court had excluded certain evidence tending to show a relationship between the defendant as the general contractor and Harry Bairstow, a sub-contractor who was doing the excavation work on the premises. The offer, in substance, was that Carl E. Brickson, the defendant, made a verbal centract and agreement with Bairstow some time prior to Seppember 2, 1928, to do the entire excavating job for the sum of \$2900.

In order to establish the relationship of independent contractor between the defendant and Bairstow it is necessary to show by proper evidence that Pairstow had the absolute right to control the manner of doing the work in question. This control

foundation, an execution 18 feet deep was made on the let, and extended the entire midth of the let, or approximately 30 feet the cable wood for transmitting telephone macroges was loosted two exthree feet below the surface of the alley and ran along the smatter length of the exception from three to four feet east of the root line of the premises. (m October 1, 1828, the conduit was found to be broken and demand and the outle was suspended along the side of the open exception for a distance of shout 40...

of the most on the building had progressed so as to parall the plaintiff reparalt the plaintiff to replace the conduit, the plaintiff repaired the damage to the cable, on or about January 1, 1986, and

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The important question to be considered by this count is, it is the standard of the standard bad no control over these contractors in the performance of their work. The offer by the defendant was made after the court had excluded certain evidence tending to show a relationship between the defendant so the general contractor and Herry Seireson, a sub-contractor who wer toing the excevation work on the premises. The effect who were that the defendant, is embedded.

In order to ertablish the relationship of independent contractor between the defendant and bulgstow it is necessary to show by proper syldence that Fairstey had the absolute right to control the manner of doing the work in quertion. This control

does not appear to be in Bairstow from the offer to prove the existence of a contract between the defendant and Bairstos. Upon a somewhat similar question, the Tupreme Court in Melson Bros. & Co. v. Industrial Com., 330 Ill. 27, said:

"The right to control the manner of doing the work is the principal consideration which determines whether the worker is an employee or an independent contractor. (Becatur Railway and Light 60. v. Industrial Board, 276 Ill. 472.) The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent."

Undoubtedly the defendant directed Bairstow where to excavate. The excavation was carried on at the alley line, at the defendant's direction, and from the evidence, this excavation injured the conduit and the cable, and as a result made it necessary for the plaintiff to repair the damage.

The defendant complains of the attitude of the trial court in propounding questions to the witnesses in the case, and the prejudicial remarks of the court in the presence of the jury. Generally it is not proper for a judge to take an active part in the trial of a case, for the reason that the jury may be influenced by the remarks made by the judge in the examination of witnesses; but it is always proper for the court to question witnesses so as to get at the truth of the controversy. The do not regard the remarks of the trial court as injurious when the court announced its judgment, and determined, as a matter of law, that the employment of Bairstew was not as an independent contractor.

Upon the question of the liability of the defendant for damages caused to the plaintiff's conduit by this excavation, there is evidence that one of the assistant engineers

does not appear to be in Sairsber from the effect to prave.
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Undoubtedly the defendant directed Mairatow where to excevate. The excevation was corried on at the alley line, at the defendant's direction, and from the evidence, this content to the confer the confer the plaintiff to repair the damage.

The defendent complains of the atthicude of the trial court in propounding questions to the atthicuses in the case, it is proper for a judge to teic an the jury of the jury settle to the trial of a case, for the rescon that the jury may be influenced by the reserve ands by the judge in the court consinction of attreases; but it is always proper for the court to question althouses so as to get at the truth of the court to troversy. To do not right the reserve of the trial court deformined, as a sector of less, that the complement of Dateston deformined, as a sector of less, that the complement of Dateston

Upon the question of the limitity of the defendent for demages counsed to the plaintiff's conduct by this exercition; there is evidence that one of the ensistent engineers

for the plaintiff, after receiving a report of damages to the telephone equipment, went to the cite of the excavation on October 1. 1928, and found broken conduits and an exposed telephone cable hanging along side the excavation, and then at a later date, returned and found workmen filling in the excevation. which extended into the alley, and by such filling in, covered the exposed cable with dirt. After sufficient progress had been made in the erection of the building, the plaintiff made repairs. There is a conflict in the evidence that a telephone cable was exposed. There is evidence offered by the plaintiff by one of its witnesses, Tmil Steinbauser, that in June, 1929, he called at the office of the defendant and talked about the damages with Seth Johnson, the bookkeeper in charge of the premises. When this was called to the attention of the witness, he said, "I know all about it. " and that if we (the plaintiff) would send a bill he would be glad to take care of it. This statement is denied by Johnson, who admitted, however, that a call was made at the defendant's office by the plaintiff's representative in . regard to the damages. At this time, the defendant was absent from Chicago upon a trip to Europe, and Johnson, apparently, was in complete charge of the business. Later the defendent, at the request of the representative of the plaintiff, called at plaintiff's office and talked with Francis Baldwin, chief claim adjuster, about the bill for damages. He stated, substantially, that the bill was too high and that the defendant wanted the plaintiff to forget about it. This the defendant denied, but the fact remains that he called at the plaintiff's office in regard to the damages.

All these facts were before the jury and the verdict is

and to annual To troops a new reason to the limit of the telephone equipment, went to the cite of the excevation on Cetaban 1, 1973, and Incad Rectes sectain and on expand tolic gamps with braging along side the sucception, and then an annexe later Milly setment out touch wedness filling in the seasoning which sitesful late the chief, and by south falling he, saveped the expanse and a relative to the . Fail age of the course and and in the station of the collins, the chalities and appeared. There is a contiller as the syldness that a fellingor and as areas exposed. There is evidence effered by the plaintiff by one of its wrinesee, inil Otelmnouser, that is June, 1988, he called of the otition of the determinate and tolers about the entitle at the leth Commen, the bookkeeper in charge of the premiser. Blem this was called to the ettention of the witzess, he cald, " know all about it," and that if we (the plaintiff) would rond at thousand sid? . it to erro what of bein of blues of fild a denied by Johnson, who admirted, however, thet a call was made at the defendant's office by the plaintiff's representative in regerd to the demages, at this time, the defend on war shorest res Chicego woom a trip or Surge, and Johnson, apparally, was in complete charge of the business. Later the defendent, is bolled . This is a conservation of the observation of the conservation of pleisentr's order and talked with branch indeeds, other alets adjuster, shout the bill for desages. He stated, substantially, that the bill was we high and that the defendent wented the plaintiff to forget about it. This the defendent dealed, but at soithe s'illimisiq out to believ od tout origner took out regard to the damages.

al these facts were before the jury and the verdick is

amply supported by the evidence in the record. There is no serious contest upon the question of damage to plaintiff's equipment, and the amount thereof.

Complaint is made that the instructions of the court invaded the province of the jury in that they instructed the jury that the defendant did the work of excavating, etc. The language used by the court in the instructions was objected to by the defendant, but the court was amply supported by the evidence.

The remaining question to be considered is, did the court err in recalling the jurors and directing the jury to render the verdict arrived at by them. The evidence amply supports the verdict finding the issues for the plaintiff. The part of the verdict corrected by the jury was the insertion of the amount of damages sustained by the plaintiff. There is no actual dispute in the evidence upon the amount of damages sustained. The statement of claim filed by the plaintiff alleged the damages to be \$596.28, and the verdict, based upon the evidence, is for \$489.88. That was the intention of the jury when the original verdict was returned. The merits in this controversy are with the plaintiff, and there is no error such as would require a reversal. Based upon the evidence, it does not appear that the defendant was substantially prejudiced by the jury inserting the amount of damages and fulfilling the clear intention of their verdict. The conclusion reached by this court is well expressed by the Appellate Court in the case of Wickizer-McClure Co. v. Bermingham & Seaman Co., 151 Ill. App. 540, in these words:

"However arroneous the action of the court may be in permitting the jury to reconsider and correct a verdict rendered after they have separated, the court will not reverse unless there are some merits to the case."

The judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P. J. AND HALL, J. CONCUR.

apply supported by the evidence in the record. There is no serious contest upon the cuestion of decays to plaintiff's surignent, and the scount thereof.

that the defendant did the recreating, etc. The language by the court in the isstructions was objected to by the court in the isstructions was objected to by the descendant, but the court was amaly supported by the evidence.

The remaining question to be considered is, did the www. or in recelling the jurors and directing the jury to render the verdict errived at by them. The evidence amply supports the when end to fire and thinkeless on the term at the collect tolders to you are not to continue to the area of the continue to the church Laute ou of erect . Tittaining of the to section demonstrate -state og! .bouldage consuct to decume set acou souther at at ot essent our flags of the middle tiltuis and to beilt minto to twee \$190.86, and the verdict, hered open the wildings, in far \$400.86. ass joilvey isnisire ent meds your ent to melinetal ent eas fed? referred. The series in this successful at the pick the picket. mean beast there is no error such as would require a reversal. -due ead takked het that the to to to the declara were add to rooms and polyternic our our of beelingers in allegings .tothray right to meithered reels add militiat was clusion reached by this court is well sypressed by the Appellula since A subsidered .v .c. stal or-tonight's to seen and in Stopo Co., 151 Ill. App. 540, in these sords:

Adorsver erroneous the action of the court may be in parmitting the jury to reconsider and course a verdiet rendered after they have reparated, the court will not reverse unless there are court merits to the cree.

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WILDOW, P. J. AND HALL, J. CONCUR.

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PHILIP WORWICH,

Appellant.

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ALICIA STEINBERG.

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

268 I.A. 628

Opinion filed Dec. 21, 1932

MR. JUSTICE HEBEL DELIVERED THE OFFICE OF THE COURT.

This is an action instituted in the Municipal Court of Chicago by the plaintiff against the defendant wherein the plaintiff sought to recover \$1350, and interest, for moneys alleged to have been advanced by him to the defendant. A trial was had on December 18, 1931, and by agreement the case was submitted to a jury of six men. After a hearing the jury returned a verdict finding the issues for the defendant, upon which verdict the trial court entered a judgment, and from which the plaintiff appeals. No question is raised or suggested as to the sufficiency of the pleadings filed by the parties in interest.

The important question to be determined is whether the verdict for the defendant was against the manifest weight of the evidence.

From the plaintiff's evidence it appears that plaintiff is related to the defendant, the defendant being his aunt: that on July 13, 1989 the defendant asked Mernard Jadwin, Cashier of the Public State Sank, for a loan of \$1.350 on 18 shares of stock of the bank owned by her; she was informed by Jadwin that it was unlawful for the bank to make such a loan; that subsequently the plaintiff met the defendant at the bank and said that he was willing to help her make the loan and that Jadwin, the cashier, would take the certificate of stock of the defendant, and in the event of a sale,

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Opinion filed Dec. 21, 1932

ME. JUNETUS HEREL DELIVERED THE STREET OF THE COURT.

This is an action instituted in the Municipal Tourt of the control of the control

From the plaintift's evidence it appears that plaintiff is related to the defendant oring ble cunt; that on July 10, 1885 the defendant saked Marnard Jadwin, Caubier of the Public State Mank, for a loun of \$1,350 on 18 shares of stock of the constitution of the lawful for the back auch a loun; that subsequently the plaintiff act the defendant at the back and hald that he say willing to help her make the lean and that Judwin, the enshier, would take

pay the plaintiff \$1,350, the balance of the purchase price to be paid to the defendant. Plaintiff issued his check for \$1,350, payable to the defendant, and marked on the margin of the check these words, "Loan account of 18 shares Public State Bank." At the time of this transaction the defendant signed a letter prepared by Jadwin, authorizing him to sell defendant's 18 shares of stock at not less than \$130 a share, and after paying the plaintiff \$1,350, to pay the balance to the defendant. Plaintiff's check was cashed by the defendant at the Continental Bank at the note teller's window. In April, 1930, the plaintiff wrote a letter to the defendant demanding his money and interest. No money was received by the plaintiff, nor were the 18 shares of stock sold which were deposited with the Cashier of the Public State Bank.

The defendant contends that the check of the plaintiff was given to her in payment of 10 shares of this stock, and not as a loan.

that she was a stockholder of the Public State Bank, and owned
18 shares; that Jadwin, the eashier of this bank, had sold five
shares of stock issued by the bank and owned by the defendant, at
\$150 a share, and in July, 1929, she called at the bank in response
to a call by Jadwin, who told her that Phillip Morwich, the plaintiff,
wanted to buy some of her stock; that she met the plaintiff at
the bank and he asked her how much she wanted for her stock, and
in reply she stated to him \$150 a share; that plaintiff would not
pay \$150, but told her that he would give her \$135 a share; that
she then sold 10 shares of stock to the plaintiff and he gave her
a check for \$1,350 for ten shares, and that she endorsed the
certificate, which evidenced 18 shares, and left the stock with Jadwin,
the Cashier, to be split, 10 shares for the plaintiff and eight

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The defendant contends that the check of the plaintiff with mixed to be the creat, and not so a local.

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shares for the defendant; that she signed a letter which she thought was a transfer of the stock to the plaintiff; that she did not tell Jadwin or Norwich, the plaintiff, that she was in need of money; that at that time she had a balance in her account at the Foremen National Sank of \$3,118.48, and also a small account at the Howard Bank.

There is a conflict in the evidence as to the endorsement upon the check for \$1,350 of the words, "Loan account 18 shares Fublic State Bank," and there is a further conflict between the witnesses as to what was said at the time the plaintiff issued his check for \$1,350 to the defendant. It will not be necessary to consider the conflict in the evidence; that was for the jury, and in doing so, the jury must test the evidence both of the plaintiff and the defendant as to its credibility. From the verdict it is evident the jury concluded that the evidence of the defendant and her witnesses was entitled to greater credence than that of the plaintiff and his witnesses. We cannot agree with the plaintiff's contention that the evidence offered by the defendant was so unbelievable, unconscionable, and incredible, and beyond the limits of human belief, that in law it had no probative force. It was rather unusual that a loan was made at the time the transaction took place with the plaintiff in the presence of the bank officials, and that a note was not signed by the defendant to evidence the indebtedness.

The evidence is silent as to the maturity of the loan and the interest rate. We are unable to say that the manifest weight of the evidence is against the verdict of the jury.

The defendant has called the attention of the court to the fact that the plaintiff has failed to note an objection or exception to the order of the court denying plaintiff's motion for a new trial, or to the motion made in arrest of judgment, or to the entry of the judgment on the verdict. While it is true

chares for in duranter of the about to the plaintiff; thet she abought was a transfer of the about to the plaintiff; thet she did not trail labels or some in the about the column to be about the a

There is a conflict in the evidence es to the enforce-

as a post the check for [1, 350 of the words, "Loss secount la dhase Public Seite Sunt. " and Mare is a Curties conflict Setum Dearest This Lake will wait and to blue one fails of an example in tion sheet for ILL SI . The defendant of the new and seems ald as decided the doubles as the evidence; that was the tore at and he also souther and that you will not and and her and here. The threatest of the desire the burn the best before the second by on I a complete of the industrial and the see at the the this can be a since of the same of the sam the seven tennes of the state of the Tilleton and to fed in in it? a contention that the extence offered by the defendant was on unbellevelle, unremediate, and heavelleder on new the limits of repeat tolder, the last it had a select very It wer rether namenal that a loon was made at the time the transsind out to someway out all thinking out with socia soot motion officials, and that a note was not signed by the detendant to avidence the indebtedamas.

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that Sec. 38 of the Municipal Court Act, and Sec. 81 of the Practice Act as amended in 1911, do away with the necessity of formal exceptions to adverse rulings by the court during the course of trial, they do not, however, overcome the necessity of saving an exception to the court's adverse ruling upon an objection made other than during the course of the trial. No exception having been preserved to the ruling of the court upon the motions above mentioned in the bill of exceptions this court would be relieved of the necessity of passing upon the sufficiency of the evidence, but in view of the consideration we have given to the evidence and our conclusion that the verdict of the jury was not against the manifest weight of the evidence, the verdict for the defendant will not be reversed. The conclusion thus reached disposes of plaintiff's contention that the court erred in denying plaintiff's motion for a judgment non obstante veredicto.

admitting evidence of the defendant's bank account. This evidence was introduced as bearing upon the defendant's need in making the alleged loan with the plaintiff. Plaintiff's witness Jadwin testified to the effect that the defendant told him she needed the money, that otherwise there would be trouble with a mortgage. The defendant denied that she made such a statement to Jadwin and denied that she was in need of money, because she had a balance of \$3,118.48 in the Foreman National Bank. The plaintiff made the evidence of the defendant material when he offered the evidence of Jadwin, who testified to the facts above mentioned, and the admission of the defendant's evidence was not erroneous.

The plaintiff complains that he offered evidence as to the meaning of the words appearing on plaintiff's check, "Note Teller," as indicating that the check was paid to a note teller in payment of a note which was excluded from the jury by the court. The vital objection to his evidence is that an opinion expressed

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defendant's evidence was not orconous.

The plaintif completes that he offered evidence as the continue of the check, and the continue of the check of the court.

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by a so-called expert is an attempt to bind the jury upon a material issue between the parties, which is, whether the plaintiff loaned the money and the defendant borrowed it to pay a note. Why the note teller was not produced, or the records of the bank at which it is claimed the defendant paid the note with money received from the plaintiff, instead of the expert testimony, is not clear. This court is satisfied that the plaintiff was not prejudiced by the refusal of the court to admit such so-called expert testimony. The judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

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by a so-emiled expert in an attempt to him the just upon a material issue between the parties, which is, washer the plaintiff leased the money and the detendent burrowed it to pay a note, shy too note teller was not produced, on the reserve of the bank at which is is not the reserve of the bank at which is in the content of the content is a sift of the justice.

The judgment is affirmed.

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WILLIAM WOLKOFF, etc.,

Appellee.

V .

WOODLAWN TRUST & SAVINGS BANK, a Corporation, et al.,

Appellees,

On Appeal of:

STELLA MURPHY.

Appellant.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COOK COUNTY.

268 I.A. 628<sup>1</sup>

Opinion filed Dec. 21, 1932

MR. JUSTICE HEBEL DELIVERED THE OFINIOR OF THE COURT.

This is an interlocutory appeal by Stella Murphy from a temporary injunction order entered on the 21st day of July, 1932, by the Monorable Marcus Kavanagh, one of the chancellors of the Superior Court of Cook County, which order, in part, reads as follows:

"It is Ordered that the said Stella Murphy and the remaining complainants in case No. 561665 and the complainant in No. 560059, Superior Court of Gook County, be and they are hereby enjoined and restrained from prosecuting and proceeding further with equity proceedings filed by said complainants in the Superior Court of Gook County, Illinois, against the defendants therein named, bearing court numbers 561665 and 560059 permanently.

The Court Both Further Order that upon notice and further hearing bond need not be required of complainants; that good cause has been shown and this court is of the opinion that the injunction ought to be granted without bond, and it is further ordered that said injunction issue without bond being required of the complainant."

The pending bills of complaint are suits to enforce the liability of stockholders of the Woodlawn Trust & Savings Bank. The bill before the court was filed by William Wolkoff on July 6, 1932, in the Superior Court of Cook County. On June 28, 1932, the Honorable William J. Lindsay, one of the chancellors of the Superior Court of Cook County, to whom the first bill was assigned case No. 560059, wherein Stella Murphy was the complainant and the

sale eviction stilling

Appellee,

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## Opinion filed Dec. 21, 1932

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county, be and they are hereby enjoined and restrained and restrai

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The pending bills of sommisted are suite to enforce the

liability of absorboiders of the Scotlann Trust & Savings Hash.

The Mail to the Superior Court of Cook County. On June 28, 1852, the

Court of Cook County, to whom the first bill was assigned case

No. 560058, wherein Seells Harphy was the complainant and the

Woodlawn Trust & Savings Bank, et al, were the defendants, appointed William Barrett as a receiver, and entered a further order restraining all other creditors from filing or prosecuting similar bills.

Thereafter, on July 18, 1932, the Hon. Marcus Kavanagh, as chancellor, appointed Jules Eichenbaum receiver in the instant case. On July 20, 1933, in this proceeding, the chancellor vacated the injunctional order of June 28, 1932, in case No. 560059, and on July 21, 1932, the foregoing injunctional order was entered, from which Stella Murphy perfected this appeal.

Only the bill of complaint, the petition, and the answer to the petition filed in the instant case by certain of the defendants, were considered by the chanceller in entering this order complained of.

appealed from was not justified either by law or fact. It is worthy of note that one of the complainant's solicitors verified the bill of complaint, as well as the petition, which petition is entitled, "A petition for an Injunction." This practice indulged in by the solicitors is not to be encouraged. It has the tendency to make the solicitor an active partisan, and such act militates against the aid which the solicitor should render the court in the determination of the questions involved. It would have been better if the complainant had sworn to both the bill of complaint and the petition. The solicitors for the complainant have failed to offer any reason for this practice, and no doubt they appreciate that this conduct is subject to criticism.

It appears from the record that the several bills were filed in the Superior Court of Cook County by various creditors to enforce added liability of stockholders of this bank under Sec. 6, Art. 11 of the Constitution of the State of Illinois. The scope

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of this remedy has been passed upon by the Appellate Court in the case of Babka Plastering Co. v. City State Bank of Chicago. 264 Ill. App. 142. in these words:

"The generally accepted rules are that the fund oreated by the statute is in the nature of a security for the common benefit of the oreditors; that the stock-holders are in effect partners who assume a contractual, primary liability, running directly and immediately to the creditors, each stockholder being severally and individually liable for every debt accruing while he held the stock, with a limitation of the liability to the amount of hisstock and that a suit in equity affords the most effectual and convenient remedy for its enforcement (citing numerous cases)."

One of the bills, No. 560059 was filed by Stella Murphy. Another bill was filed on the same day, in which the firm of Church, Haft, Robertson, Growe & Spence, appeared as solicitors. The case of Stella Murphy was assigned to Judge Lindsay, and the other then pending bill. represented by Charles M. Haft, was assigned to Judge Denis E. Sullivan. Both of these bills were filed before the Auditor of Public Accounts had appointed a receiver for the assets of the Woodlawn Trust & Savings Bank. On July 3, 1932, the Auditor of Public Accounts of the State of Illinois, did appoint H. G. Vernon as receiver for the Woodlawn Trust & Savings Bank. A further bill was filed on July 6, 1932 by the complainant in the instant case, No. 560873, against the same defendants, to enforce a stockholders' liability against the owners of the stock of the Woodlawn Trust & Savings Bank.

There are three bills pending for the same purpose - to enforce the stockholders' liability provided for by the Constitution of the State of Illinois. These successive bills should be controlled by a proper order, consolidating the litigation, and no doubt such an order will be entered at the proper time. India Rubber Co. v.

J. G. Smith & Sons Co., 75 Ill. App. 282.

The next question to be considered is, was the injunctional order justified by the verified pleadings? In passing upon this question the court will not determine or pass upon the merits

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The next question to be considered in, was the injunction at order justified by the verified classifier In market consider the court will not detective or resemble the markets.

involved in the several proceedings, except so far as is necessary to pass upon the question before this court.

The bill of Stella Murphy, filed in the Superior Court of Cook County, was filed first in point of time, and was pending when the bill in the instant case was filed. There are no facts charged in the instant bill that would justify the order for an injunction. The verified petition filed in aid of the bill of complaint charged that Stella Murphy and others, as complainants, filed a certain proceeding, No. 581665, in the Superior Court of Cook Gounty against the stockholders of the Woodlawn Trust & Savings Bank, to enforce the same remedy sought by the complainant in the instant case; that Stella Murphy abandoned cause No. 560059 by joining with other complainants and filing the bill of complaint in cause No. 561665 for the same remedy; that in order to avoid a multiplicity of suits, no receiver having been appointed in the last mentioned suit, it would be necessary for a receiver to be appointed in the instant case, which was done.

There is no charge by the complainant William Wolkoff, in the instant case, that he will suffer a monetary loss unless an injunction be granted.

The general rule is that in order to maintain a bill of complaint in equity, and in order that an injunction may be granted restraining the prosecuting of a number of suits praying for the same remedy, it must appear from the bill that the prosecution of the pending bills will occasion a loss to the complainant unless such injunction is issued.

Many of the points raised in the briefs of the parties in the case before this court, go to the merits of the several equity suits now pending, which, of course, this court in this character of proceedings, will not consider. torough to the overall varieties, the country Liverage of the leading to the marks

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of proceedings, will not consider.

Our conclusion is that there were not sufficient facts shown in the bill or petition filed to justify the court in entering an order for an injunction. The order is accordingly, reversed.

ONDER REVERSED.

WILSON, P.J. AND HALL, J. CONGUR.

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LIVINGSTON BARING CO., a Corporation, Plaintiff in Error.

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oHICAGO RAILWAYS COMPANY, a Corporation, et al., Defendants in Error. of cook county.

268 I.A. 628<sup>3</sup>

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff by this writ of error seeks the reversal of an adverse judgment entered upon a directed verdict.

The declaration alleged that one Erwin Nauman was on Jebruary 19, 1924, employed by the plaintiff, which was operating under the Worksan's Compensation act; that on this date, through the negligent operation of one of defendants' street cars, it ran into a wagen of the plaintiff in which Nauman was riding and so injured him that he died on that date: that plaintiff paid to the widow under the Compensation act the sum of \$4,000; that the accident and injury to Bauman was through no fault of plaintiff but through the fault of the defendants, and that having paid the compensation plaintiff had been subregated to the rights of the widow and next of kin. Defendants filed a plea of general issue. Plaintiff's brief argues only that there was sufficient proof of negligence in the operation of the defendants' street car and want of contributory negligence on the part of the injured man, to have required submission of the case to the jury. For the purposes of this opinion, this may be conceded.

Defendants' principal point, however, is that the record fails to disclose any evidence that Mrwin Nauman was the man infured in the accident. They sesert that "there is not one bit of evidence tending to identify the man on the wagon or tending to show that he sustained injuries which resulted in his death."

Plaintiff's brief does not controvert this assertion, and examina-

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CHICAGO BAILBAYE GEORGEY,

268 I.A. 628<sup>3</sup>

TING FUSTICE REGULARY.

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-gree's no new accept alway one teds beautin solications out ary 19, 1914, employed by the claintiff, which was operation under the Werkman's Campensation act; timt on this date, through the mang of mi and it amen to east to the sea to see it was all and and and all bornhai on his public new assess notice at Thinks off to near wable out of hime Tribulate said seam said no balk of tand ald the Commencention set the num of Ma. M.D: that the nacident dypords in Thinkele to sleet on excerts say annual of yantal ban decrease and the felt and that had the self to the feet ad trainist? had been rebreated to the right of the wider made of kin. Defendants tiled a plea of general issue. Finintil's at concentions to toory revisition our would had the sauges total and represented the descenter's errors and vant to notices add tory negligence on the part of the injured aun, to have required submission of the ease to the fury. Now the purposes of this opinion, this may be conceded,

Notenante' principal point however, is that the record ratio te disclose any evidence that however, is have an the men injured in the accident. They seems that "there is not one bit of
jured in the accident to the men on the menon or tending to
show that he suctained injuries which reculted in his decid."
Plaintiff's brief does not contraver this assertion, and canaira-

tion of the record compels ascent to defendants' point.

Two occurrence witnesses testified that on the day of the accident they were passengers on a northbound Wentworth avenue street car in Chicago: that in the block between 43rd and 44th streets it collided with a horse-drawn wagon which was moving southwesterly, crossing the northbound street car track. One of the witnesses said that it was a bakery waton "which turned out to be a Livingston bakery wagon." He saw a man entering the wagon at the side and the street car collided with it, but he only saw the am just before the collision. The other occurrence witness testified that after the collision he got out of the street car and saw a man lying in the street between the track and the west ourb of the street; that he did not go to where the man was lying, but saw him taken away by a police patrol. There was no evidence as to the appearance of the man or as to the injuries he sustained, and no evidence as to what happened to him after he was taken away by the police patrol nor where he was taken, and no evidence that this man died from the injuries received in the accident or that he died at all.

It was shown that an Erwin Lauman was employed by the plaintiff at this time as a route agent and that his duties sometimes required him to travel with salesmen when deliveries were made by horse and wagen. Arthur hauman testified that he was a brother of Erwin, who was married; that he saw him on February 19, 1924, at an undertaker's on 63rd street, and that he was dead. The wife of Erwin Hauman testified that he was employed by plaintiff; that she saw him on the merning of February 19th; that she heard of his death at eleven o'clock on this morning and saw him at the undertaker's on February 21st, at which time he was dead; that plaintiff had paid her 13,780 on account of her husband's death.

While it is sufficiently proven that Erwin Hauman met with an

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only to and end no deads helithest assess in assessors ... assess Streiner Assessibles as an encountry that had footbook or our in Chicago; that in the block between the and atth. galves now colds soges award-sound a silv babilles it siestim southwesterly, erossing the nerthbound errors car track. of the bound deline angen grained a new al told blee commercia and is nogov nút yniverso man a mas el ". negov yrrise setegalvi. r 🔻 the same give and dark and the tradition was provered and from able and and just before the sallisten. The courrence witness and has too dearen and to two dot, an molecular and refle ands helits drug door sale has doors and amoving fourth outs at gatel and a war Not placed and you are great at an one are no really threshe and On as any page of the state of the state of the state and the state of th the secretary of the man or no be vired injuries of to penerance and gave sound now so yearly will at homogoned facts at an acception all able and sumbles of his project for an exact the findin suffice off and from the intuities received in the meeting of the hand had . Ila Ju both

It was shown that an havis domain was employed by the minimal of this time on a route egont and this his diddes nowether required him to travel with selected when deliveries were made by train, who was matried; that he can him on february 18, 1974, at an undertaker's on that he was dead. The wife of train housen testified that he was employed by shahiti'; that who saw him on the morning of Mebr. my 1976; that ele heard of his chart she heard of his can't that we death at eleven o'cleak on this morning and can him at the morning the whish since he was deat; that plans that that him and the till' had poid nor 13,750 on macount of her humbered; that plans.

This had poid nor 13,750 on macount of her humbered death.

accident February 19th which caused his death, for which his widow received compensation from plaintiff, yet there is no connection shown between him and the unidentified man injured in the street car assident. It would be only a surmise that the two men were identical.

The right to be enforced under section 29 of the Workmen's Compensation act is strictly a statutory right, and nothing will be assumed in plaintiff's favor. Hartray v. Chicago Railways Co.. 290 Ill. 86. "Liability cannot rest upon imagination, speculation or conjecture." Paterson a Co. v. Industrial Board, 281 Ill. 326; Chicago Union Traction Co. v. Hampe, 228 Ill. 346.

almost the same situation was under consideration by this court in Johnson v. Chicago City Railway Co.. 166 Ill. App. 49, where it was held that the plea of general issue did not admit the identity of the person alleged to have sustained injuries on the day in question.

open the failure to prove the identity of the man involved in the street car accident as Erwin Rauman, the trial court was justified in directing a verdict for the defendants.

The judgment is affirmed.

AFFIRMED.

Matchett and G'Connor, JJ., concur.

scalent February 19th which caused his death, for which his related recolved to the convictor from phaintiff, yet there is no converten enown between him and the uniteralist man injured in the street car socialest. It would be noty a survice tast the two men were identical.

The right to be enforced under section 2% of the during will compensation act is strictly a capatory right, and nothing will be assumed in plaintiff's fever. The common in the content of the content of

Alsost the some situation was under consideration by this court in Schusen v. Unicase City Hailvey vo., 166 111. App. 49.

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in the street car necident we have the identity of the user included in the trial court was justified in directing a verdict for the defendants.

The Judgment is all reach.

STREET,

Matchett and G'Conner, 33., concur.

MARY MACIUMEVICE,

VB.

CHICAGO AND MORTH WESTERN RAILWAY COMPANY, Appellant.

S. L. FABIAN, Doing Business as S. L. FABIAN AND COMPANY, Appelles. APPEAL FROM SUPERIOR COURT

268 I.A. 6289

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff suffered the loss of her left hand in an automobile accident. She brought suit against the owner and driver of the automobile, S. L. Fabian, and the Unicago and North Western Railway Company. The jury returned a verdict exceptating Fabian and finding the Railway company guilty and assessed damages against it of \$15,000. The defendant Railway company appeals.

The accident happened at about 8:30 p. m. on hovember 5, 1930, at a point where the highway between haukauna and Green Bay, in the state of Wisconsin, crosses the single track railroad of the defa dant Railway. Fabian, with Mr. and Mrs. Orintas and Mary Maciukevice, the slaintiff, were returning to Chicago, going in a southerly direction, after an all day ride in Wisconsin. Plaintiff and Mrs. Orintas were riding in the back seat of the automobile; Grintas was in the front seat on the right of Fabian, who was driving on the left side. They ran into a signal post, called a wigwag, which the Railway had placed near the tracks and the highway; the automobile was overturned and plaintiff injured. She contends here that the defendant Railway negligently placed the wigwag so near the highway as to be a dangerous obstruction, which caused the accident.

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curves to the left. There are a number of markers or signs along the curve for the guidance and warning of persons approaching the crossing. The wigwag in question was 9 feet from the rails and on the west or right hand side of the highway. Although there was some controversy, it was shown by satisfactory evidence that the wigwag was 3 feet and 10 inches from the edge of the traveled part of the road. It is an iron mast or post 8 feet high, of thin cast iron 4 inches in diameter on a concrete base; on the top is a diamond shaped frame in which hangs a "banner" - a metal disk 2 feet in diameter, painted white, with a large black cross. It is an electrically operated device controlled by the approach of trains. The banner swings back and forth within the frame, showing a light when trains are approaching. It is what is known as the standard crossing protection in Wisconsin, and its purpose is to warn persons on the highway of an approaching train.

The highway at the curve, up to within about 100 feet from the crossing, was concrete 20 feet wide with approximately a 2 feet shoulder on either side. The highway for 100 feet next the crossing was macadam and tar; along the center of the highway is painted a yellow stripe running almost up to the railroad.

According to the most believable evidence, Fabian entered the first part of the curve at a speed of about 30 or 35 miles an hour; the automobile ran off the road and was in the weeds and grass; the headlights were dim so that they showed only 50 or 60 feet on the road ahead; when it was about that distance from the wigwag Grintas shouted to Fabian to "look out." About the same time Grintas saw the wigwag, which seemed to be squarely in front of the car; when he shouted Fabian suddenly jerked and swerved the the car first one way and then another until the wheels were off/ground on one side and then off on the other, jumping and tipping several times. The center of the front end of the automobile hit the wigwag post, knocking it over, and the automobile continued on its

ourve to the left. There are a number of sersons approaching the the curve for the guidance and manning of sersons approaching the crossing. The wigness in question was 3 feet from the rails and on the west or right hand side of the highway. Although there a centroversy, it was shown by satisfactory evidence that the wigness was 3 feet and 10 inches from the size of the traveled part of the read. It is an iron ask or part of the traveled from a factor of the tenest of the theory of the firm a diameter, painted white hangs a "hanner" - a metal disk 2 feet in diameter, painted white, with a large black cross, it is shown as the standard crossing protection is Visconcia, and its purpose is to standard crossing protection in Visconcia, and its purpose is to

The highway at the ourse, up to within about 100 feet from the creesing, was concrete 30 feet with approximately a 3 feet shoulder on cities aids. The highway for 100 feet next the cross-ing was massing and ter; along the conter of the highway to rainted a yellow stripe running almost up to the railroad.

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way diagonally in a southwesterly direction; it stopped lying on its side on the far rail of the railroad track, about 20 or 30 feet west of the highway.

Wheels a foot from the center yellow stripe all the way to the railroad tracks, at the same time keeping his right hand wheels 6 or 8 inches from the right hand edge of the paved part of the road; that he was going at about 53 miles an hour when suddenly the right hand corner of his bumper struck the wigwag and the car swerved to the right and tipped ever; that he did not observe the wigwag post until he hit it. Counsel for defendant very properly call attention to the incredibility of this testimony. If the automobile was a foot from the yellow stripe and also 6 or 8 inches from the right hand edge of the road—as the space between the stripe and the edge of the roadway was 16 feet—the automobile must have been about 8 feet wide. An automobile of the type in which the party was riding, a Lincoln dedan, is 5 feet 11 inches wide at the widest part.

We are of the opinion that the preponderance of the evidence clearly proves that the accident was caused solely by the negligent driving of defendant Fabian. It is evident that as he entered the curve he was driving at such speed that the heavy bincoln car was thrown by centrifugal force so far off the road that he ran into the wigwag, as it was squarely in front, and hit it with the front center of his automobile, his diamed headlights failing to illuminate it until it was too late. Under the circumstances, in order to escape being hit the wigwag would have to be located nearly 3 feet (half the width of the automobile) farther away from the place where it was, or approximately 7 feet from the roadway. The verdict exonerating Fabian and finding the hailway alone guilty was clearly against the weight of the evidence.

Defendant argues that the location of the wigwag involved an engineering problem, which is not subject to judicial review.

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liver tracks, at the same time breezing his right hand whenle d or from the right hand sheels d or from the right hand edge of the pared part of the road; that the same whereas the car everyed to the car the galler stripe had to the car the galler stripe and the right hand of the car the galler stripe and the cage of cate of the care road - as the apage between the stripe and the cage of cate wide, has accomobile of the type in which has party was right, a lincols deduc, is 5 test li inches wide at the party was right,

To ore of the spinies that the preparence of the evidence clearly erover that the sociality by the negligant driving of sefendant Tablan. It is evident that he entered the curve he ves driving at such apead that the heavy Lincoln day van thrown by centriving at such apead that the heavy Lincoln day van thrown by centriving I force no for all the read that he ran into the views entered in front, and hit it wis the front center of his autocohile, his disman headily and independence it was to have, which is the vignag reald have to be located nearly 3 foot (half the victor autocohile) farther wasy from the place where it was a victor is autocohile) farther wasy from the place where it was. I have and finding the Solians and finding the Solians and stading the Solians alone guilty was clearly englast the relation or the orthere.

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The duty to erect obstructions which are intended for the protection of the general travelling public carries with it a discretion as to where they shall be erected, and this discretion is not subject to judicial review unless it is so exercised as to amount to a real menace to the public who are travelling in a reasonably careful and prudent way. Seibert v. Mo. Pac. R. Co., 188 No. 657: City of Fairbury v. Parnes. 228 Ill. App. 389: Herner v. City of Philadelphia, 194 Pa. 542; Gulfport, etc., v. Manuel, 123 Miss. 266; Stern v. International Ry. Co., 220 M. Y. 284. We do not regard the location of the wigwag in question as involving an engineering problem requiring expert or technical knowledge. Rather. it involves common sense and knowledge based on observation. Furthermore, the judgment of experts is not necessarily infallible, An average man who had occasion to see very frequently the place in question and observe passing automobiles might have a better judgment as to the location of the wigwag than a technical engineer would have.

Railway company was not negligent. The purpose of the wigwag was the protection of travellers on the highway as they approached the crossing, by warming them of an approaching train. To serve this purpose it was necessary to place it where it would arrest the attention of travellers. The farther it was placed from the highway the less probability of it being observed; therefore it must be placed at that point nearest the highway which is just short of its being a dangerous obstruction to travellers. The question is, not whether there is a safer place, but whether the particular place chosen was so dangerous to travellers using the highway in a reasonably cautious way that its location becomes unreasonable. This becomes a question of law only when all reasonable minds would agree that the location was safe. This involves the consideration of all the surrounding circumstances; the degree of the curve of

The duty to erect charactions which are intended for the protecmoiderpalb a it will neitran olider palifevers farmen and to mais as to rear than small be erected, and this minoration to not supof twome of as hociorars on oi it is another faithful of it ereal meases to the sublic whe are travelling in a reasonably Beibert T. Mo. Pac. h. Co., 188 Mo. 687; . anw imphure has been and City of Salvaurr v. Laruss, Has 133. Apr. 350; Hermor v. City of Palints) note, 194 Pe, 144; Tellings, 150, T. Manuel, 125 8106. The transfer of the contract o .ince as quirioval as malreson at parties and he antropal and from secting problem requiring expert or technical importantes. it involves common sense and knowledge based on observation. relablicated the fudgment of experts to an accommunity total and accommunity posig sas gisacuser'i grev ess as anissoco bas osw ana anima a th question and observe passing automobiling might have a better alternative as the largest as the wigness and as the community ner I bluew Tran

traffector out sails wal to restau a me bail of bodes ore aw Railway company was not negligant. the pursues of the vignes was the presented to travellare on the bighrey as they approached the Te perve this eroseing, by warning them of an approaching train. narrose it was necessary to clans it where it would served the attention of travellers, The farther it was placed from the highway of sew it argiorant; therroads gains it to yillistory usel ods to stone dout at and we wanted and section saing said se boosto The succession in its being a dangerous obstraction to travellors. relative there is a said alloce, but whether the particular place cheren was so dangerous to travellers noing the nighway in a versionally cautious way shat its lucation become aureasquale, dire becomes a question of law only wind all rememble while neigned that the location was safe: This involves the consideration To overs and to seemen out resemble works with reces out the lo the road, width and character of the pavement, the probability or otherwise of the wigwag being struck by automobiles. These are questions of fact about which it could not be said all reasonable minds would agree.

A further consideration is that the evidence tended to show that it was customary to point the mast or post of the wigwag with white stripes; that although the instant wigwag had been set up on was October 30th, the mast remained unpainted and/of a black or redish color at the time of the accident. Assuming that the white stripes were for the purpose of increasing the visibility, the fact that it was not painted was a proper subject for consideration by the jury.

A witness, VanZeeland, testified rather indefinitely, that
the wigwag at this point had been knocked over a good many times
prior to the present ascident. Evidence of prior similar accidents
is admissible under the laws of Illinois. City of Chicago v.

Povers. 42 Ill. 169; Roore v. B. D. & C. R. R. Co., MS Ill. 63, and
many other cases. Whatever may be the law in Visconsin, the rule
is that in questions of evidence the law of the forum controls.

5 R. G. L. 1045. However, testimony that other wigwags had been
knocked over at this place, standing alone, and without any explanation of the circumstances, was improper and erroneous. Such
evidence is competent only where it is shown that the prior accidents happened under similar circumstances. It is common knowledge
that automobile drivers are of a wide variety of carefulness and
many of them do reckless and dangerous things.

Maying admitted the evidence as to prior accidents, defendant sought to show that in those cases the hallway had collected damages from the drivers of those automobiles which had collided with the wigwag. The court sustained an objection to this. Defendant was entitled to show this as indicating that the drivers in the prior accidents were in fault, and not the Railway company in locating the wigwag. the road, width and character of the payenent, the probability or sthermise of the winyou being struck by antonobles. These are will of fact whost which it sould not be said all reasonable adads would not be said agree.

A further enablished by their the religion backet to show silv margir odd to fuce to loan odt dulag of granteus car il tedt se on the cold but the traction that the last the last the section of the delter to deal a 'take beinted acquired at the to the control of color of the three of the sections. Assuming that the white stripes the purpose of lacrossist the light of the fact that to was not malaced over a propose subject for courtlerites by the jury a witness, Vendering toodisted retest individually, the the vigens of this point had been knowed over a good man three absolute which pains to women't . tondines promote and all talling - P reserved to gain admitted to good sale peace adding total and tre to Ill. 100; Mapro v. D. D. C. R. A. Co., 155 Ill. 63, and many other cares. Whetever may be the law in Theoresis, the rais alorgon muro's odf to wal odf ountly of to molicous at tait the 8 N. C. I., 1845. Moverer, tentimony that other nigrage had beta. action per capilly has preste mathematicage, while he never beginned setion of the elrametances, was improved and errandous. Such -loss to compress that your at it events the proper it and read the complete waterfront means of fit agent from the medicine retire beneated brinds han energiale drivers are of a wide variety, of carefulness add wany of blom de receleus and fangerens lifuge.

Leving abulteed the ence of the evidence of the prior accident, defordert accept to show that in those coors the halles which had.

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Defendant was satisfied to show this as indicating that the drivers
in the prior socialists were in fault, and not the halless company
the the prior socialists were in fault, and not the halless company
the teacting the virus.

Defendant's witness, Nock, should have been permitted to tectify as to the custom of painting the banner of the wigwag white with a black cross, and that the particular wigwag in question was so painted.

The witness, Kulp, should have been permitted to testify that it was customary along highways both in Wisconsin and Illinois, to place traffic signs, mail boxes, telegraph poles, railroad crossing signs and like objects within a distance of 3 feet from the traveled part of the highway. If this was the custom it would have a bearing on defendant Fabian's knowledge of the conditions of the highways over which he had traveled. Also, Kulp should have been permitted to testify as to the uniformity of the width of the shoulders of the roadways.

Instruction So. 1, given at the request of plaintiff, is criticised. It in substance told the jury that at the time of the accident there was in force in Wisconsin a statute which provided that whenever any street or public highway crosses any railroad track at grade, the railroad company "shall grade, construct and maintain in good and safe condition for public travel the portion of such street or highway extending upon, over or across said tracks or right-of-way." The grading, construction or maintenance of the highway at the crossing was not an issue in the case, but the jury might get the impression from this instruction that the statute prohibited placing anything, including the vigwag in question, within the limits of the highway.

Instruction Sc. 2, given at the request of plaintiff, is also open to the same criticism. The statute referred to provides that every corporation constructing, or owning, or operating a railroad, shall restore every highway or road across which the railroad may be constructed, and thereafter maintain it in the same condition. This statute referred to cases in which a railroad con-

Refendent's riteass, Fock, should have been permitted in the rigram white the barner of the rigram white in the barner of the rigram white it was a constant of the rigram white it is a constant.

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Instraction Me. A. given at the request of plaintif, is existed and. It is substance told the jury that of the cime of the chart whenever any street or public highway eroses any railroad rack at greet, the reilroad company "shall grain, construct and in such street or highway existing amon, over or across said tracks or right-of-way." The grading, venetruction or maintenance of the highway at the cracking was not an issue in the case, but the fury with get the impression from that increasing the intention of the nixtuit pro-

Instruction to. 2, given at the request of plaintiff, is also open to the same criticism. The status referred to provided that every derpointion scuetructing, or owning, or exercise which the invalidation overy highest or read across which the con-

structs its line across an existing highway. Mere it was proven that the railroad track was there long before there was any highway at this point. Nor was there any question in issue involving the restoration of the highway to its former state. The instruction suggests that any safety device established by the railroad company on the highway at a grade crossing is an impairment of the use of the highway and a violation of the statute.

Plaintiff's instruction No. 4 should not have been given. The Wisconsin statute quoted gives the right of action, otherwise nonexistent, against any municipality, or political subdivision known as a town, and that any person damaged in a town or county by reason of any defect in a highway where such damages shall be caused by the negligence of any private corporation, such private corporation shall be primarily liable therefor. This simply means that in case of joint negligence of a town and a private corporation, the latter shall be primarily liable. The instruction had no bearing on the instant case.

Plaintiff's given instruction So. 7 is quite lengthy. In substance it told the jury that if they believe that the defendant located the signal post so near to the traveled portion of the highway by that it interfered with the reasonable use of the highway by the public and was dangerous and uncare and likely to cause injury to persons exercising ordinary care and caution in their own behalf, and if the jury also found that the plaintiff, kary Baciukevice, was riding along said highway exercising ordinary care and caution for her own eafety at all times, and that as a proximate result of the negligence of the defendant Railway company the automobile in which she was riding struck said signal post, thereby injuring her, the defendant Railway company should be found guilty. Plaintiff's declaration charged the concurrent negligence of Fabian and the defendant Railway company. The manner in which Fabian drove the

structs its line scross on existing hidway. Here it was proved that the reilroad truck was unors long before there was any highway at this point. Nor was there only question in issue involving the resteration of the highway to its former state. The heerman the sampany on the highway it a grade creating is an impairment of the use of the highway and a violation of the statute.

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The Wisconsin statute quoted given the right of setien, otherwise have and the county the set of the set of the county by reason of any defect in a nighway where such demages chall be caused by the negligence of any private sor eration, such private that in case of joint negligence of a term and a private derious that in case of joint negligence of a term and a private derious the bearing a term and a private derious bearing an the instruction had no bearing on the instruction had no

Plaintiff's given incorner to . 7 is quite lengthy. In substance it told the jury that is they believe that the defendant lengthese that the digitarated the name to the traveled portion of the night way that it interfered with the requestion use of the highway by the persons exercising ordinary care and caution in their own behalf, and if the jury also found that the plaintiff, hary macinisvice, and if the jury also found that the plaintiff, hary macinisvice, for her own earlety at all these, and that as a proximate result of the negligence of the defendant Malivay company the subsmooths in the defendant Enterest to the subsmooth of the defendant modelies and the declaration charged the company angularmes of fation charged the company. The negligence of fation and the defendant salivay company. The number is water about about and the

car was a major issue in the case, and yet this instruction leaves him entirely out of the picture. It places the innocuous conduct of plaintiff, Mary Maciukevice, who was a back seat guest in the automobile, without any control of the driver, over against the action of the Railway company in locating the signal post, without any reference to the fact that Fabian's reckless driving might have been the sole cause of the accident. This was especially misleading in view of plaintiff's given instructions los. I and 2. The instruction also told the jury that the Railway should be held liable if "the same was known to, or discoverable by, the defendant Chicago and Lorth Western Railway Company." This might be construed as referring to the location of the signal post.

Defendant's refused instruction No. 8 should have been given. It referred to the Wisconsin statute which controls the speed of vehicles in traversing curves. It was pertinent to the issues involved.

Defendant's instructions hos. 9, 10, 12 and 13 were properly refused. They in substance told the jury that the Railway company should be found not guilty if Fabian should be found guilty of any negligence proximately contributing to the accident. The law is otherwise. The negligence of one defendant does not excuse the concurring negligence of a joint defendant, both contributing to the accident.

Defendant's refused instruction to. 10 was misleading. There was no evidence "that the layout or manner of the construction of this highway" was the sole proximate cause of the accident.

Defendant's refused instruction to. Il included the Visconsin statute regulating the headlights on motor vehicles. Fabian had testified that his headlights were "turned kind of down; \*\*\* that he could not see very much, \*\*\* that the lights were turned 'to what we call dim'; \*\*\* that they 'were on dim, or medium'."

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Unfondant's instructions has it, it, if and it were properly rotherd. They in substance this the fury that the Hallery company of the first of the Hallery companies of the accident. Include in the regularies. The regiligance of one defendence has each end and the regiligance of one defendence has been defendenced to the companies.

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He estimated that they illuminated the readway ahead about 50 or 60 feet. The Wisconsin statute required the operator of a actor vehicle to use such lights as would render the use of the highway by such vehicle reasonably safe. The jury were required to pass upon the sufficiency of Fabian's lights, and the instruction should have been given.

The briefs filed by both counsel prompt us to remark that very rarely if ever is one accident, with the surrounding circumstances, exactly like another. Cases involving ditches along the highway, or telegraph posts, or other like obstructions having no relation to the public safety, are of no great help to the reviewing court. Too often the decisive point is smothered by excessive citations and lengthy quotations. A few authorities stating general principles are sufficient. Respective counsel have dwelt considerably upon the decisions in Illinois and Wisconsin, but the essential principles controlling the instant case are the same in both states.

For the reason that the verdict of the jury was clearly against the greater weight of the evidence, and for errors occurring upon the trial as indicated above, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and O'Conner, JJ., concur.

60 fast. The Viscone in statute required the coerator of Ameror vehicle to not such lights as routh restor the not the highway by such vehicle renewably cafe. The fury vers required to pass have been given.

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Patebett and O'Connor. JJ., centur.

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JOSEPH TOMAK, Appellee,

VB.

JAMES SEIDL, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 6291

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

In an action of trover tried by the court, plaintiff had a judgment for \$1300, from which defendant appeals. The point in issue is the ewnership of a promissory note for \$1300 secured by a trust deed. It was stolen from plaintiff, and if defendant purchased it in good faith for consideration, before maturity, he became the owner and the judgment is erroneous. The evidence above that he paid a sufficient consideration for the paper, but plaintiff claims it was after maturity. If this is true, the judgment is correct.

The note in question was dated October 10, 1922, due three years after date, in the sum of \$1300, with interest, executed by John V. Kavan and Albina Kavan to the order of themselves and by them endorsed. March 10, 1925, Kavan and wife sold the premises covered by the trust deed to John Voda and Antonie Voda, his wife, subject to the trust deed, and thereafter Voda paid the interest at the offive of Kavan as provided for in the note.

Danek, who was then the owner. He received from her the note and trust feed with some other papers and put them in an envelope and deposited them in his sufety deposit box which was in Kavan's vault. Plaintiff had rented this box for over ten years and had the two keys to it; he kept all his valuable papers in this box. The last time he saw the envelope in the box was in October, 1929.

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ASSES TO

268 L.A. 629

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a and Tribular, court by the court, plaintif had a Judament Fest \$1300, From which defrendent aspects, The make the have in the ownership of a president; note inc [1300 assured by dunbuetob ti bue . Thistisia mer's melode naw tl a truet deed. parenused it in your fully for establishing, before establish, be began the a new just we just seven us. The syllmum a so that he made a sufficient out stage, the collection of the bear bear bear and till sielle is an exer enter; if his is tan, as language is correct.

The note in question was duied betaber 10, 1872, due three genre of ser date, in the sum of dillo, with interest, susuated by John ". Raym and Albino Revac to the order of thomselves one by them andersed, Darth 3C, 1930, Layer and will sail line availant navered by the first dead to July 'Gits and Angels Today, mis will a terror to the trust deed, and thereafter bed to to to to tout et the office of favor on provided for in the mote.

October 80, 1948, plaintiff puremased the note from Hary Banek, who was then the punct. He received from her the note acologue on al med duy bon ereges redio esco ally book dourt bos a areal at our Julies and Hancah Abelia also at many turbungsh has Plaintiff had rented this box for over ten years and had the two mays to it; be anyt all the valuable smooth to this been The last time he saw the envelope in the ben was in October, 1929. The next time he opened his box was in 1931, when he found all of his papers missing, and the envelope in which the note and trust deed had been placed was filled with scrap paper and the note and trust deed were gone. Plaintiff testified that he had never sold them to anyone, or authorized Eavan or anyone else to sell them.

October 10, 1925, when the note matured, an unsigned endorsement of extension was made on the note, referring to a written agreement of extension of the same date. October 10, 1923, a secand unsigned endorsement was made on the note to the effect that it had been extended to October 10, 1931, as per written agreement of even date. The agreement for extension made on this date purports to be between John V. Ravan, party of the first part, and John Voda and Antonie Voda, his wife, parties of the second part, and describes the party of the first part. John Kayan, as the legal owner and holder of the promissory note. At this time the legal owner and holder of the note was Mary Danek and not John Kavan, Mary Danek was not a party to this extension agreement. February 10, 1930, Kavan, who had in some wrongful manner gotten possession of the note and trust deed, sold them to the defendant for \$1366. John Kavan committed suicide February 9, 1931. Defendant says that the first time he knew plaintiff claimed any interest in the capers was about two weeks after Mr. Mavan's death.

Defendant's position is that having bought the note on February 10, 1930, which by the last extension agreement was not due until October 10, 1931, he purchased before maturity. It may be conceded that if there was a valid extension defendant purchased before maturity, but the extension is properly challenged by plaintiff. The agreement for extension purports to be made between John Kavan, who was the maker of the note, and Voda and wife, parties who had bought the premises conveyed by the trust deed. It is an agreement between the obligors only; the holder and owner of the note is not a party thereto. It is self-evident that no valid

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October 10, 1925, when the note metered, an unniqued onderse and or extension was neste up the role; reformant to a william describer 10, 1070, a seccasul and and to definingly to freezeway that goeste and a son and as also any dramers on hamitany has transaction as live to a so with the transaction and the control of behavior and the at erus case, Inc agreement for an element on their out of the parts to be between John V. Kavan, party of the first sart, and John Vode and Antonio Vode, bis wife, partiso of the second part and describes the garty of the first part, John Eavan, as the least fault out out a let be about grown one by though his wave was and ted and the man was was was to religious and any CARROLL AND ASSESSED ASSESSED ASSESSED ASSESSED ASSESSED ASSESSED ASSESSED. ic. 1920. Reven, who had in some vrongly manner gotten passession of the note and trust deed, and diam to defenduce for \$1800. Total Carra committee suicion Potracier i, Spil. Baracons rays that the first time he know plaintif' claised any interest in the papers was about two weeks after he haven's death.

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agreement to extend the time of maturity of a note can be made without the consent of the owner and holder. The maker alone cannot extend it. It follows, therefore, that when defendant bought the papers the note had long since matured and there was no valid extension.

In <u>Hide & Leather Bank v. Alexander.</u> 184 Ill. 415, it was held that the maker of a note could not alone postpone the date of payment, "but an agreement for such extension could only be made by both parties." See also <u>Merchants b. & T. Co. v. Welter.</u> 205 Ill. 647. The case of <u>Justice v. Stonecipher.</u> 267 Ill. 443, cited by defendant, is not in point, for there the owner of the notes endorsed them and delivered them to his agent for collection, who fraudulently put the notes in circulation. That is not the case here, although the defendant assumes in his brief that plaintiff placed the note in the custody of <u>Eavan for safe keeping</u>, but the evidence abundantly shows that <u>Eavan was operating a safety deposit vault and that plaintiff rented one of these boxes</u>, in which he kept his papers. The same distinction obtains with reference to <u>Y. M. C. A. v. Rockford Eatlonal Bank</u>, 179 Ill. 599.

Defendant says, in effect, that if the extension covering the period in which he purchased the paper was invalid, the same was true when plaintiff purchased the papers. This question might arise in a controversy between plaintiff and Mary Danek, the seller of the note to plaintiff; but she was paid in full and cannot complain. Neither do the obligors question their obligation upon the note. The controversy is between the purchaser of a stolen note and the person from whom it was stolen. In such case the purchaser can assert no claim based upon an alleged defect in the title of the owner which could not successfully be maintained by anyone having the right to question the title. It is the established rule that no one can transfer a better title than he has. Drain v. LaGrange State Bank, 303 Ill. 330; Sherer-Gillett Co. v. Long.

egreement to extend the time of maturity of a note can be made without the concent of the order alone cannot extend to. It follows, therefore, thet when defendant bought the papers the note ind cong vince majored and there was no valid extension.

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318 Ill. 432; Sherman State Bank v. Smith. 244 Ill. App. 171. Ravan, having no title to the note, could not convey a good title to defendant.

If the defendant had examined the paper he was buying he would have seen that it had matured and had never been properly extended. Both plaintiff and defendant were in fact innocent, but where two parties are without fault the rule is that the one whose negligence caused the loss, although arising from excusable ignorance, must bear it.

The judgment is affirmed.

AFFI RAND.

Matchett and O'Connor, JJ., concur.

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SANFORD W. HICKKAN, Executor, etc., of Estate of Alice G. Hickman, Deceased,

Defendant in Error.

VS.

GREAT AMERICAN CASUALTY COMPANY, a Corporation; Plaintiff in Error. ERROR TO SUPERICK COUNT

268 I.A. 6292

ER. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit on a policy of insurance issued by defendant, upon trial by the court had jud ment for \$2223.65; reversal is sought.

By its policy defendant agreed to pay \$2,000 as indemnity upon the death of Alice G. Mickman resulting from bodily injuries received in an accident. Alice Mickman lived in California with her husband, Sanford W. Mickman, subsequently appointed executor, while defendant's home office was in Chicago.

Defendant makes sixteen points in its brief, all asserting in substance that the provisions of the policy as to notice of the death of the insured were not followed. It provides that "in event of accidental death immediate notice thereof must be given to the Company \*\*\* affirmative proof of loss must be furnished to the Company at its said office \*\*\* within ninety days after the date of such loss." Defendant claims that no proper notice of the death was given the company until after the expiration of ninety days from the date of death. Plaintiff claims that the record justifies the finding that notice was given in apt time.

Alice Mickman died on the evening of November 1, 1929:
November 7th a written notice was sent to the defendant company
advising it of her death and asking for blanks for making proof of
death; this was received by defendant November 12th and on November
13th it replied, acknowledging receipt of the letter of November
7th and asking for the correct policy number, as the number given

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Plaintiff, bringing suft on a policy of insurance icense ed act and and the the court had jud ment to been as revereal is countr.

By its volicy tof medant agreed to pay \$2.000 as indensity upon the death of Alice S. Hickman resulting from bodily injuries received in an accident, alice Michael train in California with to inches intologic visual authority appoints and the .ougoido at aaw soitte sand a' sashasteb silde

Dofendant makes winteen points it it's brief. all acustonia aff to polion of an volley and to emplayong and that sometadue al sneve al" sand achivers of . bewello't for even bereat old to thech off as maying of June learness outton assistant stuck formeloon la Company was afficative great of less must be furnished to the Company at its sold office was within what; days offer the date of desa ed to object color that as proper no store of the death such the company until after the explantion in their days from the date of death. Plaintiff claims that the record fuelifier the rindian that notice was given in agt time,

Alice Michean died on the evening of Forence 1, 1939; was were fushing leb out to thee as a size and law a Mil redseval In Trave galles for manage for maines has alread fool to be galaires desti; this was received by defendant inventor little and on ecomony like it soulist, assessing the state of the letter of agranger The out making for the correct policy number, as the number diver

in the letter was the renewal receipt number instead of the policy number: Bovember 26th Er. Mickman wrote to defendant giving the correct policy number and asking that the necessary forms for making proofs of loss be sent at once: January 11, 1930, the attorneys for plaintiff wrote defendant, saying that "due proof of death under this policy was submitted to you several weeks ago." and inquiring as to how/defendant would take action: January 99 th defendant replied that it had no record of having received such proofs and that it had not forwarded any blanks for proof and was awaiting formal requests from the official representative of the estate before sending out any claim blanks. It will be noted that although the letter from plaintiff's attorneyswas received by defendant January 15th, it delayed making any reply until two weeks had elapsed. February 1st the attorneys for plaintiff wrote to defendant that Sanford W. Hickman was the executor of Alice G. Hickman's estate and again requested the necessary blanks in order that proof of claim under the policy might be made; February 5th defendant forwarded the forms for proofs of claim and these were filled out, executed and returned to defendant, together with a certified copy of the letters testamentary showing the appointment of Sanford W. Hickman as executor of his wife's estate, and affidevits of the details of the accident. These were received by defendant February 17th. Defendant asserts that the ninety days period expired February 1, 1930, and that when it received the proofs February 17th it was "nineteen days too late."

The words "immediate notice" and "reasonable notice" are practically synonymous when used in an accident inturance policy. Sun Accident Assoc. v. Olson. 59 Ill. App. 217; Rich v. Hartford Accident & Industry Co., 208 Ill. App. 506. In Mingara Fire Ins. Co. v. Scammon. 100 Ill. 644, it was held that a notice within fifteen days was a reasonable time, although the policy provided

ralico est lo buedant radam intera lavemen est sur restel est. 💽 and made he granted that are not the manual of the state of the state of the state of correct volter aument and anking that secessary Forms for making proofs of loss be esst at once; January 11, 1930, the atis tooks and hard animals defended to the time to a some enth under this editor was ashed test to you grant reside and and inquiring on to bey defundant would late action; Consury 19th plant beriese that the brows of head to the receipt believe seaher the new how known to bed associated and bedraying the part and the attents edi la erisarmentar fabillo edi mott escapet famo't pulilawa estate before scating out ony claim blacks. It will be noted that -op ye beviseer enveyements affiliatele mort vettel add The little was and an and an and an and an and an another Intruory lat the ethorneys for plaintiff reserved hougals bad defendant that Saniford V. Michael was the encouter of Alice C. refer at almid quasure and lead request alaga had states of anxioli. that proof of chair mader the policy might be made; February 5th agov pandi ban minis 'is allower to't swant and bebruwto't danhaolah a driv randoned Jantas let of the after the belonger of the belift seemining all mivels transmission to the app belilites of Manford W. Michman as executor of Life wife's estate, and affile Intant Rebruary 17th. Defendent augusta that the alacty days end beviser of new Sant bas, 1821, 1 greened merica being press's Jebruary lith it was "nineteen days too late."

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for "immediate notice of loss." In the present case defendant was notified of the death of Mrs. Mickman on the sixth day after its occurrence. Constrains the policy most strictly against the Insurance company, as we must do, it could reasonably be held that the notice of November 7th was sufficient notice of the death of the insured. This has been held under similar circumstances in Richardson v. Astropolitan Life Ins. Co., 159 Atl. 585; Brickson v. Mutual Benefit Sealth & Accident Co., 122 heb. 580.

However, it is well established that where the insurance company delays in furnishing blanks for proof of loss, such delay may be considered as a waiver of thmpliance with the policy roquirement that proof must be made within a specific time. Order of Chosen Friends v. Austerlitz, 75 Ill. App. 74. Defendant cites as holding to the contrary Maskas v. Borth American Acci. /Co... 181 H. E. Rep. 750. The facts in that case are quite different from those involved here. In that case blanks for proof of loss were sent pursuant to request, within seven days after the death of the insured, but were not filled out and returned to the company until 192 days after the loss. The delay there was solely by the plaintiff. In none of the other cases cited by defendant was the insurance company permitted to avoid liability on the ground of delay in receiving notice where such delay was caused by the failure of the insurance company to act promptly. No party should be permitted to take advantage of its own wrong. Movember7th, six days after Mrs. Mickman's death, defendant was requested to forward claim blanks, again on bovember 26th and again on January lith: but it was not until February 5th that the blanks were forwarded. We are of the opinion that the facts justified the finding of the trial court that apt notice of the death of Mrs. Hickman had been given to del'endant.

the line of the seath of her, dichem on the sixth day after its securrence. Construing the policy mest strictly against the lacarrace company, as we must do, it could reasonably be held that the notice of hovester 7th was sufficient notice of the death of the interest that the interest in the death of the interest in the interest in

Davover, 16 to wall solublesed that south the lighteness commenter to furnitating blanks for proof of loss, such dolar er volles and in in manual to review a se acrestence ed von solt sittings a statte size at some Yours tall Frankvine. ef men r mis . . . . . . . 75 Ill. App. 74. Defendent cites as wilder in the cultrary present route territor and at this as from those involved here. In that eace bianks for erect of leas might and to free mere althin seven days of translation and of the insured, but were not filled out and returned to the company until 192 days after the loss. The delay there was allely by the plaintiff. In some of the other cases cited by defendant was to have and no writted I hiome or bettom-s treemed electional may -fire and ve houses our walsh dous even solden muly less al value ure of the incurance company to met promptly. ad bluede vared od ndy . My Tadanvel . nor was at to one the tad of bettingen browto't of herecover are suchanted, deals s'unuall erm refus claim blooks, sputs on bevenber 26th and spain on January lith: herewall was and but the brown it but the warm war the but and to materit and bathisast asan't and said maintgo and to ore all most had man ast notice of the death of Mrs. Michael bad poor miven to delectent. Two other points are presented in the argument of defendant, although they are not made in the brief of points. Under Rule 19 of this court the argument must be confined to a discussion of the points made in the brief "and no others." However, we have given them consideration and hold that they are without merit. It is said that the policy was not issued by defendant. The facts, which are somewhat lengthy, do not support this claim, and furthermore, the defendant retained the premiums paid and hence ratified the issuance of the policy. Dickerson v. N. W. Mutual Life Insurance Co., 200 Ill. 270.

It is next argued that are. Mickman was not injured while riding in a private automobile "of the exclusively pleasure type," which was a condition of liability of defendant. The automobile was an old Reo touring car of the so-called "pleasure type." The fact that it was in some disrepair and that at the time of the accident also contained some tools which ar. Mickman had been using in repairing a fence, does not change the type of the automobile. Poncino v. Sierra Nevada Life & Casualty Co... 285 Pac. 729, and im Life & Casualty Company of Tenn. v. ketcalf, 240 Ky. 628.

Defendant in argument seeks to create suspicion as to the conduct of Er. Mickean at the time of the accident, but no facts are proved that would affect defendant's liability under the policy.

We hold that the finding was proper, and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

ant, olthough they are not made in the brief of polate. Under Mule 19 of this court the engument must be confined to a discussion of the polate made in the brief "and no others." However, we have given then consideration and hold that they are without marit. It is said that the policy was not issued by defendant. The facts, which are somewhat lengthy, do not support this claim, and furthernore, the defendant reinined the premiume paid and hence ratified the issuence of the policy. Dickerson v. E. W.

It is not the series of the continuous of the so-called spiceure type. The fact that it was in some disrepair and tust at the time of the socient also contained some tools which it. Nickman had been using in repairing a force, does not always the type of the automobile.

Defandant in argument sours to eroste quanteion as to the conduct of Mr. Miches at the time of the accident, but no facto reveal at the first of the conduct of the first order.

We held that the finding was proper, and the judgment to

Section 1 - Land Commercial State of Contract of Contr

WILLIAM D. NEYBRING, Sheriff of Cock County, Illinois, for the use of PHILIP MORRIS ADVERTISING DERVICE, Inc., a Corporation,

Appellant,

WS.

M. GODERSKI and PUBLIC IEDERATTY CO., a Corporation, Appellacs.

APPEAD THOM SUP DION COURT OF GEORGE COUNTY.

268 I.A. 6293

## MR. PRESIDING JUSTICE MESURALY DELIVERED THE OPINION OF THE COURT.

mobiles from plaintiff with the Public Indemnity Company as surety on its bend in the sum of \$2,000. This was dismissed without a hearing on the merits. Thereupon the present suit on the bend was commenced and upon trial by the court the issues were found for the plaintiff, debt \$2,000 and damages \$155.01, debt to be discharged upon payment of the damages. Plaintiff appeals and argues that he was entitled to judgment for damages in the full amount of the bend.

Under section 36 of the Reviewia act, chapter 119, when the merito of the case have not been determined in the trial of the action in which the bend is given, the defendant in the action upon the replevin bend may plead that fact and his title to the property in dispute. Hanchett v. Gardner, 138 Ill. 571.

Nominal damages and costs alone can be recovered where plaintiff in a replevin has his suit dismissed without trial and shows in an action on the hand that the property involved was in fact his property. Lyon & Healy v. Poase, 86 Ill. App. 251; Hertz v. Laufean, 46 Ill. App. 591. And the burden in such an action is upon the defendant to prove right of property in himself. Steviana v. Earnest, 30 Ill. 513.

To sustain this burden E. S. Goderski, the husband of M.

And to the company of the company of

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A. CONTRACT and PUBLIC TESTAMINY CO., a Corporation,

268 I.A. 629

DELIVERED THE CHILICE OF THE COUNT.

To sureafu this burden N. S. Godereit, the hughmed of h.

Goderski, the defendant, testified that the owned the cars in question: that she had owned cortain bonds which she had sold and placed the proceeds in her banking account in her own name exclusively: that the money for the purchase of the cars in controversy was drawn from this account. Checks were introduced in evidence which had been given for the purchase of these automobiles and the bills of sale run to her. Ars. Goderski testified to the same effect; that the cars belonged to her and were in the garage of her husband when they were taken under the sheriff's execution issued in Philip Morris Advertising Service v. Walter Phillips. Plaintiff's counsel earnestly attack this testimony, stressing answers made by the witnesses from which, it is argued, there is a clear inference that ownership was in 3. S. Coderski and not in his wife. After giving consideration to the record, we are of opinion that the trial Judge properly found that the title was in the defendant, M. Goderski.

Plaintiff, however, argues that E. Goderski by leaving the automobiles with Walter Phillips, an automobile dealer, for sale clothed him with the indicia of ownership, and therefore she was estopped from asserting any title. In the early part of 1931 Walter Phillips was a dealer in used automobiles at Diversey and Kedzie avenues; April 1, 1931, he entered into a contract for advertising with the Phillip Morris Advertising Service, Inc., the plaintiff usee; pursuant to this contract the advertising agency inserted advertisements in the Chicago Tribune on April 25, 26, 27, 28 and 29, and on May 17; Walter Phillips did not pay the agency for this advertising and on Jane 16, 1931, it recovered a judgment against Walter Phillips for the amount due, and on the same day caused a levy to be made and took the four automobiles in question from the garage of B. 3. Goderski. The evidence shows, however, that these automobiles were purchased by E. Goderski subsequent to

the part and heavy how have the partitioner; the heavy and proceed the the time to note you make a contract the term that the term is the term of and there are the out towards, and we then it abstract and hereig clustraty; that has money you the purchase of the care in controversy was drawn from this honomat. Unseeds were introduced in evimailifernibu escul le escuptur ent toit nevi mosé avé neint escet and the bilis of rain ran to her, here, dedocate testified to the equives and an order has the of Diguester about 10 daily these to make milywoods of Villagin only tollow spind over this make business that the Asset to railing Scotting Absorbing Service To Beller Stating. MALASSETT , CAMPLIANCE SOLD SOLDER, CLIPSCOPE, JOHNSON B' THIRDSOLD the inference that ownership was in W. dedaraki and any in his willy, affect of the working to the reactly be see of estatus -on out at new ofth out jand basely through outsit faird out tank forderi, it. Godernei.

Finitiff, however, argues that he dedered by leaving the clothed him with the indicie of evertably, and therefore the wan esteoped from manerting any little. In the early part of 1951 walter Phillips was a feeter he used automotion of hiversey and Sedric avecaus; April 1, 1950, he entered into a contract for advictive avecus; April 1, 1950, he entered into a contract for advictive avection in the Unicago Tribune on April 15, 26, 27, 22 and 18, and on the unique for the advertising and on Jane 16, 1850, it received a judgment for the advertising and on Jane 16, 1850, it received a judgment equals a lary to be made and took the four motemation in question from the parage of 2. 2. Dedered. The syldence above however, that these automobiles were purchased by M. Galarski subcequent to

were purchased were delivered for sale to Walter Phillips at his garage at Diversey and Eedzic avenues, but were taken back by defendant, E. Orderski, and were in her husband's garage for about a week before the Levy of June 16th was made. So that at the time Walter Phillips incurred the obligation for advertising, the automobiles in question had not been surchased by E. Goderski, and, of course, were not in the possession of Phillips. It is therefore obvious that Phillips was not clothed with the indicts of ownership at the time he became indebted to the advertising agency.

Plaintiff seems to argue that, because the defendant, h. other
Coderski, had at one time consisted certain/care to Phillips for
sale, she because liable for all his debts, and especially for debts
contracted before she acquired the cars in question. This is not
the law. It is a well recognized rule that in order to give rise
to an estappel it is necessary that the party estapped shall have
made, by act or word, some representation upon the faith of which
the person setting up the estappel has acted, with damage to himself. Silverthorne w. Chapman, 259 Ill. App. 289; Sherer-Cillett
v. ions. 318 Ill. 432. The Philip Borris advertising Agency did not
and could not set to its demage because of any representation,
either by word or sot, relating to the automobiles which defendant
did not yet own.

Chickering et al. v. Bastress, 130 111. 306, cited by plaint1ff, is not in point. There the court found that there was a fraudulent agreement made for the purpose of hindering creditors by persuading them to give false credit to one of the parties while the other parties retained a secret lien. Sorden Motor Finance Co. v. Astna Acceptance Co., 251 Ill. App. 536, involved the sale of an automobile to an innocent third person by a purchaser whom the seller had clothed with indicia of ownership. These cases are not applicable to the instant case.

Other call, had as one time evaniant estaid ours to Phillips for eals, she bound limite for all ais interest ours to estaily for delta tracted before one sequired the labts, and especially for delta tracted before it is not law. It is a well recognized full city in enter to the rise in anterest it is nearly that the party cateoped scall nive to an enter, by set or word, some representation upon the faith of which the person estimated and the cateoped has ested, with dwo go to him the person of the total of the call the same of any recreation.

The long set to its total to the interestate Appendiation, when the person taken of the recent the set of the sides of any recreation.

Objection of a point, 175 Mil. 166, edge by placing, is a set of placing of all states of a set of a s

There is no substantial contradiction of the evidence produced on behalf of the defendants, that the title to the cars at the time of the replevin suit was filed was in h. coderski. Beither is the defendant estopped from asserting such title.

We held that the judgment was proper, and it is affirmed.

APPIRED.

Hatchett and O'Connor, JJ., concur.

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Smell of themer, Mr. dennil.

SECREE ADAIR LONGLEY, Appellant,

VS.

HARY CAROLINE LONGLEY et al., Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

268 I.A. 6294

BR. JUSTICE MATCHETT DALIVERED THE CPINION OF THE COURT.

Albert W. Longley died testate at Pasadena, California, on October 29, 1928. His will bore date of June 9, 1928. A codicil thereto was executed May 14, 1928. The will and the codicil were duly filed in Cook county, Illinois, the place of testator's residence.

Complainant, asserting that he is the son and heir, filed a bill to centest the will upon the theory that its execution was brought about by unfue influence exercised upon the testator by his widow, kary Caroline Longley. She and other legatees, including a number of charitable institutions, answered denying that complainant was the son and heir and also denying the charge of unfue influence. After the cause had been put at issue defendants moved that the issues to be tried should be separated and that of whether complainant was the son and heir should be heard first.

In support of the motion defendants presented the affidavit of Frank G. Gardner in substance to the effect that complainant was an impostor and that no credible evidence could be produced that he was the son and heir. The affidavit asserted that the trial of the paternity issue first and separate from the other issue would save time and expenses. Complainant resisted the motion and an affidavit was filed in his behalf by one of his solicitors asserting that it would be shown upon the trial that complainant was born the illegituante son of the testator by alice Hall, whom he thereafter married, and that after the marriage he

PROBLEM ATATA LONGERY . Junion TIMETO BOY SETTING . . . . . . ATTRECH ARES. NO. A PARTY OF THE OWNER OF LOTTING THE PERSON NAMED IN STREET, STREET 268 I.A. 629

MA. JUSTICE RATCHIET DELIVERY THE CHILDRE OF THE COURT.

Albert W. Longley died tactate of Paradone, Colifornia, on Coseber SE, 1970. Bis will bore date of June 9, 1925. A and left through you consulted her bit, Little, The oll; and the 'to again add a line of the good at an in the star fill the . somehieer at redame.

Completenent, apparting that is the now and init. The and selected the relationers has bloody bird its resources was to act of the control his widow, heey Carollaw ............ "Lee mid elber legitions, inshad a number of charfeatte invitence, amerered deaving that te agrada sit sultant on in him tien bus non aid new Justiniques under influence. After the cours had been sub at drove defeatering To fadt how becaused of bloom being of appeal off fadd beyon whicher completence was the sen and hear signed be keere three.

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The metion of defendants was granted. Complainant thereafter moved to set it aside. This motion was denied. When the
cause came on for trial complainant again moved that the issues
be submitted to a jury. This motion was also denied. The chancellor heard the cause in open court excluding evidence offered which
tended to show undue influence and restricting the evidence to the
single issue of the paternity of complainant.

At the close of the evidence the court gave its opinion that complainant was the son of Alice Longley but that the evidence was insufficient to prove that he was the son of Albert. The determination of the court was largely based upon inferences that certain letters of complainant which appear in evidence were inconsistent with a filial relationship.

The solicitors for complainant filed a motion for leave to submit further evidence and in support of the motion submitted an affidavit to the effect that some evidence had been discovered since the trial which it had not been possible to obtain in time by the exercise of diligence, and that as to the other evidence they had been misled through the rulings of the court restricting the evidence to those matters strictly bearing upon the issue of paternity; that the issues of paternity and undue influence were inextricably woven together and that facts which could be produced as to the exercise of undue influence by Mary Caroline Longles.

not a selected complainent to be the sen, thus helitimisting in by virtue of sociles 3 of chopter 30 of the statutes (buits-furd's 111. Nov. State., chap. 30, sec. 1, p. 1114). This afficact that that the facts as to toth decues sould be sided in the state of Ca ifernia, and that the decues pere section is the mach decorporiones but would add greatly to the expressent that the litteration.

The wation of defendance was granted. Complaining thereis the second to a fary. This motion was also denied. The orangeller beard the same in apen sourt encluding evidence offered to the

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submit further evidence and is support of the metion for leave to submit further evidence and is support of the metion admitted an almost that further evidence and the submit to the chief in the by the emergias of diligence, and that as to the citer evidence by the emidence to the citer evidence the submits; bust the lemma of paternity and under influence sore inextify; bust the lemma of paternity and under influence sore inextically waves together and that is a value could be retracted as the emercias of angle and the large could be retracted as the emercias of angle and the large could be could be retracted as the emercias of angle and the large could be could be retracted as the emercias of angle and the large could be a submit to the could be angle and the could be a submit to the emercias of angle and the large could be a submit to the could be a submit

would also negative the interpretation placed upon the correspondence by the court. They asked leave to submit such evidence, but the action was denied, and a decree was entered dismissing the bill of complaint for went of equity.

It is centended by complainant in the first place that the court erred in directing that the issues should be separated. It is urged that the issue of whether complainant was son and heir should have been raised by a plea in abatement and that through the failure of defendants to so plead, and by answering they vaived their right to have the issues tried separately.

That this issue should, under the usual chancery practice in this State, have been raised by such a plea in abatement is, we think, sustained by the authorities, and the order directing a separate trial after such plea had been waived by filing an enswer was, in our opinion, technically erroneous. Whatever the practice may be in other states in which a code of procedure has been adopted, the rule in this State is as above stated. See Story Equity Pleadings, 9th ed., sees. 702-728, pp. 548-562; Mitford's Chancery Pleadings & Practice, 7th ed., sec. 2, part 2; Puterbaugh's Chancery Pleadings & Practice, 7th ed., sec. 134; Turckheim v. Birkley. 287 Ill. 434. The same rule has been applied by the Supreme court of this State where suit was brought by an unincorporated union, (Franklin Union v. People, 220 Ill. 385) by a person averred to be insane (Bangert v. bangert, 232 Ill. App. 517) and by a party suing as trustee (Fischer v. Etierel, 179 Ill. 59.)

In Turchheim v. Birkley, 287 Ill. 434, an appeal was taken from a decree entered upon the verdict of a jury finding the testatrix of unsound mind, the issues being incapacity and undue influence. In the course of the trial defendants asked leave to examine complainant out of the presence of the jury to consider his competency to bring this suit. The court sustained an objection

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It is sentered by serplainent in the first place that the court errod in directing that the issues grand be senorated. It is urged that the issue of whether send lumnt was son and heir fould a well-send and a selection of defendants to so pixed, and by unawaring they waived that right to have the issues tried separately.

That this State, have been raised by such a plea is missecount is, we which, sustained by the sustained by such a plea is order directing a sumink, sustained by the sustained by thing an answer separate trial offer second pion had been waived by thing an answer set, in our opinion, technically erreneus. Shatever the practical may be in other states in valous a cede of precedute has been adopted, the rule in this State is as shows attied. See Story Raulty Floudings, the this State is as shows attied. See Story Raulty Floudings, the call of a seen. The Tid, po. Six-568; hitterd's faprens court of this State vacre mate was been applied by the faprens court of this State vacre mate was been applied by the faprens court of this State vacre mate was brenght by an onix faprens accord to be imame (lawrest a branch of 122 111. App. 317)

trix of veround wind, the instanted heaverity and undue infinering of veround wind, the instant defendants select leave to examine means antice the presence of the jury to consiter his exampatency to bring tale sait. The court custoined as chieflan

on the ground that heither by plea her by answer was the issue raised. Pefendants then asked leave to withdraw the answer and to file pleas alleging that complainant was an alien enemy, atc. Leave was granted, but such aleas were filed. A motion by complainant to strike the pleas was sustained upon the ground that they had not filed in apt time. Defendants then filed an answer which, with other matters, set up the defenses which had been stated in the stricten plea, but the court sustained exceptions to this part of the answer. The Juprene court said:

"Such averagets are not properly an answer to the bill but should be raised by pleas to the person. (Puterbaugh's Ch. Pl. & 'Pleas to the persons do not necessarily lis-Pr. -- 5th ed. -- 100.) puts the validity of the rights waich are made the subject of the claim but they object to the ability of the party to sue or be sued. They are of two kinds: First, pleas to the person of the plaintiff, etc., (Story's Eq. Pl., sec. 722) such as the plea that plaintiff is an alien enemy. (Ibid. sec. 724). The pleas in question were pleas to the person and should have been illed in apt time. Appellants did not seek to file these pleas until engaged in the trial of the cause. The chancellor held that said offer same too late and struck the pleas from the files. It was not an abuse of discretion on the part of the chancellor to strike the pleas. They were dilatery pleas, and defendants could not, as a matter of right, file them on the trial of the case. Pleas of incapacity to sue are pleas in abstement. They do not go to the merits of the bill but only tend to an abstanant of the sult. ( (Fischer v. Stiefel, 179 Ill. 59.) The piece should have been filed in apt time, and as appellants failed to do so the chancellor did not err in striking said pleas from the files. Lincoln v. McLaughlin, 74 Ill. 11; Dow v. Blake, 148 1d. 76; Phenix v. Stacks.

In this connection defendants suggest two Illinois cases. One of these is Stone v. Salisbury, 309 lll. 56, where a bill was filed by an alleged heir to contest a will, and the defendants by their answer denied that the contestant was the daughter of the testatrix and set up other defenses. The cause was tried as an entirety and was submitted to a jury on all the issues, which were found for defendants, and there was a decree accordingly. Upon appeal complainant argued error in that the issue of parentage was submitted to the jury, but the court said that complainant made no metion to separate this issue but voluntarily proceeded to submit all the

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the III and the same services of the other wave deal's A. II. or a committeen; making and at mante of faults of though Personal and only of the parties of of to dection out of one of the games of the gallatine and came ad the new of office and he untilled and an routed had been and all the with the special case of made of their additions for the street and the and the contract of the contra parties below your bared periferential and present and for hard and all and the later of a reason the piece of the fact of the state of the same ing a stable table to the control of weather it state, the use me are not be the control of the sales of th preside at the first but and them to as abstract of the called - in the comment of the second of the contract of the comment. has the out out to whithing with place from his films. Lincoln r-Colombia, W. Miss der Jerry, Maint M. W. William Land. a walk and and

In this connection defendants suppose to illinois cases. For all those is first to these is filled by these is fill van filed by these is fill van filed by these is fill van filed by the these is a fill van filed by the tental that the tental van the partite of the tental van the tental van the tental as an entirety and van entirited the tental the leaves vides were found for the fendants, and there was a deeme according. Very encoul excellent the tental angued error in their the leave of parentage was author to the jury, but the court that complaines and no method to

issues to the jury and that she therefore could not be heard to complain.

The other case is Gorden v. Gorden, 263 Ill. 182, where Adolph Gorden filed a petition in the County court praying that an order admitting to probate the last will and testament of Randall Gorden should be set aside. The petition averred that Adolph Gorden was the sen and heir of deceased. Upon motion of the executors of the will the cause was set for two distinct hearings, the first to be upon the issue as to whether petitioner was the legitimate son of the deceased, and the second to be upon the issue as to whether he had any interest in the estate. The County court found the first issue against the petitioner and dismissed his petition. As real estate was involved there was an appeal to the Supreme court where the order was affirmed, but a careful reading of the opinion fails to disclose that the practice was complained of or discussed in any way. These cases while interesting are not persuasive.

record we find that the issues as the same were developed upon the trial were inextricably weren together and that a hearing at which the evidence material to both issues was presented for consideration would have made possible a much more catisfactory review of the record. If defendants desired a separate and preliminary trial upon the issue of parentage, that issue should have been raised by a plea in abatement and by answering they waived their right to any such separate trial. The effect of the order allowing the motion therefore was to give to defendants the benefit of procedure to which under the pleadings in the case they were not entitled. The court erred in allowing this motion and in refusing to set it aside. However, we would not be disposed to reverse for such a technical error were it not for the fact that a careful examination

is ease to the jury and that she therefore could not be beard to

The other case is Corden v, Carden, 265 Ill. 182, where and noticely flower threes not no onletter a heart makes plained to immersed han illy foot out of dery of nalified tobre ne Remeal vertee mouth be not entite, The most time everyon than To notion and thelph Sorden was the sen and helr of deceased. the executors of the will the cours was set for two thecinet hearlarge, the views to be upon the times on to winding politicaterina the legitimate one of the deciment, and the seased to be upon tague as to whether he had any interest in the estate. The Countr begularit han remailise wir to all and the the thing of the his patition. As real catale was involved there was as seened to and the War see a last of the section and a section of the section and the section of the sectio and the sale and the control of the sale and the sale and the sale winters of at descent to any may. These seems will to interesting are het herrqualive,

After a coreful ended of all the evidence in tale and the first and the fer orenidoration would have made possible a much more extinfectory veries of the record, if defendants desired a esparate, and preliminary trial upon the issue of parentage, that thene whould have been rate of by a plea in chatement and by enevertes they naired their right to any auch separate trial. The effect of the order allowing the action therefore was to give to defendants the bounds of pracedure to which when the metion and in refusion to set it are court erred in allowing this metion and in refusion to set it eacher, we would set be disposed to reverse for such a seide teacher arrors are the first fire feet that a current or set it as action and to reverse for such a

of the whole record discloses that the result was a substantial injustice to complainant.

An extended oral opinion was delivered by the chancellor and this has been preserved in the record. His conclusion from all the evidence was that complainant was the son of Alice longley but that the evidence failed to establish that he was the san of Albert Longley. This conclusion seems to have been largely determined by the fact that in the opinion of the chancellor certain letters written by complainant to Albert Longley failed to disclose a filial affection upon the death of Alice Longley, which took place at Legangeles, California, September 13, 1927. It is asserent from the opinion of the court that the conclusion of the chancellor was reached after much hesitation. We shall not undertake to discuss the evidence in detail nor express an opinion upon the weight of it in view of the conclusion to which we have come. It will be sufficient for the purpose of the opinion to say that the evidence discloses with certainty that more than a year prior to the death of Albert Longley he and defendant Mary Caroline, his widow, were made aware of the fact that complainant claimed to be the pon and hoir by Alice Longley. The evidence tends to show that the letters of complainant to Albert Longley were suppressed; that the desire of complainant to communicate with Albert Longley was denied; that he was excluded from the home of Albert Longley; that the police of Pasadena were called for the purpose of keeping him out of the home, and that he was denounced to the public authorities as an impostor. It also appears that the signature of Albert Longley, the testator, was obtained to an alleged affidavit which karch 14, 1926, was sent to the Chicago Title & Trust Co., executor under the will. This affidavit in its own language purports to state "all the knowledge that I have of one George Adair Green." Without passing on this affidavit or the weight of it, it will be sufficient to say that it does not truthfully state the facts as disclosed by

of the whole record dissipace that the result was a substantial

TALIFORNIE AND HE SETENATED HAVE READING FROM BUILDINGS IN and This has been of earpean in the reacht. His morehance from refered to his now out any transforms Jari saw eachive edt fie To mea said one and sand dallinger of halie's conchive and tadd tad This conclusion some to have been lurgely de-Albert Longley. tayed by the Yeat than in the exhibit of the chamoullat serials escionib of bolist gaignoù étodia es suchialemen es mossire en le l arrive data deprint dags the test at the senter, which had your at bosingeles. Culifornia, September 13, 1927. It to apperent from say peliconeds out to solutioned and their sait to related and manush of ouritable see Hade av . moistined down tothe bodoes to it is not own marairo as section one flats of someive add it in view of the conclusion to which we have done. It will be sanghise wit that the paragraph the contract that the contract time talling disclose with certainty that more than a year prior to the death of Albert Longley he and dal miduck Mary Caroline, bis widow, were ine one out of or beginso familiation full for our obse helr by Alice Longley. The evidence tends to ring that the letters walnut will find theatespace warr yelland furthe at familedown jent theires ear relyand drouth dity educations of family femes to volley and tand tradia to amed one nor't before now id Pandona vers called for the purpose of keeping him out of the ne se suitined he was descended the public action of daily him . smooth It also appears tent the signature of Albart Longley, the toward delive divablicia hopelis me of bonishis was a related to lend, was cont to the Chicago Title & Frust Co., executer under the will. This affidavit in its own language purports to state "HI IN MARKERING BAIL I NAME OF ONE DECKE ARRESTS OFFICE." VICTORIA imploition of filly it, it to supply out to styphito othe me gaineng to may that it does not braining against the court in that you at

an overwhelming preconderance of the evidence with reference to the relationship that existed between the testator, Albert Longley, and complainant from his earliest years up to the time of the death of his mother Alice, which took place at LosAngeles as stated above. It is in our opinion most important to ascertain as far as possible the circumstances under which this affidavit came into existence and the mental and physical condition of the testator at the time it was made. Indeed, the facts and circumstances in this regard from the time of the execution of this will and with reference to the influences brought to bear upon Albert Longley are, as we conceive them. Important not alone upon the issue of whether undue influence was used in order to bring about the execution of the will and codicil, but also upon the issue of the parentage of complainant. All those facts cover a much less period of time than that which was covered in the endeavor to accertain the facts in regard to complainant's parentage.

It is obviously unjust that complainant should be put to the expense of two law suits when only one will suffice. In the endeavor to confine the issues to the single one of parentage, much evidence was excluded which in our opinion should have been admitted. We should also, we think, point out the evidence of the witness Buttelph which should, in our opinion, have been admitted in evidence; also the written statement of Robert Green with reference to the parentage of complainant. (Complainant's exhibit 106.) The evidence of Clarises Burnidge also should be admitted for whatever it is worth.

Not only do we think that this cause is one where in justice to all the parties the issues should have been tried together, but we also believe that concerning the issue of parentage the chancellar might well have taxen the advice of a jury. The language of the Supreme court in a much less important case, Russell v. Paine, 45 Ill. 350, is applicable here:

and all represented fully communities may be become throughout any all all any one Pelarinament four contract persons the testator, Albert Levilve and The classic and the sector will be account to a little and a sector and all and a sector and a s one eine ame fivabilla sint noine As resulted only to sold home Lackayin has liden a line and all the time it was made. Indeed, the feets and chromose in this server olde has like wild be neighbors off to end out both brane as , one yolyaci brodia need need of the word seemential ods of need vanious he would still some minds due Profitioned , built byleasted by to muliusone sur issue gaine of tobic at been any secontral outers to specimense suff to assert and negs onto first limites and film and mini amid to believe meal down is toyer ason't enough Lla : Smanla Lorena that will new your ed the endeavor to become and in the tarte as parament a complainment a permitted

for only do e think that this cause is one wase in jurtice to all the parties the large should have been trick together. but we also believe that ouncerning the issue of purmings the but we also might well have taken the odvice of a jury. The lancuage of the hapsing court is a unun loos important case. Happell . Paine, 45 Ill. 850, is applicable here: "This is of that character of cases where the chancellor should require an issue of fact to be formed, and tried by a jury. In such a conflict of evidence, and where there is such uncertainty as there is in this case, the issue may well be submitted to a jury for their determination. It is within the discretion of the chancellor, at any time before a decision is arrived at, to require such an issue to be formed. Where the evidence is contradictory, depends upon alight circumstances, the veracity of witnesses is involved, and where the manner, intelligence and relation of witnesses to a case, must have their proper weight, it is highly desirable that the issue should be tried by a jury."

The record shows some chillful fencing between opposing counsel upon the proposition to valve the incompetency of the parties under the statute and permit them to give their testimony. The decision at which we have arrived will enable these parties to enter into such agreement if it in fact is desired.

For the reasons we have indicated the decree of the trial court will be reversed and the cause remanded with directions to take the evidence on both lacues and submit these issues to a fury.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., concurs.

more astisfactory decision could be arrived at if all the evidence on both issues were before the court. The two issues were weren together and the evidence as to what transpired during the last few years before albert died would be pertinent on both insues.

For this reason alone I concor in the conclusions in the foregoing opinion.

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Mellurely, B. J., communa.

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PROPLE OF STATE OF ILLINGIS, Defendant in Error,

VB.

DUNCAN TURNER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

268 I.A. 6295

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is one of three cases consolidated for hearing in the trial court and in this court. The information filed on September 2. 1931, in each case charged that in January of the same year defendant unlawfully, knowingly and wilfully encouraged the boy named in this case. Curtis Sears, to become a delinquent child in that "he, the said Duncan Turner, did harbor and keep the said Curtis Sears in a club house on Ardmore avenue and Indian road, in the City of Chicago, under the supervision of said Duncan Turner. and did cause Curtis Sears to commit indecent and lascivious acts and conduct." There were motions for a bill of particulars and to suppress certain evidence, both of which were denied. Defendant waived trial by jury, and there was a trial by the court with a finding that defendant was guilty as charged and judgment that he pay a fine of \$200 and stand committed to the House of Correction until the same was paid. Defendant refused to accept an offer of the Judge to be put on probation. Prior to the entry of judgment motions for a new trial and in arrest of jud, ment were overruled.

It is earnestly contended that the motion to suppress should have been allowed for the reason that the evidence, which consisted of certain photographs hereinafter considered, was obtained by the State through an unreasonable search and seizure. The pictures were found in defendant's possession. They were taken without a search warrant and, the evidence for defendant tends to

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MR. JUCTICE RATCHETT INLIVERED INS OFFICH OF THE COURT.

all at antreed to't bejubilionance event and to one at sing trial court and is this court. Her information filed on Sectomber at less, in each case charact that in January of the came year deton one to ancount villally and villally ancounty to the total von the transfer to the total villally and the transfer to the total villally to the transfer t pased in this case, Varite Sears, to become a delinguest called in bles out good has reduced bit , warm funcial bles out to the Curita Soura in a club house du Ardwore avenue and Indian real, in the City of Chicago, under the supervision of raid Buncan Tarair, agas directions in the commit indecemb and laurices and the and conduct. " There were mediena for a bill of sarticulars and to suppress cartain orthance, beth of which were dealed. Defeated a list fund out of their was a trial by the court was a lair a bear a of said smombat has because se willing any suches too said nathad? me increased to dound that the death and and to the court a gas to golfo was some was being the refused to accept as offer of the Judge to be put on probation. Prior to the entry of judga-wit halurrayo erew dum hul to duerra al ham lairs wen a rot smallen

is in earnessly contended that the notion to suppress should have been allowed for the reason that the evidence, which consisted of certain protographs hereinstice considered, was one taked by the State through an unresconstic search and celeure.

The pictures were found in defendant's poseculou. They were taken without a search varrant and, the evidence for defends to

ohow, without his consent and by force. The police officials, however, testified that defendant consented, and the court apparently believed their testimony. However, the matter is not important or controlling in view of the conclusion at which we have arrived after a consideration of all the evidence.

There is practically no conflict in the evidence. Defendant, an accountant out of employment, and owner of property at 5433 Rosedale avenue in Chicago, in March, 1930, sponsored and caused to be incorporated an organization known as the "Whitehall Athletic Club." The object of the organization was stated to be to promote the moral and spiritual welfare of its members. The membership of the club consisted of boys under seventeen years of age and of boys exclusively. Girls were not admitted to membership. A clubhouse was leased in close proximity to defendant's home, and the activities of the club seem to have been under defendant's management and direction. A number of pictures of boys in the nude were taken and some of them hung on the walls of the clubhouse. From these boys and under the direction of defendant a so-called "Polar hear Club" was organized. The members of this club were accustemed and expected to brave the wintry storms and snows unclothed. Some of these pictures, as already stated, were hung up in the clubrooms to which, the evidence shows, the fathers and mothers of many of the boys were frequent visitors.

Defendant testifies that the object of the pictures was to point out to the boys that they must be decent in mind and body, and that the pictures showed that they were all clean, decent boys. He further testified (and his testimony in this respect is not contradicted) that one of the boys who testified against him was put out of the club for being quarreleone and using bad language; that another of the boys complaining was put out of the club because defendant saw him "running around in a Ford and picking up

show, without his sensent and by vares. Ind police officinis, herever, testified that defendant sensentes, and the court sparently heldered that testiment, deverer, the metter is not important or sentrolling in view of the conclusion at which we have arrived after a equal-tention of all the evidence.

lbara la proctionlly ne conflict in the evidence. se virous le rome han . incluyelone to inc junt ma and . inc had been all and the control of the control of the control and the control of the Cincles in we are as an aread not be are to a post of od of boar a at ad at hapate new anitanimans, but in spaces out . ". Bull adjugate -code and the market and the state of the contract of han one to among months as and a police of the gide of boys mainsively, Girls were not adulted to mainten by the ..... and a trail of the property of the act to a comment of a language but maken moved would us move of the walk to to be relevable and menogement and direction. A number of pictures of boys in the number were taken and some of them hour on the walls of the challenge. Belien-on a funduatel to seliperize and tabus has eved sould moth erou dite was organized. The members of this will were one sweet has naveda yajule vel event of halonger has bemelacoon dome of three pictures, as already stated, were hune un clothed. in the clubrooms to which, the syldence says, the fathers and mothers of many of the bays were frequent visiters.

Defect out to the baye that the oblect of the pictures was to gent to the pictures that they must be decent in mind and hedge, and that the pictures aboved that they were all allow, decent buys. We further testified (and his test many in this respect to not sentradicted) that one of the boys who testified explant his respect to the club for being quarrelease and using but imaguage; that emainer of the boys complaining was gut out of the club to cause defendant now him "ramming around in a ford and picting up

strange girls." and told him he would have to get out of the club; that another witness was put out of the club when defendant found he had stolen books, and that he was suspended for smoking.

Our attention has been directed by the State to certain letters written by defendant to one of the parents complaining against him, which indicate that a controversy existed in regard to the failure of some of the boys to pay their dues, and an examination of them shows the same to be of a very abusive character.

These letters are abusive in the extreme, but in no sense indecent.

The long time which elapsed between the taking of these pictures and the time of filing complaint indicates to us that the meral welfare of the community was not at the basis of these procecutions. There is no proof in this record that any one of these boys ever became in fact delinquent within the meaning of the statute. We are aware, however, that the actual fact of such delineuency is not a necessary element of the crime here charged. (People v. Klyczek, 307 Ill. 150.) Nevertheless, it is necessary that the specific crime charged in the indicement be proved (Feople v. Day. 321 Ill. 552), and the specific allegation here is that defordant knowingly and wilfully was guilty of acts which tended to cause the delineuency of these boys, in that the conduct to which they were persuaded by him was indecent or lassivious. The taking of a picture of a boy unclad where no members of the other sex are within view has never, so far as we are aware, been held to be such an act, and a picture of an unclad female was held to be not of itself indecent in City of Chicago v. Jackson, 187 Ill. App. 244. In Rex v. Crunden, 2 Campbell's Reports, 89, a man who went in swimming unclad within view of homeo of families was held guilty of an indictable offense at common law, and that such is the law we have no doubt.

Acide from the undisputed fact that these pictures were

strange cirls." and told him he would have to get out of the club; that another witness was put out of the club when defendant found.

letters written by defendant to one of the parents complaining
the failure of come of the boys to pry their dues, and us examination of their shows the came to be of a very absolve character.
These letters are obusive in the extrame, but in no come indepent.

The long time which alapsed between the taking of those

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The Judges of this court may not agree upon the question of whether such an organization was conducive to the moral welfare of the youth, but that is not the question which we are here called upon to decide. The question is whether defendant is guilty of a crime as defined by the statute (see Laws of Illinois, 1915, p. 369) and as charged in the information. In the determination of that question this conviction ought not to be allowed to stand, unless this defendant is guilty beyond a reasonable doubt. Applying that rule and resolving every reasonable doubt in favor of defendant, as it is our duty to do, we hold that he was not guilty of the specific offense charged and that the judgment should be reversed.

McSurely, P. J., concurs.

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PEOPLE OF THE STATE OF ILLINOIS.

Defendant in Error.

YS.

DUNCAN TURNER,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CRICAGO.

268 I.A. 630

MR. JUSTICE KATCHETT DELIVERED THE OPINION OF THE COURT.

This case is one of three which were heard together in the trial court and consolidated for hearing in this court. The facts and the law applicable have been considered in an opinion this day filed in case No. 36009, and for the reasons stated in that opinion the judgment in this case is also reversed.

REVERSED.

McSurely, P. J., concurs. O'Connor, J., dissents.

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ME. JUDICE MATCHET BELLVIER THE SPIRIOR OF THE GOURT.

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Columnst, J., discharts.

PROPES OF THE STATE OF ILLINOIS.

Defendant in Error.

VB.

DUNCAN TURNER, Plaintiff in Error.

BRROR TO MUNICIPAL COUNT

268 I.A. 630<sup>2</sup>

BR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case is one of three which were heard together in the trial court and consolidated for hearing in this court. The facts and the law applicable have been considered in an opinion this day filed in case No. 36009, and for the reasons stated in that opinion, the judgment in this case will also be reversed.

REVERSED.

McSurely, P. J., concurs.

O'Connor, J., dissents.

POURSE OF THE STATE OF EXISTOR. Defections in steel,

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SHREET TO SUBSTITUTE OF CHIZGAGO. 268 I.A.

MR. JUSTICE BATCHETT DELIVERED THE OFFICE OF THE COURT.

This case is one of three which were heard to one at seas aim the trial court and concentrated for hearing in this court. The facts and the law epplicable have been considered and one epinion this lay filed in case No. 36000, and for the reasons stated in that opinion, the judgment in this case will sho be reversed, We divise to the state of

Meduraly, P. J., concurs.

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V. E. HOVER, Defendant in Error,

YB.

EWALD WIRTHS, Plaintiff in Error. ERROR TO SUPERIOR COURT
OF COOK COURTY.

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MR. JUSTICE RATCHETT DELIVERED THE OPINION OF THE COURT.

Mover v. Wirths, 264 Ill. App. 620. The action was brought in case for injuries which plaintiff sustained on June 13, 1928, when the motorcycle upon which he was riding collided with an automobile owned by defendant. The collision occurred at the intersection of Jackson boulevard, a public highway running east and west, and Springfield avenue, another public highway running north and south, in the city of Chicago. The declaration charges general negligence in several counts and in the third paragraph of the second count charges defendant "so wilfully, wantonly, recklessly and unlawfully drove, managed, controlled and operated his said motorcycle" that plaintiff was injured, etc.

At the close of all the evidence defendant moved the court for an instruction in his favor, which was denied. He also moved the court to direct a verdict in his favor as to the second count, which averred wilful and wanton negligence. This motion was also denied. The court thereupon at the request of defendant, in addition to the usual forms, gave to the jury two forms of verdict covering only the second count of plaintiff's declaration, namely, whether defendant was guilty or not under the second count. The jury returned a verdict finding defendant guilty generally and assessing plaintiff's damage at the sum of \$10,000, and also returned a verdict finding defendant guilty under the second count. There were motions for a new trial and that the special verdict returned under the second count should be set aside, which were

W. M. MOTHER.

Dofendant in Beros.

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WALD VINITED,

Plaintiff in Lerer.

FRRCH TO SUPERIOR COURT
OF COCK GOURTY.

268 I.A. 636°

AND RANGES OF NA PRINCIPL OF CONTRACT PRODUCT AND PARTY.

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over for injuries which plaintiff sustained on June 13, 1923, when

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At the class of all the evidence defends moved the court for an instruction in his favor, which was denied. He also moved the court to direct a verdict in his favor as to the second court the court to direct and registence. This motion was also denied. He court thereupon at the registe of defendant, in addition to the neval forms, gave to the jury two forms of verdict tion to the neval forms, gave to the jury two forms of verdict whether defendant was guilty or not under the second count. The account plantiff's damage at the such of the count also returned a verdict finding defendant guilty under the second count. There were motion for a new trial and that the special verdict returned under the second count.

overruled, as was a motion by defendant in arrest of judgment, and judgment was thereupon entered against defendant, from which this second appeal has been perfected.

It thus appears that two juries have passed upon the issuce between these parties, both of which have found defendant guilty of negligence and one of which has found him guilty of wilful and wanton negligence, and these verdicts have been approved by two trial judges who saw and heard the witnesses. An Appellate tribunal is under such circumstances reluctant to reverse a judgement. Barkevich, Adm'x v. Atchison, Topeka & S. F. Ry. Co., 263 Ill. App. 1. An examination of the briefs of the parties and the opinion of the court filed in the former appeal discloses that no point was made by the parties with reference to wilful and wanton negligence. The case was therefore presented by the parties and considered by the court on the theory that it was necessary for plaintiff to affirmatively prove that at and just prior to the time he was injured he was in the exercise of due care for his own safety; in other words, that he was not guilty of centributory negligence. In that opinion this court stated:

"It is urged in behalf of defendant that the verdict of the jury conflicts with the clear weight of the evidence, and we are of the opinion, after a consideration of it, that plaintiff did not prove - which it was necessary for him to do - that he was in the exercise of due care just before and at the time of the accident in which he was injured. We reach this conclusion, assuming his own testimony gives a true and correct narration of the circumstances under which he received his injuries. He says that he could see the automobile of defendant as it approached from the west. His view was unobstructed, but he does not say that he did anything which would in any way tend to prevent the collision. It was just as much his duty as it was the duty of defendant to be on guard and to use reasonable diligence to the end that the collision might be prevented. """

For the reason that the verdict is clearly and manifestly against the weight of the evidence so far as the care on the part of plaintiff is concerned, the judgment of the trial court is reversed and the cause remanded for a new trial."

An examination of the former record discloses that by neither of the parties was the plaintiff questioned as to whether he did anything just prior to the hoppening of the accident and when it became apparent to him that it was about to occur for the

evernied, as was a motion by defendant in armost of fulgame, and

"It this appears that two juris a kers passed upon the issuch action the service and so with a serve the service and servic to white mid through the deal to and appenditud to willism willful and wanter menipence, and three vertiets have been approved by two trial judges who see heard the witnesses. An Appellate tribunal is agree as incompanded as in the server a july THE CONTRACT OF THE PARTY OF TH III. San. I. 'as executable of the sulets of the parties out the on sadt manejonin incom asyme't sat at beli't frace out 'to acialco morney has littly er asserted asky asirtes out we shan any Shion han so is a constant of he seemed of or one parties and han be parties on hand tot granspan saw it this ground and no drupp and ye harablance eds as take; such has so half avois viewisamille as litraleig we wif to's case to be referenced as an early of war aid name aid amid man vratualitation to vality, to any out that waste at existing ligence. In that epinion this court state!

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An emmineties of the reserved discloses that by restrict questions as to wester the restrict questions as to waster the desirable of the applies for the the three to be bone about to account the that to was about to ecount for the

purpose of preventing its occurrence. Upon this trial plaintiff was questioned upon that point and gave evidence tending to show that he endeavored upon ascertaining that the accident was imminent to decrease the speed of his motorcycle in order to prevent it. The sole reason therefore for which the cause was reversed on the former appeal is eliminated from this record.

It is earnestly contended by defendant that the court should have given the instruction requested at the close of the evidence to return a verdict for defendant and further that the verdict returned was against the clear weight of the evidence. If we had been of the opinion that plaintiff could not recover as a matter of law, the cause would not have been remanded upon the former aspeal. The opinion then rendered reviewed the evidence in detail. We did not find the verdict against the weight of the evidence so far as the negligence of defendant was concerned. The judgment was reversed solely because it was against the weight of the evidence on the issue of due care by plaintiff. We did not find the verdict of one jury to be against the evidence on the issue of defendant's negligence. We cannot now hold differently when two verdicts of guilt have been returned. A detailed review of the evidence was given in the former opinion.

The question of whether there was any evidence from which the jury could find defendant guilty under the second count, which charged wilful ad wanton negligence, is, however, now raised for the first time in this court. Assuming that there was no evidence tending to sustain the second count, this alone would not compel a reversal of the judgment since the other counts are sufficient to sustain the judgment. Scott v. Parlin, 245 III. 460; Price v. Bailey, 265 III. App. 356.

The question, however, of whether there was any evidence from which a jury could find that the injury which plaintiff sustained was wilful and wanten as charged in the second count is

rarrone of preventing its occurrones. Then this trial plaintist was questioned upon that point and your evidence tending to show mant to decrease the apend of his subsceptie is order to prevent

Place all last tenderter of Abinogana giferrare at all BASE THE SEASON OF THE SECTION OF CHARLEST SAFE MAY IN VALUE STORE STATES and tall tellight has find orthy not suffer a graves of anothing il .conchive and la sciplor une to est fantage usw hamuser selfrar as as appear to him thing plainter and to and to med had ov matter of law, the enues would not have been remaded upon the came unpaid the appalent contered year of the village to Sarion and rentage retains one that on bib of . Aladob at eridence so far as the negligoner of defendant was ennerged. MIN to idalow out funtage and it samped gloing bearever and domestate of the evidence on the losse of due care by plaintiff. We did not and no conchive est tunings of or greet one to softwow out built issue of defendant's negligance. We camet now bald differently when two verdicts of guilt bave been recurred. A detailed review are the evidence can given in the fact terms and the

The question of whether there my evidence from viled the jury could find defendent guilty maker the seems court, watch disreged wilful as weaten nestitance, is, herever, now relacd for the first time is this court. Accounts that there was no evidence the first time is this court, into alone would not compate a reversal of the judgment class the other counts are sufficient.

-and Thinkely delic graph out that but blues you a delice mout on the total second count in

raised on this record by the motion to set aside the verdict of the jury returned as to that count. <u>Ecoco v. O'Donnell</u>, 260 Ill. App. 544.

On this issue there was a share conflict in the evidence. The theory of plaintiff was (and the evidence tended to show) that furt prior to the accident defendant was driving his automobile east on Jackson boulevard and south of the center line of it: that he approached Springfield avenue, an intersecting street, and when about 75 feet west of it he crossed to north of the center and stopped: that there were no stoplishts at the intersection: that plaintiff was at the same time approaching this intersection from the east riding his motorcycle on the north side of Jackson boulevard and near the north curb; that the westbound traffic at that time of the day was very heavy, which defendant knew: that nevertheless defendant suddenly out across Jackson boulevard in front of this westbound traffic and near the northwest corner of the intersection, making a lefthand turn in front of the stream of traffic at a dengerous rate of speed. The jury was apparently convinced that the accident occurred in the manner described by plaintiff, and we cannot say that the finding was wholly unreasonable. If the accident happened in that way, the carelessness of defendant was so gress as to indicate a mind regardless of consequences to others. At least, it was a question for the jury whether his negligence was or was not of that kind. The jury found it so to be, and we cannot say either that there was no evidence to sustain it or that the evidence manifestly and clearly preponderates the other way. The form of verdict calling upon the jury to determine whether the negligence of defendant was wilful and wanton was submitted at defendant's request. The practice was unusual, but defendant is in no position to complain. The question as to the kind and character of defendant's negligence. if any, was for the jury. Killilay v. Hawk, 250 Ill. App. 222;

raised on this record by the motion to set saids the verdiet of the jury returned as to that count. Bosco v. Changell, No. 311. App. 564.

On this issue there was a misro confilet in the orthonos. (work of behave sometive and han) any Tilinkala to green't aff that furt prior to the againent defendant was driving but automotile east on Jackson boulevard and routh of the center line of it: that he appreciated to the property of the transplant of the and respect only to direct of hearth out it to says seet BY fueds month end stopped; that there were no attaints at the interportion; anti-necessal alia pullimenton enti core edi Jo ese Trivatelo 1809 monact to akk mare and no siverest and maker sees out mort alliers havedsesw suit finds firm stron add reas has bravelued that time of the day was very nearly, which he wis the that and deposits of the content of the state of the state of the section of the secti to verse fearition and uses has alliest busedless will to smott magram and to swert at mens board to a pathom, notices total will of traffic at a dangerous rate of speed, the jury was aspectative ed badfrash tames and at herricoco fooloos the tam accorded our allow ser anthal't out that the finding was wholly unrescondis. If the decidert hungered in that way, the eartlense and the coder of the security of the contract of the contract of the coder of consequences to others. At least, it was a question for the jury whether his negitience was or was not of that hind. tery found it so to be, and we come as as afther the chore was has tipalians somehive our roll to il alatans or combive on clearly proponderates the cites way. The form of vertice calling NAME AND THE PARTY OF BOTH ADDRESS OF TAXABLE BOT AND ADDRESS. toward all and weeken was salmile on actional and little was . Els lones at noither on at al tenher teh dud Lennun ouv abitaru on question as to the kind and downster of defendance and If mor, west for the large, Ellitary w, mask, man lit. App. Man;

Easco v. O'Monnell, 260 Ill. App. 544; Buck v. Alex, 263 Ill. App. 556; Seiffe v. Seiffe, 267 Ill. App. 23.

We find no reversible error in the record and the judgment is affirmed.

AFFIRMED.

McBurely, P. J., and 6 Connor, J., concur.

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AMBERTANA.

Harris A. A. and Phones I. A. and M.

PEOPLE OF THE STATE OF ILLINOIS.

Defendant in Error.

YS.

JAMES DeSTEFANO, Plaintiff in Error.

SEROR TO MUNICIPAL COURT OF CHICAGO.

268 I.A. 6304

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Upon trial by the court, a jury having been waived, defendant (plaintiff in error) on May 3, 1932, was found guilty of being a vagabend. Motions for a new trial and in arrest having been overruled, defendant was sentenced to six months imprisonment in the House of Correction. It is urged for reversal that the evidence was wholly insufficient to prove defendant's guilt beyond a reasonable doubt and that the information upon which he was tried was insufficient.

The prosecution was under section 270, chapter 38, of the Illinois hevised Statutes. (Smith-Hurd's Ill. Rev. Stats., chap. 38, sec. 270, par. 578.) The information, filed February 13, 1932, charged "heretofore, to-wit, on the 11th day of February, A.D. 1932, at the City of Chicago, aforesaid, defendant was an idle and dissolute person was went about begging, used juggling and other unlawful games and plays, was a runaway, a pilferer, a confidence man, a common drunkard, a common night walker, a lewd, wanton and lascivious person in speech and behavior, a common railer and brawler, was habitually neglectful of his employment and calling, did not lawfully provide for himself and his family. was an idle and dissolute person who neglected all lawful tuciness and did habitually misspend his time by frequenting houses of ill fame, gazing houses and tippling shops; that he lodged in and was found in the night time in an outhouse and in the open air without giving a good account of himself; that he was a thief, a burglar, a pickpocket, having no lawful means of support, and was habitually Police of the Commission of th

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JACO DANTALIO. PlaintiiT in Arror

SWAGE TO EULIGIPAL (41).

266 I.A. 630"

. JUSTICE MATCHART BELLVARED THE OPINION OF THE WAINT.

Unon trial by the court, a fury having bean naived, defendant (plaintiff in error) on may 5, 1852, was found guilty of peing a vegabond. Notions for a new trial and in arrest having be a secretic defendant was nonlessed to air mention imprirement in the House of Correction. It is arrest for reversal that the evidence was unaily insufficient to prove defendant's guilt beyons a shall that

sdi lo . SE resquio . OFE nelsose rebau any noliusesore sal Hilnolo Navined Statutes. ( Set to-Shard's 111, Rev. States., sung. ER, mes. EFC, par. EVE.; Inc teleposition, Films February 13, 1932. charged Theretere, to-wit, an the lith day of February. L.D. will me one your or the control of t and disapt hear, anima doud about the metal bear the man other unlawful games and plays, was a runsway, a pilierer, a confidence man, a common drumand, a common night walker, a level. wanton and lessivious person in spearing and behavior, a common team, or were been and been all addition of he world been aller and calling, did not lawfally provide for bile and line franch anny) and fulled the herealigns are seened adultable has a Chi or are and the heart years with the box of the parties of the box Tenn, paning houses and thering dunes; that he leaded in and was found in the mago air ni bae associate as al amit takin air al found? giving a good secount of himself; that he was a thior, a burglar, a pincept, having no leavily manu of support, and was hapivoly found prowling around steamboat landings, railroad depots, etc.

In support of the information a certified copy of the record of the Criminal court of Cook county in the case of People v. James Destefano was offered and received in evidence. It discloses an indictment in that court returned on December 16, 1928, for largery; that on motion of the State's Attorney the felony charge was waived; that defendant withdrew a plea of not guilty and pleaded guilty to petit largery, and persisting therein, the plea was accepted and entered of record, the value of the property having been found to be \$14; that a motion for release on probation was continued to December 22, 1928, when it was sustained, and defendant ordered released on probation for one year upon his own recognizance.

Evidence by a police official was given tending to show that that defendant in the Criminal court was the idential defendant in the case on trial.

Another officer testified that he saw defendant on Earch 22, 1932, at the entrance of the county jail, when defendant told him he was visiting an immate named Euzzie who was looked up there. The officer arrested defendant there with three other persons who were with him. The witness said that defendant was at that time in the lobby to the entrance of the county jail, was not committing any breach of the peace and was law abiding at that time. The next morning defendant was discharged from that arrest.

Another officer testified that he had seen defendant several times in the last eighteen months; that one evening about three weeks past he had with a squad car chased defendant, who was riding in an automobile with one Margeno, who the police suspected was driving a stolen car. The witness said that defendant at that time told the officer that how defendant, had not worked for about five months. An investigation disclosed, however, that the automobile was not stolen as suspected. The witness said that he did not know whether defendant had any lawful means of support or had any

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In support of the information a corrilled copy of the

the Criminal court of Cook county in the case of Mergin described and received in the crimina. It discount the closes an indiction in that court returned on Tosomber 10, 1980, for larceny; that on motion of the State's Attorney the Folony charge was vaived; thus defendant withdress a pieu of con guilty and pleaded guilty to petit isreemy, and persisting therein, the pleasures accepted and entered of recerd, the value of the property was accepted and entered of recerd, the value of the property of the Country Count to be 618; that a couldn't or returns on property of the Country Count

ant in the case on trial.

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income, but he said defendant told him that he did not work. The officer who verified the information testified that he had seen defendant three times in the past three and a half months. He saw him karch 9. 1932, when he served the warrant on him. Se also saw him February 13. 1932, in the Municipal court. de saw him December 28, 1930, at Harrison and Aberdeen streets, Chicago, in a Ford sedan with a man named "LeCosta." The official stopped and questioned them and defendant at that time said that he had not worked for five The witness said that he knew nothing of his own knowledge months. as to whether defendant worked or as to his means of support. saw defendant had an injured hand, and defendant teld him it was burned operating a still that blew up. This witness when recalled said that defendant was a "runaway" at any time he was seen; however, he always "fortunately" caught up with him; that he did not know defendant to be a confidence man, a common drunkard, a lewd. wanton and lascivious person, a common railer and provler, or, from his personal knowledge, a thief.

Another officer testified he had known defendant for about three years and had seen him within eighteen months prior to February lith probably twenty times, the last time being December 8, 1931, when he saw him riding in an automobile with hargeno. He chased him, thinking the automobile was stolen but found that it was not; that defendant at that time said that he could not work on account of his hand, and laughing said, "A still blew up on me." This witness said that he did not know whether defendant had any lawful means of support.

Another officer testified that he had known defendant for about two years and saw him October 16, 1931, with Margeno in front of a garage on Polk street, and that defendant told him at that time that he had not been working for about seven menths; that previous to that time he had helped his father on a peddler's wagon. The witness said defendant was not doing anything wrong in front

9155 .Arow son bit on sons who blos sank worth blaz of fut omeni -of goes had of fail belifted not bearing and belifter our resting Yeshand there thank in the roat three and a said marine, its age in March 9, 1938, they is sarved the warrant on him. He also new him Detructy 13, 1988, in the duninipal court. do saw him December the table of Shreton and Abreton streets, tillings, to a Jard sebeautions one begans laintly out "Labour," James and a like mat evit to the arm for her an fails blue and fund on such an tab line mail substituted and all to galaten went of Just blue security out all transports and are as at the service are as a service at naw 35 alii blod sanar tab han , hann at antat an han danbatob wa befined aposting a still that blew up. Tate witness when and that dat enders was a "remanar" at any time he was need; dec blo ad sust; the as we suggest "ylogensto"" wawle ad . tove und de endart to be a confidence man, a common drumtard, a levi. wanton and landvious porman, a common rather and provier, or, from his personal innerted and mort

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The rithest and defortest not doing anything wagen in Frent

of the garage; that he was badly in need of a shave and clean clothes and told witness he had slept in front of his own home.

The sergeant who arrested defendant testified that he went to defendant's home at two a.m. and found him in bed; that defendant got up and went with him to the station, and defendant told him he had not worked for six months. The witness did not snew of anything wrong done by defendant.

another officer saw defendant on the morning of February 6, 1932, at 1:30; he was then in an automobile with two men. Defendant told witness that Margene owned the muchine, and this upon investigation was found to be true. The witness asked defendant if he had been working and defendant said "No, the depression is on," and that is had been unemployed for six or seven months. The officer said that defendant was arrested because he was a suspect and that he was on that occasion discharged.

Defendant testified that he lived at 717 Abardeen street with an aunt and uncle; that in July, 1931, he was in an automobile accident where his left hand was injured; that the injury was still unhealed and he had not been able to do much work since; that it was a permanent disability and he did not have the same control and use of the hand he had before the accident. Defendant said he had an income from a truck from which fruits and vegetables were peddled: that hie young brother Marie peddled about four days a week and the income to defendant from that business was about \$22.50 a week: that the entire income averaged from \$35 to \$60 a week; that he took sixty per cent as his share because he owned the truck; the license, he said, was in the name of his brother because defendant had trouble with the Finance company; that he paid cash for the truck, a Chevrolet; that markings on it are "DeStefane" and it is an open truck. He said that he had done that work himself but was not able to drive the truck. In reply to questions by the court defendant

of the garage; that he was badly in need of a share and cleam

to defendant's beme at two c. m. and found him in bed; that defendant got up and went with him to the station, and defendant teld him he had not worked for aix mention. The witness did not anow of any-

Another officer can defended on the morning of February feedant told witness that haryon owned the manning, and this upon feedant to the vitness sered defendant if any catiguities was found to be true. The vitness sered defendant if and that he had been upontlyed for six or seven wester. The officer and ser said that defendant was arrested because he was a suspect and that he was on that coension discusses.

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In reply to questions by the court defendent

stated that the accident in which his hand was hurt occurred at Shelto and Marrison streets; that the accident was reported to the police etation at the time and defendant was at that time seventeen days in the hospital. Defendant also denied that he had told any of the police officers that he received injury to his hand from a still blowing up. On cross-examination he said he had been in the peddling business for about four years and was 26 years old; that the car involved in the accident belonged to him; that he could drive the car but could not drive a truck; that he had other lines of employment besides the fruit business; that he had worked one and a helf years in the coal mines at Meron, Illinois, fourteen months in bridge work with the American Bridge Company, Gary, Indiana, and three years at the Automatic Electric Company, Chicago. He stated he was not married.

Mario DeStefano testified, corroborating the statements of defendant with reference to the peddling of fruits and vegetables and to the ownership of the truck.

It is essential, in order to sustain a conviction for the offence with which defendant was charged, that the evidence tend to prove beyond a reasonable doubt the existence of a status such as is described in the statute. One act only, however unlawful, is not sufficient, as we understand it, to establish that status. The information should have charged a continuing offense, and the proof should have established the existence of a continuing offense, since such is the nature of the crime. It may be that defendant is all that the statute charges, but the evidence here is not sufficient to establish it beyond a reasonable doubt. The courts have no right to guebs away the liberty of a person.

It is not necessary to further discuss the evidence in detail. The judgment must be reversed on the authority of <u>People v. Rlein</u>, 292 Ill. 420, a similar case based upon quite similar evidence, in

of that the scallent is which his mead was hard orearred at this state of the fine seventeen while state the traction of the hospital. Defendant also dealed that the neaf told any still blowing up. On event-creating the raid he had been in the still blowing up. On about four years and was 25 y are old; that the car live has dealed as drive a seast; that he sould still blood of ampleyant besides the fruit backcoo; that he had other lines of ampleyant besides the fruit backcoo; that he had other lines at ampleyant besides the fruit backcoo; that he had other lines and ampleyant besides the fruit backcoo; that he had worked one and artist work with the hadren backcoo.

Mario DeStains trailited, correlated the southening of described of defendant with reference to the pudding of fraits and verticions and to the ownership of the truck.

It is creential, in order to sustain a consistent is the sections of the continues of the contribute of the contribute

It is not necessary to further discuss the evidence in delait.
The fudgment must be reversed on the nutrarity of <u>Bessie v. Ruis</u>,
202 III. 482, a shaller own based upon quite similar evidence, in

which the judgment was reversed by the Supra e court. See also the note to Harris v. State of Texas, in 14 A. L. H. 1481; Armatead v. State, 11 Okla. Orim. Rep. 649, 150 Pac. 511. The State's Attorney cites us to People v. Wolf. 199 111. App. 445, an abstracted decision which is distinguishable not only upon the facts proved but also in that the specific points here relied on were apparently not raised.

For the reasons indicated the judgment is reversed.

REVERSED.

McSurely, P. J., and O'Connor, J., concur.

The note to the first of the specific points have relied on very specific points have relied on very specific points have relied on very sparsely specific points have relied on very sparsely not rules.

For the reasons indicated the judgment is reversed.

Redurchy, P. J., and d'Connor, J., cencur.

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MARIA DELMAZZO, Appellant,

VS.

HARRY VOSNOS, MARY VOSNOS, JOSEPH W. CHULOCK and LOUIS JAFFIE, Annellees. APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

268 I.A. 6305

AR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff such defendants as the makers and guarantors of certain first mortgage real estate bonds of the principal amount of \$700. The bonds bear interest at the rate of seven per cent per annum, payable semi-annually on the 24th day of August and February of each year. The statement of claim averred that all interest due up to and including August 24, 1930, was duly paid; that on February 24, 1931, the interest became due on the bends, and that default was made in the payment; that, as the bonds provided, plaintiff declared the principal amount of said bonds due and payable, but that the same had not been paid.

The affidavit of merits averred that plaintiff had no right to accelerate the maturity of the bonds and set up the defense that since a suit in equity was pending to foreclose the trust deed securing these bonds plaintiff cannot maintain this suit at law.

There was a trial by the court and a finding for plaintiff in the sum of \$73.50, to reverse which plaintiff has perfected this appeal, contending that judgment should have been entered for the full amount.

Mach of the bends centains the following provision:

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Appellece.

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268 I.A. 6305

MR. JURYICH SATCHETT BWLLVHESD THE OFFICE OF THE GLURG.

Plaintiff and defendants so the omiere and guaranters of cottain first mortgage real estate loads of the principal amount of \$700. The bonde bear interest at the rate of seven per cent or amount, capable neal-sunually on the Sith day of ingust and Tebruary of ouch year. The statement of civil day everyod that all interest due so to and including August ha, 1950, was duly yaid; that on February 36, 1931, the interest became due on the bends, and that default was made in the payment; thus, on the bends provided, plaintiff declared the principal amount of said bonds age and payers, but that the case had not seen puls.

the affiderit of merits eversed that plaintiff had no vight to accelerate the too defense that the coult was persing to forestone the trust deed one caring these base the trust deed one caring these beats plaintiff council metalain this cuit at low.

There was a trial by the sourt end o finding for plaintiff in the sum of \$74.50, to reverse which claiming how perfected this appeal, contenting that judgment should bure been entered for the

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"Upon default in the papaent of intercet, or of the principal in the principal in deed and in succeptance with the terms and provietons thereof, of this lond, or of any of anis bonds."

That such provision for the acceleration and maturity of the bonds is valid and enforceable and that notwithstanding a percing suit to foreclose, the owner of such bond may maintain a suit at law, is so well settled in this state that a citation of authorities would seem unnecessary. A few of the more recent cases are Rankin-Whitham Fark v. Mulcohev, 344 Ill. 99; Steinberg v. Floster, Steel Corn., 265 Ill. App. 60; Schatakis v. Rosenweld, 267 Ill. App. 169, to which may be added the yet more recent case of Jauss v. Simon, No. 36010, in which an opinion was filed by this court hovember 14, 1932, and which is not yet reported.

Defendants have not appeared in this court in support of the judgment. As a jury was waived, the judgment will be reversed with a finding of facts and judgment here in favor of plaintiff, Maria Delmazzo, and against defendants Harry Vosnos, Mary Vosnos, Joseph W. Chulock and Louis Jaffie, for the principal sum of \$700 with interest at the rate of seven per cent per annum from August 24, 1930, until the date of the entry of this judgment, amounting to \$115.01, making a total sum of \$315.01.

REVERSED WITH FINDING OF FACT AND JUDGMENT HERE.

McSurely, P. J., and O'Connor, J., concur.

orision for the acceleration and maturity of the bends

defined a porting and the continuation was filed by this scurt devent box 1952, and which he publishes was filed by this scurt devent.

Defendants have not appeared in this court in support of the judgment. As a jury was valved, the judgment will be reversed with a finding of fiets and judgment here in favor of plaintif, Maria V. Chulook and Louiz Juffie, for the principal sum of \$700 with the set of the entry of this judgment, smounting to 115.01, making a total sum of \$300.01.

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McCarely, P. J., and O'Corner, J., concur.

We find as fact that there is due to plaintiff, Marie Delmazzo, from defendants Harry Vosnos, Mary Vosnos, Joseph W. Chulock and Louis Jaffie on account of the bonds here sued on, the principal sum of \$700, together with interest thereon at the rate of seven per cent per annum from the 24th day of August, 1930, until the date of the entry of this judgment, amounting to the further sum of \$115.01, and making a total of \$815.01, for which judgment is entered.

We find as fact that there is due to pisintiff, Lurie can as and server and feet and bests Jeffle on account of the bends here such on, the principal sum of \$700, together with interest thereon at the rate of seven per cent per armum from the 24th tay of Angust, to the further sum of \$115.01, and making a total of \$315.01.

GONDON A. RAMMAY, so Receiver for the ALBANY PARK NATIONAL BARK & TRUST COMPANY OF GNICAGO, Appellant.

YS.

James H. Prhatiss.

Appellec.

APPHAL PHOR MUNICIPAL OFURT

268 I.A. 631

MA. JUSTICE RATCHART DELIVERAD THE OPINION OF THE COURT.

on Sectember 1, 1931, plaintiff caused judgment by confession to be entered against defendant upon a note dated June 3., 1933, payable to the order of the Albany Park Sational Bank & Frust Company of Chicago, due ninety days after date, for the sum of \$1736.78. The statement claimed interest from December 31, 1930.

On October 7, 1931, defendant Glad a petition (which afterwards by order of the court stood as an affiduvit of merita) which in substance averred that the note had been paid in full through the application thereto of the proceeds of a centract between one Cowie and the Thite Cake Manor Syndicate, which contract Cowie had assigned to defendant. The affidavit averred that this contract was left with plaintiff; that the payments in question were made to the Fortage .ark Estional Each for the benefit of defendant, and that the Albany Park bank, through its authorized agent, promised and agreed at the time of depositing the contract that it would collect from the Portage Park National Bank all payments made to it by the syndicate or by any person holding contracts for the purchase of syndicate property and would apply the same on defendant's note: that the Albany Fark bank, by and through its duly authorized agent, collected the sum of \$6.500 and upwarts to be applied on this note, which was more than sufficient to pay it in full.

The juigment was set soide: there was a trial by jury, and

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Tan july ont van out calle; chere were a tried by jury, and

at the conclusion of the evidence plaintiff moved for a directed verdict in his favor, which mution was denied and the olurt on its own motion instructed the jury to return a verdict for defendant and against plaintiff, on which motion judgment was entered against plaintiff.

There is practically no conflict in the evidence us to matters material to the issues, and the controlling question in the case is whether under the uncontradicted evidence the affirmative defense of payment interposed by defendant was established.

Defendant in his argument has naggested a further defense to the effect that there is evidence tending to show that the note upon which out was brought had been altered after it was delivered. The only evidence from which such defense might be inferred was that it appeared from an examination that a paper was at one time pasted on the back of the note and had been removed. If this fact could justify the inference of alteration, such inference was wholly overcome by the uncontradicted probable and reasonable testimony of an employee of the Albany Park bank that the paper attached was a tag which he put upon the note for the purpose of identifying it as one of a number which the bank examiner had ordered charged off. He eave he put the tag on for the purpose of showing whether all or a part of the note had been charged to undivided profits. He also testified that no credits had even been entered on the tag.

The evidence from which it is argued that payment was established is an follows:

Defendant lived in Menilworth, Illinois. He knew one mac-Leod, who also lived there and who has since sied. Aucleed was president of the Albany Fark National Bank & Trust Co. He was also president of the Fortage Fark National Bank and the Irving Fark Sational Bank. He was also the trustee of a real estate There is practioning no ecalities in the evidence in the meterial to the lessons in the destroy and the controlling question in the determine or the controlling question in the determine or page of the controlling or controlling.

- In the second as a supplemental transfer a second and the second and out tast work of makend possilve at amout tout tookle out of new of rest. Jerethe ment bed figured and fine makes mous afon ... ed souls combat duce inline and complye time off .bayavile .. for som that it appeared from an apparation that is the some the game and the plant of the acts and and acts and the this fact could juckify the toference at alteration, such teller. many has alliable becalled as one of the assessed all all and and when there were the state of the state o restrant and tell paths and regreater, for redrig god at har britishly, teaper theretering the an one of a number witch the two being the present charged off. He maye he put the lar of its offer mirrore -us as because med but even on. To freq a to the redictor galvade divided profilm, the slaw tractities that the profite had over bone enterred on the tag.

-en now former that argued in a land ment sometre and the falless:

 syndicate known as the White Cake Lanor Syndicate. Fortage Park Sational Bank was depositary for the funds of the syndicate.

A man named Cowie had a centract with the syndicate under which he from time to time became entitled to payment of commissions. Cowie assigned this contract to defendant Frentiss. About December 2. 1939, defen ant through MacLood applied for a loan of \$5.5.0. which was granted by the albany Park butional Sank & Trust Co. Perendant testified that at the time of this transaction hackend took him to a window in the bank and told him to make a note for \$5.800, which defendant made. Rucked gave him a certificate of deposit for 1800 and a cashier's check for the balance after interest had been defucted. Defendant mays that Macheod told him at that time that the collections made on the Covie centract "into the Portage Park National Bank" would be applied on this note. He also says that MacLeod told him to write a letter agreeing that payments on the Cowie contract should be paid to the Albany Park bank until the note was paid. Defendant promised to write this letter, but dofendant did not (as the affidavit of merits asserts) turn over the Cowie centract to MacLeod either on that day or thereafter, nor does it appear that defendant ever sade any assignment of this contract.

Sowever, on January 2, 1929, defendant wrote as follows:

"Hr. Murray Macleod, Fresident Under Trust #3, c/o Portage Park Hatismal Bank, 4717 Irving Park Blvd., Chicago, Illinois. Bear Sir:

This will authorize you to pay on and after this date all sums of money due me under Cowis contract to the Albany Park National Bank & Trust Company, to be held as a reserve account for me to apply on any inactedness which I may have to said Albany Park National Bank & Trust Company. This arrangement will continue until all of my obligations with the said Albany Park National Bank & Trust Company have been liquidated; and you are authorized to make remittances referred to above until you shall have received actice from them that my obligations are paid.

Very truly yours,

(Signed) Jus. H. Frentiss."

aguitante hears as the thire tong house ognisate. Portuge Park testional bank was desputery for the fouce of the syndiante.

a mon named device and a succession with the contract of analysis homes to the company or inspirous sampler with an units much as surjust parametr James , religious Tour-estab as experience Mark Suspicios within A. 1879, derivative transport was not be local to local to line of the contract of the same greatest by the natural value heatened from a Trans to Per endent tootified that at has time at time transmeries kan see not see a sand of the last the last the base all the country of mis seet the stati triver a his even beatter, their restriction of the court flatter, our party of sented that the said to the total and the beauty of the beauty of the beauty of the beauty to the book tetrated. But was any a will be taked book and to that the the tell will edited, bade on the tests need then the sain all water will be believe and their dance from the right expenses crawner tand increase respel a address and bias how and ball again Alter Land ages questioned at along of bingin decision of made and upthe note one gold. Lefendant fronteed to uptee this lester, hat doand gave and (extern addres to strabilly out on) see his dampinet The contract to Tables alther on that day or theretare are the It ages which the car was not seen to see property of the Chevres

However, on January M. 1869, Authorians write no Johaner

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sili antion this me pay to pay the river to a vila aller the and aller the and aller the and an aller the and an aller the analy, and an aller the are aller are the are aller are allered to a a

Very tealy years, ". Frentles."

From time to time thereafter payments were forwarded by the Fortage Park Lational Bank to the albany Bank for application on the indebtedness of defendant and were applied in reduction of the same. On June 30, 1930, the Albany Park bank wrote defendant explaining the credits which had been theretofore made and stating that there was still due \$1736.76. The letter asked defendant to sign and return a renowal note for that amount due in minety-one days. Defendant signed and returned the note, which is the instrument and on. In August, before the maturity of the note, haddened lied.

There is evidence tending to show that the syndicate col-

lected \$5,800 which should have been applied upon the amount due to defendant on the assignment from Cowie. It was, however, never deposited to defendant's account in either one of the banks. As a matter of fact, the syndicate used this money to pay its own debts, the syndicate claiming that defendant had been, as a matter of fact, overpaid upon the Cowie assignment. As to the merits of that controversy, evidence was not produced which would enable a determination. Mowever, there is uncontradicted evidence that neither the syndicate, nor the Sortage Park bank, nor the Albany Park bank ever received any sums which were definitely set apart as belonging to defendant under the Cowie contract. There is no evidence in the record that any sum of money belonging to defendant ever came into the possession of any agent of the Albany fark bank who was duly authorized to receive payment of this note. The letter of January 2, 1989, authorized had ond to make payments in defendant's behalf under certain conditions. The payments were not made, and there is no evidence that the required conditions ever came into existence. There was no duty cast upon the Albany Park bank to make collection of debte which might be due to defendant and apply the

From time to time and more payments and reverse in reduction of the time time and were explicit in reduction of

There is evidence tending to show that the expense to assume the leaded for the second to described the second the second to described to describe the syndicate used this somey to ong its one of shot, overful upon the syndicate used this somey to ong its one that contraversy, evidence was not produced chior would conting a determinable. Moreover, there is no contradicted out to a syndicate, now the Seringe films built, now the alboop actions to describe the syndicate, now the Seringe films built, now the alboop outstook to describe the subsection of the strong to as relationed to the reserve that and or something to described ovidence in the reserve that any out of something to described the stronger to conting to described

ever done into the possessist of any agest of the Albany Perk bank
was duly actionized to receive parment of this soie. The letter
of Jenuary 2, 2000, extinctions in testend to make parments in defeadant?
beinelf under actions and tions. The parments were not made, and
there is no evidence that the resulted conditions great and into
outstance. There was no daty each upon the Albany Jack bank to make

ment with defendant, was the agent of defendant and acting for his accommodation. The agreement sight perhaps he so construed as to obligate him to forward to the Albany Fark bank any sums of maney which might be deposited in the Portage Fark bank to defendant's account, but the evidence does not show that the moneys which account ander the Cowie contract were ever so deposited prior to the death of MacLood. The were deposit of money belonging to the cyndicate in the Portage Fark bank, of which MacLood was president, some part of which ought rightly to have been set saids by the syndicate for defendant, could not (interpreting the evidence most strongly in defendant's favor) amount to the payment of his note.

McMamara v. Clark, 85 Ill. App. 439. This court has held that a more authorization to pay is not payment. Frank From So. v. Ervan, 185 Ill. App. 382.

We hold as a matter of law upon this evidence that plaintiff is entitled to recover the amount of this note with interest. American National Dank v. Voolard, 342 Ill. 148.

The judgment is therefore reversed with a finding of facts and judgment entered here for the amount due plaintiff. That amount is \$1970.25.

REVERSED WITH RINDING OF PACTS AND JUDGMENT HERE.

McSurely, P. J., and O'Connor, J., concur.

The agreement of and agreement of the second and and agrice for all advanced to the second agreement for the second agreement of the second agreement of the allege for a construct on to obtigate him to forward to the allege forth bear to before the second state after the agreement, but the second for any forward the second agreement, but the second second agreement of moneys weigh the death of inclosed. The more decodes of money belonging to the opticions in the forward forth bear, of soiler business, and preserves of the second second agreement, and the formation ought righting as here been and antiques agreement of the agreement agreement.

No hold on a natter of low upon this evidence then plains tiff is entitled to recover inc amond of this note with interpolation fations. Fair v. Tooland, Odf Ist. 144.

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Redurely, F. J., and Claprer, J., coreur,

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FISHING OF FACTS.

defendant upon the sate sued on in this case the sum of \$1736.76.
with interest thereon from December 31. 1930, to December 29, 1932,
the date of judgment, at 7 per cent per minum, amounting to the
further sum of \$242.47 and making a total sum of \$1979.25,
for which judgment in favor of plaintiff and against defendant
should be entered.

others by become

do find an facto that stome in due to plaintiff from all interest in December 29, 1932, and interest and of \$242.47, and value a latest sum of \$1979.25, and value as states and of \$1979.25,

SHERIDAN-PHONPTON AND ASNEX BUILDING CORPORATION, a Corporation, et al.,

YB.

ARTHUR J. DAARE et al., Appellants.

V199 .

SHERIDAN-BROMPTON AND ANNEX BUILDING CORPORATION et al., Appellees. APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

268 I.A. 631"

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Sheridan-Brompton and Annex Building Corporation, a corporation, filed its bill against Arthur J. Danne and others for an accounting and to enforce the payment of the amount found due for the purchase of 252 shares of stock and a proprietary lease in a co-operative apartment building, and that in default of payment of the amount so found due the certificate of stock and the lease be delivered up and cancelled.

The defendants answered the bill and filed a cross-bill making the complainant and others parties defendant. The cross-bill charged that the cale of the 252 shares of stock, a class "D" security, was in violation of the Illinois Securities act. It was cought to have the sale declared void, and the cross-defendants decreed to pay to the Dannes the amount they had theretofore paid on account of the stock and lease, together with reasonable atterney's fees, in accordance with the provisions of section 37 of the Illinois Securities Law. After the issue was made up the cause was referred to a master and apparently the hearing was had on the issues made by the cross-bill alone. The master found that some of the cross-defendants had not violated the Illinois Securities act, that others had violated section 14 of that act (Cahill's 1931 Stats., chap. 32, p. 770), and recommended that a decree be entered declaring

BULLDING CONTONATION, a Corporation, ot al.,

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APPRAL FROM SUPERIOR COURT

A JUNEAU DICOMON PLATFORM OF THE OFFICE OF THE DOORS.

The Sheridan-Brampton and Annos Muilding Corporation, a converting und to enforce the payment of the smeant found due for the purchase of SH2 abares of stock and a preprietary lease in a so-operative energiant buliding, and that is default of payment of the amount so feach due the cortificate of stock and the lease be delivered up and associed.

The defendants suswered two bill and filed a cross-bill meking the complainant and others parties defendant. The cross-bill charged that the cale of the SES chares of stock, a class "F" security, was in violation of the illinois Decarities set. It was cought to have the cale declared void, and the cross-defendants decared to pay to the Dannes the amount tacy had theretofore paid on securities for the stock and leave, together with resemble attorney's fees, is securities had leave, the provisions of section 37 of the Illinois Securities had apparently the hearing was had on the tenue was made by the cross-defendants had apparently the hearing was had on the issues cross-defendants had not violated the Illinois Securities act, that cross-defendants had not violated the Illinois Securities act, that others had violated section if the that set (Untill's 1911 State.)

the sale void and that the cross-complainants were entitled to an accounting. Objections were filed to the master's report by the Daanes but they were overruled. They were ordered to stand as exceptions before the chancellor; on a hearing the exceptions were sustained, the cross-bill dismissed for want of equity, and at the same time the original bill was dismissed on motion of complainant. An appeal was taken by the Daanes to the Supreme court on the claimed ground that a constitutional question was necessarily involved, but upon consideration by the Supreme court it found that no constitutional question was presented, and the case was transferred to this court. (The Sheridan-Brompton Corporation v. Daane, 348 III. 306.)

The record is voluminous and confusing. It is here in the form of two volumes, one of which is marked "Vol. 3." Upon examining the other volume we find that the page next after page 145 in that volume of the record is designated "Vol. 1." Then follow a great many pages and we find what is marked "Vol. 2" and the following page of the record begins with page number 1; making it very difficult to find any particular exhibit offered in evidence.

The substance of the finding of the master, so far as is necessary to state, is that the Sheridan-Brompton and Annex Building Corporation had an authorized capital stock of 11,000 shares of a par value of \$100 each; that it sold all the shares to certain parties as trustees of the Sheridan-Brompton Trust; that a few days thereafter the trustees entered into a written contract with cross-defendants arens & Dato, copartners, whereby arens & Dato agreed to act as sales agent for the trustees in the sale of the stock; that a few days thereafter, January 2, 1925, the cross-defendant, arens & Dato, Inc., was chartered under the laws of the State of Illinois, and thereupon that corporation entered into a written contract with Krens & Dato, the partnership, whereby the corporation was to carry

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The record is voluminous and conjusing. It is here in the form of two volumes, one of which is marked "Vol. 3." Upon examinating volume of the record is dustanced "Vol. 1." Then follow a great many pages and we find what is marked "Vol. 2" and that following pages and we find what is marked "Vol. 2" and that vory leving pages of the record begins with page number 1; making it vory

The substance of the finding of the master, so far as is a comparation had an anthorized capital stock of 11,000 chares of a corporation had an anthorized capital stock of 11,000 chares of a partite an tracted of the Mastidan-Broupton Trust; that a few days the trustees of the Mastidan-Broupton Trust; that a few days the trustees entered into a written contract with oreacted an antal second for the trustees in the sale of the stock; that a few days the truster, January 2, 1925, the cross-defendant, Erens & Date, Inc., was charest under the laws of the State of littles and thereupon that corporation entered into a written contract with and thereupon that corporation entered the derivation was to carry

out all the contracts of the partnership, which included the contract for the sale of the stock.

The master further finds that February 16, 1925, the Sheridan-Brompton and Annex Building Corporation as "issuer" and the trustees of the Sheridan-Brompton Trust as 'sellers" caused 11,000 chares to be qualified as "class D" securities under the Illinois Securities Law. And thereafter the corporation and trustees caused periodical supplemental statements, as required by the Illinois Securities Law, to be filed with the Secretary of State, the last of which statements was filed April 23, 1927, and in the following December the qualification of the stock was cancelled by the Secretary of State, apparently on the ground that the supplemental statement due about that time had not been filed.

The master further found that on May 27, 1926, Daane and his wife purchased from the trustees 252 shares of the capital stock of the Bullding Corporation and a proprietary lease of an apartment in the building, for which they agreed to pay \$25,200 in installments, and to carry out this contract there was an escrew agreement with the Chicago Title & Trust Company; that the Dannes paid 34,000 as an initial payment and made other monthly payments as required, to the Chicago Title & Trust Company: that the certificate of stock and the proprietary lease were placed in engrow: that the sale of the stock to the Daanes was negotiated by Erenn 9 Date, Inc., by their agent (Mdsall); and the master finds that "Brenn & Date, Inc., was a 'dealer' as defined in Paragraph (5) of Section 2 of the Illinois Securities Act;" that in August, 1929. the Daanes netified the trustees that they had elected to rescind the sale and demanded the return of their money; and he finds that on the hearing before him the Duanes tendered back the securities sold to them. The report them continues:

"Tenth: That all of the provisions and requirements of the Illinois Securities Law, with the exception of Section 14 thereof.

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is the purchased from the trustees 25% sarrang the cast of no be many gradely and a local property and had been been as the Mange operfered in the fullding, for widely busy carried to pay the firm to be deliberable, and he corry you Wist system there are so easier season of the property of the little party of the little party. expensed gifthon wells obserbas impore Labilat me we 000.11 . . . we required, to the Chi came Title # Trust company; thet the errpresent al bearing or a large residence of the desta to establish masting bada is open new approximate of the sea self to see and facility Date, Inc., by their agent (binall); and the master flude tant Leetlon R of the Liliania hearthice Act: " that the anguat, 1920. bulence of baken in had valle stall neglected and helition neman salt inds shall od has typnom rinds to amider out behause has also add on the hearing before him the leaner tendered buck the securities sold to thme. The report them continues:

"Ismth: 'And all of the provinces and requirements of the

were substantially complied with by the cross-defendants. \*\*\* as Trustees of the and Trust:" that Erenn & Dato, Inc., was found to be a "dealer" as defined by paragraph 5, section 2, of the law. "and as such did not comply with the provisions of section 14" of the Law "in that it did not file or cause to be filed in the office of the Secretary of State the statement required by said Section 14 to be filed by a 'dealer' after the stock of said Sharlan-Browston & Annex Building Corporation had been qualified as a 'Cless D' security." The master then finds that the release pleaded by the cross-def mlants outered into between the parties in another suit was not a release by the Dannes of the claim they were making in the instant case because that question was not invelved in any way in the settlement of the other case. The master then concludes that while the trustees, the sellers of the stock. had substantially complied with all the provisions of the Securities Law, yet he recommended that they be held jointly liable with Erenn a Dato, Inc., which he held was a "dealer", because the trustees did not see that Krenn & Dato, Inc., complied with section 14 of the Law. The master further concludes that the Sheridan-Brompton Annex Building Corporation, the "issuer" of the stock, had not violated the law; that Erenn & Date, copartners, 4id not participate is the sale of the stock to the Dannes, and that the crossbill should be dississed as to these parties.

The master further found that the Duanes were entitled to an accounting against the trustees and Krenn & Dato, Inc. The Duanes filed no objections to the master's report. Objections were filed by the trustees and by Krenn & Duto, Inc., which were overruled and, as stated, were ordered to stand as exceptions and were sustained by the chancellor, and the creas-bill dismissed for want of equity.

Summerous points are made by the Dannes in the brief filed in their behalf, claiming that there were a great many violations of

The master further found that the Beames were emitted to soccariing egainst the tractes and Krenn & Date, lon. The rere filed by the trustees and by from a Date, Inc., which were overraised and, as stated, were endored to stand as everythers and were suctained by the charaction, and the erros-him similard for auctained by the charaction, and the erros-him similard for applies.

thair be ulf. Claiming that there were a great many violations of

the Illinois Securities law not only by the cross-defendant truetees arens & Date, Inc., but also by other cross-defendants. It is contended that a number of sections and clauses of several sections were violated by the defendants; but we think none of these points is properly before us except as to whether there was a violation of section 14 of the act because the Dames did not file any objections to the master's report.

In <u>Old v. Reyer</u>, 277 Ill. 202, it is said, p. 205: "Counsel for appellant argues that the trial court erred in entering a decree holding that appellant was not entitled to a homestead in the property. Counsel for appellee insist that appellant cannot raise this question because he did not file the proper objections and exceptions to the master's report on this point. The general rule is, the court will not consider errors assigned on appeal based on matters considered by the master unless proper objections were taken before the master, and, if overruled, renewed in the trial court.\*\*\* But 'where the master in his report states all the facts correctly but is mistaken as to the legal consequences of those facts, it is not necessary for the party dissatisfied with the master's finding to except to the report, as the question decided by the master may be opened, upon further directions, without exceptions."

Wrong legal conclusion from them, then no objections need be filed to his report. But in the instant case, the master did not find what papers or documents were filed by the defendants with the secretary of State so that we might know whether his conclusions that the Sheridan-Brompton and Annex Building Corporation, the "issuer" and the trustees, the "sellers," had properly qualified the stock as "Class D" under the Securities Law, were well founded. If the Dannes desired a finding of fact by the master on this and other questions they now urge, they should have filed objections to his

the Illinois Sauritina law not only by the cross-defendant trus
to Date, inc., but also by stains cross-defendants. It is

tended that a number of sautions and clauses of several sections

tended by the defendants; but we think none of those points

violated by the defendants; but we think none of those points

to the master's report.

If the merter states all the facts correctly and draws a wrong leyal conclusion trem than, then no objections need be filed to his report. Set in the instant same, the merter did not find what papers or documents were filed by the defendants with the test rectary of biate se that we might know whether his conclusions that the Sharidan-irrepton and amount building Correction, the "issuers and the trustees, the "sellers," had properly mullified the creates as "the second the trustees the Sames desired a finding of foot by the master on this and other questions they new uses, they should have filed objections to his

report. Not having done so, under the authorities they cannot now contend that the master erred in his conclusion. Therefore the only question properly before us on this phase of the case is whether krenn a Dato, Inc., who through its agent sole the stock to the Dames, was a "dealer" within the meaning of Section 14 of the Act, the master having found that Krenn a Dato, Inc., was such dealer by reason of paragraph 5 of section 2 of the Act.

Section 14 provides: "After qualification of securities in Class 'D' by the issuer, any douler or owner may sell such securities upon filing in the office of the Secretary of State a statement verified by the eath of such dealer or owner as otherwise provided by this Act. a statement of the amount and Asserbation of the accuration to be sold by him or it, the maximum price for which they are to be seld, his or its address by street and number, qualification, occupation, and business experience of such dealer or owner for a period of ten years prior to filing much statement. giving name and address of each employer, the period of employment and the reason for resignation or discharge." Paragraph 5 of section 2, under the terms of which the master found that erenn a Dato. Inc., was a dealer, is as follows: "The terms 'dealer' or 'broker' shall include every person and every company, firm, trust, partnership or ass ciation, incorporated or unincorporated, other than a solicitor or issuer, that engages either wholly or in part in the business of selling, off ring for sale, negotiating for/sale of or otherwise dealing in any securities issued by another or by others underwriting, purchasing or otherwise acquiring such securities from another for the purpose of reselling them or of offering them for sale," etc.

Section 14 was passed in 1919, while caragraph 5 was not passed until 1925, when it was added as an amendment to section 2 of the Act. The master did not dinf, except inferentially, that

remark. Not having done so, under the maticalities they came a series now enly question property before us on this make of the case is to the language, was a "lealer" within the measures of Section 14 of the Act, the measure having frused that Trend & Set, the measure having frused that Trend & Set, the measure having frused that Trend & Set.

haldbroken by matterfilling mother, restigues all matters in Class 'D' by the Leaner, any dealer or owner may only a wil era named of the contract of the salitan and the matter of the same and them a ogivenso an reaso to telesh hour to sees out to helitor the To military by the transmitted of the manufacture of the transmitted and trans the mourities to to sold by bim of it, the minimum price for which ting are to be mild, his or the advence by wired and medica, paddi-"cation, occupation, and basiness erg-rishes of such design or gener for a period of ten years prior to filles and alaterent. inarreless to belter and the soin seeing to saraha has asserted and the reason for realization or discharge." Foregraph 5 of nontion 2, under the terms of witch the number found that arens & Dale, Inc., was a dealer, is no fellows: "The terms 'dealer' or 'broker' Mall tedals wher parent and every amount, 1214, 91-21, partners s made ment of allow to the second of the second of the second of the collector or tanger, that engages since wholly or in part in the in the end of inting, off with for only begothering for water of ye to redicin ye homes soldiness the al milisch esistente to others underweiting, ranging I or somethe agoing a of naceworld to me mail antilagon to engone and not remain and sold antila ing then for sale, " atc.

Saction 14 was pussed in 1819, wells exactuable was a new not passed on til 1818, when it was added as as newscenar to contion ? of the Act. The marker bit not dinf. exacts inferentially, that

Erenn & Date, Inc., was a dealer within the meaning of section 14 the of the Act. But whatever may be/true interpretation of paragraph 5 and section 14 above quoted, we are of the opinion that the question is not of importance here, because, we think, the statute was substantially complied with and all the information required by section 14 was on file with the Secretary of State.

Rebruary 16, 1936, a number of papers were filed in the office of the Secretary of State for the purpose of qualifying the 11,000 shares of stock under the Securities Law. These papers contained an inventory and appraisement. Twenty-five conies of the summary were also filed, as was a written irrevocable consent and power of attorney, required by section 16 of the Act, which was signed by all of the trustees of the trust and was under outh. These papers also contained a sworn statement of the amount and a description of the securities to be sold, the maximum price for which they were to be sold, the address by street and number. qualification, occupation and business experience of each of the trustees for a period of ten years prior to the filing of the document, giving the name of the employers of the trustees as required. The sale of the stock was brought about by Edsall, an employee of Krenn & Dato. Inc., and on March 9. 1925, certain documents were filed in the office of the Secretary of State qualifying Edsall as agent for the sale of the securities. These statements gave the prior occupation and experience of Edsall and were verified by him. Supplemental statements as required by section 20 of the Act were also filed with the Secretary of State in September, 1925, and March and September, 1926. September, 1925, an application was Tiles by Arenn & Dato with the Secretary of State for its registration under the law. This application contained a statement of name, residence, qualification, and business experience and complied with sections 13 and 23 of the law, and complied with section 14 of

Sebruary 16, 1926, a municr of guesta were filed in the efand gardilland to secure out not been to great and to said \$1,000 marte of start meder be formilled i.e. Chees regree contained an inventory and approlement. Twenty-Tive costs of the pur jurgue aldanovers intilian a was as ill cale over your mamma asy halifur . to a car to all not read by Lange, rement, which was align reliant one for fraction of the track ond was under only. s but summer sait to succession arrows a boulaince colo avega estall ter or the securities to be all its maximum price of the valon they were to be sold, the solitess by attent and manber, and to thus to semitreuse anesies one acidequees anites Fillaup truckers for a period of tem years orior to the filling of the deads and, giving the near of the encloyers of the trackers as required. to est of the stask was brought should by hidmald, as subleyes if Ayens & Bate, Inc., and as kareh 5, 1925, certain decuments on flecha naivilleus stask to yrajamost ent to enl'to cal al ball't out you admend the sant? . selfling out to also out to fonce while you hal'throw stow has also had be one its one is not not increase a raine stew the and to de notices of botheyer as alterestate laderes lagger else filed with the Secretary of State in destember, 1926, and March and Jentanber, 1936, seatenber, 1935, an application was "illed by drone a linke with the merciary of State for its registration under the less will applied ton contained a statement of neme, realdence, munitivelies, and business experience and complied To be unitous side to be and complete the as been as well as the as a with the Act, except that it contained no statement of the amount and description of the securities to be sold by it and the maximum price for which they were to be sold; that information, however, was contained in a statement filed by the trustees February 16, 1925. So that it appears that all the information required by the Statute was on file in the office of the Secretary of State and that there was substantial compliance with the law - a literal compliance is not required. So far as the technical violation of Section 14 by Krenn & Date, Inc., is concerned, if it be held to be a dealer within section 14 of the Act, it in no way prejudicially affected the Dannes.

In these circumstances we think the decree of the Circuit court of Cook county dismissing the cross-bill for want of equity must be affirmed.

DECREE AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

the Act, except that it contained no eletement of the enqual and description of the secrities to be sold by it and the marinus price for which they were to be sold; that information, however, was contained in a statement filed by the trustees february 16, 1925. So that it expects that all the information required by the Statute was enduated in the office of the Secretary of blate and that there was substantial compliance with the law - a literal compliance is not required. So far as the terminal violation of Section 14 by Erenn & Date, Inc., is concerned, if it is be held to be a little to the state of the section 14 by Erenn & Date, Inc., is concerned, if it is be held to be a little to the state of the section 14 by Erenn & Date, Inc., is concerned, if it is be held to be a little to the state of the section 14 by Erenn & Date, Inc., is concerned, if it is be held to be a little of the state of the section 14 by Erenn & Date, Inc., is concerned, if it is be held to be a little of the section 14 by Erenn & Date, Inc., is concerned, if it is be held to be a little of the section 14 by Erenn & Date, Inc., is concerned, if it is be held to be a little of the section 14 by Erenn & Date, Inc., is concerned, if it is be held to be a little of the section 14 by Erenn & Date, Inc., is concerned, if it is be held to be a little of the section 14 by Erenn & Date Inc., is concerned, if it is the section in the section

In these circumstances we think the decrea of the Circuit court of Gook county dismissing the creas-bill for want of equity must be siftened.

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ARLSON CULP, doing business as Belson Culp & Company, Defendant in Error,

vs.

FRED H. MASUKARN. Plaintiff in Error. ERROR TO MUNECIPAL COURT OF CHICAGO.

268 I.A. 6313

MR. JUSTICE O'CODEOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover \$2617.57 claimed to be due him for services in making an audit and doing other work in connection with certain companies in which defendant was interested. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for the amount of his claim, and defendant appeals.

The record discloses that R. k. Sweitzer was interested as a stockholder and otherwise in a number of corporations, and defendant, Massmann, held some bonds of one of the corporations. Both these men had considerable money invested in one or more of the companies which appeared to be in an unsatisfactory financial condition, and with a view of seeing what could be done a meeting was held, at which Sweitzer and his attorney and hasamann and his attorney were present; the condition of the companies was discussed and it was agreed that before any more money was invested an audit should be made to determine the status of the companies. The evidence offered by plaintiff is to the effect that at that meeting Sweitzer and Massmann authorized their respective attorneys to have the work done. The evidence further is that afterwards Cancon, who was an attorney for Massaany, got in touch with plaintiff, who was a certified public accountant. and employed him to so the work on a per diem basis, one-half to be paid by Sweitzer and the other half by Massmann. The work was done and the bill submitted, one-half was paid by Sweitzer, and

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tareast of Judgetal Judget then Interest Thillians \$2617.67 claimed to be due him for corrison in making an mudit at geliagenes alettes site solderance at Miov resite anich bas which defending was interested. Discovers trial before the of Tribale for all separates, but particular than greet, a supplied to a preside Company to the major of the towns on the year's

The report discloses that a. H. Sweiter Bus interpolect. as a stockholder and otherwise in a number of corporations, and dent, Nassmana, held some being of one of the cornections. eron to one at betreval grain single tenos had non enert aftell of the companies which aspected to be to us assaisfactory of history was with a view of the could be could be had your assa aid has resilent on the it as watten a care incommon, and his abterney were present; the condition of the grow was crotted sand horage and it has horauchly and celanguous and salaredeb at show as bluede time as becaved now years status of the companies. The evidence offered by plaintiff is haniyotikan nunuresi hun yendinwa guliesu sani in indi isalik adi si winds respective according to him the work done. The evidence farther is time afterwards commen, who was an attempt for bandum get in touch with plaintir, one was a vertified public assessment, and ampleyed him to do the work on a par dien bands, enc-half to new Arm off the live of the first but by Massaum. has , westieve ud bing new 'tlod-eno , had inde 1114 out has mach to recover the other nali of the bill plaintiff brings this suit.

The defendant's position is - and he offered evidence to sustain it - that he did not authorize the employment of plaintiff as an accountant, or otherwise, personally, but that it was the understanding that plaintiff, or whoever was employed to do the work, would be paid by the companies whose books plaintiff was to There is a direct conflict on this point. As stated. audit. plaintiff's evidence tonded to show that the work was to be done personally for Sweitzer and Lassmann, while that offered on behalf of defendant was that the work was to be done and paid for by the companies whose books were to be audited by plaintiff. This was a contreverted question of fact - the evidence was conflicting. The court saw and heard the witnesses and found in favor of plaintiff, and we are clearly of the opinion that we would not be warranted in reversing the finding of the trial court on the ground that it was manifestly against the weight of the evidence. From what we have said we think it appears that the contention of defendant that Gamon was not authorized by him to employ plaintiff to do work for him, defendant, personally, is equally untenable.

befordant further contends that the judgment is wrong and should be reversed because, even if plaintiff were employed as he contends he was, to audit the books of the corporations involved, yet the evidence snows without contradiction that plaintiff did more than audit the books; that according to plaintiff's own testimony he made investigations towards the rehabilitation of the properties, and that this work was not a part of the audit for which he was employed; - that if it be held that defendant authorized Gamnon to employ plaintiff to make an audit, this would not authorize plaintiff to perform other services; and since it does not appear from the evidence what part of the charges was made for the audit and what part for the other work, the jud, ment must be reversed. In reply to this contention plaintiff's counsel enys

the airs against Vilouity dipt out to hind said servers at of chartly horolie of the - st moliton afinahaela -Trigmbolo to impagatore ent coltentian des bit ed indi - il aferese i en accountent, or otherwise, personally, but that it was the ent at al beyoldes our revealer. This misse that guild anti-masses and at any Tildelale amond second selection out to blag ad bloom , whom there is a direct soulliet on tele print. As stated, anch of of now drow add tody wade of habout speedies of This whale There is briefly but the base of the party of the party of the and he had being that must not be more when high hard and descined the companies vance books very to be undited by sintactiff. This was a controported queetlos of that - the evidence was tentilething. -alofy to term't at band ban bacom in our brand ban was fried wall -may at Juny hims we had nothing and he grands was me and , India buncan only no grace delts out to guinal's out galerover of beginn that it was manifered, against the weight of the evidence. From what we have said we think it appears that the casterlies of ten Titalela quique of ali ad heattenine des num secuel dell lumber

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that plaintiff testified he was employed not only to do the accounting or auditing of the books of the corporations, but was also employed to make a financial investigation into the whole history of the companies; and further, that defendant is not in a position to raise this question because in his affidavit of merits he did not specifically deny the allegation in plaintiff's statement of claim, which was that plaintiff was employed "to perform professional services as a public accountant in examining the books, investigating the financial status and auditing the books, papers. assets, and liabilities" of the companies. We think this latter contention is untenable because the defendant, in his affidevit of merits, denied that plaintiff was employed by defendant "to perform professional services as a public accountant in examining the books, investigating the linancial status and auditing the books, papers, assets, and liabilities of the American Standard Corporation."

But we think defendant's contention cannot be sustained because a careful consideration of the entire record discloses the fact that this point is now made for the first time. It was not made on the trial of the cause, and it is elementary that a contention such as this cannot be urged for the first time in a court of review.

The judgment of the Eunicipal court of Chicago is affirmed.

APPIRED.

McSurely, P. J., and Matchett, J., concur.

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LAKE SHORE COURTRY GLUB.
Appellant.

VS.

NORACE L. BEAND, AREIS W. BRAND, ERNA BEAND ZEDDIES, FRIEDA G. BRAND, ROBERT V. ZEDDIES and ERDA N. BRAND, Appellees. APPEAL FROM DECREE OF SUPERIOR COURT OF COOR GENETY.

268 I.A. 631

DR. JUSTICS O'COMAGE DELIVERED THE OPINION OF THE COURT.

Complainant, as lessee, filed its bill to enjoin the defendants, lesses, from forfeiting its rights under a written lesse, or to be relieved from a forfeit if it had already been declared. After a hearing the bill was dismissed for want of equity, and complainant appeals.

The record siscloses that on February 1, 1909, Virgil 2. Brand, Horace L. Brand and Armin W. Brand, brothers, leased approximately 76 acres of land in Cook county, which with about 40 other acres was to be used by complainant as a golf course. The period covered by the written lease was 30 years - from the 1st of April, 1909, to the 31st of March, 1939. The rent to be paid was \$5,000 a year for the first five years and thereafter periodically advanced, and for the last ten years was \$7,000 a year. In addition to the rent complainant was required to pay taxes, assessments and incurance and to creet a club house on the premises at a cost of not less than \$25,000 prior to April 1, 1912; the clubhouse to consist of one building or a cluster of buildings cannected for club rooms, complete with modern appliances and equipment.

on the same day, February 1, 1909, the parties also executed an option contract whereby the complement was given the right to purchase the 76 acres for \$166,000 at any time prior to December 2, 1922, and after that date and prior to

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doublehant, as lesses, The its bill to enfels the defendance, lessers, from forfeiting its rights under a written to be relieved from a forfeit if it had already been the filles of the bill was disalosed for rest of south, and compleis on a senity, and compleis on a senity, and compleis on a senity.

The record displaces had an Jebruary 1, 1907, First separationicity V6 series of Land in Seek county, which with about a corresponding a correspond to the real county of county as a golf course. The period covered by the written lease was 30 years - from the lat of April, 1908, to the list of Larch, 1939. The rest to be cold was 15,000 a goar for the first live years and increality circumses, and for the institut was required to pay year. In addition to the rest counts institut was required to pay town, accesses at a cost of set less than 120,000 gries to heritate previous at a cost of set less than 120,000 gries to heritate previous as a continue as a cost of set less than 120,000 gries to heritate from previous at a cost of set less than 120,000 gries to heritate from the cidhege comments for city recent, countries of buildings commented for city recent, countries with measure.

On the seme day, February 1, 1869, the parties also essential an estimate was given the right to empirish the given the right to purchase the 76 mercy for 1240,000 of any time prior to be and other to be and other to

December 2, 1936, for \$175,000, provided it was not in default under the lease. Shortly after the execution of the lease complainant accuired about 40 other acres immediately adjoining the 76 acres on the south, and proceeded to construct a golf course on the property, and built a looker room and saddy house on the 76 acres at a cost of more than \$25,000. The 76 acres lay immediately west of Sheridan Road (which at this point runs in a northerly direction) in the north end of Cook county. Bust of Sheridan Road was a tract of about 10 acres which extends to the waters of Lake Michigan. The club secured this truct and decided to erect its main club house there, which was done at a cost of more than \$100,000. A subway was constructed under Sheridan road running from the main clubhouse to the looker rooms and caddy house. Four members of the club were permitted to build four private houses on the 76 acres, which were occupied by them in summer and for which the club received as ground rent 3500 for each building. The buildings were paid for by the four parties, each building costing about \$20,000. The golf course and all the buildings mentioned were completed and used by the members continuously: all rent, insurance and taxes were paid by complainant and the relation of the parties was amicable in every respect. So objection or complaint was made that the clubhouse was not built on the 76 acres, nor was there any objection to anything done or neglected to be done by complainant for a period of more than 17 years and not until after complainant Sentember 24, 1926, served notice on defendents that it would exercise its option under the lease to buy the 76 acres on September 20, 1927. On September 29, 1926, defendants notified complainant in writing that it was in default under the lease and could not elect to buy the 76 acres, specifying nineteen different defaults.,

September 30, 1927, the complainant filed its bill in the Superior court of Sook county against the defendants for the

secondar E. 1936, for \$178,000, provided it was not in default entarouse some fine to uniformer and tarket affected to an in the passes eston if her uninted at the control of the control of the fire of the control of on the court, and promoced to construct a polt course on the grouperly, and built a luciest room and eachy house on the 75 seres at a cost of more than IRI, will of or word lar lamediately west (neltowith glandfrom a at name taken whit he daine) hapi ambired to in the north end of Cook county. Hert of Charifan hoad was a track of shout lo serve wilds extende to the voters of Lois Michael. The club secured this tract and docked to erect its main club house there, which was done at m cast of more than \$150,000. A subservence of sampliful a the most more authorise to a make all and an interest to the looker rooms and ender house. Your members of the oldy were permitted to build four private houses on the 76 mars, which were Amora sa key lacer dula chi tolder not bus remove al mod ye belance rost 2000 for each building. The buildings were paid for by the four as a such building conting about TW. Call and P course and aradama gilt yd heen hus heteinine eres heanlinem agaiblind ant lle continuously; all yout, insurance and hames were paid by commandations . Japager yrove at classian are action of to metater out ton ne filled for new severidate sais that then new falalowes we noticely se the VS mores, nor was there any objection to mything done or neglock has array of muit oron to believe a net immistance of once ad of he not until after complainant teptember Md. 1926, served notice on deand gud of seast and rehau melico sit autorone bluon it fails alamina? 76 mores en September 20, 1987, On September 39, 1986, Asfondants and unhar though at may it that unlike at themislamon halithes loace and usuld not close to buy the Ve serve, apolitying almateem . . of Lumilab Justo 1712

September 20, 1927, the complainent lied its bill in the September of the senty egainst the defendants or the

specific performance of the option contract, and after a hearing a decree was entered requiring the defendants to convey the 76 acres. Defendants appealed to the Supreme court, where the decree of the Superior court was reversed and the cause remanded with directions to dismiss the suit. Lake Shore Country Club v. Brand. 339 Ill. 564. About five months after the dismissal of that case complainant filed its bill in the instant case to prevent defendants from forfeiting the lesse or, in the alternative, to relieve it from a forfeiture if one had already been declared.

Ceedings had in the specific performance case, claiming that complainant was estopped to contend that it was not in default under the terms of the lease. Exceptions were filed to the answer but they were everywhed. The case then went to a hearing and the chanceller limited the evidence, holding he was bound by the decision of the Supreme court in the specific performance case which, as he concirued it, estopped complainant from questioning that it was in default under the lease; a decree was entered dismissing the bill for went of equity, and complainant appeals.

The Supreme court in its opinion is the specific performance case discussed the lease, the option contract, and the evidence in considerable detail, and held that complainant was in default under the lease, specifying among other defaults that complainant had not constructed a club house on the 76 acres; that it had taken down \$25,000 which it had deposited with the Chicago Title & Trust Company, trustee, centrary to the terms of the lease; that it had taken out insurance policies on the property, the loss clause of which was not made payable as the lease provided; that complainant had paid the taxes semetimes in its own name instead of that of defendents; that it had permitted the crection of the four summer houses on the property; that it had not submitted plans of the buildings to be constructed on the property; and therefore was

ing the court appealed to the Engrane court, where the doorse of the September court, where the doorse of the September court, where the doorse of the September court was reversed and the summated rate of the second court as the street of the second court case to provent serentual from

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they were avenualed. The case then went to a hearing and the
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The Supreme count in the opinion in the energic personnes in establic considerable detail, and held that quantiant was in establic considerable detail, and held that quantiant was in establic bad not own 185,000 water it had deposited with the Unicara Title 6 fract Company, tractor, contrary to the serms of the lose; that it had taken out invariance policies on the property, the lose of that of with was not made naveble as the lose provided; that concluded of that of out and paid the trace openities in its own name instead of that of defendence on the property; that it had permitted the cruckied plans of the buildings to be constructed on the property; and therefore restinate to be constructed on the property; and therefore restinate to be constructed on the property; and therefore restinate to be constructed on the property; and therefore restinate to be constructed on the property; and therefore restinate to be constructed on the property; and therefore restinate to be constructed on the property; and therefore restinates to be constructed on the property; and therefore restinates to be constructed on the property; and therefore restinates to be constructed on the property; and therefore restinates to be constructed on the property; and therefore restinates to be constructed on the property; and therefore restinates and the constructed on the property; and therefore restinates as

not entitled to a specific performance of the ention contract. The court flore suid (to. 521-522): "At setisp contract is not a controet of sale within any definition of the term, and at best but river to the erties helder a right to purchase upon the terms and conditions, if any, exectited in the option agreement. In order to avail bimself of the right the optionse must comply with the conditions set out in the cotion contract. 424 An option contract does not come within the equitable rule against forfoltures. The question of declaring a forfeiture is not involved. An outlan contract gives to the optionse a right under the named conditions. If those con-Altions are not met the optioned does not acquire the right. Such a situation involves none of the chamento of forfaiture. It desrives ne party of any right and obrugates no contract, but, or the other hand, is but the enforcement of the contract made by the parties." The court also discussed the question advanced by the courtainant that the defaults under the lease bad been vaived by the defendants. and save that the evidence is insufficient to show that all the dofendants knew of certain of the defaults mentioned, and that therefore the evidence was insufficient to establish a waiver of such defaults.

The lease provided that before the defendance could take adventage of any claimed defaults by complainant in the payment of rent reserved by the lease, they must give complainant 90 days notice in writing of each default; that if there was default in the payment of any other across under the lease, at any other defaults, they must give 60 days written notice to the complainant of such defaults; and if such defaults continue for the 90 or 60 days respectively, the land love wall decises the term anded without further notice. So far as the record discloses, the sefendants gave no such notice to complain, ant or any claim 6 defaults with a view to terminating the lease. All that appears in this respect are a number of letters written by the

parties and at the transporter and track a six follows and the sent times and (so, bid-shift out of the sent at a sent times after con first to him await out to marrially on a shall we clear to beyond has now the man enterior of death a verteal unity and an arrive as maken at the second and the second in this second in the last of the last o when not like allow have measured our pouts of in Monage filter. many married and the second or the contract matter will be the day would not come within the conitable cale anchors ther charges. The concepted sorie formula metale il device the est traited of another adviced gives - a sight witten the sense and as the sense and it is there again Cities are not be not the serious one can applicable the tar on the serious named and it is an additional. Yes or you are not the want produced institution dangle of the party territory as a representation of the companies and ". make real or the man and the contract of the second and the second grants tours and yet harrives reactions and become all and a train well asset the tell ander the Lean need but seen the tell and religions and della mai agt fin seel mang as smale black to nonships and sand ages due and the transfer of the deflected manning of the bares for the veries as initial as to latter as reiner as the cold a facility of

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defendants, or some of them, returning to complainant a number of checks complainant had sent for the rent and in some of which it is stated that, "The owners have heretofore terminated the lease of the Lake Shore Country Club for reasons with which you are familiar."

It further appears that after September 24, 1926, when complainant served the notice that it would exercise its option, defendants refused to accept any further rent although it was tendered to them from time to time as it accrued.

The defendants centend that the decree is right and should be affirmed because the complainant did not come into court with clean hands, the argument being that it arbitrarily defaulted in a number of particulars under the lease and was not acting in good faith in attempting to prevent the forfeiture of the lease, but was only seeking to revivify the option of the centract.

A consideration of the entire record discloses, we think, the fact that constant acted in entire good faith in constructing the clubhouse across Sheridan Road; in the building of the lecker rooms and caddy house; in the payment of taxes; in the payment of rent; in its permission to the four persons to build the four summer homes; in insuring the property and in everything it did. It is true that counsel for the complainant admitted it is endeavering to prevent a forfeiture of the lease with the view of revivifying the option contract, but we think the intention of the complainant in this respect is not important in this case. The question of the option contract is in no way involved here. The only question before us is whether the defendants should be prevented from forfeiting the lease or, if the evidence should disclose that they have already done so, to relieve from such forfeiture.

A further argument is made by the defendants that complain.

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defendants, or sows of them, returning to complainant a number of choose commissions in the commission of which it is some or which the commission in the later through Country Club for resumence with which you are

It further appears that effect incleader 24, 1976, was not the state of the state of the state of the same and though it was tendered to then the to the man it secrees.

The defendants contend that the decree is right and about to a stimmed because the complainant did not cone into court with clean hands, the argument being that it arbitrarily defected in a number of particulars under the lease and was not acting in good faith in obtaining to provent the farfeither of the lease, but was only secting to revisity the option of the contract.

A consideration of the entire resert discloses, we think, the the clubiouse across bhortions head; in the bullding of the its rooms and endig house; in the polyment of teare; in the payment of read; in its perminsion to the four persons to baild the four senses house; in lasaring the rooperty and in everyching it fid. It is true that counsel for the congletaent admitted it is wides or trevent a forficience of the congletaent admitted it is endeavoring to prevent a forficience of the think the three of revisitying the option contract, but we think the invention of the congletaent in this respect to not in me way involved here. The coly question before as is another the defendants should be prevented from forficience or, if the evidence should be prevented from forficiency the issue or, if the evidence should

ant is not in court with clean hands because shortly after the lease was executed it entered into an agreement with the defendant, Serace b. Brand, whereby it bought from him five acres inmediately adjoining the 76 acres for some \$6,000 or \$7,000, as a special and secret consideration to him so that it night induce him to see that his two brothers, who signed the lease with him, would relieve complainant from building a clubhouse on the 76 acres and that complainant might also draw down the \$25,000 it had deposited with the Chicago Title & Trust Co. under the lease. We think there is no merit in this contention.

From a consideration of the record we are clearly of the opinion that the transaction was in every way honorable. We think the action of complainant, in bringing this suit in an endeavor to prevent a cancellation of its lease, is not unfair or inequitable in any particular and therefore the doctrine of unclean hands is inapt.

in the specific performance case, from which we have above quoted, it is clear that there were no equitable considerations nor any question of forfeiture involved in that case. This is clearly stated by the court; but the question involved was one of contract only, while in the instant case equitable considerations are involved because the bill is filed to prevent a forfeiture of the lease, and equity will relieve from a forfeiture where the claimed breach has been waived by the landlord with knowledge of the facts, where the breach is trivial and has not been made in bad faith, and where compensation can be made. Ill. herehant's Trust So. v. Marvey, 335 ill. 284; Mayer v. Sulling, 263 Ill. App. 219; Palmer v. Ford, 70 Ill. 309; Andrews v. Sullivan, 7 Ill. 327; Giles v. Austin, 62 B. Y. 486.

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lease was excepted to entered into an expression the defendmodistely adjoining the 75 ceres for some 16,000 or 67,000, an a
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From a consideration of the opinion of the depress court in the specific performance came, from which we have close queted, it is clear that incre were so confidence came, it is clear that increased in that case. This is civarily stated by the court; but the question involved may can of committee the that the increase was equitable confidence that the increase a forfaiture of the involved because the bill in this is never at a forfaiture of the leans, and equity will relieve from a forfaiture where the class breaks by the leading with insulation of the factor, where the breaks by the leading with insulation in the factor, where the breaks is trivial and has not been and in the factor.

The factor, where the breaks is trivial and has not been and in

In view of the Maltation by the elemention in the adulasis

of evidence, we think it ought not be held that the complainant was estopped to question the claimed breaches or that they had been waived because all of the evidence might disclose that the breaches had been cured or were waived, and that upon all the evidence it would be inequitable to permit a forfeiture. For instance, the answer of defendants filed in the specific performance case, expressly admitted that they had accepted the rent with knowledge that the clubhouse and other buildings were not created on the 75 acres. Certainly this is some evidence of a waiver of the breach claimed in this respect.

the defendants, conveyed his interest in the pramises in 1931 to his daughter, Mrs. Seddies, she and the other lessors were tenants in common; that all tenants in common, alone, have the right to declare a forfeiture; that Ers. Zeddies could not declare a forfeiture for any breach which occurred prior to 1921, and therefore none of the lessors can do so; that most of the claimed breaches occurred prior to that date and are therefore not available to the defendants. In support of this contention complainant cites Masse.

v. Gaunt, 327 Ill. 31; Traders Safety Bldg. Corp. v. Shirk, 237 Ill. App. 1; Matson v. Smith, 180 Ill. App. 289; Saxton v. Chicago Storage Go., 129 Ill. 318; Dunne v. Minsor, 312 Ill. 335.

In the Weece case, sunra, (327 Ill. 21) the court said (pp. 22-23): "The right to declare a forfeiture of the lease for breach of its covenants occurring prior to the transfer did not pass to appellant when he purchased the property. (Sexten v. Chicago Storage Co., 129 Ill. 313; Watson v. Fletcher, 49 id. 498; Barber v. Watch Hill Fire District, 36 E. I. 236, L.R.A. 19156,245.) The covenant against assignment of the lease or subletting of the premises was inserted for the benefit of the lessor, and he alone could insist upon the covenant. He may waive it if he sees fit,

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and if he does not insist upon it no one else can. Buith v. Goodman, 149 Ill. 75."

In the <u>Shirk case, supra, (237 lil. App. 1)</u> the assignee of a leasehold made an attempt to forfeit a lease upon grounds that had arisen prior to the assignment. We there said (p. 13): "There is, we think, no doubt that such a cause of action was not assignable at common law. <u>Track v. Wheeler</u>, 7 Allen (Mass.) 109: <u>Natson v. Shith</u>, 180 lil. App. 289. The common law rule was, however, changed by the Statute of 32nd Henry Sighth, ch. 34, and this statute has been adopted as a part of the common law by the legislature of lilinois. It has never been repealed, and we do not understand defendants' claim that under the provisions of that statute this right of action would be assignable.\*\*\*

"It would seem that, where a right of action is entire and arises prior to the assignment, only the assignor could maintain the suit, while if the breach out of which the cause of action arises is a continuing one, it would, of course, pass to the assignoe. However, whether a court of equity, which looks to the substance rather than to the form, might not regard the right here in question as already vested in the beneficiaries (as defendants suggest) is a question not free from doubt, and we prefer to put our decision upon other grounds."

In the <u>Watson</u> case, <u>supra</u>, (130 III. App. 239) an assignee of the reversion sought to forfeit a lease for a default which occurred prior to the assignment to him. It was there said (p. 294):
"But the default in the payment of rent took place before he acquired title to the reversion, and as assignee thereof he sould not take advantage of a cause for forfeiture which accrued prior to the assignment to him of such reversion. 18 Amer. A Eng. Ancy. of Law. (2nd ed.) 393; <u>Watson v. Fletcher</u>, 49 III. 498; <u>Trank v. Wheeler</u>, 7

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In the inter our, ourse, (137 lil. App. 1) the accines of a lease state in actines of a lease state in actines that a lease were grounds that a, we take, un doubt that ance a squee of action was not analyse. In the action of last and the action of the action and a special of action and a special of action and a special action act

"It would mean that, where a signt of bation is emitted and antianti, while if the breach out of value in the sestime. Fora sontinuing one, it would, of source, pone is the sestimen. Foraver, whether a sourt of equity, which have no the salutance rather
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In the Firege case, mary, (100 lil. Asp. 230) an antiques of the reversion a agit to terricit a longer for a defealt which casured order to the majorable him. It was there end (p.154):
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Allen (Eass.) 109; Small v. Clark, 97 No. 304; Fenn v. Smart, 12 East 444."

In the <u>Sexton</u> case, <u>suara</u>, (139 III. JIS) it was held that the right of entry for the breach of a condition subsequent was a mere chose in action and therefore inalienable. The court, speaking by Mr. Justice Schofield, there said (p. 332): "The right to enter for breach of condition subsequent could not be alienated, as it could have been had it been an estate, and Coke says: 'The reason hereof is for avoiding of maintenance, suppression of right and stirring up of suits, and therefore nothing in action entrie or reentrie can be granted over.' (Citing authorities.)

"It is said in 1 Washburn on Real Prop. (2nd ed.) 474,\*451:

\*Such a right' (i.e., to enter for breach of condition subsequent)

'is not a reversion, nor is it an estate in land. It is a more chose in action, and, when enforced, the granter is in by the forfeiture of the condition, and not by the reverter.' And the court there further said that section 14 of the handlerd and Tenant Act did not convert the right of entry for breach of covenant into an estate but that it still remained but a chose in action.

In the <u>Munne</u> case, <u>supra</u>, (312 Ill. 333) it was held that a violation of the condition subsequent in a deed or will gives the right to re-enter to the granter or his heirs only. The court there said (p. 343): "At common law the right to take advantage of a condition breach of a outsequent by enforcing a forfeiture, or the right of re-entry, so called, belonged exclusively to the granter, and after his death to his heirs. The heir of the granter is entitled to avail hisself of the benefit of that right though not expressly named in a reservation thereof. That rule of common law is applicable in this State. (<u>Boons v. Clark</u>, 139 Ill. 466.)"

The answer of the defendants to this contention, as stated by their counsel, is: "Conceding for the make of argument that

Alles (tuss.) 200; incil v. Clark, 87 sec. 204; Your v. Court, 12

In the jesten case, sugge, (100 III. VIB) it was held that the right of the right of the property of the broads of a condition subsequent was a little of condition subsequent seal that the read of the standard of condition subsequent seal that and could have been tas it her arrefer and condition of subsequence, superceasing of right and stirring up of suita, and therefore nothing in action outsies or no eatrie can be granted over. \( (Chtims suchosistes.)

In the Paper once, secret, (NE 122. 200) it was held that windered or the vision of the species of the species to a seed or vision the right to re-enter to the greater or his heirs only. The sourt tires add (p. 360): "At comen law the right to take advantage of a seed that committee or seed of gladesquent by enforcing a verfaters, or the right of re-entry, as called, belonged endusively to the granter, and after his death to his called, belonged endusively to the granter, and after his death to his called to right visage as entitled to avail the constit of the right visage had excremely nearly nearly a recovering nearly as a recovering a recovering and the constitution of common law is applicable in

 this was so, then there can be no ferisiture, and there is no need for the interposition of the restraining hand of a court of equity, as the remedy at law would be adequate." And that the lease provides that the right to forfeit it and to re-enter the premises was expressly granted to the heirs and assigns of the original parties to the lease. And continuing they say: "Nurthermore, we wish to point out that the complainant has always contended that the right to forfeit never came into existence until the notice of default had been given under clause Fifteenth of the lease and the failure of the Club to remedy the defaults within the time therein stipulated.\*\*\* The record further shows that as soon as the leasers had knowledge of the defaults this notice was given by those defendants.

We think none of these answers is sufficient. Complainant was not required to wait until the defendants took some action toward ousting it from the property. It was entitled to have the matter determined so that it would know whether its rights under the lease had been forfeited. The answer of the defendants that the right of forfeiture was expressly granted to the heirs and assigns of the original parties, we think is insufficient because the lease did not vest in the heirs or grantees the landlord's grounds for forfeiting the lease which existed prior to the time the heirs or the grantees acquired their interest in the property; and as above stated, even if it was material, which we think it was not, no such notice was given by defendants of any claimed defaults, with a view to terminating the lease, and therefore complainant's rights under it could not be forfeited.

Under the authorities cited, we are of the opinion that the contention of the complainant in this respect must be sustained.

The decree of the Superior court of Gook county is reversed

this was as, then there can be no forfaiture, and toors is no mad for the interpolition of the restraining hand of a court of equity, as the remedy at low would be adequate. And that the isose provides that the right to forfait it and to re-enter the creates was eargreedly granted to the holes of the original parties to the lease. And continuing they say: "Furthernore, we wish to peint out the complainant has always contended that the right to dorfait never case into existence qualit the formation of default and been given under clause with the time and the failure of the formation of the the fine the recent further characters within the time the character alignated knowledge of the defaults at the time the case at the leasers had been the defaults within the time the leasers. Industrial of the case at the leasers.

We think none of these enteres to estimate the festive sock more seston was not required to wait until the defendence took more seston toward constant it. From the property. It was entitled to have the matter that it would know whether it is the rights under the lease had been forfeited. The answer of the defendence that the right of forfeiters was expressely granted to the heirs and sectors of the cripical, persies, we think is broudficient head social of the exiginal, persies, we think is broudficient to because the lease did not vest in the heirs or grantees the leader to lease the grounds for forfeiting the lease which exists to the grantees and if it was material, which the property; and as above states over it it was material, which the property; and as above states over it it was material, which the property; and as above states over it it was material, which the formula of this is the material of the faithfully, will a view to be rutheating the lease, and

Under the authorities eited, we are of the opinion that the content of the respect must be sustanted.

The decree of the function court of Cook county is reversed.

and the cause remanded for further proceedings in accordance with the views stated in this opinion.

REVERSED AED REMANDED.

McSurely, P. J., and Matchett, J., conour.

More negationed all apaltenesses positive but belowing using our box

JOSEPH CH. SHAPER

UNION BARK OF CHICAGO, Guardian of the Estate of CHARLES GARGOLA, a Minor.

Plaintiff in Error.

VB.

THE GREAT ATLANTIC & PACIFIC THA GOMPANY, a Corporation, Defendant in Error. DERICH TO SUPERION COURTS.

OF COOR COURTY.

268 I.A. 632

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries claimed to have been sustained by Charles Cargola, a minor, on account of the alleged negligence of the defendant in operating a motor truck which collided with a motor-cycle on which Cargola was riding. At the close of all the evidence there was a directed verdict for the defendant, judgment was entered on the verdict, and plaintiff appeals.

The record discloses that about five o'clock on the afternoon of may 25, 1931, plaintiff, a boy about seventeen years of age, was riding his motorcycle north in Wentworth avenue. There was a double line of street cars operated in that street and when he reached the intersection of 57th place, an east and west street which does not extend west of Wentworth avenue, there was a collision between the motorevele and one of defendant's meter trucks. The motor truck was north of 57th place and was being driven south in Wentworth avenue. Perore it reached 57th place the driver and one of his two helpers, who were with him on the seat of the truck, held out their hands signalling that the truck was to turn east in 57th place. At that time a northbound street car was approaching 57th place. Street cars did not stop at 57th place to take on passengers, but when the motorman saw the men on the truck signal that they desired to turn east in 57th place, he slowed down and signalled the driver to proceed, ahead of the street car; the street car then came to a rather

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Plaintiff in Arror.

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ARRUM TO RUBERTON OFFINE OF USER OCURTY.

RR. JUSTICE STOORED BELIVERED THE OFFICER OF THE COURT.

Plaintiff brought an action against the defendant to recover demagns for personal injuries claimed to have been oustained by Charles Gargels, a miner, on account of the alleged negligence of the defendant in operating a motor truck maioh collided with a motor cycle on which Gargels was riding. At the close of all the criteres there was a directed vertick for the defendant, judgment was entered on the vertick, and plaintiff appeals.

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sudden stop and the truck passed is front of it. Gargola, who was driving his motorcycle east of the street cur, did not see the truck, and the motorcycle and truck collided and he was severely injured.

Which was two blocks south of the place of the accident; that as he proceeded north he was driving between the east curb and the northbound street car track; that the street car overtook him and was some distance ahead of the motorcycle as they approached 57th place; that both were traveling at about 13 or 14 miles an hour; that the street car came to rather a sudden stop and he continued north, when the collision occurred; that he did not see the truck until it struck him; that the street car began to slacken its speed when about fifteen or twenty feet from 57th place.

The evidence further is to the effect that plaintiff was driving his motorcycle about fifteen miles an hour at and prior to the time of the collision; that the truck made the turn at 57th place at from three to five miles an hour. There is other evidence in the record to the effect that plaintiff was driving his motorcycle at from twenty-five to thirty miles an hour.

Where a motion for a directed verdict is made at the close of all the evidence, the motion should be allowed if there is no evidence, or but a scintilla of evidence, tending to prove the material allegations of the declaration. Libby, NeBeill & Libby v. Cock, 222 Ill. 206. Under the law in the instant case, before plaintiff could recover he must grove by a prependerance of the evidence that he was in the exercise of due care for his own safety and that the defendant was guilty of negligence which proximately contributed to his injuries. If there is any evidence, viewed most favorably to the plaintiff, tending to establish these two facts, then it was error to direct a verdict for the defendant.

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Me cartified that he drays his metaryale from 50th atreet, all a proceeded north he was driving between the curb curb and the northbound erreet car track; that the atreet car overtook him and was some dictance ahead of the motorcycle as they approached 57th place; that both were traveling at about 15 or 14 miles an hour; place; that the street care traveling at about 15 or 14 miles an hour; that the street care came to rather a sudden atop and he southness north, when the collision occurred; that he did not see the truck north, when the collision occurred; that he did not see the truck north.

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As a general proposition, the question of the negligence of a defendant and the question of contributory negligence on the part of the plaintiff, in a case such as the one at bar, are questions of fact for the jury and only become questions of law when all reasonable minds would reach the conclusion that plaintiff was not in the exercise of due care for his own safety, and that the defendant was guilty of negligence in the operation of the truck which contributed to plaintiff's injuries. Loutnam v. Chicago City Ry. Co., 198 Ill. App. 329; bale v. Chicago Junction Ry. 10., 259 Ill. 476; Relly v. Chicago City Ry. Co., 265 Ill. 64c.

In the Kelly case, after announcing the rule that in a personal injury case the question of contributory negligence is generally one of fact for the jury, the sourt centinuing said (p. 645): "but cases occasionally arise in 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 a judgment for the defendant."

In the instant case we think it clear, from all the evidence, that plaintiff was not in the exercise of due care for his cwn safety. He testified that he saw the defendant's truck being driven south some distance north of 57th place when his metercycle and the street car were some distance south of 57th place. He saw the street car slow down but did not endeavor to stop his motor-cycle, which the evidence shows he could have done in a very short distance - "a foot or so" - before there would have been a collision. Moreover, he testified that he did not see the truck at all until the collision.

In these circumstances we think all reasonable minds would reach the conclusion that he was not in the exercise of due care for his own safety and that his conduct was "violative of all rations."

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pure of the plaintiff, in a case such as the one at har, are questions of fact for the fury and only become questions of has when not in the enercise of due case for his own nafety, and that the defendant was gailty of maglificates in the operation of the track onlich contribated to plaintiff's injuries. Louison 4. Chief the St. Co., 193 111. App. 229; Male v. Chief.

personal injury case the question of centribusory negligence is generally one of fact the jury, the court continuing and (p. 545): "but eases occasionally arise in which a person in secondless or his conduct so violative of all rational standards of conduct socileation that the court conduct socileation that the court can matter of law, that no rational person rould have meted as in did, and render a judgment for the defension."

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In these circumstances we think all reasonable minds would reach the centiles that he was not in the exercise of due card for als own widlantes of all rational

standards of conduct applicable to persons in a like situation," and therefore the court properly directed the verdict.

We are further of the epinion that all the evidence is to the effect that the defendant was guilty of no negligence which proximately contributed to plaintiff's injuries, and for this reason also a directed verdict was proper.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

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CONSTRUCT PROPERTY.

HARRY RINGER, Appellant,

VE.

INVING OIL AND SUPPLY COMPANY, a Corporation, et al. MARIB MOSS,
Appelloc.

APPRAL PROM THE SUPERIOR COURT

268 I.A. 6322

MR. JUSTICE G'COMPOR DELIVERED THE OPINION OF THE COURT.

by this appeal the complainant seeks to reverse a decree of the Superior court of Sook county sustaining a desurrer to his bill for the foreclosure of a mortgage and dismissing the suit for want of equity. The question for decision therefore is the sufficiency of the bill, which was filed June 22, 1932.

Shortly stated, the substance of the allegations of the bill is that on June 21, 1930, the defendant, Irving 011 and Supply Company, a corporation, being indebted in the sum of \$60,000, executed its forty promissory notes payable to bearer. There were nine notes for \$1500 each, two for \$2,000 each, nine for \$2500 each and twenty for \$1,000 each, the first of which was due and payable June 21, 1931, and the last June 21, 1935. The notes bere interest at 6 per cent per annum until maturity and 7 per cent thereafter. To secure the payment of the indebtedness the Irving Oil and Supply Company executed its trust deed of the same date conveying certain property, together with the rents. issues and profits therefrom to the Citizens State Benk of Chicago. as trustee; that the complainant was not informed as to which of the notes and interest coupons had been said; that he is the owner and helder of one of the principal promissory notes for 31500 which by its terms matured on December 21, 1931, and that it had not been paid.

"That on information and belief, interest coupons maturing June 21, 1932, secured by said trust deed, were not paid:" that by

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seroek a enceyer of maner insulationes and Insone alify the ald of returned a gainfatane grames doed to truce refregal out to not sine out galesiasib has egantive a to orusoforot out tot fills want of equity. The question for decision therefore is the out'tcloser of the bill, which was filed June 22, 1932.

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That on information and ballet, interest coupons makering June 31, 1932, secured by eath trust head, were not path;" that by reason of the default in the payment of complainant's note for \$1500, complainant "has declared and does hereby declare the entire indebedness accured by said trust deed to be immediately due and payable." together with all interest thereon, "and complainant files the bill of complaint for the foreclosure of the lien of the said trust deed on behalf of and for the use and benefit of hisself and the holders and owners of each and every one of the notes and interest coupons secured by said trust deed."

It is further alleged on information and belief that Marie Moss is the owner and helder of two of the notes for \$1,000 each. There is no allegation in the bill as to who was the owner, or owners, of the other notes, but apparently they and other parties are made defendants under the designation of "unknown owners."

The prayer for relief was the usual one contained in the foreclosure suits and there was a prayer that a receiver be appointed pendente lite.

attached to and made a part of the bill. There is no provision in the note for the acceleration of the payment of the indebtedness, so that if there is any authority for the legal holder to accelerate payment of all the indebtedness, it must be found in the trust deed, the pertinent parts of which are as follows:

any part thereof, or in the interest thereon, or any part thereof, at the time and in the manner above specified for the payment thereof, was the whole of said indebtedness including principal and accrued interest shall, at the aption of the legal holder thereof at once, without notice, become and be due and payable," and that in such a case a bill of foreclosure might be filed; "that in case a right of foreclosure \*\*\* shall arise hereunder either upon maturity of said principal notes, or by breach of any of the covenants" of the trust deed, the "Trustee or the legal

It is farther alleged on information and boltof that Marie Mass is the owner and holder of two of the suctor for \$1,000 onch.
There is no allegation in the fill as to who was the expense, or exercise of the other notes, but apparently they and other parties are made definition to be designation of funknown owners.

The prayer for relief wee the usual one contained in the dereslosure suits and incre was a prayer that a receiver be approximated and the suite section of the suite suite section of the suite sectio

A copy of caspinianni's sidimized or the trust deed are attached to and ands a part of the bill, there is no provision in the unto rot the indertakeness, so that if there is any subjectly for the legal holder to accolarate payment of all the indertakens, it must be found in the trust deed, the partiment parts of viles are as follows:

"If default be made in the payment of said indebtedness or any part thereof, at the rime and in the admer above specified for the payment thereof, see the whele of said indebtedness including principal and morused interest shall, at the spidos of the legal holder thereof at sace, without notice, become and be due and payable." and that in when a case a bill of foreslosure might be filed; "that in ease a right of foreslosure was aball arise herounder elther upon maturity of said principal motes, or by breach of any elther of the covenints of the trust deed, the "Ernetee or the legal

holder of said principal notes or either of them may bring such legal or equitable proceedings for the collection of the moneys hereby secured as may be deemed necessary," and that all expenses paid or incurred in connection with the foreclosure by the "Trustee or the legal holder thereof" and all costs paid by the Trustee or "any holder of any part of said indebtedness," shall be paid by the granter.

under the provisions of the trust deed above quoted, the question arises whether the complainant, the owner and holder of one of the principal notes for \$1500, secured by the trust deed, has the right to accelerate the payment of \$55,500 of the indebtedness, some of the notes not being due and payable until three years after the bill was filed.

Counsel for the defendant says in his brief that the chancellor sustained the desurrer on two counts - (1) that the complainant had no right to accelerate the maturity of the entire indebtedness; and (2) that he had no right to maintain the bill on behalf of the owners and holders of the other notes secured by the trust deed.

the bill must be sustained. The trust deed from which we have quoted provides that in case of default in payment of the indebtedness or any part of it, or the interest thereon, the whole of the indebtedness then remaining due and unpaid might, at the option of the "legal holder" of the indebtedness become immediately due and payable. This provision, as written in the trust deed, is free from ambiguity. It says the legal holder of the indebtedness might declare it due and payable, - not the logal holder of part of the indebtedness. We must construe the trust deed as it is written. There is apparent ambiguity only when the previsions of the trust deed are applied to the facts in the case, there being a number of different owners and holders of the notes. The other prevision of the trust deed above quoted has reference to the expenses and

holder of said principal notes or citier of them may bring smallegal or constants or contacts of the moneys hereby recoved as may be deemed necessary." and that all expenses paid or incurred in counseties with the forecitairs by the "Trundee" any holder of any part of anid indecisables." shall be paid by the granter.

Under the provisions of the trust deed show quoted, the question arises whether the empiricant, the emper and halder of one of the principal notes for \$1500, asoured by the trust deed, has the right to accelerate the payment of \$26,000 of the indebtedness, some of the notes hat being the oud paymole until three years after the bill was filed.

Councel for the Assessment negs in its ories that the comchancellor numerised the descript on two counts - (1) that the complainant had no right to accelerate the metority of the entire indebtedness; and (2) that he had no right to maintain the bill on
behalf of the owners and holders of the other notes secured by
the trust deed.

We think the decree sustaining the descript and disminsing the bill must be sustained. The trust deed from which we have cuoted provides that in case of folialit in payment of the indebtedness or may part of it, at the interest theorem, the whole of the ladebtedness them remaining due and unpaid minut, at the option of the "legal helder" of the indebtedness become immediately the and payable. This erotision, as written in the trust deed, is free from ambiguity. It mays the legal helder of the indebtedness alght declars it due and payable, " net the legal helder of part of the indebtedness. The must essertise the trust deed as it to written. There is apparent subjectly only when the orevisions of are applied to the fact in the orevision of the trust deed are applied to the fact in the network provision of the trust deed are applied to the fact of the network of the trust of the arrence to the expenses and

costs incurred in case of foreclosure, and we think it does not help the complainant's contention that the holder of one of the notes had the right to accelerate the payment of the balance.

We had occasion to consider a provision of a trust deed where a question similar to the one before us was involved, and where the provision was substantially the same, and we held that the acceleration of payment could only be made by the helder of the whole of the indebtedness. Seidel v. Holcomb, 249 Ill. App.

10. We think there is no substantial difference in the provisions of the trust deed in the instant case and the one in the Saidel case. We are entirely satisfied with our holding in that case, and the decree of the Superior court of Cook county is affirmed.

DECRES AFFIRMED.

MaSurely, P. J., and Matchett, J., concur.

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We had occation to consider a previous of a trust dood now a question sixilar to the one before as eas involved, and the centiment of the indebtedness. Seldel v. Bolomb. 240 111. Acc. to the indebtedness. Seldel v. Bolomb. 240 111. Acc. to the indebtedness case and the one is the \_\_i\_ni.

manusary, F. J., suid hackenst, J., concur.

E. R. SCHULTZ.

YB.

J. SCIDSCHAR, Soing Susiness as BURBEA TALKING MACHINE CO., JOSEPH DUNAS, MUTBEA TALKING MACHINE SO.. a Corporation, Appellants. APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 6323

MR. JUSTICE O'CONNOR DELIVERED THE OPISION OF THE COURT.

Plaintiff brought an action against the defendants to recover the value of certain radio cabinets, conscies, completed and
uncompleted radios, claiming that defendants removed them from 2247
South Lagalle street without authority and converted them to their
own use; that he demanded the return of the property, which was refused.

The defendants in their affidavit of merits denied they had removed the property, denied they had converted any of the articles to their own use and averred that they never had any of the articles in their possession. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for 1900, and the defendants, Seidscher and the Sureka company, appeal.

The evidence of plaintiff is to the effect that for a period of about ten years he was engaged in the radio business, buying, assembling and celling radios at wholesale; that he knew the defendants, Seidscher and Dunas, and had business dealings with them; that he had some radios at 2247 Lawalle street, Chicago, which premises were used for warehouse purposes and for the manufacture of radios; that about April 10, 1931, he went to the premises and that there was equipment for the manufacture of radios and other material owned by himself and the defendant Seidscher; that plaintiff owned the stock of goods and at that time there were about 75 radios practically com-

La. BOKILKI, SAME

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Plaintiff brought on antion against the Lufundants to reuncompleted ration, statutes to South LaCalle urrest vities the city and course the con-

The defendants in their nerticed and amount describe decided they bed reserved the property, decided they had amount my of the series of the series of the series of the articles is their personation. There was a trial before the court without a jury set a pinning out judgment is plaintiff from for 1907, and the defendants, added not the first attachment as a property of the formula, added not the first and and the coldector and the formula, and

The eridence of plaintiff is the circuit that for the release, buring, as several temperates at the for your temperates at the product temperates and seling and seling redicts at wholessie; that he had seling redict and had bustment about the interperate its item; bust came tended of Riff invalues, thicket, thicket, thicket preside that he was seen and for the manufacture of redict that the selicity of the selection of the time president and that there was equipment for the emails of redict and other material evad the stood and other material evad the stood and other material evad of point and the stood of redict plant the stood of point the stood of point and at the time there were about 75 redict practically come.

pleted which belonged to the plaintiff; they were known as the "Minerva" radio: that about five days thereafter he again went to the premises on Laballe street and found that the radios were mone: that he called up defendant Seidscher and asked where the radios were and that Seidscher said they were at Dunus! warehouse on Wabash avenue: that the witness then asked why that was, and Seidsoher replied that plaintiff should see the defendant. Dunas: that shortly thereafter plaintiff went to Dunas' warehouse on Wabash avenue by appointment and there saw the defendants, Scidocher and Dunas: that he demanded the radios from them, which they said were there, but which he did not see: that later he again asked Scidscher about the Radios and he said they had been sold by defendants for \$12 apiece: that before this last conversation plaintiff had sent Jensen to the Wabash avenue warehouse to look over the radioc to see how much it would soot to complete them, and Jensen testified he went to the warehouse on Wabash avenue and saw the kinerva raidos there; that he could not be mistaken because the Minerva radio was a "monster:" that it was "homely."

The defendant Seidscher, alone, testified for the defendants; Dunas was not called. Seidscher denied that he told plaintiff that defendants had sold the radios for \$12 apiece and in answer to a question put to his by the court he said he did not know where the radios were; that he had bought radios from plaintiff for which he had paid \$22 apiece; that the defendants bought 100 radios from plaintiff and a Br. Simmons in April but that there was a delivery of only 25 radios. He further testified that he was president of the defendant Sureka company; that defendants did not buy the radios in question and did not have them; that he did not remove any radios from the LaSalle street premises without anyone's consent; he further testified that he removed the machinery from the premiseson LaSalle street which he owned, but that he did not remove any radios.

Befordante contend that the judgment is wrong and should be

old pa around alor word; I'll saint out of thomore wold wolder as a sear a section of the day of the day of the collect "aventh" rance year public out built book has deepe atlanta to need may add making out wants being box womanied commercial our belief on party ware and that believes told have were at James' resolutes as Tolant making that the witness that wheel will had been builted wiscond that the man and see the defendant, Sura to the charge vd senson deaday no sesson various to answ Thisting restres 1 and there and there are the following, Saldacher and March Paris and Sand the saldacher and the saldac ind again over him yeld chem, will be they bulk vere there, but and tunde and and total heads along and rest rade too for his of delim cooled fil not adapted by Alex pool big the of he and all a and the this land coursection platfill and the Cannon to the Al deem was see at pointer and towe seed at aspertance more mand. would neet to complete than, and Joneses teetified he went to the ed sudy : eradi coliar arragil ad was had parent dasies as according "trained as all takes because the distant ratio and a second that it was "ignaly."

The defendent Seldscort, whose, testified for the defendnte; bunce was not called. Seldscher denied that he taid givintiff
that defendents had sold the redice for 118 epiece and in mover to
a question put to sin to the court he paid he did not know where the
redice were; that he had bought radios from plaintiff for which he
had paid \$88 apiece; that the defendents bought lot radios from
plaintiff and a fir. Whomen in total but that there was a delivery of
only 48 radios. We further testified that he was president of the
defendent Mureha company; that defendents with not buy the radios in
question and did not have them; than he did not buy the radios in
from the Lamile street presides without anyone's sensent; he further
testified that he reserved the reachinery from the president harden.

\*\*Crost the Lamile street, but that he did not remove any radios.

Definite contend that the judgment is urong and should be

reversed because it is the law, as stated by defendants' counsel, that "where a party comes lawfully in possession of chattels and retains the property, to put him in the wrong, demand and refusal are necessary," and that no demand was made. The evidence is to the contrary. Plaintiff testified he made a demand for the radios on Sciancher and Dunas. Moreover, if defendants' testimony that they never had the radios is true, then obviously no demand was necessary. The law never requires the doing of a useless act. It is obvious that a demand would have been unavailing, in which case none is required. Entimal Bond & Investment Co. v. Zukos, 256 Ill. App.608.

A further point is made that the judgment is contrary to the manifest weight of the evidence. We have set forth the substance of the evidence as it appears in the record and are clearly of the opinion that we would not be warranted in disturbing the finding of the trial court on the ground that it is against the menifest weight of the evidence. The court heard and saw the witnesses teetifying and was in a much better position to judge where the truth lay than is a court of review. There being a conflict in the evidence, the question was one for the trial Judge.

Te are also of the opinion that the contention made that the judgment is wrong, as against the defendant corporation, is untenable. It appears that Seldscher was the president of the defendant corporation and at one time did business under the same name and it is not at all clear that judgment against the defendant corporation was not warranted under the evidence and under the law.

A further contention is made that the trial Judge was prejudiced against the defendants; that he refused to permit the defendants to present their evidence in an orderly way. We think there is no serit is this contention. While the court did take part in the examination of the sitnesses, we think his action was entirely proper in this respect, and that although he did at times indicate

the law, as clearly in infendence of coursels und

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A flagher point is made that is fedured to contrary to mailfort weight of the oriform. In how we idente the ambetance of the soldence as it appears in the record and are clearly of the opinion that we would not be merumed in disturbeny the listing of the testing outton that we the ground that is another the weight of the oriform. The court that and see the centrying and we to a much testing to the opinion to feder more the truth lay than is a seart of a mark of a rectal delicar position to feder more the truth lay than is a search of rectal distance, the cuesare case for the trial distance.

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A flation contention is and the the trial Judge was probadiesd against the Actionismiss to action to commit the Actionism and a to creases the in ordered way. "I distribute to no early in this contention. While the court did take part in the that he was going to decide the case without hearing further from the defendants, he later permitted defendants to go about and offer in evidence what they might have.

The judgment of the hunicipal court of Chicago is affirmed.

JUDGMENT AFFIRED.

McBurely, P. J., and Matchett, J., concur.

ANT TOTAL MARKAGE FROM SECTION OF THE SECTION OF TH

WILLIAM M. COLLINS. (Plaintiff) Appelles.

VB.

GRORES L. SCHRIR.
(Defendant) Appellant.

APPEAL FROM SUPPLIOR COUNT

268 I.A. 6824

MR. PRESIDING JUSTICE ERRNER DELIVERED THE OPINION OF THE COURT.

This is an action in assumptit upon a check drawn by defendant on February 23, 1923, payable to plaintiff. At the close of all the evidence the court directed a verdict against the defendant and entered judgment on the verdict for \$3066.23, being the amount of the check plus interest. To reverse this judgment defendant has appealed.

The undisputed evidence discloses that in 1921 Occar F. Mayer was the lessee. Under a 90 year lease of the property at 57-59 West Randolph street, Chicago, under which he was obliged to pay the taxes. The property prior to May 1, 1931, was accumied by the King Joy Lo Restaurant, under a sub-lease from Mayer. May 1. 1931. Mayor sublet the presises to plaintiff for a period of ter years, plaintiff to pay a certain rental and the taxes accruing after the date of the lease. At the same time plaintiff in turn sublet his lease to the Aing Joy Lo Company on the same terms that the property had been sublet to him. Inder the provisions of those various leases the taxes of 1921 were to be prorated, plainting to pay two-tairds and mayer one-third. These taxes were paid in Sevember, 1922, with money fur ished by plaintiff. In all these truspections defendant, who is a member of the Ear and the son-in-law of Mayer, acted as Mayer's attorney. Prior to May 7, 1922, defendant received \$1,000 from Mayer and \$1,105 from the King Joy Le Company for the payment of the taxes for 1921. February 3, 1923, defendant gave the check sued upon.

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AND RELEASED AND ADDRESS TO ADDRESS OF THE PARTY OF THE PARTY.

This is an action in assumpatt and a clock drawn by for Factors on Sciencey 23, 1960, payents to pictuilly. At the close of all the evidence the court firework a vertical applies the doction amount of the check plan interest. To reverse this interest defined at the appeals of the appeals.

The undirect estimate distant int the letter is Mayer was the Leases, order a by year loads of the property at Wat Tolding totals, Stings, take the be weet and the best will to may the tares. The presently ories to key I, 1981, was counted by the Miss Joy Lo Restaurent, under a sob-tome from seper. May to believe a re't Midalelo od suslant to the belief to my Might of ten georg, staintill to pay a costain family and the tree costaint Wildel for the cale of the leave. In the seat the color are all the first and are a little and a color ent sald as years to the what was converge as the same that that the property and been well as the alm. -ly to stil ambat sions at those various lounce the value of 10 10 very to be now .baids-see angual has absint-our you or Tiliniels . Bellet term were tall in herealt. Lift, with maney for Luned by plainto wadness at one, inchestab angioned acor if all the Ear and the som-In-les of Wager, acted as hayer's abstract. has recall and the herican rackets to be a contract 13 100 firm the Ming day La Correct for the meaning of the Sants for land. Forguery 4, 1983, defend one gave the cook and agen,

accompanied by a letter addressed to plaintiff, in which he said he was enclosing his check for \$2,105 with which to pay the taxes on the Randolph street property, \$1,000 of which he had received from Mayor and \$1,105 from the King Joy Lo Company, and in this letter he agreed, if evidence was submitted that he had received more than \$2,105, to pay the difference to plaintiff. No claim was made in the letter that the check was being delivered conditionally.

There was also testimony on behalf of plaintiff that neither defendant nor mayor ever paid any part of the taxes.

One of the defeness was, that the check was delivered to take effect only upon a condition which was not fulfilled, defendant claiming he delivered the check, not to be deposited or cashed, but merely to be held until it would be determined whether or not the amount represented by the check had already been contributed by defendant to the payment of the taxes, and if it developed that he had, the check was to be returned.

Lawrence J. O'Toole (plaintiff's agent to whom the check had been delivered) desied that the check was delivered conditionally, and testified that the money to pay the taxes was furnished by the plaintiff. Plaintiff testified that defendant never gave him any money at any time to pay the taxes.

The burden of proving this defense was on defendant. The question then is, considering defendant's competent evidence alone. Does it tend to establish the defense? If it does, the court erred in directing a verdict.

The only witness to testify in support of this defence was Ernest Schein. He testified that he was around when G'Toole and defendant were Alexandring the matter of taxes; that he heard G'Toole may defendant oved some money as a part of the contribution that the King Joy Lo Company was to make, and defendant said that the King

ted by a letter addressed to plaisiff, is skigh he said he and see at a see and see at a see and see a

Secret was bigged on the problems of problems and her would

One of the defence was, that her should was delivered to take only upon a socialist was not fulfilled, defendant alleges only upon a socialist net to be described or canned, but mayely to be held until it would be detended whether or not the same washed whether or not the defendant to the proposed by the chart of the trace, and if it developed that had, the chee, were to be returned.

Lawrence J. O'Tenia (plaintif's eyest to when the amed bud been delivered) decited that the check was delivered conditionally, and tentified that the mency to pay the tures was furnished by the plaintiff. Flaintiff testified that defendant naver pays him may maney at any time to pay the taxes.

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The only states to testify it support of this defense was Income to the state of Income Inner Inner Inner I state to test the reason that Inner Inner I state the sate the sate the sate of the the the sate of the the the time of time of the time of time of the time of time o

Joy Le and Mayer money had been left on deposit, and if that was the case, he (defendant) would not contribute any more; that O'Toole said if defendant would turn over the check and it developed the money had been put up, the check would be returned.

This was substantially all the testimony regarding the supposed condition. The defendant then endoavered by the testimony of Ernest Schein to prove its nonfalfillment. We have carefully examined the record but find no competent evidence tending to prove defendant had contributed any part of the taxes for the year 1921. The court did not err in directing the verdict.

The only other defense was that the check was without consideration. It is undisputed that Mayer agreed to pay the taxes for the first four months of 1921; that defendant was Mayer's attorney and agent, and that Mayer gave defendant \$1,000 and the King Joy Lo Company \$1,105, to be used in the payment of the taxes. Under this state of the record, we hold there was a consideration for the check.

For the reasons indicated the judgment of the Superior court is affirmed.

AFFIRETD.

Gridley, J., concurs.

Scanlan, J., took no part in the decision.

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paced contition. The defeation these estemposed by the testimony of neet Subsite on the nontitional. To have savefully expensed Subsite to be provedully expense that the contributed any part of the taxes for the year 1971.

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For the reasons indicated the judgment of the operior

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JOEL D. HUNTUR, administrator of the estate of JAMES L. CANTY, deceased, (plaintiff),

Appeller.

V.

PHOMAS LOWERY, (defendant),

Appollant.

APPRAL FROM CIRCUIT COURT, COOK COUNTY.

268 I.A. 633

MR. PRINCIPLE JUTIC KORNER BELIVERED THE OPINION OF THE COURT.

This was an action on the case under the statute by Joel D. Hunter, as administrator of the catate of James L. Canty, deceased, against Thomas Lowery, for wrongfully causing the death of James L. Canty. The case was tried before a jury and plaintiff recovered a judgment for \$6,500. To reverse this judgment defendant has appealed.

The declaration consisted of three counts. The first count alloged that on January 28, 1928, while James L. Canty was riding as a passenger on a street car on 47th street in Chicago, the defendant with great force and violence assaulted, beat and injured James L. Canty, as a result of which he died January 28, 1926. The second count alleged that while plaintiff's intestate was a passenger on said street our and was in conversation with the conductor thereof relative to the payment of his fare, and while conducting himself in an orderly manner, the defendant without just cause or provocation, with force and arms assaulted plaintiff's intestate and chot him with a revolver; that plaintiff's intestate cid not attempt or threaten to kill or shoot the defendant or place his life in peril; that as a result of said acts of the defendant

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James I. Canty. The case was tried before a jury and plaintly.

The declaration consisted of three counts. The first count alleged that on January 20. 1886, while Januar I. Conty was riding as a passenger on a atract car on 17th street in Onleags, the defendant with great force and violence assisted, beat and injured Janua I. Canty, as a result of which he died intended on a passenger on sold street our and was in conversation with the consusting nimed? Tell live to the payment of his face, and while consusting nimed? In an orderly warmer, the defendant without intends on provocation, with force and area assaulted plaintiff's intendate and obst him wish a revolver; that plaintiff's intendate and obst him wish a revolver; that plaintiff's intendate one alternate as him as a revolver; that defendant or place this intendate or place.

the plaintiff's intestate immediately thereafter died. The third count alleged that while plaintiff's intestate was a passenger riding in a westerly direction on a street car on 47th street. Chicago, and was not then a fugitive from justice indicted for the commission of any orime or felony or guilty of any crime or felony, the defendant then and there maliciously and with a malignant heart shot and killed plaintiff's intestate. Each count alleges that plaintiff's intestate left him surviving his widow and two children, who by reason of his death were deprived of their means of support. The defendant pleaded the general issue and special pleas of son assault demone, and molliter manus imposuit, and the plaintiff filed replications to these pleas.

Only three witnesses testified to the occurrence. Tony Zemont, for the plaintiff, testified that on the evening of January 28, 1928, he boarded a street car going west at 47th street and Wentworth avenue, paid his fare and walked into the car and leaned against the radiator: that Canty, who was drunk, also boarded the ear at 47th street and Wentworth avenue and when the conductor asked him for his fare he searched his socket for about four minutes; the car by this time had arrived at Princeton avenue, where the defendant dressed in regular street clothes boarded the car; that defendant remained in the rear platform while Canty continued to argue with the conductor, and the defendant told Canty to pay his fare. He further testified: "I heard struggling there and I heard several shots." He also testified that he was underneath the seat when he heard three shots; that after the shots he saw Canty lying on his back in the roar of the car; that he had been shot; that he did not see anything else happen between Canty and the defendant just previous to the time that he heard the shots. On cross examination he testified he saw the defendent and Canty fighting;

count alloyed that while plaintif's intertate was a passager riding in a westerly direction on a street car on 47th atreet.

Interpt, and whe not then a fagielve from justice incided for the sanderion of englares or followy or quilty of any orige ar followy, the defendant then and there maliculously and with a maligness heart what their bud hilled plaintiff's intentiate. Each arount lieges that plaintiff's intentiate har time sarriving his widow and the confidential of the confiden

I har a themps hestified to the commence. Tony Lawret, for the platestry, working and on the resulter of America bus dearly dive to seen pulse use seerle a beleased ad 19961 488 Venturia evenue, paid his fene and walked into the even leaned equines whe socialisty that Course che was drawn, also broken the mar. as. 4750, planet and inchestric versus and what his emplacher aghed him for his fare he sourched his posint for shoul four minutesy the car by this time had errived at Frinceton avenue, where the and the soft proper sectors that a proper of the soft the sector enfordent remained in the year platform with Confy perstaund to ergue with the contrader, and the defendant told Canty to pay him 'Atom I' bee even's guilinguis breek I' theirites velicut ell . ere's neveral sintes." He also tentified that he was undergoth the cont when he heard times shoter that after the shote in see Canty lying on his book in the rour of the ear; that he had been shot; that he the net one anything clas become before the take datement fuet provious to the time that he heard the shots. translation be testified he see the defendant and Carty fightings that defendant struck the first blow; that he did not see who fired the shot; that he saw the sum in defendant's hands.

John Smolarek testified for the plaintiff that he boarded a 47th street car going west at 47th street and Ventworth avenue and sat in the third seat from the rear platform facing forward; that defendant, who was in plain clothes, sat next to him; that after the car had proceeded three or four blocks a drunken passenger (Canty) get upon the car and started an argument with the conductor; that defendant walked to the platform where he and Canty grabbed each other; that they were fighting; that defendant had a gun in his hand; that he heard three shots and saw Canty lying on the platform; that after the shooting defendant walked into the car; his face was scratched above the eye.

Edward J. Grabinski, a witness for the defendant, testified that on January 28, 1923, he was a conductor on the 47th street line and made a stop at centworth avenue where two vehicles had collided in front of the car; that he got off the car and when he returned a boy on the platform pointed out a passenger (Canty) who had boarded the car; that he walked into the car and asked this passenger for his faret that this passenger started to use vulgar language and incuired if he (the witness) wanted him (Canty) to get off the car; that he said "Yes. if you did not pay your fare," and went for the rear platform followed by Canty; that he stopped the car and Canty started to get off, having one foot on the top step and one below. He then got back on the platform and used some vulgar language. Just then defendant, dressed in civilian clothes, stepped from the inside of the car and Canty swore and said. "I will best you up and your whole family. see." Defendant drew his coat lapel back and showed his star and said, "I am an officer." Canty leaned over and struck him, knocking him to the floor; he got up and was knocked down again and when he arese

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John Smalane kerilitian for the plaintiff that is boarded and leadiff the boarded and leading the three the avenue at 47th atmost and leading white the 47th atmost and leading and the time that the thirty and the time that the thirty are the time and time and

Ideard & Grebbanks a vibrac for the defendant, bus . . . that on January 25, 1983, he was a concurber on the 47th street line of habitles had actolaby out and course druggles to good a chee bas god a borouser of made but and out The Son all dails quan and he smoul on the piniston printed so; a provence (dusty) vite too business the pend and not represent and below one ton tell and below to bell then an li bothemi has charped reality one of befully reasoned aids sois meV' bloc uni kunis gran enis The see of (games) will imbana (coorsia mis) the case of the page paper factory and was not the work placetons followed the guivad The for of hefinda yourd has use old herene od sed tydnob yd one for an ine top call one balow. It time got but on the because administration good read argument togeth name together one southing im striking skelices through them the incide of the ent out Capty Robus relies a Same uses but ou use food file In abind the excess I' shire but told ald bework here flowed Laguel Jones will much landershoot as ald quideer " design lesses over been like in a mette as as the Floors has got up and was knooked done apain and when he arose the second time he drew his revolver and fired into the floor. As he fired into the floor Canty grabbed defendant's arm; they struggled and another shot was fired.

The defendant has assigned and argued three grounds as to why the judgment should be reversed. The only question necessary to be considered presented by this record is, Did the court err in instructing the jury?

The court at plaintiff's request instructed the jury that if they found for the plaintiff they will assess his damage at some sum not more than \$10,000, and by another instruction they were told that they may give plaintiff vindictive damages, emart money, and that in assessing damages they were not confined to any amount of damages actually proved to have been sustained by plaintiff, but may assess damages, in their discretion not exceeding the amount claimed in the declaration. There were no other instructions given to the jury for computing the damages.

This action is the creature of the statute and must be governed entirely by its provisions. (Conant et al. v. Griffin, Adar. etc., 48 Ill. 410; Chnesorge v. Chicago City Ry. Co., 259 Ill. 424.) It is not an action for personal injury. (Prouty v. City of Chicago, 250 Ill. 223.) The measure of damages as fixed by the statute (sec. 2, ch. 70, Sahill's Illinois Revised Statu. 1931), is "a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person." The only injury for which the jury can estimate damages is a pecuniary injury, that is, what have the wider and next of kin lost, in a money view, by the death? (I. C. R. R. Co. v. Weldon, 52 Ill. 290, 295; The North Chicago Street P. R. So. v. Brodie, 156 Ill. 317.) The statute makes the pecuniary loss to the wider and next of kin the sole measure of

the second time he may his persient out first join the figure. As first leds the first hear formation or exceeds the first start hear control or exceeds the same singular and excellent chart out firsts.

The defendables and anoigned and argued three grantes as to why the the factorial be reversed. The only question resecutry to standard be reasoned in the the court orrect in the court orr

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damages - and the satisfaction of that loss is the sole purpose for which an action can be instituted. (Chicago & Rock Island R. N. Co. v. Morris et al., admrs. etc., 26 Ill. 400.) Pecuniary loss is held, as to lineal kindred, to mean what the life of the deceased was worth in a pecuniary sense to them. (Chicago & Alton R. R. Co. v. Shannon, admr., 43 Ill. 338; quincy Geal Co. v. Hood, admr., 77 Ill. 68.) The amount to be recovered is to be estimated by the jury from the facts and circumstances proved, his prespects of life and his means, opportunities, ability and habits with reference to the making and saving of money or money's worth. (C. P. & Mt. L. L. Co. v. Scoldridge, 174 Ill. 330.)

In the case of <u>Crawford v. Lachary</u>, 235 Ill. App. 122, the jury was teld they could fix the damages "at such sum as the jury may believe from the evidence she has sustained," and the judgment was reversed because the instruction gave the jury no intimation that the jury could only award such sum as would compensate plaintiff. (See also <u>C. B. & J. R. Co. v. Euck</u>, 112 Ill. App. 620.)

After a consideration of the authorities we hold that because the injury for arongful death is limited to pecuniary loss it
was error for the court to tell the jury they might give plaintiff
damages at some sum not more than \$10,000 and include therein a sum
for amart money. Remages could not be enhanced beyond the pecuniary
loss suffered by the widow and next of kin of the deceased.

For the errors indicated the judgment of the Circuit court is reversed and the cause remanded.

REVERSED AND REMARDED.

Scanlan and Gridley, JJ., concur.

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chroade Meon Tube Componetion, a corporation, (plaintiff), Appellee,

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INCORPORATED, (defendant).
Appellant.

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APPRAL PROM MUNICIPAL GOURT OF CHICAGO.

268 I.A. 633<sup>2</sup>

MR. PROCIDING JUSTICE KENNER ILLIVERS, THE OPINION OF THE COUNT.

This action was commenced by the confession of a judgment on August 5, 1931, in favor of Chicago Meon Tube Corporation, plaintiff, against Dunbar Funeral Farlors, Inc., defendant for \$195.85. The defendant obtained leave to plead, the judgment to stand as security. Upon a trial by the court without a jury, on January 15, 1932, the judgment was confirmed as of the date of rendition thereof. Notions for a new trial and in arrest of judgment having been overruled, the defendant prayed an appeal, which was allowed on condition that defendant file an appeal bond in the sum of \$300 within 30 days.

The record discloses that March 17, 1932, the defendant presented and had approved by one of the judges of the Municipal Court of Chicago its appeal bond. The condition of the bond is as follows:

whereas, the said Chicago Neon Tube Corporation, a corporation, did on the 15th day of January, 1. D. 1932, in The Municipal Court of Chicago, in the State aforesaid, recover a Judgment against the above bounder Dunber Funeral Parlors, Incorporated, a corporation for the sum of One hundred and ninety-five (\$195.85) Pollars and eighty-five Cents, besides costs of suit, for visich aski judgment of the said hunicipal Sourt of Chicago, the said Funder Funeral Farlors, Incorporated, a corporation has proved for and obtained an appeal to the appellate Court of the First District of the State."

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The record discharge that Perch 17, 1945, the defendant for the Parking at the Namicalgal Court of Chicago its appeal bond. The conditions of the bond in Pallower

Lugichad ad desegond a s designed a s designed for the lare (32.2013) ordination has been doing and Jagmadic in Jacob doing add Jagmadic in Jacob doing add Jacob and adding The plaintiff has filed a motion in this court to dismiss
the present appeal on the grounds, "that the appeal bond filed in
the court below was not filed within the time limited by the court,
nor within the time fixed by a valid extension made by the court below."

The right of appeal is purely statutory and the statute granting such right must be strictly complice with. In cases where the statute fixes the time within which the appeal bond must be filed the provision is mandatory and jurisdictional, and the court from which the appeal is taken is without power to extend the time. (Rozier v. Williams. 92 Ill. 197.) In cases like this where the statute does not fix the time within which the bond must be filed, but requires the court granting the appeal to fix such time by its order allowing the appeal, the party praying the appeal shall, within such time, not less than 20 days, as shall be limited by the court, give and file in the office of the clerk of the court from which the appeal is taken, an appeal bond. If an appeal bond is not filed within the time limited by the court the appeal must be dismissed. (Wormley v. ermlay, 96 ill. 129.) In the instant case, in the order allowing the appeal the court fixed the time within which the appeal bond should be filed. The order allowing the appeal was entered on January 15, 1932, and the time fixed for the filing of the bond was 30 days. No order was entered within the 30 days after January 15, 1932, extending the time for filing the bond to a time beyond the expiration of the 30 days. There the court in granting an appeal fixes the time within which the bond is to be filed, the court retains its jurisdiction over the question until the expiration of the time limited by the order, and may, either at the term when the appeal is allowed, or at a subsequent term before the expiration of the time allowed. extend such time, but if the time fixed in the order as made or

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The right of appeal is purely abolicary and the statute erode sease al . Attr boilgas glielite: of four table allering SOURS of form band diverge and obtain additionally and band's whately said the property of the same to the property of the court from the cou or release a sense of the sense of the later and the sense of Energy will which effective our organic older with some all favor and fire apparation not fin the year offile outside the Seed said by Jiled, but requires the court grantise the eggest to the commutate by the main offering the typical, the garty propher the quiest built, within most time; and lose than 30 days, as shall be limited by tim enter a year Insure and make may cases one to Muste the the outless and the sale and middly ball't der at bree frames as if abuse frames as another at ar yether!) about mails and deam fangue and draws and by bestmil suid 'orgins 90 111. 120.) In the tustems mass, in the order allowing hend Liverys will dislike hiddly mad? and branch frame and Leepen and cheeld be filled. The enter elleving the appeal on torond on Jonatacy 19. 1962, and the time direct for the filling of the bond one IC days. In some was mixture within the fit dept offer formery life 270% orderables one to maide the contract of the contract of the contract of days. There the court is promised as appear I but of the waters, with the boom to be falled, the court retains and preserve detical and all to materiague and disput materiag and were maked to shouself of Length old make and the total for all the client in the contract or at a submequent team before the explantice of the time allowed, us show up were add at worth auth tell 11 feet could flow butters

extended has expired the jurisdiction is lost and the act of the court in approving the bond is a mullity. (Yill v. City of Chicago, 218 Ill. 178; Hall v. First National Bank, 330 id. 234.)

APPEAL DISMISSED.

Secular and Gridley, JJ., concur-

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FAITH MANUFACTURING COMPANY, a corporation, (plaintiff), Appellant,

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THOMAS J. BEHDER, (defendant),

Appellec.

APPRAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 633°

MR. PARSIDING JUNTISH ENRICE BELIVERSD THE OPINION OF THE COURT.

action was brought by plaintiff. Paith Manufacturing Company, against Thomas J. Bender, to recover for money advanced to defendant at his special instance and request and on account stated. The defendant filed an affidavit of merits denying he was indebted to the plaintiff in any amount. He also filed a counterclaim, alleging that on March 5. 1931, he was employed by defendent to "process" certain steel golf club shafts for which plaintiff agreed to pay defendant \$60 a week and a certain royalty or commission of five per cent on all shafts; that defendant worked for plaintiff on said contract up to July 24, 1932, and during that period carned \$998.20 as salary, and \$336.51 as commissions, making a total of \$1334.71; that plaintiff paid defendant \$1198.20, leaving a balance due defendant from plaintiff of \$156.51. Tried before a jury and a verdict and judgment in favor of defendant and against plaintiff for \$136. from which the plaintiff bus appealed.

The plaintiff's evidence discloses that in March, 1931, the plaintiff was engaged in the manufacture of die castings, and the defendant was a shop foreman for the Illinois Bending & Manufacturing Company. Stephen Faith, president of plaintiff,

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the designate was angused in the manufacture of die castings, and the designate was a simp foreman for the Illinois Sending & Caspany. Seithe president of plaintiff.

learning that the defendant passessed a secret process for tempering steel golf club shafts, sent Herman Bachli, to induce him to disclose the process, and at Backli's request, on March 20. 1931, defendant come to plaintiff's plant and discussed with Faith the terms on which he would disclose his method to plaintiff; that a written contract was entered into. by which plaintiff agreed to may defendant a revalty for his work in processing golf club shaftes that about a week or two later Faith inquired of defendent what amount defendant sould need to live on; that after some discussion plaintiff agrees to advance defendant \$60 a week to be charged to defendant's carmings; that shortly after this conversation defendant came to plaintiff's plant and superintended the processing works that from april 10. 1951 to July 51. 1931. plaintiff advanced in weekly installments of J60 a week the total sum of 8998, and in addition, on July 22, 1931, \$200, which latter www was paid defendant because he said judgment had been obtained against him and if he did not pay it, he might have to go to jail; that on July 31. 1931, defendant quit; that the amount due defendant for rayalty was \$336.54.

Defendant's version is that after the signing of the contract of March 26, 1931, he devoted some of his evenings and spare time to the preparation of blue prints and plans for the erection and installation of machinery necessary for the manufacture of the shafts; that about two weeks later Paith asked defendant to quit his job at the Illinois Bonding and Manufacturing Company and devote all of his time to the work, and if he did plaintiff would pay him (defendant) \$60 a week salary in addition to commissions; that defendant did as requested and became the superintendent of plaintiff's "swedging" department devoting all of his time to such work; that from april 10, 1931, to July 31, 1931, he received from plaintiff, each week, a check bearing across its face the legend "pay check", the total thus

antenned tall survey further a howevery farmed to half full principal makes he so got species of the formal date at finds fully hing forth Sumbulab 4 LLDI 400 darall to Aregary at Lines to have encounted make an agent off that the necessary has built a Withhill of some torusmon mastive a fast slikinining of bodies cid conforth histor of pileyes a mediation was at torona Thinkely maker of actual income new ted his work in presenting galf olds their paint over a read or test as him along the manual or derivation or manual form or high which would -burish sensets or intege Williams and more than and a sure to the sure uetta viruse inii tegrinuse of Inchasteb at begande ad of down a Cat one being durances but drade o' Tiliniale of once dachen'to mitagraveso alds Depresenting works the spect has bell or buly his tell, plane to one Intel with them a Chi to administrate allow at beensyl . . . . The and in addition, on July Mi, 1851, Call, anichitier sile describe best-order areas but resident blue of nament distriction bling and the case year and a large or one or other than the part of the large one with the no westlerers with decimal to the opposed both force telling benchmirch . Cold. CHICAGOS.

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long, to July 31, 1951, he received from plainter; each reak as
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received being \$998; that on July 22, 1931, he (defendant) presented to plaintiff a statement showing the number of shafts produced by his process and requested plaintiff to pay the royalties account; that the amount due was \$336.54; that plaintiff agreed to pay \$200 on account and gave defendant a check for that amount. This check did not bear the legend "pay check"; that on July 25, 1931, Faith told defendant his salary was reduced to \$20 a week; that he (defendant) refused to accept the reduction and terminated his employment.

It is contended by plaintiff that the verdict and judgment is against the weight of the evidence. There was a clear conflict in the evidence. Where there is irreconcilable conflict in the testimony a court of review will not reverse the judgment if the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the judgment. "Where the testimony is conflicting it is the special province of the jury to determine its weight and correctness. The verdict of a jury, shen approved by the trial judge, should not be disturbed by a reviewing court unless the record clearly shows it is contrary to the weight of the evidence."

[Bels v. Piepenbrink, 518 Ill. 525.]

apparent conflicts therein, we have reached the conclusion that we would not be warranted in holding the verdict and judgment contrary to the manifest weight of the evidence.

It is also urged that the court erred in admitting improper evidence. It appears that the defendant testified that as foremen he received four payroll records of the "swedging" department, showing the amount earned by the employees in that department, among which was the name of the defendant. Defendant testified these orbibits were handed to him by some one in plaintiff's office; that it was his duty as foremen to check the time of the men working under him. Both

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is the evidence. Where there is throughfull consists to the following the three there is the entitle to the the three constitutions of the constitution of the constit

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Faith and defendant had before these exhibits were offered in evidence testified as to the facts, Faith claiming the \$60 checks were advances, while defendant claimed they were in payment of sclary. Under this state of the record it was not reversible error to admit the exhibits in evidence.

Other errors are assigned, but since the points have not been argued they will be deemed to have been waived and not considered. (People v. Cobba 343 Ill. 78, 83; Morrester Co. v. Industrial Board, 282 1d. 489, 488.)

Finding no reversible error the judgment is affirmed.

Scanlan and Gridley. JJ., concur.

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RALPH H. POORMAN, (plaintiff), Appellee.

V.

F. LANDON CARTAGE COMPANY, a corporation, (defendant).
Appellant.

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APPEAL FROM MUBICIPAL COURT OF CHICAGO.

263 I.A. 633"

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Ralph H. Poorman sucd F. Landon Cartage Company, a corporation, in a fourth class action. The case was tried by the court with a jury and there was a verdict in favor of the plaintiff and a judgment against the defendant in the sum of \$600. To reverse the judgment defendant appeals.

The plaintiff sued to recover for damages to his automobile truck through the negligence of the defendant. In plaintiff's statement of claim it is alleged that November 22, 1929, plaintiff was driving south on Wabash avenue, Chicago; that defendant negligently operated another automobile in a northerly direction and collided with a mail truck operated by the United States Sovernment, which was traveling in a westerly direction on 30th street, and the mail truck was caused to collide with plaintiff's automobile, etc.

In defendant's affidavit of merits it is admitted it operated its automobile in a northerly direction, but denied it was operated negligently; denied its automobile collided with plaintiff's automobile; denied it was necessary for plaintiff to expend \$1000 for repairs, and elleged that any damage suffered by plaintiff was due to plaintiff's negligence.

As grounds for reversal defendant contends that plaintiff

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THE OTHER A PICE MINNE DELIVERED THE CORREGO OF THE COMP.

Ealph H. Formen and F. Lundon Cartege Company, a corporation, in a lourth class action. The coas was tried by the court with a jusy and those was a ventist in fover of the plaintiff and a judgment equilat the defendent in the sum of 1600. To reverse the judgment defendent appeals.

The pinintiff and to recover for decays to his entomobile truck because the in negligance of the defendant. In pinintiff a state most of claim if is alleged that Horozour his little plaintiff was driving anoth on Waback avenue, University that different and antiformally operated another automobile is a northwelf direction and cullided with a mail truck aperated by the United States Severament, which was drawaling in a venturally direction on 20th atract, and the mail truck was enumed to collide with plaintiff's automobile, and

In defending a sith out aneste it is admitted it eperated its subsambile in a merimaly discolion, but denied it was appraised and morphism district and morphism of the subsambility denied it was accessary for plaintiff to expend 12000 for repairs, and elleged the teap demands enflowed by plaintiff was fire temperature and elleged the teap demands enflowed by plaintiff was fire to approximate the complete of plaintiff and company to plaintiff.

was guilty of contributory negligence and that the judgment is not supported by competent and sufficient evidence as to damagea.

It appears from the evidence that the accident occurred at about 4:30 n. m. . November 22. 1929, at the intersection of Wabach avenue and 30th street, Chicago. It was a clear day and the rayement was dry. The northeast corner of Wabash avenue and 30th str at is improved with a two-story residence setting back 50 or 60 feet from the sidewalk on 30th street. The plaintiff was driving his truck south on Wabash avenue and a United States mail truck was being driven west on 30th street. The plaintiff's truck, with a 11-ton load of coal, was traveling at a speed of about 20 miles an hour. until he saw the mail truck 25 or 30 feet east of Wabash avenue traveling about 15 to 20 miles an hour. At that moment he (plaintiff) was 25 feet north of 30th street. and defendant's truck was 100 feet south of 30th street, also traveling at about 15 or 20 miles an hour, and as the plaintiff continued southward, he watched the mail truck until the two collided in the center of the intersection, and stopped in the path of plaintiff's truck. The evidence further discloses that the center of the front end of defendant's truck collided with the rear left corner of the mail truck when plaintiff's truck proceeding southward at 4 or 5 miles an hour was between 10 and 15 feet north of them. When plaintiff saw the mail and defendant's truck were going to collide he grabbed his emergency brake, but was unable to stop his truck. The front end of his truck hit the mail truck three or four seconds after defendant's truck had struck the mail truck. It further appears that had the defendant's truck not collided with the mail truck plaintiff's truck would have passed behind the mail truck.

In support of the contention that the plaintiff was guilty of contributory negligence defendant's counsel calls our attention to

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It appears from the extreme that the auctions agreement denied to make out of the control of the comment of the disease of Swamers told his the table as on the case of the there are an arms. was dry. She moved correct to reach to the server of the server is improved with a Tennellary neckloner vehile; back to ar on York and amiving one Thismisis out . Jeers alou me allowable eds mort united now depart lime awings outlied to have seened global on drawn Sawell critic was an long obsert. The mining of the last a line allot land of coal, one traveling at a speed of about 10 miles an hour, none danced to Jane 300't 00 to 88 deres fine one was an Liter (MIRELACE) and resume from the armond on marks of our of American Services ess II feet morth of Soch event, and defendant's truck was 100 feet south at high street, also braveling at thought 10 or to miles an mour, dury! Then add builder at absentions boundings Thinkely all as has hangang her and incorporate the title comment of the hand from one and theme meanfould torong and only and a court a Tribula to along any all the benter of the from the from the beneath a terms will be all become four a 'Thindaly made mount than our to person find good but to diven just 21 has 31 nowered now raid no cultur 2 to 5 in busunitues eres fourt e trabuchels bus flow edd was blisting and of eldens are sed , what demonstrate old buddens and obilion of males More I am eas his kers als it ove I want . I would be to be the control of Lines out downthe had down a toundary too vetto absence and no sould ion douts a surbusten and had bad anough redital is about collided with the mail drough plaintiet's truck would have peased believe the mail trades

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subdivision 4 of section 34. Ch. 95a. Cahill's Revised State. 1931. p. 1930, which provides in part as follows: "In all cases \* \* \* vehicles transporting United States mail \* \* \* shall have the right of way over other vehicles." and he argues that the plaintiff should have yielded the right of way to the mail truck. In this view we are unable to concur as in our opinion had the defendant complied with the section of the statute just quoted there would have been no accident. Defendant's counsel also argues that the plaintiff did not have his truck under proper control just prior to the accident and that he did not maintain a proper lookout as he approached the intersection. The question of contributory negligence only becomes a question of law where the evidence is so conclusive that the court could not arrive at any other conclusion than that the injury was the result of the negligence of the party injured. If there may be a difference of opinion on the question, so that reasonable mines will arrive at different conclusions, then it is a question of fact for the jury. In C. & R. I. R. R. Co. v. Schmitz, all Ill. 446, 452, it was said:

"'It is not a rule of law that the emission of the duty to look and listen will bar a recovery where there are facts excusing the performance of that duty, \* \* \* and it is the settled rule of this court that it can not 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.' And it is a question for the jury to determine whether, in view of all the surroundings, the injured party is guilty of negligence in failing to look and listen, or whether he is relieved by the circumstances from the duty to look and listen."

Under all the facts and circumstances proved in the instant case we are of the opinion, the question as to whether the plaintiff was guilty of contributory negligence, was a question for the jury, and that he was not guilty of contributory negligence as a matter of law. (Vaitrovich v. Black. 254 Ill. App. 49; Ames v. Frmour & Co., 257 Ill. App. 449.)

It is also contended that the verdict and judgment are not supported by competent and sufficient evidence as to damages. On the trial plaintiff, to show prime facie the extent of the damages to

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his truck testified, that after his truck struck the mail truck he towed it to the Hendrickson Motor Truck Company, which company had been engaged for about 20 years in the business of building and repairing trucks; that the truck was repaired there; that he watched the repairs being made; that the repairs were all necessitated because of the accident; that he received a bill for the repairs, which he paid, and the bill was then introduced in evidence over defendant's objections. It is an itemized bill for repairs on his truck and is marked "Paid 12/31/29". There is nothing in the record casting any suspicion on the fairness and good faith of the bill.

Proof of payment of the bill was prime facie sufficient, and it was not error to admit the bill in evidence. (Byalos v. Matheson, 328 Ill. 269, 272; Juhbeam Beverage Co. v. Cunningham, 242 Ill. App. 15, 18.)

Finding no reversible error the judgment of the Municipal Court is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

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(plaintiff), Appellee.

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HOME MATGRAGE & INVESTMENT CO., a corporation, (defendant), Appallant. APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 633

MR. PRETITE JUSTICE READER DELIVER D THE OFINION OF THE COURT.

Rema Theresa Dinkel sued Home Mortgage & Investment So., a corporation, in a first class action. The case was tried by the court without a jury and there was a finding and judgment in favor of the plaintiff and against defendant for \$1040. To reverse the judgment defendant appealed.

In her statement of claim filed becomber 3, 1931, plaintiff alleged in substance that March 13, 1931, by its president and countersigned by another officer of the corporation, the defendant issued a check for \$1040, payable to plaintiff, drawn on the United American Trust & Savings Bank of Chicago, in payaent of a note upon which defendant was liable; that said check was presented to the bank on which it was drawn, but was returned "Payment Stopped"; that the check has never been honored and defendant refuses to pay same after demand. The defendant filed an amended affidavit of merits reciting that the check was without consideration moving to or from the defendant; that the president of defendant corporation had no authority to sign the check and had been instructed by the board of directors of the defendant corporation not to issue the check; that the note, the supposed consideration for the check, was a certificate

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of deposit signed by Matterman & Glanz, payable to plaintiff, dated October 17, 1919, payable October 18, 1920; that it was not a note upon which defendant was liable; that the defendant never assumed nor agreed to pay the certificate of deposit; that defendant is a corporation organized and existing under the laws of the State of Illinois for the purpose of acting as agents and brokers for others in the negotiations of loans on real estate, and had only such powers as were expressly granted to it by its charter, and that its implied powers were only those necessary to carry into effect the powers expressly granted; that it did not have the power to purchase any unsecured obligation of any person. It also pleaded the ten year statute of limitations.

The record discloses that prior to October 17, 1919. Matterman and Louis D. Glanz. concrtners, were conducting a mortgage bank business at 1110 Milwaukee avenue. Chicago, and that on that date plaintiff deposited with them \$1000 for inventment in a mortgage, and received in return a document (hereafter designated as a certificate of deposit) whereby Hatterman & Glanz acknowledged there was due plaintiff \$1000 on October 18, 1920, with interest at four per cent per annum; that May 7, 1920, the "Heme Agency & Loan Company," a corporation, was organized under the laws of Illinois with powers. among others, of acting as agents and brokers for others in the negotiation of loans on real estate; that on May 13, 1923, the name of Home Agency & Loan Company was changed to Home Mortgage & Investment Co., and on August 31, 1929, the assets and liabilities of the copartnership of Hatterman & Clans were taken over by the Home Mortgage & Investment Co., and the amount due plaintiff upon the certificate of deposit appeared on the books of the defendant as a credit due plaintiff; that on March 13, 1931, plaintiff

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presented and delivered the certificate of deposit to Louis B. Glanz, president of the defendant corporation, and received in return therefor a check for \$1040 drawn on the United American Trust & Savings Bank, payable to her order, which check was countersigned by B. L. Kempski, and thereafter she presented the check for payment on the bank on which it was drawn, but payment thereof was stapped.

The only points raised by defendant in its brief are (1) that the defendant never assumed to pay the certificate of deposit;
(2) that the certificate of deposit was barred by the Statute of Limitations, and (3) that the defendant could not assume to pay the certificate of deposit because any such assumption would be ultra vires.

It is undisputed that Louis Glanz was president of the defendant; that B. S. Kempski was in the employ of the defendant authorized to countersign checks and that the check upon which suit in the instant case was brought was given to the plaintiff and that when plaintiff received the check she surrendered to defendant the certificate of deposit and that it was marked "Paid" and that the amount due plaintiff appeared as a credit due her on the books of the defendant. It is upon this state of the record that defendant's counsel claim the evidence was insufficient to hold that defendant assumed to pay the certificate of deposit.

Books are used for the purpose of keeping a summary of all them the accounts which the person keeping I has with each person in whose name a ledger account is kept, and are presumed to show the condition of the account, and are regarded as an admission that the sum shown thereon as a credit is due and unpaid. "An admission, wherever found, is admissible in evidence against the person making it." (Goulson v. Hartz. 47 Ill. App. 20, 27.) In the instant case the undisputed evidence discloses that the amount due upon the

proposed and delivered the cortificate of depent to Louis In Clusses in the clusses of the defendant corporation, and resetted in return there. for a check for \$1040 drawn on the United Inc. | next con Track & Syland and another she presented the check for request on the supplies, and thereoffer she presented the check for request on the

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certificate of deposit held by the plaintiff appeared on the books of the defendant as a credit due the plaintiff. From such admission we hold that the defendant did assume to pay the certificate of deposit.

It is next contended that as to Hatterman & Glanz, the claim was barred, and that the agreement to pay plaintiff the amount of the certificate of deposit by the execution of the check. did not raise the bar. In this view we cannot concur for the obvious reason that the plea of the Statute of Limitations is a personal privilege and defense and it can be availed of only by the person for whose benefit the statute inures. or such other person as stands in his place and stead. (Fish v. Farwell, 160 Ill. 236, 242; Metropolitan Life Ina. Co. v. The People. 209 1d. 42. 48.) Had the plaintiff sued Matterman / Glanz upon the certificate of deposit they might have pleaded the Statutes of Limitations, but in the instant case the plaintiff sued, not on the certificate of deposit but upon the check given to the plaintiff. The fact that the defendant assumed the debt was sufficient to take the case out of the statute. (Wooters v. King, 54 Ill. 343, 344; Ditch v. Vollhardt, 32 1d. 134, 135; Edwards v. Harper, 234 Ill. App. 296, 301, and cases cited: merican Steel Foundries v. The Railroad Supply Co. 235 Ill. App. 228, 252.)

Defendant's counsel also argue that the court erred in refusing to allow defendant to introduce evidence of the lack of authority on the part of the president to issue the check. Martin Johnson, a witness for the defendant, testified that in February, 1951, plaintiff "manted me to give her a check for the certificate of deposit, \* \* \*. I brought it to the attention of Mr. Glanz and he said we could pay it and I said I wouldn't issue a check without the authority of the Board of Directors." He was then

respective of deposit held by the plaints special on the books we had the countries of deposits.

and same of amounted or us fait behavior dance of the france and trible-hip que an immersure our and the players are minds sib adoude and to mailmoone out by discount to etectificate and to marters of car's moved decrease or water sidd of cond will be feel told range tint the plan of the (sature of Limitation in a grangen. magger add ad white to believe but see it bus consist but egoliving acoust on more a cuito done to messai biniste est dilance acoust aci ends all all the rest of a self . South bus sonig als si " - - Tile 1 Life Ing. Co. v. "he double, 200 id. 42, 43.) And the dissipate the administrator with some mode & somewhall from statements they might have pleaded the distutes of hinterious, has in the Blenger be stouffiree off or for about Timerich of tops leaded said Socia Socia will . This chair sais at movin though and mace that In the ture only out I at applicable and their and become a decision to the charmes (nothing to fine, he like bed, bent black we builden!) AND SCHOOL SPECIAL OF AN AND SHOP STATE STATE STATE 230 121. 1ph 108. 108.)

Defendant's coursed also esque that the court erred in refusing to allow cofendant to introduce evidence of the lock of authority on the part of the president to lock the the check. Herein the 1951, plaintiff "weated me to give her a check for the certificate of separate at to the absorbion of ir. Claus and he said so dould pay it and I said I wouldn't locks a clark without the nutherity of the Board of Directors." He was then

asked. "Do you know whether or not the Board of Directors of the Home Mortgage & Investment Company ever approved this payment?" To which an objection was sustained. There is no evidence in the record tending to show that the authority of the president was limited, nor does the record disclose that defendant's counsel offered to show that his authority was limited. A corporation acts through its president, and through him executes its contracts and agreements, and an act pertaining to the business of the corporation. not clearly foreign to the general power of the president, done through him. will. in the absence of proof to the contrary, be presumed to have been authorized to be done by the corporate body. (Bank of Minneapolis v. Griffin. 168 Ill. 314, 317; Hanover Coal Co. Pullen. 137 Ill. App. 559, 560; Corn Belt Bank v. Forman, 264 Ill. 589, 599, and cases cited.) It was for the defendant to show that such act was without authority. (Peeria Life Ing. Co. v. International Life & Annuity Co., 246 Ill. App. 38, 49.) No such swidence was offered by the defendant, and the sustaining of the objection to the question above noted did not constitute reversible error.

It is finally contended that the defendant could not assume to pay the certificate of deposit because any such assumption would be ultra virea, and in support of this contention counsel argue that the defendant corporation was chartered as an agency and loan corporation and that the powers granted to it did not include the right to assume the payment of the certificate of deposit.

We are of the opinion that this contention is untenable for the reason that what the defendant did in the instant case was clearly within the corporate powers of the defendant. It is undisputed that plaintiff deposited \$1000 with Natterman & Glanz for investment in a mortgage. The defendant was incorporated for the

sail to appreciate the brack of the nor resided word vor our . Dodne "Managing addd birmstock from quarters Aroutagest in applical most To which an objection was amendmed. There is no evidence in the record touching to about the animarity of the preschool was Limited, nor door the record disclose this defendant's countril area and improved to continue of the continue of the last of the state of the attraction of traderous and or well not a furthering all apprell and longing and he conclude out to published the her and all the said and should be having to the posted poor of the greatering teat tenness of agreement to all truth to common wit of all to any course In siral vales of the best to be try our part of and a state of the last and and a state of the last o amount of the result of the state of the second AND AND AND AND AND ASSESSMENT OF THE PART OF THE STATE OF A PART AND ADDRESS. Pro-Acre And rude of Justice of all and our H. Cabulla sauce the will form the first or an entitle the first that the first to be Adventig Dies Dies alle offen die alle in seek erhieren was rifferen A maideous and as maideolds and to nathalasma and but atmosphe and and whomas additioned adolf thoses, you hit holds would

the defendant corporation was chartered as an agency and lean corporation the corporation of the countries of depending

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purpose of acting as agents and brokers for others in the negotiation of loans on real estate, it therefore had authority to negotiate a loan for her. To hold defendant can repudiate the contract would not advance justice, but would accomplish a logal wrong. We think the following language of the court in <u>Bradley v. Ballard.</u> 55 711. 413, 419, is applicable here:

"The borrowing of money was not, in itself, an act ultra vires. \* \* \* The money was not borrowed to be used for an illegal or immoral purpose. The lenders have been guilty of no violation of law, nor wrong of any kind. The corporation has received their money and used it for a purpose, which, whether ultra vires or not. was unquestionably the sole purpose for which the corporators associated themselves together, \* \* \* Justice requires the corporation to repay the money it has thus borrowed and expended."

We find no reversible error. The judgment is right and it is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur-

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CHARLES ACPPELT, (complainant). Appellee.

V.

CLAYTON AIGIE et al., Defendants.

ON APPEAL OF OAK PARK TRUST & SAVINGS BANK, a corporation, as trustee, Appellant.

INTERLOCUTORY

APPRAIL FROM SUPERIOR

COURT OF COOK COUNTY.

268 I.A. 6341

MR. PRESIDENG JUSTICE KREEKER DELIVERED THE OPINION OF THE COURT.

By this appeal Oak Park Trust & Savings Bank, as trustee. seeks to reverse an interlocutory order appointing a receiver entered in a foreclosure proceeding.

Complainant's bill, filed July 20, 1932, prayed for the foreclosure of a trust deed accuring the principal sum of \$40,000 and for the appointment of a receiver <u>pendente lite</u>. July 28, 1932, there was a hearing on the motion for the appointment of a receiver, based solely on the allegations of complainant's verified bill, resulting in the court entering an order appointing Jules Lichenbaum receiver of the premises described in the bill of complaint, and the rents, issues and profits, upon the complainant filing within five days a bond as required by statute in the sum of \$750.

The material allegations of the bill are that april 20, 1927, Clayton addie, a bachelor, executed his 98 bonds, numbered 1 to 98, both inclusive, aggregating \$40,000, and secured their payment by the execution of a trust deed to the Cak Park Trust & Mavings Bank, a corporation, as trustee, upon real estate in Cook County.

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268 I.A. 634

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By this appeut tok Fark Trust & Aurings Bank, as truster, seeks to reverse an interlocatory erick appeinting a receiver ontered in a foreclosure proceeding.

Complainant's bill, filed July 20, 1552, prayed for the foreclouse of a truck dead meaning the principal sum of 160,005

there was a bearing on the motion for the appaintment of a receivery based solely on the allegations of exapiniment's verified bill, receiving in the court emission of exapiniment's verified bill, receiving in the court emission as acces appointing Jules Wickenbaum white he had a required by statute in the sum of 5750.

The material allegations of the bill are that spril in.
1927, Clayton addie, a backulor, executed bis 95 bonds, mediered 1
to 96, both inclusive, engregating \$40,000, and secured their payment by the execution of a trust deed to the Dak Fork Trust & Savings
Sunk, a corporation, as truster, upon real estate in Good Courty.

Illineis, in which trust deed the granter assigned the rents. issues and profits of said real estate; that bond Sc. 1, for \$500. and bonds numbered 2 and 3, for \$1,000 each, matured April 20, 1930: that bonds numbered 4 to 8, both inclusive, for \$500 each, matured April 20, 1931; that bonds numbered 9 to 58, both inclusive, for \$100 each; bends numbered 59 to 78, both inclusive, for \$500 each. and bonds numbered 79 to 98, both inclusive, for \$1,000 each. matured pril 20, 1932; that all of said bonds bear interest at the rate of six per cent per annum, payable semi-annually on October and April 20 of each year; that complainant is the owner of \$4,000 of soid bonds with interest coupons attached: that said bonds and the interest thereon have not been paid: that bonds numbered 9 to 98. both inclusive, are unpaids that the interest on all of said bonds fell due on april 20, 1952, and has not been paid, and that all of the bonds secured by the trust deed have natured and have not been paid and complainant has declared all of said bonds immediately due and payable; that the premises have been permitted to deteriorate and fall into a bad state of repair: that waste is being committed by persons in passession of said promises; that the taxes for the year 1930 have not been paid; that the premises are improved with stores and apartments; that said premises, together with the building thereon, constitutes seant security for the indebtedness, and in the event of a decree of foreclasure and sale, there will not be sufficient money realized from said sale to satisfy the indebtedness secured by the trust deed, and that upon said sale, due to a material change in the market, from the time said trust deed was executed, the price obtainable for said premises will not exceed \$35,500; it also appears that bonds numbered 1 to 3, both inclusive, aggregating \$5,000 have been paid.

inimer out bemiles results out heet tours delide at actorisis to and profits of and real sales that less less lor (BCO. madered 2 and 3, der \$2,000 each; mebured spil 30, 1930; that books undergot \$ to \$, both bulleties, for \$700 and \$ believed ageth ma, build that books madered 9 to bit, both tanburbus, see Hill world, hearty numbered 12 to 78, beth leviesies; for him seeing arises 500,18 upl anylauleul fied 228 pt 80 begoding and he derived med about him in the half girlf and Erus brunden politic in alliance-line oblique yourse vog hota vog ade la union on all the waves and all faint amount of the passes of the control of been about them had himfore to assess decreased above about him he et & korodena ekana init inka pana iga bred moroni isoroini ... He both leclarity, are supply that the uncore we all of the Audit the alling over the and her altiful all diego on our Link about dem armi has breeden awed head facult out to become about out to II. whole losest shoot than to like benefish and thinkeloud has bing most sin each of holding have been been perhips to delegations . To bedilame grief of sector trat tringer to see a see a see flat but . They all not some out tent preminers that he meressed at encared loss have not been paint that clan prominen are improved with nearest and aportmodicy that said president, topology with our heliable theorem. constitutes some security for the ladebtenness, and in the every of. a decree of forcellence and cole, there will not be sufficient money realized from send and a satisfy the independence seemed by the tings and east that upon and all ealer due to amberial dunings in the envires firm the time out troub desi was encounted the price abtained. for dald promiess will not exceed \$18,200; in class sprease that boads numbered 1 to 8, both inclusive, eggreeting (5,000 have boom paids

A number of grounds are urged for the reversal of the It will not be necessary to discuss all of them. It has repeatedly been held that a receiver pendente lite will not be appointed at the instance of a mortgage ounless it appears that the premises are inadequate security and that it is not inscuitable to make the appointment. (Strauss v. Georgian Bldg. Corp., 261 Ill. App. 284, 288; Frank v. Miegel, 263 id. 316, 322, 323.) The allegation that the premises have been permitted to deteriorate and fall into a bad state of repair and that waste is being committed by persons in possession of the premises are legal conclusions of the pleader. (Grabowski v. MacLaskey, 257 Ill. App. 484, 486.) The bill alleges that the premises are improved with stores and apartments; that the said premises, together with the building thereon. constitute scant security for the indebtedness, and in the event of a degree of foreclosure and asle, there will not be aufficient money realized from said sale to satisfy the indebtedness secured by the truet deed, and that upon said sale, due to a material change , in the market from the time said trust deed was executed. the reice obtainable for said premises will not exceed \$35.500. There are no other allegations in the bill as to the value of the property. These allegations are not sufficiently definite as to the inadequacy of the security, and under the circumstances it was inequitable to appoint a receiver.

For the reasons indicated the interlocutory order of July 28, 1932, appointing a receiver of the premises is reversed.

A muchou of grounds are unged for the vereyont of the It will not be message to dissent all at thus. It has ad you little atil sinchmen reviewer a suit blad most that already if weather supraffers a to securise out in befoliogs are two son at it test time withwar of supokest was all a sil to make the apprintment. Introduce we hampion that been sell title App. 2004 and course of the state of the course and apply you educates as in things and went wentering and fact belongs to as sufficient which at report on your ten player as afair and a soul fifely add to anningloupe Lagel our evaluating out to naturable. minder. (de meaki e. Macio shoy, 187 ill. hope 486, 486.) -Implies says a fitte terropal our stainers the said segalle 1110 special bird one only premiers, beganner with but being bloom to derve this at bein , americade out but hat williamen sense adultance emainly from po Jan Lity study to Lon ham annochared to overed a not be a little of the said the children of the said and the little of the said and summed Late store A of task , since indee more facile box book forms with perty and the depend and cond days blue built and mail furance and all able looks for old greekers with our crossed littleton. Trees are no other allegations to the bill as as the raine of the preparty. Thene he granpehent and as as estimine viscolating ten are analyzating the same by, not seemed the structured in the past total and the AMERICAN N. LEGISLE

For the rouses indicated the interinouising order of lair 20, 1932, appointing a redeiver of the premises is reversed.

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JOHN A. TAGGERT, Plaintiff in Error.

V.

JOHN E. KILLY and THERMSA KILLY, Defendants in Error. COM COUNTY.

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ME. JUSTICE CHIELY PLLIVERED THE OPINION OF THE COURT.

By this writ of error the complainant and crossdefendant, John A. Taggert, seeks to reverse a decree of the circuit court, entered in a mechanic's lien proceeding on January 23. 1932, wherein the court, following the recommendations of a master or special commissioner, adjudged (1) that complainant's amended bill as amended "be and the same is hereby dismissed for went of equity;" (2) that the statement of claim for a mechanic's lien (No. 156.598). filed by Taggert in the office of the clerk of anid court on June 25, 1929, "be declared null and void and of no effect as against defendants and cross-complainants and that the same be and hereby is removed as a cloud upon their title to the premises involved: (3) that Taggert "be and he hereby is ordered and directed to execute and issue a release or quitclaim deed to said defendents and cross-complainants within SO days from the entry of this decree, thereby releasing and quit-claiming all interest which he has or claims to have in and to said premises by virtue of said mechanic's lien, and that in default thereof this cause be referred to a master in chancery of this court for the purpose of executing and delivering said release or quitchaim in the name and stoad of said complainant" (Taggart); and (4) that the costs of this suit, including the fees of the master to be

SECOR

JOHN A. TAGGERS.

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assessed by the court, be paid by said complainant and that execution issue therefor. In a further paragraph of the decree the court ordered that "the motion of complainant to re-refer the cause to a master in chancery to take proofs and make findings as to his claim upon a quantum meruit for services rendered as an architect, or that the court hear evidence as to the same in open court, is hereby denied." We contention or argument is made in the briefs here filed by Taggert that the court erred in its denial of the motion.

Complainant's original bill was filed on July 10. 1929. Upon defendants' demurrer thereto being sustained he, on November 13. 1929, filed an amended bill in which he alleged that he was a licensed architect with place of business in Oak Park. Illinois: that on May 11, 1929, defendants, being the owners of certain real estate in Cook County known as 331 North Austin avenue gave to complainant "their written authorization (copy attached, marked Exhibit A) to prepare plans, blue prints, drawings and specifications to be used for the construction of a building to be erected on the above described premises:" that in compliance with the authorisation complainant "proceeded to make" the plans, etc.: that on May 15, 1929, he made "a counter-proposition in writing (copy attached, marked Exhibit B) to defendants." in compliance with which he "continued to make" the plans, etc., completed them, and about June 1, 1925, submitted them to defendants, who "ratified said authorization and counter-proposition of May 15, 1929, and approved said plans, blue prints, drawings and specifications in writing, by placing their signatures thereon;" that among other things the written agreement of May 15th provided that defendants pay to complement "the sum of 3% of the cost of the building upon the completion and approval of the drawings, and an additional sum of 25 to become due and payable 90 days from the

enseased by the souri, be puth by actd escriticans and that execution ordered that the motion of complainest is re-verier the sate to a master in character to take present and sales findings on to his claim upon a quantum mermit for eartiess remiered as an architect, or time.

Insulational's antehnik will you tilled an July lie, trops off redesign on and developing all of alterests approach fall charles being property of the part of their ways it out their an Jilly believes on helly willing arolived with place of business in der form, Climetes that an Ner Shall of Manhou Line atterns to country and paring appropriate applicable except or in thirties induce and other regard and entered to except on places, blice printed combine out apprillantiage for he up on fed the and marked of a building to be erabed on the eder the plainting and designation will take resentation of their "precious "PROBABILIES DE RANGE CON ENGLISES DISCUSSES AND TAKEN DE LINES DISCUSSES." (E this had been a book which the part from the metal come ... to defendance the compliance with witch he economics to pulse the Marie appear a particular and state and appear and analytical and a particular and a partic moidinagoup-todinon han andianabonium bian hoi'ilday and anduchme'reb ad the spaintry and the plant of the plants of the property of the property and the regularities, in column of physics said similarities. Belivour Mill will be immeete, mailin and egethi welfe prome and the tree colories buy to complained "the sun of the contration daily the published upon the completion and specific of the discipuon and one mark which it allowed him and amone of his to one Louditian as

day of the approval of the plans, and that until the actual cost of the work be known the said fee should be based on the estimated cost of \$130,000 for said building;" that "under the terms of said agreements there is now due from defandants to complainant "the sum of \$5.400" (i.e., 3% of said estimated cost); that complainant held himself ready to proceed with the superintending of the construction of said building, and was and still is ready, willing and able to superintend said construction, but was prevented from so coing because of the failure and refusal of the defendants to proceed with the construction of said building," without any fault on his part; that the value of the work so performed by complainant amounted to \$5.400. and that the work for the superintending of said construction "amounts to the sum of \$3,600" (i.e., 2% of said estimated cost), "making a total due to complainant of \$9,0001" that on June 25, 1929, in accordance with the statute complement caused to be filed in the office of the clork of the circuit court a claim for lien, setting forth the legal description of the premises, and a brief description of the services rendered by and the amount due to complainant; that defendants "wholly neglect and refuse to proceed with the construction of said building, or to pay the said sum of 39,000," although often requested so to do: and that by reason thereof complainant is entitled to a lien. etc. The bill concluded with the usual prayer for the foreclosure of the premises to satisfy the lien, etc.

Exhibit A. attached to the bill, is a copy of the claimed "written authorization." It is dated May 11th, 1929, is addressed to complainant, and purports to be signed by both defendants, and is an follows:

<sup>&</sup>quot;I hereby authorize you to prepare preliminary drawings for a fire-proof apartment hetel bldg., to be erected on my property at 331 F. Austin Blvd., Chicago."

tree forten and filtry built ham security and he incorrege and he was becambles not be beened of though not often out groups of tree new by him to mare this remain and "spublished bime ton Cho. Ghill be depo aus mil denniaignee as administrat more sub wen at breat dinerector that revelations had himse beloning that to his point would be maintaine off to universal requested the bosony of these Misseld of while has nothin expers of hitty bus now has entitle the named against me sort outcomen, and the anathographic rides bradefunges - one dit approve ed compactor and to Landia has confiat in and duti above also so that you twentyle "agentative being to mallinguage ten 4001. Il as bedrever deers from a at bases two on Area and he suffer of alapung" malipunings him, his mathicalmirrouse end us duar teld in it Inted a religion" (form hearing to the least) "305. Il he burn and due to complained of \$8,000." that an June 15, 1327, in securianue will be not the adv at being at or server appliations advanta edit date Cogni of even prices amid not given a room thanks and he drain assisted out to molique to be a bed appealed out to molidizate nonce to the sum of the comment of the confidence of the second blue To nelimpronum sels side tempera as senter bee feeling affere mekanyang magia digenila "gamga" in me bise odi yan an se angilad a of helifate of special pass touren's manger of Said but on on or Mens use. The will considered with the nestal prayer for the force cipence of the eropiess to settery the lies, etc.

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Exhibit B, is a copy of the claimed "counter-proposition in writing." It is dated May 15, 1929, is addressed to John R. Kiley, is signed by complainant and is as follows:

"This is a verification of our telephone conversation, and your letter to me, dated May lith, signed by you and hrs. Kiley, authorizing me to proceed with drawings for an spartment hotel to be erected on your property at 331 No. ustin Blvd.

My fee for services is 5% of the cost of the building, 3% of which is to become due and payable by you upon the completion and your approving drawings, the balance of 2% to become due and payable 50 days from the date of your approving the plans. Until the actual cost of the work is known the above fee will be based on the estimated cost of \$180,000. With this understanding I will proceed to complete your plans and engineering drawings and will work my forces overtime to have them finished at the earliest possible date. I was much pleased to hear that you were so atisfied with the sketches and the front elevation I submitted to you last week."

Defendants, in their answer to the amended bill, admit that on May 11, 19-9, they were the owners in joint tenancy of the premises involved; allege that they are not advised except by the bill, and hence demend strict proof, that they gave to complainent the said "written authorization" of May 11, 1929, (Exhibit A) or that complainant prepared any plane, etc.; deny that on May 15, 1929, or at any other time, complainant made to them his se-called "counter-proposition in writing" (Exhibit B); deny that defendants ever received such a writing, or that they ever accepted or subsequently ratified any such proposition; deny that complainant ever made or completed the plane and apecifications mentioned; dany that defendants are indebted to complainant in the aum of \$5,400 or in any other sum; allege that complainant's claim for lien was filed with the clerk of said court for the improper purpose of clouding defendants' title to the premises; allege in substance that negotiations were first had with one William K. Murphy. who represented himself to be a contractor and builder, in regard to the feasibility of eracting on 8-story building on the premises. that Burphy said that his friend, Tamert, an architect, "would

Inhibit 3, is a sepy of the element "counter-proposition
in writing." It is dated May 15, 1830, to sidremed to John H.
Niley, is signed by complainant and to so fellows:

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Distortantes in their amount to the emended hills when and to promot taket all community was your puts all the many many promines territoric allege that they are not abother sample by the . diministrate description of the contract of the description of the contract the and "writted amendantime of the life live indicate A) or that employees, property our plants which complete the large line and the that or of one chare their weightness said to do not be presented compactor and your (indicate in writing in the state and the server to a compact of the server of th ever received anch a writing, or that they over accepted or nubuscannot restrict any make propositions dear that completeness over dads took them time and officers and aft beinfunes to about at so cotall to may not at translations of bottsbut one advance to mail't new metl wer minio n'imparantement des lieu seus contre peus spiritually be entroying measured and out from the month out after cody vacaded and involve presidency out an allow familiarded negotiations were fixed had with one Villiam L. Marphy who of harper of problem the agriculture is of all blooms between the the freetpility of erecting in brokery suiteing on the problems himself and that this frequent charter and does him physical field

make a thumb-mail sketch of the proposed building," for which no charge would be made, that thereafter Murphy took defendants to laggert's office, where conversation was had as to the erection of a building of a certain type upon the premises and where defendants sismed their names to certain plans; that at the time complainant and Murphy assured defendants that said plans were "only tentative" and defendants' signature thereon was necessary in order to ascertain from the proper city officials whether such a building could legally be areeted on the promises, and that defendants also then signed, upon request of complainant and Murphy, an application for a leans further allege that thereafter, about May 13, 1929, at defendants' home, complainant and Murphy presented to Theresa Kiley a certain namer, purporting to be a front elevation of a proposed building, that she put her signature thereto solely upon their representations that it "was merely to show her good will." that thereafter other conferences were had, at which complainent and Murphy frequently urged defendants to sign a contract for the erection of a building upon the premises, which they refused to do: that thereafter about June 24. 1929. John R. Kiley informed both complainant and Murphy that he had investigated the references of complainant as an architect. that said references were not satisfactory and that defendants had decided not to go any further with the erection of any building, and no building was erected thereafter on the promises; and further alleged that complainant and Murphy "fraudulently conspired together, and made the representations above set forth to these defendants, knowing them to be inexperienced in such matters, to induce them to enter into said building project, which complainant and Murphy fully knew was improticable and unwise and would involve defendants in financial difficulties;" that after they ascertained that defendants would not go shead with said project they further conspired together to

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place a mechanic's lien upon the premises, thereby clouding defendants' title thereto, and the same was so placed with the fraudulent
intention of forcing defendants to make some kind of a settlement
with them; that said lien was not filed in good faith and was not
based upon any contract, and "was filed merely for the purpose of
harassing and annoying these defendants;" and that said lien "is for
an excessive and exorbitant amount, and is therefore fraudulent and
void."

Defendants also filed a cross bill, making substantially the same allogations as in their answer, and praying that the statement of claim for mechanic's lien, filed by complainant in the clark's office on June 25, 1929, be removed as a cloud upon their title to the premises. Complainant subsequently filed an answer to the cross bill.

During February, 1930, complainant amended his amended bill by adding a paragraph in which he alleged that his said contract with defendants was entered into in good faith without any false or fraudulent representations or statements made to defendants by him or any one in his behalf; that William R. Murphy had nothing to do with the negotiations except as a friend both of defendants and complainant; and that said statement of claim for lien was filed by him in good faith and for no ulterior purpose. Subsequently the cause was referred to master in chancery, John Prystalski, to take proofs and report the same, together with his conclusions on the issues formed by the bill and cross bill and answers therete. In December. 1930. said Prystalski having been elected a judge of the superior court of Cook county, and have resigned his position as a master. an order was entered on stipulation of the parties directing him to continue as a special commissioner and hear further evidence and, when completed, make his report as such. He submitted his

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report on July 22, 1931, and the same was filed in the circuit court on October 22, 1931, in which, after outlining the pleadings, he made numerous findings, based upon the mass of oral and documentary evidence which had been introduced before him by the respective parties. These findings are in substance as follows:

That defendants (the Kileys) were and are the owners in fee simple, as joint tenants, of the premises involved, known as 32 North Austin avenue, and having a frontage of 35 feet on austin avenue and a depth of 148 feet, with an alley in the rear and another alley to the south; that in May, 1929, the premises were improved with a twp-story frame dwelling house, then occupied by the Kileys as their home; that early in that month a building, known as the "Columbus Park Motel," and located about 4 blocks east of the Hiley property. had been completed, and John N. Kiley. thinking that a similar building might to advantage be erected on his and his wife's property. sent to examine the new hotel building. hile there he met an occupant of one of the rooms, william K. Murphy, who claimed to be a building contractor, and had a lengthy conversation with him; that they went and viewed the Kiley property and Murphy then told Kiley that it was just the thing for an apartment hotel; that a few days thereafter Murph, called at the Kiley home and saw both defendants, urged them to eract an apartment hotel on the property, said that it would be necessary to employ an architect to "prepare aketuhes and make proliminary drawings" and suggested complainant (Taggert) as the architect to be employed; that the Kileys agreed with the suggestions and Murphy at once saw complainant with the result that within a few days complainant prepared certain preliminary sketches for the proposed building, and Murphy brought them to the Kiley home and had a further conversation with them; that at this time urphy presented eaid "written authorization" letter of May 11th, mentioned in complainant's bill, and at his request the two Kileys signed said letter and delivered it to him; that the extent of the authorization was for complainant "to prepare prediminary drawings" for the proposed building; that a few days thereafter the kileys, through the active efforts of Murphy, met complainant at his business office and had a conference with him, in Murphy's presence, "with reference to the preparation of working drawings and specifications and the terms under which complainant was to prepare the same;" that at this time complainant was and still is a duly licensed architect; that the Kileys were each about 63 years of age and inexperienced in the construction of buildings; that complainent testified that shortly after this conference he on May 15, 1929, mailed to Eiley his "counter proposition in writing," set forth in his smended bill; that both defendants testified that they never received such a proposition or letter and never saw it, that while the letter mentions a "telephone conversation" there was no proof that such a conversation had been had, and that "the master finds that the proof does not show that said letter was ever received by defendants or either of them;" that thereafter complainant prepared certain drawings, introduced in evidence as exhibits 2 to 12, some of which "were signed by both of the Kileys in complainant's office, and one at least by Mrs. Kiley at her home; that subsequently a written agreement was prepared by Murphy as contractor, and submitted to defendants, for the erection of a nine-story apartment hotel building on said property, but that defendants did not sign the agreement or any similar one; that said agreement provided for the erection of such a bailding at a cost of \$180,000; that on June 4, 1929, at

report on July 13, 1521, and the name was filled in the sirouit court court evolut value as second court of the ship of the same of the same downsmitter oridence of the had been introduced before him by the respective perties. These

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The defendants (the Mileys) were and are the company For adopting to folial beneating of the granters savelyout, manage as in and a last as each to transfer from the test on lastin avenue and a depth of left fresh with an oling in the rear and another eller to the marky that is high blate the president ware laproved with a transfery from dealthy brane, then recepted by the hitors as that's and miles for any and the second agent of the or of the state of the s excreming which will be one misself a results sudered one "Linkell forth - Hind affects a see that the will are the product of the the minist of winds be evented to his and the all the states of PRODUCED BY SEC OF SURE ADD. (SELECTION DOMESTIC SELECT BY PROat one of the renner william it maybe, the cheline to be a noticing From their bods, built alle mellinimmen aphysical is but hen yearhouses were view von billey prepared and distribution of the care of the same view and the tollored and thing the second policy will a feet and the on the sale of the Kiley home and ear both defendance, urged to he alone in appropriate on the present on the section in the section in where has anticipal to respect to "property of galaxies and party and aid as (inegal) deseluiques briserages has "engliment yeard ) in we'r ac middly dand dinoen add dite dennialymoe was come in the bed been really between Total of the party between the state of the party bed been and present the state of the party bed been and party bed bed been party to the state of the party bed bed been and bed bed bed been party bed bed been party been party bed been party Surement company and a said to been posted dilly malescoped control a the many world and to word to wilder being the property of the complained to proping and the state of the s wilders bled a few days thereafter the lifters, through the editors g had him emiliar constraint whe its provided give you progress by adverted confinence with nice in Margin's presente, "note reference to the properties of section dentities the spotterious and the factor properties resultations was a manufacture the court "tens of this time couplations Related will also shall be a didy blommed analytical think also the littleys will park while it was no was and beautiful to the converse in the start to the newsplace while youth threath had been during which and pend he on may like littly matter to hillsy him "souther proposition his switchings, not forth in his second bills away such advantage towerfood and they make cooking again a problem of there are nothing and and les that make one Levicer manetone a "bolegame equivarentles" there ustana and dual han shed most bed wold exerces a more that low a bevious very on married sine contrapts for anch lawre out dade, about between a cities of their there is they are contained by the The second of the state of the political for the styrides of a pine-cary spectment botch velificato descript and make one all equationies duty and expressing him an In entroce our way haddward descript plea total total total and as profession of team of the property on the artistic a fine of the

Murchy's solicitation, both defendants signed an instrument, designated as an "Application for Loan" (introduced in evidence), wherein they anught a loan of \$180,000 from "Holzer, Inc." to be repaid in 10 years at 6-1/2 per cent interest; that "there is no testimony that said application ever was presented to the Holser people, or that any definite action ever was taken to secure the money;"nthat complainant claims that, in addition to said drawings (exhibits 2 to 12), he prepared "specifications," to be used in the construction of the proposed hotel building, and that he "gave the original specifications to defendants and a copy to Murphy," that both defendants testified that they had never received or seen any such specifications, that no specifications were produced or exhibited before the master on the hearing, and that the master finds that "no apeliciations were prepared by Taggert in connection with the above matter;" that the plans as by lagger in commercial with the accomplete plans, and a building buch as proposed could not be constructed from said plans;" that the plans as proposed "do not conform to the zoning ordinances of the City of Chicago, and that if an applic tion were made for a building permit based on said plans such permit would not under the law be issued:" that complainant "did not furnish complete plane or specifications covering the erection of a building such as was contemplated;" that no building ever was creeted on the premises in conformity with said plans, and that "nothing further was done by the parties towards the erection of the building there as set forth herein;" that complainant, in his claim for lien, filed with the clark of the court on June 25, 1929, (photostatic copy attached to the report) "states that on June 1. 1929, he made a contract with the Kileys to furnish plans, specifications, blue prints and services as superintendent and director of the work on the building to be erected for the sum of five (5) per cent of the total cost of the building, - said cost being not less than 1180,000, that claimant has completed all plans, specifications and blue prints required, and is ready and willing to record with the superintendence herein, and he therefore claims a lien for the sum of Nine Phousend (\$9,000) dollars;" that the written authorization, as set forth in said letter to complainant of date of May 11, 1929 (exhibit A attached to the bill) "authorized only the preparation of preliminary drawings;" that complainant new claims "the sum of \$5,400, which is 3% of the proposed cost of the building (\$180,000), - this covering a complete set of plans and specifications for its erection;" and that "there is no testimony before the master as to the gost of or value of such preliminary drawings."

and the master or special commissioner, in concluding his report, recommended that complainant's amended bill be dismissed, and that a decree be entered in accordance with the prayer of defendants' cross bill. Complainant's objections to the report were overruled and the same were ordered to stand as exceptions before the court. Iter a full hearing on the exceptions the same were overruled by the court, and on January 23, 1932, the decree in question was entered as first above mentioned.

Various points are urged by counsel for complainent for a reversal of the decree. They are in effect that the findings

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and conclusions of the master or special commissioner are contrary to the evidence, and that the decree, following those findings and conclusions, to not sufficiently supported by the evidence or the After a careful consideration of the documentary evidence and of the testimeny of the various witnesses, which is conflicting in some important particulars, we are of the coinion that all of the master's findings are sufficiently sustained by the evidence, and that the decree is fully warranted by the evidence and the law. We think that it clearly appears that complainant only was authorized by defendants to prepare preliminary drawings or sketches for a proposed hotel building on their property, in order that they might determine, after ascertaining the probable cost of the improvement. whether they should go shead wish it; that after negotiations they decided not to erect the proposed building or any building; that they never authorized complainant, either orally or in writing, to prepare detailed plans and specifications for any buildings that such plane as were made by complainant and considered by the parties were incomplete, faulty and in violation of the soning laws; that no specifications ever were furnished to defendants by complainant; and that complainant is not seeking in this proceeding to establish a lien for the work of making said preliminary drawings or sketches. ind we think that the facts of the present case are somewhat similar to those in the case of Chronstein v. Howell, 227 Ill. pp. 215, where a decree allowing a lien for certain architect's services was reverged, and where in the opinion of the court it is said (p. 219): "We \* \* find that the services rendered by appollors were not for the improvement of the lot, but merely for the purpose of furnishing defendant with information tending to show the possibilities of such an improvement. The sketches prepared by appelless were not used by appellant in the improvement of the let, and no use was made of

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them by appellant except in so far as they enabled him to determine the character of the improvement that the let was capable of austaining. The claim of appelless does not come within the terms of the statute. (See Cahill's Stat. 1929, chap. 82, sec. 1, pp. 1658-9.) The fact that appelless may be entitled to recover in an action at law for their services in preparing the sketches eges not entitle them to a mechanic's lien upon the premises in question." And we think that the decree in the present case is in accord with the holdings and decisions of the first division of this court in the cases of Mallinger v. Shapiro, 244 Ill. App. 228, 233, and Mallinger v. Berggren. 255 Ill. up. 636. Much reliance is placed by counsel for complainant, in urging a reversal of the instant decree, upon the decision of our Supreme Court in the case of Groven v. Meyer. 342 Ill. 46, but the facts in that case are to be distinguished in several essential particulars from those in the present case. And we are further of the opinion, after considering the allegations of complainant's statement of claim for lien (filed with the clerk of the circuit court on June 25, 1929) in connection with the evidence adduced upon the hearing, that said claim for lien was excessive and fraudulent, and known to be such by complainant when filed, and that for this reason, also, the instant decree was properly entered. In Margh v. Mick, 159 Ill. App. 399, 407, it is said: "There a party seeking a lien knowingly and willfully claims more than his due, he forfeits his lien." (Sec. also, Christian v. Alee, 104 Illo App. 177. 188.)

January 23, 1932, should be affirmed, and it is so ordered.

AFFIRMED.

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MABLE G. BARKER, administratrix of Estate of Bertrand D. Barker, deceased,

Appellee,

V .

THE BRIT MAILWAY COMPANY OF CHICAGO, a corporation. Appellant. APPRAL FROM SUPERIOR
COURT, COOK COUNTY.

268 I.A. 634

MR. JUSTICE GAIDLAY DELIVERED THE OPINION OF THE COURT.

In an action for damages for causing the death of plaintiff's intestate on the night of November 7, 1929, by reason of the claimed negligence of defendant, there was a trial before a jury in February, 1932, resulting in a verdict for plaintiff in the sum of \$10,000. On March 19, 1932, judgment was entered upon the verdict against defendant and the present appeal followed.

which defendant filed a plea of the general issue. In the first count it is alleged that on the night mentioned defendant owned, controlled and was operating a steam railroad in Chicago; that its tracks extended at grade across a much travelled public highway, running northeasterly and southwesterly and known as columbus Boulevard or Southwest Highway; that plaintiff's intestate, with due care for his own safety, was driving an automobile in a northeasterly direction on the highway and across the tracks; that defendant, by its servants, then and there so negligently managed and operated its freight train, moving westerly on the most northerly of the tracks, that the locomotive collided with the automobile; that by reason of the collision plaintiff's intestate was so

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severely injured that he shortly thereafter died; that his death was the result of defendant's negligence without any negligence on his part; that he left him surviving, as his only heirs-at-law and next of kin. Hable G. Barker, his widow, and Mary C. Barker. his daughter; and that they have been deprived of their means of support and have sustained damages, etc. In the second count the charge is that defendant negligently "failed to guard the crossing or to maintain a watchman or signals there, and failed to give warning in any other manner to persons approaching said railroad tracks from the public highway there." In the third count it is alleged that defendant "was accustomed to and ordinarily did maintain a watchman at the crossing to give warning to travellers upon the Boulevard of the approach of trains upon the tracks, but that at said time and place defendant negligently failed to have any watchman at the crossing and failed to give any warning to plaintiff's intestate of the approach of the train." In the fourth count the charge is that defendant, by its servants. "negligently in the night time drove n locemotive and train of cars along and upon its tracks at said place. without ringing a bell or acunding a whiatle or having a light upon said locomotive."

On the trial the only witness that testified for plaintiff as to the collision was Wesley Lapell. He at the time was approaching the tracks in another automobile on the his hear, being a long distance behind the automobile which plaintiff's intestate was driving. Nugere Multon, a police officer, called to the scene of the collision after its occurrence and a witness for plaintiff, testified as to certain physical conditions observed by him. Doctor Thester Guy, plaintiff's witness, testified that he made an examination of the body of the deceased on the following day; that he found a fracture of the masel bones, numerous bruises and contusions of the forehead;

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and that he was of the opinion that death had "resulted from a skull fracture with shock and hemorrhage of the brain."

Seven witnesses to the accident testified for defendant. They were William E. Enox, who was driving his automobile northeasterly behind that of plaintiff's intestate, and six employees of defendant. These employees were: The fireman, engineer and a member of the train crow in the cab of the locomotive of the freight train at the time; an "engine foreman" of the Illinois Central Railroad Co., standing west of and not far from the crossing; and the engineer and fireman of another locomotive standing on the most scutherly of the tracks and about 200 feet west of the crossing, facing east. Eight other witnesses testified for defendant, including a photographer, who identified certain photographs of the place of the accident and surroundings, which photographs taken about three days after the accident were admitted in evidence.

Plaintiff's intestate was 48 years old. His hearing and eyesight were good. He was and had been for several years Chief Highway Engineer of Cook County. He was well acquainted with the character and location of defendant's tracks at and near the crossing. Prior to the completion of the new Boulevard he had discussed with defendant's engineer the type of construction of the roadway over the tracks and the character thereof desired by the County at that point. He had driven over the crossing 12 or 15 times prior to the accident, both in the daytime and at night. The crossing watchman, employed by defendant, was on duty on the night of the accident, but he was not a witness at the trial, as he had died prior thereto.

The following facts in substance were disclosed from the testimony of defendant's witnesses and the other evidence introduced by it; Columbus Boulevard was newly constructed, and its paved readway was about forty-five (45) feet wide. It ran northeasterly and

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Plaintiff's interview now is pears old. His hearing and sight were good. He ness and been for neveral years Chief Mighway Thylneur of Coek County. He was well acquainfed with this rive to the completion of the new Norleyard he had discussed with the defendent's confiner the type of construction of the readout ever the tracks and the character shortest desired by the County at the the tracks and the character shortest desired by the County at the new tent. He had driven ever the creasing 12 or 15 times prior to the confiner, both in the daysime and at sight. The creasing variebook oupleyed by cofenious, was on duty on the night of the nections.

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southwesterly and crossed defendant's four tracks at grade. These tracks at the crossing ran practically east and west, but east of the Boulevard they curved towards the north. At the crossing the width of the tracks including the spaces between them was about forty (40) feet. Just north of the tracks and west of the Boulevard was a shanty, used by the crossing watchman and a train foreman or The territory immediately south of the tracks was open prairie, and for a distance of about a mile south of the crossing one travelling on the Boulevard in a northeasterly direction had an unobstructed view of moving trains on the tracks east of the Boulevard. Shout 50 feet south of the tracks and immediately east of the Boulevard was a standard cross-arm sign. with the words "Railroad Crossing" prominently exhibited. and about 125 feet south of the tracks and cast of the Boulevard were two red lanterns on a cross-bar. which were lighted and in operation at the time of the accident, which occurred about 10 o'clock p. m. on a clear night. The freight train just prior to the accident was moving westerly on the most northerly of the four tracks, with the locomotive in front, approaching the grossing and running at a speed of less than 10 miles an hour. There were 41 freight cars in the train - 32 loaded cars and 9 empty. The locomotive was equipped with a standard automatic bell, the usual whistle and a standard headlight. All equipment including the automatic brakes were in good working order. As the train approached the crossing the whistle had been sounded at the usual place, the bell was ringing continuously and the headlight was burning. Its rays could be seen ahead for a distance of more than 500 feet. The watchman was at the crossing and in the Soulevard waving a red lantern.

Defendant's witness, Knox, a superintendent for the Commonwealth Edison Co., testified he was driving his automobile northeasterly on the Boulevard at a speed of about 35 miles an hour;

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that when he was about three blocks south of the crossing another automobile. which he afterwards learned was that which claimtiff's intestate was driving, meaned him, sains at a speed of about 48 miles an hours that he did not then see any other automobiles travelling on the Bouleverst that when he was a block or two from the crowing he awe the headlight of the locamotive and the freight train approaching from the cast: that when he arrived at the crossing the train was blocking the highway; that upon investigation he learned an accident bad occurred; that he did not at first see any flagment that after he had alighted from his car he saw a flagmen come out through the standing train with a lantern in his hands that as he was approaching the crossing he did not hear any locemetive bell ringing, as he was not then paying any attention to signals: that the automobile which plaintiff's witness (Lapell) was driving did not reach the scene of the accident until several minutes after it had happened: that "the driver of that automobile, which was behind me, " upon reaching the blocked oreseing, at first "turned around and started to go the other ways" but that "he came back with his car when he saw there was an accident."

Clarence Hauert, the fireman on the locometive, testified that there were no railroad cars, east of the Boulevard, on any of the tracks south of the one on which his train was moving; that as the locometive approached the Boulevard he noticed an automobile travelling northogaterly and approaching the tracks at a speed of about 50 miles an hour; that its speed was not reduced as it came on; that he also saw the crossing watchman waving a red lantern at the time; that the automobile continued to advance, being on the east side of the Boulevard until it reached the most southerly track; that then, increasing its speed, it made "a diagonal curve" towards the north, and its "radiator came in contact with the end

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of the front pilot beam of the locomotive, when the locomotive was on the west side of the Houlevard; and that in that position the automobile was carried along westerly for about 70 feet, when it (the automobile) "dropped off".

Harry Stanton, the engineer on the locametive and sitting on the north side of the ceb, testified that when he was about 60 feet east of the Boulevard he "saw the flagman there swinging a red light;" that he did not see the automobile prior to the sollision; that his first intimation of an impending collision was when his fireman shouted to him; that immediately thereafter he made an "emergency stop" of his train; that when he was "about 500 or 600 feet from the crossing" he sounded "two long and two short blasts of the whistle;" that shortly prior to this time he set the automatic bell ringing; and that it rang continuously until after the accident.

Thomas Murray, a member of the train erew and in the cab of the locomotive at the time of the accident, testified that shortly thereafter he alighted from the cab; that he then noticed that the automobile "was stuck on the front pilot beam; the radiator was driven into the front pilot beam"; and that the headlight of the locemetive was burning. James Cannon, the engineer of the other locomotive standing on the most southerly track and about 200 feet west of the Boulevard, testified that his view of the crossing and to the south of it was unobstructed; that he saw the automobile approach the crossing at a speed of about 45 miles an hour, which was not reduced; that he saw the headlight of the encoming locometive; and that after the accident he went and saw the automobile "right near the pilot beam at the side of the locomotive." Billiam N. Fetersen, the "engine foreman" of the Illinois Central Railroad Co., testified that after the accident he went to the scene thereof, and that the automobile "was kind of driven in between the pilot beam

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Thom: a lime way a madrer of the tends ever and in the out of the languative at the time of the meddent, tentified thus b plice mail and last same and track to be and talkness the agreement affrom paralter and people and proof the front policy of a first beauty and the contract the contract of the contract To ideliheed ads sould have a "more dalia drough and usual movies naw the Locomptive was burning. James County, the configures of the my lands has fired afragions such add on animals averaged video not not be the Deliberation building the bin when the desirate of the desirate state of all demotion of the contract the destructions and it he disconsists at hear Makels armed an audia do succe to have a de malescra est Monorage government primary may be splitted out to all their government our are district allocuments and was low due and include oil works doub bear . H med Line " the class of the leadenstive." " Lillian I. retarions the "outpet formend" of the Tillingia Control believed being ima Correcti amone and as snow and tentiliper acti rathe land halklens mand folicy will grow-ded at covered by bank new" millionnian and Roge and the cylinder head."

Wesley Lapell, plaintiff's witness, testified on direct examination that he can the accident where Barker was injured and that as he (the witness) was driving his car northeasterly on the Boulevard and while he was south of 79th street (nearly a mile south of the railroad crossing) he noticed two automobiles come from 79th street on to the boulevard and advance northeasterly; that these cars kept ahead of his car; that he subsequently learned that they were the Barker and Knox cars: that he followed them, being a considerable distance in the rear; that as they approached the crossing Barker's car was ahead of Knox's; that he saw a freight train. coming from the east. collide with Barker's car. which was carried west "about the length of a box car from the crossings" that the Knox car had stopped about on the first or south track; that he came up about abreast of it and alighted and ran to where Barker's car then was "to see if I could give any help;" that Barker was inside. "lying over on the wheel of his car:" that he "was still breathing:" that subsequently he was removed from the car and taken aways that he (the witness) was well acquainted with the crossing, having frequently travelled on the Boulevard; that as he approached the crossing he did not see or hear any freight train coming from the east until he saw the lecomotive "hit Barker's car;" that his eyesight and hearing were good; that he did not hear any bell ringing or whistle sounded; that he did not see any headlight burning or stresming from the locemotive: that the crossing was dark and "was only lighted from the lights of the automobile ("nox's) ahead of me;" that "as I came up there I did not see any watchman or flagman out in the road;" and that "no signal was given by lantern or otherwise." It is apparent from the crossexamination of the witness that he was a considerable distance couth of the crossing when the accident happened, and not in a position to

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the judgment should be reversed because the verdict is against the manifest weight of the evidence, both as to the question of defendant's negligence and the question of the contributory negligence of plaintiff's intestate. After a careful review of all the facts and circumstances in evidence, we agree with the contention. We think that it is disclosed by a clear preponderance of the evidence that defendant was not guilty of the negligence as charged in plaintiff's declaration or any count thereof, and, furthermore, that plaintiff's intestate at and immediately before the time of the collision was guilty of contributory negligence. He knew where the railroad crossing was and the surrounding physical conditions, as he had driven over the crossing many times before. As he was approaching the first or most southerly track there was no obstruction to his view of the oncoming train on the most northerly track. He should either

observe all of the devails thereof, as tertified to an others.

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have seen the train or heard it. Instead of stopping his automobile in a place of safety he took a chance and, running diagonally toward the morth, attempted to pass in front of the train, evidently misjudged its speed and the distance up to and a cross said northerly track, and propelled his automobile head-on against the side of the locomotive, resulting in such injuries to him as caused his ceath shortly thereafter.

The judgment of March 19, 1932, appealed from, should be reversed and the cause remanded. Such will be the order.

REVERSED AND REMARKS.

Merner, P. J., and Scanlan, J., concur.

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AN POST REPORTED TO A TOP OF THE PROPERTY.

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LEWIS MEYERS.
Plaintiff and Appellee.

V.

MODRIS RIFKIN, JEWWIE RIFKIN, MORBIS BAVID RPSTWIN and FARMIE BPSTBIN,

Defendants.

LIBERTY TRUST & SAVINGS BANK, a corporation, Garnisher, An Appellant.

LOUIS TUCKER, Intervening-Petitioner, An Appellant.

APPAL FROM MUNICIPAL GOURT OF CHICAGO.

268 I.A. 6344

MR. JUSTICE GALLEY DELIVERED THE OPINION OF THE COURT.

On November 5, 1931, plaintiff caused a judgment by confession for \$4253 to be entered against the defendants. Morris Eifkin and wife and Morris David Epstein and wife. on their two notes, each dated September 1, 1926. One is a principal judgment note for \$4.000. due on Reptember 1. 1931, and the other is a coupon interest note for \$130. due on the same day. The principal note shows upon its face that it is secured by a certain trust deed, running to the Chicago Title & Trust Co., as trustee, on certain real estate. The execution issued on the judgment was returned by the bailiff "no part satisfied" on November 9, 1931, and thereafter the present garnishment proceedings were instituted against the Liberty Trust & Savings Bank (hereinafter called the Bank), as garnishee. It filed its smended answer on February 11, 1932, and on the same day, by leave of court. Louis Tucker filed an "Intervening Petition." There was a hearing before the court without a jury, during which two witnesses testified for plaintiff and two

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On Revember is 1931, plaintiff counce a judgment by pirroll . ujunbastab and tanings borston of at 2001 tot coluction med wiste and wife and there is a manufactured by the other and willies seement dates dependent le likes. Une la a principal judgment note for \$4,000, due on Arphenber L. 1861, and the ether is a course interest note for \$130, one on the same day. The principal actu cheep agent that the temped by a vertain track track the running to the Unicore Title & Trunt is., as tructor, an certain bounded are assented and up become malescene and results asset -candi has 1861 to the work of the late of the lock of the Penilogo de Sufficial room again bereven from Labour, Smoorey of Free befor all front roll to discovered them the control of the control and carmiches. Is filled its communical amount of bally all characters and on the same day, by Lugre of court, Louis Tacker filed on "imbara distillation of the relation the control of the court without a and bus tilinisic tol neitiland appearably and mother matrub graft lettere and said trust deed were introduced in evidence. The Bank, as garnishee, introduced a certain "Trust agreement and Beclaration of Trust, dated July 18, 1930, and known as Trust No. 2084." No further evidence was introduced by the Bank, and no evidence was introduced on behalf of Tucker, intervening petitioner, except that his attorney, at the suggestion of the court, stated that Rifkin, Epstein and Tucker would testify to certain facts. On March 19, 1932, the court found the issues "for the intervening claimant, Tucker, as to \$100, and for the plaintiff, as to \$686.25, as to property in hands of the garnishee" and entered judgment against it (the Bank) on the finding. Separate appeals were prayed, allowed and perfected by Tucker and the Bank.

In the emended answer of the Bank, as garnishee, it states that "it is trustee under Trust No. 2084, and that as such it has in its custody and possession \$786.25, which sum was deposited with it by Morris Rifkin, to be held by it under the terms and conditions of said trust."

In the intervening petition of Louis Tucker he alleges that the moneys deposited with the Bank are "partnership funds," and are the "joint property of Kifkin. Epstein and Tucker, a p rtnership owning and operating the building and premises described in Trust No. 2084," and "were deposited in escrow for a specific purpose by said partnership, namely, for caring for the extension of the first mortgage on said property owned by said partnership jointly, and caring for the interest on said first mortgage and incidental expenses." The prayer of the petition is that the moneys "be hold to be partnership funds, that the garmishee be discharged in so far as said funds are concerned, and the funds be ordered delivered to petitioner."

At the commencement of the hearing, plaintiff's attorney

lettern and soid truct over introduced in syldener. The Back of garmiches, introduced a certain "Truct garmiches, and Declaration of Truct, dated July 18, 1000, and known as Kruck No. 2004." He further evidence we introduced by the Boar, and no cridence was further evidence we introduced by the court, wholes the Sirita.

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1958, the court found the issues "for the intervening chrimmt."

Tucker, as to \$100, and for the ginimitif, as to \$650.25, as to property in heads of the generation and othered judgment against it property in heads of the generalises" and othered judgment against it

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stated in substance that plaintiff samed a first mortgage on certain real estate: that the Meitman Trust Co. was collecting the interest payments for him, etc.; that Morris Rifkin deposited with the Bank \$786.25, to be used for the payment of interest, and for commissions for obtaining an extension of the mortgage which had become due; that at the time he deposited the moneys Rifkin wrote and delivered to the Bank his letter setting forth how, under what conditions and to whom the same were to be paid; and that subsequently plaintiff refused to extend the mortgage under the terms demanded and the moneys, so deposited, remained in the hands of the Bank. To this statement the attorney for the Bank added the further statement that the Bank held the legal title to the real estate. known as 3001-9 M. Austin avenue, Chicago, under Trust No. 2084, and that the beneficiaries named in the trust agreement were Rifkin. Epstein and Tucker. Thereupon plaintiff's attorney introduced, as plaintiff's Exhibit 1. Rifkin's said letter addressed to the Bank, dated September 11, 1931, and signed by Rifkin individually, which is as follows:

"In Re Your Trust No. 2084. I am herewith depositing with you the sum of \$786.25, to be held under the above trust, and to be distributed to the Meitman Trust Co., in connection with the first mortgage on the premises commonly known as 3001-9 N. Austin avenue (titls to which is held in trust by you under the above trust), subject to the understanding that same shall represent payment to them for the following: Payment of semi-annual interest due on the first mortgage on said premises, September 2, 1931, \$406.25; payment of commission for extension of said mortgage for a period of two years from said date, September 2, 1931, \$375; Necessary recording expense 55, total \$786.25.

You will please advise the Heitman Trust Co. that you are holding the above sum to be forwarded to them, subject to the above instructions."

Flaintiff's attorney also introduced in evidence, as
Flaintiff's Exhibit 2, a letter of the same date by the Bank, per
B. Levinson, its vice-president, to the Meitman Trust Co., in which
it stated the amount of the deposit and the instructions it had

are appeared to 10 to principle when the property of the property of the later to the property of the later to the later t and polypolicy and out of four countries and had popular few gladers Diversely, accounts the black of the later in think account with DOLLOW ADDRESSED IN PROSPECT AND THE THREE PARTY AND THE P And double specimen out to enterested in the higher set medical teat. agree about organs old haddampt of olds all in hotel special Auto-colon grad alters private south a bit and a not begoetfal Dan witnesseedin fold in this color of at one own add make of hee amittinous behavior, asked odd crosp specime our busine or marries vitterially of the moreys, so deposit of the horizont and horizont of the more this without the enterior for but according to the Auritary alcterers that she Bank hold the logal this to the real coins, known an DOUGH IN ARREST OFFICE OF STREET LAND HOLD TO ARREST AND ARREST ARREST AND ARREST AND ARREST AND ARREST ARREST AND ARREST ARRE her sleeped and in the trust agreement were sirely at beams negratory Subsect Thereigns plebold? a sources introduced an electricity market I, wilgis's said debigs addressed on the June, dabed deplumber My 1981, and olders by "their tellers, which he as all pers

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received as to the paying out of the moneys, and further stated that such payment is "subject to the understanding that said mortgage shall be extended for a period of two years." and that such extension "shall be subject to unpaid general taxes and special assessments." The first mertgage trust deed, executed by the defendants, dated Centember 1. 1996, and duly recorded, also was introduced in cylence. as Plaintiff's Schibit 3. Thereupon A. L. Meyers, a nephew and agent of plaintiff, testified in substance that plaintiff was and is the owner of certain unpaid notes of defendants, secured by the mortgages that about September 15. 1931, because of the receipt of a letter from the Heitman Trust Co. regarding a possible extension of the matured mortgage, he and plaintiff had a conference in the offices of the Bankt that B. Levinson, vice president of the Bank, and Epstein were present; that Epstein said that \$786.25 had been deposited with the Bank and urged the acceptance of the proposed extensions that he (the witness) stated that the funds deposited were not sufficient, that there wane two or three years' taxes unpaid on the property, that certain past due interest remained unpaid, that when plaintiff had purchased the notes and mortgage from the Heitman Trust Co. that company had guaranteed to repurchase the same within 30 days after maturity if not then paid, and that plainti'f would not agree to any extension of the mortgage unless the unpaid taxes were satisfied, all due interest paid and the Meitman Co. would agree to continue their said guaranty; that Epstein said he would talk to highin; that other conferences were had with Epstein and Rifkin, but that no extension of the mortgage ever was made: that during these conferences Tucker's name was not mentioned; and that subsequently a foreclosure proceeding was commenced on the mortgage and also a suit against the Heitman Co. on its guaranty to repurchase the mortgage, which upon demand it had refused

to do.

and the wealth of the appears and the feet and they did not the foreign and amond row him duit authoral refere wit as believe ut browning riess tadt continuodes Home does that "arrows and he being a not believe and Linds "Attentionian Johnson has never through thouse at 100 hour of Links" the their series to be to be to be the form of the first and the first Contested I. 1826, and delly recorded, also upp introduced in crideness on Plateter's Entitle 2. Thereupon to its Mercey a sepher and approand of has now Thirelain don't sensiable mitheathfood Thirmiely he bancaster has of layours admittable to eather banger minister to name that about Soptember 15, 1984, heading of the receipt of a litter true bounded wit la subsection abliance a posterior of the Control of threfi wit he swifts and at comercines a had littained but see amoutrom that Ha ferdenon, vice precident of the Bank, and Opphelo oc. a precest ben aust the Cate hostwoods and and March ! sold blee missey deals (seepuly mis) and Anda quadrumine hunonous and ha sometenous said haves many that the tweets dependent our case may be the contract of the contract of duct minimum dual agreement and the bloom would began would be and and involving and highlights outstand, although and over deprecial new had process sell of dear handles and more ogeners normated to reputchmentals story of this to deer after interity if maintender yere as awage for allow Thinkeling soil has thing could be the working was named to appear their war and the contract of the contract of the market black the state of the properties of the black bar black new principles and a west fully in this is the state of the contract that agapticat and to subapasse on Ind and antitie has placed fifty had wrow over was made; that during these conferences Tucker's none was not the contract and the contract of the contract of the contract of ath no sob manifelt one tunings thus a onle has mantron out no Souther find 41 ferrors topy study; recognized with recognized at places or

A. H. Miller, plaintiff's witness, an assistant to
Levinson in the Bank, testified in substance that the \$786.25
was left with the Bank by <u>Rifking</u> that no payments whatever were
made out of the fund to anyone; that the Bank still holds the entire
amount; and that it never had anything to do with the management of
the premises mentioned in Trust Bo. 2084, never collected any rents,
nor made any disbursements in connection therewith.

The Trust Agreement, known as Trust No. 2084, dated July 18. 1930, and introduced in evidence by the Bank, is on a printed form, in common use. It is signed by Rifkin, Epstein and Tucker, and by the Bank, per B. Levingen, its vice president. It is a more neked trust for the purpose of holding title to the premises. It certifies that the Bank "as trustee hereunder" is "about to take title" to the premises (describing them), and that when it has done so. it will hold them "for the ultimate use and benefit of the following named persons according to the respective interests herein set out, to-wit: Morris Rifkin - a one-third interest: David Mostein a one-third interest; Louis Tucker, a one-third interest." And it is agreed inter alia that "the interest of any beneficiary hereunder shall consist solely of the power of direction to deal with the title to said property and to manage and control it as hereinafter provided, and the right to receive the proceeds from rentals and from mortgages, sales or other disposition of said promises, and that such right in the avails of said property shall be deemed to be personal property. and may be assigned and transferred as such;" that "this trust agreement shall not be placed on record;" that the Bunk "will deal with said real estate only when authorized to do so in writing, and that it will \* \* on the direction of Bifkin, Epstein and Tucker, \* \* make doeds for, or otherwise deal with the title to said real estate," \* "; that "the beneficiary or beneficiaries hereunder shall have the

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management of said property and control of the selling, renting and handling thereof, and any beneficiary, or his or her agent, shall handle the rents thereof and the proceeds of any sales of said property, and said trustee shall not be called upon to do anything in the management or control of said property or in respect to the payment of taxes or accessments or in respect to insurance, litigation or otherwise, except on critten direction as hereinabove provided, and after the payment to it of all money necessary to carry out said instructions;" and that the Bank "shall receive for its services in accepting this trust and in taking title hereunder the sum of \$30; also the sum of \$5 a year for holding title after July 17, 1931, so long as any property remains in this trust."

After the introduction in evidence of the Trust Agreement. the following occurred:

"M. LUCTUR: (Attorney for the Intervening Petitioner.)
I have Mesers. Rifkin, Epstein and Tucker here ready to testify,
and I would like to put them on the stand.

THE COURT: Make a statement as to what they will testify to and perhaps counsel will agree that they would testify that way

if placed on the witness stand.

MR. LUSTER: They will testify that Rifkin was collecting the rents from the property, and that he was short \$200 of the amount necessary to create the deposit; that in order to complete the fund Louis Tucker contributed \$100, David Epstein \$100, and the balance was advanced by Rifkin.

M. ANDERN (attorney for Plaintiff): I admit, if placed on the stand, they would testify to those facts, but I do not admit

the truth of them nor the legal effect."

No further evidence was introduced and the finding and judgment as first above mentioned followed.

Counsel for the two appellants here contend that the court erred in entering the judgment because the evidence shows in substance (1) that the moneys deposited with the Bank, to be disbursed to the Heitman Trust Co., upon its procuring an extension of the mortgage, "was a trust fund in favor of the Heitman Co. and not subject to garnishment;" (2) that after it appeared that the

accompanies of and property and control of the entiting, rembing and property, and enif trustee shall not be entited agen to do saything property, and enif trustee shall not be entited agen to do saything the factor of trustees of naturality of the respect to insurance, litigation of characters as insurance, litigations of characters as insurance, naturally and after the payment to be of all money necessary to entry out anti-

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Common the two appoilants here contend that the fact that the form of the formal that the fine formal deposited with the flows the fine frank day, upon its procuring as vicinates of the mortgogo, "was a track fact in fewer of the fieldment of the mostgogo to general days fact in fewer of the field the general that the procures that the

Meitman Co. could not procure an extension of the mortgage upon the indicated terms, the moneys belonged to Trust No. 2084, of which there are three beneficiaries, kifkin, Spotein and Tucker; and (3) that the moneys constituted a "joint" fund, belonging to Rifkin, Epstein and Tucker, who were "partners" and the fund had been "created by rents collected from the property." We cannot agree with the contention or the arguments. We find no evidence that the deposited moneys had been collected by Rifkin from rents received from the property. On the contrary it sufficiently appears that Rifkin individually deposited the moneys in cash with the Bank. but being a little "short" he procured \$100 each from Epstein and Tucker to make up the total required sum. Nor does the evidence show that Rickin. Mpstein and Tucker were "partners". The mere fact that apparently the three had a joint property interest in the premises involved, and may have shared in the gross returns therefrom, does not make them a "pertmership." (Cahill's Ltat. 1931, sub-sections & and 3 of Section 7 of the Uniform Act relating to partnerships, Chap. 106-a, p. 2154.) For does it sufficiently appear that the deposited moneys ever belonged to the so-called "Trust No. 2084". Nor does it appear that by the deposit and accompanying letter any "trust fund" was created in favor of the Meitman Co., so as to prevent a garnighment proceeding as against the fund. (See, Kelsay v. Taylor, 56 Oregon 13. 18; Commercial Nat. Bank v. Kirkwood, 172 Ill. 563, 569.) And when the negotiations as to the proposed extension of the mortgage failed and seased, Rifkin, as the depositor of the moneys with the Bank, could properly have demanded the repayment to him of said moneys, and the same would be subject to garnishment by his judgment creditors.

It is to be noticed that fucker, in his intervening potition, makes no claim to the \$100, which it appears he contributed to Rifkin to assist the latter in making up the total of \$786.25 to be deposited in the Bank, but frames his case on the theory that the

Meltana Cu. could not presume in outenains of the mortgage upon to their terms the memore belonged to leaves between the which there are three beneficiarisms withing Emphasia and Euckary and (2) that being because this of a "lottle" court, betrauted to had han't wit has "arontrog" area one toward one wietering been "erented by runta collected from the property." he comet sometive on that all accompanies and no metropology data we want aday mort wintin of hubbollon most but agrees besisoop out fails Phones allering to the standard of the variety of the last beyone when edd dill miss at except had believed the could be still be seen him taleful much many DOLL branches of "France" alleld a pinker and Tueker to make up the tedal required can, Nor deep but avaicage abov time Athles Apoloin and Tucker very "parkness". The pare fork the apparently the three had a joint property interest in the prominent Invelved, and large stand the blue grass several this of they are and the three of the contraction (deline) " of the contraction of the ar destine 7 of the Saifern ack relating to pertentialized Chanleds and the deal tranger resident the all the deal to deal the contract the All wood tell . "help our fourth" builtures out of degenied news against appear that by the deposit and accompanying letter any "true" was erecked in favor of the Meliana lost as as to provent a ferricional presenting on egoings the Foots | how, below? v. Terton, 66 Dyegon 14; and her (.000 and all) the absence to a good and antermore and delial egoptus and to animulus become one as es amplialismes and and cooking a little and the advantage of the marger of the hands could properly have demanded the repayment to him at and tonograp and the came mould be subject to granufact of his granueus cresibers.

position, makes no sixta to the clour saish to appears he concrioused to diring to meetes the leases in meking up the total of \$700.15 to

extension and all of greature dead bentions we as at a

entire deposit belonged to a "partnership," of which he claimed to be a member. Notwithstanding his failure to prove any partnership, it appears that the court allowed him a judgment as against the fund to the extent of his contribution to that fund. As to this ruling no cross-errors have here been assigned by plaintiff. It may be that the entry of such a judgment, as was entered in his favor, is not in accord with proper prectice (Claver v. Vells, 40 Ill. App. 350, 355), but such entry does not here require a reversal of the entire judgment - it being one which in effect requires the Bank, as garnishee, out of the total fund deposited with it of \$786.25, to pay to Tucker \$100, and to pay the balance, \$666.25, to plain-

After a careful consideration of the present transcript and of the arguments of respective counsel, we are of the opinion that the judgment appealed from should be affirmed, and it is no ordered.

ARFIRMED.

Kerner, P. J., and Scanlan, J., concur-

to the entent of his contributes to the fund. As to this religion has contributed the contributed the fund. As to this religion to the fund. As to this religion we come outside the mark to the mark to the contribute of the fund the contributes of the contributes.

AREMBERSO.

Terment P. Let and Commune Set concur-

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MYRTLE KUDER SPEYER, conservatrix of the ostate of ANNA KUDER, Insano, spellant,

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LILLIAN CHRISCHER and JOHN GRRISCHER, Appelless. 1

APPR W. PROM DENIGIPAL COURT OF CHICAGO.

263 I.A. 6351

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action of the 4th class in the Nunicipal court of Chicago. The cause was submitted to the court and at the conclusion of the plaintiff's evidence the issues were found against the plaintiff. From a judgment entered upon the finding plaintiff has appealed.

The amended statement of claim alleges that plaintiff is the duly appeinted conservatrix of the estate of Anna Euder, incane, and that there is due to said estate from defendants the sum of \$525 for rent for the premises at 5315 Wentworth avenue. Chicago, from December 1, 1927, to August 31, 1929, at a rental of \$25 a month; that defendants occupied said premises for the said time and agreed to pay therefor the sum of \$25 a month, and that they have failed and refused to pay the said rent; further alleges that defendants occupied the premises for the said time and agreed to pay therefor the fair and responsible rental value of said premises for said period of time so occupied, that the fair and responsible rental value of the premises was \$25 a month and that defendants failed and refused to pay said sum as rental for said premises although often requested so to do, to the

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The months that defendants resulted the promises for the suit that alleges that defendants complete the promises for the anid than affect the fair and re-emails remial value of said promises for the month.

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damage of plaintiff. as conservatrix, etc., in the sum of \$525. The defendants, in their affidavit of merits, deny that there is due to the said estate from them the sum of \$525 or any other sum for rent for the said premises; dony that they agreed to may for the occupation of the said premises the sum of \$25 a menth or any other sum: "state the fact to be that they occupied the premises above described for the period from becember 1. 1927. to usuat 31. 1929, under an oral agreement with plaintiff whereby plaintiff employed defendants as care-takers to occupy and care for the promises. \* \* \* and promised and agreed to and with defendants to pay to defendants the sum of \$10 per month for occupying said premises as care-takers; deny that they agreed to and with plaintiff to pay to plaintiff the fair and reasonable rental of said premises: dony that the fair and reasonable value of said premises was \$25 per month: dony that plaintiff has been damaged in the sum of \$525 or any other sum."

The evidence shows that Anna Kuder was adjudged insome on becomber 2, 1915, and that she had been incorcerated in the Elgin State Mospital for the insome from that date to the time of the trial; that the conservatrix and the defendant Lillian Gerischer are sisters, and daughters of Anna Kuder. Defendants admit they occupied and used the premises during the time alleged in the statement of claim, and their defense, as set up in the affidavit of merits, is that they were there under an agreement by which they were to occupy the premises free of rent and in addition they were to be paid \$10 a month as caretakers. It will be noted that the conservatrix was not appointed to that position until May 28, 1931, and as the suit is brought for use and occupation from December 1, 1927, to August 31, 1929, Myrtle Euder -payer insividually could have made no binding contract with

domage of plaintiff, as comparented seen in the end of land. The defendants, is their afficients of moutes day sheet there is mun modes was to dide to mus and most mort ofutes him sais at sub the rear for the outh preminent days that they agreed to pay for the occupation of the said produces the success of the moltagence and other and being not the field to be used they enoughed the provinces maye described for the puried from December 1, 1967, to lugged Ha blifelain whetade T. linking after communical Late on Kelmy after employed no Trade of the contract to coverage and case for the or administration of business and hardway for the to and the contract of or to defendants the eas of \$18 ; received as contrary door title ... previous Airs to delive addressed the tile off thinkelp of yes of rea all new oseinway blue he sales aldenoessy bus righ old July youb on the case are the plaint in the bear dunged at the case of this are ". mus Todisa tan

The opiness short has his hear incorporated in the light conscions 2, 1915, and that she had been incorporated in the light has his date to the time of the trial; despited for the incorporate that the promises of the time alleged in the charged and and the premises during the time alleged in the character of claim, and their defence, as set up in the afficacyle of morting, is that they can extrement by which they were to econopy the premises there and in addition they were to be paid the manch as earether at the light of the premises of root and in addition that the conservated the position until her rot the conservately and as the said is brought for an and econopited trans and econopited transitions are entired transitions.

defendants, and it is hardly necessary to state that Anna Muder could not have made the alleged agreement with defendants.

In the view that we have taken of this appeal it will not be necessary for us to notice all of the contentions raised by plaintiff. Plaintiff did not prove that the defendents agreed to pay rental for the premises, and the trial court found for the defendants upon the assumption that it was accessary for the plaintiff to prove such an agreement. Such is not the law. "On proof of ownership of plaintiff and secupation by defendent, the owner is entitled to recover the reasonable rental value for the time of such occupancy, unless an agreement is proven to exist between the parties that the occupancy was to be without rent." (Walsh & Co. v. Taylor. 142 Ill. App. 46, 47, and cases cited therein; Claussen v. Claussen. 279 111. 09, 105.) In the Walsh case the court also called attention to the fact that under section 1. ch. 60, Cahill's Ill. Rev. St., 1931, "the owner of lands " " " may sue for and vecevor rent therefor, or a fair and rememble satisfaction for the use and eccupation thereof \* \* \* . Second . Then lands are held and eccupied by any person without any special agreement for rept." (See also Jackson v. Rector, 201 311. App. 29, 31; Lurie v. Brewer, 248 311. App. 525; and cares cited therein.) The trial court, is making his finding, seems also to have been influenced somewhat by the fact that the smended statement of claim alleges that defendants agreed to pay the sum of \$25 a month, and that it further alleges that defendants agreed to pay the fair and resconable rental value of said premises, and that as plaintiff had failed to prove any agreement her case failed. The court arred in so holding. As this is a fourth class action in the Municipal court of Chicago, in which no pleadings are required, the claim is what the avidence makes it. (See Chicago, '. I. & P. R. Co.

dunks, and it is bardly nearestay to sints into Mudan sould not baye and the allaged agreement with defectants.

for Illy to Inequa abde to needed evad on tode well add at of busing analymount and to his values of an way grangings of of magne administration of the every tent of the district . All district outs not homel forms faint out the tention out had later you Thirteen are not removed and it did to beginning and maps administration to love and an egroment. Seek to not the ker. "On pared of nt mame and . Specime leb we maide a come bas little and le come came he can't out not regar laters obtaining off cornery of halfalfers seconomeys unless on agreement is proven so write between the profine seconomesa that the economicy was to as national repeat ( saint & de v. Tarior. Att ILL ing. 45: 47; and sacep sized thereing Chausen v. Clau and the cold and the tell to be the come of the cold at the cold a to the floc that under mortion i, one to the tile nev. tree referred they reverse the ret day you ? \* \* name to reme add? . Itel and home has been page and their more of both to address on the market or the une to be a decided of the light of the state of the stat goods it make sail) ", there not summaryo Labrage you ! . . . . . . . AND AND ARE THE THE PART OF THE PARTY OF THE TALL OF THE PARTY OF THE ancient and consecutation of The training of the consecutation of the co self dated and and and indicates becauseling read over as only amount mus off yay of beening advantue to be in the streeting between ni person nimetre bet reis appalle mentre t i i i i ben elicon e dit lo Books for continuent blue to suffer Lotter allineauer for mant and yang set plaintiff but dotted in prove our approprial had more fritted. The court erred he so helding. Is this is a few close solice in the and the tree of the speciment of the state o alaba te which the evidence willow its ( (mee ( hite one " . T. h " . it ? ) on

Frunk Western Ry. Co., 319 Ill. 421, 435; Larie v. Brower, supra.

531.) Other cases to the same effect might be cited.

Plaintiff contends that "the trial court erred in refusing to permit the husband of the conservatria to testify." It appears that the court refused to allow this witness to testify upon two grounds. (a) that there had been an order to exclude witnesses, and "plaintiff's husband, misunderstanding such order of exclusion, went to the back of the courtroom and not out of the courtroom, and (b) that the witness was the husband of the conservatrix, who is a daughter of Anna Euder, and that the husband therefore was disqualified from tratifying in the cause. Is to the first ground, it appears from the evidence that the witness did not know that he was to be called as a witness and therefore he had remained in the room. In swing v. Cox, 150 Ill. App. 25, 26, the court said: "Where witnesses have been excluded from the court room while other witnesses are testifying. and a witness disabeys such order, the court under some circumstances has a discretion to refuse to permit such witness to testify, but such discretion is a reasonable and not an arbitrary one and its abuse is subject to review. If a witness disaboys an order of the court he may be preceeded against for contempt but he is not disqualified from testifying; a litigant act a party to such violation of a rule abould not be sunished by being desrived of the syldence of the witness and be east in a law suit because of an imposent violation of a rule of court, which the party sid not know was being violated and of which rule the sitness had no knowledge. Moto v. Papple, 156 Ili. 655; Balliner v. People, 95 Ill. 394; Bow v. People, 160 Ill. 458; Talmer v. Feenle, 112 111. App. 527; 3 Ency. Svi. 340." (See also Smith ve Pubcis, 192 Ill. App. 863.) In view of the fact that the real

subjected at Arcon Strong Labor and Tool also have Military among if Archivel of the consequence and he become and disease and per mapy whiteed all could's allow value of hearing your and finish the property of the party of the second state of the party of the second their areason to relate your option to record a translated and their property (a) has Suppositioned talk the new Year tree manufactor with the Stand with the religions and the and properties; and he however not now according to the land ment or Philippen in now westernich beginning and Judy Asse available made in and with absorpt 17 among facts are no an around our or published w as to him tof mi and and draw world deer hit spectres sell forty appealing and its agree at some up to respect, for all exchange him marries many them commanded product things from the other larger later than ampetitively yes assessed to write allies more years and much to indicate assurement a new trees store from all agains then opened a conflict a feet has a discretion to relieve to, people ends withink to beeitigs but mande add han and gracolora on the han alternation of the collision to do o was refer to realize a without a lime of it will be the day of Bellikanjah sau ah mi sua samesuna nei lautana beberang pi ja 🗀 while a lie with the ready posts to prove the contribution of a vale security and to receptive his to horaxyon mind of besintance and see bissens where a la moldaged we more at his account did not a as dans and has Mattle to but becalos quied any count can all young one delie arross to rela the elected but so incolores that we bed provide all along the first with the Address of Mary 1881, 423, April of Anniet Parameters of State and not? "Yest with your 2 and not only all the address of Does not their part will be made on the faithful again with hid partners.

plaintiff in the case was an incame person, we think that the trial court should not have barred the witness from testifying because of the alleged violation of the rule, especially as the court stated that he did not see how the proposed evidence of the husband could be influenced by any testimony that had been theretafors given. The court also erred in holding that the witness was disqualified because of his relationship to the conservatrix. It is a sufficient answer to the court's ruling in that regard to say that Tyrtle Ruder Speyer was appointed conservatrix of the estate of Anna Muder, insane, and that under that appointment it was her duty to care for and manage the real and personal estate of her ward. The claim in question belonged to that estate and hyrtle Auder poyer individually had no interest in the claim. The argument of defendants timt a recovery in the instant case would swell the assets of the estate and increase the commission of the conservatrix and that therefore the mea interested / the claim and her husband distualified. is without the alightest merit.

The judgment of the Municipal court of Chicago will be reversed and the cause will be remanded.

REVERSED AND REMANDED.

Kerner, P. J., and Gridley, J., concur.

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EDMA GIOVACCHIMI, Appellee,

V.

KINIM BROS. CORPORATION, a corporation, appellant. APPEAL FROM SUPERIOR COURT.

268 I.A. 635<sup>2</sup>

MR. JULTICE SCANLAN DELIVERAD THE OPINION OF THE COURT.

Tama Giovacchini sued Klein Bros. Corporation, a corporation, in an action on the case. There was a trial before the court, with a jury, and a verdict returned finding defendant guilty and assessing plaintiff's damages at \$7,800. Judgment was entered on the verdict and defendant has appealed.

The declaration, consisting of one count, alleges, in substance, that defendant, on August 25, 1928, operated a "general dry goods and merchandise business in a certain store building" located on South Halated street, between 20th street and Canalport avenue, in Chicago, for the sale of its wares and merchandise to the public; that plaintiff entered the building for the purpose of purchasing certain of said merchandise and while in the exercise of due care and caution for her own safety she was engaged in walking through one of the aisles of the store building and in front of a certain counter commonly known as the scap counter; that it was the duty of defendant to exercise ordinary care and caution to keep the parts of its store where the buying public might be expected to pass, in a reasonably safe condition, so as not to permit or cause injury to them while in the store building, but that defendant, wholly regardless of

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266 A.I 685

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its duty in the premises, carelessly and negligently permitted the floor of said sisle in front of said soap counter to be and become worn, slippery and dangerous, all of which facts and circumstances were well known to defendant, or by the exercise of reasonable care could have been known, and which were unknown to plaintiff, and by the exercise of ordinary care could not have been ascertained by her, and that by reason of the said carelessness and negligence of defendant and while plaintiff was walking along said sizle, she slipped and fell upon the floor of said sizle and was injured, to the damage of plaintiff of \$25,000. Defendant pleaded the general issue.

Plaintiff, at the time of the accident, was thirty years of age. Then she was eighteen months old she become afflicted with infantile paralysis and as a consequence she was compelled to have "artificial appliances" on her left leg to enable her to get about. The foot and lower part of the limb, because of the disease, became smaller; "it was smaller from the knee down than it was from the Plaintiff, in 1927, while still wearing the appliance, knoe un-" had an infection in the foot of her left leg, due to the infentile paralysis. "There were atrophic sores below the knee." It then become necessary to amoutate the leg at the knee, and thereafter she wore an artificial leg. This leg was kept in position by a leather receptacle into which the stump of plaintiff's leg was placed, and also by means of a belt around her weist and by straps fastened to the belt which went "around the stump of the leg" and were then fastened to the artificial leg. This artificial leg bent at the knee as plaintiff welked. Shortly after plaintiff commenced to use the artificial leg a second operation was performed on the stump, which was made necessary by the irritation caused by the use of the artificial limb. Plaintiff used a cane when she walked.

its duty in the promises, carriously and negligantly paraited the its store at each december and state in the store of any court and become very and singerous, all of which for several decimals, and singerous is defended, or by the several of reconnecte cure and through the several decimality, and by and the best beautiful and which were unknown to plaintiff, and by and that the careleganess and anythereness at defendent and think by reasonable cure and callege and and that any algorithm and thinks plaintiff are maintiff, and the same and adole, the carelegan and anything along what chair size allows and allowed and

pears apulat our appointment for and said out to afficially mitto installina ascent non the tallace meables are non-made sens as hellegers now the redesposant A at the aborderon allowed - durant supplication of the local of the confidence in the parant and lame work of the Links, because of the discount and l and may I am Si tould much come and more wallows you the trailless standings not galvers thin other affile of although an infoction in the foot of her left legs due to the inforbile refe. "Here were atrapite perse below the hare." ade reflected bee queed ad to not the abstract of wiscone amone This let you kept in position by a leuter oped deluffed for over and the cold as all a "thick of glades of a last a light of the alve by monne of a bulk cround has welst and by straps factored to made above him "ned and to quarte only important from challes also paid mis to send got holotation and a med Lateltier out at homeday's as beamsone liking andle giranic shoulder Winning an cond wee the artificial les a conomi egoration was parlounce on the princips which was made not the bit the levels of the or the the abolism one made more thistight while Labettiine out to one

As she testified: "Just for a support to balance myself a little bit, but I never put my weight on it."

Plaintiff's theory of defendant's responsibility was that defendant "for upward of twenty years displayed on this table for its customers, seap, and it was chiefly unwrapped seap in bulk. This soup from the handling by customers and sales recoles shed such considerable quantities of its dust " " " that part of this dust escaped from the soup on the table and reached the floor alongoide it; \* \* \* that it had so long maintained that method of displaying and handling its goap that it was presumed to know that soap of that description shed its dust and when that dust left the pile or sifted from the table it would naturally fall on the white smooth floor and sconer or later produce a condition of danger. threatening dangerous slipping for its patrone passing over that aisle in front of the soap tables \* \* \* that the defendant from its upwards of 20 years' use of that method of handling soop had implied or presumptive notice and knowledge that there was constant shedding of soap dust on to the white smooth floor which might cause some of its patrons to slip and fall: that on the occasion in question the amouth white and worm floor in front of the table was slippery by reason of the presence on it of seap dust. and the plaintiff slipped on it and fell. her left hip striking the floor in the fall which caused the injuries complained of." Defendant contended, inter alia, that neither seap dust nor any other substance was on the floor at the time of the accident, that plaintiff was not caused to fall by any condition of the floor, and that she did not slip on the floor, but that she fell, and solely by reason of her crippled condition.

Defendant has raised and argued many grounds in support

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Dalebill's theory of helwood's requestibility was that and admit which are together the present to beauty production of the land of t eller or your improves affekts one if our owner commission aff Take many from the banding by suctioners and suffer swill paid akil to syne duli e a a danh adl to arlildamp eldershie --goal's seld bushess then added out on them with anoth become a se To hardron some contespina your on had at souls a a sal abianuols And once of begreeny new 17 Audit game all getification has garbanged and first double deals worke han Just will build maideling of the the case while no older from the table to each concerning full on the cities of the and cooked or later preduce a condition of democr. July were release employ \$21 or or original accompany unfortuned. party toutestail and take " " " thirty goes out to inter all stoke and some until not be seen at that any one of the other and typesone are predicted and executered has setting eviluated to stiples fisher really also one will also see out one to the come in amiddents molecuse and no sond gifts has gift as appared with the wante segme piful and he smoul at quall moon into older discome and maidente at and the standard of the processes at it as associate and weelt and publishe and that was allest han it to be well withinker Suchmotell ". To benishing and ruged and became daidy field add at association routh the one dance come contains from a bills writing associations for now Which a sit a smoken a sit he and ad to reall ode no as den bit one dad one every ent de metalboor you we liet at beaune The course of the city and the state and the state of the imantifices nellegine

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of its contention that a new trial should be awarded, but in the view that we take of this record it will be necessary for us to pass upon only three.

Defendant contends that the verdict is clearly against the manifest weight of the evidence. After a painstaking study of all the evidence that bears upon the manner and cause of the accident, we have been forced to the conclusion that this contention is a meritorious one. As the case may be tried again we purposely refrain from analysing and commenting upon the facts and circumstances in evidence.

During the examination of a witness for plaintiff by the latter's counsel, the witness made a statement that apprised the jury of the fact that defendant was insured against damages for injuries to employees. While we are satisfied that counsel for plaintiff did not intend that the witness should make the statement, and had no reason to apprehend that he would do so, nevertheless, in view of the state of the evidence, there is force in the contention of defendant that the statement influenced the jury in its verdict. However, we do not mean to intimate that on an appeal where a plaintiff's case was reasonably clear and the amount of the verdict was not excessive, we would hold that a statement like the one in question, made without fault on the part of counsel, would, in itself, constitute reversible error.

Defendant contends, and not without force, that counsel for plaintiff mede improper and prejudicial statements to the jury in his closing argument. These statements, especially one in which the counsel intimated that the defense had influenced, or attempted to

influence, witnesses, should be avoided in another trial.

The judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

of the contention that a new trial about to ameded, but in the view that we take of this reverse it will be necessary for he was said there.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of october in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice. Hon. THOMAS M. JETT, Justice. JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

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268 I.A. 6353

BE IT REMEMBERED, that afterwards, to-wit: On OCT 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



IN THE

## APPELLATE COURT OF ILLINOIS

## SECOND DISTRICT

October Term, A. D., 1931.

BARNEY DOLL,

Appellee,

VS.

CHARLES HAAS, and ANDREW HAAS,

Appellants.

Appeal from the Circuit Court of Stephenson County.

WOLFE -- J.

Barney Doll, the appellee herein filed his declaration consisting of three counts, to the June Term of the Circuit Court of Stephenson county, Illinois, against Charles Haas and Andrew Haas, the defendants below, who are known as appellants in this court, charging appellants with knowingly and wilfully premitting their cows, which were known to them at that time to be diseased, to mingle with the cows of the plaintiff, whose cows were free from any disease.

The counts are similar in substance and charge that on March 1st, 1929, and for a period of two years therafter, the appellee was a tenant of appellants' under and pursuant to a certain lease, whereby, among other things, it was agreed between them that each should furnish sufficient cattle to properly stock said farm; that the share of stock furnished by each party should be of equal value. The counts charge that appellee owned and possessed twenty-four milk cows and heifers, sound, healthy and productive; that appellants were possessed of a

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## SECURE OF PERSONS ASSESSED.

TOTHURYE GIOUEE.

Difference and the party

BARWIN DOLL, ippellee,

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CHAPLUS HAAS, and AUDRIN HAAS,

Appach firm this Carting of the Court of the Court of the Court of the Courty.

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Berney Boll, the appellee herein filed his doslaration consisting of three counts, to the Suna Lern of tha
Circuit Court of Laphenson county, Illinois, egoinst Charlee
Hads and Andrew Mass, the Sefendants below, who are known as
appellants in this court, charging appellants with impringly and
wilfully premitting their cove, walch were known to then as
that time to be discussed, to mingle with the cowe of the

The enuments are similar in substance and charge that on March Lot, 1898, and for a pariod off two years throughor, the appelloc was a tenant of arpellants' under and pursuent to a seriein lease, thereby, among other things, it was agreed between them and once send furnish sufficient estim to properly street said form; that the above of stock furnished by each party should be of equal value. The counts charge that appellas owned and possensed twenty-four milk cows and helitors, around, healthy and presenced twenty-four milk cows and helitors, around,

similar number of cows which were not then and there, sound and healthy and free from infectious or contagious disease; that the fact was well known to both appellants, and that the cows and the cow barns on said leased premises were infected with germs of some infectious and contagious disease, and that the appellants then and there well knew that fact; that the appellee did not know of said disease germs in said cow barn, or in said cattle owned by the appellants; that neither of the appellants told appellee of the existence of said disease germs in said barn or in the cattle of the appellants, but, on the contrary concealed the facts from the appellee; that appellants did knowingly, wantonly and negligently permit said infected cattle owned by them to mix with the healthy cattle of the appellee; that because of said negligent, wilful and wanton conduct of the appellants, the cattle of the appellee were infected, whereby the appellee has sustained damages to the amount of \$10,000.00.

To each of these counts of the declaration the defendants filed a general demurrer, which demurrers were overruled by the court. Proper exceptions were preserved by the appellants to this order of the court. On motion of the appellants a bill of particulars was filed in substance as follows: "The disease, ailment, infection, or contagion communicated to appellee's cattle is sometimes known and defined and referred to as 'garget'; also sometimes known and referred to as 'mamitis', contagins and infectious mastitis; that said disease is also known and referred to as inflamation of the udder.2 The disease in general terms being one cause of impairment of the milk functions of cows and causes them to produce stringy, clotted, bloody and impure milk, not fit for human consumption, and entirely unmarketable."

e which were not then and there, sound tanacai) anorpathos no apoltosini modi ee adt seit bes .atmallages itod of meen' llaw and to ted to cow barns on said loased arealses were inflicted her , we so is some infectious and costaging discour, real tout : toof thit word flow orest box most atmailer a . . . . wor hive at acres easeath bice to word jon bib eel. Toddien fort : winefloogs off yd berwe elfise bisa ni ... To void appoince of the valationse of reis discase no , the strailsque out to sitte out at to mund bigg of the -Leggs tart : malegs of the facts the speller: the tart . . did knowingly, wenterly and negligently remain maid in To elitse wiltlead out driv wim of radi to be bonwo elitse nothing and lettly , then then been no seems of that believes -er soon selfagge end to sittee edt , admellegge edt to tout the enough the enough of the enough to the enough .00.000.03

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Appellants filed a plea of the general issue and notice under the same. By their plea s they denied the supposed trespass, or charges laid against them. In the notice under the general issue the appellants charge the appellee with numerous acts of mismanagement of the premises where the cattle were kept. They also charge the appellee with many acts in the treatment and care of the cattle which was liable to cause the disease. They deny specifically that they had any knowledge of any infection in their herd of cattle, or barns, at the time the cattle were intermingled.

The appellants were the owners of several farms in Stephenson county. The appellee in partnership with one Gillon had been a tenant on one of these farms for a period of eight years prior to March 1, 1929. Gillon and appellee dissolved partnership just prior to that date, and in the division of the cows, the appellee took nine for his share. Prior to moving onto the farm in this suit, appellee increased his number of cows by purchasing others until he had approximately twenty. Appellants had the same number of cows on the farm onto which appellee moved March 4, 1929. Prior to March 1, 1929, appellants and appellee had entered into a lease whereby the lessor was to put in one-half the cows, and the lessee the same. In general the lease provided that each of the parties was to furnish half of the live-stock, and the increase of the live stock and the production of milk was to be divided equally. The appellee took his cows with him when he moved onto the farm, and milked all of the cows and had possession of and managed the farm. In the fall of 1929, appellee again leased the farm for a period of one year, beginning March 1, 1930, and kept the same cows that were on the farm at the expiration of the 1929 lease.

Appellants filed a plus to the partit stanffered notice under the sene. By their plea a they denied the el respess, or changes laid spainer them. In the notice the goneral taxas the aspallants carres the aspallace with saft of the residence out to transportable to atom and . . . . were kept. They also capre the appelled with many acts of wider and delike elitres oft to ease are theatest s - n . . . the discept. Lier dony specifically that the bad any any infection in their lerd of ortion to barns, Continue to continue to make a contract of the Assessed to whome and were with Libertal said. em lituw cidarentro ni selleca and .yanace moznongst ... The Review of the Appelled the Application of Course of Street Street, and Controlled de ser malle agent al sense se mine estay vinite dissolved partnership just order to that days, and in the ton of the cows, the appelles tock mine for his chare. bessevent colleges, the said at the fact of the pulyon of the all abusiness and ad divine as also property of their to assume and owenty. Appellants had the sense number to come on that that out o nich amellee moved bareh 4. 1989. Erlar to Hare't 1, 1889. edt vécucite and a crat boretae ballocca ana enloque your not supply our con great and histories of front any commit or not energy out to done our delivery rand wit framing of Printed Self Str. September and Str. September of Sec. Spiral stock and the randustion of wilk was to be divided equally. off of the Bevon af medw mid his avec aid fleet cellenge off but to melancanou had but avon and to file health bus , and menaged the farm. In the fall of 1625, aprollow again leased they apply not should be invasived to their the property and the property of their states and their

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The appellee introduced evidence tending to show that soon after he had moved onto the premises and the sows of the different parties became intermingled that he noticed that some of the cattle were diseased and were giving bloody milk. He called a veterinary to examine the milk and he diagnosed the trouble as being caused by mamitis. The employees of the appellee gave their version of the condition of the cattle and the condition of the milk. The appellants introduced evidence to show that they had no knowledge of any disease being in their cattle at the time of the mingling of the cattle under the lease, or had ever been diseased, and that their cattle were all free from disease on March 1st, 1931, at the time of the expiration of the tenancy of the appellee. The case was tried before the jury who found in favor of the appellee and assessed his damage at \$2500.00, and the case comes to this court on appeal.

It is insisted by the appellants that the lower court erred in not directing a verdict for them, for the reason that the declaration does not state a cause of action. In our opinion the objection is well taken as to the first count of the declaration as it does not charge that the defendants had any knowledge that the cattle of the appellants were infected with a contagious or infectious disease at the time complained of. We think that the second and third counts of the declaration, however, do state a good cause of action, and it was not error for the court to refuse to direct a verdict in favor of the appellants.

It is next insisted that the verdict is contrary to the weight of the evidence in the sase. The evidence in support of the allegation that the defendants, or either of

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It is next insisted that the verdiet is centrary to the weight of the evidence in the same. The critical in

them, had knowledge that their cattle were infected with disease is very, very meager; however, this is a question of fact for the jury to decide and we do not feel disposed to reverse the judgment on the ground that it is contrary to the weight of the evidence. It is the peculiar province of the jury to pass upon and dispose of questions of fact and the reviewing court is generally not justified in reversing a verdict, unless it can say that it is manifestly against the weight of the evidence, even if by reading the evidence the court should be of a different opinion relative to its weight from that which the jury found to be the fact.

The plaintiff in testifying relative to the value of his cattle testified his cows were worth from \$159.00 to 140.00 a piece; that twenty of them would average that much: that the five heifers were worth 270.00: that he sold all of his cattle for \$730.00. Over the objection of the appellants, appellee was permitted to introduce a bill of sale for a number of these cattle that were shipped to Chicago, and showed the price that the appellee received formthem on the Chicago market. The appellee insists that the objection to this evidence, being only a general objection, is not a good objection, and the court properly overruled the same. Under the authorities laid down in the cases of Hardin v. Forsythe, 99 Ill., 521; Hicks v. Deemer, 187 Ill., 164; and Cantwell v. Welch, 187 Ill., 275, we think the objection to the evidence should have been sustained. The sales slip was not competent to prove the price for which the cattle were sold and should not have been admitted in evidence.

Over the objection of the appellants, the appellee was permitted to introduce in evidence a box and label marked

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'Cow Cure'. One of the employees of appellee found this empty box in the barn where the cattle were kept. This box was evidently introduced in evidence for the purpose of showing that the appellants had knowledge of their cattle being infected. The only evidence that the defendant knew anything about any of these boxes being on their premises is found in the testimony of andrew Haas, who testified that it had been ten years before the trial that he and his brother had purchased any of such boxes of medician and the medicine was never used for anything except as a tonic for their cattle. During all t is time other cattle were kept in the barns and most of the time the barn was in the possession of their tenants. It is our opinion that the court erred in admitting the box and label in evidence.

On examination of the appellee's testimony relative to the value that he placed on his herd of cattle at the time they were intermingled with the cattle of the defendant, and treating his evidence as to what the cattle were worth at the time he sold them, as being the correct values, this court cannot understand how the jury arrived at a verdict of \$2500.00, and the verdict in this respect, we think is contrary to the evidence.

For the reasons above set forth the judgment of the Circuit Court of Stephenson county is hereby reversed and the cause remanded.

Reversed and remanded.

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|                      | in the year of our Lord one thousand nine                                         |
|                      | Appellate Court, at Ottawa, thisday of                                            |
| *                    | In Testimony Whereof, I hereunto set my hand and affix the seal of said           |
| record in my office. |                                                                                   |
|                      | true copy of the opinion of the said Appellate Court in the above entitled cause. |
|                      | ne State of Illinois, and the keeper of the Records and Seal thereof, do hereby   |
| SECOND DISTRICT      | ss.  I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and                   |
| ATE OF ILLINOIS,     | 1                                                                                 |
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## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk. 268 I.A. 6359

BE IT REMEMBERED, that afterwards, to-wit: On OCT 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



IN THE

APPELLATE COURT OF ILLINOIS.

SECOND DISTRICT.

February Term, A. D., 1932.

C. R. HEDRICK, Appellee,

VS.

W. W. MERCER, Appellant.

Appeal from Circuit Court, Peoria County.

WOLFE \*\* P. J.

C. R. Hedrick started suit in a Justice of the Peace court in Peoria County against W. W. Mercer, the appellant, to recover damages to the automobile of Hedrick occasioned by a collision of the automobiles of the respective parties to this suit. The accident occurred on the evening of May 6th, 1931, in the City of Peoria, Illinois.

At the trial of the case before the Justice of the Peace, Hedrick recovered damages against Mercer for the sum of \$227.60. From this judgment Mercer prayed an appeal to the circuit court of Peoria County. Trial was had before a jury in the circuit court of said county and a verdict rendered in favor of Hedrick in the sum of \$227.60. On this verdict a judgment was entered for said amount and the case is brought to this court by appeal for review.

The suit is the result of a collision between the automobile owned by G. R. Hedrick, appellee, which was being driven by his son, and the automobile owned and driven by the appellant, W. W. Mercer. The collision occurred on North

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WOLLER \*\* IF. J.

O. L. Jedrick started suit in a Justice of the Peace court in Peace wanty excits: . M. Moreer, the appellant, to recover demages to the automobile of hedrick coocasioned by a solitain of the automobiles of the respective parties to this suit. The accident occurred on the evening of May 6th, 1-21, in the City of Feeris, illinots.

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The suit is the result of a callicion between the automobile owned by V. R. Hedrick, arcalles, to the an feirg driven by his san, and the automobile owned and driven by the automobile owned and driven by the latter owned and driven by the latter owned and driven by the latter owned and driven by the calling on secure course.

Madison street in Peoria, Illinois. Madison street is a paved street running in a northerly and southerly direction in said city. The appellant's car was being driven in a southerly direction on Madison street, and appellee's car was being driven in a northerly direction on said street. Appellee's car was damaged and was repaired by the Reliance Motor Company of Peoria. The itemized bill introduced in evidence charges for repairs, including labor and parts, to be \$227.60, and the same was paid by the appellee. That the cars came together and that the injury to appellee's car was occasioned thereby, is undisputed. The question is whether the driver of the appellee's car was in the exercise of due care and caution for the safety of appellee's car, and whether the appellant was guilty of negligence while driving his car on the evening in question at the time of the collision.

Vine street intersects Madison street at right-angles at the south end of the 2900 block of North Madison street.

Fairholm street intersects North Madison street at right-angles at the northerly end of the 2900 block. Appellee contends that his son was driving north on Madison street towards Vine street on the right or east side of Madison street; that said Madison street was thirty feet wide and paved with brick; that as he approached Vine street he saw a vehicle approaching from the opposite direction; that when he first saw the car it was about a block away to the north of where the collision happened; that as he approached Vine street he was traveling about twenty miles an hour; that the car approaching from the north was traveling in about the center of the street; that as he crossed Vine street and entered the 2900 block of Madison street, he reduced the speed of his car; that as he entered the 2900 block he was

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traveling to the right of the center of Madison street about three feet from the righthand curb of said street as he was going north; that he noticed a car parked close to the curb in front of him on the righthand side of Madison street headed north; that as he got about fifteen feet behind the parked car, appellant's car, which had been traveling in the center of the street came directly over towards his car; that the cars collided and the left front wheels of both cars came together; that the extreme front of his car was about even with the rear of the parked car when the cars collided; that at the time of contact the left front wheel of his car was about three feet to the right or easterly side of the center of Madison street. In this contention the appellee is supported by a number of witnesses.

appellant claims that he was driving on the right side of the street going south; that as he approached the 2900 block of Madison street he noticed the dim lights of a car parked in the 2900 block on North Madison street in front of the first house north of Vine street; that he noticed a car approaching below Vine street, which was appellee's car, being driven near the righthand or easterly curb of Ladison street; that he was traveling at least thirty miles an hour when he first saw it; that as the car of appellee approached the parked car the driver came within a distance of eight or ten feet of the same, then swerved and turned suddenly to the left out from behind the parked car; that at this particular time appellant's car was within a few feet of the parked car and was traveling at about 20 miles per hour; that he attempted to increase the speed of his car to avoid a collision, but the two cars came together with their left front wheels and fenders. There is evidence in the record that tends to support this contention of the appellant.

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The appellant chains that he was driving on the right occupation of the group galactic that as an approached the 1900 beiros tao a lo estati mib sar bearter ad testa mesibal le tarif ed to from a decrea receiped after ne clock 0000 a north of Vine street; that he norteed a car approaching Vine street, which was appoiled a car, being drives com inthand or casterly ours of indices street; that it has if was fath ad now took us asim with tasel as go l more to the and the first police appropriate to the self and the test come within a distance of cight of the to the send, then bedying the former error the risk and of the thinking beauty has because me now many to the second of t seles of their to pulloyert any bus and bedree out to test and are trad he attempted to ma coase with and a coase most a substitute of the research of the probability about mels and forders. There is evidence in the record .lunkanga est to neither est the appellant.

We have examined very carefully the testimony offered by the parties to this suit, and it is our opinion it is clearly a question of fact for the jury to determine wherein the weight of the testimony lies. They have found in favor of the appellee and unless this court can say that their finding is manifestly against the weight of the evidence we would not be justified in setting aside the verdict. We cannot say that the verdict is against the weight of the evidence, therefore, we do not feel that we would be justified in setting aside the verdict as being contradictory to the weight of the evidence.

Plaintiff's Exhibit One was an itemized bill from the Reliance Motor Com any to the plaintiff for repairs to his car. This exhibit was admitted in evidence. The appellant now contends that there was no evidence in the record sufficient to show that all of the work and material shown by this exhibit was done on the car as a result of the collision. The appellee and his son both testified that the appellee's car was in good mechanical condition before the time of the accident --(that repairs were made as a result of this accident)-- It is our opinion that the exhibit was properly admitted in evidence and was prima facia proof of the correct amount of the damage to appellee's car.

The appellant insists that the court erred in giving the instruction to the jury for the plaintiff, which is as follows: "The court instructs the jury that there was in full force and effect a certain ordinance of the City of Peoria at the time of the accident which is in the words as follows, to-wit: "A vehicle, except when passing a vehicle ahead, shall keep as near the righthand curb as practicable." We cannot see wherein the appellants were prejudiced by the giving of this instruction. However, the appellant is not in a position to

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urge this as error as his abstract violates Rule 16 of this court in this: "The abstract must set out in full every instruction and note whether the same was given, modified or refused." An examination of the record discloses that the abstract does not set forth all of the instructions that were given by the court at the trial of the case. We find no reversible error in the case, and the judgment of the circuit court of Peoria County is hereby affirmed.

Affirmed.

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| ATE OF ILLINOIS,             |                                                                                   |
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| SECOND DISTRICT              | ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and                    |
| said Second District of the  | he State of Illinois, and the keeper of the Records and Seal thereof, do hereby   |
| tify that the foregoing is a | true copy of the opinion of the said Appellate Court in the above entitled cause, |
| record in my office.         |                                                                                   |
| ,                            | In Testimony Whereof, I hereunto set my hand and affix the seal of said           |
|                              | Appellate Court, at Ottawa, thisday of                                            |
|                              | in the year of our Lord one thousand nine                                         |
|                              | hundred and thirty-                                                               |
|                              | Clerk of the Appellate Court                                                      |
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## AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the fourth day of October in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

268 I.A. 636

BE IT REMEMBERED, that afterwards, to-wit: On OCT 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1932.

ANNA C. HEINKEL, As Administratrix of the Estate of Marie Eder, Deceased, Defendant in error.

VS.

Appeal from the Circuit Court of Lake County.

ARTHUR MAES,

Plaintiff in Error.

WOLFE, P.J.

The plaintiff filed a suit against the defendant in the Circuit Court of Lake County. The declaration consists of two counts. The first count declared upon a promissory note for \$800.00, dated November 18, 1919, payable on demand, with interest at six per cent per annum. The note did not state when the interest was to start. The second count declared upon an open account for money loaned for \$200.00, and interest thereon. No proof was admitted upon this count, so this count is not involved in the suit. The only question is the amount due, if anything, on the note.

To this declaration the defendant filed nine pleas: the general issue, counter claim, set-off, notice of special matter, and affidavit of defense, that the administratrix had no letters of administration, and the statute of limitation. The plaintiff filed a replication denying specifically every allegation that was set forth in the defendant's special pleas. Evidence was offered in support of the plaintiff's and defendant's contentions, and at the close of all the evidence the court orally directed the jury to find the issues in favor of the plaintiff and assess her damage at \$704.17.

At the time the court gave this instruction the defendant

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ARTHUR MANS,

Redatiff in Serer.

WOLFE, P.J.

The plaintiff filed a suit opened the defendant in the contest of two levels of two late tours of lake decisors of two sections of two sections of the first count feeles of wear a proviseour note for \$500.00, dated forester 18, 1018, perceile an decor, with interest at six per cent ner annew. The sets tid not state when the interest was to start, the second declared was a even account for money homed for econd the laterest thereon. In proof was count to money homed for sound interest thereon. In proof was count to appn this count, so this count is not in-' volved in the smit. The enly exception is the amount one, if smy-thing, on the mote.

To this declaration the defendent filled hime plens: the general issue, counter claim, set—off, notice of special rest on, and efficients of defense, then the administration had no letters of administration, and the statute of lighteston. The plaintiff filled a replication denying specially every alloyation the filled was set forth in the defendent's special place. Avidence was offered in support of the plaintiff's and defendent's contentions, and at the close of all the cythenes the court trilly directed the justy to find the lesses in feror of the plaintiff and atness the descent

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objected and excepted to the giving of the instruction. Numerous objections were urged in the printed briefs and argument of the plaintiff in error why the judgment of the trial court should be reversed, but in our opinion, consideration of all those points is not necessary to a proper decision of the case.

It is first urged that the court erred in directing a verdict in favor of the plaintiff as the plaintiff in error contends there is a question of fact in the case, and that he was entitled to have a jury decide it. It is a well recognized principle of law that if the evidence, or the legitimate inferences which may be deducted from it, tends to support the defendant's or plaintiff's case, the court should not premptorily instruct the jury to find for the plaintiff or the defendant. When the evidence is conflicting on the question as to which are more credible, it is a question for a jury. It is not within the province of the judge to weighthe evidence and ascertain where the weight is. Peremptory instructions should be given only when a question of fact is not involved. Wenona Coal Company vs. Holmquist, 152 III. 581; Lake Shore Ry Co. vs. Richards 152 III. 72.

The defendant in errors concedes that this is the law, but she claims there was no competent evidence in the record to dispute her claim. The defendant Maes, without objection, testified of his book account and at the time the book account was offered in evidence the defendant in error put her objection as follows: "Now, you honor, we object to the introduction of this book as evidence, or any part of it, for the reason that the witness in his pleas and affidavit contradicts his statement made in the examination by counsel. We object for the further reason that it is an attempt to set forth the claim of unliquidated damages which the plaintiff claims in this case, which cannot be done; and for the further reason that if he has any claim, his claim should be filed as the statute provides, in the probate court of Cook County, Illinois."

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circult her claim. The defordant hase, without objection, ted of his book secount and at the time the took secount in evidence the defendant in sture the took secount in evidence the defendant in sture and her objection of this poek as evidence, we object to the intuctability of the witheas in his aleas and efficavit controller ale state. The witheas in his aleas and efficavit controller ale state. The witheast in the amminstica by counsel. We object for the of unliquitated drawes which the aleast forth the elvic of unliquitated drawes which the aleast forth the elvic and for the further reason to this dore, camed be done; and for the further reason that if he had laim, his claim should be filled as the statute veryon that if he had and the court of Gook do way, Illinois."

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We think that the court properly overruled the objections as made by the plaintiff. The first objection would be clearly a question of fact for the jury to say as to whether the book account did contradict his statement as testified to at the time of the trial.

The second objection is not good for the reason that the defendant was not trying to recover anything from the plaintiff, but only off-setting the amount that the plaintiff claimed was due on the note. It was not necessary for the defendant to file his claim in the probate court of Cook County during the time of the administration of the estate as he is not attempting to collect anything on his claim, but is asking to have the claim credited as payment on the note which he had given to the plaintiff intestate. We think the questions as to the amount due on the note together with the accumulated interest, and correctness of the book account; were questions of fact that should have been submitted to the jury, and the court erred in giving the peremptory instruction to the jury to find for the plaintiff.

The plaintiff in error insists that a peremptory instruction should have been given in writing, and the court erred in orally directing the jury to find the issues for the plaintiff. In the case of Helfing vs. Van Zandt, 162 Ill. 166, the court passing on this question say: "It is next claimed that the court erred in orally directing the jury to find the issues for the plaintiff and to assess the plaintiff's damages at a certain amount. Under our statute the Circuit Court has no authority to instruct the jury orally on any material issue in the case. Here no defense was made before the jury and there was no question in regard to the amount the plaintiff was entitled to recover under the evidence, and the instructions to the jury was harmless; but, at the same time it was erroneous, and had an exception been reserved to the decision of the court in instructing the jury, we would be inclined to hold

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irecting the jury to find the issues for the court errol in orally directing the jury to find the issues for the plaintiff. In the me of Helfier vs. Yen Zendt, 188 Ill. 186, the court presing an his sucstion say: "It is next claimed that the court presing an orally directing the jury to find the issues for the objection and to seess the plaintiff's descress the centein whent. Take of a refer the plaintiff's descress the centein whent the jury or any material issue is the ease. Nowe so lester was under the jury and there was no question in resent to the enough the plaintiff assential to recover under the cridence, and the plaintiff assential to recover under the cridence, and the instructions to the jury was hearless; but, of the same in it is a erroneous, and an execution here reserved to the decirion of the court is inchanged to the jury, or would be inclined to the court to the last.

that the judgment should be reversed." We none Coal Co., vs. Holmouist, 152 Ill. 581.— We are aware that some of the appellate courts have held that it is not error to give peremptory instructions orally, but they all say that it is a better practice that such instructions should be writing.

It is our opinion that the peremptory instruction should be in writing and the court erred in giving such instruction orally. The judgment of the Circuit Court of Lake County is hereby reversed and the case remanded.

Reversed and remanded.

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| STATE OF ILLINOIS,  SECOND DISTRICT  SS.  I, JUSTUS L. JOHNSON, Clerk of the            | ne Appellate Court, in and |
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| for said Second District of the State of Illinois, and the keeper of the Records are    |                            |
| certify that the foregoing is a true copy of the opinion of the said Appellate Court is |                            |
| of record in my office.                                                                 |                            |
| , In Testimony Whereof, I hereunto set my hand                                          | and affix the seal of said |
| Appellate Court, at Ottawa, this                                                        | day of                     |
| in the year of ou                                                                       | r Lord one thousand nine   |
| hundred and thirty                                                                      |                            |
| Clerk of the Ap                                                                         | pellate Court              |



## AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the fourth day of October in the year of our Lord one thousand nine hundred and thirty-two within and for the Second District of the State of Illinois: Present -- The Hon. FRED G. WOLFE, Presiding Justice,

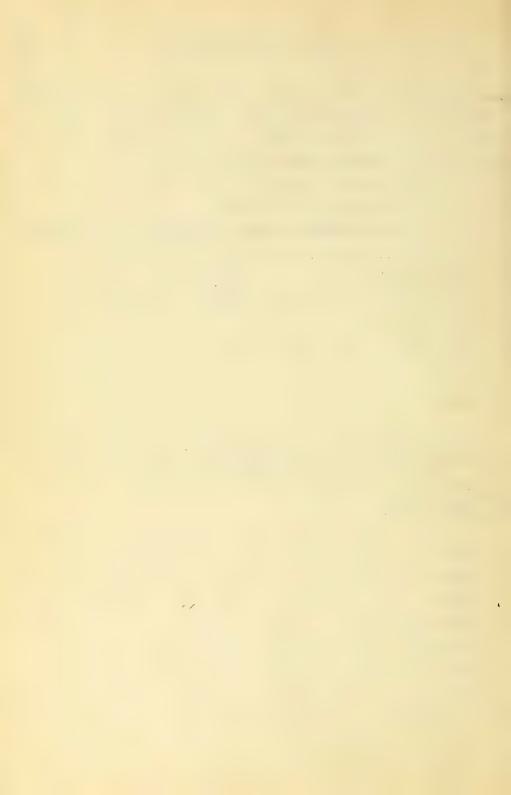
Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.  $268I.A.636^2$ 

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



IN THE

APPELLATE COURT OF ILLINOIS

Second District.

May Term, A. D., 1932.

BELVIDERE NATI NAL BANK
of BELVIDERE, N. J.,
Appellant,
vs.

Appellant,
Peoria County.

Appellee.

WOLFE \*\* P. J.

This is a suit in assumpsit brought by the appellant, Belvidere National Bank of Belvidere, N. J., against the appellee Karl Zepp, in the County Court of Peoria County, to the February term, 1926.

The amended declaration alleges that on April 20, 1925, the Asbestos Products Corporation made its certain draft or trade acceptance, and thereby requested the defendant (Karl Zepp) to pay on June 20, 1925, to the order of the Asbestos Products Corporation \$420.00, which said draft or trade acceptance the defendant on the day first aforesaid executed and delivered to Asbestos Products Corporation. The Asbestos Products Corporation thereupon endorsed and delivered said draft or trade acceptance to the American Cities Co., Inc., who endorsed and delivered the same to the plaintiff (Belvidere Mational Bank), and that the defendant promised the plaintiff to pay said sum of money, according to the tenor and effect of said trade acceptance.

APPINIA VIT BONGE OF TAILUGE.

PERMITTERS STREET

May Ican, A. D., 1930.

BELVIDERS WART JAL BANG OF BILVIDERS, N. J.,

vs.

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This is a suit is assurped brought by the appallent, Relyidere detional Ban't of Delyidere, W. J., againer the appalles Marl Sepp, in the County Court of Persia County, to the Tebrusry tara, 1986.

The americal declaration alleges that on April 26, 1925, the Asbattes iroducts der oresism value for certain durit or trade acceptance, end thereby requested the defendant ( erlisp; ) to year an June 10, 1920, to the order of the isbattes andered on-poration 1420.00, union soid doubt or trade securities and definitely aforested and delivered to arbeing the desire to delivered to arbeing the delivery of the Asbattes Correspond to the contract of the delivery to the andered and delivered and delivered the first condities to., inc., who endorsed and delivery to the terminal first to year and from the first to year and the plaintiff (solvidore are an arbeing, see the trade the plaintiff (solvidore are and them), see the trade and effect of soid the pay said can of the year the soid the plaintiff to year said can of the organism as the

The amended declaration also alleges that on July 10, 1925, after said trade acceptance became due by the terms thereof, the plaintiff, through its attorneys O'Brien, Boardman, Parker & Fox, of New York City, wrote a letter to defendant and demanded payment of said trade acceptance from said defendant; that on July 14, 1925, the defendant employed Roscoe Herget, an attorney at law, of Peoria, Illinois to represent said defendant in making a reply to said letter, and to state for the defendant his reasons for refusing to pay said trade acceptance, and thereupon said Herget, acting for the defendant, wrote to plaintiff's said attorneys a letter dated July 14, 1925, giving defendant's reasons for refusing to pay said trade acceptance, which said letter states: "Mr. Zepp has referred to me for reply your letter of the 10th inst. From the evidence submitted to me it appears that the alleged trade acceptance was obtained from him by fraud and misrepresentation which he is able to prove and substantiate. This being so he would not be liable for the claim. He has ordered the merchandise described bo be returned to the Asbestos Products Corporation, and whether or not they have accepted its return I do not know, but I would suggest that you confer with them and direct them to accept without delay the return of the merchandise, as Mr. Zepp positively refuses to make any payment or to be a party to a scheme such as has been perpetrated upon him."

(Signed) Roscoe Herget."

Said amended declaration further alleged that said defendant was estopped from setting up any defense to the payment of said trade acceptance except such defense as is consistent with and contained in said last mentioned letter.

An affidavit of claim was filed with the declaration, signed by Clarence C. Smith, cashier of the plaintiff, Belvidere

The areaded declaration also plicates that on buly 13. . . said trade secuptamen became due by the terry thereor, the state of bulgares has trained as tetter to defect will deal well . . page and at well firsts Josephians from most durinkent, that was to terrate of the defendant compleyed to see Herret, or attarner at Teomis, Illinois to represent said defeated in taking a ancent ali ther, and to etate for the december that recent to pay anid trade accotagoo, and thereton said "erarotte him at it for defendant, write to plat at ill a call of tolders with a dated Joly 10, 1025, giving defeadant's measure for nation tolded the factor paradysess. Short little special methods APAI AND DO CARROLL COMPANIES OF LAW AN ASSESSMENT AND ASSESSMENT ASSESSMENT AND ASSESSMENT ASSESSMENT AND ASSESSMENT ASSESSME Associate and Poly Claryty I' as at Reddictor basedies all moff than national and appropriate that the Rev Link and American and State where which has he sides to grown and constructions. This value we do sufficiency of between our of calcid and our saided of the Adres t be be returned to the isbestes inducts continuing, and I dod , went they have accepted ins return I do not know, but I Witness of court results him small outs soften one I sell January Million viewificon margin of the marches, estimate for margin position Tures to nake any payment on to be a warty of a robuse med at ". wid regs beterrang need a

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Mational Bank, which stated that the demand of the plaintiff is for 1420.00, and interest, due on a trade acceptance dated April 20, 1925.

To the amended declaration the defendant filed a plea of the general issue, also a plea denying that he signed the instrument in question and charged the same to be a forgery; he also filed a special plea as follows:

"And for a further plea in this behalf, the defendant says that the plaintiff ought not to have its aforesaid action against him, the defendant, because he says that he, the said defendant, did not knowingly make, deliver or accept the writing in the said declaration mentioned; that he never saw said writing in his life time and never heard of its existence until shortly before this suit was brought; that on or about April 20th, 1925, a person alleging to be a representative of the said Asbestos Products Corporation called upon this defendant and requested that this defendant represent said Asbestos Products Cornoration in the vicinity of the City of Peoria, as a painter, to see to it that any of the products of said corporation sold in this vicinity were properly applied on the jobs upon which they were to be used; that the defendant, at that time, executed a contract for the purposes above mentioned; that he read said instrument before he signed the same; that sand writing in the declaration mentioned was not a part thereof; that that was the only paper that he ever executed in which the Asbestos Products Corporation was mentioned; that in the execution of said instrument above referred to, he was in the exercise of due care and caution so as not to execute any instrument with which he was not familiar and that if the signature 'Karl Zepp' alleged to appear on said writing in said declaration mentioned, should be the signature of this defendant, it was obin this formula of the domina of the pleistiff is

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tained by some fraudulent trick or device, - the nature of which is unknown to this defendant, - by the said representative of the said Asbestos Corporation, at the time he executed said contract above herein mentioned; and this the defendant is ready to verify."

The defendant also filed an affidavit of meritorious defense as follows: "Karl Zepp being first duly sworn upon his oath deposes and says that he is the defendant in the above entitled cause; that he verily believes that he has a good cause of defense to said suit upon the merits to the whole of the plaintiff's demand; that the nature of such defense is: That he did not make, execute, accept or deliver the said instrument, to-wit: said trade acceptance sued on; that he did not purchase from the drawer of said trade acceptance any goods of any kind, as set forth in said trade acceptance, or obtain any other thing of value at any time from said corporation; that there was no occasion whatever for him to execute any instrument of any kind to said Asbestos · Products Corporation, and that if the signature 'Karl Zepp' appearing thereon should, by any chance, be the signature of this affiant, it was obtained thereon by some trick, fraud, or device, the nature of which is unknown to this affiant, without the knowledge of this affiant by the representative of said Asbestos Products Corporation and that he did not authorize the said Roscoe Herget to write the letter set forth in the plaintiff's amended declaration."

On October 7, 1931, the plaintiff filed a general and special demurrer to the defendant's special plea filed September 30, 1931, alleging special causes of demurrer, as follows:

- "1. Said plea is double and argumentative. It is both a traverse and an avoidance in one plea.
- "2. Said plea purports to be a plea of confession and avoidance, but it does not give color of right in the plaintiff by admitting the execution of the instrument sued on.

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"3. Said plea is in substance the same as plea filed by the defendant on June 27, 1931, to which the Court has already sustained a demurrer.

"4. The alleged fraud, device, trick or curvention referred to in said plea are not sufficiently set forth.

"5. No facts are set forth which tend to show that the defendant was not negligent in executing said trade acceptance.

"6. No facts are set forth which show that the defendant in executing said trade acceptance used any diligence to protect himself from fraud.

"7. Said plea contains matters of surplusage which should be disregarded by the Court on the argument of said demurrer."

The court overruled the plaintiff's general and special demurrers to the special plea of the defendant, dismissed the suit and rendered judgment against plaintiff for costs. The appellant, (plaintiff below) has brought the case to this court for review and has assigned as error the action of the trial court in overruling the demurrers and in rendering final judgment against the plaintiff of its cause of action.

The only question involved in this suit is: The sufficiency of the defendant's special plea in which it attempts to charge fraud in its inception of the draft or trade acceptance.

It is first insisted by the plaintiff in error that there were holders in due course of the instrument in question; and therefore, the defense of fraud could not be available to the defendant as against them. Fraud must be proven before it is available as a defense to the suit, but if the fraud is such that it inheres to the execution of the instrument, then it is a void instrument in the hands of third parties even though holders in

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due course of business before it becomes over due.--Chicago City Railroad Co., vs. Uhter, 212 Ill., 176; Papke vs. Hammond, 192 Ill., 631.--

The next question arising is whether the plea sets forth sufficient facts, assuming that they are true, to constitute a good plea of fraud and circumvention. The general rule is that whenever a person relies upon fraud, misrepresentation or deceit, whether the proceeding is at law or equity, the facts constituting the alleged fraud must be set forth in the plea. In Bouxsein v. Granville Nat'l. Bank, 292 Ill., 503, the court in passing upon the sufficiency of a plea of fraud and circumvention said; "It is essential that the facts and circumstances which constitute fraud should be set out clearly and concisely and with sufficient particularity to apprise the opposite party of what he is called upon to answer." The words fraud, misrepresentation and deceit are of no value to the pleader in the absence of an averment of facts to which they particularly apply. They are simply the statement of a conclusion. The facts upon which the charge of fraud is based should always be averred. The general allegation of fraud, however strong in its expression, is insufficient.

It is the contention of the appellee in his allegation that the nature of the fraud, or device, in which the appellant procured his signature to the instrument is unknown to the appellee, but is sufficient to charge an act of fraud and deceit.—
In the case of Hazard vs. Griswold, 21 Federal Reporter, 178, which cites Cole vs. Joliet Opera House, 79 Ill., 96, holds that the demurrer to a similar plea was properly sustained. In the Cole vs. Joliet case the suit was upon a subscription to the capital stock of a company, a plea that the company fraudently got possession of the subscription of said defendant, and that it fraudulently obtained the signature of the defendant to the subscription by

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The neat of ention arising is wheth a the plea asts the factor fact, assuming that they are true, to countitute mark at a low form in ord confidence incla him himself to be Please in purpose to the Please of the Control of t NAMED TO PROPOSED IN A LINE OF WHICH THE PARTY OF THE PARTY. If alreading of their and all about the of even board negative and and once parties or the party life and the same of the additional -es at dl' phies : identicale and stroumer to a sold a role of bear's statistance Media recomprenents bas atomit out tail . . . . . -ifter drainifier dily has giorience and girralo two tos magn in like of on this to without otinoque out salegy of stock to troomers as to someres out at rebacks at a of s. in the problem of the second or and the state of the state of the e sion. The facts which the charge of a said is besed Townself, went to missealle into og sill , barrers ed syswis it is expression, is landrictort.

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fraudulent representations, and that the company knowingly comitted such fraudulent acts, without averring the facts constituting the fraud, is bad on general demurrer. We are of the opinion that the plea did not properly set forth the facts of the fraud and circumvention in the execution of the instrument in question so as to apprise the plaintiff of the charge they would have to meet to overcome the facts in said plea. We think the demurrer should have been sustained to the plea.

been sustained to this plea, and that is, that the facts at forth in this special plea could have been proven under the general issue. The appellee, in his brief and argument, practically concedes this to be the fact. They claimed the same could not be reached by general demurrer, and as this was not raised by special demurrer the appellants cannot not now raise this question in this court. In the case of the Central Ill., Mailroad Co., vs. Johnson, 34 Ill., 389, the court held that, 'a special plea, setting up only matters the reverse of which the plaintiff is bound to prove in order to make out a prima facia case, is bad on general demurrer as amounting to the general issue.'

For the reasons above stated the judgment of the County Court of Peoria County is hereby reversed and the case remanded to said court with directions to the Court to sustain the demurrer to defendant's special plea.

Reversed and remanded with directions.

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| ATE OF ILLINOIS,     | \{ \sigma \text{SS.}   \text{SS.}  \text{SS.}  \text{SS.}    \text{SS.}   \text{SS.}                                                                                                                                     \q |
| SECOND DISTRICT      | I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|                      | e State of Illinois, and the keeper of the Records and Seal thereof, do hereby                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|                      | true copy of the opinion of the said Appellate Court in the above entitled cause,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| record in my office. | In Testimony Whereof, I hereunto set my hand and affix the seal of said                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
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|                      | Appellate Court, at Ottawa, thisday ofin the year of our Lord one thousand nine                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
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#### AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the fourth day of October in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice. Hon. THOMAS M. JETT. Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. 268 I.A. 6363

BE IT REMEMBERED, that afterwards, to-wit: On OCT 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



No. 8516 Ag. 17.

IN THE

### APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D., 1932.

MARY DOUBET: CASSELL, Administratrix of the Estate of Corrine May Shelton, deceased,

Appellee,

VS.

CITY OF PEORIA, a municipal corporation, Appellant.

Appeal from the Circuit Court of Peoria County, Illinois.

WOLFE \*\* P. J.

The appellee as administratrix of the estate of Corrine May Shelton, deceased, started suit in the circuit court of Peoria County against the City of Peoria to recover damage for the wrongful death of the deceased, which occurred on March 6th, 1930. The declaration charges that the death resulted from the negligence of the City of Peoria in failing to maintain its streets in a reasonably safe state of repair. There was only one count in the declaration, to which the defendant city filed a plea of general issue. Trial was had before a jury which rendered a verdict in favor of the appellee for the sum of \$4500.00. Judgment was entered upon the verdict for \$4500.00, and the City of Peoria brings the case to this court for review.

Corrine May Shelton was riding in the automobile with her sister when she was injured on February 27, 1930. She had been invited to ride as a guest by her sister who was driving the car. The deceased was sitting on the righthand side of the automobile in the front seat as it was being driven along Adams Street

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May Remn, A. B., 1953.

MARY DOUBLT'S CARSELL, ideamistration of the Estate of Corrine Tay Shalton, deceased,

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OITY OF PIONIA, a municipal corporation,

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WOLFT \*\* P. J.

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her sister when she was injured on February 17, 1150. We had been invited to ribe as a guess by her sicker and politics the our. The decrease was sitting on the righthund side of tes runnuabile in the free seas of twee being driven along flara street

in a northerly direction, towards the business district of Peoria. The deceased had nothing to do with the operation or the driving or management of the automobile.

As the automobile was being driven along Adams street. and as it approached the intersection of Warren street, which is the intersection immediately south of the point where the deceased was injured, the driver of the automobile stopped for a streetcar which was being driven in the same direction. The automobile was traveling at a rate of speed of approximately fifteen or twenty miles per hour and was being operated in a careful and proper manner. As the automobile started across Warren street and around the street car it passed over a rough and uneven place in the pavement. The evidence shows that, as the witnesses describe it, the car was bouncing and continued to do so because of the bumps and holes in the street until it struck a hole east of the intersection. This hole extended practically across the traveled part of the street between the curb and the street car tracks. When the front wheels of the car hit the hole the driver lost control of the car and it turned toward the curb when the door of the car was thrown open and the deceased was thrown from her seat in the car to the curb. The deceased struck her head on the side of the curb, which blow fractured her skull, as a result of which she died. The deceased left surviving her husband and one son of the age of eleven years.

The declaration charges that the defendant wrongfully and negligently suffered said street to remain in a bad and unsafe and dangerous condition of repair caused by depressions and holes therein and bumps on said pavement. The defendant did not challenge the sufficiency of this declaration, but joined issue on the same.

The appellants charge that there is a variance between the allegations in the declaration and the proof. They insist A Tile primarie in the primary of the state and the property of the second and designating the second the interesting the faithful work or play to start and extension of New Against , the Allient of the Astronomics of the States the walls we have not be and it would allow the course the specific to people's the assessment to himse to open a de hallevent have use of the filter of the a countries in a corolid and the second within the a wall toring the most a new leasing of the textre and MADE, TO A PARTICULAR DESIGN COAT, AND THE RESIDENCE SERVICES IN THE Apa mand his to become in the dampines has anisoned now need of the section of the first block a toron of the sector of the less ard to him highest off horse of the flags belief as a last a left plant burgers the cuts and the plants are treated. They Co Treat of the car the tar the talk the track has been been at the talk of many proofs are use and to heat only note that and Jimed Resear \$1 . LOUIS OF THE SECULE OF THE PARTY OF THE PA es abull, as a result of which she died. The declased the designation of the organic activities ago

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that the declaration charges that the alleged dangerous and unsafe condition of the street was near the intersection of Adams and Warren streets, while the proof made by the appellee placed the alleged bumps, depressions and dangerous condition of the street at the intersection. They claim that these variances are material and are important, and that their defense was prepared to meet the proof as charged in the declaration.

At the close of the case, and also at the close of all of the evidence, the defendant made a motion for a directed verdict, but at no time did they state in their motion or inform the court that there was a variance between the proof and the allegation in the declaration. An objection to evidence on the ground that there is a variance between the allegations in the declaration and the proof should be made at the time of the trial so that the court may be apprised of the nature of the objection .--- Levinson vs. Home Bank & Trust Co., 337 111., 241--. ". "An objection of variance between the allegations and the proof must be sufficiently specific to show in what the alleged variance consists." -- The City of Joliet vs. Johnson, 177 Ill., 178." "A general objection to an instrument offered in evidence on the ground of a variance is not sufficient. The party objecting should point out wherein the variance exists, so as to give an opportunity of obviating the same by amendment." -- St. Clair Co. Ben. Soc. v. Fietsame, Admr., 97 Ill., 174. The defendant having failed to raise the question of variance in the trial court is now estopped from urging the same as error in this court.

The appellant insists that the notice given by the appellee to the city, of the time and place of the accident is insufficient. In the case of Prouty vs. The City of Chicago, 250

that the declaration elarges that the elliged dat arole and unease condition of the atrect was mear the intercection of (deno and warren arrests, while the proof made by the appelled black the expelled of the except alleged bumps, depression. They also there there there was intersection. They also their these three variouses we important, and that their defense was prepared to a set the proof as charged in the declaration.

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The absolute that the bound of the bound of the absolute to appelled to the alfy, of the line of the absolute to insufficient. In the case of Franky vs. In the case of Franky

Ill., 222, in passing upon the same question the court says, "We find no reason for saying that notice is required by section 2 of the Act in question where an action is by an administrator under the statute." Notice in this case was given, and it sufficiently advised the City of Peoria of the time and place of the accident. Under the rule of the Prouty case, (supra) even if the notice was insufficient, it was not necessary to give notice to the City of Peoria of the time and place of the accident in a case of this kind.

The plaintiff in error strenuously insists that the verdict of the jury is contrary to the manifest weight of the evidence, in that there is no negligence shown on the part of the City of Peoria, and that the evidence shows that the deceased was guilty of contributory negligence. The only evidence that tends to show that the deceased was guilty of contributory negligence is that she was riding with her back to the door of the car at the time the accident occurred. The evidence is not disputed that at the time of the accident the driver of the car was driving at a reasonable rate of speed, but as to the condition of the street there is a sharp conflict of the evidence relative to the depth and extent of the holes or depressions in the street. Some of the witnesses for the appellant state that there are simply slight depressions, and that from their experience in driving over the street would lead one to believe it was not in an unsafe condition. Witnesses for the appellee state that both at the intersection and at the hole or depression on Adams street, it is very rough and some of the holes are deep and in their opinion make the condition of the street unsafe for travel.

The jury by their verdict have found adversely to the appellants on both of these questions of fact and unless this court can say that their finding is manifestly against the weight of

Til., 222, in pending upon the energement a the court way, The find no reason for saying that I wide is required by easting a soft the Act in question where are cotion is by an ed iniciaron analytection the Act in question where are come now the statute. In the statute. I have in the enne now time, and it multiclearly advised the City of Postin at the sine as A theory in the autisation of the French ones, (ever) even if the motion we income in medical and insufficient, it was not necessary to give notice to the time and place of the incoident is a cross of the its field.

The plaintiff in carer streement, incises the tit verdick of the juny is contrary to the camilest waited of the cridonce, in that thore is we negligence chows on the vart of the city of Tooris, and that the evidence shows when the descend was a 11ty to contributory negligence. The enig cylicance what there en Jr. of all acceptions to engilerate to willing asy bessess and tent she wes ridian with but book to whe deem of the err of the true off the today but made the at compliance and the compress the best the confidence of the best than a confidence of the c -money a to privide now use not be not he aid trables and be emid read for the No To m little control on the character to the character than the character bus alrud out al evitation earentte and to telling grade a si extent of the holes on depressions on the atreet. Land in thingson for the amediant state that the are are the live depressions, and term them there are not seed in entities and the erreet world lead one to holisys it are it are incomed the terms one in lateration in I do reed don't there oull make out tel assessed !! at the hole or deprend at on held a ctreet, it is you were ten will of the holes you doe, and in those epilete, add the conditions of . Novemble tel of many doords add

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the evidence, the verdict of the jury should stand. The trial court and the jury had the benefit of seeing and hearing the witnesses testify and are in a much better position to judge of the credibility of the different witnesses than a court of review. If, assuming the evidence shows that the deceased was riding with her back to the car door, we cannot say as a matter of law that that would be negligence on her part. It is our opinion that both of these facts were the peculiar province of the jury to decide. The jury were properly instructed relative to the law of the case, and we can find nothing in the record that tends to show that they were actuated by prejudice or passion; nor, do we find that the verdict is manifestly against the weight of the evidence. The Judgment of the Circuit Court of Peoria County is hereby affirmed.

Affirmed.

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| STATE OF ILLINOIS,                            | ss.  I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and                     |
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| SECOND DISTRICT for said Second District of t | the State of Illinois, and the 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.                       | and of said                                                                         |
|                                               | In Testimony Whereof, I hereunto set my hand and affix the seal of said             |
|                                               | Appellate Court, at Ottawa, thisday of                                              |
|                                               | in the year of our Lord one thousand nine                                           |
|                                               | hundred and thirty                                                                  |
|                                               | Clerk of the Appellate Court                                                        |
| (65027—1M—9-31) 7                             |                                                                                     |



## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

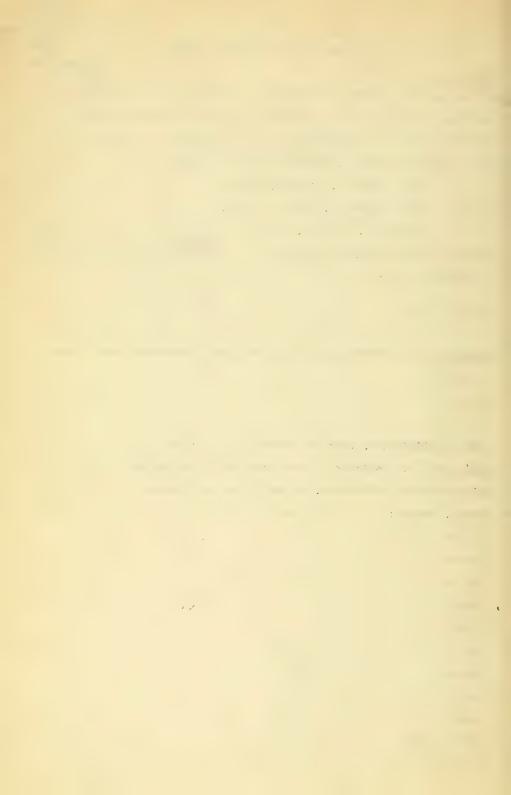
JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

268 I.A. 6364

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BE IT REMEMBERED, that afterwards, to-wit: On OCT 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



IN THE

APPELLATE COURT OF ILLINOIS.

SECOND DISTRICT

May Term, A. D., 1932.

IN RE: THE ESTATE OF

INVING THOMAS CASSINGHAM, Dec'd.

Appeal from the Circuit Court of Knox County.

WOLFE: \*\* P. J.

This case involves the question of admitting to probate of a certain will of one Irvin Thomas Cassingham, deceased. A petition was filed in the County Court of Knox County to probate what purported to/the last will and testament of Irving Thomas Cassingham, deceased, dated December 22, 1928. Subsequently another petition was filed in said Court of said County requesting the probate of an instrument purporting to be the last will and testament of Irving Thomas Casslingham, deceased, dated June 30, 1931. On the hearing, the said cases were consolidated and heard together in the County Court. On the hearing the Court found that the instrument of writing dated December 22, 1928, had been fully proven, and that it was the last will and testament of Irving Thomas Cassingham, deceased, and admitted the same to probate, and found that the instrument in writing, dated June 30, 1931 was not the last will and testament of Irving Thomas Cassingham, and denied the petition to probate the same. An appeal was taken in each of the cases to the Circuit Court of Knox County. It was stipulated that they should be consolidated in the Circuit Court. It was also stipulated that the cases should be consolidated for appeal to this Court. The only pleadings in the cases are the

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WOLFE: ## F. J.

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petitions praying to have the wills of the deceased admitted to probate.

Irving T. Casshingham died July 2, 1931, at the St. Francis Mospital in Macomb, Illinois, of permicious anemia. We first entered the hospital April 17, 1931, and remained there continuously until the time of his death. It is conceded that at the time he entered the hospital he was of sound mind and memory.

At the time of the death of said Cassingham the sole heirs at law were his brother and three sisters. On December 22, 1928, he executed the instrument as his will which has been probated in this proceeding. There is no question as to the legality of this will, unless the probating of the same has been superceded and set aside by the later instrument, dated June 30, 1931, which is sought to be probated in this proceeding. The Court refused to addit to probate the latter will on the ground that at the time of the execution of it, the deceased was not of such sound mind and memory as would entitled him, under the law of the State of Illinois, to make a will. As to the deceased possessing testamentary capacity at the time the first will was made, there is no doubt. No one questions his testamentary capacity at that ti e, but it is urged and insisted by the appellant in this case that the court erred in admitting the will to probate on the ground that it had been superseded by the latter will.

The determination of this question depends entirely upon whether there was sufficient proof of mental capacity of the deceased at the time of the execution of the instrument of June 30, 1931. That the deceased had been at the hospital for some time is not denied. That he was in an exceedingly serious

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Irving T. Jass Lington sted (ally 6, 1801, et tha St. Irancia Housital in Lasend, shiftenia, of persielous events. To first entered the hospital iveil 17, 1721, and reasonst three continuously until the time of the decimal is a moreous trained the time he entered the hospital he was of comadition and

elea saf communeast Bise to street ent to enit ent th heirs at law were his brother and there a steen. In Decarber 32. -ore read can do her fift and the time tent that come on 1888. withing a continuation of each of the continuation of the continua of this will, unless the probating of the same has been superest and set aside by the later instrument, dates June 39, 1971. which is sought to be probated in which proceeding. The dourt teds howeve and no filly matter and afadory of thebe of beauter doug to jon say measured ent, it to neitheans out to or it out to sound mind and memory as would confitted him, under the law of the state of Illinois, to make a will. Is to the deceased fliw fault and amit if the vilouppe year an east pursuenned was made, there is no doubt. No one questions ais vestammistry ont od bestelent the heart at the test that the thingens Illy odd on isinge at berry trove a t trate aces at t at taciforca to probace on the enough what is ind been successful the the LILLS STREET

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physical condition at the time of the execution of the instrument bearing date of June 30, 1931, there can be no doubt.

On June 30, 1931, his sister and other relatives were at the hospital. Some of these parties called an attorney by the name of Griggsby to come to the hospital with a view of having a will executed by Irving T. Cassingham. Nobody says definitely who called him, but from what is disclosed by the record, apparently it was one of his sisters. Mr. Griggsby, when called, went to the hospital and had all the relatives of Mr. Cassingham leave the room as he desired to ascertain for himself whether or not Mr. Cassingham was in such a frame of mind and mental condition to properly and legally execute a will. He counseled with him, or endeavored to, and reached the conclusion that Mr. Cassingham did not possess sufficient ment ality to make a will. He left the hospital without making the will. In the afternoon of that day he was called again, and he went back to the hospital. He drew a will for Cassingham and it was witnessed by two ladies who were employed at the hospital. These ladies have been referred to as two nurses, but whether they were doing nursing work at the time of the execution of the will it is not shown. It is certain that they were at the hospital and had been employed there for some time, and knew of Mr. Cassingham being there prior to the time of the making of the instrument on June 50, 1931. Wo attestation clause appears on the instrument purporting to be the will in question. The witnesses simply subscribed their names under the heading (Witnesses'. Cassingham signed his name by making his mark with the assistance of Mr. Griggsby, the attorney.

Mary Downs and Mora Downs, subscribing witnesses to

udition at the time of the execution of the instruc-

On Func 20, 1001, his bicter and other reletites. granting as billed soit the or theore parties of the ... weiv a attw I of come of the control of the action of the control or oring a will executed by Irving T. Cassingium. Mobody says of the state of the bar from what is disclosed by the ind . apparently it was one of his sisters. Fr. Griggsbr. vacu .TI hospitales set lis bin has isticon out of thew . . Item Thermid for nietreess of berizob on as meet and aveal medget wou and in a cor not il. Cassingham was in such a Trane of mind and allie a survey played has pigagive or marriage. In our and and the bid, or andeavered to, and resched the contelection r. Cassinghan did not passess sufficient munt ality to all . He left the hospital without said all . He was a wall . we aftermoon of that day he was called agein, and he west back -tiw and it has madingle for Cassinghan and it was wit with each? . Inticach off to beyoldes ele con replace out if o many to be been refurred to as two nurses, but whether they were It fill out to nelstooms out to out to drow galaxan to Due istigned and the ware good fant alattee at II . nwe do to o teen employed there for cone time, and mew of the Causimian in numerical and the publicae and to easily self of third equal trainer on June 30, 1991. We attended in change a dark on two instructivity rury region to be the order to constant in clients and or recommended to the constant and t District Control of Land Life Sadar Senso Start Leafters . It to consider this transmit make by man aid hours 

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the will, testified on the hearing of the probating of the will, that in their opinion Mr. Cassingham was in a dying condition and did not possess that degree of mentality which would enable him to make a will. Under the rules of practice the appellants were compelled to call these witnesses. In addition to these two there was called other and numerous witnesses, who testified to the mental condition of Mr. Cassingham prior to June 30, 1931. Under the law the appellees were barred from introducing evidence to show that the sestator was not competent to make a will, but rely solely on the testimony of the subscribing witnesses and such other witnesses as the proponents of the will see fit to call. The rule of law is well settled in the case of Maxwell v. Jacobs, 326 Ill., 466., in which the court says: "The rule is now clearly established in this State that on appeal from an order of the county court to the circuit court allowing or refusing probate of a will the proponents are neither limited to nor bound by the testimony of the subscribing witnesses, while the contestants are limited to the testimony of the subscribing witnesses and the cross examination of other witnesses offered by the proponents on the question of the mental condition of the testator." After the hearing of the testimony of both the subscribing and other witnesses, the Chancellor found that the testator Irving T. Cassingham, did not possess testamentary capacity, and refused to admit the will of June 30, 1931 to probate.

We do not deem it necessary to a proper decision of this case to discuss the testimony of the different witnesses who testified to the mental capacity of the deceased, Irving T.

Cassingham. The Chancellor who heard and saw the witnesses testify was of the opinion that the appellants had not proven that

الما الفيلز المستعلمات بدر المساعدين بدران بدول بدران والمسارات in their opinion Mr. Cossingham was in a dying condition : d mid also to bluer dours to listeen to cores trait accusor to atasllage and soltered to solar and radic . Iliw a sale coupofied to call these witnesses. I as addition of believes to was called other and numerous witnesses, wit vestified the the sector is an in the contract of the co he has the appelless were burred from introd char evi . If it a mind of factor of not control of the control of the solely on the testimony of the subscribing witcosses fit son If we only to attempt our old as seementive motive news -xe'l to case out at Betties flow at well to offer only . I'm . NAME OF STREET, ADDRESS OF THE PARTY OF THE PARTY OF THE PARTY OF no tent etti. athi ni bedaildetao ylreslo wen al oler : 😘 From Alexandra will be from reports will be maken as next League teditor are administrative for a statement to colit. ted to nor bound by the testineny of the subscribing with sect. -dre and to groundset sit of Betinit one atmetaether out all assessmily religion of the executive of the reason of the milters of molificance Ithmen . . . To enly sup side no atmemorary out ye est illed in ameritant out he mainson sub notile ". retalest wit " thing and other witnesses, the Chendellor found that the served with marking an education of the first property of the same capacity, and rainged to admir the will of Sun I'm 1981 to are-

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Mr. Cassingham possessed the required mentality to properly execute a will on June 30, 1931. The burden of proof was upon the appellants to show that Mr. Cassingham at the time of the making of the will at the hospital possessed testamentary capacity. — Landry v. Morris, 325 Ill., 201 - 210; Britt v. Darnell 315, Ill., 385.

Before we would be authorized to reverse the judgment we must be able to say it was palpably against the weight of theevidence. That we cannot say- (Landry v. Morris. supra)

This court is of the opinion that the appellants have failed to establish by the degree of proof required of them by the law, that Irving Thomas Cassingham was mentally competent to make the will of the date that he attempted to execute the second will; and that the Chancellor properly refused to admit the purported will of June 50, 1931, to probate and properly admitted the will of December 22, 1928, to probate. The decree and order of the circuit court of Knox county is hereby affirmed.

Affirmed.

rill on June SC, 1831. The braids of proof was alon on the sine of the bine of the of the bine of the sine of the sine the blockers of the will at the hospital processed testamentary . - Landry v. Morris, 225 Mi., 201 - 110; Britt v.

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| TATE OF ILLINOIS,              | SS.                                                                               |
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| SECOND DISTRICT                | J. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and                        |
|                                | ne State of Illinois, and the keeper of the Records and Seal thereof, do hereby   |
| ertify that the foregoing is a | true copy of the opinion of the said Appellate Court in the above entitled cause, |
| f record in my office.         | The state of the state of said                                                    |
| 7                              | In Testimony Whereof, I hereunto set my hand and affix the seal of said           |
|                                | Appellate Court, at Ottawa, thisday of                                            |
|                                | in the year of our Lord one thousand nine                                         |
|                                | hundred and thirty-                                                               |
|                                | Clerk of the Appellate Court                                                      |
| (65027—1M—9-31) 7              |                                                                                   |



#### AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT. Justice.

JUSTUS L. JOHNSON, Clerk.

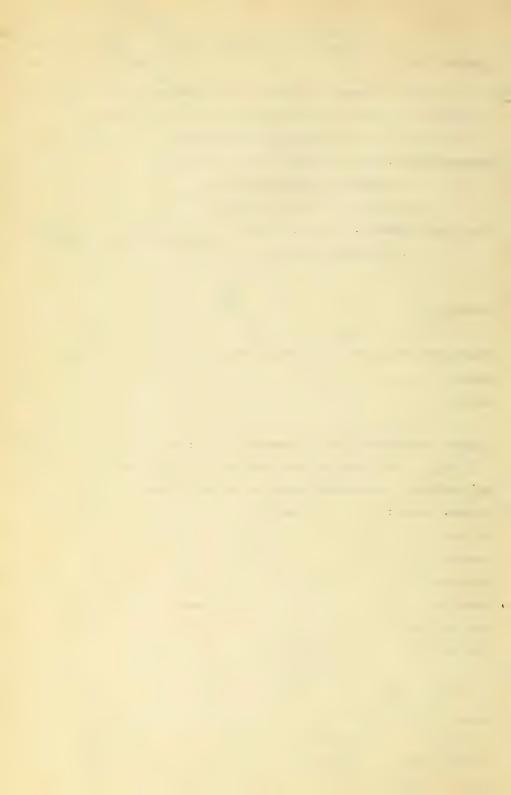
Present -- The Hon. FRED G. WOLFE, Presiding Justice.

E. J. WELTER, Sheriff.

268 I.A. 6365

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BE IT REMEMBERED, that afterwards, to-wit: On OCT 18 1832 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



In the Appellate Court of Illinois Second District

February Term, A.D. 1932

Theodore Goldsmith, et al

(Complainants) Appellees,

VS.

Jane Dowie, et al

(Defendants) Appellants,

Interlocutory Appeal from the Circuit Court Lake County

#### Baldwin, J:

This is an appeal by Jane Dowie, one of the Defendants in the trial court, and hereinafter referred to as appellant, prosecuted to reverse a decree of the Circuit Court of Lake County appointing a receiver in this proceeding.

This suit was filed on September 5, 1931 and service of process was had upon (among others) the appellant herein.

The original bill of complaint filed set forth the execution and delivery of a certain trust deed and note secured thereby, together with the various recitals of the terms and conditions of the trust deed, the dates and amounts of the said note, the description of the real estate effected thereby; the various defaults of the defendants therein averred that the property was scant security for the indebtedness and prayed foreclosure of the said trust deed and also for the appointment of a receiver. The original bill of complaint was not verified.

On October 24, 1931 the appellant herein filed her answer to the bill of complaint in the said proceeding which, in effect, admitted the material allegations of the bill of complaint and set forth the interest claimed by her in the said premises and denied that the complainant was entitled to the relief prayed or any part thereof.

# In the Appellate Jours of Illinois

In the applicables examined

(domplainents) Appellees,

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(Defendance) Ampollonia

Interlocutory Appeal from the Circuit Court Loke County

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ours of the Circuit Court of Lake County
outing a receiver in this proceeding.

This suit was filed on Toptswher S, 1951 and service of

The original bill of complaint filed set forth the execution of delivery of a certain townst deed and note secured thereby.

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Thereafter the complainant herein filed his petition under oath praying for the appointment of a receiver and later filed his amended and second amended petitions therefor, each verified by his oath.

On December 11th, 1931, upon a hearing in open court in said proceeding at which both the complainant and appellant were represented, the court entered an order appointing a receiver as prayed in the bill of complaint and the verified petition and verified amended petitions.

It is contended by the appellant herein that the appointment of such receiver was erroneous because the original bill of complaint was not verified and because it is said that the allegations of the original bill of complaint and verified petitions were insufficient.

It is not necessary for this court to pass upon the question of the sufficiency of the bill of complaint nor the verifications of the petitions.

The decree entered herein by the court recites the various findings of fact as made by the trial court from the testimony and facts presented to it.

No certificate of evidence is filed in this cause and appellant asserts that none could be filed because she says no evidence was taken. By the said decree it is recited that the said cause was heard upon the bill of complaint, the verified petition, verified amended petition and second amended petition and testimony and facts in support of said petition. Neither the findings of the trial court expressed in the decree entered nor the recitals in the decree can be controverted by the statement that no evidence was received by the court. The decree also recites "the solicitor for the defendant, Jane Dowie, now resisting" etc., and again that (appellant) "contending that no sufficient showing has been made", etc., thus that whatever took place occurred in open court in a proceeding in which the

Thereafter the complained berein filed his petition when oath proging for the appointment of a receiver and later filed his amended and account amended peritions therefor, each verified by his oath.

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The decree entrued herein by the court recites the verious findings of fact as made by the trial court from the testimony and facts presented to it.

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appellant, if not actually present, was represented by counsel and the entire record of such proceeding, if other than is recited in such decree, should have been produced herein and in its absence the reditals of the decree are to be taken as correct findings from the evidence produced.

In the case of Brown vs. Miner, 128 Ill. 148, page 156 where the decree entered in the case recited that the said cause was heard upon the bill, answers, replications and "also the proof taken and reported by the master in chancery to this court, and testimony heard in open court" it was contended therein that such decree was entered without any report having been made by the master.

In passing upon the question the court said "this recital in the decree can not be contradicted or overcome by the clerk's certificate that there is no report of the Master in the files. The decree recites that John Brown was of sound mind when he executed the note and mortgage, and finds that fact, together with other facts on which it is based. The facts thus found in the decree justify its rendition. In the absence of a bill of exceptions or certificate of evidence, it will be presumed that the findings were warranted by the proofs heard by the court. In the absence of a certificate preserving all of the evidence heard by the trial court, it must be presumed that there was sufficient evidence to warrant and sustain the finding."

Again, in the case of Allen vs. LeMoyne, 102 III. 25
page 27 the court said "where the facts are found by the court,
and recited in the decree, the finding can not be reversed
unless all of the evidence heard on the trial is preserved in
the record, and thus brought before the court. Where the
evidence is not all preserved, it will be presumed that the
evidence heard and not preserved was sufficient to authorize
the finding."

Under the circumstances the findings of fact contained

in the resistate of the decree are to be taken as

In the case of Fram vs. Muer, 133 III. 163, page 183 where the decree entered in the case recited that the said lee was heard upon the bill, answers, replications and walso the proof taken and reported by the master is chancery to this court, and testimony heard in open court it was contended in that such decree was entered without any report having been made by the master.

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Again, in the case of Allen vs. Leskyme, 10° III. FE page 87 the court said "where the forte are found by the court, and recited in the decree, the finding can not be reversed unless all of the evidence heard on the trial happenved in the record, and that brought before the court. There the evidence is not bil preserved, it will be presured that the evidence heard and hat preserved was sufficient to ruthering the finding."

Under the circumstances the findings of fact contrined

in the decree must be accepted as binding upon this court and from such findings it is apparent that the trial court was fully warranted in entering the decree appointing the receiver in this proceeding.

The decree of the Circuit Court of Lake County entered in this proceeding appointing a receiver herein is affirmed.

AFFIRMED.

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al termination and the stand liberal and he accorded

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| STATE OF ILLINOIS,                    | ss.                                                                              |
| SECOND DISTRICT                       | I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and                       |
| or said Second District of the        | State of Illinois, and the keeper of the Records and Seal thereof, do hereby     |
| ertify that the foregoing is a tr     | rue copy of the opinion of the said Appellate Court in the above entitled cause, |
| of record in my office.               | 1.                                                                               |
| , , , , , , , , , , , , , , , , , , , | In Testimony Whereof, I hereunto set my hand and affix the seal of said          |
| ,                                     | Appellate Court, at Ottawa, thisday of                                           |
|                                       |                                                                                  |
|                                       | in the year of our Lord one thousand nine                                        |
|                                       | hundred and thirty                                                               |
|                                       |                                                                                  |
| (65027—1M—9-31)                       | Clerk of the Appellate Court                                                     |
|                                       |                                                                                  |
|                                       |                                                                                  |



#### AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice.

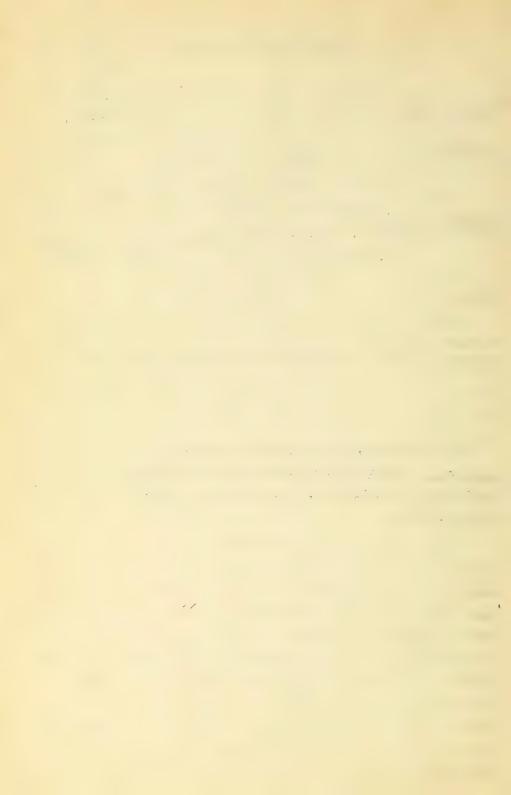
Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk. 268 I.A. 637

16

BE IT REMEMBERED, that afterwards, to-wit: On OCT 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



### IN THE APPELLATE COURT OF ILLINOIS Second District

February Term, A.D. 1932.

General No. 8145

Agenda 15

EUGENE BOLLE,

Appellee

VS.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,

Appellant

Appeal from the Circuit Court of Lake County.

JETT, J:

This suit was instituted in the Circuit Court of Lake County by Eugene Bolle, appellee, against Chicago & Northwestern Reilway Company, appellant, to recover damages for injuries he sustained through what is alleged to have been the negligence of the appellant company. The suit was brought under the Federal Employer's Liability Act.

The principal question involved was whether or not the engine on which appellee was riding and working at the time he received the injuries of which he complains was being used in inter-state transportation.

Judgment was obtained in the Circuit Court of Lake County in favor of the said Eugene Bolle, appellee, and against the appellant company, and an appeal was prosecuted to this court where the judgment of the Circuit Court was affirmed. The said appellant company filed a petition for certiorari in the Supreme Court of the State of Illinois, the prayer of which was denied, and thereupon the said Chicago & Northwestern Railway Company petitioned the Supreme Court of the United States for a writ of certiorari directed to the Appellate Court of the State of Illinois, Second District. The Supreme Court of the United States granted the prayer of the petitioner and heard the cause. The supreme Court of the United States reversed the judg-

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nul, and an appeal For programted to this court where the judeof the Circuit Court was affirmed. The call appellant company
lad a petition for certional in the Currenc Court of the State
llinois, the orayer of thich was denied, and theremore the said
llinois, the orayer Sailway Company patitional the superme Court
the State of Illinois, Second District. The supreme Court
ted States greated the prayer of the neittiener and heard

ment and remanded the cause to this court "for further proceedings not inconsistent with the opinion of that court."

In the mandate of the Supreme Court of the United States the following appears: "AND WHEREAS, In the present term of October, the year of our Lord 1931, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said Appellate Court in this cause be, and the same is hereby, reversed with costs; and that the said appellant, Chicago & Northwestern Railway Company, recover against the said appellee \$350.40 for its costs herein expended and have execution therefor.

AND IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the Appellate Court of the State of Illinois, Second District, for further proceedings not inconsistent with the opinion of this court.

In view of the decision and holding of the Supreme Court of the United States, and in accordance with the mandate of that Court, the judgment of the Circuit in said cause is reversed.

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REVERSED.

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| PATE OF ILLINOIS,    | SS.  I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| SECOND DISTRICT      | ne State of Illinois. and the keeper of the Records and Seal thereof, do hereby                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|                      | true copy of the opinion of the said Appellate Court in the above entitled cause,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
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| ,                    | In Testimony Whereof, I hereunto set my hand and affix the seal of said                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|                      | Appellate Court, at Ottawa, thisday of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|                      | in the year of our Lord one thousand nine                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|                      | hundred and thirty                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|                      | Clerk of the Appellate Court                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
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### AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the fourth day of October in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

268 I.A. 6372

19

BE IT REMEMBERED, that afterwards, to-wit: On OCT 18 1832 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



### IN THE APPELLATE COURT OF ILLINOIS Second District

October Term, A.D. 1931

Gen. No. 8403

Agenda 22

A. GERTRUDE COTTON,

Plaintiff in error,

VS.

Error to the Circuit Court of Knox County.

JAMES SIMPSON, et al,

Defendants in error.

JETT, J:

This suit is in this court by reason of a writ of error sued out by the plaintiff in error, directed to the Circuit Court of Knox County, to reverse a decree of that court entered January 3rd, 1931, dismissing plaintiff's in error bill for want of equity and taxking the costs against her.

The record discloses that the plaintiff in error filed her bill in the Circuit Court of Knox County against James Simpson, F.S. Taylor, J.J. Welsh, Ben D. Baird, D. R. Burr, the Galesburg National Bank and T. M. Cox, in which it was alleged that she, the plaintiff in error, was induced through fraudulent representations of some of the defendants in error to purchase stock on three separate occasions in a corporation alleged to have been organized under the laws of South Dakota, and in which it was charged it was only a pretended corporation. The said bill also is based upon the theory that the stock purchased by the plaintiff in error was sold by some of the defendants in error in violation of the Illinois Securities or Blue Sky Law. It is alleged that the plaintiff in error first purchased 40 shares of stock at \$4,000 on July 30th, 1917; that she next purchased 60 shares on August 15th, 1917, and on September 5th, 1917, she purchased 100 shares, all of which purchases were induced by fraudulent representations made by defendants in error F. S. Taylor and James Simpson. The fraudulent cond and a part security

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Defendants : error.

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no record discloses that the plaintiff in error fillel her of I the Virguit Court of Knox County agricus Jesse Dimpeon. . . Tevior. J. J. Welsh, Een D. Schrd. W. N. Purr. the Calesburn "Itonal Bank and T. M. Cox, in which it was alleged that she, the ancid-inserter desimbert drugent beautai asy . worre at This I I e of the defendants in error to nurchase stock on three out to occasions in a corporation alleged to here been organized word the laws of South Bekenn, and in which it was charged it was onir a pretended corporation. The said bill the is based upon the blor saw route at Thirmials and ty bearslawer foots eat tant by some of the defendants in verse in violation of the Illinois at the same of the section of the section of the section of , and the re were to make the state of head to be the common to the comm ERLY, that the hart provided in beauty on trace and tack that states to the process of business air all the money and in the we see were induced by frondulent representations and a by a lead and in error F. S. Feylor and Jenes Simpson. The Innahilant

representations alleged in the bill are that Simpson and Taylor stated to the plaintiff in error that a corporation had been formed under the laws of South Dakota and that it owned a large tract of land in North Dakota.

It is contended by the plaintiff in error that the defendants in error, or some of them, represented to her that a corporation by the name of The Sheridan County Land Company had been organized under the laws of South Dakota; that it was the owner of a large tract of land in North Dakota and that a number of prominent citizens in the vicinity of Galesburg were large stockholders therein, which statements plaintiff in error claims were false and untrue; that relying upon these statements and representations plaintiff in error was induced to pay \$20,000 for stock in the corporation which she insists was never organized and had no legal existence.

It is charged that the Galesburg National Bank is a party defendant; that on or about September 5th, 1917; plaintiff in error was sick and unable to transact business; that the defendants in error Simpson and Taylor, purporting to be acting for the Sheridan County Land Company solicited plaintiff in error to buy more stock in said purported corporation and made, in effect, the same statements and representations relative to the incorporation of the said pretended corporation and the stockholders thereof, its purposes, property and assets as hereinbefore set forth, and that as a special favor to the plaintiff in error, they, as such officers, would lay aside and hold subject to purchase 100 more shares of the capital stock of the said pretended corporation, provided the plaintiff in error would make her promissory note and deposit the same with the said officers of the said pretended corporation for the amount of the par value of the said stock, to-wit, \$10,000; that by adopting this method plaintiff in error would secure the opportunity of purchasing the additional 100 shares of stock in said pretended corporation at any time she saw fit by paying said promissory note, and that if

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she should not care to purchase said shares of stock she would incur no liability upon said note or obligation to purchase said shares of stock in said pretended corporation but that said note would be returned to her; that relying upon said statements and representations. she, on the said date, to-wit, September 5th, 1917, executed and delivered to Simpson and Taylor, purporting to act for said pretended corporation, the Sheridan County Land Company, her promissory note of that day payable to the order of Simpson and Taylor, on or before 90 days after date, at Galesburg, Illinois, for the principal sum of \$10,000 with interest at the rate of 6% from date until paid: that said Simpson and said Taylor, purporting to represent and act for the said pretended corporation received said promissory note and thereafter, as she was informed and believes and so charges the fact to be, without her knowledge or consent deposited the same with the Galesburg National Bank as collateral security for certain indebtednesses of said pretended corporation, or some of the alleged officers. to said bank. It is further alleged by the plaintiff in error that she informed Simpson, Welsh and Taylor, three of the defendants in error, she did not desire to purchase any more of the capital stock of said pretended corporation and requested them to return to her said promissory note; that Simpson, Welsh and Taylor represented to her that said promissory note, together with other notes of said pretended corporation, had been deposited with the said Galesburg National Bank as collateral security for said indebtedness of said pretended corporation to said bank but that as soon as said pretended corporation could raise the necessary funds to pay said bank the promissory note of the plaintiff in error would be taken up and returned to her.

It is the contention of the defendants in error, first, that considering the facts in the case it was immaterial whether a corporation was legally formed under the laws of South Daketa or not, but if material, the burden of proof to show no such corporation was formed was upon the plaintiff in error who failed to make such proof; that

would blue que docte lo secuée blea escion . 1 10 10 1 10 10 10 motion con said note or chilaction to nurches will allow at -er ad bices asen bing suit sui noitareques behant is, a the said date, to-wit, September Stb, 1917, excessed and "I red to Simpson and Teylor, purporting to act for self protonical or pration, the Sheridan County Land Coupany, her prominenty note of day anyable to the order of Simson and Paylor, on or before 90 to wie at the leaders. Illinois, for the principal sun of the plant that the party of the sales of the and the part was your members of the property of the time that health and col retended corporation received anis orunisarry mete and thereof that not beginned on the papelled but throughput of any any and the add dily one and beticook theares to aphalest the -haddenil Dank to colleteral security for certain indebtedpossible upoil out in the co. Bright and principles from the section And have no thereign out of the Lie worth of all of their size of ermod Simpacu, Valab and Maylor, three of the defendance in Year lading of the year and another the original for the med od marter to medd between how welfarence behastone bies to ot before note: that Simpon, Welch and Marder represented to bles To soid promissory note; together with other woter or retended sorporabion. Bed been described with the enid tellesters the tend to are collected as a collected and indestructed and the collected as a second and the collected as a behavior bise on uses as fedt tod dred bise of noif morro behave corroration could reise the necessary funds to pay entit burn the in the primary and bluer never at this slade and to other years and and hower

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tion was legally found under the laws of South Points or not, but
if material, the burden of proof to allow as outh neuronation was formed
was upon the plaintiff in ourse who failed to make such proof; that

the plaintiff in error cannot recover in this case because she was an original subscribing stockholder who with others filed a written proposal and agreement to incorporate a company under the laws of South Dakota for the purpose of purchasing land in North Dakota; that the plaintiff in error has failed to establish that she was a partner of the defendants in error in this case, or any of them; that there is a variance in the allegations of the bill and the proof, in that the plaintiff in error failed to prove she purchased stock in July, August and September as the evidence shows conslusively she was one of the original subscribing stockholders for 200 shares: that plaintiff in error has failed to prove by a preponderance of the evidence her allegations of fraud in the bill: that she is estopped by her conduct in subscribing for stock, accepting same, paying for same at various times, attending stockholders' meetings and signing notes with the company from recovering in this case; that she is guilty of such laches in bringing this suit as will bar any recovery; that the Galesburg National Bank was a bona fide holder before maturity of the \$10,000 note upon which it took judgment; that the plaintiff in error had a remedy at law against the bank if she had any defense on the note in the suit by the bank.

Plaintiff in error in her argument states that her case is predicated on the theory that she subscribed for 200 shares of capital stock in a corporation by the name of The Sheridan County Land Company, formed under the laws of South Dakota, and that to induce her to subscribe for said stock certain defendants in error made false representations and that upon discovering the alleged fraud she had a right to tender back the certificates and bring this action for her money.

In the bill filed by the plaintiff in error she does not make this contention but alleges that she was induced to buy stock on July 20th, 1917, August 15, 1917, and September 5th, 1918. The evidence shows that the plaintiff in error was one of the original subscribing stockholders of The Sheridan County Land Company and

now and observe many which all presents described steps of \$2.124 Malland Selfmilities is tail't accept allow one authorized attitionable Lonington on An area and before printers a relativistic of American Ann Discourse SECURITY OF THE REAL PROPERTY AND ASSESSED BY THE SECURITY AND ASSESSED. or one that is the cror has fulled to establish the the tree on the defendants in error in this case, or any of the : . . . is a varience in the allerations of the bill and the resolvered the plaintiff in error failed to wrove and organization. Alud In July, Aurust sed September as the cridence chors conclusively the out the original subscribing stockholders for 200 charges to consuspence of the fall of the second and thirt is the ed ede todt : [[ld edt in beat to nacitapella red ec moin en mariness beneficially milledly asset malest seems of solver the styling hite site some fire interesting in this capital selection in the capital selection in the select red if it as time aid; pointed of sodes down to yellur at a a told or rows that the delegency betteral bent rue a bone file boler the substance of the \$10.000 note upon which it test to with ing off derings and the glount a bad some at think I it we we say defense on the note in the suit by the beak.

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that she signed the proposal with other subscribing stockholders for

The evidence on which the plaintiff in error relies to sustain her allegations of fraud was furnished by her herself. She testified that she met F.S. Taylor, a defendant in error, and had a talk with him about purchasing stock in a corporation and that he told her he was the acting secretary-treasurer of The Sheridan County Land Company and was selling stock in that company; that he had sold stock to a number of prominent men in the vicinity and gave her certain names; that she was not personally acquainted with any of them; that he mentioned James Simpson of Abingdon as having purchased stock and that this converation took place at Taylor's home. She also claimed she had another interview with Taylor at the Elk's or County Club at which time he said he was secretary-treasurer, and that they had the corporation formed: that James Simpson was present and that defendants in error Welsh, Burr and Baird together, and a Mr. Stalker and Walter Clark had purchased stock; that he had about \$20,000 of stock left which he would like for her to buy. Plaintiff in error further testified that she again said Taylor and Simpson at the Senitary hanufacturing Company in Abingdon and that subsequently she purchased or subscribed for stock in the corporation. These, so far as we are able to ascertain, are all of the alleged fraudulent representations made to her prior to the time she purchased the stock.

On cross-examination plaintiff in error testified she dined one day at the Elk's Club with Taylor and his wife but nothing was said about buying stock in The Sheridan County Land Company; that she met Taylor a few days later at his home in Galesburg, at which time she testified that he said he was secretary-treasurer of The Sheridan County Land Company; that she next saw Taylor at the Sanitary Manufacturing Company at Abingdon with which Simpson was connected; That Simpson was present and at that time she told Simpson and Taylor she would take the balance of the stock; that at this time, June 1917 she subscribed for 200 shares of stock. On the occasion of this conversation the plaintiff in error does not claim that any misrepresentations were made to her by either Simpson or Taylor.

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Adence on which to plaintiff is ever relies to evertain thought of frend was furnished by her heraelf. She tassified in a series of the series of a series of the series of the will of well blow and bands but unifratogree a mi Moots paiendous, so 1 s of foets hice had of talt typeques this at foets gailing or how o by a groatent am in the vicinity and gave her sertifu nurse; have an was not personally requestated with may or them; that he And docto handleste saived as hebened of Abinese State and berland took place at Taylor's hous. The also clared delight interview with Toylor at the Will and or town in time he said he was secretary-treasurer, and thet they had restion formed; that James Wimmon Wos present and that To 00,000 threat find this parent atom to be bed three of the if which he would like for her to buy. Plaintiff in earch and in common has subject they along one food delitions and part entile white wear down has accepted at the contraction of the or subscribed for stock to the corporation. Prese, so far realities of broudly not by the ope, discretes of all other states

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From an examination of the subscription list which the plaintiff in error signed it is not stated anywhere, nor is it represented, that the Sheridan County Land Company is a corporation or that it owns land in North Dakota or elsewhere. The plaintiff in error with other subscribing stockholders signed a proposal by which it was proposed to purchase 11,541 acres of land in Sheridan County, North Dakota, at a certain price to be paid upon certain terms therein mentioned, and that it was proposed to organize a company incorporated under the laws of South Dakota. There is nothing in the record to disclose that the plaintiff in error was unable to read or that she did not thoroughly understand the proposal set forth in the subscription list. It will therefore by seen that the plaintiff in error signed a proposal to incorporate a company for the purpose of purchasing land in Sheridan County, North Dakota. In view of this fact the alleged representations of Taylor as testified to by her become immaterial. Regardless of what she claims Taylor told her before she subscribed for the stock she knew when she signed the subscription list as an original subscribing stockholder that there was at that time no Sheridan County Land Company organized under the laws of South Dakota and that the Sheridan County Land Company did not own any land in North Dakota.

It is quite evident that the plaintiff in error was not relying upon the representations made by Taylor that there was a company already formed and that it owned land when she subscribed for the stock.

In Williams vs. The Thwing Electric Company, et al, 160 Ill. 526, the relief asked for by the complainant was based on alleged fraudulent representations made by the defendant Thwing to induce her to subscribe for certain stock and in its decision the court held, "that a subscription to the capital stock of a corporation cannot be cancelled because the subscriber, through agnorance of law acted under the mistaken idea that she was purchasing stock of a corporation already organized, instead of participating in the organization of a new corporation." According to the rule herein announced the alleged

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representations by Taylor were not only sufficient to constitute fraud but they became wholly immaterial when plaintiff in error signed the subscription list.

It is also urged by the plaintiff in error that Simpson and Taylor, two of the defendants in error, represented that assessments of 20 to 30 per cent of the whole amount subscribed had been levied by the Board of Directors, and that all of the other stockholders had paid the assessments as called for; that such statements were false but she was induced thereby to make payments on her subscription.

The evidence of the plaintiff in error shows that these alleged statements were made long after she had subscribed for stock and since that is true such statements are immaterial and had nothing to do with inducing her to sign the subscription for stock. The proposal which she signed set forth that she agreed to pay for the stock as called for by the Board of Directors of said company. Furthermore whether other stockholders paid or not was immaterial to her and no defense to the action on her subscription.

It is shown by the record that on July 30th, 1917, plaintiff in error gave to Taylor, secretary-treasurer, her check for \$4,000 which was a 20% assessment on her stock subscription for 200 shares. At the same time Taylor as secretary-treasurer gave her a receipt for this money which receipt stated that it was in payment of a 20% assessment on her subscription to the capital stock in The Sheridan County Land Company. For this sum of money she received a certificate for 40 shares of stock bearing date September 10th, 1917, which was signed by Simpson as president, and Taylor as secretary and he had thereto the corporate seal of the Sheridan County Land Company.

It appears that on August 15th, 1917, plaintiff in error made a payment on her stock subscription of \$6,000. At this time she put up six notes of other persons as collateral security; on the note was endorsed a notation signed by F.S. Taylor, secretary-treasurer, that it was given in payment of a 30% assessment against her sub-

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It appears that on Anguet 15th, 1217, plaintiff in error wede a payment on her stock subscription of 36,000. It tile time son put up air notes of other persons as calleteral secondity; on the cote was endorsed a notation signed by 8.8. Forlor, secrebary-incoment that it was given in payment of a 50% automount against her sub-

sciption to the capital stock of The Sheridan County Land Company. When \$3,500 had been paid on the \$6,000 note a certificate for 35 shares was issued to plaintiff in error dated January 4th, 1919. Subsequently plaintiff in error made a payment of \$10,000 being the balance due by the execution of a note for said sum. At the time this was done F.S. Taylor, secretary-treasurer, executed to plaintiff in error a statement certifying that plaintiff in error had given him her promissory note for \$10,000 and it was agreed that upon payment of same there would be issued to her 100 shares of the capital stock of the Sheridan County Land Company. This note was assigned to the Galesburg National Bank which bank afterwards brought suit on the same. No stock was issued at the time this \$10,000 note was executed but on March 25, 1922, M. E. Zetterholm, a partner of defendant in error Welsh, sent by mail to plaintiff in error a stock certificate for 125 shares of the capital stock of the Sheridan County Land Company. The plaintiff in error, whose name at that time was A. Gertrude Merrill, resided in Champaign. When plaintiff in error received the certificate for 125 shares of stock at Champaign, she turned it over to one Stanley D. Tilney who was associated with one T. B. Geiger, an auditor in Peoria. In addition to the plaintiff in error giving notes and paying for stock, and accepting certificates from time to time without any objection or any claim that she had been defrauded she attended a stockholders meeting on December 18, 1919, at which time 75 shares had been issued to her. At this meeting she voted with other stockholders to empower the directors to borrow money to pay off the amount coming due January 1st, 1919, and also January 1st, 1920, on the contract of the Sheridan County Land Company for the purchase of land.

The record further discloses that plaintiff in error was present as a stockholder at a meeting held December 21st, 1920. At this meeting she was accompanied by one S. J. Luchsinger who was a relative, by marriage and an attorney of Oshkosh, Wisconsin. At this meeting a

To rot escalifica o asca 000,000 and an arminante or the control of the co ait water oor, of to the enge and a course of things of the and soft the execution of a note for said sun. At the time still on love to be being a second or second in the said are able har rerre at thitingly tent thity the trainitit in error and bull feetly are 17 by \$00,022 on any religious to all totals. set to serve to the relief bound of blues ered to see to to a ..... I of the Sheridan County Land Converge, This note was brighted absence to died rathe from Locality upproduct of the Sandales at a the came. No stock was termed at the time thic 110,000 mote of real but on Merch 25, 1923, M. E. Betterholm, a partner of foots a your at itifulate of line of tone , dalay your in the nellar of the letter satt to search of the ination Land Company, The plaintiff in error, whose were et that We was A. Gerrade Merrill, readded in Chrosolan. Rice Claintiff is prior received the certificate for 125 charge of chook at the apaigm. ered it over to one Starley D. Tilvey who was associated with Triville of the constitute is Poorie. In addition to the plaintening of the plaintening of the constitution of the constitutio in error giving notes and paying for stock, and according cortain cases most bad shart the time to biostion or any claim that the bed been "Traviled she attended a stockholders assting on December 15, 1919, et will allow the course had been been at the course of the c THE STATE OF SECTION AND DESIGNATED BY SCHOOLSTERN THAT IS NOT AND ASSESSED. made but him , the property and trained from the till the bill be but the one had please entitled up to building any by the building and the Real by blottening and

The record further disclars that plaintiff in error was pronced as a stockholder at a mosting held becomber flot, land. At this westing a maris. At this westing a

committee was appointed to investigate property in Chicago which had been offered in exchange for land beloning to the company; and also, the president was authorized to arrange with Geiger for an audit. At this time Luchsinger talked with Simoson and Taylor along the lines that there was no organization for the sale of land or stock of the company; that is, that the company had no outside organization to handle the sales, and Luchsinger stated that he believed that if the affairs of the company were audited the stock could be disposed of to an organization with which he was connected. It further appears that in September 1917 The Sheridan County Land Company had entered into a contract with the Continental Land Company to purchase 11,541 acres of land situated in North Dakota for \$167,353.05; \$7,500 of the purchase price was paid on the execution of the contract, \$20,000 was payable August 15th, 1917; \$30,207.95 by September 10th, 1917; \$20,197.78 by January 1st, 1918, and a like amount by January 1st, 1919, and various other amounts down to and including January 1st. 1925. The contract was dated July 1st, 1917. It was not acknowledged on behalf of the Continental Land Company until August 1917, and on behalf of the Sheridan County Land Company on September 27th, 1917. and the same was filed October 1st, 1917.

From what is disclosed by the record it seems to us that the plaintiff in error was not induced by fraudulent representations to subscribe for capital stock in the proposed corporation to be known as The Sheridan County Land Company. The rule is that fraud will not be presumed; that the burden was upon the plaintiff in error to prove the allegations of fraud alleged in her bill by the greater weight of the evidence. The written proposal to organize a corporation to buy North Dakota land and to take 200 shares of stock completely refutes the contention of plaintiff in error that she could have believed at the time she signed the instrument that a corporation was already formed and that it was the owner of a large tract of land in North Dakota.

It is taken to the surrouty in Jilor or bit it. the example for lend beloning to the exampt and thes. earli and ranks reflect to a measure at the ballet regain a said the the thore was no organization for the sale of load or stock of the spany; that is, that the company had no sutside say wrighter to handle the sales, and incheinger stated that he believed that if the of the company were sudded the sense of the discovery and at gravion with watch he was commonted. It further amerya that in retember 1817 The Sheridan County Lund Cornery had entered into earns 11.5.11 services to numery to nursines 11.511 cores . I nd situated in Worth Dukota for (167.355.05; 17.500 of the oursice was paid on the execution of the contract, 700.000 per NOTE AND DESCRIPTION OF PARTY OF PERSONS AND STREET AND VALUE OF PROPERTY AND A SERVICE AND A SERVICE OF PARTY AND ADDRESS AND ADD . . . I verious other securits down to ond includes denony lat. lend. The contract was dated July let, tal was not reclied the lend. me bre . V.281 taugus littus granges Land lateration of the Minte behalf of the Sheridan County Land Courtny on series bett 1217. and the some was filed Cotober let, 1917,

From what is disclosed by the record it seems to us that the plaintiff in error was not induced by frankulant representations to subscribe for ceptical abook in the properties comparite for ceptical abook in the properties to the their frank fill not be presumed; that the burden was upon the plaintiff in error to creat to creat the cuidence. The written preparate a correction to creat buy forth Dakota land and to take 200 charce of about completely reduced at the competion of plaintiff in error that the combettion of plaintiff in error that the combettion was relieved at the tire of the testament the completely was ready formed and that it was the comer of a land the tready formed and that it was the comer of a land the

It is urged by the plaintiff in error that no corporation by the name of the Sheridan County Land Company was ever formed. In view of the rule hereinbefore announced whether the land company was legally organized or not is wholly immaterial because the plaintiff in error under the name of A. Gertrude Merrill was one of the original subscribing stockholders who signed a proposal that such a corporation be organized for the purpose herein stated.

Defendants in error strenuously insist that there is no proof in this record that The Sheridan County Land Company was not a duly organized corporation under the laws of South Dakota; that in the bill of plaintiff in error she alleges as her principal ground of fraud that it was represented to her before she signed the written proposal for the organization of a corporation that such a corporation had already been formed. The written proposal she signed gave her notice and plainly stated that no such corporation had been formed and therefore she had no right to rely upon previous oral statements. Furthermore the burden of proof was upon the plaintiff in error had it been material to prove there was no such corporation as The Sheridan County Land Company. The bill frequently mentions the Sheridan County Land Company as a "pretended corporation." In Bowman vs Agh, 143 Ill. 649, a bill was filed to set aside certain conveyances alleged to have been executed to defraud creditors, and also to set aside a pretended decree appointing a successor in trust in a trust deed. It was insisted that there was no legal evidence of the alleged decree appointing one Haley as the successor in trust to a man by the name of Cooper, and that the record fails to support the validity of the sale made by Haley as successor in trust. The court in its opinion held that the burden of showing the invalidity of the decree was upon the complainant and that the admissions of the bill were sufficient to establish, as against the complainant, the existence of a valid decree in the absence of any evidence tending to show the contrary. The court at page 667 said,

tiff in error under the name of A. Gortrude Merrill was one of the tiff in error of the sact sact that and

Though on all erect that theirt them are read at about 1 0 to first power that the fraction frost; heat decays was not given and our front partition against the error, and making an electronic bent beauty to blown includes on an arguide are corns at this talk to filed matrice all regula are emiled by an information on \$4. Mail Books accounts a finer toir antiquiption a la militarione and call Conservawere danger wie Letyrers milder film out? Deserts mad theetly him wild were you will the subject of the ballots which we love to be fire suctions and there are not not the previous and the statesonts. Furthermore the burden of proof was upon the plaintiff moitstagged flows on any stadd evenu of Labratan mead it had were at as the first device Last Language. The lift descently wanted at . Participant halppranch, as given find nice; solinar are STREET, NAME AND ADDRESS OF TAXABLE PARTY AND ADDRESS OF TAXABLE PARTY. acceptant to part to have been executed to describe our executed Les to cet aside a pretended decree appointing a saccessor I well on por excit test hetgient age il .hach taurt a ni tur wi evidence of the allaged decree empirisher one falor as the sucarest in trust to a man by the name of Joaper, and that the groupd fulls in the respect to yelfall by the sale and the yelfaller out to come of trues. The court is the coinies held that the burden of chewing the bed that for thenchange out need and overed but to vibileval add trained on intiffrate of the toffine once flid odt to acceptable complainmut, the emistance of a valid degree in the absence of any evidence tending to show the contrary. The court at hope 667 anid.

"The bill alleges, and of course by such allegation admits, the entry by the city court of Alton of a "pretended decree" appointing Haley as suscessor to said Cooper in said trust. A pretended decree is a decree apparently or prima facie valid, and the complainant having admitted the entry of such decree, the burden was clearly upon him to show that such decree was invalid. an unreality, a pretense." In view of this rule the plaintiff in error having designated The Sheridan County Land Company as a "pretended corporation" thereby admitted that the corporation was apparently or prima facie valid, and the burden was upon the plaintiff in error to show that said corporation had no valid existence, that it was an unreality, a pretense. Furthermore, plaintiff in error in addition to designating in her bill the corporation as a "pretended corporation" she alleged "that the proposed corporation was to be organized for pecuniary profits, etc., as stated in such petition or articles of incorporation. A copy of which is hereto attached as Exhabit "A", and by feference made a part hereof." In addition to these allegations plaintiff in error introduced in evidence as Exhibit "28" articles of incorporation of The Sheridan County Land Company. The conclusion '.is irresistible that it was the duty of the plaintiff in error to show that the statements and representations alleged in her bill were fraudulent and false and it was encumbent upon her to prove there was no corporation known as The Sheridan County Land Company organized under the laws of South Dakota. We are not prepared to say that she has made such proof.

It is urged that the evidence shows that the Galesburg National Bank was not the owner of the plaintiff's in error note at the time it took judgment on the note in the Circuit Court of Knox County and was liable for its part for the fraud practiced on plaintiff in error. If the plaintiff in error has failed to establish the material allegations of her bill, bearing upon the question of fraudulent representations, against the defendants in error with whom she dealt

The off of ges, and of course by each alleration admits, the -trious "serosh behasters" a to notile to tames with to the is File as successor to said Cooker in said truct. A wret miled derive he decree someontly or union bears as at some contributed the second sample error and larged a part of created processing olearly upon him to show that such decree was invalit, an unreality, a pretonee. In view of this rule the plaintiff in a as yescarb hand three Combineds adl bodangineb prived torts creatly or priva facia valid, and the burden was upon the the an had anthomorphin from budd made at come at 491 11 f strategical to see in marellets, a consequent for it hery consisted and the contract of property of contribution of course of billionally " reportion as a "protesded corporation" she alleged "thut the osed corporation was to be arganized for pacuniary profites. etc., as stated in much netition or articles of innorporation. A copy of which is herets stimuled on Embilit "A", and by reference Thitrisia contingells esait of antitible al ". looged from a sher -mi le asistis "Et " fixibit " avidonce on bishipit " atticles of incorporation of The Sheridan County Land demons. The conclusion of your of Thisplain, and to with and it out blisters at fire and at hereifs and reagences has strongists and tadd weds were troudelent and false and it was anomalous upon to prove there was no corporation known as The Sheridan County Land Volpong or anison the law of South Delets. We use not uses to sey that she has unde cuch proof,

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at the time she subscribed for the stock in question, she will likewise fail as to the Galesburg National Bank being liable. In other words, if the plaintiff in error has failed to prove her charges of fraud as charged against defendants in error, then she will have failed to prove it against the bank.

The question arises, in view of the contention of/plaintiff in error, as to whether or not the Galesburg National Bank was a bona fide holder for value before maturity of the \$10,000 note given by plaintiff in error to the defendant in error Taylor.

Every holder of negotiable paper is presumed to have taken such paper in good faith, for value before maturity in the usual course of business and without notice. Knolt vs. Canright, 202 Ill. App. 502; Bates vs Cronin, 196 Ill. App. 178. Plaintiff in error having introduced the declaration of the Galesburg National Bank and the affidavit of Peter Brown, its president, attached thereto which recited that the note contained therein " was assigned before maturity" to the plaintiff, is precluded from asserting that the Galesburg National Bank is not a bona fide holder for value before maturity. A. M. Forbes Gartage Co. vs G.T.R. Co., 162 Ill. App. 448-452.

In Wolan vs. Bakes, 268 III. 515-521, the court held that where appellee, having introduced in evidence an order of the Probate Court as to heirship, could not dispute its recitals, and this although the Probate Court had no jurisdiction to enter it.

Plaintiff in error has alleged in her bill that the bank was not an innocent holder of the note. In order to prove this allegation it was incumbent to prove that the bank did not purchase the note for value before maturity or that it was not assigned to the bank as collateral before maturity. In view of the state of the record we are of the opinion that the plaintiff in error has failed to prove that the bank did not purchase the note for value before maturity or that it was not assigned to the bank as collateral for a loan before maturity.

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of fraud as charged equinet defendants in carea.

In holen vs. Makee, 388 111, 515-531, the court held the where appelled, having introduced in evidence an order of the robate Court as to heirahip, could not dispute its recitain, and this although the Probate Court had no jurisdiction to enter it.

Plaintiff in error has alleged in her bill that the book was not an innocent holder of the note. In order to prove this allegation it was incumbent to prove that the leak did not puropose the note for volue before maturity or that it was not essigned to the beak as collateral before maturity. In vice of the state of the record we are of the opinion that the plaintiff in error has failed to prove that the beak did not numbers the rate for relactional before maturity or that it was not essigned to the rest or collecters.

It is insisted by the plaintiff in error that the defendants were liable under the Incorporation Act of Illinois which makes all parties liable for all debts and liabilities contracted in the name of such corporation, or pretended corporation, who assume to act as officers or directors of any corporation or pretended corporation before it was authorized to do business in this state. This section of the Illinois Incorporation Act cannot be invoked and it has no application as the plaintiff in error does not claim to be a creditor of The Sheridan County Land Company and is not trying to assert any liability against such corporation. Furthermore the Sheridan County Land Company was not organized under the laws of Illinois.

It is said that the defendants in error are liable as partners because The Sheridan County Land Company did not have a certificate to do business in Illinois as a foreign corporation. We have examined this contention and owing to the state of the record it is not well founded. It is also urged that The Sheridan County Land Company never complied with the Illinois Securities Law and that the laws of North Dakota provided that no foreign corporations should do business in that state without having a place of business therein and an agent for service of process. The Illinois Securities Law has nothing to do with any issue involved in this cause as the law regulating securities was passed in 1917 and became effective January 1st, 1918.

We have examined the other questions argued by the plaintiff in error and we are of the opinion that the cancellor was within the rule in dismissing the bill for want of equity.

DECREE AFFIRMED.

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It is said that the descendants in error are liable on pertners

cuse The Distiden descrip iand Company did not have a certificate
to do business in Illianis as a foreign corporation. Is have examined this convention and owing to the state of the resurd it is
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Company never couplied with the Illianis Scourities Les and that the
laws of North Dakota provided that no foreign corporations should de
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has nothing to do mith any issue involved in this cause as the law
regulating securities was passed in 1817 and because of the law

We have examined the other questions argued by the claistiff in error and we are of the opinion that the exacellar was mithin the rule in disalector the bill for work of equity.

CHAPTS DISSE

| STATE OF ILLINOIS,                                                                                                |
|-------------------------------------------------------------------------------------------------------------------|
| SECOND DISTRICT SECOND DISTRICT I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and                        |
| for said Second District of the State of Illinois, and the 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, thisday of                                                                            |
| in the year of our Lord one thousand nine                                                                         |
| hundred and thirty                                                                                                |
| Clerk of the Appellate Court                                                                                      |
| (73815—5M—3-82) 7                                                                                                 |



## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October in the year of our Lord one thousand nine hundred and thirty-two. within and for the Second District of the State of Illinois:

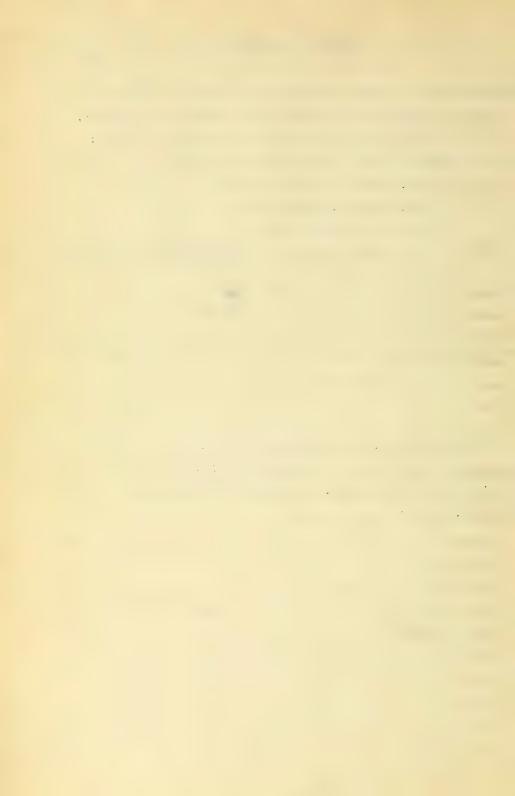
Present -- The Hon. FRED G. WOLFE, Presiding Justice. Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. 268 I.A. 6373

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the OCT 18 1932 Clerk's office of said Court, in the words and figures following, to-wit:



## IN THE APPELLATE COURT OF ILLINOIS Second District

October Term, A.D. 1931.

General No. 8417

Agenda 58

ROSELLA BESON.

Plaintiff in error,

VS.

Error to the Circuit Court of LaSalle County.

ROBERT ZIMMERMAN,

Defendant in Error.

JETT, J:

This cause is in this court on a writ of error to the Circuit Court of LaSalle County, to review a judgment of that court in an action of trespass, instituted by Rosella Beson, plaintiff in error, hereinafter referred to as plaintiff, against Robert Zimmerman, defendant in error, hereafter called defendant, on account of an assault alleged to have been committed upon her at her home in Streator, Illinois, by the defendant on or about the 29th day of August, 1929.

that the defendant on the 29th day of August, 1929, with force and arms assaulted the plaintiff and then and there violently laid hold of her and then and there with his fists gave and struck the plaintiff a great many violent blows and strokes on various parts of her body; and also with great force and violence shook and pulled about the plaintiff and threw her to and upon the ground and gave and struck her a great many other blows and strokes; and also then and there with great force and violence tore her clothes which plaintiff then and there wore and by means of which several premises of plaintiff was then and there greatly hurt, bruised and wounded and became and was sick, sore, lame and disordered, and so remained for a long space of time; that she suffered great pain in body and mind and was prevented from performing and trans-

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Defendant in Error.

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transla dounty, to review a judgment of that court in an transace, instituted by Rosella Reson, plaintiff in error, to the error, hereafter called defendant, on account of an talleged to have been committed upon her at her home in the Illinois, by the defendant on a hout the 25th day of

The declaration consists of two counts. The first everyed in the defendant on the 781h day of August, 1839, with force and seasilted the plaintiff and then and there violently leid and ther and then and their with his fists gave and struck the claimfiff a great ceny violent blows and strokes on various parts of her body; and also with great force end violence encode and other body; and also with great force end violence encode and count the plaintiff and three her to and consider ground of them and struck her a great many other blows and strokes; and other and struck her a great force and violence tone her elothous and then and there with great force and violence tone her elothous and then and there with great force and violence tone her elothous and the contract force and violence tone her elothous and the contract force and violence tone her elothous and the contract force and violence tone her elothous and the contract force and violence tone her elothous and the contract force and violence tone her elothous and the contract force and violence tone her elothous and the contract force and violence tone her elothous and the contract force and violence tone her electrons and the contract force and violence tone her electrons and the contract force and violence tone and the contract force and violence and the contract force and violence and violence

acting her affairs and business and was obliged to and did necessarily lay out divers sums of money amounting to \$100 in and about endeavoring to be healed of the said bruises, etc. In the second count it is averred that on August 29th, 1929, the defendant with force and arms assaulted the plaintiff and then and there violently seized her and laid hold of her and attempted forcibly and wickedly to ravish her, the plaintiff, against her will; then follow averments as to her being ill and laying out large sums of money.

The record shows that the plaintiff at the time of the trial was forty-five years of age; that she had been married twice and had obtained divorces from each of her husbands.

The plaintiff claims that the defendant, Robert Zimmerman, came to her home on August 28th, 1929, at about the hour of 4 F.M. and offered her two dollars to have sexual intercourse with her, and that the defendant assaulted and attacked and tried to rape her; that at the time the attempt to ravish her was committed she resided on East Hickory Street in Streator, Illinois; that it was a hot, bright day; that there were two entrances to the house and that both front doors were open and the screen doors unlocked; that she told the defendant three of her roomers were upstairs and one down stairs at the time of the alleged attack.

The evidence discloses that the plaintiff resided in one of the most public places in the City of Streator; that her home was across the street from the City Park which is two blocks square, and is located one block north of the main street of the Said City of Streator; that a family by the name of Gurney lived next door east and only about eight feet from the home of the plaintiff; that the Woman's Club Building was next door west, then the American Legion Home, the Post Office, the Streator Club, the City Hall and Police Station, the Masonic Temple and the Elks Club. It appears that Hickory Street is a much travelled street; that numerous benches were in the park across the street from the home of the plaintiff.

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The plaintiff claims that the defendant, hobert liverview, owner that home on August 1839, at about the hour the death of 4 P.4. and I red her two dellars to have sexual intercourse with her, and that the sexualties and attacked and tried to rema her; that at the set in Etreator, Illinois; that it was a hot, inight day; that there intercours were upstairs and one down stairs at the tire of the alleged toomers were upstairs and one down stairs at the tire of the alleged treet.

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On the trial of the case the defendant denied all of the charges of improper conduct.

It appears that the plaintiff and her former husband Jacob Beson lived on a farm about fifteen years in the neighbowhood in which the defendant resided. In March 1928 they quit farming and moved to Streator. Beson was a member of the East Manville Threshing Machine Company and owned one share of stock. In the threshing season of 1929 the defendant and one Thomas Holland, who were manager and secretary respectively of the company, learned that Beson had sold his share of stock and they decided to learn who had purchased the same in order that they could notify the purchaser of the annual meeting which was usually held within ten days after the threshing was completed when a report was made for dividends declared. On the afternoon of August 28th, 1929, defendant went to the home of Jacob Beson on Hickorty Street in the City of Streator to inquire about the share of stock. He then first learned from the plaintiff that she and Beson were not living together. She informed the defendant that she did not know where Beson was working but thought he was then living near Manville, Illinois. Defendant testified that the plaintiff told him that she was through with Beson: that her husband had accused her of being intimate with her roomers and of going out with other men; that it was a hot day and Zimmerman asked for a drink of water and she showed him into the kitchen where he got a drink of water and left.

In addition to what has been stated it appeared on direct examination of the plaintiff that she divorced her husband, Sam Orr, for cruelty but he made charges against her of misconduct; that he accused her of improper conduct. Plaintiff testified on direct examination that she divorced her second husband and also on the ground of cruelty and that he made charges against her and then withdrew them.

The plaintiff testified she had not talked to the defendant for several years prior to the 29th day of August, 1929, but that he came to her house that day. When she told him that she and her husband had separated and that she was going to divorce him then it was that he offered her two dollars.

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We have carefully examined the evidence and we find that it is conflicting and we are not prepared to say that the jury was not justified in finding the issues for the defendant. Much of the argument on the part of the plaintiff is devoted to the fact that the court of its own motion gave the jury two instructions defining the material issues and the amount of proof necessary to make out a case under each count of the declaration. An examination of the record shows that these two instructions were given by the court and not at the request of either of the parties to the suit. There is no assignment of error to the court's giving these instructions and they are not properly before the court for review. We have, however, examined the instructions and are of the opinion no error was committed in the giving of them. Objection is made to the giving of the 7th and 8th instructions of the defendant which referred to the burden of proof. The 7th instruction states that the plaintiff must prove her case by a preponderance or greater weight of the evidence under the first count of her declaration. The 8th instruction requires that the plaintiff prove her charge in the second count of the declaration beyond a reasonable doubt. It will be remembered that the second count charges the defendant with a criminal offense, namely, an assault with intent to commit rape and we are of the opinion that under the rule as laid down in Rost vs. F. H. Noble & Co., 316 Ill. 357, in order to convict the defendant of an intent to assault as charged in the second count of the declaration she must prove it beyond a reasonable doubt.

In Rost, Adar. vs. Noble & Oo., 316 Ill. 357-372, it is said:
"The rule is universal that in criminal prosecutions evidence must satisfy the jury of the truth of the charge beyond a reasonable doubt. In general where civil rights only are involved the decision must be upon the preponderance of the evidence. The reason in which the rule seems to have had its origin is applicable to cases where the charge was of a felony, and in general it is in such cases only, that the rule has been applied. It will not be extended further but is limited to charges of felony. The offenses for which penalties

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In Rost, Advr. vs. Noble A Co., 516 IIA. 357-378, it is said:
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are imposed by the statute are not crimes of a character the charge of which in a civil suit is required to be proved beyond a reasonable doubt, and the instruction properly so advises the jury."

Our attention has been called to the rule announced in Cooper vs Nutt, 254 Ill. App. 445, in which it is claimed by the plaintiff that it was error to give instruction No. 8 because of the rule announced in Cooper vs Nutt, supra. It will be remembered that the case of Cooper vs Nutt was one instituted with a view of recovering a penalty for failure to comply with section 38 of Chapter 32 of the revised statutes entitled, "An act in relation to corporations for pecuniary profit." This section provides that each stockholder of a corporation should have the right at all reasonable times by himself or by his attorney to examine its records and books of account: and that any officer or director who denies permission to do so. should be liable to the stockholder so denied in a penalty of ten per cent of the value of the stock held by such stockholder. In the case of Cooper vs Nutt, at 460-461 the court among other things said: "It is the claim of defendant that the court instructed the jury that a verdict forplaintiff could be founded on a preponderance of the evidence. Defendant's counsel insist that the instructions to that effect are erroneous, and they should have advised the jury that the weight of the evidence must go beyond a preponderance and establish the facts by "full and complete proof." Whatever may have been the earlier rule in regard to the quantum of evidence necessary to warrant a verdict in a case of this character, it is now well settled that a preponderance of the evidence is sufficient. \*\*\* In civil cases where a defendant is charged with a crime, it is no longer the rule that the proof of the crime shall be beyond a reasonable doubt. The Supreme Court has definitely decided that point in cases where a misdemeanor is charged, and the case of Rost vs Noble & Co.. supra, is cited. It will be observed that in Cooper vs Nutt the court was writing relative to a case in which the suit was to recover a penalty agency will deposit a "or positive for one off-days, and by bearing and rains a buoyes towers of or healtpox of vine live. It is in the ". " the instruction properly so advice the jury."

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The court did not hold in Cooper vs Nutt that the rule would be the same in a case where a felony was charged as in a suit where a mere misdemeanor is charged or one in which it is sought to recover a penalty. We are of the opinion that the court in giving instruction No 8 was within the rule and it was not reversible error to give it."

The plaintiff also contends that the court erred in modifying instructions Nos. 5 and 6 offered by her. The modifications of each of these instructions was proper and did not in the least chagge the meaning of them but simply made the instructions conform to the charge as averred in the declaration.

It is also urged that the court committed error in refusing to give instruction No. 9 offered by the plaintiff. The court did not err in the refusal of said instruction No. 9 for the reason that the subject matter of said instruction was fully and completely. covered by another instruction given on behalf of the plaintiff. Instruction Nos. 10 and 11 offered by the plaintiff were proper instructions and could have been given by the court but the plaintiff is not in any position to object to the refusal to give them as they are instructions that have to do with the question of punative damages or smart money, and the jury having found by their verdict for the defendant, the plaintiff has not been injured by the refusal of the court to give each of said instructions.

It is also argued that the court erred in permitting the attorney for the defendant to cross-examine the plaintiff as he did. On examination of the record it appears that most if not all of the questions asked on cross-examination of the plaintiff related to the subject matter that had been gone into in chief by

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counsel for the plaintiff. In other words the plaintiff had laid
the foundation which permitted the cross-examination of the plaintiff
by the defendant in the manner in which she was cross-examined. It
is also said that the court erred in allowing defendant to put witnesses on the stand and examine them bearing upon his character.

It is contended by the plaintiff that the testimony of the character
witnesses for the defendant should have been stricken. In our opinion
under the law and the issues in this cause this testimony was competent.
The testimony of his neighbors was to the effect that they knew his
general reputation for chastity and that it was good. In view of the
charge as laid in the second count of the declaration the defendant
had a right to show his general reputation as was done in this case.

It is urged by the plaintiff that the verdict of the jury was the result of prejudice against the plaintiff. We have examined the record and do not think this objection is well founded. We have examined all of the objections raised by the plaintiff and we are not prepared to say that reversible error was committed in the trial of this case.

The judgment of the Circuit Court of LaSalle County will therefore be affirmed.

JUDGMENT AFFIRMED.

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| STATE OF ILLINOIS, ss.  |                                                                           |
| SECOND DISTRICT         | I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and                |
|                         | of Illinois, and the keeper of the Records and Seal thereof, do hereby    |
|                         | y of the opinion of the said Appellate Court in the above entitled cause, |
| of record in my office. | estimony Whereof, I hereunto set my hand and affix the seal of said       |
|                         | late Court, at Ottawa, thisday of                                         |
|                         | in the year of our Lord one thousand nine                                 |
| hund                    | red and thirty                                                            |
|                         | Clerk of the Appellate Court                                              |
| (65027—1M—9-31) 7       |                                                                           |



### AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

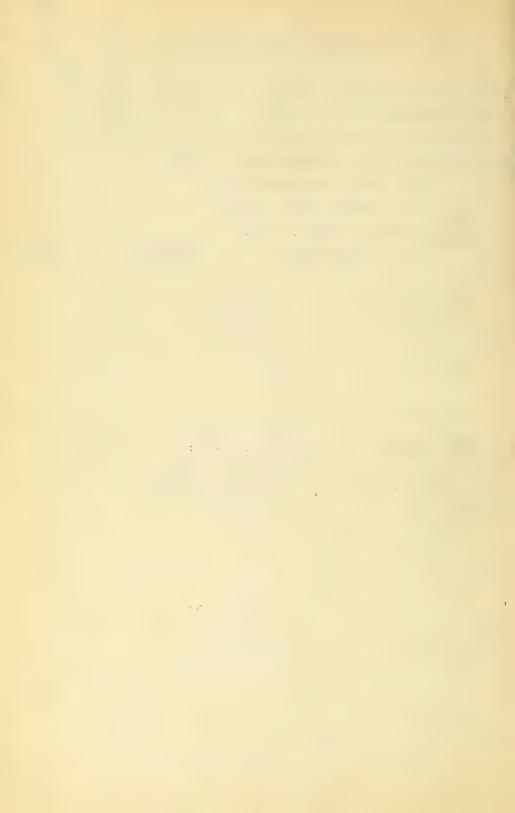
Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

268 I.A. 6374

BE IT REMEMBERED, that afterwards, to-wit: On OCT 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



IN THE

#### APPELLATE COURT OF ILLINOIS

Second District

MAY TERM A. D. 1932

8502

Agenda 10

HAZEL R. BATSON,

Appellee,

VS.

HERBERT M. BATSON,

Appellant.

Appeal from the
Circuit Court of
Du Page County.

Jett. J.

In May, 1930, Hazel R. Batson, appellee, filed a bill against Herbert M. Batson, appellant, praying for separate maintenance and support money. In her said bill appellee alleged that the appellant had deserted her without just cause; that he was living separate and apart from her without fault on her part; that appellant earned 7,500 a year; that she had no property of any kind, had been sick and was relying upon friends to furnish her with funds with which to live; that she was then living in the premises which were formerly occupied by her and her husband, the appellant herein.

Upon the filing of the bill summons was issued and subsequently served on appellant. In July appellant appeared before the court on notice of appellee with a view of having a hearing on the question of temporary alimony. The appellant appeared and objected to the jurisdiction of the court, which was overruled, and he was ordered to pay the sum of \$50.00 a week to appellee. Appellant prayed and perfected an appeal to this court. The cause was reviewed in this court and the order of the Circuit Court was affirmed. Batson vs Batson, 262 Ill. App.

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Jott, J.

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452. Afterwards and on to-wit, the 14th day of November, 1930, appellee presented her petition to the trial court reciting that she had no property, except personal effects and her interest in the premises occupied by her as a residence, and that the said appellant had filed and refused to pay or give her any money since he deserted her on the 16th day of March, 1930; that when appellant deserted her she had \$315.00, all of which has since that time been expended and for considerable time past she had been the object of charity of her friends and relatives; that she had incurred grocery bills and sundry other bills for her living expenses since the 16th of March, 1930, and that she had been unable to pay the same; that she was greatly in debt for living expenses and was unable to obtain further credit; that the appellant had failed and refused to make any contributions whatever toward her support and maintenance and that she had no income of any kind or character; that on or about the 8th day of January, 1950, the appellant had urged appellee to permit him to obtain a divorce; that he agreed to furnish her a home, to pay her 20% of his income and to furnish her a life insurance policy upon the life of the appellant to secure her in case of his death; that she had refused to permit him to have a divorce and the said appellant then threatened that he would leave her and never give her anything unless she permitted him to obtain a divorce; that he did leave appellee as aforesaid, and has never paid anything for her support; that appellant is caployed by the National Bank of the Republic, and appellee was informed before the said bill for separate maintenance was filed that he was receiving in the neighborhood of \$7,500 a year; since the filing of the said bill she has been informed that he

452. Afterwerds and on to-mit, the litter by at invite, after, ignitions where in it at mailing was actuated actiones that he crooker Academy bearens er bed ear that interest in the premises occupied by his as a reside co, and that the said appeilant had falled and reduces to pay as give her any money since he does wood her on the little day of ferein, the fire appointment descerted her she but this one, and which has since that thus been expended and for orm idensity there ing about too to time is tested out need but see tage relie ur. and that theory percent bad sha that car bills for her living expenses since the loth of seron, 1:10, der era that joine out que or altheu moet out all fait bins gradily in debt for ity agreement and say muchic so obtain edua of hostfor him balled has Jackhons ind findt (fibero reditud any contributions wherever toward her support and antico makes and that she had no imports of any bind or omeraceout; what on or about the 8th day of Jeanson, 1860, She appelied to talted herry, and the percent a mindle of min figure of sollange france her a hans, to pay how may of the inerted the tracks of the Licens one to offi our new worker consumni office and sours her in same of the douth; that all had a first to me it is it honodored invot finaller a creation to correct a system Accellated only a willism for white the own burn burn out over a little was him to obtain a divorce; the a did deare conditions afercanta, and he mever to it depth Any who have built for the value of the coping of the lightened on to 20 th. Leville of the top inchience was and in commedutors released that you are are are are and proceed bearedul there great a real, to be the designer one of guiviener and and that or and learners more and one thid bice and to public out could

is earning between \$8,000 and \$10,000 per year and received in addition thereto certain bonuses from the National Bank of the Republic, and that appellant had advised appellee while they were living together that he had certain stocks and bonds of the value of \$20,000.00, but of late years he has refused to give her any information concerning his ownership of stocks, bonds and other securities; that he had finally advised her he had sold and disposed of all of them.

The petition further alleged the filing of the petition on the 18th day of July, 1930, the order entered pursuant thereto and the appeal by the said appellant to this Court. Appellee further argued she had received no sum whatever from the appellant pursuant to said order of said court and had no money with which to employ counsel to represent her in the Appellate Court, and no funds to pay court costs and costs of printing briefs and arguments to be presented to this Court, and prayed that the appellant might be ordered and directed to pay her temporary alimony and solicitor's fees. The petition was sworn to by appellee. Appellee filed an affidavit setting forth in substance the matters set forth in said petition.

Appellant filed an answer admitting the marriage ceremony and their living together as husband and wife, and alleged that he was receiving a salary of not more than \$7,000 a year. The hearing on said petition was continued from time to time until the 6th day of December, 1930, when an order was entered directing the said appellant to pay \$50.00\ upon Saturday, the 6th day of December, 1930, and a further and like sum of \$50.00 upon Saturday of each and every week thereof until the further order of the court as temporary alimony, and a further sum of \$500 as temporary solicitor's fees. From this order appellant prayed and per-

ing between 18,000 and 110,000 per year and received in thereto certain bonuses from the Sational Leaf of the lie, and that smellent had satised countles while they living together that he had certain stooks and bouds of the lie of 120,000.00, but of late years he has refused to it any information concerning his ownership of stooks, and other scourities; that he had finally simise bur cold and disposed or all or them.

The petition further ellered the filter of the fitter of the fitter of the street numbers on the lett day of all p. 1850, the crast to this Unit.

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Appellant filed an rusess aimitting the arries coresons and their living terether as hashes and wife, and alleged that he was receiving a schery of not move then 17,000 e year.

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fected an appeal to this court but failed to prosecute the appeal and sued out a writ of error. At the May Term, 1951, on motion of appellee the appeal and writ of error were dismissed. The appellant then sued out a writ of error on the order of the trial court entered on December 6th, 1930, and this cause too was considered by the Appellate Court. On a hearing in this court the order of the Circuit Court of DuPage County was affirmed and an opinion filed thereon on or about June 3rd, 1932.

The record further discloses that when this court affirmed the order entered July 18th, 1930, appellee presented to the trial court, after due notice to the appellant and his solicitor, a verified petiti n asking that an order be entered directing the appellant to show cause why he should not be attached for contempt of court for a failure to pay the amount due under the decree of the court entered on the 18th day of July 1930, and up to the 6th day of December, 1930. In he r petition the appellee , set forth the entry of the order of July 18th, 1930, the perfecting of the appeal by the appellant and the decision of this court concerning said appeal. She also set forth the entry of the order of December 6th, 1930, and the suing out of the writ of error thereon to this court and asserted that she had been compelled to retain counsel to represent her in the Circuit Court as well as to defend her rights in the several proceedings in this court; that the appellant was a healthy, able bodied man and had been employed since the entry of said order on the 18th day of July, 1930, by the National Bank of the Republic in the City of Chicago, until the recent consolidation of said bank with the Central Trust Company of Chicago, and that the appellant is now employed by the Central Republic Bank and Trust Com any, and is a vice-president; That he is abundantly able to pay the amount

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bet seems sellers, 1979, appeal of the seller seems seems bet wid has for the art of the court, after the arms the court of neglection of vicinity at the control of the control of the control of the control of the appellent to show ease why he he all and be ettened eff weigh our grows : alt way of saudin a wol truce le territ and the court catered on the 16th day of July 1960, and up esilong of Descaber, 1989. In he restition the appoint -sor sit, along ortry of the calon of Jaly 18th, 18th, the voraid To roisison this ins inclings but ye isages of to as . off lo gram wit for the cale off . Inter bire mint - . a the comber 6th. 1880, and this saint out of the write of reon to this court asserted term such bean comof the retain coursel to responent boy in the Circ't Court at anathernous fer ver our out as deta and bastob of as field has and belief the appollent was a salthy, shad the same make the for all as a state. It so the movies all social state of any July, 1980, by the Jatinal Reak of the 's which in the Oli out with the for the the think to we had bled the the ntral Irust Conjunt of Julegy, and ther to a major of taut al has grassed translated Pray and the Control of the Control and the tuncan of grand wide thin things and and the transfer of the comments of the c

ordered by the court but has failed and refused to do so and that there is due to appellee under said order, from the 18th day of July, 1930, to the 6th day of December, 1930, the sum of \$50.00 a week, all of which is due and unpaid. In support of her petition appellee presented to the court her affidavit wherein she set forth substantially the same facts as are set forth in the petition. The trial court on the 9th day of October, 1931, entered an order finding that appellant had wholly failed and neglected to pay to appellee any of the sums ordered to be paid and that there was due appellee as alimony so directed to be paid from the 18th day of July, 1950, to the 6th day of December, 1930, the sum of \$1,000, and that the appellant had failed and neglected to pay said sum or any part thereof and ordered appellant to show cause by the 25rd day of October why he should not be attached for contempt of court.

Appellant answered the rule to show cause by filing an answer and supplemental enswer wherein he alleged that on and before the said order of July 18th, 1930, was entered all of his property and income was subjected to certain encumbrances and assignments, and that on the 22nd and of May, 1930, he had executed an assignment assigning 50% of his income to one Ralph B. Treadway as trustee. The assignment, however, does not indicate the purposes for which the funds so assigned were to be used. His answer further shows that for the fifteen months following the assignment he paid to Treadway 4687.05, and that he, himself, disbursed otherwise 4663.96, including 1139 to the Continental Illinois Bank; \$526 to the Bowmanville Bank; \$750 on a personal loan; \$74.50 paid on life insurance; \$60 to charity and \$350 on transfer of stock.

On the hearing the court on the 9th day of November,

ordered by the ownt but has failed and reflect to do earny day of Fuly, 1980, to the Sth day of Secender, 1.35, and man of 180.00 a week, ell of write his was seed unpetd. It sugment of her petition appellate prosected to the court her affiderit wherein the set forth section abstantially its set e forth es are finite or forth in the petition. The trial court on the first and wholly forth in the petition. The trial court on the first and wholly failed and neglected to ray to appellace any of the runs undered to be paid and neglected to ray to appellace an elimeny so directed to be paid and the lost day of July, 1880, to the Stm day of February as directed to be paid and replaced as any of the sugment of the stm day the sugment of the court that the form of the sugment of the stm day of the Sind and and the lost of setting and the failed and the lost of stm day of the Sind and and the the attended to very said and court thought of stmaded for ourse of the Sind and and the stmaded for ourse of the Sind Court.

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1931, entered an order finding that there was due to appellee from the appellant for arrears of alimony, under the order entered on the 18th day of July, 1930, as the amount accrued from time to time to the 6th day of December, 1930, the amount of \$1,000. The court further found that the answer and supplemental answer to the rule to show cause filed by the appellant did not purge the appellant of contempt and did not answer the rule to show cause; that no sufficient cause had been shown by appellant why said amount had not been paid or that he had been or was unable to pay the same, but alt ough able so to do appellant had wilfully failed and refused to pay said sums. The court found the defendant guilty of contempt and that said contempt tended to defeat and impair the rights of appellee and to bring the administration of justice into contempt. The court ordered that appellant be committed to the county jail, there to remain charged with said contempt until he paid the said sum of \$1,000 into said court for the use of appellee or until released by due process of law. From this order the appellant perfected an appeal to this court and it is this order that is before the court for its consideration in this proceeding.

The burden of proof was upon appellant to show that he acted in good faith and with an honest purpose to comply with the order of the court and that he was unable so to do. Appellant has failed to make such a showing. From the record in this cause, including the answer filed by the appellant to said rule to show cause, it is apparent that he did not in good faith attempt to comply with the order of the court but has resorted to every means possible to avoid making such payments, including the perfecting of appeals and the prosecution of a writ of error. The

1951, entered an ander Tinhing that there age the a prolled from ne heart for arread to midney, under the order entered the the 18th day of July, 1960, as the assumt recorded from the to imo to the 6th day of Beermber, 1820, the assent of 1,010. The of revere fed and have now toward out fail bruot tolight the est equal to. 5.5 the Llogge out of boilt anne week of piet our tours to is of plot off meren for bib and forwings to insiles thing you should enough works need had same treleffing on taid of closus were no seed but on this we bire nood for bed towers vilvalia bon trailoges of ot on alde man the sud, owne and you -biled end refused to .ex a big of bound tes belief funden at behind transmos size that bue tamet to to viling the mitervaluista and quard of her collegge to adder end vingel has of wholinges taily hereite truce eat ... et mines of all select to Dina altiw hegged a remar of erect, that, the color of bellication trues area over doo, if he also bise sat bise and little or the use of appelles or antill released by due process of law. Ema fiche en l'er i regen un haisettes ingliques est tebre sist meri wildershine old to before the court for all all all in this proceeding.

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answer of the appellant to said rule to show cause set forth facts that were inexistence and before the court at the time the order of July 18th, 1930, was entered. By his answer he set forth payments made under an assignment made before the order of the court was entered. Hisanswer also shows payment made upon indebtedness in existence long before the order complained of was entered. The order of July 18th, 1930, is res judicata of all these facts and the appellant by his answer has not attempted to show that his ability to pay was decreased since the order, or that the requirements of appellee were any the less. The answer of the appellant admitted that he had received a salary of 7,000 a year, but that he had of his own volition, paid the money to various creditors. It appears to us that the appellant made no attempt whatever to comply with the order of the court but in defiance of the order distributed and paid out his funds as he saw fit. The appellant did not show that he was not able to pay but only that he was more concerned with the making of payments to other creditors than helping to support his wife in keeping with the order of the court; he failed to produce any facts showing that there was any change in his condition financially or otherwise which made it impossible for him to comply with the order of the court. Appellant has not potitioned the court to modify or change the order of July 18th, 1930, because of changed circumstances or of his inability to carry out the terms of such order.

The order of July 18th, 1930, directing the appellant of the pay alimony was a judgment of the court. After the entry of the order it became a vested right which could not be divested by a subsequent order of the court. The affirmance of that order made

street error the terms when are a first time at a collection not to them as there are not not by him one are of its month that were not with the of the or which the state of the party and the total mir lie ralem tali, yme're alam emparitum na palan talou armenny per to bin in once other sail realed good sacretions of avendary said the best livering, were by comparable plant to make any Territor the send the representation of the sense has the sense of tent in thity to pay wes decreased since the order, as thet To we want of the allow or any office and the second of th CCO, V: to weales a bovious had ed fait befinds and improof your alt that, soithfor muo aid to had an tant tud. er objections it appears to as that the appearing a . . at and trues sha to represent the flatter of reversion ... ed as assure alm the order distributed and not of the contract as in The appoliant did not that that he was not clie to pay SECURE OF THE PERSON NAMED AND ADDRESS OF THE PARTY AND NAME OF THE OWNER OF THE PARTY the first received in States and Darket with his order way on the with that there was any clarge in his soudition Timensielly nerwise which and is impossible for him to seemly with the eder of the court. Appellant was now protestened the court to o are obenge the order of July 1980, 1980, because of with the time of Colorest Co. It is a sentimental topical. LOBBLE CONTRACTOR

the order of Entry Loth, 1980, directing the appollant elizably see a judgment of the court. After the court of the court, its efficience of the court.

it final. Batson vs Batson, 262 Ill. App. 452.

When a case has been determined by the Appellate Court and its mandate has gone forth, what that court there held in determining the questions involved is the law of that case, until, if ever, the same is reversed by the Supreme Court, and is binding on the parties, the trial court and the Appellate Court. Gridley vs Wood, 220 Ill. App. 46-47.

Past due alimony is a vested right and cannot be changed by a subsequent order of the court. Cole vs Cole, 142 Ill. 19; Craig vs Craig, 163 Ill. 176.

tempt for failure to comply with the order of July 18th, 1950, would be to show such a change in the circumstances of the parties as made it impossible so to do. The answer of the appellant to the rule to show cause alleges no facts not existing at the time the order of July 18th, 1950, was entered. The court has no authority to alter or modify the order of July 18th, 1930, upon the state of facts existing at the time the order was entered. The order of July 18th, 1950, is res judicata of all the facts existing at the time the order was entered by the court. Smith vs. Smith, 534 Ill. 370-382; Cole vs Cole, 142 Ill. 19-24; Deen vs Bloomer, 191 Ill. 416-423.

The appellant in his argument refers to certain allegations of an alleged cross-bill. The praccipae for record filed by the appellant does not request that any cross-bill be inserted in the record. At the time the record was filed in this court no cross-bill was found therein. It appears, however, that subsequent to the time of the filing of the record appellant obtained an order and filed what purports to be a cross-bill. There is nothing

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Origing vs Tood, 720 111. htp. 40-47.

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order and filed that are party as he advantaged . A rew is not last

to show, so far as we have been able to ascertain, just when the cross-bill was filed. The cross-bill appears, however, to have been sworn to on the 27th day of November, 1930, subsequent to the time of the entry of the order sgainst the appellant to pay the alimony as entered the 18th day of July, 1930. Furthermore, there is no part of the alleged cross-bill abstracted. Mad it been, it would not have served any good purpose of the appellant since the order involved in this cause was entered long prior to the time of the filing of the alleged cross-bill.

In conclusion it is evident from the argument of the appellant that he has misconceived the issues involved in this cause. This is not a proceeding to review a judgment of the court in entering the order of July 18th, 1930, but is one to punish the appellant for failure to comply with the order which has been affirmed by this court. The conclude, therefore, that the appellant by his answer did not purge himself of the contempt of the court and that the record in this case fully establishes the guilt of the appellant, and the order and judgment of the trial court should be affirmed, which is accordingly done.

ORDER AND DECREE AFFIRMED.

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| emame of IIIINOIS                 |                                                                                  |
|                                   | ss.  I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and                  |
| SECOND DISTRICT                   |                                                                                  |
|                                   | State of Illinois, and the keeper of the Records and Seal thereof, do hereby     |
| certify that the foregoing is a t | rue copy of the opinion of the said Appellate Court in the above entitled cause, |
| of record in my office.           | and a second second                                                              |
| ,                                 | In Testimony Whereof, I hereunto set my hand and affix the seal of said          |
|                                   | Appellate Court, at Ottawa, thisday of                                           |
|                                   | in the year of our Lord one thousand nine                                        |
|                                   | hundred and thirty                                                               |
|                                   | Clerk of the Appellate Court                                                     |
| (65027—1M—9-31) -7                |                                                                                  |



Character.

# 268 I.A. 638

General No. 8647

Agenda No. 22

April Term, A. D. 1932

ROBERT G. EARLEY, Receiver of JOHN B. COLE-GROVE & CO. STATE BANK, Appellant,

vs.

ANDREW MILLER, Appellee.

Appeal from County Court, Christian County.

#### ELDREDGE, P. J.

On December 4, 1929, Andrew Miller, appellee, executed a judgment note for the principal sum of \$389.80 payable to the order of Robert G. Earley, Receiver of the John B. Colegrove & Co. State Bank of Taylorville. On the next day judgment was confessed in the County Court of Christian County. On motion of appellee the judgment was vacated and he was granted leave to plead. One of the pleas filed by him was want of consideration. The cause was submitted to the Court for trial without a jury and the Court found the issues joined upon this plea in favor of appellee and entered judgment accordingly.

It appears from the evidence that appellee lived at the time of the transaction involved, in Taylorville and his mother was living on a farm, whether as owner or tenant does



not appear from the evidence. It further appears that she had executed a chattel mortgage on some of her personal property including some grain. The chattel mortgage was not introduced in evidence and there is no affirmative evidence as to whether the Bank or the Receiver was the grantee therein. It further appears from the evidence that the mother of appellee requested him to sell some of the grain for her which he did. What grain or how much so sold does not appear from the evidence nor does it affirmatively appear that the grain he hauled and sold for his mother was grain which was actually covered by the chattel mortgage. One witness testified that he was told by the warehouseman to whom appellee delivered some grain that it was sold by appellee in his own name. The grain dealer himself did not testify and the above testimony was but hearsay evidence. Appellee testified that he did not know that his mother had executed any chattel mortgage nor that the grain in question was covered by it and there is no testimony to dispute this. Another witness testified that appellee admitted that he had sold the grain in question but this was a pure conclusion of the witness. The trial being before the Court only the competent evidence is deemed to have been considered by the Court.



In a conference over the matter between the Receiver, his attorney and the State's Attorney appellee was told that he had committed a very grave offense and was asked to give a note to settle the matter and he executed the note in question. There is no competent evidence that the amount of the note represented the amount of money he received for the grain. Under the evidence in this case the judgment of the trial Court was right and it is affirmed.

Affirmed.



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General No. 8615

Agenda No. 16

January Term, A. D. 1932

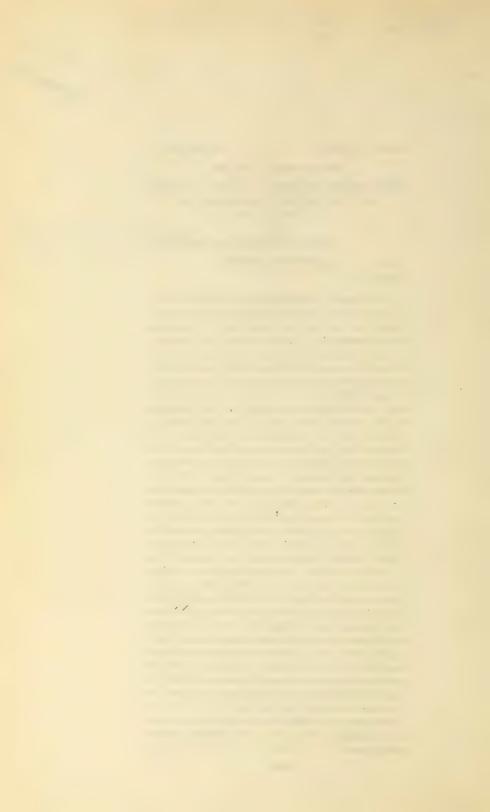
GOLDIE McKEE WIEBUSCH, a Minor by GEORGE H. WIEBUSCH, Her Husband and Next Friend, Appellee,

A. G. HOLLINGSWORTH, Appellan. 6 8 I.A. 6 3 2

Appeal from Vermilion.

NIEHAUS, J.

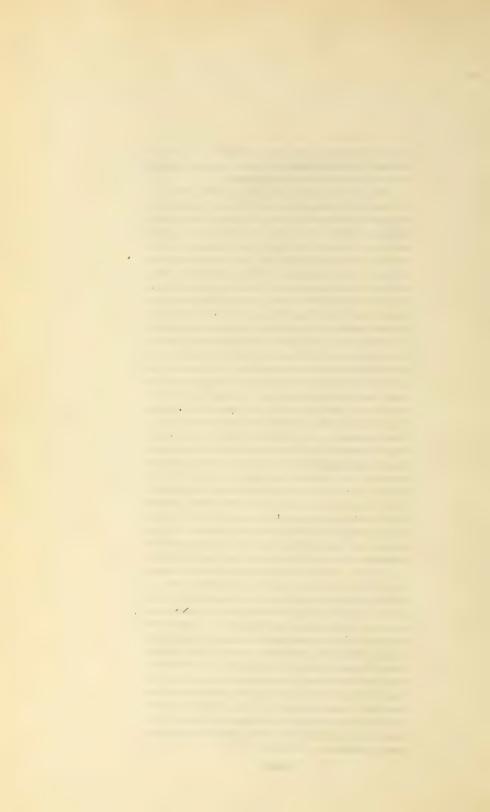
The Appellee, Goldie McKee Wiebusch, a minor, by George H. Wiebusch, her husband and next friend, brought this suit in the Circuit Court of Vermilion County against A. G. Hollingsworth, the Appellant, to recover damages for personal injuries suffered by her as the result of the alleged negligence of Appellant's son, Oakley Hollingsworth, in the management and operation of an automobile owned by the Appellant, which the son was driving along West Raymond Avenue, near to a point where it intersects Vermilion Street in the City of Danville, and struck down the Appellee, who was standing near the center of the street to take passage on a street car which was coming along in the center of the street on the tracks of the street car line operating along West Raymond Avenue. The declaration filed in the case, charges general negligence in the operation of the Appellant's automobile by the son, Oakley Hollingsworth, in the first count: and that the automobile at the time of Appellee's injuries, was driven by the Appellant's son as Appellant's agent. The second count charges joint negligence on the part of Appellant and his son in driving the car in question. A plea of the general issue was filed to the declaration; and the Appellant also filed a special plea averring that he was not in possession of nor driving, operating or controlling the automobile involved in the accident. Another special plea was filed denying that Oakley Hollingsworth was his agent in driving and operating the car, at the time the Appellee was injured. The principal issue in the case was whether the son was the agent of the father in driving the car in question at the time of the injuries to the Appellee. There was a jury trial in the case which resulted in a verdict for the Plaintiff, assess-



ing her damages in the sum of \$1333.50. The Court rendered judgment upon the verdict; and this appeal is prosecuted to reverse the judgment.

The evidence shows, that the Appellee, who was a housemaid by occupation, on February 11, 1930, left the place of her employment in the evening of the day mentioned about 7:15 P. M. in order to take a ride on one of the street cars which were operated on the so-called Roselawn Street Line on tracks which run east and west in the middle of Raymond Avenue. She walked to the intersection of West Raymond Avenue and Vermilion Street, which is one of the thoroughfares of the City of Danville; and from the point near the intersection, she walked to the place in the setreet next to the street car tracks on West Raymond Avenue where passengers are taken on street cars which were operated along the street mentioned. She got to the place where she was standing about the time that the street car was approaching and it coming towards her as she was standing there with two other persons who were also about to take passage on the street car. These persons were Ada Smoot and her husband, Stephen Smoot. The Appellee and the Smoots stood together and apparently were looking at the approaching street car which at that time was about 75 feet distant, when the automobile driven by Appellant's son coming suddenly from behind the street car and from the same direction at a very rapid rate of speed, crashed into them and caused the injuries to the Appellee. How the accident happened appears from the testimony of John Claypool who testified as follows:

"I am a conductor on the city lines and was operating the Roselawn car south on Vermilion street. I noticed people standing in the street close to the west street car tracks. They were standing in a line north and south within about eighteen inches or two feet of the west rail and I was about the middle of the block between Raymond and Winter when I first noticed them. The last I saw of the people they were standing there and then when the car came through it cut my view off from them. I got out of the car and saw Mr. and Mrs. Smoot lying on the track about twenty-five feet above the car and the McKee girl was on down towards the middle of the block. After I saw the car run in between me and these people I



saw it after it stopped. As it passed me it came over on the line. These people were something like twenty-five or thirty feet ahead of me when the car cut in between me and them. The car went along the track for a short distance and then angled back to the curbing. The left headlight of the car was turned back over. The car went about twenty feet from Conron Avenue before it finally stopped. In my opinion this car was traveling fifty miles an hour when it passed me. I don't remember hearing the driver of the car say anything. The automobile drove within eighteen inches of my car as he passed me.'

The evidence in the record taken all together tends to prove that the accident happened and the injuries suffered by the Appellee, resulted from a negligent management and operation of the Appellant's car as driven by the son; that the Appellant was not in the car, but the son was driving the car to take two young men who were guests in Appellant's household, to a picture show in Danville for their entertainment. It is contended by Appellant that the Appellee was guilty of contributory negligence and therefore disbarred from a recovery. Concerning this contention, it is sufficient to say, that this was one of the issues of fact in the case; and was submitted to the jury as such; and was determined by the jury against the Appellant's contention. We conclude upon the consideration of the evidence, that the jury was warranted in finding that the Appellee exercised such care and caution for her own safety at the time and just before the accident in the situation in which she happened to be, which an ordinarily prudent person would have exercised under the same or similar circumstances. As heretofore indicated, however, the main controversy in the case centered in the contention made by Appellant's counsel that the Appellant's son in using and driving Appellant's car, was not acting as Appellant's agent; and that there was nothing more involved in the driving of the car by the son than the Appellant's permission.

It is contended, that the son could only become the father's agent for the purpose of carrying into effect his father's directions in matters pertaining to commercial business or trade transactions. We cannot agree with counsel in this contention, but regard this yiew of agency as too narrow for the ordinary scope



of human affairs and activities which may be entrusted to be carried on or into effect through the agency of another or others. Many of the requirements and necessities of the affairs of a household are conveniently carried on or into effect by means of the agency of others, especially those matters which the heads of a household cannot or do not desire to give their personal attention; and for that reason employ servants or other agencies to carry them into effect. It is apparent that as the head of the household in this case, the Appellant had conceived the idea, that for the purpose of entertaining his guests, that they be taken to a picture show in Danville, and that in order to carry out his plan and purpose in that regard, he directed his son to use his automobile, and drive the guests to Danville to a picture show. We conclude that in carrying out this plan and purpose of the Appellant, by Appellant's direction the son in acting became and was acting as his agent; and the evidence shows that at the time of the accident the son was driving the car to carry into effect the directions given him by his father.

This court passed on the question of agency of Appellant's son in another case which grew out of the same accident (Smoot v. Hollingsworth, Gen. No. 8559) and we reached the same conclusion concerning the matter of agency in that case. The facts showing agency are based upon the testimony of the Appellant, who was called as a witness in behalf of the Appellac. The Appellant testified concerning this matter as follows:

"I am one of the defendants in this suit and live in Bismark. On the day of this accident, February 11, 1930, I had visitors or guests at my home in Bismark. There were two boys from Cave-in-Rock, Illinois. They were guests of the family and had been at my home about two days and nights. When my son left home that evening the guests were with him in my car. It was a Chevrolet.

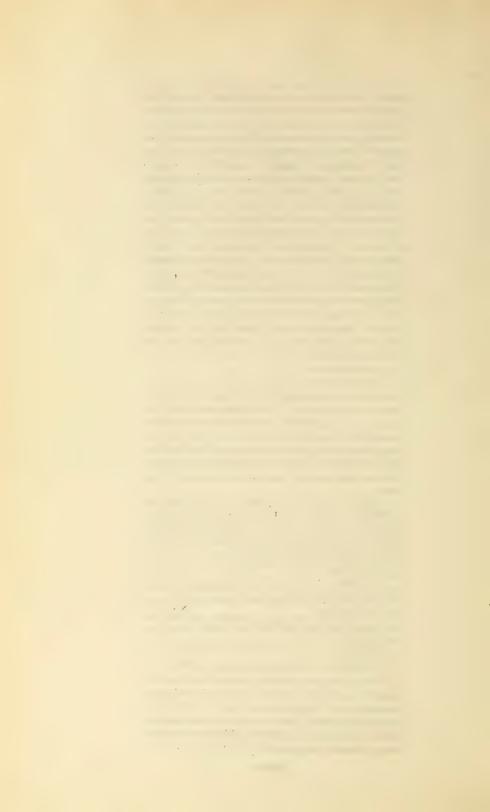
Q: And now on the afternoon of that day what, if anything, was said by you to your son about taking the automobile and taking these guests anywhere or

entertaining them?

A: Well, that morning I told him to entertain the boys during the day and take the car and take them to the show.

Q: Do what? A: Take the car and take them to the show.

Q: Where? A: In the automobile—to Danville."
Error is assigned because it is contended that Appellant's counsel were unduly restricted in their cross examination of Appellant, who had been called as a witness by Appellee. This contention is based upon the rulings of the Court in sustaining objections to the following questions propounded to the Appellant on cross



examination:

Q: Did you give general permission to your son, Oakley, to use this car whenever he wanted to?

Mr. Dysert: Objected to.

The Court: Objection sustained.

Q: Did you have any business in Danville that night?

Mr. Dysert: Objected to—not cross examination.

The Court: Objection sustained.

Q: Did you have any occasion to send your son to Danville that night for the purpose of buying hogs, cattle or livestock?

Mr. Dysert: Objected to.

The Court: Objection sustained.

Q: Was your son on any business that night involving any transaction for you otherwise than bringing the two guests which you had down to Danville?

Mr. Dysert: Objected to.

The Court: Objection sustained."

The matter of general permission to Appellant's son to use the car was not in issue; and it did not have any bearing concerning the special matter upon which the alleged agency was based. Nor was it pertinent to the issue of agency involved in this case whether or not the Appellant had any occasion to send his son to Danville that night for the purpose of buying hogs, cattle or livestock; nor was it material whether Appellant's son was on any business that night involving any other transactions than bringing the two guests down to Danville for entertainment. We conclude, therefore that the objections to the questions were properly sustained.

The Appellant also assigns error on the modifications made in some of the instructions requested by him to be given; and on the refusal of certain other instructions. Instruction No. 1 which the Court modi-

fied, is as follows:

"1. The jury are instructed that the burden is upon the plaintiff to prove by the preponderance of all the evidence in the case, that at the time of the accident in question, Oakley Hollingsworth was acting as the agent or servant of his father, and in pursuance of some business or duty of his father. It is not sufficient under the law that the said Oakley Hollingsworth was engaged in some act merely to further his father's interest."

We are of opinion that the instruction was proper ly modified because as presented it restricted the matter of agency



of the son for the father to some matter of business or duty of the father; and eliminated the right of the father to constitute his son agent for the purpose of driving the car in question to effectually accomplish some other purpose or desire of the father, such as the matter involved in this case.

Instruction No. 2, which was modified by the Court, has the same limitation in it; and we think for the same reason that the modification was proper.

We find no error in the Court's refusal of instructions offered by the Appellant. Some of these instructions were objectionable for the same reason hereinbefore stated; and others are misleading in attempting to substitute a false issue for the determination of the jury, namely, whether or not the son was driving the car for his own pleasure. It is apparent, that the son while driving the car as agent of his father, such driving might have been a pleasure to him.

This suit as originally brought was against the Appellant and his son jointly; but during the trial it was dismissed as to the son. The second count in the declaration charged negligence against the Appellant and his son, jointly. It is contended by the Appellant that there is a variance between the second count of the amended declaration and the proof adduced to sustain it. There was no variance; but there was no proof to sustain the charge in the second count of joint negligence; but there was evidence adduced which tended to sustain the charge in the first count, and which the jury must have considered sufficient to sustain the charges in the first count; and this is sufficient to support the verdict returned by the jury.

The record does not disclose any reversible error and the judgment is therefore affirmed.

Affirmed.



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## 268 I.A. 6383

General No. 8634

Agenda No. 13

APRIL TERM, A. D. 1932

HENRY REES, Appellee

vs.

GEORGE SCHNEPP and FRANK L. MARTIN, Partners, doing business under the firm name and style of Illinois Battery and Electric Co.,

Appellants

Appeal from the Circuit Court of Adams County SHURTLEFF, J:

This is a suit brought in Justice Court in Adams County by appellee to recover damages for the injuries to an automobile claimed to have been caused by the negligence of appellant's driver, in suddenly stopping in the highway without giving any signal. There was a trial and judgment in Justice Court for appellee, and appellants appealed the cause to the Circuit Court where a trial de novo was had.

In the Circuit Court appellee recovered a judgment against appellants in the sum of \$116.50 and appellants have appealed the cause to this court.

The errors pointed out by appellants are:

First: That the verdict and judgment are against the manifest weight of the testimony. Appellants offered no proof. We have examined the proofs and the record and we are satisfied that the testimony offered fully supports the verdict and judgment.

**Second.** Appellants assign error upon the court's giving appellee's twelfth instruction, as follows: "The jury are instructed that the motor truck, which was being operated by Alexander Lammers, at the time of the damage to plaintiff's car complained of, is known as a motor vehicle of the second division, and that,



under the laws of this State, it is unlawful to operate such motor vehicle upon any public highway or street, unless it be equipped with a mirror, so attached that it will afford the driver a view of the road behind him; and the jury are further instructed that, if they find from the preponderance of the evidence that the said Alexander Lammers was, at the time of the accident, an employee of said defendants George Schnepp and Frank Martin and acting within the scope of his duty and employment, and, if they further find from the preponderance of the evidence that the failure to have said mirror on said truck was the proximate cause of plaintiff's damage, and that the driver of plaintiff's automobile was exercising due care and caution immediately preceding the accident, then their verdict should be for plaintiff."

In the opinion of this court the instruction stated the law of the case, as applied to the facts proven.

Third: It is assigned as error that the court did not give appellant's twenty-fifth instruction, as follows: "The Court instructs the jury that in the eye of the law a pure accident is a collision which occurs without the fault or neglect of any one, and no damage can be recovered for the damages resulting from such accident. And in this case, if the jury believe from the evidence that the collision between the defendant's car and the automobile in which the plaintiff was riding, was the result of a pure accident, as that term is defined in these instructions, then the defendants cannot be held liable and the jury should find them not guilty."

The principle laid down in this instruction is fully covered by other instructions given.



Finding no error in the record warranting a reversal, the judgment of the Circuit Court of Adams County is affirmed.

Affirmed.



Opinion di ma Catala 177 175

× 268 T.A. 6284

General No. 8645

Agenda No. 20

April Term, A. D. 1932

LOLA F. HINDERT, Appellant,

vs.

W. J. GOREHAM, Appellee.

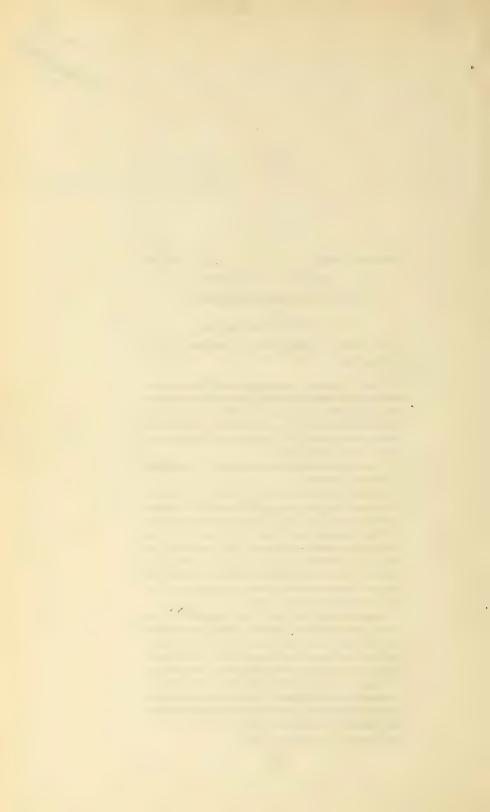
Appeal from the Circuit Court of Vermilion County. SHURTLEFF, J.

This is an appeal from a judgment for defendant, appellant, for costs and in bar of the action in an action on the case for the recovery of damages for personal injuries received by appellant, Lola F. Hindert, against the appellee, W. J. Goreham, in the Circuit Court of Vermilion County.

The statement of the case as made by appellant is about as follows:

At about five o'clock in the afternoon of June 14th last, about four miles south of Crescent City, Illinois, on State Route No. 49, a two-way concrete traffic highway, appellant was riding in the front seat of an automobile owned and driven by the appellant's husband, in a northerly direction on the east side of the center of the highway. Her husband was an experienced driver and they were driving slow at the time, about thirty miles an hour.

Appellee and his family were in appellee's car, coming in a southerly direction toward them and on the west side, and when his car was first discovered the cars were about two hundred fifty feet apart. Appellee's car was on the west side of the center of the highway and appellant's car on the east side of the center of the highway. The attention of appellant and her husband was then attracted to the appellee's car "wiggling" in the road. When the cars were about two hundred feet apart appellee's



car shot over the black line to the east side of the center of the highway, directly in front of the car in which appellant was riding, and to avoid a headon collision appellant's driver then turned his car to the left across the black line in the center so far that the left wheel was off of the pavement on the west side and the car was in a northerly and southerly position when it was struck by the right front wheel and fender and radiator of appellee's car just behind the right front wheel of the car in which appellant was riding, and this was the position whereby appellant received serious and permanent personal injuries, and this was the position of the cars immediately after the accident. Appellant's injuries were not contradicted by any witness.

Appellee states the case about as follows: On June 14, 1931, the appellee, W. J. Goreham, who was principal of the Sidell high school at Sidell, Illinois, was driving his Chevrolet sedan automobile south on Route 49 about four miles south of Crescent City, at a rate of speed of about thirty miles an hour, near the home of a man named Rosalius.

The four and one-half year old son of appellee was on the front seat with him lying down, while the baby, aged seven months was in a basket, in the back seat at the left end of the seat. The wife of appellee was sitting at the right end of the same seat.

Appellee saw the car in which appellant was riding approaching some distance down the road. As he was approaching that particular place where the accident happened he saw two guinea hens on the road, one in the center of the east side of the road eating, and the other on the side on which appellee's car was being driven walking west toward the shoulder.

Appellee took his foot off the accelerator and slowed up, giving the guinea a chance to get off the shoulder. When the guinea hen was about three feet off the shoulder, Appellee



stepped on the accelerator and just at that time the car of appellant's husband cut across in front of his car on the west side of the pavement and the right side of the car in which appellant was riding came into view of the appellee.

There was a collision, and when the appellee came to he was draped over the steering wheel, and he heard his oldest boy calling out and the baby crying. After the accident his wife was unconscious, the youngest boy was thrown from the back over into the front seat and down on top of the older boy. Appellee took his family out of the car and took them over under a tree by the roadside.

There was testimony in the case tending to show that appellee was watching the guinea hens and did not see the Hindert car until the crash came. Other witnesses testified that appellee's car crossed over the black line to the east side of the road and that the Hindert car turned northwest and crossed the black line to the west side of the road, apparently to avoid a head on collision with appellee's car.

The proofs in the case were very close and doubtless on the facts a verdict could have been sustained by either appellant or appellee. There were three counts in the declaration. There are no errors in the giving or refusal of instructions, except appellant assigns error upon the giving of appellee's sixth instruction as follows:

"The court instructs the jury that the plaintiff must prove every material allegation of each count of her declaration by the preponderance of the evidence before she will be entitled to recover under such count and a failure to sustain the burden of proof by plaintiff will require that you find the defendant not guilty."

This instruction does not state the law. It places a much higher degree of proof upon appellant in requiring her to prove



every material allegation of each count of her declaration by a preponderance of the evidence before she will be entitled to recover under "such" count, or as apparently intended "any count," and it leaves it to the jury to determine what are the material allegations in the declaration. This was error. (Krieger v. A., E. & C. R. R. Co., 242 Ill. 544; Baker & Reddick v. Summers, 201 id. 56; Laughlin v. Hopkinson, 292 id. 85; Lerette v. Director General, 306 id. 354; Williams v. Stearns, 256 Ill. App. 433)

In Baker & Reddick v. Summers, supra, the court held on page 56:

"The second instruction told the jury that they should find the issues for the plaintiff if she had established, by a preponderance of the evidence, the material allegations of any of the counts in the amended declaration. There was no instruction telling the jury what the material allegations of the several counts were, and what were the material allegations was a matter of law for the court. Although it is a practice not to be commended for the court to refer the jury to the declaration for the issues, it has not been considered error to make such reference where the instruction requires proof of the averments of the declaration. The proper method is for the court to inform the jury, by the instructions, in a clear and concise manner, as to what material facts must be found to authorize a recovery. The averments in the declaration which would be clear to a lawyer would often be obscure and unintelligible to the average jurymen. (Moshier v. Kitchell, 87 Ill. 18.) Where the jury are not only referred to the declaration to determine the issues, but are instructed to find a verdict for the plaintiff if the material allegations of the declaration are proved, they are left to decide, as a matter of law, what are the material allegations, and might conclude that some allegation essential and material in the law was not material or necessary to be proved to justify a recovery; and such an instruction as this was held to be undoubtedly erroneous in Toledo, St.



Louis and Kansas City Railroad Co. v. Bailey, 145 Ill. 159."

In Toledo, St. Louis and Kansas City Railroad Co. v. Bailey, cited supra, the court held:

"It is insisted that the court erred in giving an instruction, for the plaintiff, to the effect that if the jury found that 'all the material allegations of the declaration' were proved, they should find for the plaintiff, etc. The instruction was undoubtedly erroneous. What were the material allegations of the declaration was a question of law, and it was error to submit to the jury to find what were and were not material allegations. We are of opinion, however, that, in this case, the giving of this instruction could not have prejudiced appellant. Six instructions were given on behalf of appellant, which fully informed the jury what it was necessary to prove to entitle the plaintiff to recover, and without the proof of which no recovery could be had. It is impossible that the jury could have been misled by this instruction, to the prejudice of appellant."

There have been many cases in which this question of permitting the jury to determine what are the material questions in the case has been discussed, and some have been affirmed and some reversed on that issue (Krieger v. A., E. & C. R. R. Co., supra,); but all have held the instruction, as in this case, error. The proof required to establish appellant's case by the terms of this instruction constitutes reversible error.

Appellant further assigns error on statements and conduct of appellee's counsel in his opening statement to the jury and in his offer of proof. On appellee's counsel making his opening statement to the jury the following occurred:

"And, gentlemen, in a short time after this accident Mr. Hindert, the husband of this woman, paid Mr. Goreham \$500.00 in settlement of this case, in settlement of Mrs. Goreham's injuries and the children.



"MR. DYSART: Now, I object to that statement for two reasons. In the first place it isn't true; there isn't a word of truth in it, and in the second place it would be improper if it was.

"THE COURT: Yes, I think that is objectionable. The jury will be instructed to disregard it.

"MR. MANN: Only one thing, I think Mr. Dysart's statement it isn't true—

THE COURT: Let's get rid of all that as far as we can. The jury will not permit themselves to be influenced by the remark."

While appellant's husband, Edwin G. Hindert, was on the witness stand, on cross-examination by appellee's counsel the following colloquy took place:

- Q. After this accident, some time after this accident happened I want to ask you if you didn't—if an agent of your's paid Mr. Goreham the defendant here, \$500.00 for injuries to himself and his automobile and take a release from him for you?
- "A. I did not. I have an insurance company that carries liability but I had no dealings with that company in respect to any settlement.
  - "Q. Didn't they pay money to Mr. Goreham?

"Objection. Sustained.

"A. I didn't know only they wrote me a letter saying that Mr. Goreham had made a claim and that they had made adjustment; that's all that they ever told me.

"MR. DYSART: Move to exclude the testimony.
"THE COURT: Same may be excluded. Defendant excepts."

The conduct of appellee's counsel in this regard was most unprofessional and made only to create prejudice, and may well have been sufficient to have caused the verdict. Anything that the husband of appellant may have done or may not have done could not bind the appellant, and she may have had a cause of



action against her husband as well as appellee's wife; at least his negligence could not be imputed to appellant and the jury were so instructed. For such conduct, verdicts have been set aside and will continue to be set aside. Westbrook v. Chicago & N. W. Ry. Co., 248 Ill. App. 450; Watt v. Iroquois Auto Ins. Underwriters, 256 id. 216; Paulsen v. McAvoy Brewing Co., 220 id. 273; Thomplson v. Andrews, 243 id. 438.) In Bale v. Chicago Junction Ry. Co., 259 Ill. 480, the court said: "All these statements were severally objected to and the objections were sustained by the court. The address was an impassioned appeal to the emotions of the jury, persisted in after repeated objections sustained by the court. Its deliberate purpose was to arouse sympathy and excite prejudice. and this purpose was not defeated by the sustaining of an objection or the withdrawal of one remark to be immediately followed by another of like character. This kind of argument cannot be justified, and if willfully persisted in will justify the reversal of a judgment even though the court has sustained objections to it. It is, of itself, sufficient reason for granting a new trial."

It is not necessary, when counsel have been sufficiently warned, that opposing counsel should have to persistently object; to constitute reversible error; it is only necessary that the court should be satisfied that the jury may have been prejudiced and so found their verdiet, in a proper case.

For the reasons stated, the verdict and judgment of the Circuit Court of Vermilion County is reversed and the cause remanded.

Reversed and remanded.



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268 I.A. 638

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General No. 8651

Agenda No. 26

April Term, A. D.1932

C. S. STOKES, Trustee, etc., Appellee, vs.

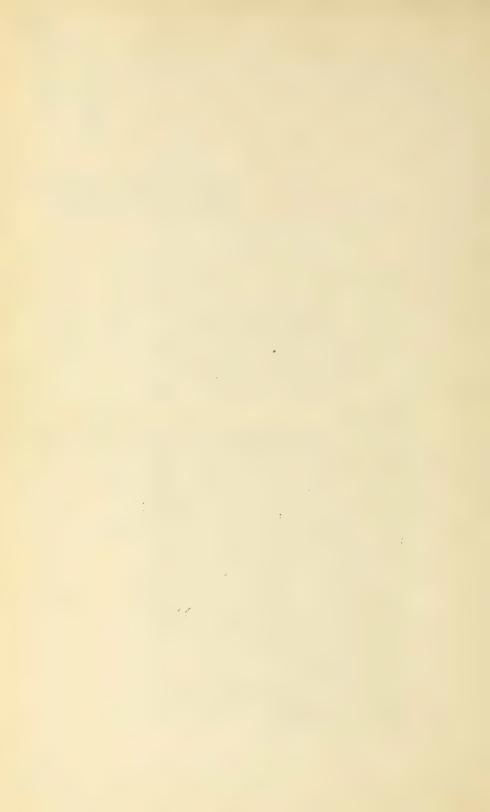
WILLIAM E. JOHNSON, JAMES M. LYLES, Trustee of WILLIAM E. JOHNSON, a Bankrupt, et al., Appellants.

Appeal from the Circuit Court of Christian County SHURTLEFF, J.

This cause involves the right of one C. S. Stokes, trustee, to foreclose a mortgage given to one Ida J. Lemmon, who then claimed to be acting as trustee under the last will and testament of Louis Johnson, by William E. Johnson, on approximately two hundred acres of land located in Christian county and a like number of acres in Montgomery County, Illinois.

The complainant charges in his bill, in substance, that one William E. Johnson executed said mortgage on July 9, 1928, for the sum of \$54,000, while Ida Lemmon was acting as trustee under the last will and testament of Louis Johnson, deceased, which said mortgage was filed for record in Christian County on October 15, 1929, and in Montgomery County, January 28, 1930. The bill further sets forth the provisions of said mortgage and alleges that no part of the principal has been paid and there was a failure to pay interest due July 9, 1929.

The appellant in this case, James M. Lyles, was not one of the original defendants in said cause, said bill having been filed prior to his appointment as trustee of the bankrupt estate



of William E. Johnson, the mortgagor. Afterwards, with the authority of the United States District Court, and with leave of court, he filed his intervening petition and answer to said bill of complaint as trustee in bankruptcy of the estate of William E. Johnson. James M. Lyles, as such trustee, answered, denying the existence of said indebtedness. He further alleges that the lands described in tract I are located in Christian County, and those in Tract II in Montgomery county, and that said mortgage was filed for record in Christian County on October 15, 1929, and in Montgomery County on January 28, 1930; that the recording of the mortgage in Montgomery County was within four months of the filing of petition in bankruptcy; that at the time of the recording of said mortgage the said William E. Johnson was insolvent. Said petition sets forth that said mortgage operated as a preference to said mortgagee under and by virtue of the Bankruptcy Act, and the same was null and void. It is further alleged that at the time the said notes and mortgage were executed the said Ida J. Lemmon was not the duly qualified trustee of the said Louis Johnson estate and the same was not given pursuant to any decree.

It is further asserted that at the time said note and mortgage were executed William E. Johnson and his sister, Ida Lemmon, were insolvent and indebted in a large sum, to wit, \$100,000, and that said parties connived and confederated together and pretended to act as trustee and executors, and delivered said pretended mortgage for the express purpose of defrauding and defeating their own creditors, and of making a gift to said niece and nephew. It is further denied that complainants are entitled to any relief.

Afterwards an amended answer of James M. Lyles was filed



stating that on the 18th day of April, 1930, William E. Johnson was adjudicated a bankrupt and James M. Lyles was duly appointed and qualified as trustee; that he was informed that William E. Johnson made said note and mortgage, but that at the time he was not indebted to Ida Lemmon, trustee; that Ida Lemon, in said transaction, was not acting as trustee under the last will and testament of Louis Johnson; that said mortgage was recorded in Christian County on October 15, 1929, but not in Montgomery County until January 28, 1930, the later date being within the four months of the filing of the petition in bankruptcy. It is further alleged that at the time of the execution of said mortgage the said William E. Johnson was insolvent and that the transfer of property embraced in said mortgage operated as a preference as against the other creditors of the said William E. Johnson and is null and void. Said amended answer further states that said note and mortgage were not given pursuant to the order and direction of the last will and testament of Louis Johnson. It is further asserted that on July 9, 1928, and before, the said Ida Lemmon and William E. Johnson were indebted to the extent of \$100,000 and were insolvent. With this knowledge they connived and federated together and pretended to act as trustees and executors of the estate of Louis Johnson and executed and delivered the pretended note and mortgage set forth in said bill for the express purpose of defrauding and defeating their own creditors and thereby having reasonable cause to believe that the enforcement of the same would constitute and effect a preference in favor of the complainant and the same should be held for naught. It is further alleged that said note and mortgage were made for the purpose of making a gift



to said niece and nephew, and denies complainant is entitled to relief. Replication was filed and answer of infant defendants by guardian ad litem filed. After hearing by the court the relief as prayed for by complainant was decreed and a foreclosure decree on said mortgage was entered. Appellants have brought the record, by appeal, to this court for review.

It appears from the proofs that Louis Johnson, of Morrisonville, died September 8, 1924, at Morrisonville, Illinois, testate. On October 13, 1924, William Johnson, his son, and Ida Lemmon (formerly Ida Johnson), his daughter, were appointed executors. The first provision of said will provided that his debts should be paid; the second, a legacy for \$1,000 to Louise S. Johnson; and the third paragraph, which is of importance here, bequeathed to Ida Johnson, in trust, as trustee, \$25,000 for Josephine Johnson, and the sum of \$25,000 likewise for Albert Edward Johnson, to be paid them on reaching twenty-one years of age. Further provision was made in case of the death of either beneficiary, and the powers of the trustee defined. In said third paragraph the following occurs: "The executors of this, my last will and testament, are hereby authorized and directed to pay over and are nereby authorized and directed to pay over and deliver to said trustee out of my personal estate personal property of the value of fifty thousand (\$50,000) dollars, after the payment of my debts, the costs and expenses of administration and the bequest of one thousand (\$1,000) dollars to Louise S. Johnson, widow of my deceased son, Albert Edward Johnson. In event my personal estate shall not be sufficient therefor, then and in such ages my said abildran. It descents then and in such case my said children, Ida Johnson and William E. Johnson, shall equally contribute, share and share alike, a sufficient amount of personal property to make said trust fund of fifty thousand (\$50,000) dollars upon the trusts above mentioned, to be placed in the hands of said trustee.'

This provision expressly directed the payment of the \$50,000 out of the personal estate of the said Louis Johnson. The fair cash



market value of said personal property at the time of the death of Louis Johnson was found, by the inheritance tax appraiser, to be \$57,383.37. The executors of this will, William E. Johnson and Ida Lemmons, however, did not follow the directions of said will. After the death of their father, Louis Johnson, they apparently converted to their own use said personal property. William E. Johnson was president of the Morrisonville State Bank. The elder Johnson owned 410 shares of said bank. Of this the sister, Ida Lemmon, took 215 shares and the brother the balance. No attempt to qualify the said Ida Lemmon, then Johnson, as trustee under the last will and testament of Louis Johnson was made, nor any provision made to pay the legacy of \$50,000. Finally, nearly four years afterwards, on June 6, 1928, a petition for the appointment of a trustee under the last will and testament of Louis Johnson was filed. The appointment of Ida Lemmon was made by the Circuit Court of Christian County. Bond was fixed at \$60,000. This bond was not filed and approved until August 27, 1928. However, before the qualification of the trustee, on June 9, 1928, a quitclaim deed was made and executed by Ida Lemmon and her husband, George Lemmon, conveying to William E. Johnson two hundred acres of land in Christian County. This deed was not placed of record until July 9, 1928, and when filed for record in the Recorder's office had on it the notation, "Please do not publish." The property embraced in said deed is the same property which was devised Ida Johnson by paragraph four in the last will and testament of Louis Johnson, deceased. On this same day, July 9, 1928, although Ida Lemmon, the appointed but unqualified trustee under the last will and testament of Louis Johnson, deceased,



received, if the date of the same is to be believed, the mortgage which is being questioned in this proceeding. A note for \$54,000, dated July 9, 1928, due five years from date, payable to Ida Lemmon, trustee, was executed. To secure this, it is claimed, at the same time a mortgage was executed by William E. Johnson, which purported to secure said note, on the land which Ida Lemmon had conveyed to him by quitclaim deed June 9, 1928, but not recorded until July 9, 1928, with the notation, "Please do not publish." Embraced also in the same mortgage was two hundred acres of land in Montgomery County, which was bequeathed to said William E. Johnson by paragraph fifth of the last will and testament of Louis Johnson. At the time of the execution of this mortgage to Ida Lemmon she had not qualified as trustee, no inventory had been filed, and, in fact, none was ever filed. Although the quitclaim deed, dated June 9, 1928, was filed for record on July 9, 1928, the mortgage was not filed in Christian County until October 15, 1929, fifteen months afterwards, and not in Montgomery County until January 28, 1930. It is this mortgage that is being questioned here.

The facts further disclose that the estate of Louis Johnson has never been closed, or at the time of these proceedings had not. After the death of the father, Louis Johnson, William E. Johnson and Ida Lemmon, his children, took possession of his property and proceeded in carrying on what the facts apparently show was a joint business. At the time of the execution of this mortgage William E. Johnson and his sister, Ida Lemmon, had become deeply involved financially. According to the testimony of Johnson, at the time of the making of the mortgage he owed to unsecured creditors a total



sum of \$114,846.58. Ida Johnson likewise owed almost a like amount, being approximately \$83,000. It is also clear that many of the debts were joint, showing that each apparently was familiar with the business of the other.

The evidence further shows that at the time of the execution of said mortgage the property held by William E. Johnson and Ida Lemmon did not equal in value their indebtedness, but that even at that time it was a case of hopeless insolvency.

On January 27, 1930, Ida Lemmon resigned as trustee under the last will and testament of Louis Johnson, deceased. The mortgage claimed to be valid in this case had not as yet been filed in Montgomery County. After her resignation and before C. S. Stokes was appointed trustee, and on March 31, 1930, his bond was approved. It was in the interval between the resignation and the appointment of C. S. Stokes that the mortgage became of record in Montgomery County—January 28, 1930.

Following the recording of this mortgage, on January 28, 1930, James M. Lyles secured a judgment against William E. Johnson; on February 5, 1930, the creditors, Joseph Whitehouse and G. W. Hill, did likewise. Then followed judgments on February 6, 1930, by William Gotlob and C. A. Wycoff, and also by many other creditors. On April 18, 1930, both William E. Johnson and Ida J. Lemmon were adjudicated bankrupts in the United States District Court for the Southern District of Illinois. James M. Lyles was appointed trustee of the bankrupt estate of William E. Johnson. He intervened in the present case with the authority of the District Court of the United States for the purpose of protecting the beneficiaries of his trust.



The position of James M. Lyles, appellant, is that the mortgage sought to be foreclosed is tainted with fraud; that William E. Johnson and Ida Lemmon, as executors, did not carry out the provisions of the will of Louis Johnson in transferring to Ida Lemmon this property to secure the legacy provided in the will of Louis Johnson, but sought, rather, to hinder, delay and defraud the general creditors of his trust. Furthermore, that the failure to record this mortgage, and their subsequent adjudication in bankruptcy under the facts surrounding this mortgage, absolutely make the transfer of this property an attempt to create a preference.

We have examined the abstract and record and we are not able to find that Ida J. Lemmon, trustee, ever filed an inventory of the trust estate in the Circuit Court of Christian County and that she did not file her final report, or any report, showing of what the assets of the trust estate consisted, until January 13, 1931, nearly one year after she and William E. Johnson had been adjudicated bankrupts. By the decree of the Circuit Court of Christian County, entered on July 28, 1928, in said trust proceedings, the trustee, Ida J. Lemmon, was "ordered and directed to receive from Ida J. Lemmon and William E. Johnson, individually and as executor and executrix of the last will and testament of Louis Johnson, deceased, the sum of \$25,000, to be held by her in trust for the complainant, Albert Edward Johnson, and the further sum of \$25,000 to be held by her in trust for the complainant, Josephine Johnson, together with interest upon said sums of money from the eighth day of September, 1925, at the rate of five percent per annum, until paid."

And she was further ordered "To keep and invest and reinvest said sums of money in such funds or securities as may be suitable for the investment of trust funds, and to change, vary and



transpose the same, as may be necessary in the conduct of said trust; that the same may be invested in any bonds of the United States of America, or of the State of Illinois, or in notes secured by improved farm lands or city property or other suitable security."

On the face of this case, these funds had already been invested, by mortgage, in the farm lands of the executor and executrix, who held these funds or the personal property, to the amount of \$50,000, out of which the funds should have been made, on July 9, 1928.

It is contended by appellee that the record does not show that William E. Johnson and Ida J. Lemmon were insolvent at the time this transaction took place. The record of this transaction itself shows their joint and individual insolvency. As executor and executrix of Louis Johnson's estate, neither of them have ever paid over, accounted for or executed their father's will, or set over any personal property to the minor children of Albert E. Johnson, as their father's will directed them to do. In June, 1928, Ida J. Lemmon and her husband executed a quit claim deed of two hundred acres of land in Christian County to her brother, William E. Johnson, for no consideration whatever. This deed was acknowledged June 14, 1928, and recorded on July 9, 1928, with the request to the recorder, "Please do not publish." What was the occasion of secrecy about this deed? Under the will of Louis Johnson, the two minor children of Albert Edward Johnson, deceased, were to have \$25,000 each, "out of the personal estate," and were to have "out of my personal estate, personal property of the value of \$50,000." This was a specific legacy of personal property, amounting to \$25,000 each, to the minor children of a deceased son.



It is undisputed that the estate of Louis Johnson, deceased, had personalty to the amount of nearly \$58,000. The legacies to these minor children could be paid only out of personalty. They were not a charge upon the realty: (Simonson v. Hutchinson, 231 Ill. 508; Shuld v. Wilson, 225 id. 336; Wentworth v. Read, 166 id. 139; Reid v. Corrigan, 143 id. 402; and Alderman v. Dystrup, 293 id. 504.) The executor and executrix had dissipated the personalty in their father's estate and were not able to carry out their father's will, in kind, as directed by the terms of the will.

Nothing was shown to the Circuit Court of Christian County why the executrix and executor could not distribute in kind. They could not do that, otherwise, they would have been ordered to follow the terms of the will. On July 28, 1928, by the order of the Circuit Court of Christian County, the executor and executrix were directed to pay over \$50,000 to the trustee, Ida J. Lemmon (one of the debtor trustees), in money, cash, for the benefit of the two minor legatees. Neither the executor nor the executrix has ever complied with the order. Outside of some surplus moneys-interest, about \$3,000-paid over to the guardian, nothing has ever been paid. Nothing has ever been done otherwise upon that order, except that William E. Johnson had promised about a month earlier to pay the sum in five years.

A trustee's promise to pay a trust fund in five years, even if accompanied by his note and mortgage, does not satisfy a court order to pay in cash or funds: (Farmers & Merchants Bank v. Bayer, 259 Ill. App. 31; Scott v. Gilkey, 153 Ill.168; Stone v. Wachovia Bank & Trust Co., 61 A. L. R. 733, and note.)

The above is the rule as to negotiable instruments and



contracts. It is doubly binding as to trusts and court orders. Nothing is shown in the record that the minors or their guardian knew anything about the method of complying with the court order cited in this opinion. No one ever knew just how the executor and executrix had pretended to comply with said court order, until January 30, 1930, when appellee, Stokes, was appointed trustee of said trust in place of Ida J. Lemmon, resigned, but a few weeks or days before the executor and executrix were adjudged bankrupts. Even then Ida J. Lemmon's final report was not filed in the Circuit Court of Christian County until a year later, January 13, 1931. That report is the first, last and only court record or public information as to how the executor and executrix pretended to comply with the court order of July 28, 1928. The conduct of this trust, by the executor and executrix, from the death of Louis Johnson to the bankruptcy of the executor and executrix, both towards the minor legatees and toward their own creditors, has been a constructive and active fraud, and has always received the condemnation of the courts. The rule is laid down in Thorp et al v. Mc-Cullum, et al, 1 Gilman, 625, where the court holds: "Administrators act in a fiduciary character, in the collection of debts, the sale of property, and settlement of estates. The general principle of equity is, that trustees and others sustaining a fiduciary and confidential relation, cannot deal on their own account with the thing, or the persons, falling within that trust, or relationship. The rule is not universal, but general. Whether Sarah McCullum, the administratrix and purchaser, falls within the general rule as to this sale, is the question before us in the case, brought by purchasers from her, but with legal notice of



the defect in the deed, by its being recorded.

The general rule is as I have it laid down, and has been applied to those who are strictly trustees, to assignees, commissioners, and solicitors of bankrupts, executors, administrators, guardians, agents, and officers of the Court, and all others, in whom there is a trust and confidence reposed, which would bring ix conflict, the interest of the trustee, and the cestui que trust."

And in Hannah v. The People, 198 Ill. 87, the court said: "Speaking upon that subject, we said in Central Elevator Co. v. People, supra, (p. 207): 'It is a firmly established rule that where one person occupies a relation in which he owed a duty to another, he shall not place himself in any position which will expose him to the temptation of acting contrary to that duty or bring his interest in conflict with his duty. This rule applies to every person who stands in such a situation that he owes a duty to another and courts of equity have never fettered themselves by defining particular relations to which, alone, it will be applied. They have applied it to agents, partners, guardians, executors administrators, directors and managing officers of corporations, as well as to trustees, but have never fixed or defined its limits. The rule is founded upon the plain consideration that the one charged with duty shall act with regard to the discharge of that duty, and he will not be permitted to expose himself to temptation or be brought into a situation where his personal interests conflict with his duty. Court of equity have never allowed a person occupying such a relation to undertake the service of two whose interests are in conflict, and then endeavor



to see that he does not violate his duty, but forbid such a course of dealing irrespective of his good faith or bad faith.'"

The executor and executrix from the death of their father converted the entire estate and the trust fund to their own use and so far as the personalty and specific legacies were concerned lost it and them. The conveyance of the two hundred acres of land in Christian County by Ida J. Lemmon in July, 1928, to her brother, William E. Johnson, for no consideration, was a conveyance in fraud of her creditors and was accomplished by a concert of action with her brother to carry out an illegal and fraudulent act, both as to the beneficiaries of the trust and as to their creditors. This is shown in the direction to the recorder not to publish the existence of the deed. It is further emphasized by pretending to secure the legacies of the minor legatees, in the sum of \$54,000, on July 9, 1928, by the execution of the note and mortgage by William E. Johnson, when no decree was entered establishing the trust until July 31, 1928, which was ordered entered nunc pro tune, as of June 6, 1928, the date the petition was filed. The entry of the appearances of the executor and executrix, and all the findings and orders in the decree, were entered by consent of the executor, executrix and the guardian of the minor legatees, petitioners. All of the acts of the parties to this proceeding show a concerted action and plan, all working together to bring around a definite result, although there is no proof tending to show that the guardian or the minor legatees had any knowledge as to the convevance and mortgage, executed by and between the executrix and executor. It is further to be noted that Ida J. Lemmon, on her appointment as trustee, had given an ample and sufficient bond in the sum of \$60,000, which for some reason was released

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when she presented her final report on January 12, 1931.

There appears a docket entry of March 31, 1930, of the approval of the bond of the present trustee, but it has not seemed of sufficient importance to place in the record. While it is of much less importance than the bond of the original trustee, Ida J. Lemmon, we cannot see how anyone interested in the minor legatees could have stood by and permitted the bond of Ida J. Lemmon to be cancelled. It is but a sample of the interest that has been shown them in the entire proceedings. Appellee insists that their interests have been guarded; that it was the guardian who forced the proceedings to have the trust estate settled and that the mortgage was executed to a trustee duly appointed by the Circuit Court of Christian County. No such state of facts appear in the record and the trustee to whom the mortgage was executed was not appointed by the court until nearly two months after the mortgage was executed and delivered. Appellee is relying too much on matters entered nunc pro tunc. We find no evidence in this record tending to show that the minor legatees or the guardian had any knowledge of the true state or intent of the transaction, but in fact, the guardian was paid in cash over \$3,000, called "interest money," to lull her into security. The transfer of the lands in Montgomery County, for which the mortgage was not recorded until January 28, 1930, less than four months before the adjudication in bankruptcy, is void as a preference under sub-sections A and B, section 60 of the Bankruptcy Act. It has been held: "A transfer is required to be recorded within the intendment of this section in those cases in which, under the state law, recording is necessary in order to make the transfer valid as against those concerned



in the distribution of the insolvent estate; that is, as against creditors, including those whose petition the trustee is entitled to take by virtue of section 47-a as amended in 1910. Carey v. Donohue, 240 U. S. 430, 36 Am. B. R. 704."

As to the two hundred acres of land in Christian County, for which the mortgage was recorded on October 15, 1929. a different question arises. In June, 1928, William E. Johnson, executor, and Ida J. Lemmon, as executrix, were held and bound to turn over the legacies to Josephine Johnson, \$25,000, and to Albert Edward Johnson, \$25,000, minors, to the said Ida J. Lemmon trustee named in the will, and as directed in the will: "Out of my personal estate, personal property of the value of Fifty Thousand (\$50,000.00) Dollars," and this property came into their hands as executors in 1924. This property they did not have in personal estate, and each of them doubtless scented the danger that if this matter was permitted to run, and they should be confronted with a court order requiring them to pay or turn it over, and their affairs should become such, that they could not make the payment or turn over the property, they and each of them would be guilty of embezzlement, under the provisions of section 216 of Chapter 38, Smith-Hurd's Revised Statutes, 1931; thus, the great activity to get this matter arranged and carried out, according to a plan fully understood and in concert and in accord, by the executrix and executor. They did not have the personal property specifically bequeathed to turn over, or the court would have required them to carry out the terms of the will. The note and mortgage had been executed in June, 1928, requiring the court orders entered later in July, 1928, to be entered nunc pro tune, as of June 6, 1928. The financial



condition of the executrix and executor without doubt was such that they preferred not to submit the security taken for the legatees to the scrutiny of a court; at least, they did not do so until each was adjudicated a bankrupt.

In June, 1929, William E. Johnson defaulted on the interest due on the \$54,000 note. In June, 1928, William E. Johnson was indebted to other persons, unsecured, in addition to the said minor legatees, in a sum greater than \$114,000, and had property other than that mortgaged to the trustee, of the value of \$62,500, placing his own value upon it, including 215 shares of Bank stock in the Bank of Morrisonville, which he valued at one hundred dollars per share, and which became worthless in 1930; the bank closed for liquidation. It is beyond question that in June, 1928, William E. Johnson was hopelessly insolvent. It has been held that where the property has become intermingled with the general property of the trustee, so it can no longer be traced and identified, then the trust is destroyed and the cestui que trust occupies no better postion than that of a general creditor: (26 R. C. L. 1355 Para. 218; The Mutual Accident Association v. Jacobs, 141 Ill. 261.)

It is strenuously insisted in this case, that under the residuary clause in the will these legacies became a lien upon the real estate, which passed by the residuary clause in the will, citing: **Stickel v. Crane**, 189 Ill. 211, and **Williams v. Williams**, 189 id. 500. The difficulty of that holding is that none of the lands involved in this suit passed by the residuary clause in the will, but were specifically devised, one tract to William E. Johnson and the other tract to Ida J. Lemmon, then Johnson.



A great many other questions are argued in the briefs, which we do not consider necessary to pass upon for a conclusion of the merits of the case.

The appellant, James M. Lyles, Trustee in Bankruptcy of the estate of William E. Johnson, represents only the creditors of the estate of William E. Johnson. The creditors of the estate of Ida J. Lemmon, if there are such, are not represented in this suit. The two hundred acres of land in Christian County were specifically devised by Louis Johnson, deceased, by said will, to his daughter, Ida J. Lemmon. She conveyed the lands by quit claim deed in June, 1928, to her brother, William E. Johnson, for the purpose of having the said lands reconveyed to her by mortgage, to secure the legacies of said infant children. The lands were conveyed to William E. Johnson for no consideration, and nothing passed out of the estate of William E. Johnson as a consideration for said lands, and the creditors of William E. Johnson, then and now, are in no manner injured by the transfer. The title of these lands has been placed in a trustee, in an attempt to secure the trust indebtedness held by these two minors. Whether there have been any deficiencies or incorrect proceedings in the attempt to pass the title of these lands from Ida J. Lemmon to the security of the indebtedness of the minors, does not in any manner concern the creditors of William E. Johnson or the trustee of his estate.

It follows, that the decree of the Circuit Court of Christian County as to the lands in Christian County should be and is reversed, and that as to the lands in Montgomery County, the decree should be and is affirmed.

Reversed in part and affirmed in part.

Opinion freed - Ucts 1.

General No. 8589

Agenda No. 7

268 I.A. 63

January Term, A. D. 1932

F. MEYER & BRO. COMPANY, Appellant,

VS.

SAMUEL IDDINGS, Appellee.

Appeal from Logan

Per Curiam:

The Appellant, F. Meyer & Bro. Co., commenced this suit in assumpsit in the Circuit Court of Logan County to recover the sum of \$144.00 from the Appellee, Samuel Iddings, which is the amount alleged to be due the Appellant for installing a furnace in the Post Office Building in Atlanta owned by the Appellee. The amount sued for is the price stipulated by the parties in the written contract for the furnace to be installed in the premises referred to. The contract calls for the installation of a pipeless furnace. There was a jury trial of the case; and the jury returned a verdict finding the issues in favor of the appellee, upon which the Court rendered judgment. This appeal is prosecuted for reversal of the judgment.

The Appellant's counsel, in their brief, make the following statement concerning the subject matter involved in this appeal:

"No involved legal question was presented in the trial of this case. The issue was clean cut and all that was to be determined was a question of fact. Did the Appellee, Iddings, contract to and in fact purchase the furnace installed by Appellant in the building occupied by the Post Office, and was the furnace thus installed such as complied with the terms of the written contract?"

It appears from the evidence, that the furnace installed was a second-hand Montgomery-Ward & Co. Windsor Furnace No. 1020, which had formerly been in use in a home in Peoria. This fact is not denied by Appellant; but Appellant's representative, Charles Spindler, testified with reference to this feature of the case, that the Appellee agreed to accept a used furnace, in the negotiations which were had before the contract was executed. The Appellee in his testimony denied that he had agreed to accept the used furnace which was installed; and that when the furnace was being



installed in the building, the Appellee objected to its installation, because he said it was not the furnace he had bought. He also notified the Appellant of that fact; and demanded the removal of the furnace from the premises, which demand was not complied with.

The question of fact, whether or not the Appellee bought or agreed to accept the used furnace in the negotiations between the parties previous to the execution of the written contract, was submitted to the jury; and the jury passed upon it as a controverted question in the case. As a controverted question of fact, it was the province of the jury to determine it; and they did determine this question against the contention of the Appellant. Upon reviewing the evidence concerning this matter, we cannot say that the jury were not warranted in their finding nor that the finding was manifestly against the weight of the evidence. It must also be pointed out, that verbal negotiations had between the parties previous to the execution of a written contract, merge in the written contract; and that the written contract which is finally entered into by the parties prevails over any previous verbal understanding about the same matter; and that there is nothing in the written contract from which an inference can be drawn that the Appellee bought or agreed to accept a second-hand or used furnace. In this condition of the record, we conclude that the judgment should be affirmed; and the judgment is therefore affirmed.

Affirmed.







