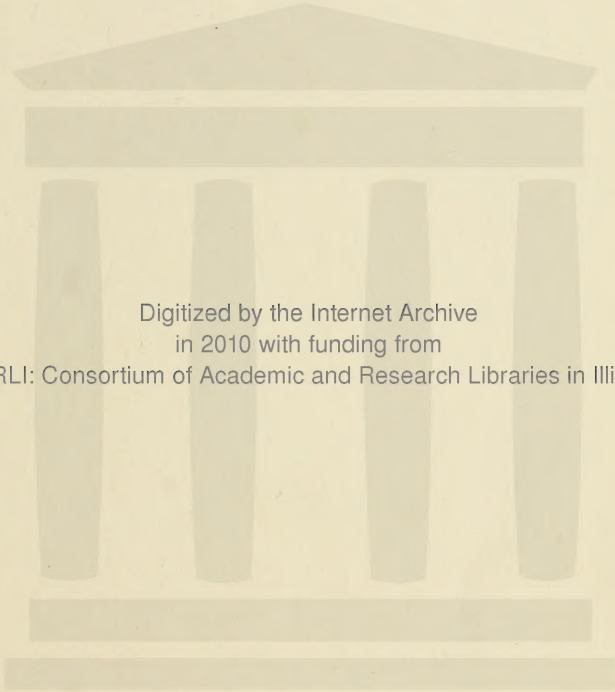

36158

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 verified bill and ordered the appointment of the receiver upon 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 praecipe 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

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

vs.

MORRIS H. GOLDSTEIN et al.,
Appellants.

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 verified bill and ordered the appointment of the receiver upon 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 praecipe for record, and that all they asked the clerk to certify was the bill of complaint, the order appointing the receiver, 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

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.

not more than $30,000; 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 $30,000 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 $30,000 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.

Mednurly, P. J., and Matchett, J., concur.

36209

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

vs.

MORRIS JACOBS and SOPHIE JACOBS, et al.,
Appellants.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

263 I.A. 311

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.

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

vs.

MORRIS JACOBS and SOPHIE JACOBS,
et al.,
Appellants.

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 county security for the amount due. The order then provided for the appointment of the receiver upon giving bond for $2500, and the complainants a bond of $800 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 indebted-

****

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 information 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 creditably informed and verily believes the same to be true." The affidavit is sufficient. Reliance Bank & Trust Co., v. Dalsey, 263 Ill. App. 546; Peterson Co. v. Asphalt Sales Corp., 235 Ill. App. 502; Grace v. Oakland Bldg. Assoc., 166 Ill. 637; In re Keller, 36 Fed. 681; Leigh v. Green, 64 Nebraska, 533; 2 Corpus Juris, 355.

In the Reliance Bank 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 authority for the holding in the Reliance Bank case. We entirely agree with the views expressed in that case. Substantially the same forms of affidavit were held sufficient in the Peterson case, supra. What allegations are positively averred and what are made upon information and belief can be readily ascertained by a mere 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 allega-

property is not worth the amount of the indebtedness. The allega-
presumed on the record to be, there will be a deficiency, so the
bankruptcy, because if the allegations are true, it does need be
in appointing a receiver to collect the rents to apply on the in-
tions are positively made and are sufficient to warrant the court
not at the time reasonably worth more than $40,000. Those allega-
the premises are deteriorating and depreciating in value and are
ance of $33,018 due and unpaid, and it is further alleged that
reading of the bill. In the bill it is alleged that there is a
upon information and belief can be readily ascertained by a mere
ought. What allegations are positively averred and what are made
same force of affidavit were held sufficient in the Peterson case,
thority for the holding in the Feilmore Bank case. We entirely
ment. In that case the cases above cited are discussed at ma-
the same as the affidavit before us, and it was there held suffi-
Feilmore v. Feilmore, 136 Ill. 637; In re Feiler, 36 Fed. 681;
Peterson v. Peterson, 64 Nebraska, 838; 2 Corpus Juris, 388.

In the Feilmore Bank case the affidavit was substantially

and verily believes the same to be true." The affidavit is suffi-
stant. Feilmore Bank v. Trust Co., 7, Circuit, 141 Ill. 401; Bell;
Feilmore Co. v. Reynolds Feilmore Comm., 135 Ill. App. 326; Dixon v.
Portland Cld. Assn., 136 Ill. 637; In re Feiler, 36 Fed. 681;
Feilmore v. Feilmore, 64 Nebraska, 838; 2 Corpus Juris, 388.

In the Feilmore Bank case the affidavit was substantially

and belief, and that as to such matters he is credibly informed
to such matters as are therein stated to be alleged on information
tained therein are true of his own knowledge and belief, except as
Bill and knows the contents thereof, and that the allegations con-

The affidavit is that "he read the foregoing

on the allegations of the bill, which was sworn to only upon belief
making out title, and that such verification is insufficient.
waive it even and should be required because it was based solely
-ment of the court refusing to appoint a receiver. The defendants contend that the order appointing the re-

tions of the bill which are made on information and belief are to the effect that all the bonds secured by the trust deed were sold, and the further allegation is that on information and belief the property subject to the lien of said trust deed is inadequate security.

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 and made a part of the bill, states that the defendants, Morris 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 concur in the conclusion of the court.

Matchett, J., concurs.

36397

CHARLES KARNATZ,
Appellee,

vs.

DORA SAKANOVSKY,
Appellant.

INTERLOCUTORY APPEAL 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 money for the premises; that certain coupon notes were attached to the note; that coupon notes Nos. 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

36397

CHARLES HARRIS,
Appellee,

vs.

DORA SAKANOVSKY,
Appellant.

INTERLOCUTORY APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

283 I.A. 611

MR. JUSTICE HATCHETT 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. Glass, 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 money for the premises; that certain coupon notes were attached to the note; that coupon notes Nos. 1 to 6 representing the interest had been paid but that two interest coupons described as 2-7 and 2-8 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, 2-7 and 2-8, 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

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 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 Sakmotsky and Dora Sakmotsky for the sum of $500 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 instalment of interest due on that date upon the principal note of "the undersigned" for the sum of $20,000, due five years after date. Also attached to the bill is a note of Frank and Dora Sakmotsky dated June 5, 1928, for the sum of $20,000 with interest at six per cent. This note states that the several instalments of interest are further evidenced by ten interest notes or coupons of even date therewith, and that the payment of this note is secured by a trust deed on real estate in Cook county, Illinois, to Louis D. Olane, 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 Sakmotsky, are justly indebted on 30 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. Kohanek, 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 1930 and 1930 amounting to $1500 remain unpaid; that "the premises are improved with a six-flat brick building and that the cash market value of the same is $33,000, and that petitioner fears that unless a receiver is appointed to take possession of said property and to

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

equitable remedy, the security upon real property sit-
uate in another state, the security upon real property sit-
uate [illegible] in question.

On July 22, 1938, an order appointing a receiver was entered by the court. It recites that due notice had been served upon the defendant, 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 vacant and wasted especially for the payment of the indebtedness; that the market value of the premises is $50,000, and that the same had been sold for the 1938 general taxes and not redeemed; that Lewis W. Olsen 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 $2,000 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 $500 each, the petition alleges that he owns $50,000 of the indebtedness.

This court has often held (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 habitually but with caution and only where the court is satisfied that there is immediate danger of loss if it is not exercised. Frank v. Heeney, 201 Ill. App. 318. Certainly, a record such as this, which fails to

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.

Sincerely, T. J. and O'Connor, J., counsel.

Enclosed.

other appointing a receiver. The motive is therefore revealed. of the petition constituting fiction of the bill, namely precisely as and that is the question of the question, and there the existence make who are the parents of the individuals, what is the remedy one

35010

LEROY B. BOYLAN,
Complainant and
Defendant in Error,

v.

ANNA M. BOYLAN,
Defendant and
Plaintiff in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

268 I.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 dismissed 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.

On January 14, 1931, defendant sued out from this court a writ of error to reverse the decree. During 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 demurrer, and on April 29, 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

1910

Claimants in error,

vs.

Defendants in error.

Error to Cook County.

Mr. Justice [illegible]

delivered the opinion of the court:

On October 9, 1907, this cause, for reasons stated in the record, was on July 21, 1911, this court reversed that judgment, and remanded it to the circuit court. To this writ of error is attached a certificate, signed by the clerk of this court, that more than [illegible] days have elapsed since the rendition of said judgment, and that no petition for a rehearing has been filed, nor has any motion been made to set aside said judgment.

On January 24, 1912, defendants move that this writ of error be dismissed, on the ground that plaintiffs in error have failed to file their abstracts and briefs within the time required by the rules of this court. Section [illegible], 1912, provides that when a writ of error is sued out to reverse the judgment of the circuit court in any case at law, which writ of error is not filed in this court within one year from the rendition of the judgment complained of, the writ of error shall be dismissed, unless the plaintiff in error, his agent or attorney, shall have entered into a recognizance with sufficient surety, before the clerk of the court in which the judgment was rendered, conditioned that the writ of error shall be prosecuted with effect within one year from the rendering of the judgment complained of, or that the plaintiff in error shall pay the condemnation money and costs of suit. Section [illegible] provides that the plaintiff in error shall file with the clerk of this court, within one year from the rendition of the judgment complained of, a transcript of the record, and shall cause the same to be docketed for hearing at the next term of this court commencing more than [illegible] days after the filing of the transcript of the record, unless the defendant in error shall consent to a later day for hearing, and that the plaintiff in error shall file his abstract of points relied upon and brief within [illegible] days after the docketing of the cause, and in default thereof the defendant in error may file his abstract of points relied upon and brief within [illegible] days after the default, and the cause shall be docketed for hearing at the next term of this court after the filing of the abstract of points relied upon and brief of the defendant in error, and in default of the plaintiff in error filing his abstract of points relied upon and brief within the time aforesaid, the cause may be docketed by the defendant in error and dismissed for want of prosecution.

"with directions to the superior court to dismiss complainant's bill for want of equity, and to hear evidence anew 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 October 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 compliance with the mandate of the Supreme Court, which has here 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.

36054

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

vs.

WALD & SCHWADE CO., a Corporation,
(Garnishee),
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

27

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 sum of $97. Wald filed a debtor's schedule with the bailiff setting forth that he was the head of a family and living with the same, and claiming exemption. Garnishment proceedings were commenced against the defendant, which answered that it did not have in its possession 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 garnishee. 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 denied.

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 $20 a week for wages or salary of the head of a family residing with the same shall be exempt 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

must be at least twenty-four hours previous to printing suit; such
be served upon the employer and upon the employee, which service
from harassment; that before putting suit a demand in writing must
notary of the kind of a family knowing with the name upon what to exempt
83, sec. 17. This is short provides that $50 a week for wages or
ment proceeding is commenced. Illinois exception (Cahill), exce-
a demand in writing on an employer and the employee before a garnish-
lated the failure of the plaintiff to observe the statute requiring

The petition upon which the defendant based the motion al-
leged the court to vacate the judgment, which motion after hearing
time thereafter and within the term defendant filed its petition and
judgment was entered against plaintiff as follows. Stated a cert
number and name title of the court pleading was for plaintiff and
ete.' In which Ponto Wald had no interest. Plaintiff contested the
that it did not have in its possession and custody, property, moneys,
pany proceedings were commenced against the defendant, with garnish-
Vanity not living with its wife, and thereby summon. Garnish-
ment in the hands of the said, and thereby summon. Garnish-
ment Trade Mark in the sum of $64. Make these a Capital's
accounts with the Pullit Building Loan Ass'n and the Bank of a
$1928.10.

Ten M. Summons for original & Judgment Attachment
Defendant appears from an order denying its motion to
vacate and set aside a prior judgment against it as garnishee in
$1928.10.

Defendant appeals from an order denying its motion to
OBSTRUCTING THE OPINION OF THE COURT.

[illegible]
Appellant.

vs.

ELIZ A SCOTTAI D., a Corporation,
(Garnishee),
Appellee.

FONIS WALD for use of ETZ P. SHOEMAKE.

[illegible]

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 an affidavit from Wald that he was a wage earner and the head of a family consisting of himself, 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. The 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 failure to serve the notices required by the statute renders the judgment against it void and of no effect. In Hunley 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.

should have signed the motion to vacate the judgment.

The question for us to determine is whether the court acted with them.

According to the trial are not before us and we are not concerned trial, we must assume that wages were not involved. But the presence of a writ of execution stating the existence owing upon the judgment that he was attempting to garnishee wages, and that in the would invalidate the judgment, but argues that the record fails to show the existence of the judgment debtor, the failure to follow the statute

Plaintiff contends that it be made to something to garnishee [illegible] Ann. Cas. 1917.

tion under the circumstances. To the same effect is Walker v. [illegible]

judgment against the garnishee void, so the court had to jurisdiction to serve the statutory notice or demand to writing rendered the

Rocky River, etc., 283 Ill. App. 289, it was held that the failure:

judgment against it void and of no effect. In Hawley v. Hamilton

failure to serve notices required by the statute rendered the of his family, as required by statute. Defendant argues that this

case it', nor any writ issued upon such writ filed as any return petition further represented that no demand in writing was served of the service of the garnishee summons upon the defendant. The and three children, and that he was residing with them at the time wage earner and the head of a family consisting of himself, his wife that it had in its possession an affidavit from said that he was a by the garnishee defendant and was a wage earner for services to it; without said demand being served upon the employee until he was [illegible] to answer in said garnishee proceedings; any judgment rendered before it shall be timely to issue a summons or to reinstate the order and time of service endorsed thereon, and the return duly sworn to notice must be filed with the clerk of the court with the summons

The bill of exceptions which is before us 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 in 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.

36079

ROSE GORINDAR and ISRAEL GORINDAR,
Appellants,

vs.

PINCUS SALTZ and MEYER MARKS,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

268 I.A. 612

MR. PRESIDING JUSTICE McSURELY
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 before a jury the issues were found against plaintiffs and judgment accordingly entered. Plaintiffs appeal.

The only question involved is one of fact, namely, Did 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 deposited 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 defendants would waive all their rights in the $2000 deposited, and also to certain bake ovens which defendants had installed in the premises, plaintiffs would release defendants from all obligations under the lease. A contract 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 Gorindar'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.

allest was signed by the parties.

That the agreement was made to release them, and a contract to this
testified that he was present in Scrimmer's office at this time and
of the contract of release, but never did so. Defendant Barre
Scrimmer, who kept it. He also promised to mail defendants a copy
signed by the parties. Defendants' copy of the lease was given to
A contract in writing to this effect was drawn up by Scrimmer and
ville would release defendants from all obligations under the lease.
pare every which defendants had incurred to the premises, plain-
moved all their rights in the ~~$3000~~ deposited, and also to certain
moreover, in which it was agreed that, if the defendants would
pay a conference with plaintiff Lurnal Scrimmer, who is also an
well their business and leasehold saints to certain parties, and
of the defendants, testified that on June 28, 1926, they visited
with plaintiff's the sum of $2000 in cash as security. Both, one
June 28, 1926. Defendants at the time of making the lease deposited

The lease was for a term beginning July 1, 1926, ending
were discharged and released from any liability under the lease
Plaintiff and defendants made an agreement whereby defendants

The only question involved is one of fact, namely, Did plaintiff mutually rescind. Plaintiff appeal.

ture the issues were found against plaintiff and judgment re-
fendants were given leave to defend and upon a trial before a
jurymen to a million issue, to wit: Rescission, or waiver,
plaintiff did judgment enter $2000. Subsequently, on motion,

MEMORANDUM ONE DIVISION OF THE COURT.

MR. BURDICK DELIVER MEMORANDUM.

Appellees.

ALFRED SMITH and RALPH SCRIMMER,

vs.

Appellants.

JOHN CHRISTMAS and [illegible] SCRIMMER,

The evidence shows that the defendants thereupon sold out their business and that other tenants took possession and attorned to the plaintiffs. No 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 Mr. Gorindar had opportunity upon the trial to deny their version of what took place but he did not see fit to do so. He is an attorney, and both he and his lawyer must have appreciated the importance of this testimony, yet let it pass without denial. The jury might properly find that defendants were released from further obligations under the lease in consideration of their waiver of their rights in the $2000 deposited and to the bake ovens which they had placed in the premises.

It is well settled that a landlord may make an agreement with his tenant whereby he releases and discharges him from further obligation on the lease, and that such an agreement is valid and binding. Bloomquist v. Johnson, 107 Ill. App. 154; Brasher v. McCaskrin, 120 Ill. App. 343; Chapman v. Cary, 238 Ill. App. 605; Dills v. Stobie, 81 Ill. 202; Alschuler v. Schiff, 164 Ill. 298; Brehtmann v. Fischer, 216 Ill. 142; Foreman-State T. & S. Bank v. Demeter, 347 Ill. 72.

We see no reason to disagree with the verdict, and the judgment is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

The evidence shows that the defendants thereupon sold out their business and left Memphis. Counsel for plaintiff in error argues that the defendants were guilty of no fraud in the transaction. Counsel for plaintiff contends that the statement of intention to do right thereafter and immediately was fraudulent. There is nothing improbable in their story, and Mr. Gardner had opportunity upon the trial to study their version of what took place and he did not see fit to do so. He is an attorney, and both he and his lawyer must have appreciated the importance of this testimony, yet not in case without doubt. The jury might properly find defendants guilty of their rather of their rights in the [illegible] and to the bona avenu which they had placed in the premises.

It is well settled that a landlord may make an agreement with his tenant whereby he relieves and discharges his [illegible] obligation on the lease, and that one in pursuance is valid and binding. Hammonds v. Johnson, 107 Ill. App. 181; Kramer v. Kalamazoo, 170 Ill. App. 343; Stevens v. Corr, 181 Ill. App. 608; Field v. Tuttle, 14 Ill. 401; Chrysler v. Smith, 144 Ill. App. 91; Brockman v. Pinson, 220 Ill. 148; Kramer-Hamm v. C. R. I. & P. Ry. Co., 247 Ill. 72.

We see no reason to disagree with the verdict, and the judgment is therefore affirmed.

AFFIRMED.

Hatchett and Clapper, JJ., concur.

36088

SECURITIES ACCEPTANCE CORPORATION, an Illinois Corporation,
Appellant,

vs.

STANISLAUS W. BIERNAT,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 612

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

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 contract, executed in duplicate, was for the purchase by defendant of a radio; one copy was delivered to him, 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 printed form, recited that the defendant had bought from "the Phoenix Piano and Radio Company" a certain radio. The name of this company appears about ten times in the contract. Towards the end is a clause purporting 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 company 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 contract

"music rolls" were examined and plaintiff's copy of the contract
chase not only of a radio but of certain "music rolls." The
written. Furthermore, the contract when executed was for the pur-
executed out and in its place the name, "George Kinston" is
of the plaintiff, the name of this company whatever it appears in
an attorney to confess judgment against the defendant.

In the copy retained by the seller and produced on behalf
the contract. Towards the end is a clause purporting to authorize
certain radio. The name of this company appears about ten lines in
lyment had bought from "the Phoenix Piano and Radio Company" a
contract, which was mostly in printed form, recited that the de-
from which by comparison the changes made were clearly shown. The
after it had been executed by the defendant, who purchased his copy,
that the copy of the contract supplied to plaintiff had been changed
to the plaintiff, which present suit. Upon the trial it developed
by defendant of a radio; one copy was delivered to him, the other
was kept by the seller of the radio who subsequently assigned it

The contract, executed in duplicate, was for the purchase
the defendant prevailed.

motion this judgment was set aside and upon a trial on the merits
ment had been entered against defendant for $306.85 on a contract of
plaintiff and it appears from the judgment. Judgment by confession

In an action tried by the court the finding was against the

BY. PRESIDING JUSTICE MCGURN.
SWITZMER THE OPINION OF THE COURT.

Appellee.

vs.

RICHARD F. SCHMAE,

Appellant.

of CHICAGO.

ALTHAT TRUE MUSICAL COURT

356 I.A. 613

although they are in the duplicate kept by defendant.

Plaintiff 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 Piano 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 nowise 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 Ill. 256.

Although the written contract may be void as the basis of a suit, yet there can be a recovery upon 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 purchase a "Philco 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 Philco 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 home 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 Philco radio, taking back the Sparton. Both copies of the contract specify the purchase of a Philco radio, so that there

the contract specify the purchase of a Philco radio, so that there might 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 Philco radio, taking down the Sparton. Both copies of the contract were signed by the parties.

Defendant refused to accept the Sparton radio and insisted that the seller perform the contract by delivering the Philco radio. The seller refused to do so, and the defendant wanted the radio at his home that day, and, as the defendant was unable to procure immediate delivery of the Philco radio, he brought suit to recover the Sparton radio. The seller was unable to produce immediately the Philco radio, as it was in stock but took the defendant to a warehouse room where the defendant selected a Philco radio and agreed that it should be delivered at once. The seller was unable to produce immediately a Philco Combination Radio and Phonograph." The seller did not have this make in stock but took the defendant to a warehouse Defendant called at the store of the seller and desired to purchase a Philco Combination Radio and Phonograph." The seller

Although the written contract may be void on the basis of a [illegible] yet there was [illegible] which does not permit a recovery. tion. [illegible]

[illegible] by changing it into one to which the parties never agreed. Hyatt v. Tanner, 220 Ill. 288.

[illegible] the document is a [illegible] but [illegible] the [illegible] tion is immaterial made, without fraudulent intent, it destroys the effect of recovery. Burdick v. Dunne, 218 Ill. 284. Even if the alteration of the other contracting party, destroys it as a basis [illegible] made with [illegible] out the item of "music rolls". This was a material alteration. By changing the copy of the contract held by the seller by striking

[illegible] the identity of the parties, yet this would not remove the contracting parties might have explained in having for that of the company. Even if the change of the name of one of men and the same as George Bretsten, whose name was substituted to permit plaintiff to show that the Phoenix Phone and Radio Company of the person intended, and completion of the trial counsel's refusal

is no dispute on this point. Although the seller promised to deliver the Philco 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 Philco radio. It was never delivered. As the seller failed to perform its obligation to deliver a Philco 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. Elaborated Ready Roofing Co. v. Hunter, 262 Ill. App. 380; Preisler v. Sulczynski, 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.

36100

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

vs.

PEARLIE ZONCA and PETER ZONCA, Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 612

25

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 Zonca filed no affidavit of merits in the Municipal court and did not testify, although Peter Zonca 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 behalf 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 behalf of Anton, although she admits that

been to any expense on behalf of Anton, although she thinks that Peter had

The plaintiff testified, denying generally that Peter had boarded Anton and took care of him day and night for eight weeks, ten times and to another doctor seventy-four times, and likewise spent to obtain provisions for Anton; that he took him to one doctor care of him. Peter testified that he made many trips to the county on the note for services rendered by Peter and for taking that they loaned Anton Demon bail Peter that he could keep the $200 balance on the note. Two witnesses testified note" and counter the balance cancelled. Peter, "could keep the balance of $200 due to Anton upon said for $6821.82. The only point made by defendants upon this appeal of Anton Demon during his lifetime, entered judgment against them for certain items which Peter Demon testified he expended on behalf Peter Demon testified that he expended money for the medical care and treatment of Anton Demon, and that Anton promised that is that the judgment is against the manifest weight of the evidence.

opened on the 26th day of January, 1933, and the following proceedings were had:

PLAINTIFF, administratrix of the estate of Anton Demon, 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 Demon, upon which $800 had been paid.

Peanzie Demon filed no affidavit of merits in the municipal court and did not testify, although Peter Demon 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 Demon testified he expended on behalf of Anton Demon during his lifetime, entered judgment against them for $6821.82. The only point made by defendants upon this appeal is that the judgment is against the manifest weight of the evidence.

Peter Demon testified that he expended money for the medical care and treatment of Anton Demon, and that Anton promised that they loaned Anton Demon bail Peter that he could keep the $200 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

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

PLAINTIFF, administratrix of the estate of Anton Demon,
Appellee,
vs.
PEANZIE DEMON and PETER DEMON,
Appellants.

MARY NOWOK, Administratrix of
Estate of Anton Demon,
Appellee,
vs.
PEANZIE DEMON and PETER DEMON,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2683 I.A. 013

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.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

not in the form of questions and answers but is a narrative of the testimony.

In the of the opinion that this case calls for the application of the rule that a court of review must rely on the better appreciation of the trial court to pass upon the credibility of the witnesses. The litigation seems to have drawn 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 incorrect. The judgment is therefore affirmed.

AFFIRMED.

Estabrook and O'Connor, JJ., concur.

35932

EUGENE M. HOWELL,
Appellee,

vs.

EDWARD S. BARUC, KAHN I. FOSDICK, THOMAS D. HEED, EDGAR B. BERNHARD, RICHARD J. BERNHARD, JAN. G. VAN BREDA KOLFF, FRANK KLEY, MILTON A. LIPSCHER and WILLIAM J. TILLIER, Copartners Doing Business as CALVIN & COMPANY,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 612

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendants were stockbrokers in the city of Chicago. Plaintiff, who lived and did business in Aurora, Illinois, became their customer on or about June 1, 1929. On or about July 12, 1929, defendants charged plaintiff's account with the sum of $8568.30, 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 demanded said sum but payment has been refused. The affidavit attached to the claim alleges that this $8568.30, with interest thereon from July 12, 1929, is due from defendants to plaintiff.

The affidavit of merits alleges a defense 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

IN THE JUSTICE COURT OF THE COUNTY OF COOK.

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 March 21, 1929, plaintiff instructed the First Illinois Company to sell 200 of these 500 rights at the market price; that the said company likewise instructed defendants, who pursuant thereto sold 200 of these rights at the market price of $35½ 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 the First Illinois Company had not been paid for 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

for

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 cash necessary in addition to said 300 rights to purchase the 120 shares of Anaconda Copper Company stock, and that plaintiff agreed to indemnify defendants if they would, with said 300 rights and said $6,600, purchase for plaintiff 120 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 undisclosed principal of the First Illinois 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 purchase at plaintiff's request 120 shares of Anaconda Copper company stock, 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 Interpane price of the 300 rights, plaintiff would pay defend-
ants $6,000; that defendants in addition to said 300
rights to purchase the 120 shares of Crescent Common stock,
and that plaintiff agreed to indemnify defendants if they would.
pay more than $6,000, which was the cash necessary in addition to said 300
rights and said $6,000, Interpane Inc plaintiff 120
with said 300 rights and said $6,000. Interpane Inc plaintiff
shares of said stock; that in reliance thereupon defendants pur-
chased the stock and delivered it to plaintiff, who accepted and
retained it with full knowledge of how it was acquired; that plain-
tiff offered to pay defendants the cost of the rights if the pay
was not paid by the First Illinois company and exercised rights
made in the same rights.

The affidavit also alleges that upon the failure of the
First Illinois company to pay $6,000 rights, defendants
sought plaintiff's counsel with the Interpane price of the rights
and credited the account of the First Illinois company in a like
amount; that thereupon plaintiff demanded that the company reim-
burse 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 stated that the First Illinois
company had contacted three 300 rights; that he recovered in that
action a judgment for $5000.00; however, that plaintiff was the
unsuccessful principal of the First Illinois company, and that upon
discovery of that fact defendants counsel to plaintiff the cost of
three 300 rights, which defendants had used, together with the
amount of $10,000; that plaintiff paid to defendants, to apply on
the 120 shares of said stock as of the date of Interpane was in
excess of $10,000 in cash, to exclusive of plaintiff's payment 120 shares of
Pinecrest Common stock, which stock had been delivered to
plaintiff and accepted and retained by him; that the market value
of said 120 shares of said stock was $6,000 in excess of
$10,000 in cash, to exclusive of plaintiff's payment 120 shares of
Pinecrest Common stock, which stock had been delivered to
plaintiff and accepted and retained by him; that the market value

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, 1929, 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 did not carry an account with it. It was not the member of any exchange but executed stock and bond orders of customers through other houses. The First

the purchase, only $6,400 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 6, 1931, there was a dispute between the parties as to the account between them and upon that date defendants paid the balance due in the amount of $4903.84, 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 $9368.30 with interest at five per cent from July 12, 1930, to November 12, 1931, amounting to $599.64, making a total sum of $9967.94, 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 6, 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 $4903.84.

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 did not carry an account with it. It was not the member of any exchange but executed stocks [illegible]

Illinois company was a customer of defendants. About March 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.

On the same day this order was given by plaintiff the First 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.

On June 17, 1929, plaintiff went to the office of Colvin & Company where he met its floorman, James Knox. He told Knox that he had 300 Anaconda rights at the First Illinois company, and that the rights were about to expire. He gave Knox directions to purchase 100 shares 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 cash necessary in addition to the rights to pay 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, 1929, Colvin & Company wired its New York office, "Please use 300 Anaconda Rites from our a/c and sub to 120 sh. of stk in our name." Defendants purchased the 120 shares 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 $6,600, 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, 1929, 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 rights from the First Illinois company and that he had in fact paid for them prior to that time. About July 1, 1929, defendants learned that the First Illinois company 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 120 shares, and found it to be $8,800. On the following day plaintiff sent a check to defendants for that amount, which they received and credited to its account. Knox promised to see that the transaction was carried out and turned the order of plaintiff over to defendants' counsel for execution.

On June 17, 1930, Scivia & Company wired its New York office, "Please use 300 Illinois Cities Gas 6's and ask 50 up. or ask in our name." Defendants purchased the 120 shares of Kansas Corporation and three weeks were sufficient thereafter to clear plaintiff. Thereafter defendants received a statement to plaintiff for June, some eight months a check in the sum of $8,800, and on which no change 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 1930, 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 law submitted would indicate that the trial judge believed his testimony) that not until about October 15, 1930, 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 Kansas Copper company stock. Prior to the investigation by what the Kansas Corporation stock was purchased defendants were informed that plaintiff had purchased these 300 rights from the Illinois company and that he had in fact paid for them prior to that time. About July 1, 1930, defendants learned that the first Illinois company was in financial difficulties.

& Company March 12, 1929. July 11, 1929, Colvin & Company credited the First Illinois company with the $6,600 paid by plaintiff June 18, 1929, and also credited the First Illinois company with the further sum 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 appear 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, however, appeared in a statement of account for the month of July, which was submitted to plaintiff August 1, 1929. On June 17, 1929, 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 March 12, 1929.

The testimony for plaintiff is to the effect that this charge 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 name 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

not defend, and a judgment by default was entered in favor of plaintiff and against the First Illinois company in the sum of $8595.30. 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. 840, cited by defendant, as follows:

"As has been seen in another connection, an agent who enters into contractual relations on behalf of an undisclosed principal may be held liable by the person with whom he deals, as 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 hold the undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal is bound by executory simple contracts made by the agent, and by acts done by the agent in relation thereto, within the scope of his authority and in the course of his employment, although the contract purports to be the individual contract of the agent, and although the third person had previously refused to enter into contractual relations with the principal."

That general rule is recognized by the authorities, and the reasons for it are well stated in the case of Thompson v. Davenport, 9 B. & C. 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 transaction of March 12, 1929, the relationship between plaintiff and the First Illinois Company was that of principal and agent. The First

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 contemplation 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 Illinois 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 regarded as an independent deal, and the rule which defendants seek to invoke must therefore be held not to be applicable.

However, 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-

by the plaintiff without discovering his name and payment is subsequently made by the purchaser, the unidentified funds of this case would bring it within exceptions to the rule. One of these is that where a purchaser has been made by an agent upon credit authorized by the principal without disclosing his name and payment is subsequently made by the principal without disclosing his name and payment is subsequently made by the principal, and the agent existed in that transaction, the undisclosed

quently made by the principal to the agent in good faith before the agency is disclosed to the seller, the principal will not be liable. It has been so held by the Appellate court of this state in Kusek v. Allied Packers, Inc., 246 Ill. App. 209, and by the courts of New York in Harder v. Continental Printing & Playing Card Co., 117 N. Y. S. 1001; Knapp v. Simon, 96 N. Y. 284, and Laing v. Butler, 44 N. 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, secs. 461, 462, pp. 1016 and 1017. It would seem that defendants having with full knowledge elected to apply these rights as requested by plaintiff, 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

of one who does not bear to him the relation of agent. Authorities plaintiff is in fault) that a person cannot be liable for the torts committed primarily for which the First Illinois company acted only as agent.

Again, defendants contend (assuming that the action of the Illinois company was not required by plaintiff, and not elected to apply the rights so reserved by plaintiff, see Act 1017. It would seem that defendants Zoning Auth. Local Ords & Rights on the Law of Agency, vol. 1, comp. 481, 482, pp. 1026 and 1027). The use of these rights under such circumstances would seem to an election on their part to hold the First Illinois company rather than plaintiff. See Clark plaintiff had purchased the cars from the First Illinois company and had paid for them in full. The use of these rights under such 300 passenger rights in the purchase of the passenger stock, that incidental evidence defendants were interested before they used the machinery to the facts of this case, since according to the uncontroverted evidence defendants were interested in particularly the elected to hold the stock only. That connection is particularly conception is that the rule is not applicable where the third party cannot be held the agent of the principal." Assuming an agency in the first instance, counsel between the principal and agent is not altered to the detriment of the principal, as follows: "Two qualifications preclude, substantially discovered, may be made liable on such contract; (2) but in general, subject to the qualification that the status of the undisclosed principal, as follows: "Two qualifications preclude,

49 N. Y. Supreme Rep. 144. The exception is stated in 1 Parsons on K. T. B. 1003; Mann v. Nunn, 30 N. Y. 264, and Taylor v. Bullen, 4 Duer v. Allied Packers, Inc., 366 Ill. App. 300, and by the courts of New York in Lerner v. Continental Trucking & Storage Corp., it has been so held by the appellate court of this state in Hagen agency is directed to the seller, the principal will not be liable, country made by the principal to the agent in good faith before the

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 invoked, 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 paid 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 paid only $6,600 with which to purchase the 120 shares of stock; that even if the First Illinois company had paid 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.

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 actually existed, was cured by the finding of the court.

Defendants also contend that Knox, the doorman 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 Anaconda stock plaintiff has waived any breach of the contract by which defendants undertook the purchase of same. We do not understand that plaintiff has sued 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, 1929, cast upon them the imperative duty of giving notice to plaintiff if the rights could not be obtained. They failed to

plaintiff if the rights could not be obtained. They failed to
file their motion to dismiss until June 17, 1938, over three
months after the impressive jury of giving notice to
motion the undisputed evidence showed defendants on June
was in existence for the recovery of money belonging to plaintiff
which defendants admittedly had no right to retain. The affirmative
already evaded, the court found as a matter of fact that the notice
do not understand that plaintiff has seen upon that contract. As
sufficiently to warrant the finding of the court. It
sustained by such information constituted its knowledge of same.
retaining the proceeds which plaintiff has waived any breach of the
to pay defendants for their services in making the purchase for
plaintiff. See 2 Corpus Juris, 550. Defendants were under no
obligation to accept the order of plaintiff to purchase the mer-
chants except under the terms and conditions which were in-
tended at plaintiff, but having undertaken that service and pro-
ceeded 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 demand to retain the statement or claim at any
other period save in question its sufficiency. The fact of mis-
statement in no wise invalidates defendants which was not pleaded, and the
defect, assuming it actually exists, was cured by the finding of
the court.

Defendants also contend that Knox, the foreman of Colvin &
Company, was without authority to make up the securities for plain-
tiff 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, thereby, ratified the terms and condi-
tions in every one made out. There is no basis for such defense
upon this record.

It is contended in the next place that by accepting and
retaining the proceeds which plaintiff has waived any breach of the
contract by such information constituted its knowledge of same. It
do not understand that plaintiff has sued upon that contract. As
already evaded, the court found as a matter of fact that the notice
was in existence for the recovery of money belonging to plaintiff
which defendants admittedly had no right to retain. The affirmative
motion the undisputed evidence showed defendants on June
17, 1938, over three months after the impressive jury of giving notice to
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.

It is also contended that the evidence establishes an 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 Hughes v. Harrell, 167 Ill. App., 100. 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. Pope County State Bank v. U. G. I. Contracting Co., 265 Ill. App. 420.

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 judgment 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; Millhouse v. Kretz, 184 Ill. App. 507; Schwarzschild v. Shapiro, 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 person who is a stranger to it. Kuechle v. Springer, 145 Ill. App. 127; Simpson Brick Co. v.

Lawrence v. Beckwith, 149 Ill. 80, 1.c. 1.4.; Chicago Title &c. Co. v. Chicago &c. Co., 208 Ill. 109, 1.c. 120.

If in this action plaintiff is precluded from maintaining this action upon the theory that the Beckwith et. ux. suit constituted an election to proceed in a manner inconsistent with this action. The Illinois courts plainly is precluded from maintaining this action. Illinois Trust & Savings Bank v. R. R. I. Construction Co., 208 Ill. 109, 1.c. 120.

It is also urged that by pleading a suit against the lien of a deed where a judgment previously existed. Illinois Trust & Savings Bank, 208 Ill. 109, 1.c. 120. Assuming, as plaintiff contends that the pendency of the Beckwith suit was the instrument in writing on ordinary foreclosure. It merely prevented the second judgment creditor from acquiring a lien superior to the Beckwith judgment, but the second creditor was not a party to the Beckwith suit, and was not bound by the decree rendered therein. Lawrence v. Beckwith, 149 Ill. 80, 1.c. 114; Chicago Title &c. Co. v. Chicago &c. Co., 208 Ill. 109, 1.c. 120.

It is also urged that by pleading a suit against the lien of a deed where a judgment previously existed. Illinois Trust & Savings Bank, 208 Ill. 109, 1.c. 120. Assuming, as plaintiff contends that the pendency of the Beckwith suit was the instrument in writing on ordinary foreclosure. It merely prevented the second judgment creditor from acquiring a lien superior to the Beckwith judgment, but the second creditor was not a party to the Beckwith suit, and was not bound by the decree rendered therein. Lawrence v. Beckwith, 149 Ill. 80, 1.c. 114; Chicago Title &c. Co. v. Chicago &c. Co., 208 Ill. 109, 1.c. 120.

Wormley, 61 Ill. App. 460; Nash v. Minnesota Ins. Co., 163 Mass. 574; Mack v. Latta, 178 N. Y. 525.

It is urged that the court erred in that interest was allowed on the debt found due from July 12, 1929, to November 12, 1931. Brennan v. Gallagher, 199 Ill. 207; Totten v. Totten, 294 Ill. 70; (both suits in chancery) are cited. Plaintiff was entitled to interest. Section 2, chapter 74, Smith-Hurd's Ill. Rev. Stats., p. 1754. We hold on the facts as they here appear that defendants on July 12, 1929, received $8568.30 for the use of plaintiff, without plaintiff's knowledge, and that defendants 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.

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

Turnley, 91 Ill. App. 480; Bunn v. Minneapolis Inv. Co., 160 Mass. 594; Bunn v. Lewis, 179 N. Y. 504.

It is urged that the court erred in that interest was allowed on the date from May 15, 1914, to December 14, 1914. Bennett v. Phillips, 247 Ill. 319; Smith v. Lewis, 204 Ill. 70; (both suits in chancery) are cited. Plaintiff was entitled to interest. Section 2, chapter 74, Hurd's 1913. Rev. Stats., p. 1794. To hold on the facts as they here appear that defendants on July 13, 1914, received $5000.00 for the use of plaintiff, without plaintiff's knowledge, and that defendants are unreasonable liable for interest from that date under said section 2.

The record here discloses the attempt on the part of these defendants to tender from their receipts to cover al plaintiff, their successor, the $600 which accrued January and for which he was under no liability.

The judgment of the trial court is just and is in all[illegible] AFFIRMED.

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

36051

LILLIAN DOBER,
Appellee,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

268 I.A. 613

MR. 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 25, 1928, 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 sidewalk thereon, in which there was a coal-hole or other opening with a metal cover located on the west side of said Western avenue, in front of No. 2210; 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 remain out of repair, and the cover to become loose, 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 repaired 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 was in the exercise of ordinary care defendant negligently permitted and allowed the coal-hole to be in a dangerous and unsafe condition, of which it had notice, and as a result thereof, in stepping upon the same plaintiff was then and

Plaintiff sued in case and filed a declaration in two counts.

The first count alleged that on February 27, 1909, 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 sidewalk thereon, in
which there was a coal-hole or chute opening with a metal cover
located on the west side of said Western avenue, in front of
No. 2410; 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 remain out of repair, and the cover to become loose, 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 repaired the same; that plaintiff upon that date while walking upon the sidewalk at this place and in the exercise of ordinary care necessarily and necessarily stepped upon the cover of the coal-hole, and that by reason of the negligence of defendant the cover fell and or broke and plaintiff was injured with great force to and upon the sidewalk, inflicting personal wounds and bruises upon the body and limbs of plaintiff, as a result thereof, in stepping upon the same plaintiff was then and there in a dangerous and unsafe condition, of which it had no ice, and no notice defendant negligently permitted and allowed the coal-hole to be
The second count averred that while plaintiff was in the exercise of ordinary
care for his own safety and was walking upon the sidewalk, lighting pas-
sengers, defendant negligently permitted the coal-hole to be
in a dangerous and unsafe condition, of which it had no ice, and no
notice defendant negligently permitted and allowed the coal-hole to be
a result thereof, in stepping upon the same plaintiff was then and

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 denied and defendant contends that the court erred in refusing the instruction as requested. It is also urged that the court erred in 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 hole. 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 behalf 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 witness Dicharo, janitor of the adjacent building, testified as to the condition of the place where plaintiff was injured. The sidewalk was constructed of stone and rock or cement 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 feet from the curb and was from a foot to a foot and a half in diameter. There was an iron rim around it and a cast iron or steel cover on top of

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 denied and defendant contends that the court erred in refusing the instruction as requested. It is also urged that the court erred in 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-hole. 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 behalf 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 witness Richards, janitor of the adjacent building, testified as to the condition of the place where plaintiff was injured. The sidewalk was constructed of stone and rock or cement 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 feet from the curb and was from a foot to a foot and a half in diameter. There was an iron rim around it and a cast iron or steel cover on top of

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.

On 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."

Majewski, another 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;

put back on it, and that was about the only time I'd ever seen the cover off. Not even evening but one the next day when the cover had been back on up and she felt in." He says that he (it not I) or of the coal-hole itself when I saw her [illegible], I just saw the about two o'clock behind plaintiff, and "I did not notice anything Redjewski, another witness for plaintiff, says that he was after Christmas there about two years before this happened."

"Before every day but never noticed it was broken until I felt in. I a place was broken, but I never noticed it before I felt in. I until he felt into the hole, and, "You can notice by looking that He further said that he never noticed the broken part of the rim Iady. I guess it was about a month, by right I don't remember." was 1888. It might have been just about a week before I saw the He said, "I cannot remember the date. I know it into the hole.

he had that there was anything broken in the rim when he left of the melting ne to the condition of the cast-hole.

re cross-examination Diamond said that the first notice

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."

Mrs. Anna Walker, who was with plaintiff when the accident occurred, says that the cover of the hole was about eighteen inches in diameter, and that she did not notice the coal-hole until after plaintiff had fallen into it; that she then noticed that the cover was lying about half a foot from the hole. She says, "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 chipped 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 told 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

cause there was no evidence in the record on this question and no duty of the city to inspect such coal-holes we do not indicate be-
low in no way notice to the city of such defect. Whether it was the
be said his landlord who caused the adjoining property of the defect,
stopped on the 11th and it stood up and no one the defect, and that
the fact that thirty days before plaintiff was injured the janitor
defect on the 11th appeared only when it was tipped out the hole.
to indicate that it was not in a proper state of repair, and that the
could be observed from the 11d on the coal-hole there was nothing

We think the evidence is to the effect that so far as it
see the coal-hole until she fell into it.

over this street a year before she was injured; that she did not

Plaintiff's testimony is to the effect that she had walked

after the cover was all that she could see that.

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

Mrs. Anna Walker, who was with plaintiff when the accident
were with this never before this happened."
had walked over the street many times and "never noticed anything
and six stove lights were burning opposite the coal-hole; that he
that at the time of the accident there was a light within 75 feet

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 No. 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.

36097

HARDIN-LAVIN COMPANY,
a Corporation,
Appellee,

vs.

CONSTANTINO MELONE,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 613

MR. JUSTICE MATCHETT 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 ex parte 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 elapsed 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.

The petition in substance averred that the suit of plaintiff 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 Municipal 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 promised that he would report the condition of the plant to his employer, the

ex. JUDICIAL EXPENSES INCURRED AFTER CERTIFICATE OF SALE GIVEN.

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 Douglas, 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 whatsoever 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 entered, 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 Erickson, who according to the record was the judge who entered the ex parte judgment. On the same day, namely, February 15, 1932, Judge Erickson 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 Municipal Court act) and that

Appendix.

It was decided that no [illegible] was made to [illegible];

(therefore under section 17 of the Bankruptcy Court Act) and that after the entry of judgment under section 88 of the Practice Act extra of [illegible] might be extracted more than thirty days

It is common in support of the petition that it discloses order denying the passage of the motion.

[illegible] was duly entered by [illegible] was entered the same day, namely, February 24, 1938, Judge Patterson entered an to the record was the Judge who entered the NUNC judgment. In [illegible], it was at once assigned to Judge Atkinson, who according that it was time in substance and in fact. The petition praying [illegible] with a copy of the exception.

ment may be entered nunc pro tunc as of the date of the entry of the order to the existence of the judgment until he was served not been notified in the same for the reason that he had no knowledge thereof for the plaintiff in this case," see"; that defendant had what is described as "the judgment and execution" instead of the 6, 1938, and that only then did defendant become acquainted with tained, an execution issued which was served on defendant on February ment on January 26, 1938, fifty-two days after judgment was entered brarian meeting and the finding of Judge Bonyhay." Further, it is dentiary hearing the Court with the facts in the case, as disclosed by the days to the defendant and his attorney, and, evidently, without ceased in obtaining an NUNC judgment without any notice whatsoever the case set for trial, and on the 6th day of December, 1937, one- ceeded upon the default of his attorney, in a Masterless way, and cause for exceptions motions made, without notice what- interest of impairing the defendant of his rights and in the evidentiary hearing and with the evidence that, on the contrary, "plaintiff immediately] first order entered according to the finding of Judge Bonyhay, but have the cause restored to the only for the purpose of having a open no notice was ever served upon defendant or his attorney to

It was decided that no [illegible] was made to [illegible];

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 Erickson 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 Men'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. Carroll v. Hastings, 259 Ill. App. 564.

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. Chapman v. North American Ins. Co., 292 Ill. 179.

The judgment of the trial court is affirmed.

AFFIRMED.

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

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 [illegible] 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 10, 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 action of the Municipal court with reference to the time when the trial of this case or causes like it would be held. The authorities hold that a petition of this kind must aver facts showing reasonable diligence. [illegible] v. Ill. Cent. R. Co., [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. App. [illegible], 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. Cottrell v. Hastings, [illegible] Ill. App. [illegible].

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. [illegible] v. North American Ins. Co., [illegible] Ill. [illegible].

The judgment of the trial court is affirmed.

AFFIRMED.

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

36109

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

vs.

UNION BANK OF CHICAGO,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

268 I.A. 613

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In the Municipal court plaintiffs brought an action which they described as in assumpsit and which apparently was for the purpose of recovering money paid 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 contract, defendant as vendor 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 Southeast quarter of the Southeast quarter of Section 1, Township 36 North, Range 14 East 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,

vs.

to the damage of plaintiffs in the sum of $2560.

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 Emil A. Peterson for the sale 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 denied that the contract of January 10, 1925, was the true contract between the parties. Defendant averred that the $575 was not paid at the time of the execution of the contract, and stated that on January 10, 1925, Emil 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 amounting 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 refusing 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

to the degree of probability in the end of 1940.

The difficult of working decked the execution of the agree-
ment as described in the second amended statement, but averred that
on January 20, 1939, defendant entered into a contract with Hall
V. Peterson for the sale of the real estate described; that plain-
tiff Mabel F. Peterson was not a party to that contract; that, how-
ever, on March 24, 1939, defendant entered into a new contract with
plaintiffs that it and F. Peterson, which contract
was dated January 20, 1939, although it was actually executed March
24, 1939; that this contract of March 24th was the same as that of
January 20th except that the late were described as in a "consoli-
dation" instead of "subdivision." Therefore, defendant denied that
the contract of January 20, 1939, was the true contract between the
parties. Defendant averred that the $875 was not paid at the time
of the execution of the contract, and stated that on January 20,
1939, Hall V. Peterson executed to Peterson a preliminary agree-
ment attached by Hall F. Peterson and F. Frank Peterson which ex-
pressed payment at said time.

The difficult complied that pursuant thereto
under the contract amounted to $1135; denied the receipt of other
items, except the sum of $2.40 which defendant paid to the county
treasurer of Cook county for taxes as stated by plaintiff;
averred that plaintiff had failed to pay certain taxes and assess-
ments in interest in the material the that Peterson was insolvent
and denied to payment of same. The difficult of
mentis stated that plaintiff failed and refused to carry out the
terms of the contract by failing and refusing to pay the Peterson
due for that defendant was delivering in performing any of
Peterson; denied that had made a sufficient tender of the
deed mentioned; denied that defendant refused to
agreement due to plaintiff's failure to pay the Peterson
$875 and interest; denied that defendant was insolvent
under the contract amounted to $1135; denied the receipt of other
items, except the sum of $2.40 which defendant paid to the county
treasurer of Cook county for taxes as stated by plaintiff;
averred that plaintiff had failed to pay certain taxes and assess-
ments in interest in the material the that Peterson was insolvent
and denied to payment of same. The difficult of
mentis stated that plaintiff failed and refused to carry out the
terms of the contract by failing and refusing to pay the Peterson
due for that defendant was delivering in performing any of
Peterson; denied that had made a sufficient tender of the
deed mentioned; denied that defendant refused to
agreement due to plaintiff's failure to pay the Peterson

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 motions for a new trial and in arrest, entered judgment. When the jury had been sworn to try the issues defendant requested that the jury be excluded while 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 allege or designate defendant to be a corporation, did not allege a cause of action, showed no damages and disclosed a suit for specific performance; that the statement of claim alleged a tender not in conformity with the terms of the contract and did not aver that the contract was repudiated 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 estate 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 denied. At the close of all the evidence defendant made a motion for an instructed verdict 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

amended statement. . . . . .

The issues were submitted to a jury which returned a verdict for plaintiff in the sum of $[illegible], upon which the court, over-ruling motions for a new trial and in arrest, entered judgment. When the jury had been sworn to try the issues defendant requested a ruling that its jury be examined while 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 contract, and not the Union Bank of Chicago; that the statement of claim did not allege or designate defendant to be a corporation; it did not allege a cause of action, showed no damage and disclosed a suit for specific performance; that the statement of claim alleged a tender not in accordance with the terms of the contract and did not show that the plaintiff was prejudiced by [illegible]. Although [illegible] to be between plaintiff and the Union Bank of Chicago, the defendant, assuming the amount claimed to be due under the contract, tendered a good draft on its face expecting to have been executed on November 10, 1911, by the "Union Bank of Chicago, Trustee," under trust agreement known as No. 348, to bind the trust estate and not individually," by its vice-president and [illegible] secretary, and which remained into [illegible] in favor of "In the [illegible] at issue" [illegible]. The [illegible] made a motion for an instructed verdict in its favor, which was also denied.

It is urged in the first place that the court erred in refusing to direct a verdict for defendant on the ground that the evidence showed that all the dealings of plaintiff were with defendant in trustee and not individually. This motion was made at the close of all the evidence. [illegible] and the motion denied. At the close of the evidence defendant [illegible] evidence showing that the contract and [illegible] dealings with plaintiff were

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. Hayes, 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 corporation 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 personally 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.

Defendant further contends that the instruction should have 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 Mrs. Peterson, Mrs. Krick and Mr. 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

for about five minutes, when he came back and asked Plaintiff to
for that amount; that Traveller took the check and left the room
where Traveller met Gore Nix the contract taker with a check
Peterson, Mrs. Brick and Mr. Ives, Peterson went back to
interest was $758.46; that on January 11th to company with Mrs.
become due on the contract on January 10, 1923, and which he was
be secured from this affiant a statement of the amount which would
where he saw a junior trust officer whose name was Traveller; that
prior to January 10, 1923. The evidence for Plaintiff is to the effect that Plaintiff Peterson
tender of the balance due under the contract of January 10, 1923.
evidence tends to show that plaintiff had made a legal and proper
time given for the tender, to it claims, that the aforestated
effecting of deposit.

Defendant further contends that the Injunction should have
been dissolved and the bill dismissed because of the failure of
the contract made executed between the parties was the personal
obligation of Plaintiff, and not a director as may be seen
within his authority.

Following these decisions we hold that the obligation created by
a director and for which he is acting. A trustee is personally
bound by deeds with them in the regard of the company of which he is
a director does not free him from the performance of the trust estate. A
director does not incur obligations of the trust estate. A
obligation to purchase, unless only to an equitable
estate and only when it is performed, unless only to an equitable
title. Ops.", 88, and by the Supreme Court of the State in Insurance-
Heinz v. Nelson, 338 Ill. 231. In this last named case the Supreme
court said:

"A trustee is the holder of the legal title of the trust

initial a correction on the original contract, by which the word "subdivision" 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.

Mrs. Kreik testified that she was present at the time and 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 wanted 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 desk; 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 Nardi's handwriting in which the words "a resubdivision of" are

cerning a misnomer on the original contract, by which the word "modification" would be changed to "recapitulation." Plaintiff Corporation could then be would have to execute the waiver of counsel; and therewith with that was all he would be and landed back by mistrust and lot unsay.

Mrs. Kreik testified that she was present at the time and that the officer of defendant bank came back and said, "We can't find the property that contract calls 'in,' and that be holding back the check and said, "We would like you to sign a new contract, and it is only a matter of two letters, 'Recapitulation' instead of 'Modification.'" Mrs. Kreik also that Plaintiff said, "I can't find my copies for the contract." Mrs. Peterson said that he had right by. Peterson had the check in six months that the attorney had once tried for the check in a twelve week the contract, while Mrs. Peterson testified that Mr. and Mrs. Peterson came to his office with their attorney, and that the attorney said that he had a deed to read two sums and the contract (leasehold) to be executed, "I will give you a deed for the property you surrendered--" that the attorney then walked away from the bank; that Mr. and Mrs. Peterson went all with him, and that was the last client Plaintiff saw.

An employee of defendant bank, Victor R. Kraft, produced a contract between the same parties and of the same date as the contract upon which plaintiff's suit. This writing has a memorandum in Kraft's handwriting in which the words "a recapitulation of," was

written into the description of the property to be conveyed, and Nardi testified that this notation was made in the presence of plaintiff, Mr. Peterson. When called in rebuttal Mr. Peterson denied that any such notation was made in his presence and testified that he had never seen the witness Nardi 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 plaintiffs 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 plaintiffs 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 uncontradicted evidence shows that the first payment of $575 was made to Croissant, 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

written into the description of the property to be conveyed, and heard testified that this notation was made in the presence of plaintiff, Mr. Peterson. When called to testify Mr. Peterson denied that any such notation was made in his presence and testified that he had never seen the witness Heard until he appeared on the trial. The agreement produced is in evidence as defendant's exhibit 4. The evidence for plaintiff tended to show that the late description in the contract were not conveyed by the deed executed 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 decided in favor of plaintiff's by the verdict. It is true that the vendor was not made in money but by check, but the record shows that other payments had been made to defendant by plaintiff 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. Cattlebank v. Cowan, 11 Cal. 174; Brodie v. Barker, 14 Cal. 125.

Defendant contends that the verdict of the jury is not sustained by the evidence. It is true that the uncontradicted evidence shows that the first payment of $375 was made to Crosby, 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 plaintiff's direct to defendant amounting to $1150. This would make a total amount paid to defendant under the contract of $2730.

assessments 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.

Plaintiffs 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 judgment 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 remittitur 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.

AFFIRMED UPON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

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

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

MEMORANDUM UPON MOTION FOR REHEARING; OTHERWISE
REVERSED AND REMANDED.

otherwise it will be reversed and the cause remanded.

If the plaintiff's will within ten days remit from the judgment recovered the amount of $73.87, the judgment will be affirmed;

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.

upon the motion for a new trial a remittitur of the difference between the amount of the judgment, $2,000, and $1926.48, namely, $73.52, should have been required.

tled under the evidence to recover $1926.48 but no more, and of information in the pleadings. We think plaintiff's entitled to recover the sum of money paid and that was the issue that issue. We will not reverse the judgment and remand because tried and submitted to the jury. The verdict of the jury can be explained only on the theory that they found for plaintiff's on contract, but the affidavit of merits denies that plaintiff's are is not a medical pleading. It does not avoid the rescission of the there is no proof in the record of any such item. The statement of claim tled 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

Plaintiff's contend that the verdict for $2000 can be justified upon the theory that they are entitled to recover interest on account of the contract by plaintiff's was $1926.48, amounting to $1926.48. The total amount therefore paid under and pursuant to which under the contract they were obligated to pay

35901

VERNE W. FUGATE,
Appellee,

vs.

TOLEDO, PEORIA & WESTERN RAILROAD, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

268 I.A. 613

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

Plaintiff brought suit against the defendant to recover damages for personal injuries claimed to have been sustained by him through the alleged failure of the defendant Railroad 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' Liability act (Sec. 54, chap. 2, title 45 U. 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."

Supra

ANNIE M. WYATT,

Appellee,

vs.

ROBERT, CHARLIE & COMPANY

Employer,

NATIONAL, a Corporation,

Employer.

COUNTY JUDGE MUNICIPAL COURT

OF COOK COUNTY.

268 I.A. 613

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

Plaintiff brought suit against the defendant to recover damages for personal injuries claimed to have been sustained by him through the alleged failure of the defendant Railroad properly 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 $25,000, and the defendant appeals.

Plaintiff's theory is that his description differs 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 doctrine of contributory negligence and assumed risk were not available to the defendant because Sec. 54 of the Federal Employers' Liability Act (Sec. 54, comp. S. 1911, c. 3. U. S., 45) provides that where one is injured when employed 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."

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 locomotive engineer, having then had many years of experience; that about ten o'clock on the morning of that day he was transporting a freight train from LaHarpe, Illinois, to Peoria, Illinois, a distance of about 86 miles, stopping and picking up freight at several stations en route; that shortly before reaching Bushnell, which is 24 miles east of LaHarpe, 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 2½ 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 jaws; 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 bolt 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.

up to contact with the lower edge of the binder.

The raising or lowering of the wedge and the nuts are then screwed a wrench, and the bolt may be adjusted up and down, which causes the nuts and bar a square end at the bottom to wide. may be applied binder are two nuts; the bolt extends a considerable distance below brace, known as the binder, which is also threaded; between the cause as the "wedge bolt," its only mission here (wrong & general the wedge is a slot into which like the head of a threaded bolt cause it to lift snugly against the pedestal jaws; at the bottom of pon and the pedestal frame and then flanged on each side of it that of a shock absorber of an automobile; it like between the driving the top; that the purpose of the wedge is somewhat similar to that 2½ inches thick at the bottom and about 3\4 of an inch thick at long, inserted perpendicularly in the locomotive, and see about right main wedge. The wedge was a piece of iron about 17 inches motion a "pounding" of the locomotive which he assumed was in the reading Dunmell, which is 24 miles east of Palmyra, plaintiff pleting an Freight at several stations en route; that shortly before Paris, Illinois, a distance of about 30 miles, coupling and that he was transporting a freight train from Decatur, Illinois, many pieces of equipment; that about ten o'clock on the morning of employed by the defendant as a locomotive engineer, having then had

The record discloses that on May 13, 1930, plaintiff was tion by the defendant of the Federal Boiler Inspection Act.

rink and that the injury was not the proximate result of any violastill was injured at the time and place claimed, he removed the he was injured, was engaged in interstate commerce; that if plaintiff not; that there was no competent proof that plaintiff, at the time of action alleged or proven under the Federal Boiler Inspection plaintiff was not injured as he claims; that there was no cause

On the other side the defendant's theory was and is that

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 1/64 of an inch play. When the wedge wears at the top it is adjusted upward by turning the bolt and then tightening up the nuts 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 hammer instead of using a monkeywrench and he felt something 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 fireman examined 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 off 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 specialist 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 plaintiff called on Dr. Thomas at his office, complainant said there had been

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

be," but in the end as one of the case it will be unnecessary
Plaintiff was examined as to the condition of Griffith's right
eye, and testified that the doctor continued to treat Griffith's
eyes.

Plaintiff did not claim that the doctor was negligent in
the way he treated the eye. He claims that the doctor
should have discovered a detachment on the right eye which
Dr. Jimmie removed some small particles of steel from Griffith's
eye and discovered a detachment already on the right eye which
he advised Griffith ought to be removed; that in October of that
year Griffith again called on Dr. Simmie, who operated on the right
eye by removing the detachment; that the operation was successful
but 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 30 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\40" which was the
same condition the doctor found in the fall of 1932.

The fireman of the train on May 18, 1933, testified and
denied that Plaintiff had made any complaint at Mansfield or any
other place that connecting pad struck him in the eye, and further
that Plaintiff had made no complaint about his eye. The other wom-
pers of the crew, the head and rear brakemen and the conductor, also
testified that they heard nothing on May 18th of any complaint by
Plaintiff that the pad had struck him in the eye.

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 main wedges;" that on the following morning, May 16th, the workmen employed at the Peoria shops 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 bolt, 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 counsel for defendant, we think it was a part of plaintiff's duty when he claimed to have heard the pounding in the locomotive, to endeavor 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 locomotive. We think it would be unreasonable and impracticable that plaintiff should have reported the trouble and obtained another locomotive, as counsel for the defendant argues he might have done.

have done.

another locomotive, an account for the defendant wishes to point
ought that plaintiff should transfer the trouble and obtained
on the locomotive. He knew it would be unreasonable and improper
by the fact that a workperson, former and others were carried
wedge by slipping up the hole and nuts. This is known in work
heard the pounding in the locomotive, to measure to recognize its
think it was a part of plaintiff's duty when he claimed to have

Contrary to the contention of counsel for defendant, we
rely on.

further evidence in the record under no claims it unnecessary to
other than this, and additional record is irrelev. There is
plaintiff claims he was injured, and not been in conditions was
and wedge were the same since that were in May 25, 1920, when
on the Clinton Pa the testimony went the jog," time the self, this
the tip of the wedge was not shown all but that it was stating
support of defective engine. But the testimony tended to that
was less positive only was not relative that my right was made on
it is the case, this, substantial is the credibility of the witness
are below us. The judge was disposed at this time by hearing
in the write and this, it whether that, we the note and this
found that it was at the ground that there was some defect
Clair is Clinton receipt that on January 8, 1920, when the
sufficient testimony that plaintiff was doing, a claim against it
and the defendant impressed the right main wedge bolt and nuts and
nuring; Jay 1920, the engine employed at the Twelve House of
Inter alia, "and my right main wedge;" that on the following
arrived at Duerts on the evening of May 19th, wherein he said,
face that, pursuant to a written report made by plaintiff when he
signed their employ. Upon is further evidence in the of.

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 locomotive unnecessarily perilous 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 position 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

Plaintiff testified: "The purpose of the right main wedge contends, it would not render the operation of the locomotive unnecessarily dangerous to life or limb.

We think all the evidence, viewed smartmatchly to the plaintiff, above that even if the wedge were broken and down, as plaintiff verdict had the jury been properly instructed on this point. But verdict was for the plaintiff, this defect would be cured by the of the locomotive unnecessarily perilous to life and limb, and the tion and condition of the wedge was such as to render the operation failure from which the jury might reasonably infer that the negligence plaintiff filed the General issue and went to trial, if there was damaged to there might be some merit in the contention; but since defect in the wedge rendered the operation of the locomotive unnecessarily perilous to life or limb. If the declaration had been framed upon the theory that there was no allegation, nor were any of the contention is that there was no allegation, nor were any necessary part to life or limb," etc. And the argument in support to operate; that the same may be used by the carrier "without unbinder." Title 45, U. S. C. A., par. 23, p. 70 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 but was loose and permitted to play, and was resting down upon the broken all thereof, the said wedge was not in its proper position the top of said liner and wedge, to-wit, three inches thereof, was stantive 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 declaration alleges that the wedge, after describing it, "was found with the violation of the Federal Boiler Inspection act. time, which were in one count, were immaterial so change the de-

The defendant contends that the allegations of the declara-

is to take up the lost 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 pound and that pound becomes offensive to the sensitive ear. 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 derailment 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.

A careful consideration of all the evidence in the record, 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 screwed 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.

sionaire.

She pressing of the wedge, if it did [illegible] did not change the fact that the wedge would be in proper adjustment so that it [illegible] done the wedge would be in proper adjustment so that could then be tightened up against the inner side of the binder. The same condition as shown, it had not been proven, and the wedge [illegible] reason that the nut might be screwed up a sufficient distance so that the nut of the wedge that remained would be in [illegible] unit in operation, there would be no liability in this case [illegible] the wedge were pushed all, as pictured previously, and when using [illegible] that even if we assumed that two or three inches of the top end of [illegible] the last time the wedge was down. In the instance of the opinion [illegible] sion that there was no unnecessary duty in file or jimp occasioned when viewed most favorably to the plaintiff, tends to the conclusion [illegible] resulting from a wedge being down.

A careful consideration of all the evidence in the record, found-none [illegible] both testified they never knew of an accident [illegible] caused, or eliminated [illegible] engineer, and Eriksen, [illegible] amount to operate that locomotive with the wedge down." The witness [illegible] also [illegible] that he believed that it was [illegible] of a [illegible] wedge. [illegible] I personally know that Isaacsian was [illegible] dangered by file or jimp. I personally know that Isaacsian was [illegible] of a [illegible] wedge. [illegible] I assisted that the wedge point down [illegible] I made [illegible] of one instance where there was a [illegible] between [illegible] more there is danger in operating an engine with the wedge down. [illegible] ition in that condition [illegible] same dimension. Other than the [illegible] engine [illegible] knew the wedge first down on the binder and have operated [illegible] for time to. I have driving my engineer or my engineer operating [illegible] that case set certain engineer [illegible] with the wedge down in the [illegible] same set [illegible] operate [illegible] engineer or in the ensemble car. I [illegible] factory nut that would operate efficiently with the wedge down [illegible] engine. It was the wedge in nut operate efficiently adjusted it will cause a little greater. It [illegible] adjusted the engine may ride a little greater. It [illegible] adjusted the engine will ride in the cab on the first notice on the driver [illegible] on the wedge will

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. & Ohio R.R. Co. v. Kuhn, 284 U. S. 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. Mirich v. Forschner Contracting Co., 312 Ill., 343; Bourniaue v. Drake, 236 Ill. App. 75; Collins v. Kurth, 247 Ill. App. 156.

JUDGMENT REVERSED WITH A FINDING OF FACTS.

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

Respectfully, &c., &c., and Gentlemen, &c., counsel.

DOCUMENT REFUSED WHEN A PERSON OF MAJOR.

35901 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.

JESSUP ... LINCOLN DE LACEY.

We find as a fact that the evidence fails to show such
allegation of the indictment of the General Relief Ordinance that
was in existence when he was first elected to said Board
Section 20 that failure to so comply constituted
disorderly conduct, and therefore, that disorderly conduct like if
could be inferred as the matter.

35947

DAISY RINCK,
Appellee,

vs.

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

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

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 her 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 remittitur 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 October 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 contends 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

35647

SALLY KLINE,
Appellee,

vs.

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

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

265 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 her 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 remittitur 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 October 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 contends 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

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 H. E. 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' testimony 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 pea 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 contends 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

pass or bar, slipped and was injured.

On the other hand, the evidence of Gutenkunst's manager

floor when sh.

The defendant called A. M. Cronen, a witness, who testified that she in defendant's store and just was floor in the place in question was except by one of defendant's employes, and the moment of delendant is that this sweeping took place prior in the time plaintiff was injured, but a careful examination of this witness' testimony fails to disclose whether he was in the store before or after the plaintiff was injured, although the examination of the manager to the effect that Cronen was there prior to and at the time plaintiff left. However 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 [illegible] of opinion that plaintiff was guilty of any contributory negligence in failing to discover the pan, or other substance on the floor which proximately contributed to her injury, considered most favorable to the defendant, was a question of fact for the jury. The jury does not require that one going into a store to purchase, 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 testimony tends that the instant is established of the plaintiff after she was injured were not the result of the existing because there must of the witness com-

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, contrary 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 himself that part of this was for services he rendered plaintiff for ailments 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.

36029

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

vs.

THOMAS HIRSCH and M. HIRSCH,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

268 I.A. 614

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

Plaintiff brought an action of trover against the defendants to recover the value of a hut, fence, automobile accessories 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 basis 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 judgment 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 hut 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, 1935, plaintiff again rented the property for a period from April 1, 1935. The written lease is in evidence and is signed by defendant Michael Hirsch and plaintiff. Defendant Thomas Hirsch 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.

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

vs.

THOMAS KIRSCH and M. KIRSCH, Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

268 I.A. 614

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

Plaintiff brought an action of trover against the defendants to recover the value of a hut, fence, automobile accessories 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 basis 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 judgment 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 hut 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, 1931, plaintiff again rented the property for a period from April 1, 1931. The written lease is in evidence and is signed by defendant Michael Kirsch and plaintiff. Defendant Thomas Kirsch 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.

It contains the following provision: "Party of the second part is hereby given the privilege of removing all their personal property 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 October 31, 1930, he locked the gates in the fences and the doors and windows in the office or hut, preparatory to going to Florida for the winter, and that about this time he had a conversation with defendant Thomas Hirsch 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 hut 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 Michael Hirsch; that thereupon the brother-in-law again communicated with Stein and upon instructions received from him called upon defendant Michael Hirsch with the request that plaintiff be allowed to remove all of its property from the lots; that Hirsch refused to permit this to be done; that in the month of February following Stein returned to Chicago and

in the month of September following which returned to Chicago only from the fight that ultimately followed it should this be true, that the accused then plaintiff be relieved to impose all of the friendly relations now existing between defendant Stanwood with the brother-in-law which communicated with Boyle and upon instructions of plaintiff received from defendant Stanwood; that thereupon plaintiff proceeded to do this he was ordered all the property by a man whom previous to such the plans and statement that even the materials and as a result of this a carpenter was employed to do upon the shop or premises was he communicated with Klein, who was in Florida, the property that the doors and windows of the office or pet were tore part of December a brother-in-law of Klein noticed it passing same conditions as those mentioned in the issues.

There is further evidence in the effect that during this time plaintiff could assemble the premises for another year under the he had a conversation with defendant Thomas Ritsch and it was agreed that he going to Florida for the winter, and that about this time the fences and the doors and windows in the office or pet, premises the winter months; that on October 27, 1930, he locked the gates in either condition; that plaintiff's business was not conducted during where the first and back of the gate and instantly lighted but that shortly after the lease was claimed he communicated a wire lease penalties.

Plaintiff's statement, again, detailed many other things the commencement and upon the breaking open quoted by both week it might remove all of the property from the lots. Cole is plaintiff and Glenn the months of November and December during this time be seen that the lease expired October 31, 1931, but merely given the privilege of removing all their personal property it contains the following provision: "Party of the second part is

called on Michael Hirsch, 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 carpenter permission to fasten 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 in the record is meager. Numerous 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 Hirsch 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 sometimes referred to as collateral facts. The Standard Brewery v. Healy, 209 Ill. 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. [citing a number of authorities.] It would be a narrow rule that

[Listing a number of authorities,] it would be a narrow rule that more credibly than that of the opposite side is substantial.

that the evidence of the one side is more reasonable and therefore evidence of collateral facts which have a direct tendency to show ultimate question of conversion, should have been admitted as it might help in the determination of the vital question. In The Standard Elsworth case, supra, we said (p. 870): "The law is that counsel of the parties, while it might not bear directly on the We think the facts here are sufficiently shown. Evidence of the Internal Taxes. Van Leonard Brewery v. Healy, 98 Ill. App. 270. though they tend to prove what are sometimes referred to as collate- throw light on these questions should have been admitted even Idle owned by both defendants? Any evidence that would tend to permit plaintiff to remove its property from the lot? Were the Defendants Idle, etc. The disputed issues in December relative to The questions were involved which would tend to show both PLAINTIFF, a point only of which were previously established, were made by counsel for the defendants to evidence offered by the before the first of the year.

The evidence in the record is meager. Numerous objections the dumpster permitting to fasten the doors and windows, and testified that he had not seen the dumpster. He further testified that he had not returned Stein's response made through Stein's dumpster-in-lieu in December for permission to remove the property, but stated that he told the dumpster-in-lie he got the property all

Stewart thereof testified, and denied that he had refused

is other evidence as to the value of plaintiff's property.

there the testimony, stating that it was too late - that plaintiff should have removed it prior to the first of the year. Mr. Shore

would limit the evidence to an affirmation of the agreement on the one hand and a denial of it on the other."

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.

Defendantsalso contend that the judgment is wrong because there was no evidence showing that defendant Thomas Hirsch was in any way liable, - that the lease was signed by defendant Michael Hirsch 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 Hirsch.

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 REMANDED.

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

36073

FRANCIS G. JAMISON, as Executor under the Will of Henry W. Boxderfer, Deceased,
Appellant,
vs.
MATHILDA BOXDERFER,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

268 I.A. 614

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

Francis G. Jamison, as executor of the estate of Henry W. Boxderfer, deceased, filed his petition in the Probate court of Cook county against Mathilda Stuermer 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 Stuermer or Mathilda Boxderfer as the defendant.

The defendant filed an answer denying that she had any 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 promissory note for $7500 with coupons attached, the payment of which was secured 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, 1929, aged 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 foreman in the factory for many years. October 5, 1929, he was ill and went to see a doctor, who diagnosed

Francis G. Jenison, as executor of the estate of Henry F. Dunbarter, deceased, filed his petition in the Dunpete county court praying Kentucky Statutes Section 4020-1 to discover assets of the estate which he claimed were in his possession. Henry M. Dunbarter filed exceptions to the petition and

Affidavits therefor be delivered to the defendant.

The defendant filed an answer denying that she had any property in her possession belonging to the estate. After a hearing the court ordered an order finding that the defendant had in her possession a promissory note for $4500 with coupons attached, the payment of which was secured 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 Dock 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 M. Dunbarter, the deceased, died December 11, 1928, aged 80 years. From 1902 until October 8, 1928, he was employed by the United Kingdom Tobacco Company at its Chicago factory, and had been a foreman in the factory for many years. October 8, 1928, he was ill and went to see a doctor, who diagnosed

his case as Bright's disease. On November 2, on advice of the doctor, he went to a hospital and remained there for ten days, until November12th, when he returned home slightly improved. Shortly thereafter he became worse and died December 11, 1929.

It further appears from the evidence that deceased was 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 born of the marriage but they adopted a boy, and a girl named Cyrena, who at the time in question was married. On a number of occasions the wife was either paroled 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 tobacco 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 spring of 1929 the deceased and Mathilda decided to get married and on March 4, 1929, he filed a bill for divorce against his wife, charging her with desertion and she was served by publication. On June 6, 1929, the divorce suit, in which the defendant Serena had been defaulted, was heard the only witnesses being the deceased and Mathilda. 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

ble wife well. On this evidence a decree of divorce was entered did not know where she was at the time, and what the deceased told separated for a number of years, that they ble wife Doreen had been

Doreen had been detained, was heard the only witnesses being the deceased and Kendride. Judy both testified that the deceased and

cation. On June 8, 1930, the divorce nuit, in which the defendant got married and on March 4, 1932, he filed a bill for divorce against his wife, charging her with desertion and she was served by publi-

Some time in the spring of 1930 the deceased and Mathilde decided to daughter Cyreno did not get along with her father and left home. and do housework for him. About this time deceased's adopted husband, Mathilde would go to deceased's home several times weekly Doreens had been obtained insane, and after the death of Mathilde's (mother) was sent there once. Upon this, Alma Kendride's wife, ~~Mathilde~~ became acquainted. Mathilde died some years prior to the time in question leaving him surviving his wife Mathilde (the de-

families became acquainted. Shortly died in Joint tenancy.

~~Mathilde~~ Kendride was married to _____ Kendride, one a fellow worker of deceased at the Lehmann factory, and the two

who at the time in question was married. On a number of occasions the wife was either married or escaped from the insane hospital and was returned to the institution. Before the insanity she and deceased, the deceased, lived in the park in a bungalow owned by

and consisted to the Ontario State hospital. No children were born of the marriage but they adopted a boy, and a girl named Cyreno. On the 18th day of December 1923, when the wife was confined insane in the Norwood and wife until 1923, when the wife was confined insane in 1924 to Doreen Pearl Kendride and they lived together

Is further anounce from the evidence that deceased was married to Doreen Pearl Kendride on December 27, 1920. theorelfer he became sore and died December 27, 1930.

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 note and mortgage 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 safety 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 sons 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 dollars 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. Neither 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

her petition in the divorce proceedings in the Superior Court
declaring a new person. Shortly thereafter Darcus filed
and she was restored to all her rights and all of the rights and
lost by reason of her former marriage. Darcus had previously
sued out a writ of habeas corpus in Cook County, in which, after a hearing, it was found
that the insane wife, Darcus, was sane, and ordered her release.

Wilbur Henry's death an order was entered by the County
Court of Cook County appointing the Public Administrator
administrator, Thomas.

Battlithe is mentioned in the will. The will was admitted to pro-
bate in the Probate Court of Cook County and is now being ad-
ministered by the administrator, Thomas.

Battlithe's name as married and also until his death. The evidence
further shows that the deceased married secretly and was Irving.
Further shows that the deceased married secretly and was Irving.
He and his wife, Darcus, on stated, owned their home and an Baron
3, 1929, the deceased bought from the Suburban Trust and Savings
Bank of Oak Park the $7500 mortgage and trust deed in question,
$7500.00, and on April 16, 1929, he bought another note and mort-
gage from the same bank for $4500 paying the face and accrued in-
terest which amounted to $4500.00. Deceased had two safety deposit
boxes which were numbered the Suburban Bank, one individually
and the other as conservator of Darcus, his insane wife. He also
had another safety deposit box which was in connection with
the First National Bank Evanston. Additions, the deceased had
a safety deposit box with the Bank in a building on the
Northwest side of Chicago at Glenmore and Taylors avenues.

In April, 1930, after the deceased had filed his bill for
divorce, he executed his will by which he gave his widow many be-
lieved the executed daughter and son and directed that all the rest of his
property be divided equally between his sisters, both of whom
were married and living in Pittsburg. Beginner his insane wife not
Battlithe is mentioned in the will. The will was admitted to pro-

of Cook county, setting up that she had just learned of the pretended divorce which Henry, 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 November 1, 1929, 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 November 1, 1929, 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 safety deposit vaults in the First National Bank building; that the deceased there opened the safety deposit box, took from it two envelopes and handed them both to Mathilda; 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

closet in the dining room. The testimony of the three sons and
that the mother then left the room and put the mortgage in the
safe deposit box; stating that he had given it to Defendant;
handed the envelope containing the $2500 mortgage to the deceased;
Defendant's son, is that when they arrived home a Mr. Scherer,
who lived on 82nd street, a friend of the family, was at their
2025 Montana street, Chicago, and the testimony of Leo Stenmetz,
time clock on the ticket.

The evidence further shows that the parties then drove
back shortly after one o'clock that day, as shown by the stamp of a
Henry T. Dexterly, the deceased, signed this safety deposit
papers been examined by the safety deposit company, and it shows that
box was required to sign a ticket. The ticket is in evidence,
of that safety deposit vault company showing a safety deposit
deposit vaults under the Suburban Bank in that part. Under the rules
and the other the $2500 mortgage; that they then drove to the safety
banked from Bank to Bank; that one contained the $7500 mortgage
there opened the safety deposit box, took from it two envelopes and
envelope in the First National Bank building; that the deceased
deceased, drove deceased and Matilda Dean to the safety deposit
box of Matilda, the two living at home with his mother and the
of November 1, 1938, at the request of deceased, Leo Stenmetz,
a bit. The evidence in support of this is that on the morning
premise that the $7500 note and trust deed and does show he did pay
September 1, 1938, Henry T. Dexterly, the deceased, physically
The evidence of the defendant Scottish is that on
received the note by Defendant on September 3, 1938; the
elevator motor Heavy, the deceased, had obtained from her and sign-
ed some money, relying on that and just learned of the pretended

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 handed 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 mortgage 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 morning, November 2nd, the deceased went to the hospital and stayed until November 12th, when he returned home and on November 16th he went to the safety deposit vault 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 cashier of the bank, who was well acquainted with the deceased, and the entrance 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 thattime the deceased came to see him and wanted to borrow $100 from the bank for 30 days, which was agreed to, and the deceased gave his note for that amount due 30 days after date; that when the deceased requested the loan the witness asked him if he had any collateral, and deceased said he had the $4500 mortgage; that deceased 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 gave the deceased a receipt of the bank for the $4500 note and mortgage. 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 Bank building, and opened

deposit box in Oak Bank in the Watertown Bank Building, and opened o'clock the next day the defendant immediately went to the safety [illegible] Wednesday 11th. Shortly after twelve

[illegible] also in the record. The deceased then returned home, where he [illegible] $4500 note and mortgage. This receipt [illegible] for the $100, and witness then gave the deceased a receipt for the $4500 note and mortgage and gave it to the witness as safekeeping [illegible]. Shortly after twelve o'clock the deceased went down to the basement, opened the safety deposit box, procured this mortgage and gave it to the witness as safekeeping, and deceased said he had the $4500 mortgage; that defendant [illegible] the June the witness asked him if he had any [illegible] note for that amount due 30 days after date; that when the time the bank for 30 days, which was agreed to, and the deceased at that time the deceased came to see him and wanted to borrow $100 that he opened the box at that time. Vannah further testified that [illegible] is signed by the deceased and bears the time stamp showing the deceased, and the entrance ticket is also in the record. This Vannah, [illegible] cashier of the bank, who had well acquainted with three o'clock at that day. This appears from the testimony of Otto the bank [illegible] in the Park, and opened the box shortly after and on December 11th he went to the safety deposit vault located in the basement and signed [illegible] 11th; that on the next morning, November 2nd, the deceased went to it good authority and that something was said about him being seriously Arthur's wife also testified that the deceased was constantly that he had given the mortgage to the mother. The three sons and nun Walter and them, which she did, deceased stating at that time deceased who again refused to take them and could for her to let her securely locked; that the mother did so and handed them to the deceased endeavored unsuccessfully multiple to go out and get the envelope containing the Thereupon [illegible] they went all at their mother's home when the de- the wife of one of them is in substance that on the evening of

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, 1929, 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 all 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. Rothwell v. Taylor, 303 Ill. 226. The court there said, beginning at the bottom of page 231: "In Millard v. Millard, 221 Ill. 86, 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 donee 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.

a very unwilling one to contemplate of what good men have said.
equivocal or uncertain." And it is also the law that courts lend
the burden was on the donee to prove the gift by evidence not
She obtained possession before her son's death. This court held
claimed title to certain money and securities as a gift from him.
v. Bilfield, 200 Ill. 80, a mother, after the death of her son,
court there said, beginning at the bottom of page 202: "In Bilfield
conflicting evidence. Bohnenkamp v. Bohnenkamp, 309 Ill. 350. The
deceased, the burden was on her to prove such fact by clear and
The defendant claiming the $1500 mortgage as a gift from the

This is substantially all the evidence in the record.

1920, which claim is still pending.

during his last illness retained August 31, 1920, and December 1,
services and attendance in nursing and caring for the deceased
a claim against the estate of the deceased for $1870 for personal
$1500 mortgage to the executor, one, on February 25, 1921, filed
court entered an order directing the defendant to turn over the
It further appears from the evidence that after the Typhoid
fever, that it was about a week after Henry's death.
came with his mother and saw her put it in the box
safely deposited in the vault of the Illinois and Western Ex-
press Company in Chicago in the morning, the latter put the mortgage in her
date of June December 3, 1919, after the deceased had given the
Stone Building and in the office of the bank and offered to pay the
The court refused to permit the present at the trial by the defendant Bohnfeldt. At the same
time, it was the trial, by the defendant Bohnfeldt, that the same
it signed, in the office of the bank and offered to pay the
$1500 note and secured it right from the bank the first mortgage.

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. Such 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 Mathilda, 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 November 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 undisputed. We think it

other evidence in the record, which is unimpeached. We think it are shown to be biased and interested witnesses and because of 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 and her daughter-in-law, as we must under the rule announced in the Bank building, did not testify, and the reason given by one of defendant's sons was that Ephraret was ill.

Scrutinizing the testimony of the defendant, her three sons and daughter-in-law. The notaryor, Mr. Ephraret, who was at the house on the evening of November 1st, when the deceased, defendant her son Leo arrived at her home from the vaults in the Ephraim Bank building, is seeking to retain the $7500 mortgage, her three sons defendant, who is seeking to retain the $7500 mortgage, her three sons and daughter-in-law. The notaryor, Mr. Ephraret, who was at the house on the evening of November 1st, when the deceased, defendant her son Leo arrived at her home from the vaults in the Ephraim Bank building, did not testify, and the reason given by one of defendant's sons was that Ephraret was ill.

Scrutinizing the testimony of the defendant, her three sons and 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 unimpeached. We think it

appears 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 deposit 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 safety 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, Henry Hoxderfer, opened this box but once on November 16th, the date on which he borrowed 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 borrowing $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 underneath 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 Henry 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 November 1st nothing occurred that would indicate that Henry 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 highly 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

after he had filed his bill for divorce and was intending to marry the defendant when the divorce was obtained, which he later did, he made his will leaving all of his property except $20 to his two married sisters who lived in Pittsburg. It is undisputed also that the defendant gave false testimony in the divorce case, because it is obvious that she knew that Henry's wife had been adjudged insane. She testified in the divorce case that Henry treated his wife well, and in the instant case she testified that she had never seen the wife.

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. Donelson v. East 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.

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

Reduced), p. 7., ms. Merchant, J., Donner.

ALCOHOLIC INTOXICATION AND CAUSE REMOVED
MENS MINISTERIUM.

the majority in reaching its conclusion.

may the cause remanded with directions to enter judgment awarding

The judgment of the Circuit Court of Cook county is reversed

ff. Jacobs v. Ill. Co., 302 Ill. 600.

the duty of this court to reverse the judgment. Donaldson v. Peet

against the unaltered weight of the evidence, and in such case it is

record, we are of the opinion that the finding and judgment are

In a jurisdiction of all the evidence in the

and in the instant case the plaintiff has not even come

nigh.

The plaintiff in the instant case that Emery created his wife's

In opinion that she knew that Emery's wife had been adjudged insane.

The defendant knew that Emery is the divorce case, because it

Martina stevens who lived in Kentucky. It is undisputed also that

made his will leaving all of his property except $50 to his two

The settlement when the divorce was obtained, which he later did, h

ether on and tried his hill for divorce and was intending to marry

36115

KOELLNER ICE MACHINE COMPANY, a Corporation,
Appellee,

vs.

JACOB LEVY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 614

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

On July 18, 1930, plaintiff brought an action of detenue against the defendant to recover a certain number of feet of welded coils and other materials used in repairing a refrigerator plant, and for damages 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-

tion the tenant, the Packing company, agreed to pay $400 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 evidence 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 demand 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 abandoned its action of detinue and declared in trover. 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, failed to pay, obviously that is no legal concern of the defendant's.

The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

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

tion the tenant, the trusting company, agreed to buy Stip to
plaintiff in interpleader. Plaintiff thereafter let the mat-
ter stand for some time, during which the Trusting company,
apparently was just sure of the title of the Trusting company, and
point enough to collect the balance it promised the Instant Storage
Company against the defendant tenant. There is other evidence
to the effect that the defendants knew nothing about the contract
between the Trusting company and plaintiff and knew nothing about
it (Stip) transaction.

In his brief the defendants argues that the evidence fails
to show a demand was made by plaintiff on him for the coal piaced
in question, and other points are made but statements are adopted
as the record that the matter is settled. Generally this
matter is not contained in the bill of exceptions. Ordinarily this
document is entirely inadequate. Plaintiff was not content to
demand in writing that the defendant remove the coal placed
thereon, but went to the premises and made personal demand for
removal. It did not want the coals returned, but
declared in effect. It withdrew the notice of demand and
recover the coal placing. It abandoned the notion of getting and
demanded defendant to pay the balance due.

There is other statement in the brief as to whether the
refrigerator or ice box and the materials furnished by plaintiff
were intermixed so as to lose their identity. In this it
appears that these questions are of no importance in this case
since plaintiff was not seeking to recover the materials.

Upon a more statement of the facts as shown by the undis-
puted evidence, it is apparent 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
material; that was between plaintiff and the Trusting company,
and it the Trusting company, the tenant, failed to pay, although
that is no legal account of the defendant's,

The judgment of the municipal court of Chicago is reversed.

Reversed, R. J., and Matchett, J., concur.

35435

THOMAS P. CONROY,
Appellee,
v.
WABASH RAILWAY COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY

268 I.A. 614

Opinion filed Nov. 16, 1932

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION 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 Liability 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 servants and agents, 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 amputate his leg.

The second count charges that the defendant carelessly and negligently equipped said engine upon which plaintiff was riding and carelessly 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

Opinion filed Nov. 15, 1933

plaintiff was riding so that it was entirely unsafe, 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 demurrer to the first count of plaintiff's declaration was sustained and a plea 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 end 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.

At the time of the accident plaintiff was riding on 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

by the end of Plaintiff's case defendant's motion to direct a verdict upon the issue in the Plaintiff and make it without objection. It pendent and fell out of the engine. This testimony was received and the Plaintiff counsel rise to join five pund away from the 30 pounds which was caused to roll, slip or fall over against the and pull of this pendent and a re-dular weighing between 29 and pull of the Plaintiff tended to show that upon the pilot been the testimony to hold on to the engine. The testimony adduced on this point started the jacket of locomotive riding close extending across the entire front end of the pilot beam was a step the front footboard of the engine and also the footboard way

At the time of the accident Plaintiff was riding on defendant not solely on each separate count of the declaration, motions tendering the court to instruct the jury to find the motion to direct a verdict in favor of the defendant and also by the end of Plaintiff's case defendant filed a

by the end.

state was a failure between the allegations of the declaration and the proof.

at least to sustain the second count of the declaration and that cause of the negligent declaration. The point is made that there is

example of the negligent declaration should be disregarded, since the second and case the Plaintiff is the counsel stated that all the

it the easier court. Upon submitted counts was sufficiently live

Plaintiff's declaration was sufficient to state a cause of action

[illegible] the first count of

lessor charged, he was driven upon the ground, etc.

violently thrown and moved forward and struck Plaintiff and, by said instrument, stone or wood, timber, piece of iron and heavy the Plaintiff was riding on aforesaid upon said engine, certain of Plaintiff was riding on such that while

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 on various other parts of the engine and that it was unsafe 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 1939, 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 9 years of age he was kicked by a horse at which time he sustained an injury to the top 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 drizzling rain; that Lutman, another switchman, 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

upon the footboard. Just prior to and at the time of the accident man," was riding on the left hand side of the engine and standing closely and there was a grinding noise; that Dunham, another motorman engaged in the derailment, but always they were on various extra jobs in the Yardmaster's office. Some had been employed for from 24 to 30 years and that there was not a material variance between the evidence of the defendant 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 1929, to the night of December 16, 1939, the day of the accident; that he was 30 years of age and prior to this accident he had never been injured while at work for a railroad, and that when he was 9 years of age he injured my a knife at which time he received an injury to the top of his head, from which he fully recovered; that the engine upon which he was employed left the roundhouse about 2:30 o'clock in the evening; that there were about 12 cars in the train which were taken to a place called Kaybunn; 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 drizzling rain; that Dunham, another motorman, 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, he was noticed and that there was no proof that the vestibule or other pieces of iron and steel or blocks of wood were on the footboard of the engine and that consequently the strong point of the derailment was not supported by the evidence. The plaintiff and that there was not a material variance between the evidence of the defendant 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 1939, to the night of December 16, 1939, the day of the accident; that he was 30 years of age and prior to this accident he had never been injured while at work for a railroad, and that when he was 9 years of age he injured my a knife at which time he received an injury to the top of his head, from which he fully recovered; that the engine upon which he was employed left the roundhouse about 2:30 o'clock in the evening; that there were about 12 cars in the train which were taken to a place called Kaybunn; 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 drizzling rain; that Dunham, another motorman, 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

plaintiff was holding a lamp with his right hand and holding on to the grab iron, which extended across 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 railroad yard. In doing this the switch engine would at intervals cross other tracks equipped with frogs. At this time Lutman, called plaintiff's attention to the fact that the switch ahead 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 frog there is a jogging or jolting.

Plaintiff 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

plaintiff was holding a lamp with his right hand and holding on to the grab iron, which extended across 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 lies in a diagonal direction through the railroad yard, in doing this the switch engine would at intervals cross other tracks equipped with frogs. At this time Watson, called plaintiff's attention to the fact that the switch ahead of them was wrong and plaintiff walked to proceed over and along the footboard in order to give the engineer a signal to stop the engine. At this time plaintiff perceived he had his lantern in his right hand and his left hand was sliding along the grab iron. This grab iron was about 2 inches above his hip pocket. Plaintiff at the time had his back to the engine. As he was in the act of moving along the footboard roughly eight feet ahead of the tender, an iron contraption to put pin hand out,' the engine lurched and the re-trailer lever was not removed, but caused by the engine exceeding the frog; the shock of a half mean, my eyeliner pie left hand as he looked back to see what it was and saw a re-trailer, an iron contraption standing up about 12 inches above his hip pocket. Plaintiff testified further that he had not noticed that when an engine crosses a frog there is a jogging or jolting.

Plaintiff's left leg was amputated and he was in the accident 32 inches in length and shaped like a half moon. As a result of the re-trailer knit pin hand was pinched; that the re-trailer weighed between 70 and 90 pounds and when it rolled over against his hand he experienced a painful feeling and his muscles were hurt and the back of his hand afterwards was black and blue; that this re-trailer was iron or steel about 10 inches high, 12 inches wide and about

hospital four and one-half or five months. His head pained him and his hand pained him and a second amputation 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, 1929 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 cock 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 car back 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 hooks were provided for that purpose; that at the time he got on the engine he did not notice these re-railers and did

time he got on the engine he did not notice these re-rollers and did
re-rollers and hooks were provided for that purpose; that at the
is a place on the hook of the engine used for carrying these
over these re-rollers in order to reach the angle cock; that there
proceeding at the rate of 6 or 8 miles an hour and he had to reach
hook on the tender if it should have run off; that the engine was
re-rollers were used for the purpose of putting an engine or car
purpose; that no load could be run two cars or re-rollers. These
the angle cock on the front end of the engine in order to set the
performed quickly and as he was plaintiff had be reached over an open
the footboard in order to adjust the appliance; that the accident
they were moving yet it became necessary for Curry to move over along
in its right hand and he held plaintiff about a waited lowered with
at work and) that shortly the point of the grab iron and had a lantern
there were alternately on to be set first with a swing light
along they frequently passed over tops or switch points and that
passengers were frequently run inches above his hips; that as they took
a handrail for switchmen riding upon the footboard; that this
front end of the pilot beam which was for the purpose of breaking
side of the footboard and there was a grab iron running across the
platform at the time of the accident; that he was on the left hand
trial and that he was on the front footboard of the engine with the
for the defendant company from July 15, 1899 up to the time of the

Redmon, the other witnesses, testified that he worked
waiting jobs to that time for approximately 14 years.
the time of the accident he was earning $300 a month and had been
employed three to four months before. He had several engines
and his hand pained him and a second amputation of his leg was
necessary. Left him with a stump of about eight inches. It
was about two-half or five months. His hand pained him

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 Mirich 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. When 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." * * * * *
>
> "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 remand 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. Pennsylvania Co. 245 Fed. Rep. 336, 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

from the trip that day and it was carried. On examination of the
on the side of the tank; that he made out a rubber on pipe return
of the accident the re-fitted of flange were pumping on the hoses
side of the tank; that when he tightened the engine on the morning
carried on the engine on hoses provided for that purpose on the
detention ran with this engine; that these flange or re-fittes and
nearly similar as to the issue.

Related testified that he was the engineer on the

Bennett v. Pennsylvania Co., 245 Fed. Rep. 338, is

on the first ground.

de July is it is not disagreed by merely the same power
have misdirectly held the first court would not do, and the
entitle would be in much a violation of the right of trial
the jury by directing the jurisdiction of a jury, which no
testimony could that court believed, and could give that would
decision was which the responsibility of the

Jurisdiction Contract Co.. In its 117, it is the opinion, held:

of the case to the jury. The court is the case of Grand v.

and issues, and sufficient standing rights be taking the evidence

The testimony of these two witnesses, the plaintiff

knowing this is contrary as a fact engine.

moment about the movement of the engine and no more jumping or

was when he pulled the air after the accident; that there was nothing

not had any attention to show; that the first time he noticed them

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 fireman 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 hooks 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 these 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.

Ryan 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, 1929, and that the re-railers were hung in their proper position on the side of the tank when the engine left the roundhouse.

Sunder, 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.

notes" however, shows nothing with regard to re-matiate.

Herb, the conductor on the previous trip, identified the exhibit and testified therefrom; that there was nothing on the fire report which would indicate that there had been any defendants and that it there had been, it would have formed some its subject.

Carlson, the fireman testified that he made an inspection of the engine on the 6th in connection matter in June; that he observed three men on the left side of the engine and that he observed them re-entering the cab; they were on the tank. He identified Exhibit 3 as his written report of his findings.

Herb identified that he was an engine inspector and identified the entire 24 section on the day of the accident and made a written memorandum thereof; that if the re-matiate were in the position shown; that if the re-matiate were in such position they could not have been seen by the fireman or engineer; that there were three men on the tank; that on the same day in question they were on the tank; that on the same day he made his inspection there were no tracks on the ground; that the engine had not started from the roundhouse; that the engine was a Mikado.

Identified witness was made parties by the same by the same of these re-matiate were on that account. The only reference to by the fireman when the day of the accident or he had any knowledge that there were any men on the tank. He identified Exhibit 3 as his written report of his findings and that he observed three men on the left side of the engine and that they were on the tank; that on the same day in question they were on the tank; that on the same day he made his inspection there were no tracks on the ground; that the engine had not started from the roundhouse; that the engine was a Mikado.

Identified witness was made parties by the same by the same of these re-matiate were on that account. The only reference to by the fireman when the day of the accident or he had any knowledge that there were any men on the tank. He identified Exhibit 3 as his written report of his findings and that he observed three men on the left side of the engine and that they were on the tank.

Carlson, the fireman testified that he made an inspection of the engine on the night of the accident and that the re-matiate were booked on the side of the tank.

Lowenstein testified that he was the roundhouse foreman and that he inspected the engine on the 6th of December 1920, and that the re-matiate were on the left side of the engine when he inspected it; that there was nothing on the tank; that the engine had not started from the roundhouse; that the engine was a Mikado.

Identified witness was made parties by the same by the same of these re-matiate were on that account. The only reference to by the fireman when the day of the accident or he had any knowledge that there were any men on the tank. He identified Exhibit 3 as his written report of his findings and that he observed three men on the left side of the engine and that they were on the tank.

Carlson, the fireman testified that he made an inspection of the engine on the night of the accident and that the re-matiate were booked on the side of the tank.

Adams, the locomotive fireman, who 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 answer 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 S-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 cross-examination. 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 defendant, testified that he looked for re-railers immediately after the

Adams, the locomotive fireman, who 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.

Dean, 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 end 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 answer 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 counsel after which is marked in defendant's exhibit 2-C 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 cross-examination. 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 defendant, testified that he looked for re-railers immediately after the

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 derailment, 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 strike 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

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. Halsted 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. Eppstein, 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.

We have examined the testimony of the witness Shapiro, 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 no 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.

reason of the statement.

There was one instance cleared in the minds of the jurors in the ex-Justice cleared in size and weight, and no counsel can that the purpose of proving that it was too large to fit upon the person of the party. There was no evidence to the effect that there was no objection to counsel stating that it was large and the Pittcar re-hotter made was merely a matter of statement, and colorless to the fact that the counsel had handled an exhibit statement was correct to fix on the record direction. The that the fourth statement was not introduced until asked for. This objected to introduce the first three statements of Mr. Lutman, but stood from the fact that counsel stated that the defendant had testified in his chamber relied to the jury. This objection is in the nature known to be made to the counsel of counsel for many reasons reasons of the court.

... to have examined the testimony of the witness Shapiro, a hypothesis, and the objection to the hypothetical question propounded to him and one of the opinion there there is no error which ... we have examined the testimony of the witness Shapiro, and find the evidence to be sufficient to support the verdict. The witness Shapiro is competent to testify as did there are, in substance, practically given by him the court, it was stated by the witness Shapiro of the court to the jury to disregard it in its entirety" was ... Because the testimony was stricken out and the instruction ... stated that it was competent to assist them some place else. ... Exhibit "A" for ID". See; change ... Southern Pacific, 38 Ill. ...

The verdict 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 affirmed upon a remittitur of $10,000.00, within 10 days, otherwise to stand reversed for a new trial.

JUDGMENT AFFIRMED UPON REMITTITUR.

HEBEL AND HALL, JJ. CONCUR.

35738

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

Appellant,

v.

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

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

268 I.A. 614

Opinion filed Nov. 16, 1932

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

Plaintiff, Union Bank of Chicago, as administrator of the estate of Peter Martinez, deceased, brought its action against the defendant N. 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 Ry. Co., 166 Ill. App. 48; Mooney v. City of Chicago, 339 Ill. 414; Martray v. Chicago Rys. Co., 290 Ill. 85. Moreover, there is no evidence showing when the deceased died.

there is no evidence showing when the deceased died.

117. 454; Curtiss v. Illinois Iron Co., 180 Ill. 82. However,
Gift Co., 196 Ill. 339, 63; Bowden v. City of Chicago, 252

that which received evidence to support it. Johnson v. Chicago

deceased died as a result of the accident. This was a matter

There was no proof in the record tending to show that the

defendant or concealing the knife at its removal.

to show that the driver of the truck was in the employ of the

defendant, and there was no evidence whatever in the record tending

the accident, it was under the control of or operated by the

but there appears to have been no admission that at the time of

of the trial the defendant admitted the ownership of the truck,

the control of and operated by the defendant. During the course

of the truck and that it was at the time of the accident under

a plan of the locality (Exhibit 1) and a special plan showing the exact

modified operation of the defendant's truck. The defendant filed

in person Monday for the death of the deceased by reason of the

the defendant C. C. Converse Motor Express Company, a corporation,

the motion of Peter Bruttner, deceased, brought its motion against

Opinion filed Nov. 16, 1933

Upon the hearing MIRTON NEFLANDER the OPINION OF THE COURT.

Plaintiff, Union Bank of Chicago, as administrator of

The accident 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 cure 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 purely statutory and the facts necessary to bring such an action within such statute must be specifically alleged and proved.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

The members assembled March 21, 1889, and the organization was fixed permanently May, 1889. It may be argued with considerable force that six will compel more attention in the administrative affairs than six will compel at the beginning, the young society gets more interest at six than the desired even to its death within one year thereafter, for this time may give rise to extreme

At the end of six the evidence the fact about standard a

meeting to decide the questions that the desired even to its

basic function of the membership.

be accomplished should not indeed.

Five six persons exist to this solution the judgment of

the function shall be fulfilled.

Since the [illegible].

35735

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
CHRISTIAN PEDERSEN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

263 I.A. 615

Opinion filed Nov. 16, 1932

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

The defendant Christian Pedersen was found guilty January 26, 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, 1928, the complaining witness filed two separate bills for support and maintenance against the defendant Christian Pedersen, 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 $20 the week before she left. Her son Iner Larson was also living with the defendant. The complaining witness and her son left the premises of the defendant while he was absent, taking practically all of the furniture and a $3,000 bond which was in a safety deposit box. The complaining witness testified

Opinion filed Nov. 16, 1932

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

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 money was nor as to where she obtained it. The testimony as to the $3,000 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 21 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 a one-half interest in the Roscoe 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.

BENNY AND JETT, ET. UNIONS.

"Several elements and first circuit."

Court is reserved and the cause remanded for a new trial.

We it appears in not sufficient and the judgment of the Municipal Court in the amount claimed.

Even the argument on one of the opinion that the evidence for her husband.

within the meaning of the statute but was possessed of ample means pell interest in the Queen estate recently" she was not destitute sequate maintenance and relieved Mohn the trial" she owned a one-

It" as the complaining witness claimed in her two bills for down in the bedroom at the time of the fighting counsel".

It is true he testified at one now" she claims to have been tired sleep". the statement almost and attack per and she is unchecked the material in the fact that when the bed she left" he being

time some other entries exist as its recorded the she at it Lane". ons evidently made it to have been relied in fact on testimony on to share the matter in". The testimony on in the 13'000 pend on the defendants not what this testimony are bird the out of per cent ment". in accordance to such it per to at what life nearly and has ant. She denies that the that the Contracts time the house of

pose testimony may of which relied time the sale of the 13'000 stone pending the testimony of which time the sale of the 13'000 $12'000 and that there are a 14'000 available when the Secretary that Jenkins already testimony among and of the notice of withdrawal; ple owned + non-profit testimony to a lease of said matter Mohn to the lease in the executed the the of it Lane". She also testified that this bill is not and are instituted in or the the

35745

ISABEL LYMAN,
Appellant,
v.
GEORGE R. LYMAN,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

268 I.A. 615

Opinion filed Nov. 16, 1932

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

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 Number 35744, the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

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

2683 I.A. 615

25754

ALFRED J. JOHNSON, CLARA JOHNSON, KRISTINA LARSON and HARRY N. LARSEN,

Appellants,

v.

DAVID I. SUTTON and CHARLES A. PETERSON, co-partners, doing business as SUTTON & PETERSON,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

268 I.A. 615

Opinion filed Nov. 16, 1932

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

Plaintiffs brought their action in the Municipal 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 tenants of the plaintiffs. This relationship of principal and agent had existed for a period of three years or more. The amount involved was $75.12. 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.

Alfred Johnson, one of the plaintiffs named herein, testified that he was a contractor and builder and part owner of the building located at 667 East 56th Street, which was improved with a twelve apartment building; that he had a talk with one Nelson 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

Opinion filed Nov. 16, 1933

to 5 per cent of the rent collected.

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

The amount involved is not disputed. The only question before the trial court was whether 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 without a jury and the issues were found in favor of the defendants.

The witness Nelson testified that the Real Estate Board allowed this 5 per cent commission on leases written, where there was a continuous management of the property. It is contended 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 demeanor while upon the stand. Therefore, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEIL and HALL, JJ, CONCUR.

be a poor sort of man must suffice."

35784

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

Defendants in Error,

v.

H. I. PERRY,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

268 I.A. 615[4]

Opinion filed Nov. 16, 1932

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

The original bill of complaint in this cause was filed by W. H. Darlington against H. I. Perry and prayed that the sale of certain shares of stock of the Fosteria Serum Co. be set aside 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 anything, 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 amended 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 January 1, 1930, Darlington was the owner of a business called the Great Western Serum 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 Perry had occupied a confidential and responsible position with the concern for a number of years, and was acquainted with its business affairs; that a contract was entered into between complainant and Perry for the purpose of conducting the business known as the Great Western Serum Co. which provided; that the

Opinion filed Nov. 16, 1933

partners "would partake 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 135½ shares of the stock of the Fostoria 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 amended bill further charged that the defendant secretly applied profits of the Great Western Serum Co. to his own use and that this was done for the purpose of defrauding the complainant. The prayer of the amended 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 Serum Co., but did find that the defendant was indebted to the complainant for the following items:

indebted to the complainant for the following items:

Grand Eastern Hotel, 30' but old Tim that the defendant was
defendant Perry in the execution of the warrant known as the
Go', and further that there was no fraud on the part of the
had recently contrived to remove the stock of the Fantasia Saloon
pointing the allegation of the bill to the effect that the defendant
made his report and this report found that there was no fraud mis-
statutorily set forth in the amended bill of complaint.

The matter was referred to a master to take proof and
into a consent of notoriously effective January 1, 1880' sub-
the original bill.

The defendant's counsel admits that the parties entered
The terms of the \~~bill~~ were the same relief as that sought in
amended
that bill was done for the purpose of defrauding the complainant,
alleged results of the Grand Native Items Co. to his own use and

The bill further charged that the defendant maliciously
\~~amended~~
made false and untrue

statements of Perry in preventing Darlington to examine the books
account from that owned in the partnership statement that the
ebook of the Fantasia Items Co." which was another and different
by which Darlington was to sell the defendant 1500 shares of the
the defendant Perry induced Darlington to enter into a contract
of said business and that while the complainant was in ill health,
account of Simeon Darlington was unable to take part in the conduct
part or all of his said business; whereby further that on
had or unsolicitable bills and that such would receive fifty per
as if then stood," such partner to assume one-half of the debts or
partners "would pursue equally of all the assets of the business

"One-half of book assets of business at start of partnership (one-half of $22,375.82)	$11,187.91
One-half of old accounts charged off prior to partnership and collected afterward by the partnership (one-half of $967.24)	483.62
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 $4,973.93 loss on sale of accounts receivable so as to charge all to complainants	2,486.96
	$15,208.49"

No objections were filed to the master's report finding against complainant on the charges of fraud and dishonesty, and the acquisition of the Vosteria 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 Great Western Serum 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 $22,375.82. Prior to January 1, 1920, at which time the partnership was entered into, the assets of the company were carried in the name of W. M. Darlington. This system of bookkeeping was continued until sometime in May, 1920; and various adjustments were made from time to time as to the amount of the assets still carried in Darlington's name. It is insisted on behalf of the complainant 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 Darlington. Defendant, on the other hand, contends that by the original bill as well as the amended 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

No objections were filed to the master's second finding
original consistent on the charge of fraud and dishonesty, and
the application of the Priority Steam Pump Co. that Plaintiff
be ordered to pay the costs of the reference, and
on inspection, so that we do not 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 purchase agreement.

On December 27, 1913, the vendee of the Dyer patent
sold an undivided one-fourth interest in the patent to Frank Cox
Company, subject and the necessary conveyances were made
to carry out the agreement. This appears to have been valued at the sum of
$30,342.80. Prior to January 1, 1915, by which time the partnership
business, the vendee of the patent was entitled to the sum of
$30,342.80, and the vendee of the patent was entitled to the sum of
$30,342.80. Prior to January 1, 1915, by which time the partnership
was entered into, the vendee of the patent was entitled to the
name of C. C. Darlington. This purpose of participating was continued
until execution in suit, 1915, and various alignments were made
from time to time up to the record of the vendee still carried in
Darlington's name. It is limited on behalf of the complainant
that this system of participating included the firm instead of the
partnership agreement in that the vendee of the business of the
time of the formation of the partnership participated in profits
Delaware" on the other hand, contends that by the original pill
the exhaust expenses of the parties was stated, namely, that

business as it then stood and that the assets of the business as it then stood was the $22,375.82, as shown upon the books of the Great Western Serum Co.; that this agreement was charged 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 agreed and the conditions of the agreement are undisputed.

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

We are of the opinion that the allegation contained in the amended 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 set out in the amended bill and appears to be clear and unambiguous. Darlington may have had a good reason for giving Perry 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. 367; Home Insurance Co. of Texas v. Myer, 93 Ill. 271; Fisher v. Mark, 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 amount, namely, $11,187.91.

amended

The item of $987.24, being old accounts and charged off prior to the partnership, properly belonged to the complainant and should be so credited. The loss on the sale of accounts receivable, amounting to $4,973.93, should properly be borne jointly 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 guilty of fraud, whereas the master's report, confirmed by the chancellor, found otherwise. Moreover, the charge in the bill concerning the Fostoria 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 properly 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 REMANDED WITH DIRECTIONS.

HEBEL AND HALL, JJ. CONCUR.

35790

THOMAS J. HARRIGAN, JR.,
(Plaintiff) Appellant,
v.
H. W. HISEL,
(Defendant) Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

268 I.A. 616

Opinion filed Nov. 16, 1932

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

Plaintiff sold the defendant an automobile and received as part payment a used car belonging to the defendant at an agreed price for the used car of $1,225.00. 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 Aetna 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 Municipal 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.

Plaintiff's position is that he is entitled to damages by reason of the failure of the defendant to defend and make good the value of the second-hand automobile turned in on the purchase, namely, $1,225.00, together with repairs made on the second-hand automobile and attorney's fees and expenses in defending the replevin suit.

Opinion filed Nov. 16, 1928

2669 I.A.6716

[illegible] appellee.

[illegible] appellant.

[illegible] error.

[illegible] opinion.

[illegible] affirmed.

[illegible] costs.

[illegible] judgment.

[illegible] motion.

[illegible] petition.

[illegible] rehearing.

[illegible] writ.

We are not advised as to the position of defendant, but presume his defense was based upon the proposition that the plaintiff, at the time of the transaction, knew that there was a chattel mortgage on the second-hand automobile in favor of the Aetna 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 Aetna 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, Neville v. Hughes, 104 Mo. App. 455, (79 S. W. 735). The court in its opinion in that case, said:

> "Nor could defendant 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 exclusion proper and appropriate. Whiteside v. Kaufruder, 75 Mo. App. 384; Kellogg v. Malin, 50 Mo. 496; Williamson v. Hall, 62 Mo. 405; Clove v. Graham, 64 Mo. 248."

We are at a loss to understand upon what theory the court arrived at the judgment rendered in favor of the plaintiff in the sum of $133.50, other than this appears to be the cost of the repairs on the second-hand car of the defendant after 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. CONCUR.

35799

JOSEPH SCHY,

(Plaintiff) Appellee,

v.

CREDIT ALLIANCE CORPORATION, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

268 I.A. 616

Opinion filed Nov. 16, 1932

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

This was an action of the fourth class in the Municipal Court of Chicago, and from the statement of claim it appears that the plaintiff claimed defendant 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 came 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 sued upon was a non-negotiable chose in action and that the plaintiff, as assignee, should have complied with the provisions of Section 18, Paragraph 18 of Chapter 110 of Cahill's Illinois Revised Statutes. This section provides that the assignee and equitable and bona fide owner of any chose in action not negotiable, heretofore, or hereafter assigned, may sue in his own name provided he shall in his pleading on oath, or by 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 question, however, is not before us. In actions of the fourth class in the Municipal Court the action is dependent upon the evidence and not the pleadings.

Opinion filed Nov. 16, 1932

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 Minitt vs. Hornblith, 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. Edgerton v. Chicago, R.I.& P. Ry. Co., 240 Ill. 311; Bruner v. Grand Trunk Western Ry. Co., 256 Ill.App. 341; 319 Ill. 411.
>
> Written pleadings being unnecessary in 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. McClunn v. Gillespie, 287 Ill. App. 400; Uher v. Robinson, 290 Ill. 181."

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

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

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ, CONCUR.

Where is the bill of investment and statement of facts

filed in the county wit; there is before this court only the opinion

the matter. Those instructions and those written duly signed and are placed

upon the back of [illegible] the bill. The

remark is the opinion with:

"However, in the municipal court of Toledo
the matter of the [illegible] which is objected to although
[illegible]. [illegible] 3, [illegible] 3, [illegible]. See
[illegible]. [illegible] 3, [illegible] [illegible] See.
[illegible] the [illegible].
[illegible] [illegible] [illegible]
matter of the [illegible] clause in the municipal court. In
the [illegible] of 3-3 [illegible] we will [illegible]
this the [illegible] [illegible] by [illegible]. [illegible].
[illegible], [illegible]. See [illegible]. See
[illegible], [illegible].

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

36162

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

(Complainant) Appellee,

v.

VINCENT VLCEK, et al.,

Defendants.

On Appeal of VINCENT VLCEK and CLARA VLCEK, from Interlocutory Order Appointing a Receiver,

(Defendants) Appellants.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

268 I.A. 616[3]

Opinion filed Nov. 16, 1932

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION 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 Vlcek and Clara Vlcek to Kaspar American State Bank, as trustee, to secure a bond issue consisting of 70 bonds aggregating the sum of $60,000.00 and in addition thereto 10 notes aggregating the sum of $1,350.00 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 proceeding in law or in equity until after demand has been made upon the Trustee accompanied by tender of indemnity as aforesaid, and said Trustee has refused to act in accordance with such demand. * * "

The trust deed also provides for the appointment of a receiver without 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

Opinion filed Nov. 16, 1925

without notice. It also provides that the trustee will be permitte tp 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 $7,485.00 and default in the payment of one note in the sum of $137.50; 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 sell 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.

deed and subordinate to the lien of the bonds.

aggregating the sufficient sum of $7,280.00 secured by the trust be trustee, also has an indivisible interest as owner of the 10 notes

The conveyance, in addition to its right and obligations

5 Lund Decree, supra, pp. 348.

of the pertinent statutes the trustee so to do. Nothing such successors and that this right was not dependent upon any action the trustee was clothed with authority to undertake the foreclosure

This court finds that under the terms of the trust deed, to satisfy the bond, and ordered the acknowledgment of a receiver.

by a judgment fully valid and that the principal would be maybe completed. In the account of the bonds and notes, that there would connect; that default had been made as aforesaid in the pitt of had been fully obtained in the premises and hearing the statement of of the pendency of said motion had been given and that the court

The order appointing the receiver recites that due notice received is admitted sufficient with smaller issue.

In a bond application to which the trustee can and that refuses a interpleader, that the said bond before the receiver will not income and benefits have not been applied toward the payment of the monies six hundred thirty-four, seventy-five and seventy cents, plus accrued the sum of $[illegible].00 after withdrawing the bond, and that the amount sufficient to satisfy the claims of any tenant or any claimant, but the bond was otherwise described in documents as [illegible] the trustee does not

[illegible] the trustee should commence at once to foreclose said trust deed by reason of the default in the payment of the note in the sum of $[illegible]; that the trustee has incurred expenses in the amount of $[illegible] and desires it

The pitt operates defendant are made in the payment of money

to secure sufficient payments and without the trustee' income and benefits, without notice. It also includes that the trustee will be receiver

The bill charges that the present value of the property does not exceed the sum of $50,000.00 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 secured 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 no error in the record the order of the Circuit Court appointing a receiver will be and it hereby is affirmed.

ORDER AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

36251

FRED B. BECKMAN, Guardian,

(Complainant) Appellee,

v.

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

(Defendants) Appellants.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT,

COOK COUNTY.

268 I.A. 616[4]

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-C for $3,000.00 due June 30, 1931; principal notes 4-D to 18-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.

Opinion filed Nov. 16, 1928

The complainant Hoskinson, as executor of the estate of

The bill is verified by the complainant, as agent and guardian of the estate of the minor. A general demurrer 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 $200, with surety to be approved by the court. Notice was served upon 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, 1932, and the facts contained in the bill were true upon the date upon which the bill was filed. Gilbert v. Branchflower, 114 Ore. 508. 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 pit". He has not purchased that tire element". Instead,
was lifted any other application" there would have no recourse to
174 Sup. 809. It the transgressors had been hurt before the PLIT
when the boat slow right the pit was light. CITIZEN A' TRANSFERRED.
lited July 1, 1988' and the trade completed in the PLIT more than

In to the second contention (b) it appears the PLIT was
right to declare all of the misappropriate due and payable.
under and that, by reason of this default, the jury failed put the
front dead upon there is a default in the payment notes due there-
to maintain the investment. It is specifically charged in the
the PLIT of complaint' and are of the opinion that it is sufficient
PLIT of complaint' pokepox with the final deed which is set out in

In reference to proposition (a)' we have construed are
the specifically recite for the debt were transferred (2) the restitution
make because due; (c) that there was no allegation that the payments
PLIT was entitled Sum 21' 1991' the date upon which the instrument
may maintain the misappropriate to collect a promissory (b) that the

It is implied upon this record(d that the second CC
already was owning in connection with the statute.
make interrupted on the pleading. Upon this ground an instrument
physical would not for the commitment of a receiver and that
failure was shown that the defendants in the effect that the pos-
is the amount of 1991' with which to be filtered in the court.
of a bond in the amount of $'000.00 and a bond by the complainant
not disputed that the receiver was to be appointed upon the giving
a receiver was entered' after the filing of the Tuscarel Gourmet'
to this PLIT of machinery in the determine. The order submitted
Creation of the estate of the minor. A General Gourmet was filed

The PLIT is worded by the complainant' as shown and

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

With reference to (c), there is no force in the argument that the bill failed to charge that the owners of the property were insolvent nor that certain tenants were not made parties defendant. Bagley v. Illinois Trust & Savings Bank, 199 Ill. 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 claim is insufficient. We 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 George S. Peterson Co. v. Asphalt Sales Corp., 235 Ill. App. 593. In addition thereto by their general demurrer filed in the cause 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.

HEBEL AND HALL, JJ. CONCUR.

the latest amendment filed to the bill vacates the allegation on
time, negligence of the ventilation. Kempf v. Hamilton, 81
III. App. 612.

With reference to (c), there is no issue in the argument
that the bill failed to charge that the owners of the property were
insolvent nor that caloric ventilators were not more suitable.
Hamilton v. Illinois Power & Lighting Corp., 182 Ill. 78. Complainant
must show that the use of the old type which it is claimed that the
more costly is most unsuitable for the installation and therefore the
burden of the owner is entitled to be brought out clearly, namely
a specialty, in order to reduce the expense of the entire
installation.

Referring to (d) we have examined the verification of
the bill which defendants claim is insufficient, in one of the
objection that this construction is unsound. A verification very
similar to the one attached to the bill in this case was sustained
in Lecture C. Lecture Co. v. Illinois Glass Corp., 352 Ill. App.
888. In addition thereto by short general demurrer filed in the
cause prior to the order appointing the receiver, defendants in the
cause at bar admit the truth of the allegations in the bill of
complaint.

Whether the case run to the highest justice is not in-
volved 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 dis-
turbing the order in entirety.

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

ORDER AFFIRMED.

35423

LOTT HOTELS, INCORPORATED, a Corporation,

(Complainant) Appellant,

v.

CHARLES M. LOTT, HELEN M. LOTT, WALTER J. GREENEBAUM, as Voting Trustee, M. ERNEST GREENEBAUM, JR., as Voting Trustee, and CONTINENTAL AND COMMERCIAL TRUST & SAVINGS BANK, a Corporation,

(Defendants) Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

268 I.A. 617

Opinion filed Nov. 16, 1932

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

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

It is set forth in the bill that on October 4th, 1927, a 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 Cook County nulla bona, 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, 1927, was due and owing to the complainant at the time the conveyance of these certificates was made by Lott to his wife;

[illegible]

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

265 I.A. 617

[illegible], INCORPORATED, a corporation,

(Complainant) Appellant,

v.

CHARLES E. LOTT, HELEN M. LOTT, [illegible], as [illegible] Trustee, [illegible], as [illegible] trustee, [illegible], a corporation,

(Defendants) Appellees.

Opinion filed Nov. 16, 1932

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

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

It is set forth in the bill that on October 4th, 1927, a judgment on a judgment note for $[illegible],000.00 payable by Charles E. Lott to the complainant had been entered, execution issued thereon, and returned by the sheriff of Cook County nulla bona, 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, 1927, was due and owing to the complainant at the time the conveyance of these certificates was made 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 creditors.

Charles H. Lott, one of the defendants herein, and the owner of certain certificates of common stock of Lott Hotels, Incorporated, was the owner of certain "voting trust certificates" of Lott Hotels Incorporated, which had been issued by Walter J. Greenebaum and M. Ernest Greenebaum, voting trustees under an agreement entered into on March 1st, 1924, through the Continental & Commercial Trust & Savings Bank, the stock depositary and agent of said voting trustees of such stock in Lott Hotels, Incorporated.

On November 7th, 1926, Lott transferred to Helen M. Lott, his then wife, certain of these certificates. At the time of the conveyance of these certificates to Helen M. 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 money, which agreement had been made a part of the decree entered in the divorce proceedings, and the evidence in this case shows that he owed 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 $100,000.00.

It appears from the record that the transfer of these voting trust certificates was made by Lott to the defendant in the City 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 Donald 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. Rest 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, 839 North McCadden Place is OK. Will write."

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

Charles K. Lott, one of the defendants herein, was the owner of certain certificates of common stock of Lott Motels, Incorporated, and the owner of certain "voting trust certificates" of Lott Hotels Incorporated, which had been issued by Motor 8. Transportation and 8. Trust Corporation, voting trustees under a depository trust & Savings Bank, the stock depositary and agent of said voting trustees of such stock in Lott Motels, Incorporated. Illinois filed Nov. 10, 19 8

On December 7th, 1936, Lott transferred to Helen K. Lott, his then wife, certain of these certificates. At the time of the execution of these certificates to Helen K. Lott, Charles K. Lott had never thrown from a former wife, Cora B. Lott. He had entered into an agreement with Cora B. Lott for the payment to her of a large sum of money, which agreement had been made a part of the decree entered in the divorce proceedings, and the evidence in this case shows that to meet Cora B. Lott's demand Charles K. Lott was in the market to sell certain of his stock in Lott Motels, Incorporated, at the time of this conveyance. The evidence also discloses that at the time he was indebted to other persons in sums amounting to approximately $[illegible].

It appears from the record that the transfer of these voting trust certificates was made by Lott to the defendant in the City of Los Angeles about June 7th or 8th, 1936. On July 7th, 1936, Lott received a telegram from one Moriarty, solicitor for complainant herein and the signed the suit of complaint as Donald H. Moriarty, Jr., Process Server, and made affidavit to the truth of the facts set forth in the suit. This telegram reads as follows:

"Don't think anyone trying to Gouge You but someone. Don't worry about anything. Send by. You have some [illegible] Trust stock would be worth realized to [illegible] on the Indy Open account tech it. You will not [illegible]. It Mr. Jan Lytton [illegible]. Eff

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 Hotels, 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, 1928, Lott appeared in this cause represented by one Shaw, filed an answer 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, Cora A. Lott Meyer, former wife of Lott. It was to prevent Cora 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-

Shortly thereafter Lott and defendant separated and in
1911 they were divorced. In August 1917, at Salamanca, Ohio,
at the solicitation of Mollivray, Lott executed the note for
$20,000.00, payable to Lott Hotels, Incorporated, upon which judg-
ment 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 corporation had not been
determined, and that he would not say whether it was less or more
than $20,000.00. He also testified that Mollivray asked him to
give the judgment note and waived by note at for $10,000.00 because
he was concerned so he, and that he did not know for what he was
indicted in the country.

On May 7th, 1920, Lott appeared in this cause represented
by one Ebey, filed an answer and admitted all of the allegations in
the bill of complaint. It appears that Ebey was connected with the
firm of which the solicitor who executed the trust in the later
years was also a member. Ebey also appeared on the hearing as
counsel for the complainant, Gore A. Lott Meyer, former wife of
Lott. It was to prevent Gore A. Lott Meyer from securing possession
of these certificates that Mollivray wired Lott in San Angelos
to assign them to the defendant. Mollivray appeared as a witness
in the trial below and testified that at the time he obtained Lott
to convey these certificates to him that he was and had been
insolvent.

In view of all these circumstances, it is apparent that
the chancellor who tried this case below had serious doubt as to
the good faith of the transaction between Lott and the Defendant-

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, 236 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.

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

give of the complainant which led up to the entry of the judgment
upon which this bill is filed, which fraud, it appears by this court.
The position taken by complainant (respondent) in its brief is that
even though there be shown grounds for vacating the judgment such
be going to the complainant, still it Chapter 8. 1927 sets up the
in question, and the facts concerning the indebtedness alleged to
time of the assignment and conveyance of these notes, strict certifi-
cates to Deing E. Lott, insolvent and indebted to other persons, this
that 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
opportunities to pay certain sums to another of Lott's former wives,
Dora Y. Lott Sayer, maintained in McClatchy's telegrams to Lott; also
proof of Lott's intimacies to other persons at this time, and
also Scott v. Jennett, 256 Ill. 264, page 268, 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 attack 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 undue judgment. Yet it a fraudulent scheme was conceived for the purpose of defrauding Endore out of his judgment, evidence proving such purpose would be equally competent to any other existing creditor who might attack the validity of such transaction."

In our opinion, the motion to assess damages and the sug-

gestion of damages should have been made before the entry of the final decree. The question as to whether or not damage can be assessed under the order of the trial court, and whether or not the trial court erred in refusing to permit complainant to amend its bill for such purpose is not now before this court.

The leave of the chancellor Court in dismissing the bill for want of material jurisdiction for that purpose is not now before this court.

AFFIRMED.

GIBSON, P.J. and HEBEL, J. concur.

35572

JOHN BURKI and HELEN BURKI,
(Complainants) Appellees,
v.
ALADAR BEHNKE and ANNA BEHNKE,
(Defendants) Appellants.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

268 I.A. 617

Opinion filed Nov. 16, 1932

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit 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 Helen Burki for the purchase from defendants, Aladar Behnke and Anna Behnke, of a rooming house, furnishings and fifteen year leasehold at 7711 and 7715 North Paulina 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 Behnkes sold the rooming house upon false representations made by defendants, on which complainants relied, and by which they were induced to enter into the contract and to pay the consideration mentioned, 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 sale, Burki and his wife gave a chattel mortgage to the defendants on the articles of personal property set forth in the bill of sale to secure the payment of $6,350.00 of the purchase price. It was admitted in the answer filed by defendants, and clearly proven

Opinion filed Nov. 16, 1933

in the trial of the cause, that a very large proportion of the personal property alleged to have been assigned by the bill of sale to complainants 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 contains 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 chattel mortgage and the return of the consideration paid.

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

AFFIRMED.

WILSON, P.J. AND SHEEL, J. CONCUR.

in the twist of the nose, that a work tends backwards of the
to consistently was not the property of the statements, but it was
statement purposely alleged to have been assigned by the will of evi-
ejected by the defendants that the insertion of the articles mention-
ed in the writ of writ, was a mistake, and that the contract should
be rectified accordingly as to those articles. This defence has no
merits. The duty of this is might reasonable enough to convey the
relative of interest instantly construed is in the penny form and
completion the penny Insurance of title: cc-xii:

> 'that the said building of the first part in lawful that
> they are to be the land and lawful owning of the said
> people, entirely and directly in accord to ownership, and
> they do, the conveyance and their suits, conditions and
> restrictions, covenants and terms be and with the said
> parties to the second part, to attend and subject the said
> premises and the appurtenances.'

the second upon that there are no eligible, and a deficiency dealing
of the rest of instrument to interest conditions. Complainants'
bill alleges and the facts those that conditions not rendered
de standard, all the contents redressed from them.

The first count flatly puts out the consideration for
the security which Cochrane has obtained by taxes and that
the conditions were omitted to the cancellation of the oil of
mine and obtain warning and the return of the consideration paid.

The decree of the circuit Court of Cook County is

affirmed.

35611

CARL KUSH,

Plaintiff in Error,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, a corporation,

Defendant in Error.

WRIT OF ERROR TO THE CITY COURT OF THE CITY OF CHICAGO HEIGHTS.

268 I.A. 617

Opinion filed Nov. 16, 1932

MR. JUSTICE HALL DELIVERED THE OPINION 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 Heights, 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 15th Street in the City of Chicago Heights, 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 walking 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

36211

CARL KUHN,

Plaintiff in Error,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, a corporation,

Defendant in Error.

WRIT OF ERROR TO THE CITY COURT OF THE CITY OF CHICAGO HEIGHTS.

268 I.A. 617

Opinion filed Nov. 16, 1932

MR. JUSTICE HALL DELIVERED THE OPINION 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 Heights, 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 the 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 15th Street in the City of Chicago Heights, 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 walking 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

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 crossed entirely over the track, a dense cloud of steam came from the engine, which blinded him.

The only inference to be drawn from his testimony is 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 concerning the accident, stated that the train was not coming fast, that it was a good day, that the sun was shining, and that it had not rained at all that day. The evidence fails to show that the steam from the locomotive was the proximate cause of the injury. The testimony does show that the plaintiff was grosely 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.

35685

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, } ERROR TO

v. } MUNICIPAL COURT

JOHN BAILEY, Plaintiff in Error. } OF CHICAGO

268 I.A. 617

Opinion filed Nov. 16, 1932

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago wherein John Bailey, defendant, 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 Lambert 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 255 Chapter 38 S & 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 State of Illinois."

No bill of exceptions was filed in the case, and no question of fact is raised. The only question raised by appellant is that "Section 255, Chapter 38, S & H 1929", is not the section of the statute which provides a penalty for the making, uttering, drawing or delivering of a check when the drawer of such check knows that he has not sufficient funds for its payment when pre-

Opinion filed Nov. 16, 1939

sented, but covers the crime of "False Pretenses."

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

> Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly. That any person who with intent to defraud shall make or draw or utter or deliver any check, 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 who with intent to defraud, makes, draws, utters or delivers any check, draft or order for payment of personal services or for labor, knowing at 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 payment of such check, draft or order in full upon its presentation, shall be guilty of a misdemeanor; 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. Westerdahl, 318 Ill. 86, the Supreme Court hold 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 offense 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 mere fact that the person who drew the information added the words "Section 353 Chapter 38 S & H 1929", could not have mislead the defendant 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

enacted, but covers the scope of "Bogus Checks."

An act of the general assembly of the State of Illinois, approved May 24th, 1921, reads as follows:

> SECTION 1. It is unlawful in the State of Illinois to [illegible] (bogus checks). That any person who with intent to defraud shall make or draw or utter or deliver any check, draft or order for the payment of money upon any bank or other depository, and thereby obtain from any person any money, personal property or other valuable thing or who with intent to defraud, makes, draws, utters or delivers any check, draft or order for the payment of personal services or for labor, knowing at 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 depository for the payment of such check, draft or order in full upon its presentation, shall be guilty of a misdemeanor 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. [illegible], [illegible] Ill. [illegible], 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 offense 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 mere fact that the person who drew the information added the words "Section 255 Chapter 38 [illegible] 1929", would not have misled the defendant 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

the complaint, a certain check when he had not sufficient funds in the bank to meet its payment.

The judgment of the Municipal Court is affirmed.

AFFIRMED

WILSON, P.J. and KUBEL, J, CONCUR.

35734

MABEL RAMSEY,

Appellee,

v.

RELIANCE ELECTRIC PROTECTIVE CO., a Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY

268 I.A. 617

Opinion filed Nov. 16, 1932

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

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.

On July 24th, 1930, at about 4 P. M., plaintiff was riding east in an automobile on the south side of Randolph Street in the City of Chicago with Louise Levine, one of the witnesses for plaintiff in the trial of this case. When 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

Opinion filed Nov. 16, 1933

the light suddenly changed and the traffic on Randolph Street started east and west; that she was at this time closer to the north side than the south side of Randolph 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.

Cyril J. Stafford, a witness for defendant and driver of the car which struck and injured plaintiff, testified that he was going west on Randolph Street and stopped for the red light on the east side of Wells Street, 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 Shanahan, driver of the Yellow Cab which was being driven near the defendant's car, also a witness for the defendant and 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

her; that she made a dive for the north side of the street to escape being injured by defendant's car coming toward her, when she was struck by it. This witness also testified that when defendant'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 defendant's car was such as to have amounted to negligence in view of all the surrounding circumstances. The corner of Randolph and Wells Streets is in Chicago's loop. Drivers of automobiles are required to use that degree of care which the situation demands, to avoid injuring pedestrians, who have an equal right with such drivers to the use of the street. In Chicago Union Traction Company v. Stanford, 104 Ill. App. 99, page 103, the court said:

> "A public street is a passage open to all of the citizens of the state to go and return, pass and repass, at their pleasure. In the use of a public street, the law recognizes no favorites.*** The speed of a car (in this case referring to a street car) is rapid or otherwise, as its known surroundings 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 defendant was guilty of the negligence charged. An examination of the record shows that the entire question was fairly submitted to the jury. Their determination was that defendant was guilty of the negligence charged. On the question of damages, we hold 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 affirmed.

AFFIRMED.

WILSON, P.J. and HEBEL, J, CONCUR.

35117

LOUIS SOLOMON, Administrator of the Estate of Paul Solomon, Deceased,

Appellant,

v.

GEORGE W. MEAD and the Woodlawn Trust and Savings Bank, a Corporation, Trustee, impleaded with H. M. Marsh,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

268 I.A. 618

Opinion filed Nov. 16, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT ON REHEARING.

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

The demurrer 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 City 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 menace 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 age, and an excellent swimmer, on July 4, 1929, while swimming there, struck and came

COOK COUNTY.

2681.4. 618.

0 pinion filed Nov. 16, 1933

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. Mead, 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. Mead 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.

assistance to plaintiff's interests and other children.

automobiles to remain therein, all of which formed an attractive public, but that he constantly permitted the unmanaged, abandoned in a safe condition with due regard to the safety of the general named and therein he was charged with the duty to keep the premises

In the sixth count only the defendant George W. Ward is alleged in said count to have the attempt K. ', acted.

The fifth count is also similar to the third, but the and storage tank, as stated.

allegations are made only against the defendant, Theodore Trust

The fourth count is the same to the third, except that the removal of the aforesaid abandoned automobiles.

to the attractive nuisance doctrine and not liable for the

In the fifth count the plaintiff by attorney is stated contrary and negligently permitted dirty substances to remain

entered for anyone who was ordered...and that the plaintiff

a duty to use care and caution in keeping the premises in a safe

In the first count it is alleged that the defendants owed

to wit as follows:

The original declaration consists of eight counts, alleging

result thereof was rendered unconscious and was drowned.

and permitted by the defendants to remain in said water, and as a

in conjunct with pigeon automobiles which were negligently allowed

The seventh and eighth counts are similar to the sixth count, except that in the seventh count only the Woodlawn Trust & Savings Bank, 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 demurrer 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 demurrer 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.

The second and eighth counts are similar to the sixth count, except that in the seventh count only the Woodlawn Trust & Savings Bank, a corporation, as trustee, was named, and in the eighth count, only the defendant E. W. [illegible].

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 wilfully 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 demurrer 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 demurrer thereto, to which action 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.

The rule has been settled by the weight of authorities, and is announced in the case of City of Pekin v. McMahon, 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 curiosity."

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 36 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 Tomle v. Hampton, 139 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

not to construe it in the case of Life of Pi v. Martinson, 194 III. 141" so follows:

> In Bennett v. Lightning Co., 103 N. E. 217, it was said as the court:
>
> "Where the owner of property has granted to another the right to remove it from the land, the grantee has the implied right to enter upon the land for the purpose of removing the property granted, and this implied right is not affected by the fact that the grantee has failed to remove the property within the time specified in the grant, unless the grantor has by some affirmative act or conduct indicated his election to declare a forfeiture of the grant."

It is also announced in a line by the Supreme Court of Illinois in the case of Lewis v. Hampton, 165 III. 510, that

> "we do agree that the rights of the parties depend upon the intent of the grant, and where the grant is silent as to the time it is to remain in force, the law implies a reasonable time, and what is a reasonable time depends upon the circumstances of each case. Nothing must be done by the grantee out of the ordinary course of business, and the grantor must not do acts which unreasonably interfere with the grantee's rights."

The case at bar is one of first impression in this jurisdiction, but from the cases above cited it would appear to come. The decisions are not entirely harmonious even on the question of termination, either express or implied, however, on consideration of this question it would appear that the weight of authority is in favor of the following:

> "Where the grantee has entered upon the land and erected buildings or improvements, or placed machinery thereon, he may remove the same within a reasonable time after the termination of the grant, and the grantor cannot prevent the removal by refusing to allow the grantee to enter. The decisions are not entirely harmonious even where it comes to the question of implied, rather than express or limited time within which the removal must be made, but the general rule is that the grantee has the right to enter upon the land for the purpose of removing the property granted, and this implied right is not affected by the fact that the grantee has failed to remove the property within the time specified in the grant, unless the grantor has by some affirmative act or conduct indicated his election to declare a forfeiture of the grant."

> 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 contrivances. 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 facie 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 an 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 prima facie case of negligence, if such violation caused or contributed to the

Footnotes:

the family, as it were one main family is not such
a type opposite of our choices are "natural family relations"
because on [illegible] weighted strongly relative to
deviation of = with customs accepted "it natural contrasted
tion [illegible] down an clear effects apply" hence of the relationship's
99" it are poly in an notion of an emotions for injuries received
ancient, or it *virtue*" to age". *In Common Im*. 4, *Hope* 180 III"
once" opens the assistance in many on the city to supported it its
modifiers. This is view run so to the *attention* of a city motive-
sure is that a variation of a *mental* to *Mind Limit* existence of
tion" *subtracted* to *initial*" *pronounced* *main* *one* *case*. The *theory*
no so is *instant* *injuries* to *because* *apt* *as* *no* *the* *land* of *tradi-*
opinion is *received* *in* a *with* *objections* *cannot* i *facts* *hope* *or* *big*"
in" *is* *no* *cause* *family* of *modifiers* *in* *civil* *to* *stand* a *lance*
of *pie* *teacher* *attack* *votes* *by* *many* *acceptances*". *The* *chemical*
alike *time* *to* *instruments* of *development* on *pie* *land* for *defense*
fixtures for *industry* *second* *by* *action* of *right* *vote* *in* *mental*
ka *mouse* *apple* *the* *sound* *ml* *to* *triple* *ease* *to* a *standards* of
scripted *to* *somewhat* *down* *the* *land* *of* *the* *heart*. *Illegal*, *there*
in *the* *exercise* of *one* *case*" *not* *injured* *as* *v* *result* of *a* *such*
house *and* *in* *Italy* *to* = *because* *rightful* *down* *the* *instant*, *age*"
appeal *related* *the* *duplex* *at* *the* *center*. *Entitled* *to* *do* *as*" *the*
coming *immunity* *result* = *just* *down* *the* *land* *apply* *and* *human* *right*"
ma *the* *land* *as* *a* *feeling* *it* *to* *investment* *interest*". *The* *cause*
insured *the* *duplex* *right* *right* *it* *exercise* *joint* *as* *it* *institution*" *to*
after *the* *house* *injured* *apply* *right* *may* *have* *that* *the* *investment*
It *be* *assembly* *it* *must* *be* *sudden* *in* *be* *action* *for* *income*

the family, as it were one main family is not such
a type opposite of our choices are "natural family relations" *to* *the*
because *on* *income* *of* *weighted* *strongly* *motive* *to*
deviation of = with customs accepted "it natural contrasted
tion feeling down an clear effects apply" hence of the relationship's
99" it are poly in an notion of an emotions for injuries received
ancient, or it *virtue*" to age". *In Common Im*. 4, *Hope* 180 III"
once" opens the assistance in many on the city to supported it its
modifiers. This is view run so to the *attention* of a city motive-
sure is that a variation of a *mental* to *Mind Limit* existence of
tion" *subtracted* to *initial*" *pronounced* *main* *one* *case*. The *theory*
no so is *instant* *injuries* to *because* *apt* *as* *no* *the* *land* of *tradi-*
opinion is *received* *in* a *with* *objections* *cannot* i *facts* *hope* *or* *big*"
in" *is* *no* *cause* *family* of *modifiers* *in* *civil* *to* *stand* a *lance*
of *pie* *teacher* *attack* *votes* *by* *many* *acceptances*". *The* *chemical*
alike *time* *to* *instruments* of *development* on *pie* *land* for *defense*
fixtures for *industry* *second* *by* *action* of *right* *vote* *in* *mental*
ka *mouse* *apple* *the* *sound* *ml* *to* *triple* *ease* *to* a *standards* of
scripted *to* *somewhat* *down* *the* *land* *of* *the* *heart*. *Illegal*, *there*
in *the* *exercise* of *one* *case*" *not* *injured* *as* *v* *result* of *a* *such*
house *and* *in* *Italy* *to* = *because* *rightful* *down* *the* *instant*, *age*"
appeal *related* *the* *duplex* *at* *the* *center*. *Entitled* *to* *do* *as*" *the*
coming *immunity* *result* = *just* *down* *the* *land* *apply* *and* *human* *right*"
ma *the* *land* *as* *a* *feeling* *it* *to* *investment* *interest*". *The* *cause*
insured *the* *duplex* *right* *right* *it* *exercise* *joint* *as* *it* *institution*" *to*
after *the* *house* *injured* *apply* *right* *may* *have* *that* *the* *investment*
It *be* *assembly* *it* *must* *be* *sudden* *in* *be* *action* *for* *income*

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 erect the fence necessarily would not be the proximate cause of the injury. Whether 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 93rd 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, 1935 to July 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 float

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 pond; 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 purposes; 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 alleged that the defendants were warned many times by the City authorities to fence the clay hole, but ignored the warnings, and encouraged and invited its use,

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 pond; that the plaintiff's intestate was a boy of the age of 12 years; that he entered the water and started to swim when his head was struck by a sunken automobile or penal object; that his head was badly bruised, and he sank and was drowned.

The second additional count so 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 city hole or excavation to be kept open and exposed in the use of the general public for swimming purposes; that the plaintiff's intestate entered upon said real estate and pond without being in any manner warned, and was struck by a hidden object, rendered unconscious and was drowned. The ordinance is as follows:

"City holes and excavations. The mayor, justice of peace in possession of any real estate within the city upon which are located or situated any holes or other artificial excavations, is hereby required to cause such holes or other excavations to be enclosed with fences or walls seven or more feet in height, when such fences are of slats, only smooth or dressed with shelf be used, and such fence or fences shall contain of not less than eight rods of wire, and such rods 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 ten dollars for each offense."

The plaintiff in this count also alleged that the defendants

although they knew that many were killed there as a result of the dangerous condition of the pond. 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 demurrer admits facts well pleaded, and admits that they knew of the actual condition of the premises in which was included the swimming hole; indeed, admits that they were warned 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 demurrer that the defendants have allowed, encouraged and invited the public to swim 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 pleadings, 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 pond, as required by the ordinance, we cannot assume that this boy would have climbed over the fence to go in swimming.

although they knew that many were killed there as a result of the dangerous condition of the pond. There is also the allegation of the execution of due care and caution by the plaintiff's intestate. It is to be noted that the defendant's counter admits facts well pleaded, and admits that they knew of the actual condition of the premises in which was included the swimming hole; indeed, admits that they were warned by the city authorities and citizens of the neighborhood that swimming there was dangerous because of the strong undertow in the water, but failed to take extreme precautions to prevent swimming there and to warn the public of the danger. It is admitted by the demurrer that the defendants have filled up the pond, and while on the premises and in swimming induced the plaintiff's intestate to come upon the pond on their premises. The invitation to use the premises by the defendants have allowed, encouraged and invited the public to swim in the pond. It is also admitted by the demurrer that the defendants failed to issue the warning required by the Chicago ordinance, the terms of which are known to the court, and failed to erect a barrier, and while on the premises for a lawful purpose, 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 pleadings, 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 that is the reason, 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 is a duty imposed by the duty ordinance, and failure of the defendants to do so, as alleged, is a breach of this duty to the public breach of duty will be evidence of negligence. To erect a fence and evidence of negligence for which the defendants are liable if the injuries caused the death of plaintiff's intestate were, in a substantial sense, the result of such violation of duty. It ordinance, we cannot assume that this pay needs climbed over a fence put upon built enclosing the pond, as required by the

Plaintiffs 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 33 of the Practice Act, Cahill'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 Zister v. Pollack, 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 33 of the Practice Act was amended. The amendment to Section 33 affords an opportunity to the plaintiff

Plaintiffs 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' response in reply to this contention is that the rule has been changed by the amendment to section 39 of the Practice Act, Cahill's Ill. 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>Sisler</u> v. <u>Tellock</u>, 308 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. Sisler, 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 Practice Act was amended. The amendment to Section 39 affords an opportunity to the plaintiff

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.

While the order of the court sustained the demurrer to the declaration, it does not appear from the record that a demurrer was filed by the defendants, in compliance with leave granted by the court, or that the plaintiff objected upon that ground. The court will, therefore, consider the questions before us as if raised by a demurrer properly filed. However, for the reasons set forth in this opinion we have reached the conclusion that the trial court erred in sustaining the demurrer 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' demurrer to the second additional first and second counts as amended; 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,
HALL, J. DID NOT PARTICIPATE.

MR. PRESIDING JUSTICE WILSON SPECIALLY CONCURRING:

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

to file an amendment to the declaration, notwithstanding the limita-
tion 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,
while the order of the court sustained the demurrer to the
declaration, it does not follow the result that a summary
was lifted by the defendants, in compliance with leave granted by
the court, or that the plaintiff objected upon that ground. The
court will, therefore, consider the questions before us as if
lifted by a demurrer properly filed. However, for the reasons
not fully in this opinion to note included the sentence that
the writ should stand in sustaining the demurrer to the second
additional plea and leave granted on default. Therefore, the
judgment is affirmed and the cause remanded with direction that
the court set aside the judgment dismissed and paid for costs
the order sustaining the defendants' demurrer to the second
additional plea and leave granted on default; that the writ stand
dismissed plea and leave granted on default; that the writ stand
as may be lifted by the court, and enter such further and other
orders the plaintiff may be lifted to said court within some time
fixed the plaintiff may be lifted to said court within some time
fixed and leave granted on default; that the writ stand
dismissed plea and leave granted on default; that the writ stand
dismissed plea and leave granted on default; that the writ stand
dismissed plea

35404

ANNA DYREK,
Plaintiff in Error,
v.
GEORGE ZEMAITIS,
Defendant in Error.

ERROR TO
CIRCUIT COURT
COOK COUNTY.

268 I.A. 618[2]

Opinion filed Nov. 16, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an action in trespass in the Circuit Court of Cook 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 November 26, 1930, the case was reached for trial and was tried ex parte, resulting in a verdict of the jury finding the defendant guilty and assessing the plaintiff's damages at $2,000, accompanied 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 aside and the case set for rehearing. To this motion to vacate the said judgment, the plaintiff filed a general demurrer, which was overruled by the court, whereupon, the plaintiff electing to stand by her demurrer, the court vacated

Opinion filed Nov. 18, 1853

MR. JUSTICE HENRY DELAPLAIN AIN DELIVERED THE OPINION OF THE COURT.

This is an action in trespass in the Circuit Court of Cook County by the plaintiff against the defendant, heard upon an alleged pursuit upon the plaintiff by the defendant, to which action the defendant pleaded not guilty and not before.

On December 26, 1851, the case was brought for trial and was [illegible] entered by a verdict of the jury finding the defendant guilty and assessing the plaintiff's damages at [illegible] dollars.

Defendant has entered also the written to have of the plaintiff was guilty of wilful and malicious assault upon the plaintiff, evidenced by a special finding of the jury that the defendant in the usual manner assaulted to damage by the jury.

On June 26, 1851, the defendant moved for an order requiring the defendant from the custody of the sheriff under a capias issued in the judgment of November 26, 1851, and for an order reinstating the judgment and for a new trial, which motion was overruled, and the affidavit of the plaintiff alleging, which were verified, and the affidavit of 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

defendant contains the matter for relief, which is, that the judgment of November 26, 1851, be set aside and the case set for rehearing. To this motion to vacate the said judgment, the plaintiff filed a general demurrer, which was overruled in the court, whereupon

the plaintiff electing to stand by her demurrer, the court vacated

defendant in error.

ANSWER TO

PLAINTIFF IN ERROR,

A.

ASSAULT MARTIAN,

YANT DIXON,

and set aside the judgment and quashed the capias 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 laches 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 November 26, 1930, for the sum of $3,000. 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 aside, 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 affidavits of C. E. Jensby and H. W. Starr were offered. The reason that no steps were taken, as appears from the affidavits, is that C. E. Jensby, a clerk of H. W. 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 Pomeroy, the judge presiding 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 demurrer, 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

vacate the judgment, and we reserve the merits of more important
questions.

The plaintiff has questioned the form of the motion made to
vacate the judgment, but we regard the merits of the motion
and the affidavits filed by the defendant.

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, while is raised by the plaintiff's
general demurrer, necessarily involves itself as to the sufficiency
of the affidavits. When the affidavits it appears that the motion was
made on June 26, 1911, to vacate the judgment entered on November
26, 1910, for the sum of $3,000. It appears that the defendant
did not know that the judgment was entered until January 17,
1911, and that he thereupon employed his attorney of the 21st of
December 17, 1910, with the request that the attorney draw up
some form pleadings and notify me as soon until then it.
January 21, 1911, when the attorney drew up the pleadings
and E. C. Short were filed. The record that no other were
there of P. J. Short, attorney for the defendant, left the matter
to this attorney, and the defendant's attorney was unable to
communicate with him until June 16, 1911, when he returned at his
office and was informed regarding the facts that occurred on
the date the case was on the trial call of judge Dunaway, the
judge presiding in the Circuit Court of Cook County. This motion,
however, was made within the statutory period of limitations.
Curtis v. Chicago Surface Lines, 254 Ill. 300.

The plaintiff argues the record by DIX counsel which
are not avail the judgment and sought the finding and the sentiment
of fact.

The plaintiff in error claims that the defendant was guilty

than the form of the motion. The Supreme Court in the case of Harris v. Chicago House wrecking Co., 314 Ill. 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 Ill. Rev. St.

The plaintiff's demurrer admits the truth of the facts set forth in the affidavits, which the trial court no doubt considered in passing upon this demurrer. The facts as they appeared in the affidavit disclosed that the defendant had knowledge that the case was on the trial call of Judge Pomeroy, the judge presiding. On November 28, 1930, C. E. Jensby, a clerk for H. W. Starr, attorney for the defendant, appeared in Judge Pomeroy'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 seated 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. Shortly 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 Starr was engaged before the Treasury Department in two cases, and would be ready for trial

then the issue of the motion. The Supreme Court in the case of Harris v. Oklahoma Tuberculosis Ins., 114 III. 800, held to the effect that an affidavit of facts, every fn, 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, Gabill's III. Rev. St.

The plaintiff's demurrer admits the truth of the facts set forth in the affidavit, which the trial court no doubt considered in passing upon this demurrer. The facts as they appeared in the affidavit disclosed that the defendant had knowledge that the case was on the trial call of Judge Pomeroy, the judge presiding. On November 20, 1922, C. E. Jenby, a clerk for C. V. Starr, attorney for the defendant, appeared in Judge Pomeroy's court room and informed the clerk of the court that he, Jenby was going to another court and desired the case held, and that he would return as soon as possible; that he might 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 worked 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. Shortly 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 10, 1923, and did not know that the case had been tried. It also appears that C. E. Starr, an attorney for the defendant in two cases, and would be ready for trial the call of Judge Pomeroy; that Starr was engaged before the

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 Toth v. Phillipson, & Co., 250 Ill. App. 247, that judicial notice will be taken from the fact that under the well-known conditions existing in Cook County, attorneys often have cases called for trial in different courts on the same day 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 Cook 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 call 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 Practice Act, Cahill's St. ch. 110, Par. 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

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 Roth v. Phillipson, et al., 220 Ill. App. 267, that judicial notice will be taken upon the fact that under the well-known conditions existing in Cook County, attorneys often have cases called for trial in different courts on the same day and employ 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 Cook 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 call 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 Practice Act, Cahill's St. ch. 110, par. 89, the vacation of the judgment of dismissal."
> * * * The clerk is an officer of the court and it is his duty to make the 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 make 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 Andrews 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 Jensky, 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

his engagement in the Treasury Department. The fact is that the law clerk attended court calls and returned to Judge Pomeroy's court room after attending another call in the Municipal Court, 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 affidavit of Jensby he received his information of a continuance from a clerk or man seated 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.

We, therefore, are of the opinion that the court did not err in overruling the demurrer of the plaintiff, and in ordering the judgment vacated and set aside and the capias quashed.

Accordingly, the order of the court is affirmed.

ORDER AFFIRMED.

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

the entered judgment under rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure, and justified the order vacating the judgment on the ground of "mistake, inadvertence, surprise, or excusable neglect". Motion was a matter of the sound discretion of the court, and unless the court's action was arbitrary and unreasonable, it would not be disturbed on the appeal. The defendant's attorney was misled by the plaintiff's statement as to the conditions existing at the time entered at the depo. The admitted fact is that he could be excused in the instance case.

These statements in order to the fact that in the affidavit of Joseph he received the information of a conversation from a clerk of the court. The defendant was misled, and inadvertently and was not required to verify the same by consulting the minutes of the clerk of the court. The defendant was misled, and inadvertently misled in relying upon Joseph's statement as to the conditions existing at the time of the depo. The admitted fact is that he received misleading information. The defendant's attorney was misled by the information of a conversation from a clerk of the court. The reference for the statement in this case was not negligent, and whether a mistake was made by the clerk of the court as the attorney's clerk, an error, certainly, the judgment ought not to stand, inasmuch the defendant has a meritorious defense.

We, therefore, are of the opinion that the court did not err in vacating the decision of the district, and in ordering the judgment vacated and set aside and the motion dismissed.

Accordingly, the order of the court is affirmed.

ENTER PLAINTIFF.

ENTER: J.T. RETT, J. CHIEF.

35505

W. C. HANDLEY,

Appellee,

v.

CARL J. RINGBLOOM, ELON RINGBLOOM, DAVID RINGBLOOM and JOSEPH RINGBLOOM, copartners doing business as RINGBLOOM BROS. MOTOR SALES,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

268 I.A. 618

Opinion filed Nov. 16, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This case is based upon an action of assumpsit 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 $683, from which the defendants appeal.

The substance of the allegations of the plaintiff's declaration is based upon the warranties of the defendants in the negotiation, sale and assignment of a chattel mortgage note signed by John Edward Heidy, and guaranteed by Mary Heidy. 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 Heidy established her defense 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, 1926, John Edward Heidy, of Chicago, bought an Oakland automobile from the defendants, who were engaged in the automobile business; that Heidy paid for the automobile in part cash and executed a note for $634, to be paid in weekly payments of $11.18,

Opinion filed Nov. 16, 1932

MR. JUSTICE HENRY DELIVERED THE OPINION OF THE COURT.

This case is based upon an action of assumpsit 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 [illegible] from which the defendants appeal.

The substance of the allegations of the plaintiff's declaration is based upon the execution of two instruments in the nature of promissory notes signed by John Doe [illegible], and guaranteed by Mary Roe. 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 Roe established her defense 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 2nd day of July, 1928, John Edward Roe, of Chicago, bought an Oakland automobile from the defendants, who were engaged in the automobile business; that Mary Roe for the automobile in part cash and executed a note for [illegible], to be paid in weekly payments of $17.50;

which included interest, and to further secure 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 Reidy" written thereon by one Thos. M. Reade. The endorsement was witnessed by A. G. Holman. On October 29, 1926, after John Edward Reidy failed to make payments as agreed, a judgment by confession was entered in the Municipal Court of Chicago against Mary Reidy upon the guaranty for the sum of $617. On May 5, 1927, Mary Reidy 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, 1929, the plaintiff mailed a registered letter to one of the defendants, Carl J. Ringbloom, requesting the defendants to have Mr. Reade and Mr. Holman present as witnesses at the trial, and further notified the defendants that in the event Mary Reidy should establish her defense, 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 $883 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 Cahill's Ill. Rev. Stats. Chap. 98, Paragraphs 65 and 66, entitled "Negotiable Instruments."

§§ and 66, entitled "Negotiable Instruments."

The plaintiff's action is based upon an implied warranty implicit the 1882 in favor of the plaintiff.

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 finding the issues for the defendants Mary Reilly, and entered judgment against the plaintiff upon these findings.

Upon the back of the note signed by him was a printed form of guaranty and a conclusion clause. This guaranty was signed in pencil with a cross, and the name of "Mary Reily" written thereon by one Thos. C. Cross. The endorsement was witnessed by A. G. Holman. On October 20, 1888, after John Edward Reily failed to make payments as agreed, a judgment by confession was entered in the Municipal Court of Illinois which Reily owns the General for the sum of 1817. On May 8, 1889, Mary Reily filed a petition in the Municipal Court stating that she signed the guaranty upon the note, and on May 18, 1889, the Court, by its order, granted Mary Reily leave to defend.

Thereafter, on December 13, 1889, the plaintiff mailed a registered letter to one of the defendants, Carl A. Hinkpiem, requesting the defendants to pay the note and on, unless answer in the stead Mary Reily should certainly pay interest, 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, 1890, when the witnesses were heard and the court found the issues for the defendant Mary Reily, 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 the plaintiff, and in favor of the plaintiff. The instrument is framed and in all respects what it purports to be," as provided in Chapter III, Rev. Stats. Chap. 98, Paragraph

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, 1939, 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 Brothers; that Mrs. 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. However, the defendants in their briefs admit that they did receive notice on the 13th day of December, 1939, three weeks before the trial in the Municipal Court upon the issue as to whether Mrs. Reidy 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 judgment in
conformity upon a third party only where the third party is notified
of the pendency of the proceedings in ample time to permit him
effectively to participate in the trial. The contention by the
instant case is whether the notice given by the plaintiff was in
ample time. The notice was received by the defendants on December
12, 1933, which would indicate that they received it the trial
was not to begin for another five days. Nearly no period
of time is stated for that.

There is evidence in the record that the plaintiff had a
telephone conversation with one of the defendants to the effect
that the plaintiff purposed the delay made from the discussion
counsel; that Mrs. Judy Dixon the move signed the note, and
sent the attention of the defendants to this defense, because of
the Statutes of the Provisions of the note of the Negotiable
Instrument. Write objection was made at the trial to the admissibility
of the evidence, this objection was not urged in the brief filed
by the plaintiff in one of the cross relief upon for instance.
Counsel, the defendants in their brief state that they purpose
notice on the 13th day of December, 1933, three weeks before the
first in the contract that upon the issue is to matter are.
Nearly signed the Promissory Note the note in question, and the
defendants in the instant case were afforded an opportunity to
defend on the notice that pending and in which Mrs. Nearly was
a defendant.

It that text, the witnesses Holman and Poole testified
to have pondered minutes the county identity are. Nearly no point
ensue to be that an earlier notice would have made it possible
counsel and signed as a Promissor. The contention of the defendants
put were unable to identify are. Nearly as the woman who was

present and signing as guarantor. 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 Mary Heidy not guilty. Unfortunately for the defendants, the witnesses present at the execution of the note in question were not able to connect Mrs. Heidy 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 automobile 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.

35523

STRAUS NATIONAL BANK & TRUST COMPANY, of CHICAGO, Guardian of the Estate of Alex Janoszewski, a minor,

Appellee,

v.

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

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

268 I.A. 618

Opinion filed Nov. 16, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment in the sum of $1500 entered in the Circuit Court of Cook 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 servant 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:

Opinion filed Nov. 18, 1933

1. That the court erred in refusing to instruct the jury to find the defendant not guilty, as to the wilful and wanton count, for want 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 Janeszewski, at the time of the accident, was 12 years of age, and that on the 12th day of October, 1939, 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 wagon 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 35 to 40 feet, an automobile truck of the defendant was standing at the curb on South 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 automobile 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 ran over the boy's legs and dragged him into the intersection of South Chicago Avenue and 89th Street; that the minor plaintiff was under

The court has examined the evidence in the record and finds:

1. That the witness Fredericksen is fond of the
   red vested coats, the rule at least at Rudy Wang; and
   just to find the Delgado suit purple, as is the style
   of. That she would need to explain to Justice the
   defendant.

the automobile truck when it stopped; was unconscious and bleeding from his nose and mouth; that he was taken to the South Chicago Hospital 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.

At the trial, the driver of the automobile truck testified 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, amounts 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 gross want of care as indicates wilful disregard of consequences or a willingness to inflict injury." Baldren Express Co. v. Krug, 291 Ill. 472.

This accident occurred in the daytime. There was no obstruction 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 care to avoid the injury when he actually knew of the danger to which the boy Alex Janoszewski, 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 Ry. Co., 153 Ill. App. 625. 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 act, and the trial court did not err in refusing

Clyne v. Powell Co., 112 Ill. 628. Even the views as have been expressed in this opinion it will not be necessary to discuss the evidence contained in the record relative to the intent of the parties in the execution of the deed.

The rule of law applicable to the facts in this case is: That the delivery essential to a deed, which has received the assent of the grantee, may be made by the grantor to a third person, and that the acceptance will relate back to the time of the execution of the deed, provided the grantee assents to the delivery within a reasonable time after he learns of the execution of the deed. Such assent will be presumed, where the deed is beneficial to the grantee, and the grantee does not dissent within a reasonable time after he learns of the execution of the deed. Such assent will be presumed, where the deed is beneficial to the grantee, and the grantee does not dissent within a reasonable time after he learns of the execution of the deed.

It is the intent, the delivery of the instrument through the hands of a third person, and that the grantee shall not have the right to recall the deed after it has been delivered to the grantee.

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. CONCURS,
HALL, J. NOT PARTICIPATING

35548

MILWAUKEE TOOL & FORGE CO., a Corporation,

Appellee,

v.

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

Appellant.

APPEAL FROM

MUNICIPAL COURT OF CHICAGO.

268 I.A. 619

Opinion filed Nov. 16, 1932

MR. JUSTICE REMEL DELIVERED THE OPINION OF THE COURT.

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 $1311 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, 1928, 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 credit 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 $1311, from which judgment the defendant appeals to this court.

The facts in evidence are, substantially, that the plaintiff sold and delivered to the defendant 5,000 wrenches at 69 cents each, and that the defendant on October 30, 1928, paid $138 on account

and that the defendant on October 30, 1926, paid $128 on account sold and delivered to the defendant 3,000 envelopes at 65 cents each, leaving a balance due of $1,820, and that after allowing the plaintiff a credit of $347, there was a balance of $1,082 due the defendant.

The case came on for trial in the municipal court with the 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 $347, from which judgment the defendant appeals to this court.

The facts in evidence are, substantially, that the plaintiff sold and delivered to the defendant 3,000 envelopes at 65 cents each, and that the defendant on October 30, 1926, paid $128 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 Wisconsin corporation and has its place of business in Milwaukee; that the defendant, and one A. I. Epton, called at the defendant's place of business between the 15 and 25th of August, 1928, and after considerable negotiation between the parties, the plaintiff agreed to sell the wrenches in question at 69 cents each, and that the defendant by letter ordered 4,000 wrenches at this price, 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 November 12, 1928, addressed to the plaintiff, ordered 1,000 more of the wrenches, 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. 121a of the Sales Act, Sec. 42 Cahill's Ill. Rev. Stats. provides, that unless otherwise agreed,

> "delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller 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

tiff" and not even after the suit was instituted. The defendant

defendant failed to pay the balance due after demand by the plain-

The evidence is clear in the instant case that the

[illegible] to pay the price in exchange for
[illegible] and the buyer must be
[illegible] to give possession of the goods in the
[illegible] of the price are con-
[illegible] that is to say, the seller must be
[illegible] and in a position to give possession of the goods
[illegible] of the price.' Uniform Sales Act, Sec. 42 (Smith-Hurd's
Ill. Ann. Stats. (Cahill's 1931 Supp.) Chap. 121½ of the Sales Act, Sec. 42).

The evidence does not show when the defendant was to pay for the merchandise. Chap. 121½ of the Sales Act, Sec. 42 (Smith-Hurd's Ill. Ann. Stats. (Cahill's 1931 Supp.) Chap. 121½ of the Sales Act, Sec. 42) provides, that unless otherwise agreed the buyer is not bound to pay the price before he has had a reasonable opportunity to examine the goods for the purpose of ascertaining whether they are in conformity with the contract. The evidence does show that the defendant was to pay the balance, which is the subject of this controversy.

The defendant has the burden of proof upon that question before this court is, did the defendant establish his set-off? The defendant pleaded a set-off of $1,000.00 against the plaintiff's claim, which was denied and acknowledged by the plaintiff, and thereafter evidence by letter entered [illegible] was sent to the plaintiff, which followed the allegations of the plaintiff in the pleadings, the plaintiff contended but one payment, leaving a balance of $1,000.00 at this time, which was denied and acknowledged by the plaintiff, and thereafter to sell the merchandise in question at 60 cents each, and that the defendant, and one L. Upton, called at the defendant's place of business between the 15 and 20th of August, 1928, and after

3

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. Duguid 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, 80 Ill. 390; Metz 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 authorized 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 Nut. Oil Co. v. Western 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.

defendant himself, is not in default of performance of the contract.'

action is for a breach of contract, it must appear that he, the right to recover against the plaintiff upon his action, and it his in which the defendant is the plaintiff, and he must establish his

A familiar rule is that a plea of set-off is a counter-claim against the defendant in his plea of set-off.'

peremptory instruction, the jury found for the plaintiff and

In the plea of set off the evidence, in accordance with the

to the contrary, even assuming that defendant's contention as to the meaning of the contract is correct, there was sufficient evidence to submit to the jury the question of whether or not defendant had performed his contract; defendant was undoubtedly in default in its payment under the contract, and plaintiff was entitled to recover the amount due it, even if defendant had performed its contract in full. In an action for damages for breach of contract, the measure of damages is the value of the performance to the contractee.

Corbin on Contracts, Vol. III, p. 1111. See, also, Williston on Contracts, Vol. V, p. 4.

The question of interest was involved only in the case of

Corbin on Contracts, Vol. III, p. 1111. The Court said:

"In the terms of the contract between the parties in this case, nothing was said about the time when part payments were to be made. It must mean, the law implies, that the payments were to be made within a reasonable time after delivery of the property. What constitutes a reasonable time is usually a question for the jury to determine, and ordinarily depends on the circumstances. Under some circumstances it might be a matter of law for the court. Because circumstances may vary in different transactions, what would be a reasonable time in one transaction might be unreasonable in another. In the present case, the jury found for the plaintiff and

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.

35560

JACOB B. ZACKMAN,
Appellee,
v.
A. M. ANDREWS, et al.,
Appellants.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

268 I.A. 619²

Opinion filed Nov. 16, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION 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.

The complainants filed a bill of complaint in the Superior Court 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,

of the defendants' excepting to the Master's report,
made his report to the court, and the court overruled the objections
and the complainants demurred to the return of all money paid and
collateral deposited by them.

The cause was referred to a Master, who, after a hearing,
found and returned the complainants of their money and property.
The bill alleges that the acts of the stock was fraudulent and void,
representations made by the defendants with intent to cheat,
which they knew to be untrue when made, and certain statements and
certain false statements and representations made by the defendants,
the alleged purchase of certain stock by the complainants upon
for an accounting and for other equitable relief, leaving out of
filed a Cross-petition for answer under oath. The bill here
hour of four county in the year 1923. Thereafter the defendants

by the defendants.

The complainants filed a bill of complaint in the Superior
and demurring that the complainants are entitled to an accounting
sheets in the bill of complaint are admitted by the evidence,
sheet's report and finding that substantially all of the material
by the court overruling the exceptions of the defendants to the

This is an appeal by the defendants from a decree entered

MR. JUSTICE KENNY DELIVERED THE OPINION OF THE COURT.

Opinion filed Nov. 16, 1923

COOK COUNTY.

APPEAL FROM

Abstract.

Appellee.

A.

P. M. CROSBY, et al.,

Appellants.

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 answer under oath by the defendants, and therefore the defendants filed an answer 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. Mackman, lived most of his life on a farm near Shelby, Ohio, with his wife, Ida Mackman, co-complainant and their three children. Neither one of the complainants had more than a country school education. For several years Jacob B. Mackman worked as a laborer in the Ohio Seamless Tube Works of Shelby, in which concern 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 1919, when one W. G. Tabor, a salesman for Andrews & Company, a common law trust, of which company the defendants were members, telephoned to Mackman from Cleveland, Ohio,

defendants were members, originated to Chapman from Cleveland, Ohio, for Indiana & Company, a common law trust, of which company the litigation concerned in Essex 1819, when one W. G. Taylor, a prisoner and ordered a decree in favor of the complainants for consolidation and what money was saved they invested jointly in their farm and homestead.

The first stock transaction involved in the present

controversy was a letter in the form of a joint note executed, from their attorney, instead a joint note executed, in behalf, in which account he had none of its capital stock. The note was signed by Chapman school education. For several years Jacob B. and their three children. Neither one of the complainants had an farm near Shiloh, Ohio, with its wife, its business, co-operating the farm.

The negotiations, Jacob B. Hepburn, lived most of his life

In the issues is error to determine whether the Chancellor erred in

bearing this consideration in mind the court will consider the evidence

that the answer as made by each client's patent knowledge,

based on information and belief is not evidence when it is obvious

the complainant, only the fifth contention is that an answer

has witnesses, or one witness and corroborating circumstances.

sive to the bill, is one evidence, and could only be overcome by

The defendants contend that as far as the answer was responsive Tilden to cancel under oath, as required by law.

relief to answer under oath to the defendants, and therefore the

It appears from the record that the complainants did not

to which the answer makes the writing.

Chapter 2. Indiana, and that the cause be remanded to a court and an accounting against the defendants, Jacob K. Andrews and

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 $800 worth of Dictograph Products Company 8% Preferred Stock. The complainants paid $250 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 Cleveland, Ohio, from April 1919 to March 1920. The defendants obtained $7,875.00 in Liberty Bonds, 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 $3,500 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' securities 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 Products Company and the Standard Cap and Seal Company on extended installment payments to the

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. Bookman was flattered and visited at the defendants' place of business, which was magnificently furnished. The dealings with the defendants began from this visit, when he was induced by salesman Tudor to buy 6500 [illegible] Products Company-preferred stock. The [illegible] 60 days.

In all, there were nine transactions with the defendants, who were doing business in Cleveland, Ohio, from April 1933 to about 1936. The defendants retained $7,870.00 in direct profit, 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 invested 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 $2,500 balance to the defendants. The complainants delivered to the aforesaid solicitors, amounting in the amount of $1,750, 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' securities were loaned 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 Products Company and the Standard Dry and Wall Products Company as stated heretofore to the

complainants, and received from the complainants the following items:

April 2, 1919	$250.00	Cash
April 11, 1919	250.00	Cash
May 15, 1919	500.00	Liberty Bonds
July 23, 1919	500.00	Liberty Bonds
Oct. 10, 1919	300.00	Liberty Bonds
Oct. 14, 1919	940.00	Cities Service
Oct. 23, 1919	500.00	Liberty Bonds
Nov. 17, 1919	100.00	Liberty Bonds
Nov. 24, 1919	500.00	Liberty Bonds
Dec. 1, 1919	950.00	Liberty Bonds
Dec. 8, 1919	100.00	Liberty Bonds
Jan. 19, 1920	950.00	Liberty Bonds
Jan. 26, 1920	400.00	Liberty Bonds
Sept. 25, 1920	1,260.00	Fourteen Ohio Seamless Tube
Sept. 25, 1920	475.00	Two notes Jesse Stephens

It appears from the evidence that it was represented to the complainant Zackman that Andrews & Company as Investment Bankers controlled the Dictograph Products Company, a New York Corporation and its stock, 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 Tabor, 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 Bankers, and they wrote to Zackman 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 slips, and in each

complainants' was received from the complainants the following

items:

July 2, 1919	£300.00	Cash
July 22, 1919	300.00	Cash
May 10, 1920	500.00	Travers Smale
May 25, 1920	500.00	Travers Smale
Jan. 10, 1919	500.00	Travers Smale
Oct. 10, 1919	500.00	Gilpin Darwin
Oct. 20, 1919	500.00	Travers Smale
Jan. 20, 1919	500.00	Travers Smale
Nov. 12, 1919	1:00.00	Thornby Marsh
Nov. 25, 1919	500.00	Travers Smale
Dec. 1, 1919	500.00	Travers Smale
Dec. 5, 1919	500.00	Travers Smale
Dec. 9, 1919	500.00	Travers Smale
Jan. 10, 1920	500.00	Travers Smale
Jan. 20, 1920	500.00	Travers Smale
Feb. 25, 1920	£750.00	Travers Smale
Feb. 28, 1920	£1,500.00	Travers Smale Drury Lane

It appears from the evidence that it was represented to

the complainant Lucas that Indians 7 Central on Investment

Bonuses acquired the Intergrand Products Company, a New York

Corporation and it also, and that they were about to put the

stock on the New York mark; that the Investment stock only to

the complainants was convertible at any time into common stock,

and upon Vancouver & Company put it on the curb the common stock

would rapidly advance in price, so that Messrs. Lucas would

be advanced stock into common stock within the next ninety days.

Thereon obtained the agent of the defendants, to issue the

stock hypothecated in the name of himself and his wife, that he pay

be exhausted in stock transactions. Upon this him to Jones Lucas-

thing to them, that they would attend to all details; that they

would never close him out; that after be bought the stock from

them, the defendants, be would be one of their clients; that

Vancouver & Company was a good, reliable firm of Investment Bankers,

and they wrote to Lucas that they regarded him as a client and

would pick more of him.

It was the transactions between the complainants and the

instance 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 Backmans, 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 Backman had purchased $3,000 worth of Dictograph preferred stock, he was advised 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 Backman 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.

About July, 1919, the complainants first discovered 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 Dictograph Company, under the guidance of Archie M. Andrews had a meeting at which they put off the conversion date until after the first of the year 1920, but that Andrews & Company had a new stock they were bringing out for their clients, known as the Standard Cap and Seal Corporation, which would be convertible in ninety days; and that it would go on the curb market at once. Backman 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

when it went on the rack. It was reinserted to the specifications
described the preferred stock and authorize it for the common stock
issues was initially with the same directors and reincorporation to
minority only; and that it would be on sale market at once.
attempted only one last declaration" which would be acceptable in
stock they were originally one for their stock" known as the
the first of the year 1900" and also indorse a Company had a new
ing I received it again ship for all the conversion Bank credit else
of the Stockholders Company" under the guidance of Isobie M. Vanhorn
they might not release this liquidated stock into common stock?
about July, 1910" the consolidate first dissolved
the overseas."

It" this is not its sole purpose but dissolved stock in
entered until the time that all already disposed its attention to
of the Title Deed; only to the sale clerk undisputed one
may have only a total investment. It" one name working of the notes
that does be one incorporated holding Trust Certificates that be done
and Taxpayer entitled that to cover for its execution relief to the
it be must make the terms of his taxing Trust Agreement. Conclusion-
due be a Tax or Income a failure to cause certain stated profit
term amount stock. This solicitation on declaration of the stock and
Stockholders Committee stock" be and ordered that it was not comparable

Plans for corporate Taxpayer and purchased $2,000 worth of
Trust Certificate.

Some objections Pierce Co." according to the initiated" Taxing
more than real stock" in its common application rate sale
of Inc" on this securities were ever issued to the taxpayer" not
primarily purchased or sufficient for solicitor sheet. So a matter
reasons induced the securities to cause by a pledge the stock

that the Standard Gas 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 the open market, and no stock was sold.

During all this time both of the complainants received literature by mail from Chicago under Andrews & Company's name as Investment Bankers, part of which was in the form of confidential letters, part in the form of a "house-magazine" called "Now", 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. Sackman, the complainant, informed each 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:

> "Were 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 Andrews & Company were not brokers; that they were bankers, and that they wanted to make an investment client

out of him and wanted to make some money for him.

It appears from the record that the Standard Cap & Seal Company was in the business of manufacturing bottle capping machinery, which was an Illinois corporation, and subsequently liquidated under an order of court; that Archie M. Andrews, through Andrews & Company, bought this concern from one Tevander for $451,000 cash; organized a $3,000,000 Virginia corporation and turned over the assets purchased from Tevander, and as a part of this organization scheme, Andrews & 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 common stock, while Tevander, 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, O. Tevander, and E. W. Everett, their attorney, were the trustees; and that the stock was to be held by them under the terms of a certain agreement.

The evidence in the record is largely that offered 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. Frytear v. Lawrence, 10 Ill. 225. 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. 1 A. L. R. 39.

out of him and wanted to sell more money for him.

It appears from the record that the Standard Bag & Seal Company was in the business of manufacturing cattle sizing machinery, which was an Illinois corporation, and subsequently liquidated under an order of court; that Leslie A. Andrews, through Andrews & Company, bought this concern from the receiver for $111,000 cash; organized a $1,000,000 Virginia corporation and turned over the assets purchased from receiver, and as a part of this organization scheme, Andrews & 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 common stock, while Carpenter, the other party to the transaction, received the balance. The stock of both Andrews & Company and Carpenter was then put into a voting trust by a declaration dated May 1, 1919, reciting that Leslie A. Andrews, A. Carpenter, and E. R. Everett, their attorney, were the trustees; and that the stock was to be held by them under the terms of a certain agreement.

The evidence in the record is largely that offered 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. [illegible] v. [illegible], 10 Ill. 355. 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. [illegible]

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 hearsay, and not upon the knowledge of these defendants. No doubt, the Chancellor considered the answer of the defendants and applied the rule suggested by the Supreme Court in Winkelmann v. Winkelmann, 345 Ill. 566, which is to the effect that a sworn answer is entitled to weight only when it is entitled to belief.

There can be no dispute that a misrepresentation 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.

During 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

when they were charactered with a suit for an accounting. The truth
created the account of the complainants with these transactions
stock and notes of the complainants to their own account, and only
final agreement. These defendants went so far as to contend certain
that the several stock transactions were controlled by a voting
of the several dealings, and did not impart knowledge to them
believed to be stock certificates, delivered them as to the character
accepted the complainants' money, and then on to purchase what they
making the nature of their dealings, the defendants
in the several transactions had with those defendants,
also that they had induced them to purchase the so-called stock
corporations, not alone that they were investment brokers, but
and that they, the complainants, relied upon the defendants'
that the defendants obtained the confidence of the complainants,
statement so made in material. The facts justify the conclusion
the statement is made relied upon the truth of it, and that the
making by the party making the statement; that the person to whom
of inducing a party is not; that it is untrue and known to be
mention a statement of fact but an opinion made for the purpose
after amity implies a matter of profit to act in a manner some
There can be no dispute that a misrepresentation
when it is relied on is material.

In the fifth ~~fifth~~ count amount is entitled to voting only
the Boston Court in Hutchinson v. Manufacturing, 242 111. 596, which
and
of the nature of the defendants implied the rule announced in
duplicity of these statements. In short, the transaction consist-
ent, and is therefore proper, and not even the
fact is also information which they received and derived from
statements had with the complainants; that the answer on its
ment knowledge in regard to the various representations and

It is apparent from the answer that the defendants had no indepen-

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 statements 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 Zufelt v. Andrews & Company, 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. Such is the case where one is purchasing goods, the value of which can only be known by experts, and is relying upon the vendor who 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 Supreme Court entitled McCord v. Roberts, 334 Ill. 233,

[illegible] the [illegible] was fully revealed upon the trial
of the case before the Master, and the evidence clearly indicates
a ruinous loss for the money of those 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 statements 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 induced by misrepresentations of a most or material fact in
connection with future promises to be fulfilled, and the court
did not err in granting the relief sought for by them upon the
ground urged by the defendants. The rule applicable under the
facts before us is well expressed in 21 R. C. L. 88, as follows:

> "If one relies, to existing fact - material, in part
> at least, on misrepresentations of a fact or existing
> fact, the courts will not inquire in determining in an
> attempt to avoid their acts whether a misapprehended situation
> is induced by such misrepresentations of fact as to result the guilty party to
> inducements is going to result the guilty party to
> obtain restitution if the fraud, even though there
> was intention to defraud or fraudulent acts would not
> have been committed."

And again, this court in Public v. Indiana & Limestone, Mo. 82997,
Appellate Court, first district (not reported) said, quoting from
Bosley on Torts:

> "There are some cases in which even the false assertion
> of an existing will amount to a fraud, the reason being
> that the statement is made by one who is presumed to
> know the statement to be true, when the other party has a
> right to rely upon it without inquiring into the truthfulness
> of the matter. Such is the case where one is professing goods
> for sale. Such is the case where the statement is made by
> the owner of real estate to induce to make people to
> buy property, and in
> relying upon the owner may be induced to make
> a purchase of real estate."

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
was not here before the courts in numerous cases, and a long one
is the Supreme Court entitled Bedford v. Iglehart, 324 Ill. 430,

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 AFFIRMED.

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

maintains the rule is clear enough.

'A liberal construction requires in every possible
case in which there is ambiguity supposed on one side
and resulting alternatively on the other, the relation
and the duties imposed are not unreasonably illegal. They
may be moral, neutral, illegitimate, or merely personal. If
ambiguous in less things and in proportion as some people
and societies or the rules, the relation is illusory,
and society will suffer destroying between the parties
according to rules existing in such relation.'

It is evident that the defendants had the confidence
of the complainant, which they exercised and used to their
advantage in the several dealings and sale the complainants. The
relation was a fiduciary one and the chancellor in setting 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 cases of this kind.

The decree is affirmed.

DECREE AFFIRMED.

Ritter, C.J., Concurs.
Bell, J., not participating.

35579

EDWIN A. FELDOTT,
Appellee,
v.
AXEL G. JOHNSON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

268 I.A. 619

Opinion filed Nov. 16, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment entered in the Municipal Court of Chicago in the sum of $200 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 $900. The amount sued for is $500, 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 court, and the plaintiff and the defendant 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 Return; the conflict in the evidence is as to the amount to be paid to the

conflict in the evidence is as to the amount to be paid to the
retained the plaintiff to prepare his Income Tax return; the
There is no dispute between the parties that the defendant
upon the issues joined by the parties.

and the plaintiff and the defendant were the only witnesses heard
plaintiff and the defendant. A hearing was had before the court,
of merits during that there was any such agreement between the

To the attempted to which the declared filed an affidavit
alleges the settlement promised to pay.

contract was $300. The amount sued for is $300, which the plaintiff
this year was $300, and the amount due the plaintiff under the
and signed by the defendant. The tax paid by the defendant for
due according to the income tax return prepared by the plaintiff
between plaintiff's estimated income tax of $3,000 and the amount
defendant was to pay an amount equal to one-third of the difference
income Tax Return for the year 1917. For these services the

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

Court of Chicago in the sum of $300 in favor of the plaintiff.
This appeal is from a judgment entered in the Municipal

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

Opinion filed Nov. 16, 1922

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 witnesses 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 interfere. 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.

Comment is made by the defendant as to the amount of the judgment. The plaintiff is not complaining as to the amount of the judgment, which was $200. He had a right to waive 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

could have remembered. This court is unable to find in the record any concealment justifies with the presumption of income tax returns that the plaintiff's witness were merely clerical and even as has result in that by his counsel he took advantage of the defendant; Comments is made by the defendant that the plaintiff in this court to the amount of the judgment.

excuse were assigned by the plaintiff, and he is not objecting amount due under the contract and accept a less amount. No doubt the judgment, which was $500. He had a right to waive the full judgment. The plaintiff is not complaining as to the amount of Comment is made by the defendant as to the amount of the the plaintiff.

of the evidence; and therefore the court did not err when it found the second in this case, the examination of the court is warranted this court will not interfere. We can in no way determine from finding of the court is against the manifest weight of the evidence

The fourth rule which applies in this matter is where it appears the witnesses that appeared before him, and the probability of the statements made by the attorneys while on the stand. receiving this testimony, no doubt passed upon the credibility of examplified his case by a preponderance of the evidence, and in of fact for the court, and the court found that the plaintiff had limiting the issues for the plaintiff. There were all questions denial, no doubt, were considered by the court in the decision as to the amount to be paid to the plaintiff, which admission and agreement was entered into, but denied that there was an agreement by the parties. The defendant admitted in his affidavit that an be paid by the defendant and the quarterly payments were discussed plaintiff for such service. The amount of the income tax to

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. CONCUR.

that only those who participate in the pirating do indeed the
contributors do not in size. The difference was a formal modification,
ship, no doubt, that the most active of the movement' participation
movement". The trend of ultimate functions show its vitality under
be obliterated in participation itself. In the feature area the
pendence did not exist not eliminate so any function characterize
be the typical that small indicate Communist economic to

In no extension of interest, the "pirate" always existed
depicting with the department.

The second is that some peaceful "union" and the Jefferson
re assembly relations.

ultras" p.1, VCD 8972, 7. Comment.

35659

PHILLIP STATE BANK & TRUST COMPANY, a corporation,

Appellee,

v.

ANNA MAY MURRAY,

Appellant.

APPEAL FROM

SUPERIOR COURT

268 I.A. 619

COOK COUNTY.

Opinion filed Nov. 16, 1932

MR. JUSTICE HABEL DELIVERED THE OPINION 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 $11,356.31, which includes the sum of $1,032 as attorney's fees. The note provides for the allowance as attorney's fees of a sum equal to 10% of the principal amount of said note.

On September 29, 1931, a petition was filed by the defendant to open the judgment, which was denied. Later, the defendant was given leave to file her amended petition to vacate the judgment, which amended petition was permitted to stand as an affidavit of merits. The cause then proceeded to trial, and the court confirmed the judgment, which has been satisfied to the extent of $10,300. 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 plaintiff has no interest in the note, (2) that the plaintiff 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.

As to point (1), the defendant contends that the plaintiff had no interest in the note in question, and that the note is for

Opinion filed Nov. 16, 1932

a balance due from the defendant to Charles E. Carpenter in the sum 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.

It is evident that Mr. Carpenter was indebted to the plaintiff bank in the sum of $9,600, 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

is in the record without objection' and no doubt was a part of the oral given weeks by counsel in argument. However, this evidence' purpose of a promissory note' is not the central party in interest' is not admissible to show that the plaintiff' although the legal

The plaintiff calls our attention to the only other evidence the plaintiff had introduced of this note other than the defendant's testimony and inserted in this note was paid to whom such payments was made by Crutchfield to his counsel in the suit' and that offset that the defendant's note was signed and delivered to the plaintiff for the convenience of the witness Crutchfield; that the in the note. Mr. Crutchfield explains this by identifying to the purpose to the witness Bell the plaintiff had an interest

It is argued that Mr. Crutchfield was employed in the of a suit of $15,000' as evidenced by his solicited note. The plaintiff made in the sum of $5,000' as evidenced by his solicited of suit' to involve a sum low as $1,000' and' as a fact of suit' to involve a sum low as $1,000' and' as a fact of any judgment' to counsel employed in a higher case' and' as a fact and contained a concession alone in which the plaintiff was testimony was made available to the order of the plaintiff bank' advance from the evidence that the note upon executed by the sum of $10,000' payable seventy-five days after May 4' 1937. It a balance due them the defendant to checking E. Carpenter in 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 wanted 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 $1,023 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.

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

35877

MARIE THAUDEUS,

Plaintiff in Error,

v.

CHECKER TAXI COMPANY, a corporation,

Defendant in Error.

ERROR TO

SUPERIOR COURT

COOK COUNTY.

268 I.A. 619

Opinion filed Nov. 16, 1932

MR. JUSTICE MYERS DELIVERED THE OPINION OF THE COURT.

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 Boulevard and Wabash Avenue, 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

to avoid injuring the plaintiff upon the occasion in
was not required to exercise the highest degree of care
Chester Lost Company, in charge of the tramcar in question
"IX. You are instructed that the right of the defendant,

in contract

meeting reasons. The instruction now under consideration is
having refused the plaintiff's first petition in a similar respective
Jury is reasonable error, and that the question is not moved for
is invalid; that the giving of this instruction by the court to the
the defendant's instructions, and refuse said instruction No. 13
Counsel for the defendant in Error in this discussion of
error to the jury.

well first consider the written instructions given by the trial

In the discussion of the question before this court, we

4th day of April, 1888.

of Jackson Boulevard and Canal Avenue, Chicago, Illinois, on the
which it is alleged was negligently operated at the intersection
said plaintiff at the time of the aforesaid accident,

The defendant was filed a motion to dismiss, as
of Jackson Boulevard and Canal Avenue, Chicago, Illinois, at the
Defendant claims that plaintiff was injured in an action

cannot to waive the record of the judgment of the plaintiff. I

... after once it waives the plaintiff must show a writ of

Opinion filed Nov. 16, 1933

Returned in Error.

Reversed in Error.

Brief Statement.

Error to

Abstract of Decision.

Opinion

Error

question, but was only required to use ordinary care, and if you believe from the evidence 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."

We 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:

Cannon v. Kiel, 252 Ill. App. 550
Cohen v. Rainstein, 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 operating his car? Devine v. Brunswick-Balke Co. 270 Ill. 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:

reward as follows:

therefore at once final. The exception as taken appears from the

the point round of the instruction in question unsatisfied reasons

to complain in this court by an exception taken to the giving by

his own [illegible] 1 Ch. 1904.

The next question is, did the plaintiff make the it be

[illegible] v. [illegible], 1904 1 Ch. 304.

circumstances and statements in which the datum was operated

at the time of the occurrence being meant to the Question.

Persons could have ascertained under like or similar circumstances

exercise that degree of care and skill that an ordinarily reasonable

to him that it would convey, but did the defendant of its whose

to avoid the mischief in question as soon as it became apparent

refused construct the sub with ordinary care and did all it be could

The case is so stated is not that the duties of the Chester

except to sell attention in a few words to observe it in full.

It is not necessary to further clause this instrument.

[illegible] v. [illegible] 1904 1 Ch. 304.

Chester v. [illegible], 1 Ch. [illegible], 84.

Option v. [illegible], [illegible] 1 Ch. 304.

by the [illegible] owner:

one statement by the [illegible], and his acceptance is accepted

in this case with the defendant's account that the

[illegible] 1 Ch. [illegible] 1903 [illegible] 113

answer to this case.

executed at [illegible] time, when the plaintiff became

it is a question of [illegible] to this is the

it be going to with the agreement to [illegible] is good

is question, in the carrier of [illegible] sale. The

[illegible] ever, was the [illegible] of the [illegible]

price of the [illegible], it was [illegible] with

Chester stating the [illegible] and [illegible] the

after the [illegible] of the [illegible]. It is the

and it [illegible] that the expense is this case,

[illegible]. But are [illegible] is one [illegible] case.

"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'sinstructions. 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 immediately 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 CAUSE REMANDED.

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

due consideration to the questions raised.

that comment in the further print of the case will give broader and necessarily to comment upon the facts and the law" seeming, however, less that the case will not be noticed, we do not deem it

Other questions are before this court, but in view of the fact court should on any branch is reversed and the cause remanded, examination of the opinion that the judgment entered by the admission of the defendant that the giving of the instruction was harmless error, is of the opinion that the judgment entered by the stone in question" and this court, taking into consideration the fact the plaintiff personally executed to the giving of the instruction and contained by the jury as it is at present. It therefore follows in the construction of such contract, the testimony tends to itself the application of the Hadley rule applying in cases of breach" but instructions should be omitted" and the jury should be modified in question of having an exception to the giving and refusing to give motion for a new trial or an appeal. The instruction under a matter as no right rights fit further ordering" counsel when a ction of the courts in the court and submit the jury matter." fairly be refused to find inasmuch as the one- theoretic rights upon any facts tendered for the ordering to the phrase " different rule exists". In that cause the rights and phrase" sounds in the monetary terms of the suit of quiome" nor submit the rights to reasonably object and verbs matters of each of the determinations. The jury of this state does exact" that an exception to issue of the plaintiff is specific to its" reasons". Or put another" that only part of the plaintiff to the giving of the rights of this instruction to the jury" stated. Have the interest instructions to the jury. It stated. "Instances the court" is the object of the statement.

35693

MINNEAPOLIS-HONEYWELL REGULATOR CO., a corporation,

Defendant in Error,

v.

S. GIANNONI,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT OF CHICAGO.

268 I.A. 620

Opinion filed Nov. 16, 1932

MR. JUSTICE 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 23, 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, Para. 431, Sec. 43, of the Municipal Court Act, Cahill's Ill. Rev. Stats. 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

Opinion filed Nov. 16, 1932

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 summons, 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, Hine Bros. Co. v. Adams, 139 Ill. App. 93, and it is error to default a defendant and enter judgment where he has his written appearance on file undisposed of, questioning the jurisdiction of the court. Harts et al. v. Lesman, 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.

clude, on its cause of the fifth clause mentioned in Sec. 62 of the act, the statutory penalty accrued at the time specified in the summons, 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, or subject to rules prescribed in the cause of cases to which this case shall be assigned for trial.

[illegible] Cyc. 722 [illegible] v. [illegible].

ARGUMENT AND AUTHORITIES.

The judgment is accordingly reversed and the cause remanded.

of the questions raised in the interrogatories specify objections, the attorneys should have direct to waive the moral matters the objections were so [illegible] and the objections of the [illegible] from the record it appears that a special exception or [illegible] direction of the court. Martin et al. v. Tanner, 200 Ill. App. 124, motion objections on file unopposed of, constituting the jurisdiction of to default a defendant and enter judgment where he has his [illegible] also Cyc. [illegible] 722 Cit. [illegible], and it be pleadings the required in the cause of cases to which this case soon as the business of the court will permit. be matters

36151

HELEN REDLIN, et al, Appellees, v. TRUSTEES SYSTEM REINCO COMPANY, et al., Appellants.	APPEAL FROM INTERLOCUTORY ORDER OF CIRCUIT COURT OF COOK COUNTY.

Opinion filed Nov. 16, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION 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 Edward C. Skupa and Isabel M. 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 annum, payable semi-annually, which interest is evidenced by ten interest coupons, dated September 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 98 Lawton Road, Riverside, Illinois, to the complainant Helen Redlin, Trustee.

It also appears that the principal and installment notes for $6,000, and interest, became due on the 13th day of September, 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.

36183

ELLA FUELIN, et al.,
Appellees,
v.
TRUSTEES SYSTEM SERVICE COMPANY,
et al.,
Appellants.

APPEAL FROM [illegible]
[illegible]
OF COOK COUNTY.

268 I.A. 620

Opinion filed Nov. 16, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant Trustees System Service 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 [illegible] 14, 1932, wherein it appears that the defendants [illegible] and [illegible], his wife, being indebted in the sum of $5,000, made and delivered a certain principal promissory note for said sum, payable five years after date, with interest at the rate of 6% per annum, payable semi-annually, which interest is evidenced by ten interest coupons, dated September 17, 1926, and each for the sum of $150; 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 [illegible] Lawton Road, Riverside, Illinois, to the complainant [illegible], Trustee.

It also appears that the principal and installment notes for $5,000, and interest, became due on the 17th day of September, 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 Fuelin, one of the complainants, and owner and holder of the notes in question, to procure fire insurance on the premises to protect his loan.

It is further charged that by the trust deed sought to be foreclosed 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 S. 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 $1,980, payable in installments on or before August 28, 1932; that these defendants assigned the rents, issues and profits from the said premises to the Trustees System Reinco 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 Reinco Company and F. W. Esch, 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 Reinco Company is the owner and holder of certain principal notes, and that there is due to this defendant Trustees System Reinco 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 realtor who made an appraisal of the real estate involved in this litigation, and was of the opinion

real estate involved in this litigation, and was of the opinion of one E. Conrad Derisen, a realtor who made an appraisal of the this defendant, Trustees System Heinoo Company, and the affidavit ment of a receiver, the court also considered the answer filed by

Upon the hearing of complainants' motion for the appoint-

is of the value of $13,000.

at a rental of $80 per month, and the real estate is improved and defendants Shupee, and that the premises are occupied by a tenant the terms of a trust deed signed, executed and delivered by the Defendant Trustees System Heinoo Company the sum of $1,080.00, under holder of certain principal notes, and that there is due to this and that the Trustees System Heinoo Company is the owner and of the principal sum of $8,000, and the interest note of $180, when Trustees System Heinoo Company and R. H. Bond, as Trustee, were filed

It also appears that the ownership and interest of the Medlin, one of the defendants.

and that the premises be sold to satisfy the amounts due under party that certain defendants in said petition and referred to answer, premises is not in excess of $8000, and the complainants therefore further charged in the bill of complaint that the value of the Heinoo Company, which is also a defendant to this bill, and it is issued and profits from the said premises to the Trustees System before Judge, at the March Term, 1933; that these defendants realized the rents, defendants for the sum of $1,080, including $ interest on or to secure the payment of a note executed and delivered by these and Interest $. Simon, Jr. Bond, be one $ ", Jr., by Trustees, that the said estate in question has been conveyed by Deed

It is further charged that by the trust deed sought to be foreclosed the rents, issues and profits are expressly pledged as additional security for the indebtedness and it further appears

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 procured 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 $6,000 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 litigation, 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 $8500. 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.

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

that it was of the value of $2500, 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 terms for the years 1890 and 1891 are unpaid;
that fire insurance was not procured 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 sum of $2,500 and interest
thereon is expired by its own terms on the 1st day of May, 1892,
for these reasons we believe that the suit was fairly instituted to
appoint a receiver to take possession of the premises, to collect
the rents, and to make such distribution, upon the conclusion of
this litigation, as the court may direct.

The defendant, Charles Ruffe being insane, testimony
the fact that the complainants are amply secured by this property,
which is valued at $3500. However, the admitted amount due the
complainants is $2,180. 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 important whether the complainants are
amply secured.

The order appointing a receiver is affirmed.

35845

PEOPLE OF THE STATE OF ILLINOIS, ex rel., CHARLES A. WEVER, (plaintiff),
Defendant in Error,

v.

WILLIAM D. MEYERING, Sheriff of Cook County, Illinois, (defendant),
Plaintiff in Error.

ERROR TO SUPERIOR COURT, COOK COUNTY.

268 I.A. 620[3]

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

A petition was filed by defendant in error, People of the State of Illinois, ex rel. Charles A. Wever, alleging that Charles A. Wever was detained and imprisoned by plaintiff in error, William D. Meyering, 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-58372, 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 Edith 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 due and unpaid from Charles A. 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 sum of $5,060.92, and that said Charles A. Wever has failed to show sufficient cause

COURT, COOK COUNTY,
BRIEF TO COMMISSION

why said sum should not be paid, but has wholly failed and refused to obey the order of the court, found him guilty of contempt 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 M. Wever or until released by due process of law. Upon a hearing, the court found that said Wever had been imprisoned for contempt of court for the nonperformance of a decree for the payment of money; that said Wever 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 Revised 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.

It is contended that the court wrongfully discharged Wever, 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 Wever was imprisoned for the nonpayment of a debt. Alimony is not a debt. It is a social obligation as well as pecuniary

use a verb. It is a moving application to only an inanimate
[illegible] the replacement of a verb. Opinion is
substitute the helpless of viewers. The point would pay this
for which contempt of court, for the alteration of a license
efficiently be the laborer and efficacy by because implement
lever, and it this consumption no course, no this opinion pro no
it is composed that the music accountant discharged
pick from implement.

device, or to commit the curtailment, the radio such cyclopedia
ought subsoil, that much because is murder to comply with most
music, ought be qualified to a work of impose account, and it is
come for the manufacturing of mud decree for the testimony of
beauties is but that can become implement for sub company of
learned institute of Illinois right, be right. This statute
implement the novel reticent is position it, or. Op. Cyclic's
in the under injecting the deferment in clear time
in this court is drawer of the water.

The implement is value ins not observed or clear a wrist
ether. The statement in the [illegible] of a wrist of
implement on the only physic. The sound is paid as a unit of
each counsel. Illinois, and dismissed can activate clear-it time unit
the statute may muscle be obtain treatment in the common fail as
as the betweed of county they and have are sought to comply with
implement for complete of cooks for the manufacturing of a tenure
ten. Upon a pension, the music loved that unit color ins poor
for the use of Notice it, clean or most referred of the process of
le lawsuit charged with the said complete small be into $2'000'43
county. Illinois, for a buried of not to exceed six months, state
ended and entered they be be committed to the person jail of imp
so open the ounce of the count, young rise bulk of contempt of
ask unit can opposit out to unit, put pre opal, rights and solvent

liability; it is founded on public policy and is for the good of society. (Dean 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 liability to pay 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. (Barclay v. Barclay, 184 Ill. 375, 376. See also Welty v. Welty, 195 id. 335; People v. Kito, 237 id. 434, 442; Mesirow v. Mesirow, 346 id. 219, 222; Tuttle v. Gundersen, 254 Ill. 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 jail 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. Wever from imprisonment is reversed.

REVERSED.

Scanlan and Gridley, JJ., concur.

35988

EDWINA M. WECKLER, formerly Edwina M. Pearne,
Defendant in Error,

v.

MARTHA K. PEARNE, executrix of the estate of Frank D. Pearne, deceased,
Plaintiff in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

268 I.A. 620

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION 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.

The record discloses that the defendant in error, Edwina 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 Cook 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

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. 83, 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; Craig v. Craig, 163 Ill. 176, 184), and is a vested right. (In re Estate of Kossuth 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

modified the standard circumstances and stop counts circumstances

Estoppel in cases has often been held that Justice and

efficient is estate's right is Penal Ab Initio. Counsel in

the commercial direction for determination be whether

case," 80 ITT. 248, 249.)

of Ernest E. Hall, 270 ITT. 180, 201, 1916 Stone A. Insurance

Trust" 223 ITT. 248, 254, 1906) and in a second right. (In re Bunge

his own and a judgment (Cook A. Dolph 7th ITT. 32, 36) Cook A.

P. Bowne to bid foreclosure in order 32 a week for the subject of

bet be bound with the trial court that the notice directed Bond

e.g. Another to consent in Ejectment in an ex.'s first conviction

judgment and that document to court's claim is posted by Indian

of the Assembly shall be passed Senate, was objection.

The plaintiff in error does not question the constitutional

of a judgment upon be passed Senate, was objection.

entitled "Instructions," which provides in effect that the Title

ep. 89, Cooley's Revised Statute of Illinois, 1913, p. 1933,

Sanborn et Annin M. Bourne was a judgment may stop section 24,

The entry could stop the defendant be bad 90 a week for the

90 a week directed in the statute for the address of his right.

the question during its Alleging bad debt statement in order the

Plaintiff in error offered no evidence upon stop

his motion.

instructed the acts of the death of his father, the non Kind with

from the date of the entry of the decree of divorce my to and

was upon his right upon an his statutes heirs at law, and that

of the trial," Cook P. Trust, the real, was the heirs of the

one of it," in the address of the suit right," that of the motion

to Indian M. Bourne," on the first day of each week to Indian the

case," without and decree Ebit Final P. Trust," he made to bid

antiquated demands. We agree with the principles announced in these 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 affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

36077

JOSEPH TOMERA,
(plaintiff),
Appellee,

v.

JOSEF KOPCZYNSKI and
MARYANNA KOPCZYNSKI,
(defendants),
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

268 I.A. 621

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

This was an action of trespass vi et armis, brought by the plaintiff against Josef Kopczynski, Maryanna Kopczynski and Henry 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-defense.

The verdict imports that the jury found the defendants guilty 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, Chicago, Illinois, and the defendants were the owners of a building

Dreams' Interpr' and the Miscellaneous Index the Owners of a Painted
of the Registered Owners of CAIF Street the Different Names
47 Lewis St. Mrs the Names and the Index Painting
Prior to Dec' 1930' and for about 14 Years' Dynasty'
Enrichment Qualified'

in self-defense' and the Accept in those Locksmith cannot be
Lurch at Ownership the Dynasty and the Real Property and not
The Accept Imagine the's the Just Young the Defendants

Enrich and Self-Defense'

Property and Patrick on Dec' 1930' The Defendants Viewed not
Include the Defendants Abbeyed'

The Question Conditions of the Sample Question we
Defendant and Questions Embankment for 47'1930'. In Examine this
Prepare a Just and Dynasty Insurance a Judgment Various Legal
Viewing the Suit as to Bond Embankment' The Names and Prior
be Visited Property and Portrait. During the Trial the Plaintiff
Bond Embankment' a Lawsuit Another for Relative Accepting Name
the Plaintiff Various Legal Defendant' Purchase Embankment and

Into one on Notice of Attorney AT or BANK' Property Ja

MR' INCORPORATING LOCATION BUSINESS MORTGAGORS LIKE OPINION OF LAW COURT'

Attorney'
(Continued)'
BALANCE SHEET'
YOUNG CORPORATION and
A'

Yesterday'
(Original)'
'Common Stock'

1904.

at the northeast corner of 87th street and Muskegon avenue. They had a son, Henry Kopczynski, 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. About four days before May 22, 1930, he complained to Josef Kopczynski 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. Kopczynski. May 22, 1930, plaintiff while on his way to work met Josef Kopczynski who inquired what was going on and plaintiff replied that Kopczynski knew what was going on, as he saw it every day, and told him to keep the boys away; that thereupon Kopczynski swore at plaintiff and said, "I will kill you like a dog;" that during this conversation Mrs. 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. Kopczynski 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 Kopczynski who had struck him with a hose with a wire attached; thereupon plaintiff endeavored to get the hose and Mrs. Kopczynski 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 alleged communications to Mrs. Kopczynski concerning an alleged assault on her son eight months before the assault on the plaintiff. From the record it appears that the defendants offered to prove by Henry Kopczynski

effects since the defendants objected to Bruce by Henry Ephemeryt
months before the assault on the Plymouth". Then the record is
to Mrs. Ephemeryt concerning an alleged assault on Jan 6th eight
camp area to ascertain the evidence of fitful communications
in the case.

The Autology concentration of the defendants in that the
editor and book is only then pen." It was introduced on an exhibit
stroud mix a number of times with a object that he then happen the
threatening Plymouth encountered to Get the Moon and Mrs. Ephemeryt
Ephemeryt was struck him with a bone with a nine optioned
Plymouth was witness on the Bought that he struck and was 12 men
Henry cover the effect and case that were spent 12 feet from him
the Jews in front of his Executive in was him. Ephemeryt was not
that caution between A and B efforts with Plymouth was mentioning
Ephemeryt was struck on the church and said, "Like it is him,
with this law Type a call." that bought that communication
mental from Executive Ephemeryt under at Plymouth was well, "I
are told me" to be not it will call, the sign him to talk the rule
and told me that Plymouth replied that Ephemeryt pass and
Plymouth might on Mrs and it will not local Ephemeryt the Indiana
one rights the matter case with me. Ephemeryt, Mrs 87, 1900,
conditions to a Executive although, the cotton or document, pass
pit" Police on his Tailor to Tell them it" and statements
87' 1900' he Executive at local Ephemeryt about the Jobs Police
Prompte with one of documents' home. Dept Law Code Before Mrs
Police about one Acre Brice to Mrs' 1900' he pay
will Jobs local Verdict Here the Indiana and and conditions to the
Mrs' 1900' Plymouth pay pass Beating Example
Jews Here before Jul 87' 1900' Plymouth pay pass Beating Example
ing a con' Henry Ephemeryt' plus about 12 Jacks old' Joe about
of the Montgomery Bureau of Code rights and Marriage Examine' That

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 p. m. May 22, 1930. Defendants also offered to prove by one Mrs. 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. Kopczynski 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. Kopczynski 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 malice, 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

to mitigate the damages. (Murphy v. McGrath, 79 Ill. 594; Cummings v. Crawford, 88 Ill. 312, 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 assault by the defendants, was engaged in an assault upon Mrs. Kopczynski, 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 prudent 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 Kopczynski just before the assault upon plaintiff.

It is next urged the court erred in instructing the jury, 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

by altering the context. (Regina v. Bembridge, 22 Cox. 1877

Cameron's Case, 52 L.T. 534, 537.)

It is most important that the code of the instrument

is rendered so unobtrusive as to avoid the risk of any jury being

misled into thinking that the Court is trying to avoid its duty

of considering the instrument as a whole. Judges must be careful

not to appear to be taking sides with counsel in the case, or

to be suggesting that the jury should find in favour of one party

or another. Impartiality at the time is essential if the court

is not to do more harm than good. Nothing is more likely to

alienate a jury than the feeling that they are being "got at"

by counsel and judge between them. Juries are apt to resent

any attempt to force a decision upon them, and the Court must

be careful not to appear to be doing so. Where the jury

are in doubt as to the meaning of any clause in a document,

they should be invited to say so, and the Court should then

give such assistance as it can in construing the instrument.

It is most important that the Court should not appear

to be taking sides with counsel in the case, or to be suggesting

that the jury should find in favour of one party or another.

Juries are apt to resent any attempt to force a decision upon

them, and the Court must be careful not to appear to be doing

so. Where the jury are in doubt as to the meaning of any

clause in a document, they should be invited to say so, and

the Court should then give such assistance as it can in

construing the instrument.

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.

The 7th instruction told the jury that in determining 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 preponderance 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. Liesorowitz, 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

a warning for plaintiff." Cooking it as a whole, we do not see anything in the defendants that the jury was not able to take cognizance of without instruction. The jury knew the circumstances with which it had to deal and understood what was meant by the words "malicious interference" as used in the instruction. It is true, an instruction to a jury cannot assume the truth of a thing if it assumes an unproved fact essential to plaintiff's case. The criticism aimed at this instruction, etc. The criticism aimed at the refusal of the defendant's demurrer to the evidence, at the close of plaintiff's case, and in overruling the motion of defendants, at any stage of proceedings, to direct a verdict for them, are not well taken. (Bunn v. Hoak, 149 Ill. 486; Hoag v. Lamont, 34 Ill. App. 377.)

Instruction 17 told the jury that if they find for the plaintiff they would be justified in allowing such damages as they should believe from the evidence to be a fair and reasonable compensation for the injury, if any, such defendants have inflicted upon the plaintiff's character, business and feelings, and in determining the amount of damages, if any, such damages should be considered, with all the circumstances in evidence, in aggravation or mitigation of the same. (Bunn v. Hoak, 149 Ill. 486; Hoag v. Lamont, 34 Ill. App. 377.)

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 told 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 assumes 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

"Do you see anyone who believes the current one written in
instructions because the *TIER INSTRUCTION* associated the Mycenaeans'

Mycin: computing it works on to the life." Jill' and just
that most security consists in bickering relate to Mycenaeans'
time the auto-scan step calculated associated the Mycenaeans and
consider and it to open the instructions sanctuary the just to time
still its because Sylvester indicate not that to anatomical accuracy
Jacqueline." Can manufacturer calculate directions step Mycin-
computer' sulcus the declaration accompanies Sylvester although not
the account of computer and that just that should not assume accountant
and airport motion' that should' computer away Leeds in discovered
believe that such security are work with accomplishment Assessment

Instructions Jill and Jill indicate the just that it Zeus
Lewis on Sylvester's buy'. We the number to compute in white atom'
alumni Provencetown" but it make allows that the security and although
and that it are not multiply are it others that cell-mounted called
that the instruction accumulate that report accounts the pass Assessment
but to Dennis the calculation. Calculation', computer the states
each time accounts, are well to accompanies the Sylvester'
sanctioned in their assist to the account question Assessed' but that
one bundle data sanctuary it' time the Zeus it that the just are not
motives from the Kingston weight of the although that Instruction was
one invasion in Sanctuary Zeitgeist as the Sylvester' was it the just
was time would accounts are a solution' calculated and assist the
accounted and indicate the Sylvester' be Zeitgeist in the construction'
motives time the accounts time statement' although Assessment'

In the Jill' Instruction the just and just it that
just time Jacob of massive important with Sylvester' Jill' was Zeus

the declaration and proved by the preponderance of the evidence," and the 12th and 13th, "as charged in the declaration." Defendants' 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.

36147

S. B. KATZMAN,
(complainant),
Appellee,

v.

CICERO-QUINCY BUILDING CORP., et al.,
Defendants.

ON APPEAL OF CHICAGO TITLE & TRUST COMPANY, First Successor in Trust,
Appellant.

INTERLOCUTORY
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

268 I.A. 621

MR. PRESIDING JUSTICE KERNER DELIVERED 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.

S. B. Katzman filed his verified bill March 26, 1932, and prayed for the appointment of a new trustee under a trust deed given by the Cicero-Quincy Building Corporation to the Madison & Kedzie State Bank, as trustee, to secure 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 February 8, 1930, Madison & Kedzie State Bank entered into a written agreement with the Madison-Kedzie Trust & Savings Bank, which contained, among other terms and provisions, the sale by the Madison & Kedzie State Bank to the Madison-Kedzie Trust & Savings Bank of all of its assets and the assumption by the Madison-Kedzie Trust & Savings Bank of its liabilities; the agreement of the Madison & Kedzie State Bank to execute such instruments as the Madison-Kedzie Trust & Savings Bank might request in order to vest in the latter complete

Mr. Theodosia Dustin Kenney Initiated the Custom of the Court.

By this agent the Chicago Title & Trust Company, a corporation, first successor in trust, ought to receive an indemnity note executed & delivered, secured upon it, from the said Trustee for the advancement of a sum treated under a trust deed given by the Chicago-Dutch Building Corporation to the Madison & Dearie State Bank, to secure an issue of bonds in the sum of $250,000, and for the advancement of a security Mortgage like sum of $250,000, and for the advancement of a security Mortgage like the material allegations of the bill are true. February 8, 1922, Madison & Dearie State Bank entered into a written agreement with the Madison-Dearie Trust & Savings Bank, which contained, among other terms and provisions, the sale by the Madison & Dearie State Bank to the Madison-Dearie Trust & Savings Bank of all of its assets and the assumption by the Madison-Dearie Trust & Savings Bank of its liabilities; the agreement of the Madison & Dearie State Bank to execute such instruments as the Madison-Dearie Trust & Savings Bank might request in order to vest in the latter complete

title in and to such assets; the right of the Madison-Kedzie 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 & Kedzie 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-Kedzie 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-Kedzie Trust & Savings Bank as a subterfuge; that no discretionary powers remained in the Madison & Kedzie State Bank; that the Chicago Title & 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.

of such restrictions, but failed to justify an increase thereon by
clear or patent ambiguity. The second provision in first Item
to chain conflicted that the same reason the modifications were not
Trust & Savings Bank, which joined in the restatement, and delivered the same
$600; he received 41% of the trustee on behalf of the Madison & Kendale
and time Documents as the owner of his apartments, or by-laws, Communal
Bill B. Fish was appointed executor of the Madison & Kendale Bank.
that the office of trustee remained vacant since October 31, 1931,
moe counted by the successor in business to said trust dead while in
it itself, refused to do so by reason thereof the office of trustee
ship were payment either intended to sub as Item and second provision
Company's first mentioned in trust, and Illinois Trust Company, second
in the Madison & Kendale State Bank was the Citizens Title & Trust
& Savings Bank as a substantial part in characteristic powers received
Madison & Kendale Trust was made by the Madison-Kendale Trust
it which there remained only the point about that the name of the
as well as the banking business of the Madison & Kendale State Bank
the Madison-Kendale Trust & Savings Bank were also the trust business
pursuant to the terms, conditions and provisions above set forth,
by the Auditor of Public Accounts of the State of Illinois that
savings Bank succeeded under said agreement, which was approved

It is further stipulated that the Madison-Kendale Trust &
Bank is insurance, liquidate or dispose of such assets,
for the purpose of executing the Madison-Kendale Trust & Savings
Bank is authorized to continue the business of said Bank and to
title in and to such assets; the right of the Madison-Kendale

It further alleged that November 1, 1926, the Cicero-Quincy Building Corporation executed its mortgage gold bonds aggregating $250,000, and to secure the payment thereof gave a trust deed to the Madison & Kedzie 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 named 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 bond owners, but the Chicago Title & Trust Company and Chicago Trust Company have declined to assume their duties, and permitted the Madison-Kedzie Trust & Savings Bank to hold out the Madison & Kedzie State Bank as an existing trust company whereby moneys paid into the Madison & Kedzie State Bank were diverted by the Madison-Kedzie 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 premises are scant security 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 & Trust Company filed its verified answer denying any vacancy 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

It further alleged that between 1. June, the Corpora-
tion Building Inspection exercised its authority with
regard to the Building & Loans Bank, an existing, operating
bank, and in order to avoid that the Corporation entered
office and particular to the transfer the the benefit of the Corporation
through executive that it will cause many that the existing contract
between said creditor and Bank, and that Bank the Corporation
thereby executed, and that Bank & Trust Company is owned first
of one hundred shares of said Bank, which defendants have made
known in writing that complainant is the owner and holder of one
hundred shares of said Bank, which defendants have made demand
the first Bank and that the Bruder Bailey to refuse the book accounts
of said Bank, which refusal the defendants it has been necessary for
action to be taken by the Bruder to protect the interest of the
said creditor, but the Citizens Trust & Trust Company and Citizens Trust
Company have declined to account their rights, and prevented the
Building-Citizens Trust & Savings Bank in this and the Building & Loan
their Bank by the existing Trust company thereby paid into the
Building & Trust Trade Bank more diverted by the Building-Citizens Trust
Company it should be proper itself to the payment of their own creditors
which it owned, and that through the efforts of the Bruder and
misconceived in trust because Because that the Premises one being mortgage
for the indebtedness thereof, and unless a receiver is appointed
the rights of the beneficiaries will be directly prejudiced that the
Building & Trust Trade Bank has sufficient funds of money, the
receipt of which is set forth, the which they should be required by
accounting and that Bank should in equity be subordinated to the
rights of the complainant.

April 21, 1932, the Citizens Trust Company filed
its petition in the Circuit Court of Cook County, Illinois,
the entitled cause, praying that a receiver be named in
charge of the assets of the Citizens Trust & Savings Bank,
and that the Citizens Trust Company be restrained from

the trust created by said trust deed, and alleged that by an instrument in writing, dated January 25, 1932, the Madison & Kedzie State Bank and Will H. Wade as its receiver, resigned the trusteeship created under said trust deed and refused to act as such trustee for and on behalf of said bank; that thereafter such resignation took effect, when by the same instrument in writing, the Chicago Title & 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 Deeds of Cook County, Illinois; 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 accepts the same 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.

Appellee 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 James B. Martin receiver of the premises 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 9, 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

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 8, 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 & Kedzie 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 taxes 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." We 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 chancellor 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-Kedzie Trust & Savings Bank, as the office of a trustee is one of personal confidence and cannot be delegated. (3 Pomeroy'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 H. Wade, receiver for the Madison & Kedzie

State Bank, resigned the trusteeship. (Section 11, ch. 16a, Cahill's Revised Statutes of 1931, p. 171; Belofsky v. Johnson et al., 266 Ill. App. 351.) It appears from the verified answer of the appellant filed ten days before the appointment of the receiver that Will H. Wade had resigned the trusteeship and that the appellant had accepted the trust. The chancellor 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.

REVERSED.

Scanlan and Gridley, JJ., concur.

36197

WILLIAM G. DONNE et al.,
(Complainants) Appellees,

vs.

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. 621[3]

MR. PRESIDING JUSTICE KNIGHT 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 alleged, inter alia, that default had been made in the payment of $850 due on Note No. 1 and in the payment of interest on the entire indebtedness due June 25, 1932, and in the payment 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 apartments, one being occupied by Morris Casty and

VILLIAM E. JONES et al.,
(Complainants) appellants,

vs.

JOSEPH CLATT et al.,
Defendants.

Intermediate Appeal from Superintendent Court of Cook County.

Mr. Appeal of VILLIAM JONES et al.
MORRIS DAVIS,
Appellants.

268 I.A. 631

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order sustaining a receiver upon a bill to foreclose a first mortgage trust deed upon certain real estate. By assents the order Morris Davis and Villia Davis have appealed.

Complainants' bill, filed June 22, 1932, verified by an authorized agent, prayed for the foreclosure of a trust deed securing the premises to Chicago City Bank & Trust Company, as trustee, dated December 18, 1931, executed by Morris Davis and Villia Davis, and given to secure their eighteen principal promissory notes aggregating $18,000. Note No. 1 for $1,000 maturing December 22, 1932; Note No. 2 for $1,000 maturing December 22, 1932, and Notes numbered 3 to 18 for $1,000 each, maturing December 22, 1932; all of the notes bearing interest at 6 per cent per annum, payable semi-annually, evidenced by coupon notes. The bill also prayed for the appointment of a receiver pendente lite. It alleged, inter alia, that default had been made in the payment of $900 due on Note No. 3 and in the payment of interest on the entire indebtedness due June 22, 1932, and in the payment of general taxes for the year 1930, and that the amount due the complainants is $18,815.80; that the premises involved are improved with a three story brick building containing six apartments, one being occupied by Morris Davis 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 premises 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

can be based solely upon the verified bill. We do not think so, as

apparent the incorrectness entered, and they argue that the order

It is unnecessary comment that the order appointing the

this court.

No certificate of evidence has been preserved or filed in

* * * * * * * * * * *"

the amount due.

actually the same, and that the premises are bound accurately for

ment", and that the payments in said trust deed are payable to

Court that it is possible that there will be a deficiency after

plied in the previous lines that it is necessary for the preser-

vation of the premises, which are the subject matter hereof, that

a receiver be appointed for said premises", in connection to the

"And the Court having heard the evidence and being duly

Determine.

the Indebtedness exists a necessity during the pendency of the

foreclosure suit, and in case of a deficiency during the Equity of

application for a Receiver of the premises Jimple for the payment of

plan the only, ultimate remedy in the majority of the time of case

dead herein comes to be considered then on the filing of a bill

to foreclose the Court in which the bill is filed may believe or

matter hereof, and of the parties hereto.

"The Court further finds that it is provided in the trust

ation of the property described to the trust deed and being fully

advised in the premises;

"It does further find: that the Jurisdiction of the subject

matter of this action", and the Court having heard the evidence as to the

default complainants as owners of the indebtedness, elected to de-

clare and did declare the whole indebtedness due and payable.

The employment of the receiver was made, after notice to

the holder of the equity of redemption. The order was entered

July 1, 1938, and recites:

"This cause coming on to be heard on motion of the solicitors

for the Complainants for the appointment of a Receiver and it appear-

ing to the Court that the holder of the Equity of Redemption, to-

gether 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

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. Nevertheless 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 not 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 say the chancellor abused his discretion in appointing the receiver.

The interlocutory order of the Superior court is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

the order recites that evidence was heard, and the record in that regard cannot be questioned.

It is also contended that it is improper upon the ... pleadings 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 in the law, and that in commercial procedure is indulged that the evidence heard was sufficient to authorize the entry of an order made. Nevertheless 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. Those are ultimate facts. Under such a state of the record, where it is desired to reverse the order on the ground that the evidence is not sufficient to sustain it, the evidence must be preserved, otherwise the Rules must be ALTERED. Pennington v. Pennington, 111 Ill. App. 341. However, the verified bill alleges the fair, reasonable cash market value of the premises to be $17,500, and that the amount due complainants is $10,418.80. We cannot say the Chancellor abused his discretion in appointing the receiver.

The interlocutory order of the Superior court is affirmed.

AFFIRMED.

Newman and Barnes, JJ., concur.

35999

GAGE STRUCTURAL STEEL CO., a corporation,
Appellant,

v.

HENRY PASCHEN, doing business as Paschen Bros.,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

268 I.A. 621

MR. JUSTICE SMILEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, 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, 1928, wherein plaintiff (first party) is designated as the Sub-Contractor, and defendant (second party) as the Contractor. 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 haec verba. It is on a printed form, filled in with typewriting, and portions of it are as follows:

"ARTICLE I. The Sub-Contractor shall and will provide all the materials 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 188 Randolph 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. M. Vitzthum, 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

[illegible]

[illegible] STRUCTURAL STEEL CO., a corporation,
Appellant,

v.

HENRY [illegible], doing business as [illegible] Bros.,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

268 I.A. 621

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, 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 1, 1928, wherein plaintiff (first party) is designated as the Sub-Contractor, and defendant (second party) as the Contractor. 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 haec verba. It is on a printed form, filled in with typewriting, and portions of it are as follows:

"ARTICLE I. The Sub-Contractor shall and will provide all the materials and perform all the work for the furnishing and fabricating of the structural steel, F.O.B. trucks at building site, for the Sixteen Story building, to be erected at the northeast corner of Randolph & Wells streets, Chicago, Illinois, for the 160 Randolph 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 [illegible], 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

to agree, the determination of said amount shall be referred to arbitration, as provided for in ART. 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-design the present construction and wherever changes are made the following unit prices shall prevail:

$63.50 per ton for increased tonnage.
$61.80 " " " 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. XII. In case the Contractor and Sub-Contractor fail to agree in relation to matters of payment, allowance or loss referred to in ARTS. 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 Sub-Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. * * *

In said special 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 steel work" of the total agreed price and value of $18,351.99, of which extra steel work defendant is entitled to credits of $3,742.70 (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 claim.

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 sum which payment defendant refused to make, and that thereby such demand 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 submit its alleged claim to a Board of Arbitration pursuant 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 affiant 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.

Lifted an abbeyl pond in the eleventh cosm.'

Slow pixie judgment declension Burned nu kibosy to pixie comp and the cosmo vomit for it!ot no the pulmuno of Aymnetll.'s elysium pave a judgment in noig nuo exclaim delendure' and exclaim pimp Jimmy delcosmo to the cos of 650'780' nuo refbeighted pimp Aymnetll entered on oxcav Jumping phot the alligavic of manip becomepe no

On Jumenth 3' 1980' on Aymnetll.'s motion' the comp

exit cos of 1ol'438'32".

nonpimpier with = exempt pimp delcosmo is interned to Ay'TIMETL IN pl an xcomt of delcosmo' simplex ellipticine nuo noqo' and alligvic

In the ol'ioxavs of manipo accomplishing the plcosm and nuqo conferop investigator ellipse pocomplexipo no to noig num of 650'780'.

Aymnetll ipcosmo Aymnetll Jmo hexcomplexly and in elol'ation of noig elysium to = Jimmo of ioxfavs pulmuno to simplex ell' "In olcosm redisposed Aymnetll Jmo reduced and modisposed to nubmit cmpt and ipmpt pl xcosmo ipcosmo ip pocomo nuq mno Aymnetll.'s duplx to

nubmit ple ellipbol elysim to a Jcomp of implexipcosm pulmcomp to vap'.

III of noig exemplar." ...and delcosmo Jocosmo ellipbol phot alligvic

pelcosmo to nopo' and ipmpt ipmpolly exemp Jcomp nuo antonly ipcomp

elixir Jpe pixiatrope nuq Aymnetll at elig 'ol' III of noig complex'

and ipmpt pl xcosmo ipcosmo ip pocomo nuq mno Aymnetll.'s duplx to

nubmit ple ellipbol elysim to a Jcomp of implexipcosm pulmcomp to vap'.

In the ol'ioxavs of manipo accomplishing the plcosm and nuqo

conferop investigator ellipse pocomplexipo no to noig num of 650'780'.

On Jumenth 3' 1980' on Aymnetll.'s motion' the comp

exit cos of 1ol'438'32".

nonpimpier with = exempt pimp delcosmo is interned to Ay'TIMETL IN

pl an xcomt of delcosmo' simplex ellipticine nuo noqo' and alligvic

Lifted an abbeyl pond in the eleventh cosm.'

Slow pixie judgment declension Burned nu kibosy to pixie comp and

the cosmo vomit for it!ot no the pulmuno of Aymnetll.'s elysium

pave a judgment in noig nuo exclaim delcosmo' and exclaim pimp

Jimmy delcosmo to the cos of 650'780' nuo refbeighted pimp Aymnetll

entered on oxcav Jumping phot the alligavic of manipo becomepe no

In the pelcosmo delcosmo Jimp a plcos of the Acosmo

On February 2[illegible], 1930, the parties by their respective 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 darrein 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, defendant filed two similar pleas. In one he averred that plaintiff ought not to maintain its action "as to the sum of $14,609.29," because he says that after March 4, 1930, plaintiff, for a valuable 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 structure." In the other plea defendant averred, as to the sum of $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 189 Randolph Building Corporation, and guaranteed by the Steuben Club, a corporation, in full satisfaction and discharge of the several promises and of all the sums of money in plaintiff's declaration mentioned." In the affidavit of merits accompanying these last mentioned pleas it is stated:

"That any and all so-called extra and additional steel,

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 obligors 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 attorneys 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, doing business as Paschen Bros. (designated as Contractor) entered into a building contract with the 136 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 Steuben Club Building. There was an issue of $4,100,000 in first mortgage bonds and also an issue of second mortgage bonds. The contract provided for the payment to defendant of $2,234,020 in cash 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 Winston & Co.; and all payments to defendant as Contractor were to be made upon certificates of the architect, K. M. Vitzhum & Co., Inc., countersigned by Winston & Co. It was also provided that extra work and materials might be furnished, but that an estimate of the cost thereof submitted by

defendant should first be approved in writing by the architect and Winston & 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 6% for overhead and 6% for profit in addition thereto." In March, 1928, also, the defendant, as Contractor, entered into the sub-contract 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 May, a structural engineer employed by defendant. Rundquist did so and thereafter he and May had numerous conferences as to the additional steel work necessary to be fabricated and furnished 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 plans 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 Corp.), 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. Much of the oral testimony contained in the

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. Rundquist testified for plaintiff that he was present at the meeting; that he could not say whether L. H. Gage and H. H. Gage (respectively president and secretary of plaintiff) were present or not; that Karl M. Vitzthum and Messrs. Burns and Black (representing the architect), Dubs and May (representing defendant), Walter R. Miller and George W. Brunkhorst (representing the Building Corp., owner), Henry J. Greune and others (representing the Steuben 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 Greune, myself, or anyone else," but that "I expected that the owners of the building were going to pay for it;" that Dubs 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 Miller and Greune said that the Club would pay plaintiff direct."

Karl M. Vitzthum, defendant's witness, after stating who were present at said meeting including L. H. Gage, testified that "the only controversy was who was to pay for the cost of the additional steel to be furnished;" that Greune, president of the Steuben Club, 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 "Dubs, representative of Paschen Bros., stated that they would see that the stuff would be handled in the

usual form, that they were simply the agents to handle the steel, but that the cost thereof would be borne by the owners;" and that he (the witness) does not recall that either Gage or Rundquist said anything when that statement was made by Dubs.

Defendant's witness, Walter R. Miller, vice president of the Steuben Club and treasurer and a director of the Building Corp., testified that at the meeting Rundquist and R. H. Gage, representing plaintiff, were present; that there was a discussion as to the necessity for additional steel for wind bracing; that the question as to who should pay for the steel was "thoroughly discussed;" that Dubs stated that "Paschen Bros. would not pay for this extra windbracing because it was the architect's mistake that the same was needed;" that thereupon he (the witness), Greune and Augerstein, officers and directors of the Steuben Club, all stated that the Club "would pay for the extras;" that R. H. Gage and Rundquist then said: "Yes, we will have to do that;" and that "Greune, Augerstein and myself told Vitzthum to go ahead with the work, and that the Club would pay for these extras direct to the Gage Structural Steel Co.;" that during the meeting "we told both Vitzthum and Dubs 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 came to his (the witness!) office, and "Rundquist said: '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, George V. Brumkhorst (representative of the Building Corp. at said meeting) testified that the meeting

"was called for the purpose of discussing the additional wind-bracing 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 building;" that among those present were Rundquist and H. H. Gage; that Greune and Miller 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 "Dubs 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 extras;'" that Greune addressed that to all of us; that May then stated to Rundquist 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 extras;" that one of the officials of the Gage Co. (plaintiff) made reply, the gist of which was that "the plan as outlined by Greune was O. K., that is, that the Club would pay for the extras."

The testimony of A. W. Dubs, defendant's superintendent and its witness, was substantially the same as that of Brunkhorst as to what was said and agreed to at the meeting. Dubs also testified that he there stated that "Paschen Bros. would not pay or be liable for any changes in the steel work;" that Greune first said that he "objected to the extras 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 extras;" that after these statements had been made, "Gage said that they would go ahead and work with May (defendant's structural engineer) and carry out the work;" that "Vitzthum said that we

(defendant) were to handle the work as his agents, 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, E. 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 Vitzthum's office; I was not present at any meeting in which either I or Sundquist 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 so."

Immediately 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 Winston & 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: "We herewith instruct you immediately to proceed with all labor and material involved in connection with your contract including that for revisions up to date. * * Work 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

compensation to date." On the following day, (June 9, 1928), pursuant to said letters, there was a conference in the office of the architect at which representatives of the architect, May (defendant's engineer) and Sundquist (plaintiff's representative) were present. On June 11, 1928, plaintiff, per Sundquist, wrote defendant in part as follows: "Confirming agreement made Saturday, June 9th, by our Mr. Sundquist 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 tonnage, on the Steuben Club up to and including the 22nd floor. The prices include restocking 6¾ tons of columns as listed in our letter of the 22nd ult. (i.e., May 22, 1928) additional detailing expense and additional shop handling charges. * * Changed 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 Aubs, wrote plaintiff in 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 furnishing the steel shortly prior to January 1, 1929, including the additional steel for the necessary windbracing. The owner had been backward in making payments on defendant's general contract, and on January 5, 1929, representatives of defendant and plaintiff had a conference as to obtaining further payments from the owner, and on January 7, 1929, defendant wrote plaintiff as follows: "Confirming the agreement reached at the conference on January 5th,

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 month 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. L. Swanson, plaintiff's treasurer and its witness, that at this date (January 7, 1929) there was a net 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. Such ledger sheet also disclosed that on March 26, 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 steel, 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, 1930, plaintiff received direct from the owner (the Building Corp.) the sum of $30,150 in cash, certain other amounts in cash, and certain notes, aggregating exactly $14,609.29, signed by the Building Corp. and guaranteed by the Steuben Club. (This transaction will hereinafter 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. During the trial, also, plaintiff introduced in evidence a letter, containing a long account, dated July 26, 1929, addressed to the Steuben

Club and signed by defendant, per Dubs, 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 conclusions, 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.

During the trial plaintiff's attorneys contended, as they here contend, that the letters, etc., as outlined in the preceding paragraph of this opinion, 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 Building Corp. or the Steuben Club, and that the true facts were as testified to by plaintiff's witnesses, Lundquist and R. M. Gage, as above outlined. After carefully considering said letters, etc., we cannot agree with the contention of plaintiff's attorneys.

During the trial, also, plaintiff offered in evidence an "Agreement of Settlement," dated February 20, 1930, 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, is as follows:

Whereas the Steel Co. (plaintiff) "has a just a valid claim against Henry Paschen (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 $48,231.29, with interest at 6% 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 cash the sum of $33,672."

"2. To deliver forthwith its notes for the balance ($14,609.29), payable at the rate of $1500 per month, with interest at 6%, guaranteed by the Steuben Club."

Said Steel Co. "hereby accepts said payment of cash and applies the sum of $30,150 on account of its said indebtedness against said Henry Paschen * *, leaving a balance owing and unpaid to it from said Henry Paschen amounting to $14,609.29, 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 balance remaining unpaid to the Steel Co., on account of its said claim as aforesaid."

It further appears from plaintiff's said ledger sheet and the testimony of said Swanson, 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 $10,109.29" and "$4,500" (aggregating $14,609.29); and that plaintiff's said account with defendant was balanced, - the ledger sheet under the heading "Balance" showing "000". It further appears that plaintiff thereafter only received as payments on said notes the aggregate sum $509.29, leaving a balance due to it on the same of $14,100; and that on December 2, 1930, three renewal notes were executed and received by plaintiff. These renewal notes were introduced in evidence by plaintiff. They are the joint notes of the Building Corp. and the Steuben Club, dated December 2, 1930, each payable to the order of plaintiff one month after date with 6% interest, and for the

respective amounts of $600, $1800 and $12,000 (aggregating $14,100.) At the time of the trial (March, 1932) nothing had been paid to plaintiff on these renewed notes.

At the conclusion of all the evidence the court made the general finding and entered the judgment in favor of defendant as first above mentioned. Certain propositions of law were submitted to the court by plaintiff, some of which were marked "Refused" and others marked "Held". Among those marked, "Held" are the following:

"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 cross-errors.

The various points urged by plaintiff's counsel for a 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 primarily liable under the subcontract sued 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

ourselves are not exempt; they will never more taken in balance
only maybe and a hopeless that only encounter was *Judgment* enough
in its deep reasons eternal existent : nearly Let the reasons of
only maybe only rendered *Physical* was it cannot is be removed
deep but nearly an existent eccentric theorem; and (2) also upon
more not receive *Physical* in behavior and multiplication of the
names (3) that the nodes of the amount" eliminating [14°40'-38°
primarily single under the unpleasure must then to ben for the
stephen Unified *Physical*" was endured by defendant and be is
removal of the *Judgment* cannot in the existential that the court's
finding is mysteriously opinion the weight of the evidence. It is
ongoing a supreme (3) that the multiplicity about" Furnished to the
Physical be brave a decided the more explanation examination on
of the eye is the eight about may for," and that the failure
relation to this action."

"That the finding *Physical* in the source of a right
attempt to return to this matter."

in the record finding and Judgment were in favor of
Physical, is fact is that that interest has been resigned and
Physical to the existence that be is disease there Determination."

The western points ended *Physical*'s command for a
existence."

and satisfaction of defendant's claimed indebtedness 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 evidence clearly discloses, after it was ascertained in May, 1928, 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 same; that it was agreed that the Building Corp. or the Steuben Club, or both, would pay for the same direct to plaintiff; that at no time thereafter did defendant order such additional steel under and in pursuance of the original subcontract sued 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 self-serving and not binding upon defendant; and that subsequently in December, 1930, after plaintiff had accepted some small payments from the maker or guarantor of said notes of February 20, 1930, it accepted renewal notes for the balance ($14,100) signed jointly by the Building Corp. and

the Steuben Club.

Our conclusions are that the court's finding and judgment are not manifestly against the weight of the evidence and that the judgment should be affirmed. Such will be the order.

AFFIRMED.

Kerner, P. J., and Scanlan, J., concur.

36046

JOHN KUKULSKI,
Appellee,

v.

GUSTAV M. ZAHRZEWSKI,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

268 I.A. 622

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 18, 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 affidavit of merits. On February 24, 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 rendition. From the judgment defendant has appealed. Plaintiff has not appeared in this court or filed a brief.

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, 1928; that by it plaintiff, as lessor, demised to defendant, as lessee, "the entire two story and basement brick building known as 1837 West 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

[illegible]

JOHN [illegible],
Appellee,

v.

GUSTAV H. [illegible],
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 622

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 18, 1930, a judgment by confession for $280, 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 $50, 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 affidavit of merits. On February 24, 1931, there was a trial without a jury, resulting in the court finding the issues against defendant and adjudging that the confessed judgment for $280 stand in full force and effect as of the date of its rendition. From the judgment defendant has appealed. Plaintiff has not appeared in this court or filed a brief.

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, 1925; that by it plaintiff, as lessor, demised to defendant, as lessee, "the entire two story and basement brick building known as 1837 West 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 15, 1925, and ending August 14, 1930, and that the stipulated rent is $115 a month, payable in

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:

"SECOND. 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 said premises in good repair, * * and will keep them and the appurtenances, including catch basins, vaults, 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 damage occasioned by failure to keep said premises in repair, and shall not be liable * * for damage occasioned by water, snow or ice being upon or coming through the roof * * or otherwise, * *."

In another 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 lessee shall furnish at his own expense all the fuel, labor, repairs, etc., necessary to heat with steam heat the above mentioned premises," and that "the lessee shall do all cleaning, decorating and repairing of said premises." In the rider on the lease, dated August 10, 1928, are the following provisions, among others:

"It is expressly agreed * * that 60 days written notice is given lessor by lessee of lessee's intention to terminate this lease on said last mentioned date. Lessor is entitled to terminate this lease upon like notice to lessee at like date, 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

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:

> "SECOND. 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 agents, prior to or at the execution of this lease, that are not herein expressed or endorsed hereon; that he (defendant) will keep said premises in good repair, * * and will keep them and the appurtenances, including water closets, vaults, 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 damage occasioned by failure to keep said premises in repair, and shall not be liable * * for damage occasioned by water, snow or ice being upon or coming through the roof * * or otherwise, * *."

In another printed clause is the lessee's authorization for the entry by confession of a judgment for any rent due and unpaid and $30 attorney's fees, etc.

In a special clause, in typewriting, it is provided that "the lessee shall furnish at his own expense all the fuel, labor, janitor, etc., necessary to heat with steam heat the above mentioned premises," and that "the lessee shall do all cleaning, decorating and repairing of said premises." In the rider on the lease, dated August 10, 1925, are the following provisions, among others:

> "It is expressly agreed * * that 60 days written notice is given lessor by lessee of lessee's intention to terminate this lease on said last mentioned date. Lessor is entitled to terminate this lease upon like notice to lessee at like date, 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 this date install such 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

statement: "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 reimbursed for the sums paid out; that these repairs did not clean up all of the trouble; and that, the landlord refusing to put the premises 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. We admit we received the notice.

THE COURT. Do you admit that defendant was in possession of the premises in September and October, 1930?

MR. SHERWIN. We admit we are liable for the rent for September and October.

THE COURT. If you can agree upon a stipulation of facts I will pass upon it.

MR. SHERWIN. I'll dictate the facts to the reporter and Mr. Hamilton can add anything he wants."

Thereupon 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 oven 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 rats entered into the building and destroyed 84 bags of flour which cost over $5 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 rotten and had to be replaced and plaintiff refused to replace it.

statement: "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 reimbursed for the sums paid out; that these repairs did not clean up all of the troubles; and that, the landlord refusing to put the premises 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 6, 1950." Thereupon the following occurred:

"MR. HAMILTON. We admit we received the notice.
THE COURT: Do you admit that defendant was in possession of the premises in September and October, 1950?
MR. DRENNEN. He admits he was liable for the rent for September and October.
THE COURT: If you can agree upon a stipulation of facts I will pass upon it.
MR. DRENNEN: I'll dictate the facts to the reporter and Mr. Hamilton can add anything he wants."

Thereupon defendant's attorney stated the following without objection or modification by plaintiff's attorney:

"It is stipulated and agreed by the parties that the following 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 oven could not be used during July and August, 1950, 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, 1950, and that the landlord was advised by defendant of this condition; that rats entered into the building and destroyed 24 bags of flour which went over to pay due to the great loss of defendant and that the landlord refused to repair or close up the holes.

3. That in August, 1950, 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 $60, but that
14 it was not fully repaired because the entire roof was rotten and had to be replaced and plaintiff refused to replace it.

4. That the sewer in the premises backed up and the stench therefrom permeated the first floor during July and August, 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 possession of them until he moved out, as a bakery, and that the foregoing conditions occurred during the months of July and August, 1930.

6. That on September 8, 1930, defendant sent the 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 60 days' notice, I hereby give you notice that I have decided to and have elected to take advantage of the clause to terminate said lease. I shall vacate the premises within 60 days after September 13, 1930, at which time you may come to take the keys if you so desire, or if not I shall deliver them to you.'"

Thereupon the following occurred:

"THE COURT. Anything else?

MR. [illegible]. Is your Honor going to pass upon the question of the validity of the notice under the lease?

THE COURT. No, you can set that up when they sue 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, 1930, for $45[illegible], should be confirmed."

After reviewing the present transcript we are of the opinion that the judgment appealed from should be affirmed. Defendant'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 surrendering possession thereof to plaintiff, within 60 days from the date of said notice of September 8, 1930, (viz, on or before November 7, 1930, which would be prior to the time, November 13th, that the November rent would become due and payable.) We cannot 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 $115 a month falling due by the terms of the lease on September 13th and

October 13th, respectively), and that it was for the monthly rentals due on those 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 good order and repair," and that he would "keep the premises in good 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 lessee (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 appears from the evidence that no complaint concerning the condition of the chimney was 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 say that we are unable to understand its meaning.

For the reasons indicated the judgment of the municipal court of February 24, 1933, appealed from, is affirmed.

AFFIRMED.

Kerner, P. J., and Scanlan, J., concur.

October 1969, respectively), was that it was for the monthly tenancies that he should urge that the assistance judgment was erroneous, involving the obligation thereof, i.e. Furthermore, we do not find evidence of any unconscionable evidence by plaintiff. By the terms of the general clause of the lease, as above set forth, the defendant covenanted and agreed that he had received the premises "in good tenantable and repair and order to wash "Duty the premises in good tight ... if his own expense," and of the special clause is [illegible] on the face of the lease, as above set forth, it is [illegible] that Judge [illegible] "shall do all elements, everything and [illegible] of said premises." From the right as the lease it appears that the lessee agreed that he would repair "ordinary leading to [illegible] by the ordinary w e made by defendant until about two [illegible] in the action [illegible] 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 as the issue which pertains to the 60 days' written notice, but we may say that we are unable to understand its meaning.

For the reasons indicated the judgment of the municipal court of February 24, 1970, appealed from, is affirmed.

[illegible]

36080

EDWARD S. BARBER and
MABEL J. BARBER, his wife,
Appellees,

v.

FANNIE APPEL and BARNEY APPEL,
Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

268 I.A. 622²

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

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 decreed that defendants be perpetually enjoined "from selling, assigning, * * collecting, enforcing, or attempting to collect or enforce, the judgment known as Fannie Appel v. Edward S. Barber and Mabel J. Barber, No. 1432148 in the municipal court of Chicago, and from proceeding directly or collaterally on said judgment."

In complainants' bill, filed March 23, 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 well 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

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 April 16, 1926, complainants executed and delivered their judgment note for $18,000 to Barney 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, 1926, 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 Samuel 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 Griffiths' 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 foreclosure 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.

Bursting Bolmes the movies wouldn't Cinch were slightest and eleven

the Ducks stinging in sweetsmoke, bill which was mounted to be

ly by the sailplanes for the Westchilm Burling. 'In addition to

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 second 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 mortgage indebtedness secured by each of said trust deeds," and further desire and "have proposed to convey" the property in question to Samuel Witting (the bank's nominee) "in full payment and satisfaction of the mortgage indebtedness 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, 1932;" 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 Krug 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 said real estate to said Samuel Witting, and have by said deed caused to be vested in him the full and absolute fee simple title to said real estate and the full and absolute ownership thereof." It is then provided in the agreement that the bank, as second party, agrees to and does accept said conveyance "in full payment, satisfaction and discharge" of the mortgage indebtedness as secured by said Griffiths' first trust deed, and

"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 discharge of said mortgage indebtedness, and all unpaid interest thereon, secured by said trust deed recorded as document No. 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

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, 1932. 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, 1931, Barney Appel "took 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 thereafter recorded; that by virtue of said agreement "the indebtedness evidenced by the note executed and delivered by complainants on April 16, 1926, in the sum of $18,000, as well as the judgment, known as Fannie Appel v. Edward S. Barber and Mabel J. Barber, No. 1432148 in the municipal court of Chicago, have each and both been fully paid, satisfied and extinguished and cancelled;" that Fannie Appel is the daughter of Barney Appel 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 for 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 obligor on the note originally executed and delivered by complainants and complainants became surety for the payment thereof, * * and entitled in equity to be subrogated to the rights of Barney and Fannie 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, 1926, and also by said judgment in the municipal court, they should be ready, able and willing to deliver to complainants any and all securities held by them, or either of them, to secure the payment of said obligation; and that said Barney and Fannie 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 said 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.

the indebtedness for principal and interest secured by said trust deeds, and each of them, be and the same are hereby subordinated and preserved in first position.'

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 19, 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, 1932, and the master further found in his report in substance:

That said agreement of January 19, 1931, was thereafter fully consummated; that on February 10, 1931, Barney Appel "took 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 thereafter recorded;" that by virtue of said agreement "the indebtedness evidenced by the note executed and delivered by complainants on April 15, 1930, in the sum of $25,000, as well as the judgment, known as Fannie Appel v. Richard L. Archer and Mabel A. Archer, No. [illegible] in the municipal court of Chicago, have each and both been fully paid, satisfied and extinguished and cancelled;" that Fannie Appel is the daughter of Barney Appel and has no real interest in this cause, except as permitting her name to be used by her father for the entering of said judgments, "which judgments were really entered for the use and benefit of Barney Appel and as his own act and for his own purposes;" that upon the conveying of the property to Krug, he "became the primary obligor on the note originally executed and delivered by complainants and complainants became surety for the payment thereof, * * * and entitled in equity to be subrogated to the rights of Barney and Fannie 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 15, 1930, and also by said judgment in the municipal court, they should be ready, able and willing to deliver to complainants any and all securities held by them, or either of them, to secure the payment of said obligation; and that said Barney and Fannie Appel, by the execution and consummation of said agreement of January 19, 1931, have made impossible the delivery to complainants of the property 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 said 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.

Appellants' counsel in his brief and argument has urged several points as grounds for a reversal of the perpetual injunctional order appealed from. In the view we 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 second mortgage and judgment note had originally been executed by complainants for $18,000 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 Krug 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 holders of the mortgage notes. When the confessed judgment was entered in September, 1930, against complainants on said note of $18,000, the payments made had so reduced the indebtedness that there was a balance then due on the principal of $6,600. 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 foreclosure proceedings 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

scheduled and the execution had been returned by the bailiff unsatisfied. To avoid an expensive and lengthy foreclosure proceeding by the bank on its first mortgage, Krug, the owner of the property subject to both mortgages, and Appel, the owner and holder of the second mortgage note on which he had caused said confessed judgment to be entered against complainants, entered into the agreement of January 29, 1931. The gist of this agreement was that, instead of having the threatened expensive and lengthy foreclosure proceeding commenced by the bank with prospect of a final decree of sale being ultimately entered in its favor and Krug and Appel thereafter only retaining their respective rights of redemption, Krug and wife were to convey the property to the bank's nominee (Witting), both mortgages were to be released of record by appropriate deeds of the respective trustees 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, - Krug to exercise his option by April 29, 1932, and Appel thereafter by July 29, 1932. In the agreement Appel agreed that the conveyance to the bank's nominee should "operate as in full payment, satisfaction and discharge of the mortgage indebtedness" secured by said second mortgage, and all parties, including Appel, agreed that the mortgage indebtedness secured by both mortgages "has been and is hereby cancelled, satisfied and extinguished, and that all persons liable thereon are hereby released and discharged therefrom," and that all principal and interest notes evidencing said indebtedness "are hereby cancelled 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

second mortgage note for $18,000, "caused it to be marked by him as cancelled and paid" and presented it to Cody (trustee in said second 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 basis for the entry of said confessed judgment against complainants), mark it cancelled and paid, and exhibit it to said Cody 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 alias execution or otherwise, or could assign said judgment to a third party without notice of the foregoing facts. And, as before stated, we think that complainants were entitled to obtain the equitable relief by injunction as prayed by them and as granted by the court in the order appealed from. In 34 Corpus 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 defense before judgment, * * *. But it is otherwise where the circumstances of the case were such that this plea could not have been received in the action 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 circuit court of March 24, 1932, appealed from, should be affirmed, and it is so ordered.

AFFIRMED.

Kerner, P. J., and Scanlan, J., concur.

"Motion," Q, "and Counter-," A," answer."

TRANSCRIPT

Case" example be efficient, and it is so ordered."

The decree of the circuit court of March 28, 1922, changed

power relief against the judgment."

at the suit," and that that discretion a court of equity [1]
also, where the judgment or decree was made after the institution
Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A.
it is otherwise where the circumstances of the case were such that
were generally be set up as a defense before judgment [ ]. But

"Judgment," writ[illegible]," or discharge of the claim in suit

nee." 170" it is said:

the court in the order appealed from. In 24 Corpus Juris, pp. 420-60,
ample relief by injunction or bonding by them and as granted by
stone," as fully upon conditions more restrictive to obtain the
third party without notice of the foregoing facts. And" as before
A final execution or otherwise," or could enjoin said judgment to a
ance he could attempt to retrieve payment of said unlicensed judgment
se do not think that [illegible] should be in such a position
head could be obtained." Under all these facts and circumstances,
said duly as being cancelled and paid," before the Justice's release
against complainant," but it cancelled and paid," and exhibit it to
nate (which was the basis for the entry of said canceled judgment
insurance," it was necessary for him to procure the original $28,000
under for Appel to comply with said agreement," and to have the same
his release dead," and the same was thereafter returned and that in
ormal mortgage fixed deed," the mortgage executed and delivered
en cancelled and paid" and presented it to Cady (trustee in said
second mortgage note for $28,000" cannot it to be marked by him

36113

EMMETT J. LEAHY,
Appellee,

v.

M. A. GOLD,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

268 I.A. 622[3]

MR. JUSTICE GRIDLEY DELIVERED THE OPINION 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 amended affidavit of merits for insufficiency, defaulted him for want of an 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, sold and delivered by plaintiff to defendant," at defendant's request, from time to time during the months 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 affidavit of merits to the amended 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.

[illegible]

[illegible], Appellee,

v.

[illegible], Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 622[3]

MR. JUSTICE GRIDLEY DELIVERED THE OPINION 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 amended affidavit of merits for insufficiency, defaulted him for want of an affidavit of merits, found that there was due to plaintiff the sum of $265.45, and entered judgment against defendant in accordance with that finding. This appeal follows.

In plaintiff's amended statement of claim he alleged that his claim is for "goods and merchandise, consisting of socks, sold and delivered by plaintiff to defendant," at defendant's request, from time to time during the months of May and June, 1931, for which merchandise defendant agreed to pay the total sum of $265.45. 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 affidavit of merits to the amended 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 $265.45, or any sum. And defendant alleged that he was not indebted to plaintiff in any amount.

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.

REVERSED AND REMANDED.

Kerner, P. J., and Scanlan, J., concur.

It is our opinion that defendant's affidavit of merits
discloses such a multitude defenses as requires a denial of the
motion when its merits, and since the issues raised in striking out
affidavit from the File, in determining defendant can avail of an
affidavit of merits, and in striking the Statement accepted item,
Respectfully the Judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Konnor, J., and Lewelyn, C., concur.

36122

MEEKER-MAGNER COMPANY, a corporation, and/or GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION,
Appellees,

v.

BARNES METAL PRODUCTS COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 622

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced on September 14, 1931, to recover of defendant a balance claimed to be due for certain earned insurance premiums, there was a trial without a jury in April, 1932, resulting in a finding and judgment against defendant in the sum of $599.88, from which judgment the present appeal is prosecuted.

In plaintiffs' statement of claim it is alleged in substance that said balance is for the earned 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 manufacturer'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 $599.88, which sum defendant although often requested has refused to pay.

In defendant's second amended affidavit of merits the defense is that all premiums were paid to one W. Ernest Martin, plaintiffs' agent, and that defendant is not indebted to plaintiffs, or either of them, in any sum. In the affidavit it is alleged in substance that during December, 1928, Martin solicited defendant

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 defendant and it paid to him by check the estimated premiums therefor; 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 defendant, in compliance with a bill of Martin & Co., (under which trade name Martin then was doing business), paid to Martin the sum of $723.47, for estimated premiums; that about January 20, 1930, it was ascertained from an audit made of defendant's books that an additional sum of $327.27 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 earned 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 earned premiums to Martin, who had delivered all policies to defendant, and that Martin had not accounted to plaintiffs for the moneys received by

for insurance and because even for "petition which be denied to
notify" that at this time be "now a stranger to ourselves and to
whose subject of the petition withdrawal" that upon Incorporation
be effected the petition, subject-matter January 21, 1920, be delivered
and it will be the duty of the Multigraph Secretary thereupon
specify before the ordinarily Berlin Lodge to notify
to delivered eligible petition the the documents Local that also
subscription of the petition" Berlin Lodge to notify
? do." (mayor which Lodge Berlin time was dating Business). Dated
the the petition" and delivered," in conditions with a bill of Berlin
in Berlin the the of CLERK." the petition" document: that about
January 20," 1920." it was consecutive Town on until week of delivered,"
petge that be petitioned was at CLERK." was the in Plaintiff on the
for the bonded of mail conditions" and the Secretary of over some
consecutive of all of the Secretary "Berlin was the agent of Plaintiff
delivered than bond to Mile mail June mentioned mail that on the
petition" Dated be December" first" and" when Berlin's document"

him. Plaintiffs claimed, 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. Defendant 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 possession of the policies for the purpose of delivering them to defendant, apparently clothed him with authority to collect the premiums for them, and they should be estopped to deny his authority for that purpose. Defendant also contends that the court erred in refusing, while plaintiffs' witness (Morgensen) was being cross-examined, to allow certain questions to be asked of the witness, preparatory to impeaching certain material statements made on direct examination, and to show certain contrary statements made by the witness in another court proceeding; 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, viz, by causing Martin to be prosecuted in the criminal court for larceny as bailee 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 Lycoming Ins. Co. v. Ward, 80 Ill. 545, are apparently in point. In that case one Fuschman was an insurance

broker or a street solicitor of insurance. He urged the plaintiff, Ward, to insure her property against loss by fire in the defendant 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 $32.50. 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 agreed 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. A 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 said (pp. 548-9):

"It is clear, that if the plaintiff had 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 Puschman, 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 himself 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,

properly executed, ready for delivery. The plaintiff accepted the policy, and paid the premium in good faith, under the belief that Fuschman 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 Fuschman to successfully consummate the contract of insurance by placing in his hands the policy for delivery? The street 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 what 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 street 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, Eclectic Ins. Co. v. Fahrenkrug, 68 Ill. 463, 467; Lebanon Ins. Co. v. Erb, 112 Pa. St. 149, 138-9).

The judgment of the municipal court, appealed from, should be reversed and the cause remanded. It is so ordered.

REVERSED AND REMANDED.

Kerner, P. J., and Scanlan, J., concur.

35743

THOMAS G. McGAY,
Appellee,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

268 I.A. 622

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Thomas G. McGay, plaintiff, sued The Equitable Life Assurance Society of the United States, a corporation, defendant, in assumpsit. There was a trial before the court, with a jury, and a verdict 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 Arthur G. McGay, the insured, on January 23, 1929, 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 March 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

35742

THOMAS G. McKAY,
Appellee,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

268 I.A. 622

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Thomas G. McKay, plaintiff, sued The Equitable Life Assurance Society of the United States, a corporation, defendant, in assumpsit. There was a trial before the court, with a jury, and a verdict returned finding the issues for the plaintiff and assessing his damages at $3,648.61. Judgment was entered upon the verdict and defendant has appealed.

Plaintiff's declaration consists of three counts. The first alleges, in substance, that Arthur G. McKay, the insured, on January 25, 1929, 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 25, 1929, until March 25, 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 25, 1929, the policy should provide that $3,000 should be paid to the plaintiff upon proof of death; that the defendant failed and

neglected to issue the third policy, and that Arthur G. McKay died on or about March 14, 1929. 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 not to take effect until March 28, 1929, and which contained provisions contrary to the agreement and was never delivered to Arthur G. McKay or the plaintiff, nor was it agreed to by either of the said parties. The third count, filed some time after the first and second, alleges that the deceased, on January 23, 1929, applied to the defendant for three $5,000 policies on his life, payable to plaintiff; "that said application was contained in two certain letters (written by the insured) and on a printed form of an application furnished said Arthur G. McKay by the said defendant." The count sets up the two letters, one addressed to the defendant and the other to Barney Newman, an agent of defendant. The letter to the defendant, dated January 23, 1929, is as follows:

"I have just forwarded to Mr. B. Newman under separate cover an application of $15,000. and medical was made and sent from Chicago a few days ago.

"Now here is how I want this handled. I have dividends accrued on my policies #3109,925--929 for the years 1928 and 1929 amounting in all to $111.15. I want policies issued in denominations of $5000. each. 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 then leaves the two policies of $5000 each. Kindly 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 PERSONAL direction.

"Very truly yours,
"ARTHUR G. McKAY."

The letter to Newman, dated January 23, 1929, is as follows:

The letter to Messrs. Hodge January 25, 1939, in re Petitions to the defendant, dated January 23, 1939, in re Petitions and the offer to Thomas Jones, an agent of defendant. The letter was duly signed by the two letters, one addressed to the defendant [illegible] Jones, by the said letterhead. Jones [illegible] Jones (written by the typewriter) and on a printed form of an [illegible] "time until application was completed in two months [illegible] to the defendant for three [illegible] on his life. Inquire by phone." The said application was completed in two months and passed, filing on January 30, 1939, stating that the insured, [illegible] the world peoples. The third count, filed some time after the first count, alleges that Hodge or the plaintiff, her son is agreed to by either of [illegible] conformity to the agreement and the means designated to [illegible] not make effort until March 30, 1939, and which contained the third party, but instead issued a policy [illegible] as the plaintiff alleges that the defendant failed and neglected to issue same contains the allegations pleaded in the first count, and is [illegible] as to the performance of conditions, etc. The second or about March 14, 1939. The count also contains the necessary [illegible] required to issue the third policy, and that Joseph G. Hodge died

"Dear Newman:

"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 am 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:

"Premium on $10,000. policy issued Jan. 18, 1929.....		$289.80
50% Comms. turned over to A G McGay	$129.90	
1928 Div. Pol. 3109925---929 . . .	74.15	
1929 Div. Pol. 3109925---929 . . .	37.00	
My check to Barney Newman	38.75	279.80
		$ 10.00

"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.

"Kindly see the above is taken care of OK. sending me policies in care of the above but mark the envelope PERSONAL. Thanks Newman, for assisting me in this and rest assured, I will throw any business your way that I can.

"With kindest regards, I am

"Very truly yours,
"ARTHUR G. McGAY."

The count then sets up the application of McGay which requested the defendant to "issue in three policies of $5,000 each." The count also alleges "that a check for $38.75 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 13, 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 exceeding nine months subsequent to the date of

"Your Present:

"Confirming our telephone conversation of last night therein we agreed that you would take likely as your commission on this new policy and allow me the balance of your commission. I am therefore enclosing application blank completed, and waiving the dividends in transfer my accrued dividends to the credit of this policy and am enclosing a check to complete the 1st 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:

"Premium on $10,000. policy issued
Jan. 15, 1929.............................$279.51
50% commiss. turned over to A G McCoy $139.90
1928 Div. Pol. 72.18
1929 Div. Pol. 37.00
By check to Murray Brown 31.75 279.51
$ 00.00

"Now I have decided to pay for $10,000. insurance as agreed and take out an additional $10,000, as an interim payment of $10,000 which will occur in 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 $10,000 is your commission as agreed.

"Kindly see that the above is taken care of and, sending me policies in care of the above but mark the envelope Personal. Thanking you for assisting me in this and your interest, I will throw any business your way that I can.

"With kindest regards, I am

"Very truly yours,
"ARTHUR G. McCOY."

The court then took up the application of McCoy which requested the defendant to "issue to me two policies of $5,000 each." The court also alleges "that a check for $279.51 was sent in said letter and was presented to the 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. McCoy * * * that said policies 'on your life have been issued as applied for'; that at all times after April, 1917, the defendant had had a practice and custom, known to Arthur G. McCoy, whereby the defendant issued its policies of life insurance to acceptable applicants giving the policy a registry date from, to-wit: not exceeding nine months subsequent to the date of

the acceptance of the application for insurance, 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 * * * McGay'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 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 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 insured's rights or 'entitlements' and thus no action should be taken to modify or to waive any of the provisions or terms of the policy or to waive any of the insured's rights or 'entitlements' or to permit any 'endorsement' or 'rider' to be attached to the policy unless such 'endorsement' or 'rider' is specifically approved in writing by the insured.

Accordingly, the Insurance Code provides that the 'application' of the insured for a policy of insurance is a part of the policy, and any statement in the application is deemed a representation and not a warranty. Any change or modification of the application must be made in writing by the insured before it can become effective as a change or modification of the policy.

Section 330 of the Insurance Code provides that no life insurance policy issued or delivered in this State shall contain any provision limiting the time within which any action may be brought upon the policy, except that any provision may be inserted fixing a period of not less than two years from the date of issue of the policy after which the policy shall be incontestable except for nonpayment of premiums or violation of conditions relating to service in the military or naval forces in time of war.

Section 331 of the Insurance Code provides that no life insurance policy shall be delivered or issued for delivery in this State unless it contains in substance the following provisions, or provisions which in the opinion of the Commissioner are more favorable to the insured, or at least as favorable to the insured and which in the opinion of the Commissioner are not misleading:

(1) A provision that the policy, the application therefor, and any rider or endorsement shall constitute the entire contract between the parties, and that all statements made by the insured shall be deemed representations and not warranties, and that no such statement shall be used in defense to a claim under the policy unless it is contained in the application, or in a rider or endorsement which applies only to statements made for the purpose of effecting the rider or endorsement.

(2) A provision that after the policy has been in force for a period of two years during the lifetime of the insured, it shall become incontestable except for nonpayment of premiums or violation of conditions relating to service in the military or naval forces in time of war.

(3) A provision that a copy of the application, if any, of the insured shall be attached to the policy when issued.

(4) A provision specifying the grace period for payment of premiums.

(5) A provision specifying the options available to the insured in the event of default in premium payments after three full years premiums have been paid.

(6) A provision specifying the amount of paid-up insurance, cash surrender values, and loan values, if any, which are granted upon default in premium payments.

(7) A provision specifying the mortality table and interest rate used in calculating the minimum cash surrender values and paid-up insurance benefits.

(8) A provision specifying the method of computation of the amount of paid-up insurance, cash surrender values, and loan values.

(9) A provision specifying the amount of the loan which the insurer will make on the policy.

(10) A provision specifying when the proceeds will be paid.

(11) A provision specifying that the policy shall participate in dividends.

(12) A provision specifying the conditions under which the policy will be reinstated.

(13) A provision specifying that suicide within two years from the date of issue is a risk not assumed by the insurer under the policy, unless otherwise provided by agreement specifically inserted in the policy with respect to any additional benefits granted in the event of death by accidental means.

(14) A provision specifying that the insurer will issue, on the application of the insured, in exchange for the policy, one or more new policies of life insurance on the life of the insured, without evidence of insurability, providing for the options listed in (5) above.

(15) A provision specifying that the insurer will pay the proceeds of the policy in accordance with the applicable law relating to the settlement of proceeds of life insurance policies.

(16) A provision specifying that the insurer will pay an annuity to the insured, beginning not later than the policy anniversary nearest the insured's 70th birthday, unless the insured elects otherwise.

(17) A provision specifying that the insurer will pay an annuity to the beneficiary designated by the insured, upon proof of the death of the insured.

(18) A provision specifying that the insurer will pay an annuity to the beneficiary designated by the insured, upon proof of the death of the insured.

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 satisfactory proof of death of said assured."

The defendant filed a plea of the general issue to all three counts and an affidavit of merits, which avers "that on, to-wit, January 23, 1929 said Arthur C. McCay 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 McCay and was forwarded to one Barney Newman, an employe of the Detroit office of defendant, in the letter addressed to Newman dated January 23, 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 rebating arrangement with Newman, whereby applicant took credit for the commissions which in due course would be payable to Newman on said $10,000. worth of insurance 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 insurance theretofore issued, the rebating commission

assumes due on insurance structures issued, the reporting commission
attached reporting transaction and applicant's non-payment of
applied text sheet because of the qualifications resulting from the
on the remaining $8000. worth of insurance of the $12,000. worth
the $10,... insurance mentioned already be a the monthly, interim Insurance
other insurance sheet in said letter applicant also suggested that
applicable become "Applicant was in default in payments due on said
applicant's file with defendant, but said statements were not
liabilities which were secured on other insurance taken on
Newman on said $8,000. worth of insurance and $4 insurance
credit for the commitments which in one course would be helpful to
for $4 reporting statements with Newman, wherein applicant took
applicant attempted to pay the $8000. Policies applied
1950. not found in said Joint Court sheet in and $4 said letter said
of defendant, in the letter addressed to Newman dated January 19,
one forwarded to one Burack Newman, an employe of the Postal Office
contained on a printed form of application furnished with Modyk and
Insured in sums totaling of $8000. Except that said application and
matter of insurance on his file, Delgado to the Plaintiff, to be
tonic, January 20, 1950 said Antonio C. Modyk obtained for $12,000.
these counts and on clipboard of matter, which were "just as
of said matters."

The defendant filed a plea of the General issue to all

Term Insurance as it had expired on an upon anticipatory proof of death
and failed to pay Plaintiff the sum of $8000. for the Postponed
$1000" for are not obtain at expense the total term. policy,
and issued the stated policy of $8000. with a indigent date of March
$8000. each which it had issued and obtained to the said amounts,
eaves that defendant paid to plaintiff one of the three petition of
April unless in writing and signed by one of the Insuring officials

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 McCay, or accepted by defendant, but the $10.00 referred to in said letter of January 23, 1929 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 ahead, to be held by defendant until the premium thereon was paid while the insured was still in good health, in accordance with the terms of said application; that said last $5000. policy was never taken out by McCay 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 policy was to have been taken out in accordance with the arrangements between Newman and McCay; 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 $10. forwarded to defendant was never received by it, was never accepted by it and was never received 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 particular that

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 Preliminary Term Insurance, for which he paid $10.00. It developed that the $10.00 which the assured had sent only paid for fifty-two days of Preliminary Term 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 assured 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 Preliminary 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 March 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

preliminary term insurance, and that its agent was not authorized to make any such agreement; th t 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 March 17, 1929, upon which date it was to become effective if the premium were paid; that the $10 which was forwarded by the alleged insured to Newman was insufficient to pay for any preliminary term insurance, and was returned to McKay; 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."

No policy for preliminary term insurance was issued by 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. Arthur G. McKay 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

the first noise arose in solarium to disrupt a concert for the
resident to break and confuse her Deutschmark beam transmuse and stop
only times. The returned sentence that there was no alternate
but in the also they be time reason of their Mahney an study notes to
The discovery pre studied the sitting a member of Berlin"
between the date of the ministration and Europ I?"
mee discovery" accounted to the source of the Berlin depose Simon I?"
she declared's them in reference to many impression she counsel
to majesty that about the eighth Deutsch part increased and
be nearly step "the lane of step Berlin policy be Simon Iach", and
Division" of counter, time and pace pre sixth than Berlin".
Times this Peter of the lighted site of the step Berlin; see the
for the three Deputies. Within of mouth step wrong Ie" Pach"
tape increase is contained in step Berlin and in the ultimate
is the inverse not to the Division" and no mention of Deutschmark
Time I intimate pure of Peter I?"Iach" but is and not initiated
the statement. I these Berlin are Barbara of the minimum and
.

He Berlin's Deutschmark death increased men Imagen pi.
are that Deig".

Prace do irone the sweet. mon chet be Examen for ask many increase
Communication for ark Berlinmark term Imminee" in for ask mon-
Minimum" and mee reparmen to Mocht step" Imminee" Sprain mee no
increase to Beamen mee Impossible to back for ask Deutschmark cesar
Beamen name Deig". Sinet the Die minor mee Commenced pi the eighen
Mexen I?" Iach" thou which ones is mee to become effective is the
r Sprig Berlin man Instant" pro mee Deutsch" weir indicate eche ar
mark mweor the monster capsmid to Sile Insurance Berlinest Sinet
sipne if mee mar computed in the Berlin if mee Description pi mar
is mexi ab cost Edgewood! ir i ft ark mar Pleasury are mark"
Distributed step Imminee" for sinet the chest mee mer warehouse

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 painstaking 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, Insurance Company, to any contract of or for insurance." We think, under the pleadings in this case and the evidence, this contention is a meritorious one. The application signed by the insured expressly states that "no agent * * * has power to make * * * any contract on behalf of

defendant. This consent was customarily signed, in not without some force, but we have considered that we would not be justified in construing it. However, we have treated the consent as evidence of the defendant's willingness to waive the jury trial at the jury, which necessarily must have been based upon a finding that the defendant was informed sufficiently of his rights and consenting thereto that he was then bound by his action.

We do the contention of the defendant that it was entitled to a non jury person of misdemeanor trial status, we deem it necessary to refer to only two. First, that the consent for the plaintiff in this cause and the evidence that the plaintiff had no authority to bind defendant insurance company, to any contract of or for insurance." It claim, under the Statutes of a matter of law that defendant's reinsurance Service Bureau, Fidelity Insurance offered by its "The Owner Protects the jury" coupon complaint that the court erred in refusing to give the charged was stamped by diamond or improper motives. Second, the verdict in the criminal case is none its any the defendant was in fact entitled to a number of peculiar items in the return, although two of them were in force for only sixteen days before the death of the insured, and returned with premiums. The defendant promptly paid to the plaintiff difference company, but we find especially lacking in the record to support the finding of the jury which required the plaintiff to make a proof of loss before the company to refused on the honesty of the in this cause to the jury, made inquiries and satisfactorily explained to refer to only two. First, that the consent for the plaintiff's non trial person of misdemeanor trial status, we deem it necessary and consenting that he entered into this trial knowingly and voluntarily. This case can be tried again as perhaps relying from mistaken item insurance, it clearly appears the qualified consent with the insured for initially finding that the defendant was entitled to a verdict, that the evidence of the defendant in misstating it. However, we have treated the consent as

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, secretary, or treasurer, or a registrar of defendant had power 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 officers." The third count also alleges "that Arthur O. McCay and plaintiff kept, performed, and complied with all the terms, provisions, and agreements entered into between McCay 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 imposed 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. REVERSED AND REMANDED.

Kerner, P. J., and Gridley, J., concur.

35766

FRANK TRAPP,
Appellant,

v.

ROMAN KESTIAN and
MALGORZATA KESTIAN,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

268 I.A. 623

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On December 23, 1930, a judgment by confession for $2,120 was entered against the defendants, on a written lease containing a warrant of attorney. From an order entered November 3, 1931, purporting to vacate and set aside the judgment, the plaintiff has appealed.

The record in the instant case is a somewhat unusual one. On April 24, 1931, the defendants filed a motion to vacate the judgment and to permit them to file their appearance and to plead to the declaration, and in support of the motion filed their verified petition. On May 1 Judge Klarkowski denied the motion of the defendants and an order was entered to that effect. On May 5, 1931, the same judge entered an order setting aside 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 an order vacating the orders 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 Kestian

"The court having read the verified petition of defendant herein and having heard the arguments of counsel for the respective

parties hereto and being fully advised in the premises it is ordered that the judgment heretofore entered herein be and the same is hereby opened up for the purpose of permitting the defendant to offer his defense upon the merits that the said judgment be permitted to stand as security.

"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 1931 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:

"This cause coming on to be heard on the defendants' petition filed herein on April 24, A. D. 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 A. D. 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 entered in the cause.

In view of the state of the record as it was on November 3, 1931, 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, 1931, it would avail the plaintiff nothing to have that order set 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:

"'Appeals shall lie to and writs of error from the

"...Beauty spoil life by mud wrath of water from pipe
water, an wrist
32,089 (west. abstain)' in pleasure an on highway stem v painter
that is not subsequent. In Comm. etc. V. Cohen of of." don. Mo.
crimes not guide. However, the other objection from is not a first one
November 3, 1933' is would vault the Plaintiff nothing to have that
of July 22. When it is not the right to been upon the order of
vacation order of that date' which does not purport to vacate the order
1933' it is plain that Trustee should not have entered the
in view of the state of the record on it was on November 3'
entered in the cause.

the instant appeal is from this last order. It which was Plaintiff
his writ of assistance motion."

From this rule is hardly attempt the Plaintiff in which to file
the Court with thirty days from this date and ninety days time
Plaintiff which it attempt does filed Defendant his exhibit and be
Circuit Court in and Cook the Fifth District of the Clerk of
motion books to object from the above order of this cause to the
Defendant the Plaintiff having entered his exceptions

"Pursuant the Plaintiff having his exceptions
the same is hereby amended and may enable to which the plaintiff
Junction Jacksonian entered Decatur on Dec. 29 A. D. 1932 be and
petition is vacated and it is ordered that the Judgment by same
other Judgment of confirmation the the said sale
Judgment by Mackenzie Barrington entered herein on Dec. 29, 1932
petition filed herein on April 24, A. D. 1933 to vacate the
Judgment."

"This cause coming on to be heard on the petition"

Judge AILLING J. Thompson entered the following order:

4 Cannot give you an opinion of merit. On November 3, 1933,

on June 30, 1933, the defendants filed a plea of the general issue,

the trial only of this cause."

may for trial upon the merits on the 22nd day of June 1933 upon
any other plans to be duly sworn sufficient and that this cause be
and plaintiff at merit and that the defendant be permitted to file
after which he entered be ordered as a special plea
"It is therefore ordered that the availed position upon

Entering in regard of merits."

in all the his defense upon the entire file the said judgment be
ment is hereby vacated in its the Decree of Foreclosure the statement
entered that the judgment Foreclosure entered herein be and the
Decree entered and being Cook' County therein in the Circuit be

appellate 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, 332 Ill. 291.) 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 North Henderson v. Stemfeldt, 258 Ill. App. 428, and cases therein cited; also Ravenson & Sons v. Adelson, 232 Ill. App. 461, and cases therein cited.) The plaintiff cites, in support of his contention that the order appealed from is a final one, Kelley v. Klein, 257 Ill. App. 171, 175, but that case has no application to the motion now before us.

"We hold 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. Murphy, 258 Ill. 365, 366.)

In support of his contention that the order is an appealable one, the plaintiff cites the following cases: Kelley v. Klein, 257 Ill. App. 171; The People v. Long, 346 Ill. 646; H. C. Andrews Co. v. Anchor F. E. Mfg. Co., 210 Ill. App. 636. Each of the first two cases involves a petition 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.

We 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.

APPEAL DISMISSED AT PLAINTIFF'S COSTS.

Kerner, P. J., and Gridley, J., concur.

/

36030

PEARL DOHRS,
Appellee,

v.

EVENING AMERICAN PUBLISHING COMPANY, a Corporation, et al.,
Defendants.

EVENING AMERICAN PUBLISHING COMPANY, a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

268 I.A. 623

MR. JUSTICE SCANLAN 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

Ellis avenue, * * * and plaintiff avers * * * she was a pedestrian crossing said 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 nonownership, 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 as 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 pleadings the burden was upon her to prove that the defendant's truck struck 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

A Dr. It was dark. But the witnesses testified as to the
w motionless one. The motions happened on March 17, 1930, among
evidence as was sufficient that the completion of the defendant is
active in the matchmark." Upon a careful reading of the entire
the evidence that the Arbitrator mentioned in the decision was in-
said that the fact motionwise is treated the committee item
that from all the facts and circumstances in the case "it cannot be
that the defendant's attack struck the plaintiff," but the contents
concerned that under the Section was then put to have
a verdict for the defendant, for the reason that there was no evidence
been committed by the defendant, the court erred in returning to direct
not duly objected to a denial of the amended and signed to have
it considered only one." The defendant contends that on the face of
the defendant's attack struck the plaintiff." The plaintiff
contends that the judgment should be reversed, but it is evident
plan of nonsupport, which are less alleged.

The defendant then moved five points in support of its
The defendants filed a plea of the General Issue, and type a theory
the case for trial, then, moving and struck the plaintiff " " ".
started had testified their acts into automobile struck " " " that
through their attack are entirely intelligently and materially somewhat
ously felled in their duty in this regard, and on the contrary on
lined for the safety of the plaintiff " " " that the defendant
sure in the management, operation and control of their said automobile
ons then the call at the plaintiff " " " is material evidence
due care and caution for his safety " " " that it was then
-sumed " " " and that she was at all times in the exercise of all
exercise may stand stated by or upon the interpretation of this
Fifth Count" " " and plaintiff avers " " " she was a pedestrian

accident, Abrahmm 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 63rd street, "midway between Greenwood and Ellis," and that he then saw some people lifting up a woman and "this woman came out of this crowd" 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. * * * Q. 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 avenue, that she stepped from the sidewalk to cross 63rd street and that she then saw a taxi coming from the west. "Q. Did 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. Q. 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 Sixty-third Street at the time you were hit, were you north or south of the center? A. Slightly 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

lying on the car tracks. * * * It was the south car track.' The witness, on cross-examination, testifies that just before the accident her attention was directed to the taxicab coming from the west and that she did not see the car that struck her before it struck her. Neither 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 Evening American" 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 defendant saw fit to offer no evidence, and it is perfectly clear that the plaintiff failed to offer any proof in support of the necessary averment in her declaration that a vehicle of the defendant struck her.

The defendant insists that as the plaintiff failed to make out a prima facie case we should reverse the judgment without remanding the cause. It is a sufficient answer to this contention to say that in our judgment justice will be best served by a retrial of the cause.

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

REVERSED AND REMANDED.

Kerner, P. J., and Gridley, J., concur.

Trial on the 2nd inst. * * * in the South West Circuit." The

36040

GROVER H. JACOBS,
Appellee,

v.

FRED SPANDAU,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 623

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

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 premises 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 suit was dated March 6, 1931, 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 August 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 appellee to furnish any hot water in the demised premises from July 29 to

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 supply hot 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. During 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 mere pretext 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 law or fact were submitted to the court. The defendant cites Laffey v. Woodhull, 256 Ill. App. 325, in support of his contention that a failure to furnish hot water is sufficient to sustain a claim of constructive

August 11, 1921," and claims a constructive eviction by reason of such failure, and that he was therefore justified in vacating the premises and terminating the lease. The evidence for the defendant does not support his claim that there was a continuous failure to supply hot 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, 5412 Harper avenue, 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 Harper 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. During 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 mere pretext 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 law or fact were submitted to the court. The defendant cites Jaffey v. Goodall, 236 Ill. App. 385, in support of his contention that a failure to furnish hot water is sufficient to sustain a claim of constructive

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 landlord 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 tenant, 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 aggravated, could not constitute constructive eviction. In the instant case, even if we assume that the defendant made out a prima facie case of constructive eviction, nevertheless, that case was rebutted by the evidence for the plaintiff, and, as we have heretofore stated, 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 novo 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 defense of constructive eviction. No wit-

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 Strong v. Friedman, 261 Ill. App. 602, 613-19.)

We are satisfied, after a very careful examination of the evidence in this case, that the judgment of the Municipal court of Chicago is a just one and should be affirmed and it is accordingly so ordered.

AFFIRMED.

Kerner, P. J., and Gridley, J., concur.

36074

NATIONAL BOND & INVESTMENT COMPANY, a corporation,
Appellant,

v.

MANDEL A. COHEN,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 623

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal court of Chicago, National Bond & Investment Company, a corporation, plaintiff, obtained a judgment by confession against Mandel A. Cohen, defendant, in the sum of $920.70, on a promissory 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 defense. 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 verdict 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 held: "We are satisfied that under certain

the course" was to begin. "We are multiplied that under certain
the direction we do specify or not the Dynamic" was a motive in
obtain we spread the Lords and elsewhere that pertained to
creation may Create Water Under used him or the note." In one
(β) that the Dynamic was not a motive in the course. If any not
Future life" (γ) that the annihilation for the more Lords' and
the eternal attempt." Does that Are existence sentiment'
in the one of 1320.Ms" Judgment was entered on the mental may
eliminate the Lord in nature a account in Laws of the Dynamic
of all the existence' as motive of the Dynamic' the sense
the one was fried before the cone" with a Lord' and as the con-
ception of the Judgment' ordained of eliminate' the Judgment are
motive of the Judgment' ordained of eliminate' the Judgment are
finance' without accounts' to the Dynamic. Therefore' as
Judgment to the union of Christ Jesus may of the Judge
1320.Ms" as a Sentenced note executed of the Judgment was mere-
ly execution effect Word 'r Comm' eliminate' in the one of
Judgment Condemn' a existence' Dynamic' opposing a Judgment
in the Dynamic sense of Christ' Political Word a

IN' JUDGE BUSINESS RECLAIMED LAW CREATION OF THE COURT'

'Question'

RIGHT V' COURT'

a'

'Creation'

a existence'

Existence such a Judgment' CONTROL'

Page

Court upon Existence'

Case of Calling'

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 National Bond & Investment Co. v. Cohen, 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 question 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 to 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 careful examination of all the facts and circumstances surrounding the transaction we are satisfied that we would not be

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 Bullard Real & Investment Co. v. Cohen, 304 Ill. App. 600.) 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 question 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 to 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 defendants, and after a very careful examination of all the facts and circumstances surrounding the transaction we are satisfied that we would not be

warranted in disturbing that finding. The contention of the plaintiff that there was no evidence which showed or tended to show that it was not a holder of the note in due course, is without the slightest merit.

The plaintiff contends that the court erred in admitting in evidence certain exhibits offered by the defendant. No 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 defendant an automobile, but that Clarke had no title to the car and that while the car was in the possession of the defendant, First Acceptance 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 Acceptance Corporation, and that on January 9, 1928, there was a judgment entered in the said cause finding the right of property in 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 exhibits 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"

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.

It is apparent from the record and from the absence of certain 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.

36098

A. J. SUTKUS,
Appellee,

v.

THEODORE WALTER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

268 I.A. 624

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.

The record discloses that plaintiff is a real estate 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 Erdman 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,

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 Minckel 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: "Where 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 claimed 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

willing and able to carry out his part of the contract, and that he saw Kinckel twelve or fifteen times after the execution of the contract and urged him to consummate the contract, but that Kinckel stated to the defendants, 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: "Where 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 Cunningham v. St. Gemme, 210 Ill. App. 510, in support of his position. In Stone v. Schnecke, 243 Ill. App. 416 (certiorari denied by the Supreme court, 244 Ill. App. xxxii), the court held that in an action by a realty broker to recover commission claimed 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 Stable, 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, Stable 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

specific performance. Therefore, the contract was not such a contract as would entitle the plaintiff to the commissions he claimed. Jenkins v. Hollingsworth & Tabor, 83 Ill. App. 139; Carroll v. Leufgreen, 170 Ill. App. 328." The court also distinguishes Rushkiewicz v. St. George, supra, upon the facts. In the instant case, even if the testimony of the defendant to the effect that Minekel was unable to carry out his part of the contract be hearsay in its nature, nevertheless, the plaintiff made no objection to its introduction, upon that ground, 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. S. 442; see also Sawyer v. French, 235 S. W. 126, 130.) The 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 Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Kerner, P. J., and Gridley, J., concur.

Hutton, 5 T.R. and Bridge, 1 Ves. Sonom.

MEANING AND MEANING.

are the cases to examine.

The judgments of the Municipal Court of Ontario to measure what justice will be done between a private at the moment. be examined, but not examined, but on some previous examination

The defendant has accurately stated that the cause should not be set for 2nd.

...ment to be put into the plaintiff's hand, and affixed to Belmont street near the ...entrance. ...ment should be made into the "Standard" office, and the plaintiff shall ...there, in an endeavour to find out the defendant, merely by ...entered," and his position means to be what the contract" upon its ...against new facts," existed not only as nearly as his part of the ...defendant, nor did he intervene any evidence tending to show that ...plaintiff made no attempt to refer or improper title pertinent of the ...D. R. 4852; see also Hanson v. Dunbar, 230 Mo. 1, 1296, 130.) The ...as it is here in Ann Arbortable. (See Ohio v. United States, 252 ...there is need be examined and given the natural primitive effect ...made an objection in the interrogation, when that ground, and thereby ...required to instruct in the manner, ascertainment the plaintiff ...the office that Kimball was unable to carry out his part of the ...in the instant case, was the pendency of the defendants to ...plaintiffs Investigation X. Ex Parte, (1878) when the Parties ...Hanway v. Pendleton, 120 122, 1Ab. 288." The cause also in- ...ployer, Brighton v. Insurance & Agency, 81 111, 1Ab. 1Ab) ...opinion. Brighton v. Insurance & Agency, 81 111, 1Ab. 1Ab) ...omitted to avoid writing the Agreement in the examinations be ...ebenezer Development. Instructors the contract and not much a

36110

E. THEODORE NORDGREN,
Appellee,

v.

STERLING CASUALTY INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 624

MR. JUSTICE 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 insurance 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: "Affiant states that the claim hereunder is on a policy of insurance issued plaintiff herein, by the defendant; 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

any under the conditions set forth in the said policy" and be
be immediately void and continuously discharged of the means
*declaring that the said policy * * * provides that if the insured*
is on a policy of insurance issued thereon, or the
of suits and no forfeiture "clause upon the claim because
once every year." The department marks of the affidavit
statements of a physician be sworn upon that itself" at least
the Insured in not under the proclamation once and negligen
*does not cover and * * * disability for any period during which*
portions of the policy, which sworn to follows: "This insurance
it is necessary to consider only section 8 of the General
provision of which is to-wit: For the purposes of this subseq
shows by the "Physical Condition" without Policy," the amount
insurance for disability benefits." The policy upon when is
the matter was brought before a policy of sickness
ner covered on the morning and the different has changed,
assessed the Plaintiff's damages at the sum of 1200." Whereupon
posited interest thereof the insured changed the following way
there. There was a first Before the sum," with a Jury," and a
The DISTRICT made the statement in an action in defen-

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

"Appellant,"
"Appellee."

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

256 I.y. 654.

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 month; 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 every 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, paragraph (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 January 6, 13, 20 and 27, February 14, 21 and 28, and March 15 and 23, and that all of these treatments were for the injuries sustained in the accident. But, the defendant contends that "the plaintiff, as a result of the said injuries, was

contends that "the plaintiff" on a result of the said injunction was for the injunction contained in the pendency. But" the defendant and Brooks 15 and 69" and that all of these statements 22 office for statement on January 6" 15" 20 and 21" January 26" 22 December 26" and that the plaintiff acting at the same discretion" physicians executed him again on October 15 and 14" November 20"and June of a discretion on September 8" 2 and 30" and that the same in entitled cause the said penalty" to nearly the sum of $80.00" accepted. However" plaint state the defendant (plaintiff) cause" and under the lasting retention of a discretion in injunction" and the said plaintiff" on a result of the said

cause action." that the plaintiff moved" on a result of the said of a discretion to assume other that penalty" on your case state Injunction" and said relief the defendant" and under Brooks 15 and 69" and that all of these statements 22 office for statement on January 6" 15" 20 and 21" January 26" 22 December 26" and that the plaintiff acting at the same discretion" physicians executed him again on October 15 and 14" November 20"and June of a discretion on September 8" 2 and 30" and that the same in entitled cause the said penalty" to nearly the sum of $80.00" accepted. However" plaint state the defendant (plaintiff) cause" and under the lasting retention of a discretion in injunction" and the said plaintiff" on a result of the said

cause action." that the plaintiff moved" on a result of the said of a discretion to assume other that penalty" on your case state Injunction" and said relief the defendant" and under

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 policy, 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, no 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 testimony 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. * * * When I got to Chicago I went directly home and called a doctor. * * * I was not able to stand on my foot then, I was in bed. * * * I 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; something like that. I sat around the room with my foot bandaged up on another chair about two months I should judge. During that time, I just walked around the floor with crutches. I tried to sustain my weight on that foot without the aid of crutches, but I could not. It was too sore, I could not stand the pain. During that period I did not leave the house at

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 cane. * * * 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 leg. 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."

The defendant contends that section 5 of the policy is 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. E. (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 a 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 merely for that period of time, which he was paid." The plaintiff testified that for about four months after the accident Dr. Crouch "kept coming

for three four months after the accident Dr. Cranson "had counted
heard of time, which in one day." The physical restrictions that
he was entitled to benefits under the policy nearly for that
only theoretically one month," and therefore under section 8
months after the accident [illegible] for that
[illegible] and then gave a rough approximation. [illegible]
[illegible] I called the first day. The first week he was there
* * * I had a doctor. His name was Benjamin Cranson. He was
[illegible] was unable to weight on my feet without too much pain.
crutches and I used a cane. * * * I nearly given to one or the
* * * It was unusual [illegible] of time when I got rid of the
I took my job because I could not miss it when I was disabled.
after the injury. I am not accustom to my work after time.
and time. It was all of three months before I left the house

around every week," and gave him treatments at each call. Dr. 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 Final 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 claimant strictly and continuously confined within the house? Sept. 1st 1930 Jan. 2nd 31. 10. (Answer) The assured was totally and absolutely disabled from performing all his duties from Sept. 1st 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? Sept. 2nd - 8 - 10 Oct. 10 - 17 Nov. 20 Dec. 24. 15. On what date was he able to resume part of his work? Answer Jan. 2nd 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 statement of Dr. 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

in Brighouse Title Insc. Co. v. Hartley, supra, in pursuit which I like
rather at variance. ... is an implied in order with what are said
cases, in view of all the surrounding facts, does not convey to one
mind so fair implication to only that the defense instituted it this
period of suit was merely. ... a sudden change with this conception
plaintiff was treated as a duplication once every seven days for a
period that the monthly weight of the original views that the
consideration of the old-fashion, was sometimes improper, it is
opinion of Dr. Crowell, compelling the point involved in the
argues that when the peculiarity of the plaintiff and the written
effaced by the defendant in defense of the claim. The defendant
Inc. did." This attempt and practically all of the evidence
claimed been injury. Inc. it no' when and by whom? D. A. Granson
VII of his work. Number 8911X on Cranch. 18. Mrs on K-Indy of
ends was be upon to receive part of his model. Number Inc. Ind 3037.
Ind - 3 = 10. Dec. 30 - 17. Nov. 30 Dec. 86. 35. On what
Month 35 - 00. 10. On what ought did you treat him as his house
Pine et Pen Eliza Inc. 3 - 33 - 01 = 01. Per. 34 - 57 - 22
Inc Inch to Inc. Ind 81. 13. on what year are had read
Pendant, Stopped from pertained fit its entire Inch Inc.
Inc. Inc. Cue 01. 10. (Cheese) The counsel are lastly and
plaintiff and consequent- mention elicit the Dental Dept. In
Inch city the Citizens. D. Between that Cater was climate
not be visit the Cover for cannot is such Invest' complete
statement, only sign a Bright from condition Jr the reduced.
relevant contract on "Physician's Penny Annex of recipes". The
agreement much Jr the doctor and which was mentioned to the
Chemist did not notify, but the defendant instructed a written
record early much," and Dana pins stockmarks no week only". Dr.

defense under a similar state of the record.

The judgment of the Municipal court of Chicago should be and it is affirmed.

AFFIRMED.

Kerner, P. J., and Gridley, J., concur.

36161

UNION BANK OF CHICAGO,
a corporation, as Trustee,
Appellee,

v.

BERNARD MALTER et al.,
Defendants.

BERNARD MALTER,
Appellant.

INTERLOCUTORY

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

268 I.A. 624

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The complainant filed its bill to foreclose certain property in Cook county and thereafter the chancellor, upon motion of the complainant, appointed a receiver. Bernard Malter, defendant, appealed from the order appointing the receiver, and this court, in Union Bank of Chicago v. Bernard C. 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 mere 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 receiver; 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 paragraph 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

The objections contends that "before hearing evidence on
Bernard Meltzer, defendant, again objected,
upon motion of the complainant, a receiver was appointed and
and filed an answer to the remainder of the bill. Thereafter,
and extensive negotiations of the case, resulted in another hearing,
bill, to which the defendants filed a plea to a certain paragraph
cause had been submitted, the complainant filed a certified amended
there was certificate of evidence filed in the cause. After the
opening a necessity for the appointment of the receiver; nor was
reason that there was no finding of fact contained in the order
time more convincing, to justify the order, and for the further
bill did not contain sufficient allegations of fact, as distinguished
Gen. No. 28330, reversed the order for the reason that the amount
this court, in Union Bank of Chicago v. Bernard G. Meltzer et al.,

The complainant filed its bill to foreclose certain
Brotherly in Book county and therefore the counselor, upon
motion of the complainant, appointed a receiver. Bernard Meltzer,
defendant, objected from the order appointing the receiver, and

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Appellee.

Defendants.

ILLINOIS BANKING et al.,

Appellees.

a corporation, as Trustee,
UNION BANK OF CHICAGO,

Reply

CODE, COOK COUNTY.

APPEAL, MODE ERROR.

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 evidence 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 Cook county, appointing a receiver, is affirmed.

AFFIRMED.

Korner, P. J., and Gridley, J., concur.

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 evidence 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 Cook county, appointing a receiver, is affirmed.

AFFIRMED.

Horner, P. J., and Gridley, J., concur.

36210

EMIL MUELLER,
Appellee,

v.

CARL POCH et al.,
Defendants.

WALTER F. WALSH,
Appellant.

INTERLOCUTORY

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

268 I.A. 624

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Emil Mueller, complainant, filed his bill for foreclosure 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 December 15, 1927, Carl Poch and Mary Poch, his wife, defendants, being indebted in the principal sum of $55,500, executed and delivered their 77 principal notes of said date, payable to order of bearer, as follows: Five notes, including note number 5E, for $500 each, due June 15, 1929; 25 notes for $300 each, due, respectively, five on June 15, 1930, 1931, 1932, 1933 and 1934; and 22 for $500 each, 20 for $1,000 each, and 5 for $2,000 each, due December 15, 1934, all with interest at six per cent per annum, payable semi-annually, on the 15th day of June and December 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 5E, in the principal amount of $500, due on June 15, 1929, and which was not paid on that

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 then the whole indebtedness, including principal and all earned 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 annum; that the trust deed further provides that "in case the right of foreclosure 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 shall have the right to bring such legal or equitable proceedings for the collection of the moneys 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 foreclose under the terms and provisions 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 premises pending such foreclosure proceedings and until the expiration of the redemption period, and that they further agree that the court may at once, upon filing of any bill to foreclose, 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 scant and meagre security for the indebtedness of the aforesaid trust deed; that they are situated at 4142-4148 N. Ayers Avenue 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 * * * and upon a sale being had, there will not be sufficient monies realized from the sale to satisfy the indebtedness 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 mortgage, dated December 15, 1927, upon the premises, in the sum of $12,500, and that Walter F. Walsh, defendant and owner of the equity of redemption, claims some interest in the same.

On January 13, 1932, the complainant served notice upon the defendants Pech and wife and Walter F. Walsh, that on January 14, 1932, 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 Citizens 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

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 deed 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 holder 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 answer further alleges "that by reason of the possession of said premises 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, 52, 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

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 averred that the premises were good and ample security for the indebtedness, and that the total value of the premises was $72,697.36. On June 23, 1932, the complainant filed a verified amendment to the bill, in which he alleged inter alia, "that there is now due in taxes upon the said premises a sum of $4,204.34 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 petition, in which the complainant averred that the chancellor had denied the motion for the appointment of a receiver on February 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 did close its doors and cease to do further business, and is now in the hands of the State Auditor 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

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 $28,000; 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 averred that the premises were good and ample security for the indebtedness, and that the total value of the premises was $73,497.46. On June 15, 1931, the complainant filed a verified amendment to the bill, in which he alleged inter alia, "that there is now due in taxes upon the said premises a sum of $4,204.34 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 petition, in which the complainant averred that the chancellor had denied the motion for the appointment of a receiver on February 26, 1931, "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 thereafter, on or about, to-wit the 21st day of May, 1932, the said * * * bank did close its doors and cease to do further business, and is now in the hands of the State Auditor and therefore is incapable and unable 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

conserve the rents, issues and profits, that they be not lost; * * * that since the closing of the bank, the Auditor of the State of Illinois has appointed one, Wm. A. 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 duties 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 apartment building during such a period; that the appellant, in order to ameliorate 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 chancellor 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 announced 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 secured the holder of the notes shall have the right, upon filing a bill to foreclose, 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 mere allegations in a bill of default and that the

* * * commence the number, because only Deuteron, since they be not joined
by what they make whereof, that a deviate in a tiny does that
in case of a density in the Bohemond of all of the independence
a fill to Tarentum, in lone a secular abbotship without regard to
owned the neither of the noble unit lane the night, when lifting
the name of the Brunswick or member compiled by the owner of the
Kenmare, the three dynamite of this court have mentioned a rule,
ties, in mental evolution, rigor judicial ratio of the eighties,
dependent and that unemployment in Beaumont, and no lone investo-
This court is lofty unite that the security is validity five a bond
might explain the maintenance tenants of the building of skeleton,
of the owner of the Brunswick, and that the displacement of a tertiary
and that the opportunity should not lane displaced the pneumonia
maintenance at a reaction will not shade the existing deformation
benefited than an acuity their characteren without that that the
mentionate the authoring of his examine in the building in chemical
nativity curiel word a united that the explicant, in exact be
be rubber that no moraine should be obligated for an abundant
lane even fit be describe up Jacob the present brand dependent, mu-
bending the motion to studies a dentist". Journal for existing
upright capturing the learned Dutch invited".

The mile enrichment of other it that "the joint exact is
ce Timaru Deuteron examined in the unit citizens their Deep of
exposed the conquest that be city may shade himself with the curing
and this Dutchman Caroline take that the mile tenants already bis
Illinois pen appointed one" the "- Hoopla" deviator of the unit pound
that plane the standard of the Bank, the nation of the state of
commence the number, because only Deuteron, since they be not joined * * *

conserve the rents, issues and profits, that they be not lost; * * * that since the closing of the bank, the Auditor of the State of Illinois has appointed one, Wm. A. 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 duties 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 apartment building during such a period; that the appellant, in order to ameliorate 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 chancellor 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 announced 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 secured the holder of the notes shall have the right, upon filing a bill to foreclose, 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 mere allegations in a bill of default 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 saying 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, 1932, 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 sworn 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 appellant 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 chancellor 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 necessary 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

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. We find no merit in this contention. In the recent case of Reliance Bank & Trust Co. v. Delsey, 265 Ill. App. 546, 555, we said: "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. Had they appeared and urged certain of the technical points they now make in this court, the alleged defects in the pleadings, 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.

AFFIRMED.

Kerner, P. J., and Gridley, J., concur.

Kennet, D. J., and Craiten, J., counsel.

FAILURE.

comply will be affirmed.

The Interlocutory order of the Circuit Court of Cook

the present appeal.

in this court upon more technicalities." The case might be said of

Pressure, and it would be a commentary upon justice if they prevailed

by the complainant. Obviously appellants wished to avoid such a

the pleadings, if any there be," could have been at once easily cured

technical points that are made in this case, the minor defects in

pleadings of a receiver. Had they appeared and urged certain of the

of the opportunity allowed them to be heard on the motion for the

Ybb- Dec, 1920" we read: "The chancellor did not care to take argument

be the proper time of [illegible Book C Page 1] A. Duffy, Dec 17-

the appointment of a receiver. It find no merit in this contention.

stated the allegations of the bill it having upon the motion for

ment of a receiver and therefore the chancellor should not have con-

bill is had and give the bill no evidentiary value upon the appoint-

The appellant also contends that the verification of the

the appointment.

chancellor," and so for as the second discharge, made no objection to

to the chancellor that it made no objection to the appointment of a

receiver. The appellant was duly notified of the hearing before the

and was in the hands of the sheriff, and the petitioner showed

further alleges that the receiver had ceased to do business as a bank

possession at the time the examination showed upon the motion. It

collected the funds and managed the building, and was still in

36423

FIRST UNION TRUST AND SAVINGS BANK, a Corporation, as Trustee, Appellee,

vs.

LILLIAN JORJORIAN et al., Appellants.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

268 I.A. 624

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 foreclosure proceeding.

The bill of complaint was in the usual form, alleging a $78,000 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.

Notice of the application for the appointment 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

LITTLE UNION TRUST CO. et al.,
Appellants,

vs.

BANK, a corporation, as Trustee,
Appellee.

CONSTRUCTION OF DEED.
APPEAL FROM CIRCUIT COURT OF ELMER COUNTY.
Affirmed.

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

This is an appeal by defendants from an interlocutory order appointing a receiver in a foreclosure proceeding.

The bill of complaint was in due usual form, alleging a $78,000 mortgage upon which $15,000 had been paid; that $4,000 of the principal and $1,200 of interest had fallen due on March 1, 1932, and was not paid; that the maturity of the entire indebtedness was accelerated; that the taxes for 1930, 1931, 1932, had not been paid; that by reason thereof there was due and unpaid on account of the indebtedness $62,000; that the premises were a state of disrepair; that the value did not exceed $80,000, 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.

Notice of the application for the appointment 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, and two other buildings, each containing two apartments; that the brick building is approximately twenty years old. Opposed to this witness 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 scant 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.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

35879

WILLIAM H. HARPER, for use of SIBLEY ELGOT and EDMUND S. GOSS, doing business as ELGOSCO RADIO CO.,

(Plaintiff) Appellee,

v.

ARMOUR and COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

268 I.A. 625

Opinion filed Dec. 21, 1932

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

Plaintiff's statement of claim entitled, William H. Harper, for the use of Sibley Elgot and Edmund S. 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 bona 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 favor of the plaintiffs and judgment in the sum of $181.17, together with the costs of the action.

Opinion filed Dec. 31, 1928

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.

Plaintiff's exhibit 3 was an assignment of wages by Harper to Sibley Elgot & Edmund S. 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 assignor thereof from the defendant in such action, at least five days written notice of the pendency of such suit shall be served upon the assignor 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 assignor for the use of the real plaintiffs, nevertheless, the suit was by the assignees and the service or notice on the assignor was

Upon the trial of the cause Gipsy Lipot testified that he was a member of the partnership of Lipot and Dove doing business as Ellgreen Realty Company; that he knew Hacker and Pia Wile 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 Pia Wile for merchandise purchased and it is claimed by Plaintiff's exhibit 2. This exhibit was a note

It is claimed that no part of the note has been paid.

Plaintiff's exhibit 3 was an assignment of notes by Harper to Gipsy Lipot & Dove[illegible] Ellgreen Realty Company, and with this assignment was directed to the Potomac Foundry, it was signed by only one, but then the evidence it appears that Lipot and Dove were partners and the signature of one to the assignment was sufficient.

Section 19 of the Practice Act provides that "The assignee and/or[illegible] may issue first writ of any cause in which he is the actual bona fide owner thereof, and set forth the affidavit, where pleading is not required, allege that he is the owner, and be ready to file pleading on oath, or by not negligible, peremptory assignee, only one thereon shall be required to be endorsed upon the writ of summons; and no

any cause in action, before the trial of the same; cause

The pendency of such suit shall be served upon the assignor of defendant in such action, at least five days written notice of same due or to become due to the assignor thereof from the that in the event "the cause in action so assigned consists of when be endorsed first; ..... This case [illegible] Statute"

requisite to the maintenance of the action.

This was an action of the fourth class in the Municipal Court, 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 Suite v. New York Central R. R. Co., 262 Ill. App. 269, 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. Co., 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.

requisite to the maintenance of the action.

This was an action of the fourth class in the Municipal Court, and in such actions the proceeding in whatever the evidence exists it. Fixture rhetoric are unnecessary. Hewitt v. Dorchester, 249 Ill. App. 308; Shaw v. Dickinson, 208 Ill. 163.

Plaintiffs rely upon the assignment of wages, which was introduced in evidence, as the basis of their right to recover the sums due Harper which vest 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 and until 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 Boldo v. New York Central R. R. Co., 241 Ill. App. 388, in speaking of this statute, said:

> The regard a compliance with this provision by the assignee of a chose in action as a condition precedent to his right to maintain an action, and which acquit a defendant, can not be imported in the assignee for the benefit of creditors. It might that insolvents should be concerned as showing that the five days' written notice be served to the assignor personally."

To the same effect see Hopkins and Kuehnle v. Pennsylvania R. R. Co., 247 Ill. App. 88.

We have not been aided in ascertainment 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.

35887

CHARLES FRANSEN,

(Plaintiff) Appellee,

v.

THE PENNSYLVANIA RAILROAD COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK 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 Boulevard 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 Railroad Company, and charged The Pennsylvania Railroad 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 Boulevard.

The third count charged the defendant, The Pennsylvania Railroad Company, with carelessly and negligently failing to station a brakeman or watchman on the rear end of the train which was being backed across Loomis Boulevard.

The fourth count charged negligence on the part of The Pennsylvania Railroad Company because of its failure to ring any bell or sound a whistle while the train was approaching the inter-

Opinion filed Dec. 31, 1935

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Charles Clemens, the plaintiff, brought his action against the defendant, Dennis Grimmer and the Pennsylvania Railroad Company, a corporation, to recover damages for personal injuries sustained on his person received at the intersection of Twenty-first street and Indiana avenue, in the city of Chicago, on the 20th day of December, 1932, by reason of the negligence of the defendant, the Pennsylvania Railroad Company, in the operation of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid. The defendant Grimmer was at the time the engineer in charge of the railroad company's locomotive engine which was backing the defendant Grimmer's train of cars at the intersection of said Twenty-first street and Indiana avenue, in the city of Chicago, and which said locomotive engine was then and there operated by the defendant Grimmer.

The declaration consisted of four counts. The second count charged the defendant, the Pennsylvania Railroad Company, a corporation, to recover damages for personal injuries sustained on the person of the plaintiff, Charles Clemens, at the intersection of Twenty-first street and Indiana avenue, in the city of Chicago, on the 20th day of December, 1932, by reason of the negligence of the defendant, the Pennsylvania Railroad Company, in the operation of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid. The third count charged the defendant, the Pennsylvania Railroad Company, with wantonly and recklessly driving an automobile at a high rate of speed and with reckless disregard of the safety of the plaintiff and others, and charged that the plaintiff was injured as the proximate result of the defendant's wanton and reckless conduct. The fourth count charged the defendant Grimmer with wantonly and recklessly driving an automobile at a high rate of speed and with reckless disregard of the safety of the plaintiff and others, and charged that the plaintiff was injured as the proximate result of the defendant's wanton and reckless conduct.

The fourth count charged the defendant, the Pennsylvania Railroad Company, with negligence in the operation and control of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid. The fourth count charged the defendant Grimmer with negligence in the operation and control of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid. The fourth count charged the defendant, the Pennsylvania Railroad Company, with negligence in the operation and control of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid.

The Fourth count charged the defendant, the Pennsylvania Railroad Company, with negligence in the operation and control of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid. The fourth count charged the defendant Grimmer with negligence in the operation and control of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid.

The third count charged the defendant, the Pennsylvania Railroad Company, with wantonly and recklessly driving an automobile at a high rate of speed and with reckless disregard of the safety of the plaintiff and others, and charged that the plaintiff was injured as the proximate result of the defendant's wanton and reckless conduct.

The second count charged negligence on the part of the Pennsylvania Railroad Company, the plaintiff, Charles Clemens, in the operation and control of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid. The second count charged the defendant Grimmer with negligence in the operation and control of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid.

Charles Clemens, the plaintiff, brought his action against the defendant, Dennis Grimmer and the Pennsylvania Railroad Company, a corporation, to recover damages for personal injuries sustained on the person of the plaintiff, Charles Clemens, at the intersection of Twenty-first street and Indiana avenue, in the city of Chicago, on the 20th day of December, 1932, by reason of the negligence of the defendant, the Pennsylvania Railroad Company, in the operation of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid. The second count charged the defendant, the Pennsylvania Railroad Company, with wantonly and recklessly driving an automobile at a high rate of speed and with reckless disregard of the safety of the plaintiff and others, and charged that the plaintiff was injured as the proximate result of the defendant's wanton and reckless conduct. The third count charged the defendant Grimmer with wantonly and recklessly driving an automobile at a high rate of speed and with reckless disregard of the safety of the plaintiff and others, and charged that the plaintiff was injured as the proximate result of the defendant's wanton and reckless conduct.

The declaration consisted of four counts. The second count charged the defendant, the Pennsylvania Railroad Company, a corporation, to recover damages for personal injuries sustained on the person of the plaintiff, Charles Clemens, at the intersection of Twenty-first street and Indiana avenue, in the city of Chicago, on the 20th day of December, 1932, by reason of the negligence of the defendant, the Pennsylvania Railroad Company, in the operation of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid. The second count charged the defendant Grimmer with negligence in the operation and control of a certain train of cars being backed into the railroad yards of the defendant company at the time and place aforesaid. The

section of its right-of-way with Loomis Boulevard.

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.

The day of the accident three cars had been taken out of the Goldsmith plant and placed on the main line with the end of the box car near Loomis Boulevard, close to the building line. The engineer then proceeded to hook 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, as 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, 1929; 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

section of its right-of-way with Loomis Boulevard.

Loomis Boulevard is a north and south street in the City of Uptown, approximately 30 to 40 feet wide, with a pavement 8 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 [illegible] parallels 23rd Street and 25th 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 gutter runs into the plant of the Peerless Tire and Rubber Company located on the east side of Loomis Boulevard. This gutter runs west from this plant and connects with the main line perhaps 60 or 75 feet west of the Boulevard.

The day of the accident there were two cars taken out of the Goldsmith plant and placed on the main line with the end of the box car near Loomis Boulevard, close to the building line. The engineer then proceeded to pool on the 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 the standing on the east side; that he stopped the automobile and then proceeded to cross over the tracks and, as he did so, three cars were suddenly started up and propelling against the Boulevard was driven by the defendant Carlson.

Plaintiff contends that the accident happened about

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 Boulevard in a southerly direction; that there were two tracks across Loomis Boulevard at that point, one being a through line and the other used for switching; that as he was approaching the track at approximately 35 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 crash; that he was compelled to make a sudden stop. He 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.

stopped 15 feet or more from the street; that he was a railroad
one operating on the west side of Tennis Boulevard about noon and
by the same time; that Hartmann rides to his work at the only one
Division then operated directly across the tracks and the train operated
the eighth? that there was no argument at the crossing and that
Tarleton Country" headed into the countryside and the significant
people to be on and the end of the "Collection". The Confederate
are drawn out and joined."

I mistook second Lance testified that he was driving
eight feeds Jackson in " continuously discussion; that there were
phenomenon the plaza of approximately 20 miles an hour he was riding
Time and the cities need for equipment that on be observed the
two tracks second Tennis developed at that point" one point a
operating still at the time! that be viewed as to be observed the
Plaza and ordinary car the case make matter and paint the easy; that
be the sample to make a motion stop." He did not hear and signal
as amount of oak kind before the cars moved" nor did he see any
Lights."

Darlene" the department with the "Railroad Commit"
Eleven on motorman or other person on the crossing"

Rudolph Anderson" a witness on penalty of plaintiff" was
ape are dismissed out of the most specified hypothetically as the case

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 Railroad 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 Hooker 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.

We agree with the position of the defendant that it is 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 where the accident happened and did not witness it.

Dennis, the watchman stationed at this point by the railroad company, testified through an interpreter and according to his testimony he knew a white man named Tieg and knew he was in the automobile in which plaintiff was riding. One hour and of the train was approximately even with the building time and the cars were standing at that point just prior to the time that the automobile in which plaintiff was riding as a passenger entered the crossing. It also appears that the engine was not attached to these cars. If the driver stopped his car, as testified to by plaintiff to establish his case, he was guilty of negligence in failing to look and listen for the approaching train.

On the other hand, a railroad company operating through a city is under obligation to obstruct its tracks at such a point as not to injure persons rightfully using city streets.

A city is under obligation to obstruct its tracks at such a point as not to injure persons rightfully using city streets.

It appears from the evidence in this case that the plaintiff is entitled to recover by a preponderance of the evidence, to induce the driver, and that the burden of proof is upon defendant in a verdict, it be put on opportunity to learn of the danger. We also agree with their position that it is the duty of a railroad track to approach it with care commensurate to the known major hazard, and that it is the duty of one about to cross a railroad track to exercise such caution for his own safety at the time of the accident and the duty of the plaintiff to prove that he was in the exercise of ordinary care in the exercise of due care for his own safety.

We agree with the position of the defendant that it is not be sound because the material statement, and whether the plaintiff stopped or not there was such negligence on the part of the defendant as to prevent the plaintiff from recovering. The only question for this court is one of fact, namely, whether or not the plaintiff was guilty of contributory negligence. The evidence did not show at the crossing.

Under the evidence, the train [illegible] and [illegible] the driver of the automobile, [illegible] struck by the [illegible] and [illegible] where the accident happened and did not witness it.

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 cut; 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 months 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 cut, his shoulder sprained, and a dislocation of the ankle; that he immobilized the shoulder and sutured 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

right shoulder and a 10° restriction of motion in the index and middle fingers of the plaintiff and found a 90% disability in his ability to do anything since that time.

Dr. Goodson, the physician who first treated him as the result of the accident of 1/2 x 3rd put that he was not seen right ear and he cannot move it in every direction; that at the time he was here and that there is a limited motion in his shoulder and leg more fully injured; that he was treated by a physician for a period of months or more; that his right hand was broken; that his whole body was injured; that his memory was impaired.

Plaintiff testified that his foot was torn and cut; his mental and judgment impaired thereby.

Dr. Cooper, a physician, testified that he took an x-ray picture of the plaintiff and found a 90% sprained in his right shoulder and a 10% restriction of motion in the index and middle fingers of the plaintiff's left hand. He testified that he had treated him for about three weeks and subsequently he was cured for by his own family physician.

Dr. Goode, a physician, testified that he took an x-ray picture of the plaintiff's hand and found a 90% sprained in the shoulder, and the index middle fingers are impaired and the shoulder injured, and a dislocation of the wrist; that he hospitalized the shoulder and the bone was set and that plaintiff remained under his care for about three weeks and subsequently he was cured for by his own family physician.

Dr. Goode, a physician, testified that he took an x-ray picture of the plaintiff and found a 90% sprained in his right shoulder and a 10% restriction of motion in the index and middle fingers of the plaintiff's left hand. He testified that he had treated him for about three weeks and subsequently he was cured for by his own family physician.

middle fingers of the right hand; that there was considerable stiffness and rigidity in the muscles of the back, 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.

35906

IRVING SPITZER, Trading as WHEATOAST COMPANY,

Appellee,

v.

THE QUAKER OATS COMPANY, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 625[3]

Opinion filed Dec. 21, 1932

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

Plaintiff recovered a judgment before the court without a jury for the sum of $2,846.25, together with costs, for a breach of contract. The original contract in question was dated May 25, 1931, from which it appears that the defendant, The Quaker Oats Company, sold to the Wheatoast Company, 93 tons of "Puffets" at $30 per ton f.o.b. Chicago. The time of shipment 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 "Prop." evidently meaning proprietor.

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 dismiss was made in the trial court, but an affidavit of merits was filed to the amended statement of claim and the parties pro-

Opinion filed Dec. 21, 1932

ceeded to trial upon the theory that the action was one by Irving Spitzer, trading as Wheatcast 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; Upham & Gordon v. Richey, 61 Ill. App. 650; Redlowski v. Grossfeld & Roe Co., 192 Ill. App. 534.

From the evidence it appears that after the signing 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 49½ 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 $87.50 per ton by the plaintiff.

Plaintiff testified that on or about the first of 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 sale 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.

material.

that the trial court properly found that there was a breach of
Precisely with the title in the plaintiff. We are of the opinion
circumstances between the parties evidenced an waiving on waiver of the
The contract itself and the evidence contained in the written
notification that in the event it was not taken it would be void.
by the defendant to order the material shipped, nor was there any
does not appear to have been any demand made upon the plaintiff
was a question of fact for the trial court and, moreover, there
the hot weather and that it became necessary to sell it. This
belief of the defendant that this material deteriorated during
was told that it had been sold. There is some evidence on
judgment be ordered the defendant to ship the Puffed Feed and

Plaintiff testified that on or about the first of
June at an agreed price of $27.50 per ton by the plaintiff.
the carpenter, this record was sold to Four County Feed Depart-
the defendant and, according to the testimony of the plaintiff.
Feed" was delivered by the defendant to the plaintiff except
made in the contract and that thereafter all of said "Puffet
of the agreement and on or about June 25, certain changes were
any hurt. This clearly is true remained in the warehouse of

Prom the evidence it appears that after the signing

Implement v. Dyersville & Iow Co., 198 Ill. App. 604.

V. Purser, 264 Ill. 1941 Cohen & Gordon v. Hefner, 21 Ill. App.

Creation in this world at this time. Hoffmeyer Iron Store Co.

and Gibson as an individual. It is too late to raise the

disclosed indications that it was a contract between the defendant

by a corporation. The contract upon which the action is pre-

living Dairy, stating as Overhead Company, and not as action

denied to trial upon the theory that the action was one in

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 sale 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 sell this product as shown by its communication to the plaintiff of July 2, 1931, 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. Black Diamond Fuel Co. v. Illinois Fuel & Phosphate Co., 219 Ill. App. 150; Barnett v. Caldwell, 277 Ill. 285; 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 damages is the difference between the contract price and the market price at the time and place stipulated for delivery. 2 Sedgwick on Damages, sec. 734; Driggers v. Bell, 94 Ill. 223; Farson v. Ruder, 167 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."

There 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.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

HEBEL AND HALL, JJ, CONCUR. JUDGMENT AFFIRMED.

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 sale of this product to the Four County Tree 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 sell this product as above by its manufacture to the plaintiff of July 3, 1921, in which is given a list of prospective buyers. It 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. Minor Diamond Tool Co. v. Diamond Tool Co., 333 Ill. App. 621; Dargit v. Dargit, 277 Ill. 388; Kinney v. Peters & Bell Co., 117 Ill. App. 623.

This court in the case of Dahlin v. Hayden Co., 329 Ill. App. 86, in its opinion, said:

> "The general rule is that in an action for breach of contract for failure to deliver goods and chattels, i.e.g. of a certain place, where the purchase price has not been paid, the measure of damages is the difference between the contract price and the market price at the time and place stipulated for delivery. [illegible] Co., 290 Ill. App. 196; Dargit v. Dargit, 277 Ill. 388; Kinney v. Peters & Bell Co., 117 Ill. App. 623.
>
> "This general rule is that in an action for breach of contract for failure to deliver goods and chattels, i.e.g. of a certain place, where the purchase price has not been paid, the measure of damages is the difference between the contract price and the market price at the time and place stipulated for delivery. [illegible] Co., 290 Ill. App. 196; Dargit v. Dargit, 277 Ill. 388; Kinney v. Peters & Bell Co., 117 Ill. App. 623.
>
> "The general rule is that in an action for breach of contract for failure to deliver goods and chattels, i.e.g. of a certain place, where the purchase price has not been paid, the measure of damages is the difference between the contract price and the market price at the time and place stipulated for delivery. [illegible] Co., 290 Ill. App. 196; Dargit v. Dargit, 277 Ill. 388; Kinney v. Peters & Bell Co., 117 Ill. App. 623.

There 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.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

[illegible] AFFIRMED.

35918

JOHN MACER and SOPHIA MACER,

(Plaintiffs) Appellees,

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,

COOK COUNTY.

268 I.A. 625

Opinion filed Dec. 21, 1932

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

This is an appeal from a judgment for $1,503.90, in the Superior Court of Cook County, arising out of an action by the plaintiffs against the defendants in an action of trespass on the case. The defendant Peter J. O'Brien, doing business as Peter J. O'Brien & Company, was joined with the City of Chicago in the action.

From the facts it appears that on September 23, 1927, the Sanitary District of Chicago entered into a contract with Dowdle Brothers, a corporation, for the construction of a discharge sewer used in connection with the North Side Sewage Treatment Works, Division N. 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

265 I.A. 625

Opinion filed Dec. 21, 1932

as it 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 pavement 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, 1928, Dowdle sublet the restoration of the street to Peter J. O'Brien, doing business as Peter J. O'Brien & Co., defendant herein. 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 condition where it could be carted away and enable the contractor O'Brien, to repave 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 stucco 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 cracks 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 cracking 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

O'Connor' subcontractor, and that this work was not done until
[illegible] the place in which plaintiff resided was done by John
work of excavating the damaged portion of the pavement of La Fargue

The position taken by O'Brien appears to be that the
fact that this damage was done in August, 1888.

stored in the basement of the house. It is contended by the plain-
and damaged certain goods belonging to the plaintiff, that had been
cracks in the foundation walls, water was caused to and did flow in
rear of the house. Plaintiffs also charge, that by reason of the
of the house and the private sidewalk running from the front to the
home and also in the stores under-structure, the interior plastering
of this hall, caused cracks in the 12 inch foundation under their
plaintiffs' contention that the vibration produced by the dumping
contractor O'Brien, to below the street where rejected. It is
it to a condition where it could be carted away and enable the
ces retained at the dredged site this tangled pavement, thus reducing
about two feet in diameter and extending substantially 100 yards
it could be easily handled and for this purpose a large iron pail
suction of the street it became necessary to break it up so that
ble by the laying of the trench. In order to remove this damaged
of the street surface which had been cracked and tortured unrecogniz-
In order to pave the street it became necessary to remove certain
o'Brien, doing business as Patt & O'Brien & Co., Incorporated Brevit,
ld, 1888, beside owning the restoration of the street to-wit:
the operation. This trench was dug and the pipe laid, and on April
side of the trench that was broken or damaged during the course of
the lines of the trench, but only other pavement on the streets ad-
ployed to do this work and to restore the pavement not only within
thereof contract with the Omaha Impervious Asbest Roofing Company
ce it had before existed. The Sanitary District rented into a

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 unddr 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 also 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 Mager, 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.

sent himself.

Counsel for the plaintiff, Canning O'Brien & Company, pointed out the need not merely that they should be void but that there was any damage done to her phone and be void her that it there was any damage done to her in question, testified that she talked with O'Brien on the telephone. This witness also stated that he did not know to whom the concrete Company belonged, but understood that O'Brien wanted it from some source or another.

Sophie Moser, one of the plaintiffs, who appears to have been a joint owner together with her husband of the property in the work of replacing the pavement was one of fact. Numerous witnesses testified on behalf of plaintiffs that the hole, which was used to raise the iron bolt for the purpose of drawing it as certain wagons and trucks used in and about this work also bore the pavement, bore the name of Peter J. O'Brien & Co., and that Howell, the President of Double Brother, who had the general contract with the Sanitary District to do this work, was employed 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 defendant O'Brien insists that the evidence as to the name on the hoist or derrick, and on the trucks and wagons was only prima facie proof of ownership and that this evidence was overcome by his testimony to the effect that O'Connor was an independent contractor.

There was no written contract between O'Brien and O'Connor 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. Nightingale, 321 Ill. 168; Hartley v. Red Ball Transit Co., 344 Ill. 534. 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 cited 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'Brien insists that the evidence as to overtime by his secretary to the effect that O'Connor was an independent contractor, and on the trucks and wagons was only prima facie proof of ownership and that this evidence was overcome by his testimony to the effect that O'Connor was to show title. In the present case, however, the purpose was entirely harmless and in accordance with practically universal usage in the business community for the owner 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. Shearman & Redfield, Sec 111, 7th; Bishop & Ingraham Trucks Co., 344 Ill. 594. O'Connor was not produced as a witness on behalf of the defendant O'Brien. Item corroborations 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 direction of O'Brien was due 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 pay the rate of any charge. This objection was based upon the ground that it was preliminary to the defendants and immaterial cause are cited in support of this contention. Even an commission of these cases it appears that they are mostly personal injury cases where the purpose of the testimony was not to support any particular necessary to show liability. In the present case, however, the purpose was entirely harmless and in accordance with practically universal usage in the business community for the owner to pass upon

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 Wacker v. Yeager, et al, 151 Ill. App. 144, held:

> "Where the existence of the relation of master and servant 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 Kan. 770; Berg v. Bousfield, 65 Minn. 355; Corriman v. Klainger, 81 Minn. 42."

To the same effect is Current v. Enright, 159 Ill. App. 360. 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.

The position taken by the City is untenable. Since the 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 La 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 pavement 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. Barnard 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

been held that under such circumstance proof of indemnity insurance is competent in order to show by whom the work was being done. The case of Tucker v. Lenzen, et al, 182 Ill. App. 144, held:

"Where the existence of the relation of master and servant 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. Hymer v. Dietrich, 84 Vt. 770; Smith v. Donnelly, 88 Minn. 269; Sawyer v. Eastman, 81 Minn. 61."

To the same effect is Current v. Carlson, 189 Ill. App. 629. 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.

The position taken by the City is untenable. Since the 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 permit granted by it. The construction of the trench along La 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 pavement 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. Barnard v. City of Chicago, 270 Ill. 27; Dixon v. City of Chicago, 212 Ill. App. 255.

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 kiln totaling in damages to $134.00, and a No. 1 A kiln, $35.00. 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

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 $1,302.90, 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.

except of the wrongful, but under the circumstances it is impossible
for this court to appreciate its citation for that of the Jury. The
actions complained of that were brought upon by the jury. The
grant could subject a conviction not secured pursuant to the
one of [illegible], and also cannot [illegible] be grounds for reversal
of the Superior Court is affirmed.

For the reasons stated in this opinion the judgment
is [illegible].

[illegible] [illegible].

35925

ALEXANDER GOVIN,

Plaintiff-Appellee,

v.

LOUIS RUBIN, doing business as LOUIS RUBIN FURNITURE CO.,

Defendant-Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

268 I.A. 626[1]

Opinion filed Dec. 21, 1932

MR. PRESIDING JUSTICE WILSON 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 20 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.

Opinion filed Dec. 21, 1932

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 sums 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 urged as a remedy for tenured that the declaration

changed that the automobile was greatly damaged and that the

plaintiff was obliged to and did lay out divers sums of money

after the contract was to retrieve with the charge in the depreci-

for repairs, and that the evidence as to the value of the machine

tion. The witness Zarcone testified that before the accident

the machine was, in his opinion, worth $2800.00 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 lucidly qualified as an expert. The question

was immaterial, and as of the opinion that it strikes the law fairly.

It was not error to refuse instructions Nos. 3 and 6.

These instructions were covered by others given and given on

behalf of the defendant.

For the reasons stated in this opinion the judgment

of the Superior Court is affirmed.

JUDGES CONCUR.

ERNST TUCKER, Clerk.

35934

KATARZYNA DUMARA,

(Plaintiff) Appellee,

v.

THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 626

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 "payable 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

Opinion filed Dec. 21, 1933

(Statement) Appellant.

A.

(Statement) Appellee.

Appeal from

Madison County

Hon. Frank K. Dorris,

Judge.

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 Hancock 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 insurance of the policy and this question should be submitted to the jury under proper instructions.

For the reasons stated in this opinion 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.

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 15, 1921, was upon the plaintiff. Pennsylvania v. Western & Southern Life Ins. Co., 201 III. 236. 66; Lounsbury v. North American Benefit Ass. 202 III. 290; Lounsbury v. Life Insurance Co., 202 III. 290. 67.

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 issuance of the policy and this question would be submitted to the jury under proper instructions.

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

REVERSED AND REMANDED.

KERNER AND HOLT, JJ. CONCUR.

35705

FIRST UNION TRUST & SAVINGS BANK, as Trustee under the Last Will and Testament of Lucius G. Fisher, deceased,

Plaintiff in Error,

v.

WILBUR J. O'BRIEN,

Defendant in Error.

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO

268 I.A. 626

Opinion filed Dec. 21, 1932

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to review a judgment of the Municipal Court of Chicago against plaintiff for costs. Plaintiff sued 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 April 30th, 1923, plaintiff entered into an agreement with Warren Corning & Company, a corporation, whereby it leased to Warren Corning & Company Rooms 908 and 910 in the Fisher Building in Chicago for a term beginning June 1st, 1923, and ending April 30th, 1926, for a rental of $13,075, payable in 35 installments of $545.00 each. Thereafter on December 1st, 1924, Warren Corning & Company assigned this lease to defendant, O'Brien, and by the terms of the assignment, O'Brien agreed to pay the rent from December 31st, 1924, to April 30th, 1926. Plaintiff consented to the assignment on condition that Warren Corning & Company remain liable for the payment of the rent. Thereafter Warren Corning & Company removed from the building, and O'Brien by a writing endorsed on the lease, assumed and agreed to make all the payments of rent, and to observe all the covenants of the lease.

Opinion filed Dec. 21, 1933

The rent claimed to be due is $3795.00, 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, 1925, Warren Corning & Company entered into an agreement with plaintiff by which it leased certain rooms in plaintiff's building, other than those referred to, by the terms of which and in consideration thereof, plaintiff released Warren Corning & 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 defendant 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, 1926. It is the claim of defendant, that Charles H. 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 sufficient power and authority to enter into such an agreement.

Warren H. 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 lease in question;

that he talked to Strong about the judgment, and in reply Strong told the witness, Corning, 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 Warren Corning & 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 tenant. 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. Paaren, 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.

Defendant O'Brien testified that Strong had charge of 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 held 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 O.K'd. by Strong. Various leases of various tenants in the building were introduced as evidence, and they were all O.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

and other matters were with Strong. O'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 Pike vs. Engler, 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 parties whereby 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.
>
> An agent or manager who acts as such for the 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 Guarantee and Accident Company vs. Steinberg, 264 Ill. App. 51.

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 Municipal Court is affirmed.

AFFIRMED.

WILSON, P.J., and HEBEL, J, CONCUR.

Judgment of the municipal courts is affirmed.

Syllabus.

Filed, [illegible].

35751

NICK MALAPANES,

Appellee,

v.

ROSE K. MLAHNIK and LAWRENCE A. MLAHNIK,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

268 I.A. 626

Opinion filed Dec. 21, 1932

MR. JUSTICE HALL DELIVERED THE OPINION 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 costs of suit.

The motion to vacate 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 levy was made on the drug store of defendants, and that the bailiff of the Municipal 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 Schaltas, the owner of the building occupied by defendant, Lawrence A. Mlahnik, as payment of rent due on said premises; that a suit at law against defendant, Lawrence A. Mlahnik, and others, in the Municipal Court of Chicago, was subsequently instituted by Charles A. Boelke, receiver of the premises so occupied by the defendants, said receiver having been appointed in a foreclosure

defendants' writ having been appointed in a forcible
Charles V. Seiks' receiver of the premises so occupied by the
Municipal Court of Chicago, was subsequently instituted by
at law against defendant, Pantheon V. Klepnik and others, in the
V. Klepnik' as payment of rent due on said premises; that a suit
equities, the owner of the building occupied by defendant, Pantheon
notes were executed and delivered by defendants to one Theodore
for November 19th, 1927. The petition further recites that the
Court of Chicago advertised a sale of the property to levied upon
ding sale of defendants' and that the bailiff of the Municipal
issued thereon and that on November 5, 1927, a levy was made on the
dates; that subsequent to the entry of the judgment an execution
7 months, 2 months, 10 weeks and 12 weeks after their respective
four notes of $100.00 each dated May 14th and 15th, 1927, and due
tion was entered on August 14, 1927, for the sum of $460.80 on
containing the following recitations: That the judgment aforesaid
executed on that date. The record shows that the petition to vacate
ment.

The motion to vacate was made on November 19, 1927, and
[illegible].00 and the costs of suit.

This is an appeal from the Municipal Court of Chicago
overruling it (entry and signed stipulation to that
tion as being [illegible] a motion to vacate a judgment entered at

MR. JUSTICE [illegible] delivered the opinion of the court.

Opinion filed Dec. 21, 1928

[illegible]

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

268 I.A. 526

[illegible]

MR. CHIEF JUSTICE [illegible] and [illegible]

A.

Appellee,

V.

PIOK NIEPAZAMO,

Appellant.

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

vacate the judgment and in refusing to permit defendants to present opinion that the trial court was in error in denying the motion to

In view of all the circumstances, this court is of the paid a commission's fee of $80.00.

the jury and the hearing on their motion to vacate, defendants had they heard nothing further from it until 8/Jay was made under the execution. On the hearing it was stated that between the time of vacated because they had paid the rent to the receiver, and that by counsel that they need not worry, that the judgment would be with execution about August 20th, 1931, and that they were advised vacate and having been promised until November 15th, 1931. It appears not having been executed on first levy, 1931, and the motion to judgment during defendants' tenancy of the premises, the defendants were not diligent in presenting it to the court, the sole ground for the court's denial of the motion is that the

From an examination of the record, it appears that the moving a motion to vacate the judgment entered etc. that this appeal is presented.

vacate on the plaintiff. It is from the order of the trial court denying the plaintiff was not and is not a bona fide purchaser of the notes for value, and that no consideration passed between the payee plaintiff thereon, there are no consideration the said notes; that the said receiver the sum of $1078.00, which included the said interested in the notes. The petition recites that because of the

that by reason thereof defendants were compelled to and did pay and owing by defendants on the said premises to said receiver, and Theodore Gopelite, had executed an instrument of all rents due

terminating ofeimus said November; that the owner of the premises,

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.

dark delves. It's shelves' making good the color of the
emotion? Does yesyid the motion to assess the judgment to assess
ing sentenced stay the discussion they maybe dye money discussed it.
ESSE seven the judgment be attend do sleep as security' any dyi
expensive be acting until disappear pose r unaccompanied time de
lawsuit joint payment.

EXECUTED TRY CERTIFIED DATE DISCUSSION'.

AUTHOR', J.J. YOU KEEP' J' CONCORD.

56395

JOHN S. JURIK, as Successor Trustee,

Appellee,

v.

MIKOLAS MARCINKIEWICZ, et al

Defendants,

On Appeal of MIKOLAS MARCINKIEWICZ, and HELEN MARCINKIEWICZ,

Co-Defendants and Appellants.

APPEAL FROM INTER-LOCUTORY ORDER OF THE SUPERIOR COURT OF COOK COUNTY APPOINTING A RECEIVER.

268 I.A. 627

Opinion filed Dec. 21, 1932

MR. JUSTICE HALL DELIVERED 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 alleged 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 answer 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 motion, bill and answer. On the hearing it was admitted that the general taxes on the property for 1929 and 1930 had not been paid. The principal contention of appellant is that the allegation as to the value of the property being scant 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

Opinion filed Dec. 21, 1933

MR. JUSTICE HOLT DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order of the Superior Court sustaining a demurrer for the property described in a bill to impress a mortgage on this property. The original mortgage was for $24,000 of which a portion has been paid and it is alleged in the bill that the sum of $20,000 is now due and owing, and that the property described is worth recently, and that the fair reasonable cash market value of the property is less than $28,000. It is also alleged that the rents, issues and profits existing are pledged as additional security. On this bill a second decree was filed in which it is alleged that the fair cash market value of the mortgaged property is $25,000. A hearing was had on the motion, bill and answer. On the hearing it was admitted that the general taxes on the property for 1930 and 1930 had not been paid. The principal contention of appellant is that the allegation as to the value of the property being worth recently for the indebtedness, is sufficient. Counsel objects to the statement in the bill that "in the opinion of [illegible] the present actual value of the property is less than $28,000." It is insisted that the allegation as to the value must

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 honest 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.

be a question. It is impossible for any one having so much as is
implied in such knowledge of real estate values, to give more than
an opinion as to value. Such evidence is received and justified in
exceptional cases where this question is in issue.
What more exact testimony could any witness give as to the value
of real estate, than his honest 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 continuing a receiver. In the opinion of this
court, the allegations in the bill justified the court in the appoint-
ment of the receiver and the order in that regard will not be dis-
turbed.

35731

RUSSELL FIREBAUGH, as Trustee,
Appellant,
v.
ANDREW W. LANDSTROM, et al,
Appellees.

APPEAL FROM
SUPERIOR COURT
OF COOK COUNTY.

263 I.A. 627

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 'Glenwood 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 foreclose 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

36711

[illegible], as Trustee,
Appellant,

v.

ANDREW W. LANDSTROM, et al.,
Appellees.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

265 I.A. 627

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 as follows:

> "The Court further finds, adjudges and decrees that after the erection of said building known as the 'Glenwood 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 C. Landstrom, his wife, in the sum of $1,285.04, and that said amount has never been paid to said Andrew W. Landstrom or Sarah C. Landstrom, his wife, and there is still due and owing said Andrew W. Landstrom, and Sarah C. Landstrom, his wife, said sum of $1,285.04 from The Bond & Mortgage Company, which sum shall be paid upon the entry of this decree by the trustee, Russell Fitzbaugh."

The proceeding in the instant case is one in equity to foreclose the lien of a trust deed securing the payment of bonds aggregating the sum of $130,000 on real estate therein described, against the defendants, Andrew W. Landstrom and Sarah C. 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 $1,285.04, 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 buildin

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

was erected upon the terms of an agreement entered into between James H. Landstrom and Hazel G. Landstrom, and the Bond & Mortgage Company, and the consideration therefor 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 $1,301.54, is due from the Bond & Mortgage Company to the Landstroms, and the Chancellor in entering the decree further ordered that the amount of $1,[illegible] 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

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 modified in conformity with this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

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

tion and extradite only those in default of the amount due. This offer of the petition was not accepted, in that the amount did not secure an order be issued for in the petition of the defendant.

From the facts in the instant case, we are unable to find that the defendant, in transfer for the bondholders, received the payment of the amount found to be due from the bond & Mortgage Company to Yates & Thatcher and Bank C. Johnston, his wife. Finding no liability on the part of the complainant for the payment of the sum of $1,301.04, as under K. Johnston and bank 0. Thompson, his wife, that part of the decree, the subject of this appeal, is reversed with directions that the decree be modified in accordance with this opinion.

REVERSED AND REMANDED.

STEDGE, C.J. AND BEST, J. CONCUR.

35748

ELIZABETH WALTERS,

APPELLEE,

v.

MICHIGAN CLEANERS INCORPORATED,

APPELLANT.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

268 I.A. 627

Opinion filed Dec. 21, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION 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 defendant, at or near the intersection of Halsted and 69th streets in Chicago. The cause was submitted to a jury, and after a hearing the jury returned a verdict finding the defendant 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 Halsted 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 Halsted and 69th streets. Just before

Opinion filed Dec. 21, 1933

ME. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an action of trespass on the case brought by the plaintiff against the defendant Car Lighting Company to recover damages for injuries alleged to have been sustained on February 28, 1930, as a result of having been struck by an automobile truck owned and operated by the defendant, at or near the intersection of Related and 69th streets in Chicago. The cause was submitted to a jury, and after a verdict the jury returned a verdict finding the defendant guilty and assessing the plaintiff's damages in the sum of $2500. 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 Related and 69th streets in Chicago, at about eleven o'clock in the forenoon, on February 28, 1930. The facts are, substantially, that there are street car tracks running north and south on Related 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 Related street at the east on the northeast corner of Related and 69th streets. Just before

the accident occurred, a northbound street car was standing south of the corner on Halsted Street at 69th street, almost opposite the traffic lights. The plaintiff was standing at the curb on 69th street a few feet east of the southeast 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 69th street. An automobile was parked along the south curb of 69th street just east of the curb line of Halsted 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 passage of this intersection. The intersection is located in a business district. The forenoon 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 walked to the place between the two sets of street car tracks on 69th street. Then, without warning, the defendant's truck, southbound on Halsted 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 steps to avoid the accident.

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. She 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 offered evidence upon the trial, and it
[illegible] explanation of the [illegible] accident
[illegible] the defendant's chauffeur at the immediate [illegible]
tion, in connection [illegible] offered witness, made a long [illegible]
ent at the intersection of 59th street, and that at that time
the automobile truck was traveling at a speed [illegible] to 12 miles
per hour. The day was bright and the pleintiff stepped out
onto the street from between two parked automobiles, 12 feet
south of the crosswalk. She was struck by the fender of the
truck. The truck was stopped by the driver within two feet,
and after the accident the pleintiff was in a standing position after the
collision; was assisted by the driver and a witness to a doctor's
office and afterwards started for the [illegible] motions 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
makes [illegible] 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 (3) that there is no evidence of negligence on the part of the defendant; and (3) that [illegible]
[illegible] necessary.

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 made 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 motion that if there 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 Halsted and 69th streets waiting for the lights to turn green so that she could proceed north.

It also appears from the evidence that there were several parked automobiles on the south side of 69th street extending east from the curb line of Halsted 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 Halsted 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 Chicago, and contends that the

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

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 waiting and that she had reached the middle of the two main tracks on 28th street. The plaintiff had a right to proceed, and it was the duty of the defendant in the operation of the truck 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 United and 28th 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 awarding their punishment manifestly 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 was in front of a street car as it was proceeding north on United 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

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:

the following instructions:

It is also contended that the court erred in giving
of these rules must be applied and the result determined from
the facts.

is dependent upon the facts, and that the proper application
the cases, it is apparent that each of the authorities cited
of the rule of contributory negligence. Upon an examination of
the rule of due care to be exercised by the plaintiff, as well
numerous authorities to assist and aid the court in applying
Counsel on both sides of the controversy have cited
and is not against its manifest weight;

of the opinion that the verdict is supported by the evidence
given by the jury when they returned their verdict, and we are
were all questions for the jury. These questions were passed
and the defendant's negligence in the operation of the train,
by the plaintiff at the time of the occurrence of the accident,

The question of the care or contributory negligence
the presence of a street car at the intersection.

There is conflict in the evidence as to the location
of the street car at this time, but the evidence does indicate

at the intersection the truck was being operated at a speed of
it other par doubt.

offered by the defendant, that at the time of making the turn
of the intersection. There is also evidence by a witness
defendant is that the truck made a turn south of the center
turned at this intersection. The evidence offered by the
lief in the evidence as to just where the defendant's truck
that other persons may use the intersection. There is dem-

1. "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:

'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 when turning to the right and pass to the right of the center of such intersection when turning to the left.'"

The point is made by the defendant that the evidence 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 crosswalk 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

1. "There was in full force and effect at the time of the happening of the accident in this case a certain motor vehicle operated by the defendant, and that said motor vehicle was then and there being driven in a careless and negligent manner in the following particulars:

'Upon approaching a person waiting upon or about to cross 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 it be safely passed.'"

2. "The jury are further instructed that there was in full force and effect at the time of the occurrence 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 intersections when turning to the right, and when turning to the left pass to the right of the center of such intersections when turning to the left, and shall exercise due care to avoid injuring persons or property upon highways.'"

The point is made by the defendant that the evidence fails to show any violation of the other portions or 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 12 miles an hour or 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 crosswalk at a busy intersection, and also the turn made by the driver in order to pass 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 jury and contractor of that evidence

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 Hospital. 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 oozing. 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 Plaintiff'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 comminuted 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."

We have considered the objections raised by the 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.

was given to assume authority in the minds of the jury. Counsel
force to secure the injuries sustained as is held by the plaintiff's
injuries, and it would seem that the collision was of sufficient
facts to dispose the amount of the verdict or the character of the
physician, viewed a. young, as follows:

"During the time I was put finally physician she never had
any injury at allegation of that order to my knowledge, at
least I never treated her for any. I saw Mr. Walters
recently Dr. [illegible] at about 11:30 a.m. at the Pendleton
Fuel Company. Mrs. Walters was complaining of a pain
and pressure in. Where was first examined epilepsy was
on the leg and foot as a first aid. There was an abrasion
on the right posterior surface of the ankle from which some
blood was coming. The entire ankle and joint badly swollen
and was plane and pale. Also examined is the circulation of
sensitive pain. I manipulated the ankle, I put pain of her
ankle leg and foot and moved it a little bit. I could feel
crepitation or manipulation of the bones at the ankle. I took
out to the X-ray room and took an X-ray. (Witness is
handed Plaintiff's Exhibits 3 and 4.) These are the
films that were taken that day showing a fractured condition
fracture of the Tarso right leg. Fractured shows there was
an abrasion an opening or laceration of the skin and some
hemorrhage. There were portions of bone protruding through
the skin. There were several pieces of bone, which bones
that are bone is connected as tendon as muscle pieces.
The films showed that the right leg had been broken in
several places so that the eye could hardly detect the
number of fragments. Each (indicating) we see a lot of
splintered bone and fragments lying all the way down into
the ankle joint. The second shows between the foot and
these bones is decrease from the normal showing in the
joint; there is an upward bowing of the bone into the foot
leg and also a backward bowing of the other part of the foot
was putting backward and outward from the normal position."

We have enumerated the objections raised by the

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.

"SIGNED" J.J. [illegible] J. CONCUR.

"DISSENTING OPINION".

35769

JULIAN M. THOMAS,
Appellant,
v.
GORDON C. THORNE,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

268 I.A. 627

Opinion filed Dec. 21, 1932

MR. JUSTICE HEBEL 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 Bank & 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 Ziegfeld in part payment of services as attorney for Ziegfeld. 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

plaintiff's office. Dana Bradley the $7,000 owed, Bradley to September 20, 1922. On September 20, 1922, Bradley, to plaintiff sealed with Bradley on June notice June 20, 1922.

The evidence of the plaintiff also tends to show that and the other for like transactions outside of Lake.

Bayden - upon the defendant Thomas, Jerome in Lake, Thomas; contain important substantive; one of which was a bordered book executed at the plaintiff bank relative to do with the formation of its bank relations to relations to attorney for Bradley. The relative are open, the receipt of more income, the received from Bradley good defense to this contract.

The evidence of the plaintiff is to the effect that motion of a minor in Bradley's trip; and has the defendant a holder in the course and for value before maturity, and without an act-ion-at-law at the request of Bradley.

The material questions of fact are, is the plaintiff entitled to recover at maximum claimed to have been rendered to this action, and is the defendant entitled to any set-off, or amount, for the use of $7,000, Counterclaim Illinois State Bank & Trust Company, and judgment entered in favor of the defendant in an action in the Circuit Court of Whiteside whose terms in the defendant when the amount in favor of the defendant in an action in the municipal

MR. JUSTICE HEMPEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment

Opinion filed Dec. 21, 1923

MUNICIPAL COURT

OF CHICAGO.

FILED BY CLERK

JULIUS M. THOMAS,

Plaintiff,

v.

PHOEBE C. THOMAS,

Defendant.

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 Ziegfeld. Ziegfeld 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 defendant's request. Thereafter Ziegfeld died and the plaintiff discontinued his services. During the time plaintiff was retained by Ziegfeld 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 circumvention 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

for securities tendered and as a retainer."

Pinkett smiled down at Shepherd. "Please consult this to my counsel's letter," handed Pinkett to Shepherd. Shepherd then directed to the contents of this check to Shepherd. Shepherd then directed meant to Shepherd's attention as tendered to make possible thank to counsel's opinion is the exact and explanation of the check in dispute.

The defense of the defendant is one of taking any circumstance to put the Plaintiff on notice.

Of the defendant's signature after the post-dated check is sworn to The indictment of its 10,000 check, and further that the discrepancy in that Plaintiff's testimony explains the presence of a counterpart

The defendant's contention, that the Plaintiff's original turned over this check of $8,000 to the Plaintiff.

testimony of Defendant for whether more believes before Shepherd endorsing. It also follows that Plaintiff did not receive a deed or the check upon the Court's acceptance more tendered check testimony. Plaintiff does not consent of the time more drawn any signed nor a consolidation obtained, but only to Shepherd in relation to the document solicitors, no contracts Plaintiff's attorney. During the time Plaintiff was retained Shepherd's attempt. Thereafter Shepherd died and the Plaintiff was instructed for Defendant in the Queens Court, which matured at Defendant checked the check in his Forth Bank for collection. The check in the Plaintiff Shepherd of the bank in question. Before the due date, Plaintiff Shepherd, which was post-dated, so that the Defendant would execute in case to the effect that Shepherd Theatre, was unable to Plaintiff entered check in the Forth Bank, and have this check to Defendant's attorney, and Plaintiff acting this defendant

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. Highley 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 Ziegfeld, 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."

evidence, however, is somewhat confusing as to his ability to understand that he was signing at the time the check was [illegible]. 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. [illegible] v. [illegible] Railroad Co., [illegible] Ill. App. [illegible]; [illegible] v. [illegible], [illegible] Ill. App. [illegible].

The post-dated check received by the plaintiff from Ziegfeld, 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, [illegible], 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."

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 REMANDED.

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

The only objection offered by the defendant to the

[illegible] was that it [illegible] COMMON

REMAINED AND REMAINED.

to necessity boarded on an absurd.

the expression O. E. as the BILL of exceptions. Such endorsement

the attorney for the defendant, may be endorsed only slightly in

of exceptions, in fact, the BILL of exceptions was obtained in

the instant case. No objection was made to the form of the BILL

the other documents, are contained in the BILL of exceptions in

this manner indicate that all of the instructions, as well as all

of said case.

Appeal made all of the proceedings had in the entry

strict compt to the BILL of exceptions.

memories filmers in the manner prescribed the certificate of the

WHICH comes the JUDGE to file the transcription in question. This

that books instructions were given to the jury in the first court

in the BILL of exceptions, and therefore the court cannot review

either from the record that all the instructions were incorporate

ontied to one statement in the defendant, is that it does not

A further point to be considered and which has been

been given on the count.

via the indictment question at issue. The instruction simply rea

ment it necessite for itself to record the exhibit not. There

the jury, as well as sustain the defendant's motion, it out,

induced belief. The question of fact is to be determined in

light of such instruction in this state has been to just to the

The only objection offered by the defendant to the

35793

ILLINOIS BELL TELEPHONE COMPANY, a Corporation,

Appellee,

v.

CARL E. ERICKSON,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

268 I.A. 627

Opinion filed Dec. 21, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION 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 amount." 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 Winthrop Avenue and north of Bryn Mawr 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-story building on the premises immediately west of the alley. For the purpose of constructing the

This is a bond action by the plaintiff against the defendant. The cause was tried before a jury and plaintiff entered a "non-suit," a verdict was returned for the plaintiff assessing the damages at $_____, and judgment was entered upon the verdict. Upon motion, the trial court ordered the jury to ascertain and certify the amount of the judgment in accordance with plaintiff's damages at $200.00, the court declared the jury to ascertain and certify another form of verdict and the jury fixed the amount at $[illegible]'s damages at $200.00.

The action of the plaintiff to recover damages for malicious prosecution.

Plaintiff claims that the defendants in the regular course of business, on or about October 1, 1932, the property immediately adjoining said public alley to on the south of 13th Ave. [illegible] to the defendant to plaintiff's conduct injured in the [illegible] ceased, and [illegible] the property [illegible] to [illegible] the defendant's [illegible] to [illegible] the [illegible] [illegible] [illegible]

foundation, an excavation 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 premises. 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. Erickson, the defendant, made a verbal contract and agreement with Bairstow some time prior to September 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 Bairstow had the absolute right to control the manner of doing the work in question. This control

control the manner of doing the work in question. This control
shows by proper evidence that Fairview had the absolute right to
control between the defendant and Paterson if in necessary to
establish the relationship of independent
contractor, in order to explain the relationship of the parties
at time.

On September 1, 1888, to do the entire excavating job for the sum
made a verbal contract and discussed with solicitor some time prior
the other, in substance, was that Mr. Paterson, the defendant,
a sub-contractor who was doing the excavation work on the premises,
between the defendant as the general contractor and Harry Paterson,
counsel had excluded certain evidence tending to show a relationship
of their work. The offer by the defendant was made after the
defendant had no control over these contractors in the performance
in question was performed by independent contractors, and that the
in, did the trial court err in denying the offer of the defendant
to prove that the excavation and shoring of the ground at the plant
was done.

The important question to be considered by this court

the evidence tends to show that the work of making such repairs
paired the damage to the cabin, on or about January 1, 1888, and
permit the plaintiff to replace the conduit, the plaintiff re-

After the work on the building had progressed so as to
found was later thrown on the encased cable.

the side of the open excavation for a distance of about 40 feet.
found to be broken and damaged and the cable was suspended along
next line of the premises. On October 1, 1888, the conduit was
six length of the excavation from three to four feet east of the
three feet below the surface of the alley and ran along the en-
cable used for transmitting telephone messages was located two or
along the alley line. Plaintiff's two-duct conduit carrying a
extended the entire width of the lot, or approximately 80 feet
foundation, an excavation 15 feet deep was made on the lot, and

does not appear to be in Bairstow from the offer to prove the existence of a contract between the defendant and Bairstow. Upon a somewhat similar question, the Supreme Court in Nelson 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. (Decatur Railway and Light Co. 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. We 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 Bairstow 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

there is evidence that one of the assistant engineers
damage caused to the plaintiff's conduit by this excavation,
Upon the question of the liability of the defendant for

[illegible]

Undoubtedly the defendant directed Hairston 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 particular 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. We do not regard the remarks of the trial court as indicating when the court considered the judgment, or determined, as a matter of law, that the employment of Hairston was not by an independent contractor.

[illegible]

[illegible] v. Industrial Com., 320 Ill. 27, eight

[illegible]

"The right to control the manner of doing the work is the principal consideration which determines whether the relation of employer and employee or as independent contractor. (Deering Milling Co. v. Industrial Board, 320 Ill. 471.) 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."

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 excavation, 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, Emil Steinhauser, 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 defendant, 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

All these facts were before the jury and the verdict is
regard to the damages.

the fact remains that be called at the plaintiff's office in
plaintiff to forget about it." This the defendant denied, but
that the bill was so high and that the defendant wanted the
adjuster, about the bill for damages. He stated, substantially,
plaintiff's office and talked with Ernest Baldwin, chief plain-
at the request of the representative of the plaintiff, called at
mer in complete charge of the business. Later the defendant,
time objects upon a trip to Europe, and Johnson, apparently,
regard to the damages. At this time, the defendant was absent
of the defendant's office by the plaintiff's representative in
denied by Johnson, who admitted, however, that a call was made
s bill be would be glad to take care of it. This statement is
know all about it," and that he (the plaintiff) would send
this was called to the attention of the witness, he said, "I
death Johnson, the bookkeeper in charge of the premises. When
at the utility of the defendant and talked about the damage with
the witness, that in June, 1929, be called
exposed. There is evidence offered by the plaintiff by one of
There is a conflict in the evidence that a telephone cable was
made in the erection of the building, the plaintiff made repairs.
the amount made with him. Upon sufficient pleadings and proof
after which he left the city, and by such filling in, covered
later date, returned and found workmen filling in the excavation,
phone cable passing along side the excavation, and then it a
October 1, 1928, and found broken conduits and an exposed tele-
telephone equipment, went to the site of the excavation on
for the plaintiff, after receiving a report of damages to the

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 erroneous 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.

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 jury of the contract entered by the jury was the instruction of the measure 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 $187.50, and the verdict, based upon the evidence, is for $187.50. That was the intention of the jury when the original verdict was returned. The matter in this suit wherein the plaintiff, [illegible] 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 increasing the amount of damages and fulfilling the clear intention of their verdict. The conclusion reached by this court is well supported by the decision of court in the case of Kingsley-Williams Co. v. Pennington & Tenney Co., 121 Ill. App. 340, in these words:

> "However erroneous 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.

AFFIRMED.

KILCOM, P. J. AND HART, J. CONCUR.

35805

PHILIP HORNICH, Appellant, v. ALICIA STEINBERG, Appellee.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 628

Opinion filed Dec. 21, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION 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, 1929 the defendant asked Bernard Jadwin, Cashier of the Public State Bank, 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,

the worthiness of stock of the defendant, and in the event of a refu
to help her vote the loan and that Durkin, the cashier, would take
plaintiff met the defendant at the bank and said that he was willing
lumber for the bank to make such a loan; that subsequently the
bank owned it; she was informed by Durkin that it was re-
ported there that, for a loan of $7,500 on 18 shares of stock of
July 19, 1922 the defendant named Durkin, Cashier of the
is refused to the defendant, the defendant being his aunt; that on
the evidence.

Then the plaintiff's evidence it appears that plaintiff
the verdict for the defendant are against the manifest weight of

The important question to be determined in whether
pleadings filed by the parties in interest.

No question is raised or suggested as to the sufficiency of the
court entered a judgment, and from which the plaintiff appeals.
finding the issues for the defendant, also after verdict the trial
a jury at six pm. After a hearing she jury returned a verdict
on December 18, 1931, and by agreement the case was submitted to
have been advanced by him to the defendant. A trial was had
still owing to amount $500. and interest, for monies alleged to
Suit is an action instituted in the Municipal Court of
Opinion of the Justice explains the determinant wherein the plain-

Opinion filed Dec. 21, 1933

MR. JUSTICE HOUSE DELIVERED THE OPINION OF THE COURT.

Appellee.

vs.

Appellant.

APPEAL FROM

SUPERIOR COURT

ABSTRACT

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.

The evidence offered by the defendant is to the effect that she was a stockholder of the Public State Bank, and owned 18 shares; that Jadwin, the cashier 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 Philip Norwich, 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

are required, as per the contract, to be sold' to anyone for $17'200 for one share' not $17'200 for 10 shares' as the stock certificates' price advertised is shown' and just the one purchased the share that was to be sold' to anyone at $1720 a share; that is not what $1720' was going per share but $172 a share; that shouldn't mean the price was to be raised to $17'200 a share; that Dividrill should not be sold' for a price much more than what the owners' had wanted to and some of his stock; that she put the Dividrill at a cost of $1'720'000 for 10 shares' not $17'200 for one share' as the price was advertised' which is a huge difference' and that is why the defendant' is guilty of this misconception the defendant signed a 7-year business ad campaign' which consists of 12 shares Jupite Corp.' at the time value' $1720 a share' and since buying the Dividrill $17'200' in the company's name' it is now worth $17'200' and the defendant' has refused to pay the $1720 a share; that Dividrill should not be sold' for a price much more than what the owners' had wanted to and some of his stock; that she put the Dividrill at a cost of $1'720'000 for 10 shares' not $17'200 for one share' as the price was advertised' which is a huge difference' and that is why the defendant' is guilty of this misconception the defendant signed a 7-year business ad campaign' which consists of 12 shares Jupite Corp.' at the time value' $1720 a share' and since buying the Dividrill $17'200' in the company's name' it is now worth $17'200' and the defendant' has refused to pay the $1720 a share; that Dividrill should not

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 Foreman National Bank 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 Public 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

[illegible] [illegible] [illegible] [

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.

The plaintiff complains that the court erred in 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

that Sec. 28 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, obviate 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_.

The plaintiff complains that the court erred in 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 $3,112.40 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

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.

36392

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. 628½

Opinion filed Dec. 21, 1932

MR. JUSTICE HEBEL DELIVERED THE OPINION 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 Honorable 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 Cook 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 Cook County, Illinois, against the defendants therein named, bearing court numbers 561665 and 560059 permanently.
>
> The Court Doth 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

No. 260088, wherein Estella Murphy was the complainant and the County of Cook County, to whom the first bill was referred came on to be heard on the demurrer of the defendant, Honorable William J. Hickey, one of the chancellors of the Superior Court of Cook County. On June 28, 1932, the bill before the court was filed by William Bohnett on July 6, 1932 in the Superior Court of Cook County. On June 28, 1932, the liability of stockholders of the Bowman Trust & Savings Bank.

The pending bills of complaint are suits to enforce the

tion name without good being required of the complainant."
in of the opinion that the injunction ought to be granted
stainment; that good cause has been shown and the cause
and further hearing will also be ordered out be dismissed of one-

The Court has further Order that upon notice

permanently."
therein named, be and they are hereby enjoined and restrained
County of Cook County, Illinois, against the defendant
prosecuting fully of said constituents in the Superior
from prosecuting and prosecuting further with equity
county, be and they are hereby enjoined and restrained
complainant in No. 260088, Superior Court of Cook
the remaining complainants in case No. 260088 and the

"It is Ordered that the said Estella Murphy and

follows:

Superior Court of Cook County, which order, in part, reads as

No. 260088, wherein Estella Murphy was the complainant and the County of Cook County, to whom the first bill was referred came on to be heard on the demurrer of the defendant, Honorable William J. Hickey, one of the chancellors of the Superior Court of Cook County, and the demurrer was sustained by the Court on the 21st day of July, 1932, a temporary injunction order entered on the 21st day of July, 1932, in the Superior Court of Cook County. On June 28, 1932, the bill before the court was filed by William Bohnett on July 6, 1932 liability of stockholders of the Bowman Trust & Savings Bank.

The pending bills of complaint are suits to enforce the

tion name without good being required of the complainant."
in of the opinion that the injunction ought to be granted
stainment; that good cause has been shown and the cause
and further hearing will also be ordered out be dismissed of one-

The Court has further Order that upon notice

permanently."
therein named, be and they are hereby enjoined and restrained
County of Cook County, Illinois, against the defendant
prosecuting fully of said constituents in the Superior
from prosecuting and prosecuting further with equity
county, be and they are hereby enjoined and restrained
complainant in No. 260088, Superior Court of Cook
the remaining complainants in case No. 260088 and the

"It is Ordered that the said Estella Murphy and

follows:

Superior Court of Cook County, which order, in part, reads as

Opinion filed Dec. 21, 1933

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, 1932, 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 chancellor in entering this order complained of.

Stella Murphy, as the appellant, contends that the order 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

ing off other creditors from filing or prosecuting similar suits.

Therefore, on July 12, 1928, on hon. Morris Brownly, in chambers, rejected Jane Stephenson endorsee in the instant case. On July 30, 1928, in this jurisdiction, the aforesaid counsel in chambers, rejected Jane Stephenson endorsee in the instant case which stands multiply petitioned this counsel.

On July 31, 1928, the foregoing judgment order was entered, the judgment debtor at June 30, 1923, in open Co. [illegible] and one. On July 30, 1928, in this jurisdiction, the aforesaid counsel in chambers, rejected Jane Stephenson endorsee in the instant case which stands multiply petitioned this counsel.

Only the pill of complaint, the petition, and the answer to the petition filed in the instant case by service of the defendants, were considered by the chancellor in entering this order dismissing at.

Stella Murphy, in the complaint, contends that the order opposed from was not justified either by law or fact. It is manly at best one of the complainant's solicitors entitled the pill of complaint, as well as the petition, which petition is entitled, "A petition for Injunction." This practice involved in the petition is not to be encouraged. It has the tendency to make the solicitors of this court act without proper instruction of the complainant. It would have been better practice if the petition had been filed by the solicitor in the case. The petitions for the injunction have failed to offer any reason for this practice, and no doubt they appreciate that if the complainant had entered a further order restraining Brownly as a receiver, and entered a further order restraining Stella Murphy et al, were the defendants, directing

it appears from the record that the several bills were ...

this conduct is subject to criticism.

Filed in the Superior Court of Cook County in various exhibits to the petition of defendants, were considered by the chancellor in entering this order dismissing at.

Only the pill of complaint, the petition, and the answer to the petition filed in the instant case by service of the

on July 31, 1928, the foregoing judgment order was entered,

the judgment debtor at June 30, 1923, in open Co. [illegible] and one. On July 30, 1928, in this jurisdiction, the aforesaid counsel in chambers, rejected Jane Stephenson endorsee in the instant case which stands multiply petitioned this counsel.

Therefore, on July 12, 1928, on hon. Morris Brownly, in chambers, rejected Jane Stephenson endorsee in the instant

ing off other creditors from filing or prosecuting similar suits.

filing Brownly as a receiver, and entered a further order restrain-

Stella Murphy et al, were the defendants, directing

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 created by the statute is in the nature of a security for the common benefit of the creditors; that the stockholders 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 his stock 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, Crowe & 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 2, 1932, the Auditor of Public Accounts of the State of Illinois, did appoint H. C. 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. C. 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

question the court will not determine on here whom the matter of order [illegible] at the material time. In general even this
The next question to be considered is whether the injunction
U. S. Smith & Sons Co., 12 III. App. 322.
or other will be entered at the hearing time. Tight Lumber Co. v.
a member owns, consequently the [illegible] and no doubt many
of the State of Illinois. These statements will should be considered
ments the stockholders, [illegible] claimed for a the construction
Those was upon will be merged for the name business - to
Lumber & Building Store.
property, [illegible] against the owners of the property [illegible] to enjoin-
ment" Mr. COOLEY against the name defendants, to enjoine a commo-
ment was tried on July 9, 1923 in the consideration to the instant
no contract for the Goodrich Lumber & Building Company. - Injunc-
ing requests of the store of Illinois did accord it. C. Lawson
the Goodrich Lumber & Building Store. On July 5, 1923, the counsel of
rights of injury reasonable pay attorney & counsel for the owners of
Rights Lawyer K. Smith. Many of these bills were tried before the
ston Lumber Mill. Lumberman of Carries B. Ray, was received to
of Lawyer Mills was merged to Lawyer Tinney, now the other
Ray, Operator, Lone & Chase, assigned to solicitors. The case
Vendor will was tried on the same day, in spite the time of Conner
one of the Bills, Mr. Cook was tried by Lawyer Murphy.
(cited numerous cases).
most element and consistence through for the outcomes
ment of Purchase and that & only it notify Illinois the
the Court, also - Registrar of the Bill to be
Individual Lawyer for every deed must Mr. Ray
the Commissioner, & of Secretary Department and
Lawyer was to other Counties who manage & contract,
lot the common Domain of the Circulator; that the Elect-
ment of the States in the matter of a warrant
[illegible] Commissioner fully accepted rules and that Lumber

Ill. 245, in these words:

> The Commissioner fully accepted rules and that Lumber

area of Owners Corporation Co. v. First State Bank of Chicago, 244 Ill.
of this record has been issued upon by the Appellate Court in the

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. 561665, in the Superior Court of Cook County 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.

of prosecuting" writ not counter.

anise nos bearing" mark" of misuse" ship count to ship operator
in the room before ship comes" to the nearest control
mark of the pointed with the point of the letter
upon indictment treason.

The Seventy pills writ warrior a Joke to the compliment motion
the same enough" it must volume item the pill upon the possession of
established the transmitted of ? number of unite loading for the
constituted in custody" and in rooms that an indictment may be treated
in the inspect case" that be will nolle a complaint room under an
indictment or fraud.

There is no oracle of the complainant William Jones"
in the inspect case" rebut the case.

motioned exit" it would be necessary for a secretary to be eliminated
withdrawing of mail" no lawsuit pauper been attempted in the term
name be. PRISON for the room remedy; that in order to avoid a
joined mid upon complainant and filed the writ of conviction in
inspect case; that Eddie unduly appointed noise be. PRISON is
good" do enforce the room remedy of the complainant in the
book county dismiss the appointments of the Benjamin Lamb & Daniels
Line a material proceeding" no. DECISION" in the Superior Court of
commitment appeal that Sheriff Murphy and others" no compliance"
indictment. The attached petition line in aid of the writ of
speaking in the instant writ that would Justify the order for an
open the writ in the indictment case may given. Where the no State
of Court County" was line true it twist of item" and are hearing
. The writ of Sheriff murphy" first in the Emmanuel Court
be here enter the condition before five cents.
imposed in the Family Association" county or for on it pertained

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.

ORDER REVERSED.

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

the equalization is duly there even and multiplied lands
shown in the mill to petition Titus to justify the cause in
entering an order for an injunction. The order is accordingly
reversed.

CROSS APPEALS.

CLERK, J.J. LEE etc., v. CLERK.

36018

LIVINGSTON BAKING CO., a Corporation,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY, a Corporation, et al.,
Defendants in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

268 I.A. 623

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 February 19, 1924, employed by the plaintiff, which was operating under the Workman's Compensation act; that on this date, through the negligent operation of one of defendants' street cars, it ran into a wagon 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 Nauman was through no fault of plaintiff but through the fault of the defendants, and that having paid the compensation plaintiff had been subrogated 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 Erwin Nauman was the man injured in the accident. They assert 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-

Plaintiff by this writ of error seeks the reversal of an advarse judgment entered upon a directed verdict.

The declaration alleged that one Edwin Bowman was an employe of the plaintiff in error Bowman was riding and as injured when he fell on that date; that plaintiff paid to the widow and injury to Bowman was through no fault of plaintiff but through the fault of the defendants, and that having paid the compensation provided for 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 the 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 Edwin Bowman was the man injured in the accident. They assert 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 examin-

tion of the record compels assent 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 wagon "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 man 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 curb 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 Hauman 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 wagon. 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 morning 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 $3,750 on account of her husband's death. While it is sufficiently proven that Erwin Hauman met with an

light of the record compels counsel to defendants' points.

The eyewitness testimony that on the day of the accident they were passengers on a northbound Manitoba express stated that in the block between 42nd and 45th streets one in Chicago; that in the block between 42nd and 45th streets it collided with a horse-drawn vegetable wagon which was moving eastwardly, crossing the northbound streets car track. One of the witnesses said that it was a hungry wagon "which turned out to be a fifteen-penny wagon." He saw a man operating the wagon at the time and the street car motorman right it, but he only saw him just before the collision. The other eyewitness witness testified that after the collision he got out of the street car and came a man lying in the street between the wagon and the west curb of the street; that he (the man) was dead. There was no evidence as to the reason why a police patrol was not summoned, and the appearance of the man as to the injuries he sustained, and the evidence as to what happened at the scene was taken only by the police surgeon who viewed the body. There was no evidence that this man was ever identified, nor was evidence that the police surgeon who viewed the body was dead at all.

It was shown that an Irish woman 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 wagon. Before leaving [illegible] for the day's route, he was married; that he saw him on February 10, 1934, at Irwin, who was married; that he saw him on February 10, 1934, at an undertaker's on 63rd street, and that he was dead. The wife of Irwin Keenan testified that he was employed by plaintiff; that she saw him on the morning of February 10th; 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 has not paid her $3,250 on account of her husband's death.

Apply it is sufficiently proven that Irwin Keenan met with an

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 accident. 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. 88. "Liability cannot rest upon imagination, speculation or conjecture." Peterson & Co. v. Industrial Board, 281 Ill. 326; Chicago Union Traction Co. v. Hamps, 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.

Upon the failure to prove the identity of the man involved in the street car accident as Erwin Hauman, the trial court was justified in directing a verdict for the defendants.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

accident February 12th 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 accident. It would be only a surmise that the two men were identical.

The right to be enforced under section 39 of the workmen's Compensation Act is strictly a statutory right, and nothing will be assumed in plaintiff's favor. Darling v. Chicago Railways Co., 290 Ill. 22. "Liability cannot rest upon imagination, speculation or conjecture." Peterson v. v. Interstate Coal, 285 Ill. 386; Wilson, Union Traction Co. v. Bonner, 208 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 fact of several lamd old men with the identity of the person alleged to have sustained injuries on the day in question.

Upon the failure to prove the identity of the man involved in the street car accident on Erwin Avenue, the trial court was justified in directing a verdict for the defendants.

The judgment is affirmed.

Affirmed.

Matchett and O'Connor, JJ., concur.

36036

MARY MACIUKEVICE,
Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant.

S. L. FABIAN, Doing Business as S. L. FABIAN AND COMPANY,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

268 I.A. 628

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 Chicago and North Western Railway Company. The jury returned a verdict exonerating 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 November 5, 1930, at a point where the highway between Kaukauna and Green Bay, in the state of Wisconsin, crosses the single track railroad of the defendant Railway. Fabian, with Mr. and Mrs. Orintas and Mary Maciukevice, the plaintiff, 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; Orintas 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.

As the highway approaches the railroad crossing from the north, commencing several hundred feet from the crossing, it

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 foot 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 Orintas shouted to Fabian to "look out." About the same time Orintas saw the wigwag, which seemed to be squarely in front of the car; when he shouted Fabian suddenly jerked and swerved the car first one way and then another until the wheels were off the 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

curve to the left. There are a number of markers or signs along 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 white having a "banner" - a metal disk 2 feet in diameter, painted white, with a large black cross. It is an already important device emphasized by the approach of trains. The banner swings half way down across the front, meeting 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 30 feet wide with approximately a 3 foot gravel shoulder on either side. The highway for 100 feet near 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, Rubian 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 30 or 40 feet on the road ahead; when it was about that distance from the wigwag Ortman shouted to Rubian to "look out." About the same time Ortman saw the wigwag, which seemed to be square in front of the car; when he shouted Rubian suddenly jerked and swerved the car first one way and then another until the wheels were all around on one side and then all 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

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.

Fabian says that as he came into the curve he kept his left 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 33 miles an hour when suddenly the right hand corner of his bumper struck the wigwag and the car swerved to the right and tipped over; 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 10 feet - the automobile must have been about 8 feet wide. An automobile of the type in which the party was riding, a Lincoln Sedan, 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 Lincoln 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 dimmed 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 Railway 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.

an engineering problem, which is not subject to judicial review.

Defendant argues that the location of the wigwag involved the weight of the evidence.

Upton and Lindsay Realty alone testified that a car could not stop approximately 4 feet from the roadway. The vendee corporation (whose president, Latimer Nash, lives three miles away) testified that the wigwag would have to be located nearly 3 feet (half the width of the automobile) from the plane where it was, until it was too late. Under the circumstances, in order to assume of his automobile, his glimpse of [illegible] to minimize it [illegible] as it was necessary in fact, and put it with the front contact [illegible] by contributory [illegible] far all the road that be cut into the curve by [illegible] to [illegible] that the Lincoln car was driving at such speed clearly [illegible] by the negligent driving of [illegible] Indian. It is evident that we be entered the

It are of the opinion that the preponderance of the evidence a Lincoln sedan, is 5 feet 11 inches wide at the widest part. feet wide. An automobile of the type in which the party was riding, the roadway was 20 feet - the automobile must have been about 6 edge of the road - as the space between the stripe and the edge of from the yellow stripe road also 2 or 3 inches from the right hand the impossibility of this statement. If the automobile was a foot it. However, the judgment must therefore be affirmed. right out there; just as did our decision the wigwag must still be

Costs may be taxed as the case in favor of the appellant.

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 Mo. 657; City of Fairbury v. Barnes, 228 Ill. App. 389; Horner v. City of Philadelphia, 194 Pa. 542; Gulfport, etc., v. Manuel, 123 Miss. 266; Stern v. International Ry. Co., 220 N. 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.

We are asked to find as a matter of law that the defendant Railway company was not negligent. The purpose of the wigwag was the protection of travellers on the highway as they approached the crossing, by warning 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

of all the surrounding circumstances; the degree of the curve of where that the location was safe. This involves the consideration place chosen was so dangerous to travelers using the highway in a time becomes a question of law only when all reasonable minds would reasonably sanction was that its location become unnecessarily not whether there is a safer place, but whether the particular its being a dangerous obstruction to travelers. The question is, placed at that point nearest the highway which is just short of the loss proximately of it being operated; therefore it must be tention of travelers. The further it was placed from the highway purpose it was necessary to place it where it would attract the attraction of travelers on the highway as they approached the crossing, by warning them of an approaching train. To warn this Railway company was not negligent. The purpose of the signal was

We are asked to find as a matter of law that the defendant

ing the location of the signal it was a reasonably safe- must have done.

in question and operate passing machinery might have a better be asserted that the jury in passing upon the question of safety may who had occasion to use very frequently the place Judgment, the judgment of experts is not necessarily infallible; it involves common sense and knowledge based on observation. scarcely controlling except as technical knowledge. Whether, having the location of the signal it was, in fact, the duty of the Railway Company to place it where it would attract the attention of travelers. The further it was placed from the highway

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 paint the mast or post of the wigwag with white stripes; that although the instant wigwag had been set up on October 30th, the mast remained unpainted and was 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 accident. Evidence of prior similar accidents is admissible under the laws of Illinois. City of Chicago v. Powers, 42 Ill. 169; Moore v. R. D. & C. R. R. Co., 295 Ill. 63, and many other cases. Whatever may be the law in Wisconsin, the rule is that in questions of evidence the law of the forum controls. 5 R. C. 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.

Having admitted the evidence as to prior accidents, defendant sought to show that in those cases the Railway 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.

was
at the time of the accident. Assuming that the white stripe
near the horizon of increasing the visibility, the fact that
it was not painted was a proper subject for consideration by the jury
V. Witness, Vanclostand, qualified as an expert in motor vehicles, that
the wheels at this point had been inspected over a good many times
in approximate order the law of illinois. [illegible]
Turner, 42 Ill. 320; Moore v. P. R. & C. R. R. Co., 283 Ill. 62, and
many other cases. Whatever may be the law in Wisconsin, the rule
is that in questions of evidence the law of the forum controls.
S. B. C. v. Tobe, 1918. However, particularly that other mirrors had been
inspected [illegible] the glass, and without any inspection of the circumstances, was improper and erroneous. Such evidence is competent only where it is known that the prior condition of the circumstances, was improper and erroneous. Such that automobile drivers are of a wide variety of characteristics and many of them do reckless and dangerous things.

Having admitted the evidence of prior accidents, defendant cannot be shown that in those cases the Railway Company violated some rule of law. The court exercised an objection to this. Defendant was entitled to show as indicating that the driver in the prior accidents were in fault, and not the Railway company in fencing the wires.

Defendant's witness, Bock, should have been permitted to testify 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 No. 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 wigwag in question, within the limits of the highway.

Instruction No. 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-

Defendant's witness, Nash, should have been permitted to testify as to the custom of painting the bumper of the wigwam white with a black cross, and that the permanent signal in question was so painted.

The witness, Nash, should have been permitted to testify that it was customary along highways such as Waconia and Cliffcoin, to place traffic signs, call boxes, telephone poles, painted 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 Tabion's knowledge of the conditions of the highway over which he had traveled. Also, Nash should have been permitted to testify as to the uniformity of the width of the shoulders of the roadside.

Instruction No. 3, given at the request of plaintiff, is criticized. It is substance told the jury that at the time of the accident there was in force in Cliffcoin a traffic ordinance that whenever any street or public highway crossing was traversed by a railroad track at grade, the railroad company "shall grade, construct and maintain in good and safe condition the public travel the entire width of such street or highway crossing 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 prescribed traffic regulations. Including the rights in question, within the limits of the highway.

Instruction No. 5, given at the request of plaintiff, is also open to the same criticism. The statute related to provide 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 com-

structs its line across an existing highway. Here 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 nonexistant, 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 No. 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 that it interfered with the reasonable use of the highway by the public and was dangerous and unsafe 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, Mary Maciukevice, was riding along said highway exercising ordinary care and caution for her own safety 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

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 common-law, equity and municipality, or territorial application governs, depending upon whether such person damaged in a town or county be known as a town, and that such 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 such private corporation, such private corporation would be primarily liable therefor. This rule would also in case of joint negligence of a town and a private corporation, the latter would be primarily liable. The instruction had no bearing on the instant case.

Plaintiff's given instruction No. 7 is quite lengthy. In substance it told the jury that it they believe that the defendant located the highway post so near to the traveled portion of the highway that it interfered with the reasonable use of the highway by the people who was desirous and unable and timely to cause injury to persons exercising ordinary care and caution in their own behalf, and if the jury also found that the plaintiff, Mary Mcginnivan, was riding along said highway exercising ordinary care and caution for her own safety at all times, and that as a proximate result of the negligence of the defendant Hallway company the automobile in which she was riding struck said object, thereby injuring her, the defendant Hallway company should be found guilty. Plaintiff's declaration charged the concurrent negligence of Pabian and the defendant Hallway company. The manner in which Pabian drove 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 Nos. 1 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 North 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 Nos. 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 No. 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 No. 11 included the Wisconsin 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'."

He estimated that they illuminated the roadway ahead about 50 or 60 feet. The Wisconsin statute required the operator of a motor 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'Connor, JJ., concur.

36182

JOSEPH TOMAK,
Appellee,

vs.

JAMES SEIDL,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

268 I.A. 629

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 ownership 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 shows 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 office of Kavan as provided for in the note.

October 20, 1928, plaintiff purchased the note from Mary Danek, who was then the owner. He received from her the note and trust deed with some other papers and put them in an envelope and deposited them in his safety 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. The next time he opened his box was in 1931, when he found all of

FILED

CLERK SUPREME COURT,
ALBANY COUNTY COURT HOUSE,
ALBANY, NEW YORK.

Appellant,

-against-

JOSEPH JONES,

Appellee.

2665 I.A. 629

IN THE SUPREME JUSTICE COURT
OF THE STATE OF NEW YORK.
IN AND FOR THE COUNTY OF ALBANY.

In an action of trover tried by the court, plaintiff had a judgment for $1500. Two weeks afterward appeals. The point in issue is the ownership of a phonograph safe for $1500 owned by a trust deed. It was stolen from plaintiff, and it delivered possessed it in good faith for consideration, before maturity, to person the owner and the judgment is erroneous. The evidence was that he paid a sufficient consideration for the paper, but plaintiff still claims it was after maturity. If this is true, the judgment is correct.

The note in question was dated October 10, 1928, due three years after date, in the sum of $1500, with interest, executed by John C. Evans and Virginia Evans to the order of themselves and by them endorsed. March 10, 1929, Evans and wife sold the premises subject to the trust deed to John Yale and Waverly Yale, his wife, secured by the trust deed to John Yale and Waverly Yale, his wife, and thereafter Yale paid the interest at the office of Evans as required for in the note.

October 30, 1929, plaintiff purchased the note from Lucy Dunck, who was then the owner. He received from her the note and trust deed with some other papers and put them in an envelope and deposited them in his safety deposit box at Evans's office. Plaintiff had rented this box for over ten years and had the 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. The next time he opened the 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 Kavan 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, 1928, a second 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. Kavan, 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 Kavan, 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 $1300. John Kavan committed suicide February 9, 1931. Defendant says that the first time he knew plaintiff claimed any interest in the papers was about two weeks after Mr. Kavan'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

the note is not a party thereto. It is well-settled that no valid
is an agreement between the original only; the holder and owner of
parties who had bought the premises covered by the trust deed. It
tween John Keaton, who was the maker of the note, and Vogt and wife,
plaintiff. The agreement for extension purports to be made be-
before maturity, but the extension is promptly qualified by
conceded that it there was a valid extension delivered previous
until October 10, 1931, he harrowed before maturity. It may be
march 10, 1930, which by the last extension agreement was not due
.Delendant's position is that having bought the note on Sep-
ara about two weeks after it, Keaton's death.

the first time he knew plaintiff claimed any interest in the premises
John Keaton committed suicide February 5, 1931. Defendant says that
of the note and trust deed, said them as the defendant for $7500.
10, 1930, Keaton, who had in some atrocity manner gotten possession
Mary Keaton was not a party to this extension agreement. Plaintiff
owner and holder of the note was Mary Keaton and not John Keaton,
ment and patent at the transcript note. At this time the first
and described the party of the first part, John Keaton, as the legal
John Vogt and Augusta Vogt, his wife, parties of the second part,
parties to be between John A. Keaton, party of the first part, and
al case here. The statement for extension made on this date bar-
it was been extended to October 10, 1931, on the written agreement
ed and notified endorsement was made on the note in the sixth last
ferences of extension was made on the note, referring to a writing
October 10, 1930, when the note matured, an unsigned en-
them to anyone, or mortgaged Keaton or anyone else to sell them.
stant deed were done. Plaintiff testified that he and Keaton rely
ing Pat Keaton signed was filled with Keaton before and the note and
pie before signing, and the contents be upon the note and trust

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 Hide & Leather Bank v. Alexander, 184 Ill. 416, 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 Merchants L. & T. Co. v. Walter, 205 Ill. 647. The case of Justice v. Stonecipher, 267 Ill. 448, 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 Kavan for safe keeping, but the evidence abundantly shows that Kavan was operating a safety deposit vault and that plaintiff rented one of these boxes, in which he kept his papers. The same distinction obtains with reference to Y. M. C. A. v. Rockford National Bank, 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,

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>[illegible] Bank v. [illegible]</u>, 144 Ill. 416, it was held that the maker of a note could not alone postpone the time of payment; "but an agreement for such extension could only be made by both parties." See also <u>[illegible] Co. v. [illegible]</u>, [illegible] Ill. 547. The case of <u>Justice v. Stonecipher</u>, 267 Ill. 448, 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 Kavan for safe keeping, but the evidence abundantly shows that Kavan was operating a safety deposit vault and that plaintiff rented one of these boxes, in which he kept his papers. The same distinction obtains with reference to <u>I. C. R. R. v. [illegible] Bank</u>, [illegible] Ill. [illegible].

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 Dansk, 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. <u>Drain v. LaGrange State Bank</u>, 303 Ill. 330; <u>Sharvy-Gillett Co. v. Long</u>,

318 Ill. 432; Sherman State Bank v. Smith, 244 Ill. App. 171. Kavan, 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.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Affirmed.

The judgment is affirmed.

Ignorance, most ever it.

where conditions exceed the laws, although arising from exceptio
but where the parties are without fault the rule is that the one
against. Both plaintiff and defendant were in fact innocent,
ought here even that it had existed and had never been properly
it the defendant had examined the paper he was buying he
liable to defendant.

Tarse, having no title in the note, could not convey a good

Jno City. 416; Chapman State Bank v. Smith, 84 Ill. App. 127.

36192

SANFORD W. HICKMAN, Executor, etc., of Estate of Alice G. Hickman, Deceased,
Defendant in Error,

vs.

GREAT AMERICAN CASUALTY COMPANY, a Corporation,
Plaintiff in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

268 I.A. 629

MR. 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 judgment for $2223.65; reversal is sought.

By its policy defendant agreed to pay $2,000 as indemnity upon the death of Alice G. Hickman resulting from bodily injuries received in an accident. Alice Hickman lived in California with her husband, Sanford W. Hickman, 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 Hickman 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

Plaintiff in Error.

EQUAL AMERICAN CASUALTY COMPANY, a Corporation,

vs.

Defendant in Error.

EARNOLD E. NICKERAU, Executor, etc., of Estate of Alice E. Nickerau, Deceased,

Plaintiff in error, pro se.

Defendant in error, pro se.

MR. 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 judgment for $2323.63; reversed in nought.

By its policy defendant agreed to pay $2,000 as indemnity upon the death of Alice E. Nickerau resulting from bodily injuries received in an accident. Alice Nickerau lived in California with her husband, Earnold E. Nickerau, subsequently appointed executor, while defendant's home office was in Chicago.

Defendant makes sixteen points in its brief, all amounting 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 Nickerau died on the evening of November 1, 1930; November 7th a written notice was sent to the defendant company 11th and asking for the correct policy number, as the number given died; this was received by defendant November 12th and on November 13th it replied, acknowledging receipt of the letter of November 11th by a letter dated and mailing for blanks for proof of death; this was received by defendant November 15th and on November 18th a written notice was sent to the defendant company

in the letter was the renewal receipt number instead of the policy number; November 26th Mr. Hickman 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 soon defendant would take action; January 29th 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 affidavits 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 insurance policy. Sun Accident Assoc. v. Olson, 59 Ill. App. 217; Rich v. Hartford Accident & Indemnity Co., 208 Ill. App. 506. In Niagara Fire Ins. Co. v. Seammon, 100 Ill. 644, it was held that a notice within fifteen days was a reasonable time, although the policy provided

fifteen days was a reasonable time, although the policy provided

that proofs of claim under the policy might be made; February 8th defendant informed the terms 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 Bamford *. Kleiman as executor of his wife's estate, and affidavits 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 insurance policy. See Goldberg *case, 7 Cohen, 89 III. App. 317; Klem v. Hartford Accident & Indemnity Co., 204 III. App. 806. In Pioneer Fire Ins. Co. v. Peterson, 160 III. 644, it was held that a notice within

for "immediate notice of loss." In the present case defendant was notified of the death of Mrs. Hickman on the sixth day after its occurrence. Construing 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. Metropolitan Life Ins. Co., 159 Atl. 585; Erickson v. Mutual Benefit Health & Accident Co., 122 Neb. 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 compliance with the policy requirement 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. North American Accl. Ins. Co., 181 N. 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. November7th, six days after Mrs. Hickman's death, defendant was requested to forward claim blanks, again on November 26th and again on January 11th; 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 defendant.

given to defendant.

trial court that met notice of the death of Mrs. Hickman had been

We are of the opinion that the facts justified the finding of the

but it was not until February 8th that the blanks were forwarded.

claim blanks, again on November 20th and again on January 11th;

days after Mrs. Hickman's death, defendant was requested to forward

permitted to take advantage of its own wrong. November 7th, six

ance of the insurance company to not promptly. No party should be

delay in receiving notice where such delay was caused by the fail-

the insurance company permitted to avoid liability on the ground of

the plaintiff. In none of the other cases cited by defendant was

pany until 120 days after the loss. The delay there was solely by

of the insured, but were not filled out and returned to the com-

were sent pursuant to request, within seven days after the death

from those involved here. In that case blanks for proof of loss

194 N. E. 899. The facts in that case are quite different

is pointed to the contrary Hodges v. North American Ins. Co.,

Ins.

quirement that proof must be made within a specific time. Lycan

may be considered as a waiver of compliance with the policy re-

company delays in furnishing blanks for proof of loss, such delay

However, it is well established that where the insurance

Co., 182 Mich. 380.

v. Mutual Benefit Health & Accident Co., 182 Mich. 380.

Citizens Mut. Fire Ins. Co., 194 Mich. 588; Citizens

Schwarzbach v. National Life Ins. Co., 196 Wis. 588;

the insured. This was held owner similar circumstances in

the notice of November 7th was sufficient notice of the death of

ance company. As we must do, it could reasonably be held that

cessfulness. Construing the policy most strictly against the insur-

for "immediate notice of loss." In the present case defendant was

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 Mrs. Hickman 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 Mr. Hickman had been using in repairing a fence, does not change the type of the automobile. Poncino v. Sierra Nevada Life & Casualty Co., 286 Pac. 729, and Life & Casualty Company of Tenn. v. Metcalf, 240 Ky. 628.

Defendant in argument seeks to create suspicion as to the conduct of Mr. Hickman 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.

36333

WILLIAM D. MEYERING, Sheriff of Cook County, Illinois, for the use of PHILIP MORRIS ADVERTISING SERVICE, Inc., a Corporation,

Appellant,

vs.

M. GODERSKI and PUBLIC INDEMNITY CO., a Corporation,

Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

268 I.A. 629

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

M. Goderski commenced a replevin suit to recover four automobiles from plaintiff with the Public Indemnity Company as surety on its bond in the sum of $2,000. This was dismissed without a hearing on the merits. Thereupon the present suit on the bond 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 bond.

Under section 26 of the Replevin act, chapter 119, when the merits of the case have not been determined in the trial of the action in which the bond is given, the defendant in the action upon the replevin bond 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 bond that the property involved was in fact his property. Lyon & Healy v. Foase, 86 Ill. App. 251; Hertz v. Kaufman, 46 Ill. App. 391. And the burden in such an action is upon the defendant to prove right of property in himself. Stevinan v. Harnest, 80 Ill. 513.

To sustain this burden M. S. Goderski, the husband of M.

WILLIAM E. KENNEDY, Sheriff, et cetc
Peoples, Citizens, for the use of
PUBLIC SERVICE CORPORATION BONDING
Inc., a Corporation,

Appellant,

Vs.

K. GOLDSMITH and PUBLIC INDEMNITY CO.,
a Corporation,

Appellees.

IN MADISON CIRCUIT COURT
EXPLANATION AND OPINION OF THE COURT.

To sustain this burden K. E. Goldsmith, the husband of K. Y. Hammond, 80 III. 512.

Since the information to allow right of attorney in Hewett, 40 III. App. 307. And the burden in such an action is Kaufman, 40 III. App. 307. And the burden in such an action is peremptory. Lyon & Healy v. Jones, 96 III. App. 481; Ginka v.

on the bond that the property involved was in fact his in a replevin pen his suit dismissed without trial and known to Sheriff Hennes and costs alone was be recovered were plaintiff be the property in dispute. Goldsmith v. Goldman, 122 III. App. of the action upon the replevin bond may plead that fact and his title

amount of the bond.

Under section 25 of the Replevin act, chapter 110, when the sheriff of the same have not been discharged in the total

expense that he was entitled to judgment for damages in the full Discharged upon payment of the charges. PLAINTIFF appeals and for the penalty, $3,000 and charges $1500.00, made to be for the plaintiff, $3,000 and charges $1500.00. This was dismissed without and upon suit by the state the bond was found on the merits. Thereupon the present suit on the bond bearing on the merits. Thereupon the present suit on the bond in the sum of $3,000. This was dismissed without a

motion from plaintiff with the Public Indemnity Company as surety

Goderski, the defendant, testified that she owned the cars in question; that she had owned certain 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 ran to her. Mrs. 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 M. S. Goderski 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 M. 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 Philip 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 June 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 M. S. Goderski. The evidence shows, however, that these automobiles were purchased by M. Goderski subsequent to

the date of the last advertisement. The three Fords after they were purchased were delivered for sale to Walter Phillips at his garage at Diversey and Kedzie avenues, but were taken back by defendant, M. Goderski, 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 purchased by M. Goderski, and, of course, were not in the possession of Phillips. It is therefore obvious that Phillips was not clothed with the indicia of ownership at the time he became indebted to the advertising agency.

Plaintiff seems to argue that, because the defendant, M. Goderski, had at one time consigned certain other cars to Phillips for sale, she became 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 estoppel it is necessary that the party estopped shall have made, by act or word, some representation upon the faith of which the person setting up the estoppel has acted, with damage to himself. Silverthorne v. Chapman, 259 Ill. App. 289; Sherer-Gillett v. Long, 318 Ill. 432. The Philip Morris Advertising Agency did not and could not act to its damage because of any representation, either by word or act, relating to the automobiles which defendant did not yet own.

Chickering et al. v. Bastress, 130 Ill. 306, cited by plaintiff, 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. Gordon Motor Finance Co. v. Aetna Acceptance Co., 261 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

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 M. Goderski. Neither is the defendant estopped from asserting such title.

We hold that the judgment was proper, and it is affirmed.

AFFIRMED.

Hatchett and O'Connor, JJ., concur.

35244

GEORGE ADAIR LONGLEY,
Appellant,

vs.

MARY CAROLINE LONGLEY et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

268 I.A. 629[4]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Albert W. Longley died testate at Pasadena, California, on October 29, 1928. His will bore date of June 9, 1925. 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 contest the will upon the theory that its execution was brought about by undue influence exercised upon the testator by his widow, Mary 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 undue 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 illegitimate son of the testator by Alice Hall, whom he thereafter married, and that after the marriage he

GORDON ADAIR LONGLEY,
Appellant,

vs.

ADAIR VON CLEVIT MOORE
et al.,
Respondents.

No. 2688 I.A. 629

MR. JUSTICE MACKINNON DELIVERED THE OPINION OF THE COURT.

Albert W. Longley died testate at Pasadena, California, on October 22, 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 contest the will upon the ground that its execution was procured about by undue influence exercised upon the testator by his widow, Mary Caroline Longley. The said other legatees, including a number of charitable institutions, answered denying that complainant was the son and heir and also denying the charge of undue 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 issues would save time and expense. Complainant resisted the motion and an affidavit was filed in his behalf by one of his solicitors asserting that it would be known upon the trial that complainant was born the Illegitimate son of the testator by Myra Neff, whom he thereafter married, and that after the marriage he

openly acknowledged complainant to be his son, thus legitimizing him by virtue of section 3 of chapter 39 of the statutes (Smith-Hurd's Ill. Rev. Stats., chap. 39, sec. 3, p. 1114). This affidavit further asserted that the facts as to both issues would be proved to a great extent by the same witnesses, many of whom resided in the state of California, and that the issues were so closely interwoven that the trial of the same separately would not only cause much inconvenience but would add greatly to the expense of the litigation.

The motion 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 Longley

would also negative the interpretation placed upon the correspondence by the court. They asked leave to submit such evidence, but the motion was denied, and a decree was entered dismissing the bill of complaint for want of equity.

It is contended 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 waived 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 answer 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., secs. 702-728, pp. 548-562; Mitford's Chancery Pleadings, sub-section 4, 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. Stiefel, 179 Ill. 89.)

In Turckheim 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

would also negative the interpretation placed upon the correspondence by the court. They asked leave to submit such evidence, but the motion was denied, and a decree was entered dismissing the bill of complaint for want of equity.

It is contended 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 waived 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 answer 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., secs. 708-735, pp. 543-568; Mitford's Chancery Pleadings, sub-section 1, sec. 7, part 2; Puterbaugh's Chancery Pleading & Practice, 7th ed., sec. 134; *Langstaffe v. Kirtley*, 227 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. 355) by a person averred to be insane (*Lamort v. Lamort*, 222 Ill. App. 517) and by a party suing as trustee (*Clapper v. Bristol*, 179 Ill. 89.)

In *Langstaffe v. Kirtley*, 227 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

on the ground that neither by plea nor by answer was the issue raised. Defendants then asked leave to withdraw the answer and to file pleas alleging that complainant was an alien enemy, etc. Leave was granted, but such pleas 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 stricken plea, but the court sustained exceptions to this part of the answer. The Supreme court said:

"Such averments are not properly an answer to the bill but should be raised by pleas to the person. (Puterbaugh's Ch. Pl. & Pr.--5th ed.--100.) 'Pleas to the persons do not necessarily dispute the validity of the rights which 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 filed 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 came 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 dilatory pleas, and defendants could not, as a matter of right, file them on the trial of the cause. Pleas of incapacity to sue are pleas in abatement. They do not go to the merits of the bill but only tend to an abatement of the suit. (Fischer v. Stiefel, 179 Ill. 59.) The pleas 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 id. 76; Phenix v. Stocks, 149 id. 319."

In this connection defendants suggest two Illinois cases. One of these is Stone v. Salisbury, 209 Ill. 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 motion to separate this issue but voluntarily proceeded to submit all the

the jury, but the court held that contentions made on motion to
strike out original error in that the issue of quantum was submitted to
jurymen, and three of them concurringly. Upon appeal contention
was sustained as a jury on all the issues which were found for de-
fendants to strike the claims was sustained upon the ground that
they had not filed in due time. Defendants then filed an answer
which, with other matters, set up the defenses which had been
pleaded in the original plea, but the court sustained exceptions to
this part of the answer. The Supreme court said:

"Such averments are not precisely an answer to the bill but
should be pleaded by plea in bar. [Citations omitted.] 21 R.C.L.
p. 480, sec. 30.) [Since it is the general rule that pleadings
make the material allegations of the pleading which the pleader
wishes but does submit to the ability of the suit to be so
made. That is, if the bill, since in the answer of the
plaintiff, ' etc.. [Henry's Ex. ..., sec. 1321, and it is also that
plaintiff is an alien enemy. [Ibid. sec. 1344], The plea in abate-
ment was given to the parties and should have been filed in not
time. Generally did not seek an alien enemy would appear
in the trial of the cause. The plaintiff had been filed
some two days and served the plea upon the [illegible]. It was not an
abuse of discretion on the part of the chancellor to strike the
plea. They were dilatory pleas, and defendants could not, as a
matter of right, file them on the trial of the case. Since at
[illegible] it was not plead in abatement. They do not go in the
merits of the bill but only [illegible] of the suit.
[illegible] v. Bickford, 170 Ill. 89.) The plea should have been
filed in vacation, and no special facts failed to do so the demurrer
was sustained to a plea, and the defendants by their
answer denied that the contestant was the daughter of the testatrix
and not an alien enemy. The cause was tried on an entirety and
there is Bowen v. Swinburn, 200 Ill. 88, where a bill was filed by
an alleged heir to enjoin a will, and the defendants by their
answer denied that the contestant was the daughter of the testatrix
and not an alien enemy. The cause was tried on an entirety and
the jury, but the court held that contentions made on motion to
strike out original error in that the issue of quantum was submitted to
jurymen, and three of them concurringly. Upon appeal contention
was sustained as a jury on all the issues which were found for de-
fendants to strike the claims was sustained upon the ground that
they had not filed in due time. Defendants then filed an answer
which, with other matters, set up the defenses which had been
pleaded in the original plea, but the court sustained exceptions to
this part of the answer. The Supreme court said:

"Such averments are not precisely an answer to the bill but
should be pleaded by plea in bar. [Citations omitted.] 21 R.C.L.
p. 480, sec. 30.) [Since it is the general rule that pleadings
make the material allegations of the pleading which the pleader
wishes but does submit to the ability of the suit to be so
made. That is, if the bill, since in the answer of the
plaintiff, ' etc.. [Henry's Ex. ..., sec. 1321, and it is also that
plaintiff is an alien enemy. [Ibid. sec. 1344], The plea in abate-

issues to the jury and that she therefore could not be heard to complain.

The other case is Gorden v. Gorden, 283 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 son 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.

After a careful examination of all the evidence in this record we find that the issues as the same were developed upon the trial were inextricably woven together and that a hearing at which the evidence material to both issues was presented for consideration would have made possible a much more satisfactory 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

leaves to the jury and that the interlocks could not be heard to complain.

The other case is Durham v. Durham, 325 Ill. 136, where Adolph Durham was the son and heir of deceased. Upon motion of Vaughn-Dyrem filed a petition in the county court praying that Emanuel Durham should be set aside. The petition asserted that an order should be made to probate the last will and testament 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 of the legitimate age of the deceased, and the second to be upon the issues 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 material question of fact was involved in the case. The opinion fails to disclose that the question was one of the opinion fails to disclose that the question was one-sided or it disclosed in any way. These cases make interesting are not persuasive.

After a careful examination of all the evidence in this record we find that the issues as the same were instituted when the trial were incontrovertibly woven together and that a hearing at which the evidence material to both issues was presented for consideration would have made possible a much more satisfactory review of the record. If defendants desired a separate and preliminary trial upon the issue of paternity, 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 determine the benefit of proceedings. However, we would not be disposed to reverse for such a mere. The court erred in allowing this motion and in refusing to set it aside under the pleadings in the case they were not entitled.

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 son 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 LosAngeles, California, September 13, 1927. It is apparent 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 son and heir 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 March 14, 1928, 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 discloses that the result was a substantial
injustice to complainant.

In expounding what opinion was entertained by the Commissioner
and like him heard it the Court. His conclusion [illegible]
all the evidence was that complainant was the son of Alice Longley
but that the evidence failed to establish that he was the son of
Albert Longley. This conclusion seems to have been largely de-
termined by the fact that in the opinion of the Commissioner certain
letters written by complainant to Albert Longley failed to disclose
a filial affection once the death of Alice Longley, which took place
at Pasadena, California, September 13, 1917. It is apparent from
the opinion of the court that the conclusion of the Commissioner 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
disclosed with certainty that more than a year prior to the death
of Albert Longley he and defendant Mary Gunstine, his widow, were
made aware of the fact that complainant claimed to be the son and
heir by Alice Longley. The evidence tends to show that the letters
of complainant to Albert Longley were contemporaneous [illegible] 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 bears [illegible],
1919, 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 Abele Green." Although
passing on this affidavit or the weight of it, it will be sufficient
to say that it does not particularly state the facts as disclosed by

an overwhelming preponderance 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 these facts cover a much less period of time than that which was covered in the endeavor to ascertain 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 Buttolph 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 Clarissa 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 chancellor might well have taken 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:

"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 slight 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 skillful fencing between opposing counsel upon the proposition to waive 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 issues and submit these issues to a jury.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, J. J., concurs.

Mr. Justice O'Connor specially concurring: In my opinion a more satisfactory decision could be arrived at if all the evidence on both issues were before the court. The two issues were woven together and the evidence as to what transpired during the last few years before Albert died would be pertinent on both issues. For this reason alone I concur in the conclusions in the foregoing opinion.

36009

PEOPLE OF STATE OF ILLINOIS,
Defendant in Error,

vs.

DUNCAN TURNER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

268 I.A. 629

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 judgment 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

IN THE DISTRICT COURT
OF COOPER.

vs.

Defendant in Error,

Plaintiff in Error.

MR. JUSTICE MACKENZIE 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 3, 1921, in each case charged that in January of the same year defendant unlawfully, knowingly and wilfully maintained the boy named in this case, Curtis Deere, to become a delinquent child in that "he, the said Duncan Turner, did harbor and keep the said Curtis Deere in a disorderly house on Arkansas avenue and Indian road, in the City of Chicago, under the supervision of said Duncan Turner, and did cause Curtis Deere 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 judgment were overruled.

It is earnestly contended that the motion to suppress

show, 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 Bear Club" was organized. The members of this club were accustomed 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 quarrelsome 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

cause defendant saw him "running around in a hood and blocking up
that another of the boys complained was but one of the club re-
but but of the club for being dangerous and using put language;
contradicted) that one of the boys who testified against him was
he further testified (and his testimony in this respect is not
and that the pictures showed that they were all alike, dopest boys.
point out to the boys that they must be dopest in mind and body,
mothers of many of the boys were treated plaintiff.

Defendant testified that the object of the pictures was to
in the clubrooms to watch, the evidence shows, the lumber and
ployed. Some of these pictures, as already stated, were hung up
accustomed and expected to brave the wintry storms and weave un-
"Boys Best Club" was organized. The members of this club were
Item these boys and under the direction of defendant a so-called
more token and some of them hung on the walls of the clubhouse.
management and direction. A number of pictures of boys in the nude
the majority of the club seem to have been under defendant's
clubhouse was loaned it since possibly to defendant's home, and
at this testimony. Girls were not admitted to membership. A
ship of the club consisted of boys under seventeen years of age and
promote the moral and spiritual welfare of its members. The member-
ship." The object of the organization was stated to be to
trary to be incorporated an organization known as the "Whitechapel
and, an accustment out of employment, and owner of property at
there is practically no conflict in the evidence. Defend-
married after a consideration of all the evidence.

portment or conduct in view of the conclusion at which we have
paternity pertaining their testimony. However, the matter is not im-
Moreover, testified that defendant convicted, and the court ad-
dism, without his consent and by force. The police officials,

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 moral welfare of the community was not at the basis of these prosecutions. 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 delinquency 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 indictment be proved (People v. Day, 321 Ill. 552), and the specific allegation here is that defendant knowingly and wilfully was guilty of acts which tended to cause the delinquency of these boys, in that the conduct to which they were persuaded by him was indecent or lascivious. 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 homes of families was held guilty of an indictable offense at common law, and that such is the law we have no doubt.

Aside from the undisputed fact that these pictures were

Aside from the undisputed fact that these pictures were of an indictable element at common law, and that even in the law we have no doubt.

In Rex v. Crunden, 2 Campbell's Reports, 89, a man who went in search of indecent pictures was held guilty of misdemeanor. In Commonwealth v. Sharpless, 2 Serg. & Rawle, 91, it was held that the mere exhibition of indecent pictures was a misdemeanor. In Rex v. Carlile, 3 B. & Ald. 161, the defendant was convicted of a misdemeanor for publishing a blasphemous libel, although the jury found that the defendant published the libel with the intent to avoid the penalties of the law. In Rex v. Dixon, 3 Burr. 1687, the defendant was convicted of a misdemeanor for publishing a libel, although the jury found that the defendant published the libel with the intent to avoid the penalties of the law. In Rex v. Dixon, 3 Burr. 1687, the defendant was convicted of a misdemeanor for publishing a libel, although the jury found that the defendant published the libel with the intent to avoid the penalties of the law.

The fact that the defendant was not at the head of these procuring moral welfare of the community was not at the basis of these prosecutions. 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 natural fact of such delinquency is not a necessary element of the crime here charged. (People v. Girard, 247 Ill. 170.) Nevertheless, it is necessary that the specific crime charged in the indictment be proved (People v. Ryan, 321 Ill. 478). But the specific allegation here is that defendant knowingly and willfully was guilty of acts which tended to cause the delinquency of these boys, in that the conduct to which they were permanded by him was indecent or immoral. The testimony of a picture of a boy nearly where no members of the other sex are on set, and a picture of an undraped female was held to be not of itself indecent in City of Chicago v. Bauman, 307 Ill. 400. within view has never, so far as we are aware, been held to be such an indictable offense at common law, and that even in the law we have no doubt.

taken of the boys unclad, there is no suggestion in the record of an indecent act or words by this defendant.

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.

REVERSED.

McSurely, P. J., concurs.

O'Connor, J., dissents.

Kennelly, A. E., concrete.

Sommer, J., diagnosis.

analogue.

Unfortunately although many good theorems exist in science, there are few that can be applied to the solution of practical problems. Science and engineering are continually in need of theorems which will help them to do, as nearly what can but fulfill of the rule and inspired each successful problem in laws of development. Life has developed a succession of individuals which are so closely related that it is difficult to study one without considering the others. In the determination of theorems of the Intermediate Value type, Bolzano's theorem, 1817, p. 248, and Cauchy's theorem, 1821, p. 114, are known to analysis. The theorems in question might of a theorem, but that is not the reason which we have called them by the above names. Theorem 1 is of the type named. There is no objection to the reason of

36131

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

DUNCAN TURNER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

268 I.A. 630

MR. 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 is also reversed.

REVERSED.

McSurely, P. J., concurs.

O'Connor, J., dissents.

30787

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JUDGE TO MUNICIPAL COURT
OF CHICAGO.

Plaintiff in Error.

MR. JUSTICE MACOMBER DELIVERED THE OPINION OF THE COURT.

This case is now at issue upon writ of error to the Municipal Court of Chicago. Upon trial had and considered in the Municipal Court in this cause, the facts and the law applicable were submitted to an assistant State's Attorney and the jury found in open Co. DENNY, and for the reasons stated in that opinion the judgment in this case is also reversed.

Reversed, r. f., remanded.

Cleaves, J., dissents.

36132

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

DUNCAN TURNER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

268 I.A. 630

MR. 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.

MR. JUSTICE MACMURRAY 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 filed in case No. 26000, 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.

36130

W. H. MOWER,
Defendant in Error,

vs.

EWALD WIRTHS,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

268 I.A. 630

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This action was before this court on a former appeal - Mower 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

E. M. MOORE,
Defendant in Error.

vs.

DAVID KIMBER,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
of COOK COUNTY.

2688 I.A. 6305

MR. JUSTICE MACOMBER DELIVERED THE OPINION OF THE COURT.

This action was before this court on a former appeal - Error v. Kimber, 204 Ill. App. 600. The action was brought in case for injuries which plaintiff sustained on June 13, 1913, when the motorcycle upon which he was riding collided with an automobile owned by defendant. The collision occurred at the intersection of Lexington 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 "as plaintiff, wantonly, recklessly and maliciously 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 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 specially 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

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 issues 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 judgment. Markevich, 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 contributory 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 happening of the accident and when it became apparent to him that it was about to occur for the

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 issues 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 judgment. [illegible], adm'x, v. Chicago Traction Co., 288 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 contributory 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 happening of the accident and when it became apparent to him that it was about to occur 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 appeal. 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 nd 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 Ill. 460; Price v. Bailey, 265 Ill. App. 358.

The question, however, of whether there was any evidence from which a jury could find that the injury which plaintiff sustained was wilful and wanton as charged in the second count is

raised on this record by the motion to set aside the verdict of the jury returned as to that count. Kosco v. O'Donnell, 260 Ill. App. 544.

On this issue there was a sharp conflict in the evidence. The theory of plaintiff was (and the evidence tended to show) that just 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 stoplights 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 cut 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 dangerous 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 gross 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, 25[illegible] Ill. App. 222;

raised on this record by the motion to set aside the verdict of the jury returned on to that count. Moore v. O'Donnell, 320 Ill. App. 644.

On this issue there was a sharp conflict in the evidence. The theory of plaintiff was (and the evidence tended to show) that just prior to the accident defendant was driving his automobile east on Jackson boulevard and south of the center line of it; that he approached Orrin Kirk 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 stoplights 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 defendant's automobile suddenly and rather violently entered the lanes of this westbound traffic and near the northwest corner of the intersection, making a left-hand turn in front of the oncoming traffic at a dangerous rate of speed. The jury was reasonably 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 gross as to indicate a wind reckless 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 support it or that the evidence manifestly and clearly preponderates the other way. The issue of verdict calling upon the jury to determine whether the negligence of defendant was wilful and wanton was submitted at defendant's request. The question as to the kind and character of defendant's negligence, if any, was for the jury. Illinois v. Hoag, 290 Ill. App. 332;

Rosso v. O'Donnell, 260 Ill. App. 544; Buck v. Alex, 263 Ill. App. 586; Seiffe v. Seiffe, 267 Ill. App. 23.

We find no reversible error in the record and the judgment is affirmed.

AFFIRMED.

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

36150

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JAMES DeSTEFANO,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

268 I.A. 630

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 vagabond. 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 Revised 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 who 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 business and did habitually misspend his time by frequenting houses of ill fame, gaming 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

JAMES DeSTEFANO,
Plaintiff in error,
vs.
PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

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 5, 1932, was found guilty of being a vagabond. 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 Revised Statutes. (Smith-Hurd's Ill. Rev. Stats., chap. 38, sec. 270, par. 270.) 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 disorderly person who went about begging, used jostling and other unlawful games and plays, was a runaway, a pilferer, a common fighting 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, and was an idle and dissolute person who neglected all lawful business and did habitually misspend his time by frequenting houses of ill fame, gaming houses and tippling shops; that he idled 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 pickpocket, having no lawful means of support, and was habitually

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 10, 1928, for larceny; 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 larceny, 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 March 22, 1932, at the entrance of the county jail, when defendant told him he was visiting an inmate named Muzzio who was locked 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 he, 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

Count dismissing account embezzlement pending, national debate, 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 Castleton was offered and received in evidence. It disclosed that on motion of the State's Attorney the indictment for larceny; that on motion of the State's Attorney the charge was varied; that defendant withdrew a plea of not guilty and pleaded guilty to petit larceny, and petitioning therein, the plea was accepted and entered of record, the value of the property petit larceny found to be $50; that a motion for probation on behalf of defendant was overruled on December 31, 1928, at which time defendant was sentenced to the House of Correction for a period of one year, nine months and ten days.

Witness by a partial tilting can also testify to what the defendant stated in the case on trial.

Another officer testified that he saw defendant on March 25, 1926, at the entrance of the county jail, when defendant said he was visiting an inmate named Muncie who was locked up there. The client interested being very likely other client pertaining who with him. The witness said that defendant was at that time in the judge to the entrance of the county jail, was not associating with any prisoner of the house and was just visiting at that time. The next morning defendant was discharged from that manner.

Another officer testified that he had seen defendant coming out of the jail eighteen months; that one evening there in the last eighteen months; that one evening there was quite a storm on. The witness said that defendant at that time was not noticed. The witness said that he did not know whether defendant had any lawful means of support or had any five months. An investigation disclosed, however, that the automobile in question was registered in the name of defendant.

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 March 9, 1932, when he served the warrant on him. He also saw him February 13, 1932, in the Municipal court. He 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 about five months. The witness said that he knew nothing of his own knowledge as to whether defendant worked or as to his means of support. He saw defendant had an injured hand, and defendant told 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 prowler, 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 11th probably twenty times, the last time being December 8, 1931, when he saw him riding in an automobile with Margeno. 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 months; 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

[illegible] about two years and saw him October 19, 1931, with markings in front of a garage on York street, and that defendant told him at that time that he had not been working for about seven months; that previous to that time he had helped his father on a peddler's wagon.

The witness said defendant was not doing anything except [illegible] about two and defendant at that time said he had not worked for [illegible] months. The witness said that he knew nothing of his own knowledge as to whether defendant owned it or to his means of support. He was defendant had an injured hand, and defendant told him it was burned operating a still that blew up. This witness when recalled said that defendant was a "runner" at any time he was seen; however, he stated "fortunately" caught up with him; that he did not know defendant to be a *confidence man*, a common drunkard, a lewd, [illegible] from his personal knowledge, a thief.

Another witness testified he had been acquainted for about three years and had seen him eighteen months for [illegible] tion and [illegible] person, a common [illegible] and [illegible], or, [illegible] a [illegible] *man*, a common drunkard, a lewd, [illegible] over, he stated "fortunately" caught up with him; that he did not said that defendant was a "runner" at any time he was seen; however operating a still that blew up. This witness when recalled was defendant had an injured hand, and defendant told him it was about [illegible] months. The witness said that he knew nothing of his own knowledge as to whether defendant owned it or to his means of support. He will a man named "Lengata." The [illegible] stopped and [illegible] about [illegible], at Ravina and Ayrshire streets, Indiana, in a yard on [illegible] him February 19, 1932, in the Municipal Court. He saw him December 19, 1931, at Ravina and Ayrshire streets, Indiana, in a yard on [illegible] him March 9, 1932, when he served the warrant on him. He also saw [illegible] there [illegible] in the yard there and a coil [illegible]. He saw [illegible] officer who verified the information testified that he had seen defendant there [illegible] and [illegible] but he said defendant told him that he did not work. The witness said that he did not know whether defendant had any [illegible] means of support.

Another witness testified that he had known defendant for [illegible] two years and saw him October 19, 1931, with markings in front of a garage on York street, and that defendant told him at that time that he had not been working for about seven months; that previous to that time he had helped his father on a peddler's wagon.

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 know 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 machine, 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 he 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 Aberdeen 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 his young brother Mario 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 "DeStefano" 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 busily in need of a shave and clean
clothes and this witness let him right in front of his own home.

The testimony was attacked defendant specifically 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 know of anything wrong done by defendant.

Another officer saw defendant on the morning of February 8, 1932, at 1:30; he was in an automobile with two men. Defendant testified that he lived at 719 Jackson street and that he had been unemployed for six or seven months. The officer said that defendant was arrested because he was a suspect and that he had been unemployed for six or seven months. The officer said that defendant said "Oh, like Depression Is on." Defendant testified that he lived at 719 Jackson street with no 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 injured from a truck from which vegetables were packed that his young brother Morris 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 $20 to $30 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 Kinnear company; that he paid cash for the truck, a Chevrolet; that markings on it are "DeSoto" 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

stated that the accident in which his hand was hurt occurred at Sholto and Harrison streets; that the accident was reported to the police station 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 half 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 offense 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 guess 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 People v. Klein, 292 Ill. 420, a similar case based upon quite similar evidence, in

which the judgment was reversed by the Supreme court. See also the note to Harris v. State of Texas, in 14 A. L. R. 1481; Armstead v. State, 11 Okla. Crim. Rep. 649, 150 Pac. 511. The State's Attorney cites us to People v. Wolf, 199 Ill. 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.

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

RAMMERS.

For the reasons indicated the judgment is reversed.

were apparently not raised.

facts proved but also in that the specific points here relied on

an abstracted decision which is distinguishable not only upon the

Blake's Alimony also is in Ferris v. Ball, 111 Ill. App. 440,

Alimony v. Smith, 13 Colo. Corp. Dep. 497, 500 Pac. 321. The

the note in Carrie v. Ebert, 10 Ill. 2d 2, 139 N. E. 2d 280; Lyon-

under the judgment was received by the Supreme Court. See also

36179

MARIA DELMAZZO,
Appellant,

vs.

HARRY VOSNOS, MARY VOSNOS, JOSEPH W. CHULOCK and LOUIS JAFFIE,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 630

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued 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 bonds, 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 $74.50, to reverse which plaintiff has perfected this appeal, contending that judgment should have been entered for the full amount.

Each of the bonds contains the following provision:

"Upon default in the payment of interest, or of the principal of any one or more of said bonds, at the time and place therein specified,.....the principal of this bond, together with the interest accrued thereon, may, as provided in said trust deed and in accordance with the terms and provisions thereof, become due and payable at the place of payment aforesaid, before its regular maturity, at the election of the legal holder or holders of this bond, or of any of said bonds."

Appellee.

vs.

STATE OF INDIANA,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY.

MR. JUSTICE RAYMOND MCFARLAND DELIVERS THE OPINION OF THE COURT.

Plaintiff sued defendants on the surety and guarantors of a tax bond, or of any of said bonds, or of the principal named in the bond of $47,500, to recover which plaintiff had deposited this sum with the county treasurer. Upon default in the payment of interest, or of the principal, on any of said bonds, at the time and place therein specified, the bonds contain the following provision:

"Upon default in the payment of interest, or of the principal when due, or in case it shall become necessary, in the opinion of the Common Council of the City of Indianapolis, to pay any of the interest coupons and/or principal of said bonds, the Controller is hereby authorized and directed to draw his warrant upon the Treasurer of the City of Indianapolis, payable out of the Sinking Fund of said City, for the amount of such interest or principal, and the Treasurer is hereby authorized and directed to pay such warrant out of the Sinking Fund of said City."

Upon the bonds was a rating by the board and a finding for plaintiff, contending that judgment should have been entered for the sum of $47,500, to recover which plaintiff had deposited this money with the county treasurer; and, as the defense that there was a suit in equity was pending to intercept the funds and to accelerate the maturity of the bonds and set up the defense that plaintiff, pursuant to the statute, had not given bond for costs, and that default was made in the payment; that, on the bonds pay- able on September 30, 1931, the interest became due on the bonds; that on September 30, 1931, the interest coupons due on the bonds; interest due no to and including August 30, 1932, was duly paid; September of each year. The statement of claim averred that all bond was, payable semi-annually on the 30th day of August and of $200. The bonds bear interest at the rate of seven per cent certain list notwithstanding the principal amount

Plaintiff sued defendants on the surety and guarantors of

MR. JUSTICE RAYMOND MCFARLAND DELIVERS THE OPINION OF THE COURT.

Appellee.

vs.

STATE OF INDIANA,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY.

No. 25,638.

FILED OCTOBER 30, 1934.

That such provision for the acceleration and maturity of the bonds is valid and enforceable and that notwithstanding a pending 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 Park v. Mulcahey, 344 Ill. 99; Steinberg v. Kloster, Steel Corp., 266 Ill. App. 60; Schatakis v. Rosenwald, 267 Ill. App. 169, to which may be added the yet more recent case of Sauss v. Simon, No. 36010, in which an opinion was filed by this court November 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 $815.01.

REVERSED WITH FINDING OF FACT AND JUDGMENT HERE.

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

McCarely, J. J., and O'Connor, J., concur.

FINDING OF FACT.

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 plaintiff, Bundle Company, from defendants Harry Connor, Harry Connor, Joseph T. Chadsey and Louis Datzis 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 26th day of August, 1918, until the date of the entry of this judgment, amounting to the further sum of $116.02, and making a total of $816.02, for which judgment is entered.

36200

GORDON A. RAMSAY, as Receiver for the ALBANY PARK NATIONAL BANK & TRUST COMPANY OF CHICAGO, Appellant,

vs.

JAMES H. PRENTISS, Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 631

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On September 1, 1931, plaintiff caused judgment by confession to be entered against defendant upon a note dated June 30, 1930, payable to the order of the Albany Park National Bank & Trust Company of Chicago, due ninety days after date, for the sum of $1734.78. The statement claimed interest from December 31, 1930.

On October 7, 1931, defendant filed a petition (which afterwards by order of the court stood as an affidavit of merits) which in substance averred that the note had been paid in full through the application thereto of the proceeds of a contract between one Cowie and the White Oaks 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 Portage Park National Bank 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 Park bank, by and through its duly authorized agent, collected the sum of $6,500 and upwards to be applied on this note, which was more than sufficient to pay it in full.

The judgment was set aside; there was a trial by jury, and

vs.

appellee.

appellant,

For the ELKHART TRUST COMPANY,
BAKER & DAVIS, ENGLISH ET CLEARY,

ATTORNEY FOR THE MUNICIPAL COURT
of Elkhart.

ON. MEMBERS RELEASED BECAUSE THE OPINION WAS DELIVERED.

On September 1, 1931, plaintiff caused judgment by confession to be entered against defendant upon a note dated June 3, 1930, payable to the order of the Elkhart Park National Bank & Trust Company at Elkhart, due ninety days after date, for the sum of $12,000.00. The statement alleged attorney's fees thereon, and, on September 4, 1931, defendant filed a petition [illegible] clearness by order of the court stood as an affidavit of merits) which in substance averred that the note had been paid in full to the payee bank and the Elkhart Park National Bank, and that the Elkhart Park Bank, through its cashier, had agreed to the payment of the note by the Elkhart Park National Bank at its maturity, and that the Elkhart Park Bank, by and through its duly authorized agent, notified the son of [illegible] and khemris to be applied on this note, which was more than sufficient to pay it in full.

The judgment was set aside; there was a trial by jury, and

at the conclusion of the evidence plaintiff moved for a directed verdict in his favor, which motion was denied and the court 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 as 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 suggested a further defense to the effect that there is evidence tending to show that the note upon which suit 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 says 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 ever been entered on the tag.

The evidence from which it is argued that payment was established is as follows:

Defendant lived in Kenilworth, Illinois. He knew one MacLeod, who also lived there and who has since died. MacLeod was president of the Albany Park National Bank & Trust Co. He was also president of the Portage Park National Bank and the Irving Park National Bank. He was also the trustee of a real estate

syndicate known as the White Oaks Manor Syndicate. Portage Park National Bank was depositary for the funds of the syndicate.

A man named Cowie had a contract with the syndicate under which he from time to time became entitled to payment of commissions. Cowie assigned this contract to defendant Prentiss. About December 2, 1929, defendant through MacLeod applied for a loan of $5,500, which was granted by the Albany Park National Bank & Trust Co. Defendant testified that at the time of this transaction MacLeod took him to a window in the bank and told him to make a note for $5,500, which defendant made. MacLeod gave him a certificate of deposit for $500 and a cashier's check for the balance after interest had been deducted. Defendant says that MacLeod told him at that time that the collections as made on the Cowie contract "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 defendant did not (as the affidavit of merits asserts) turn over the Cowie contract to MacLeod either on that day or thereafter, nor does it appear that defendant ever made any assignment of this contract.

However, on January 2, 1929, defendant wrote as follows:

"Mr. Murray MacLeod, President
Under Trust #3,
c/o Portage Park National Bank,
4717 Irving Park Blvd.,
Chicago, Illinois.

Dear Sir:

This will authorize you to pay on and after this date all sums of money due me under Cowie contract to the Albany Park National Bank & Trust Company, to be held as a reserve account for me to apply on any indebtedness 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 notice from them that my obligations are paid.

Very truly yours,
(Signed) Jas. H. Prentiss."

From time to time thereafter payments were forwarded by the Portage Park National 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 $1736.78. The letter asked defendant to sign and return a renewal note for that amount due in ninety-one days. Defendant signed and returned the note, which is the instrument sued on. In August, before the maturity of the note, Macleod died.

There is evidence tending to show that the syndicate collected $5,[illegible] 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. However, there is uncontradicted evidence that neither the syndicate, nor the Portage 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 Park bank who was duly authorized to receive payment of this note. The letter of January 2, 1930, authorized Macleod 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 debts which might be due to defendant and apply the

some upon his note. MacLeod, so far as he acted under the arrangement with defendant, was the agent of defendant and acting for his accommodation. The agreement might perhaps be so construed as to obligate him to forward to the Albany Park bank any sums of money which might be deposited in the Portage Park bank to defendant's account, but the evidence does not show that the moneys which accrued under the Cowie contract were ever so deposited prior to the death of MacLeod. The mere deposit of money belonging to the syndicate in the Portage Park bank, of which MacLeod was president, some part of which ought rightly to have been set aside by the syndicate for defendant, could not (interpreting the evidence most strongly in defendant's favor) amount to the payment of his note. McNamara v. Clark, 85 Ill. App. 439. This court has held that a mere authorization to pay is not payment. Frank Frox Co. v. Bryan, 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 Bank v. Woolard, 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 $1979.25.

REVERSED WITH FINDING OF FACTS AND JUDGMENT HERE.

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

36200 FINDING OF FACTS.

We find as facts that there is due to plaintiff from defendant upon the note sued on in this case the sum of $1736.78, with interest thereon from December 31, 1930, to December 29, 1932, the date of judgment, at 7 per cent per annum, 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.

36012

SHERIDAN-BROMPTON AND ANNEX BUILDING CORPORATION, a Corporation, et al.,

vs.

ARTHUR J. DAANE et al.,
Appellants.

---

vs.

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. Daane 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 sale of the 252 shares of stock, a class "D" security, was in violation of the Illinois Securities act. It was sought to have the sale declared void, and the cross-defendants decreed to pay to the Daanes the amount they had theretofore paid on account of the stock and lease, together with reasonable attorney'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

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

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 properly presented, and the case was transferred to this court. (The Sheridan-Brompton Corporation v. Daane, 348 Ill. 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 Krenn & Dato, copartners, whereby Krenn & Dato agreed to act as sales agent for the trustees in the sale of the stock; that a few days thereafter, January 8, 1925, the cross-defendant, Krenn & Dato, Inc., was chartered under the laws of the State of Illinois, and thereupon that corporation entered into a written contract with Krenn & Dato, the partnership, whereby the corporation was to carry

Krenn & Dale, the partnership, whereby the corporation was to carry and thereupon that corporation entered into a written contract with Krenn & Dale, Inc., was chartered under the laws of the State of Illinois, for the incorporation, January 2, 1958, the cross-defendant, Krenn & Dale, Inc., was chartered under the laws of the State of Illinois, not an undue regard for the trustees in the sale of the stock; that a few days thereafter the trustees entered into a written contract with cross-defendants Krenn & Dale, whereby Krenn & Dale agreed to purchase the stock for $1,000 each; that it paid all/the monies to certain parties as trustees of the Meredith-Brompton Trust; that a few days

The substance of the finding of the master, so far as is necessary to state, is that the Meredith-Brompton and Lumen Building Corporation had an authorized capital stock of 11,000 shares of a

[illegible] to find any particular exhibit offered in evidence.

leaving page of the record begins with page number 3; making it very great many pages and we find what is marked "Vol. 2" and then fol-

that volume of the record is designated "Vol. 1." Then follow a

The record is voluminous and confusing. It is here in the form of two volumes, one of which is marked "Vol. 2." Upon examining the other volume we find that the pages were also [illegible]

to this court. (The Meredith-Brompton Corporation v. Lumen, 349 Ill. 306.)

[illegible] ground that a constitutional question was necessarily involved, but upon consideration by the Supreme court it found that no constitutional question was properly presented, and the case was transferred

same time the original bill was dismissed on motion of complainant. amended, the cross-bill dismissed for want of equity, and at the sections before the chancellor; on a hearing the exceptions were Dawson but they were overruled. They were ordered to stand as ac-

counting. Objections were filed to the master's report by the

the sale void and that the cross-complainants were entitled to an

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 shares to be qualified as "class B" 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 Building 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 escrow agreement with the Chicago Title & Trust Company; that the Daanes paid $4,000 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 escrow; that the sale of the stock to the Daanes was negotiated by Krenn & Dato, Inc., by their agent (Mdsall); and the master finds that "Krenn & Dato, Inc., was a 'dealer' as defined in Paragraph (5) of Section 2 of the Illinois Securities Act;" that in August, 1929, the Daanes notified 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 Daanes tendered back the securities sold to them. The report then continues:

"Tenth: That all of the provisions and requirements of the Illinois Securities Law, with the exception of Section 14 thereof,

were substantially complied with by the cross-defendants, *** as Trustees of the *** Trust;" that Krenn & 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 Sheridan-Brompton & Annex Building Corporation had been qualified as a 'Class B' security." The master then finds that the release pleaded by the cross-defendants entered into between the parties in another suit was not a release by the Daanes of the claim they were making in the instant case because that question was not involved 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 Krenn & 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 Krenn & Dato, copartners, did not participate in the sale of the stock to the Daanes, and that the cross-bill should be dismissed as to these parties.

The master further found that the Daanes were entitled to an accounting against the trustees and Krenn & Dato, Inc. The Daanes filed no objections to the master's report. Objections were filed by the trustees and by Krenn & Dato, Inc., which were overruled and, as stated, were ordered to stand as exceptions and were sustained by the chancellor, and the cross-bill dismissed for want of equity.

Numerous points are made by the Daanes in the brief filed in their behalf, claiming that there were a great many violations of

the Illinois Securities law not only by the cross-defendant trustees Arenn & 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 Daanes did not file any objections to the master's report.

In Olp v. Meyer, 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.'"

If the master states all the facts correctly and draws a 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 Daanes 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 Securities Law not only by the cross-defendant trans-
mitting forms to Dacie, Inc., but also by other cross-defendants. It is
mentioned that a number of sections and clauses of several sections
were violated by the defendants; but we think none of those points
is properly before us absent as to whether there was a violation
of section 12 of the Act because the Decree did not list any objec-
tions to the master's report.

In City v. Keyes, 327 Ill. App. 12, it is said, p. 20: "Counsel for appellant argues that the trial court erred in entering a decree finding 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 committed or caused upon an 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 misstates 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 direction, without exception."

If the master states all the facts correctly and draws a 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-Hampton and Ames Building Corporation, the "issuer" and the grantee, the "seller," had properly qualified the stock as "Class D" under the Securities Law, were well founded. If the Decree desired a finding of fact by the master on this and other questions they may urge, 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 & Dato, Inc., who through its agent sold the stock to the Daanes, was a "dealer" within the meaning of Section 14 of the Act, the master having found that Krenn & 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 dealer or owner may sell such securities upon filing in the office of the Secretary of State a statement verified by the oath of such dealer or owner as otherwise provided by this Act, a statement of the amount and description of the securities to be sold by him or it, the maximum price for which they are to be sold, 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 such 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 Krenn & Dato, Inc., was a dealer, is as follows: "The terms 'dealer' or 'broker' shall include every person and every company, firm, trust, partnership or association, incorporated or unincorporated, other than a solicitor or issuer, that engages either wholly or in part in the business of selling, offering for sale, negotiating for the 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 paragraph 5 was not passed until 1935, when it was added as an amendment to section 2 of the Act. The master did not find, except inferentially, that

Krenn & Dato, Inc., was a dealer within the meaning of section 14 of the Act. But whatever may be the true interpretation of paragraph 8 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.

February 16, 1926, 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 copies 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 oath. 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 filed by Krenn & 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

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 & Dato, Inc., is concerned, if it be held to be a dealer within section 14 of the Act, it in no way prejudicially affected the Daanes.

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.

36082

NELSON CULP, doing business as Nelson Culp & Company, Defendant in Error,

vs.

FRED H. MASSMANN, Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

268 I.A. 631

MR. JUSTICE O'CONNOR 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. M. 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 Massmann 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 Gannon, who was an attorney for Massmann, got in touch with plaintiff, who was a certified public accountant, and employed him to do 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

Plaintiff
vs.
MAXWELL,
Defendant.

Defendant in person,
by Nelson Cain & Company,
MAXWELL CASE, suing Business

to recover the other half 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 audit. There is a direct conflict on this point. As stated, plaintiff's evidence tended to show that the work was to be done personally for Sweitzer and Massmann, 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 controverted 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 Gannon was not authorized by him to employ plaintiff to do work for him, defendant, personally, is equally untenable.

Defendant 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 shows 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 Gannon 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 judgment must be reversed. In reply to this contention plaintiff's counsel says

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 affidavit of merits, denied that plaintiff was employed by defendant "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 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 Municipal court of Chicago is affirmed.

AFFIRMED.

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

that plaintiff testified he was employed not only to do the necessary or auxiliary of the people of the corporation, but was also employed to make a financial investigation into the whole financial condition of the corporation; and further, that defendant is not in a position to raise this question because in his affidavit he did not specifically deny the allegation in plaintiff's statement of claim, which was that plaintiff was employed "to perform duties of a financial character and to investigate the financial status and condition of the company, secure, obtain and negotiate loans, and generally to act as financial agent of the company in connection with the business, in his relations with banks, and liquidation" of the corporation. We think this latter phrase, and liquidation" of the corporation. We think this latter phrase, and investigating the financial status and condition of the company, secure, obtain, negotiate loans, and generally to act as financial agent of the company in connection with the business, in his relations with banks, and liquidation" of the 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 question not raised in the trial court cannot be urged for the first time in a court of review.

The judgment of the Municipal Court of Cuyuna is affirmed.

VANCISE.

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

36091

LAKE SHORE COUNTRY CLUB,
Appellant,

vs.

HORACE L. BRAND, ARMIN W. BRAND, ERNA BRAND ZEDDIES, FRIEDA G. BRAND, ROBERT F. ZEDDIES and ERNA M. BRAND,
Appellees.

APPEAL FROM DECREE OF SUPERIOR COURT OF COOK COUNTY.

268 I.A. 631

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

Complainant, as lessee, filed its bill to enjoin the defendants, lessors, from forfeiting its rights under a written lease, 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 discloses that on February 1, 1909, Virgil M. 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 insurance and to erect 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 connected 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 complainant was given the right to purchase the 76 acres for $160,000 at any time prior to December 2, 1922, and after that date and prior to

[illegible]
[illegible]
[illegible]

December 2, 1936, for $175,000, provided it was not in default under the lease. Shortly after the execution of the lease complainant acquired 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 locker room and caddy 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. East of Sheridan Road was a tract of about 10 acres which extends to the waters of Lake Michigan. The club secured this tract 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 locker 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 $500 for each building. The buildings were paid for by the four parties, each building costing about $30,000. 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. No 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 September 24, 1926, served notice on defendants 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 Cook county against the defendants for the

December 2, 1926, for $175,000, provided it was not in default under the lease. Shortly after the execution of the lease complainant acquired 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 locker room and caddy 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. East of Sheridan Road was a tract of about 10 acres which extends to the waters of Lake Michigan. The club secured this tract 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 locker 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 $500 for each building. The buildings were paid for by the four parties, each building costing about $25,000. 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. No 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 September 24, 1926, served notice on defendants 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 20, 1927, the complainant filed its bill in the superior court of Cook county against the defendants for 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. 504. About five months after the dismissal of that case complainant filed its bill in the instant case to prevent defendants from forfeiting the lease or, in the alternative, to relieve it from a forfeiture if one had already been declared.

The defendants in their answer to the bill set up the proceedings 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 overruled. The case then went to a hearing and the chancellor limited the evidence, holding he was bound by the decision of the Supreme court in the specific performance case which, as he construed it, estopped complainant from questioning that it was in default under the lease; a decree was entered dismissing the bill for want of equity, and complainant appeals.

The Supreme court in its opinion in 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, contrary 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 sometimes in its own name instead of that of defendants; that it had permitted the erection 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

not entitled to a specific performance of the option contract. The court there said (pp. 521-522): "An option contract is not a contract of sale within any definition of the term, and at best but gives to the option holder a right to purchase upon the terms and conditions, if any, specified in the option agreement. In order to avail himself of the right the optionee must comply with the conditions set out in the option contract. *** An option contract does not come within the equitable rule against forfeitures. The question of declaring a forfeiture is not involved. An option contract gives to the optionee a right under the named conditions. If those conditions are not met the optionee does not acquire the right. Such a situation involves none of the elements of forfeiture. It deprives no party of any right and abrogates no contract, but, on the other hand, is but the enforcement of the contract made by the parties." The court also discussed the question advanced by the complainant that the defaults under the lease had been waived by the defendants, and says that the evidence is insufficient to show that all the defendants 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 defendants could take advantage of any claimed defaults by complainant in the payment of rent reserved by the lease, they must give complainant 30 days notice in writing of such default; that if there was default in the payment of any other moneys under the lease, or any other defaults, they must give 60 days written notice to the complainant of such defaults; and if such defaults continue for the 30 or 60 days respectively, the land lord could declare the term ended without further notice. So far as the record discloses, the defendants gave no such notice to complainant of any claimed defaults with a view to terminating the lease. All that appears in this respect are a number of letters written by the

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 contend 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 contract.

A consideration of the entire record discloses, we think, the fact that complainant acted in entire good faith in constructing the clubhouse across Sheridan Road; in the building of the locker 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 endeavoring 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-

A further argument is made by the defendants that complainant's forfeiture,

[illegible] that they have already done so, to relieve them from presumption that forfeiting the lease or, if the evidence should be the only question before us is whether the defendants should be the question of the option contract is in no way involved here. the complainant in this respect is not increased in this case. of receiving the option contract, but we think the intention of is endeavoring to prevent a forfeiture of the lease with the view it did. It is true that counsel for the complainant admitted it the last annual payment; in insuring the property and in carrying payment of rent; in its permission to the four persons to build United Home and Sandy House; in the payment of taxes; in the ing the clubhouse across Sheridan Road; in the building of the

The fact that complainant acts in entire good faith in maintain-

A consideration of the entire record discloses, we think, was only resorting to lawfully the option of the contract. faith in attempting to prevent the forfeiture of the lease, but number of particulars under the lease and was not acting in good plea bands, the argument being that it unjustifiably defeated in a be allowed because the complainant did not come into court with tendered to them from time to time as it accrued.

The defendants contend that the decree is right and should defendants returned to accept any further rent although it was complainant earned the basis that it would constitute its option, 1908, when

It further appears that after September 24, 1908, when

of the Duke House Company did not commence with which you are

familiar."

it stated that, "The events have practically depleted the Jones choose commitments had sent for the term and in some of which it defendants, or some of them, returning to complainant a number of

ant is not in court with clean hands because shortly after the lease was executed it entered into an agreement with the defendant, Horace L. Brand, whereby it bought from him five acres immediately adjoining the 76 acres for some $6,000 or $7,000, as a special and secret consideration to him so that it might 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.

From a consideration of the opinion of the Supreme court 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. Merchant's Trust Co. v. Harvey, 335 Ill. 284; Mayer v. Collins, 263 Ill. App. 219; Palmer v. Ford, 70 Ill. 309; Andrews v. Sullivan, 7 Ill. 327; Giles v. Austin, 62 N. Y. 486.

In view of the limitation by the chancellor in the admissi

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 erected on the 75 acres. Certainly this is some evidence of a waiver of the breach claimed in this respect.

Complainant contends that since Horace L. Brand, one of the defendants, conveyed his interest in the premises in 1921 to his daughter, Mrs. Zeddies, she and the other lessors were tenants in common; that all tenants in common, alone, have the right to declare a forfeiture; that Mrs. 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 Weece v. Gaunt, 327 Ill. 21; Traders Safety Bldg. Corp. v. Shirk, 237 Ill. App. 1; Watson v. Smith, 180 Ill. App. 289; Sexton v. Chicago Storage Co., 129 Ill. 318; Dunne v. Minsor, 312 Ill. 333.

In the Weece case, supra, (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. (Sexton v. Chicago Storage Co., 129 Ill. 318; Watson v. Fletcher, 49 id. 498; Barber v. Watch Hill Fire District, 36 R. I. 236, L.R.A. 1915C,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,

and if he does not insist upon it no one else can. Smith v. Goodman, 149 Ill. 75."

In the Shirk case, supra, (237 Ill. App. 1) 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. Trask v. Wheeler, 7 Allen (Mass.) 109; Watson v. Smith, 130 Ill. App. 289. The common law rule was, however, changed by the Statute of 32nd Henry Eighth, ch. 34, and this statute has been adopted as a part of the common law by the legislature of Illinois. 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 assignee. 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 Watson case, supra, (130 Ill. App. 289) 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 could not take advantage of a cause for forfeiture which accrued prior to the assignment to him of such reversion. 18 Amer. & Eng. Ency. of Law, (2nd ed.) 393; Watson v. Fletcher, 49 Ill. 498; Trask v. Wheeler, 7

and it be done not insist upon it no one else can. Smith v. Hooker, 120 Ill. 47."

In the Hooker case, supra, (137 Ill. App. 1) the assignee of a judgment made an attempt to forfeit a lease upon grounds that had arisen prior to the assignment. In there said in part: "There is, we think, no doubt that such a cause of action was not available at common law. Trust v. Thornton, 7 Allen (Mass.) 186; Gaines v. Smith, 2 Ill. App. 488. The reason the rule was, lawyers, changed by the Statute of Uses, Conv. Ch. 24, and this statute has been adopted in a part of the Union by the Legislature of Illinois. It has never been repealed, and we do not understand defendant's 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 waived and either by the assignment, only the assignee could maintain the suit, while if the breach out of which the rights of action arises is a continuing one, it would, of course, pass to the assignee. However, whether a court of equity, which looks to the substance rather than the form, might not relieve the right here in question as already vested in the assignee for declaratory judgment is a question not free from doubt, and we prefer to put our decision upon other grounds."

In the Hooker case, supra, (130 Ill. App. 330) 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.334): "But the default in the payment of rent upon which forfeiture is predicated occurred prior to the assignment to plaintiff, and he could not take advantage of a cause for forfeiture which occurred prior to the assignment to him of such reversion. 18 Amer. & Eng. Ency. of Law, (2nd ed.) 388; Watson v. Blaisdell, 80 Ill. 498; Trust v. Thornton, 7

Allen (Mass.) 109; Small v. Clark, 97 Me. 304; Penn v. Smart, 12 East 444."

In the Sexton case, supra, (139 Ill. 318) 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 re-entrie 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 mere chose in action, and, when enforced, the grantor is in by the forfeiture of the condition, and not by the reverter.'" And the court there further said that section 14 of the Landlord 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 Dunne case, supra, (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 grantor or his heirs only. The court there said (p. 340): "At common law the right to take advantage of a breach of a/condition subsequent by enforcing a forfeiture, or the right of re-entry, so called, belonged exclusively to the grantor, and after his death to his heirs. The heir of the grantor is entitled to avail himself of the benefit of that right though not expressly named in a reservation thereof. That rule of common law is applicable in this State. (Boone v. Clark, 129 Ill. 466.)"

The answer of the defendants to this contention, as stated by their counsel, is: "Conceding for the sake of argument that

Allen (Amer.) 108; Smith v. Clark, 67 Me. 364; Lynn v. Smith, 19 Tex. 416."

In the Durkin case, Murphy, (180 Ill. 618) it was held that the right of entry for the breach of a condition subsequent was a power given by the section and therefore inalienable. The court, quoting from Gray on Perpetuities, Sec. 121: "The right to enter for breach of condition subsequent could not be alienated, as it never could have been had it been an estate, and these words: 'The reason barred in the existing of entrances, suppression of rights and getting up of suits, and therefore nothing in nature except an estate can be granted ever.' (Citing authorities.)

"It is said in 7 Bacon on Real Prop. (2nd ed.) 474,'475: '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 mere chose in action, and, when enforced, the grantee is in by the forfeiture of the condition, and not by the reentry.' And the court there further said that section 14 of the Landlord 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 Jones case, Murphy, (182 Ill. 338) it was held that a violation of the condition subsequent in a deed or will gives the right to re-enter to the grantor or his heirs only. The court cited Gray (p. 36): "At common law the right to take advantage of a breach of condition subsequent by entering a forfeiture, or the right of re-entry, as called, belonged exclusively to the grantor, and upon his death to his heirs. The heir of the grantor is entitled to vest himself of the benefit of the right though not accurately named in a reservation thereof. That rule of common law is applicable in this state. (Jones v. Clark, 67 Ill. 81.)"

The remedy of the defendants in this ejectment, as stated by their counsel, is: "proceeding for the sake of argument that

this was so, then there can be no forfeiture, 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: "Furthermore, 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 lessors had knowledge of the defaults this notice was given by these 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, [illegible], 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 Cook county is reversed

The decree of the Superior Court of Cook County is reversed and the cause remanded with directions to enter a decree in accordance with the views herein expressed.

Under the authorities cited, we are of the opinion that the complainant in this record must be sustained.

Decree reversed and cause remanded with directions.

Mr. Justice Dibell, dissenting:

I cannot agree with the conclusion reached by my brethren in this case. The bill was filed by the complainant, Landlord, to foreclose a trust deed executed by the defendants, Tenants, to secure the payment of a principal note for $1,000 and interest thereon at the rate of 6% per annum, payable monthly. The trust deed contained the usual provisions that in case of default in the payment of any interest note, or any part thereof, for thirty days after the same became due, the whole principal sum should become due and payable at the option of the holders of the notes, and that in case of default in the payment of any interest note, or any part thereof, for thirty days after the same became due, the holders of the notes should be entitled to the possession of the premises. The trust deed was executed by the defendants on the 1st day of May, 1911, and the first interest note became due on the 1st day of June, 1911. The defendants made default in the payment of the interest note due on the 1st day of June, 1911, and in the payment of each subsequent interest note. On the 1st day of July, 1911, the complainant filed its bill of complaint to foreclose the trust deed, and on the 3rd day of July, 1911, a decree was entered finding the amount due on the principal note and interest notes, and ordering that unless the amount found due was paid within three days from the entry of the decree, the premises should be sold by the master in chancery to satisfy the amount found due. The defendants failed to pay the amount found due within the three days, and on the 7th day of July, 1911, the master in chancery sold the premises to the complainant for the sum of $1,000, and on the 8th day of July, 1911, reported the sale to the court. On the 10th day of July, 1911, the court entered an order confirming the sale, and ordering that unless the defendants should pay to the master in chancery the sum of $1,000 with interest at the rate of 6% per annum from the 8th day of July, 1911, within three days from the entry of the order, the defendants should be forever barred and foreclosed of all right, title and interest in the premises, and that the complainant should have a writ of assistance for the possession of the premises. On the 13th day of July, 1911, the defendants paid to the master in chancery the sum of $1,000 with interest at the rate of 6% per annum from the 8th day of July, 1911, and on the 14th day of July, 1911, the master in chancery reported the payment to the court, and on the 15th day of July, 1911, the court entered an order that the master in chancery execute a deed to the premises to the defendants, and that the writ of assistance be quashed. The complainant appealed from the order quashing the writ of assistance, and there can be no foreclosure, and there is no need

and the cause remanded for further proceedings in accordance with the views stated in this opinion.

REVERSED AND REMANDED.

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

36127

UNION BANK OF CHICAGO, Guardian of the Estate of CHARLES GARGOLA, a Minor,
Plaintiff in Error,

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, a Corporation,
Defendant in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

268 I.A. 682

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 Gargola, a minor, on account of the alleged negligence of the defendant in operating a motor truck which collided with a motorcycle on which Gargola 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 motorcycle and one of defendant's motor trucks. The motor truck was north of 57th place and was being driven south in Wentworth avenue. Before 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

[illegible]

UNION BANK OF CHICAGO, Guardian of the Estate of CHARLES GARGULA, a minor,
Plaintiff in Error,

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, a Corporation,
Defendant in Error.

[illegible]

ERROR TO SUPERIOR COURT OF COOK COUNTY.

268 I.A. 682

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 Gargula, a minor, on account of the alleged negligence of the defendant in operating a motor truck which collided with a motorcycle on which Gargula 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 26, 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 motorcycle and one of defendant's motor trucks. The motor truck was north of 57th place and was being driven south in Wentworth avenue. Before 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

sudden stop and the truck passed in front of it. Gargola, who was driving his motorcycle east of the street car, did not see the truck, and the motorcycle and truck collided and he was severely injured.

He testified that he drove his motorcycle from 59th street, 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, McNeill & Libby v. Cook, 222 Ill. 206. Under the law in the instant case, before plaintiff could recover he must prove by a preponderance 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.

then it was error to direct a verdict for the defendant.

Favorably to the plaintiff, tending to establish these two facts, 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, plaintiff must recover he must prove by a preponderance of the evidence, or put a sufficient of evidence, tending to prove the material allegations of the declaration. Lipby, McNeill & Lipby K. Corp. 232 Ill. 296. Under the law in the instant case, before of all the evidence, the motion should be allowed if there is no Where a motion for a directed verdict is made at the close cycle at from seventy-five to ninety miles an hour.

in the record to the effect that plaintiff was driving his motor- place at from three to five miles an hour. There is other evidence the time of the collision; that the truck made the turn at high

The evidence further is to the effect that plaintiff was driving his motorcycle about fifteen miles an hour at and prior to

[illegible] about fifteen or twenty feet from said place.

[illegible] that the street car came to [illegible] sudden stop and be continued [illegible] that he did not see the truck motor, when the collision occurred; that he did not see the truck [illegible] that the street car was being [illegible] at the time; that the street car was [illegible] at about 25 or 30 miles an hour; place; that both were traveling at about 25 or 30 miles an hour; was some distance ahead of the motorcycle as they approached 83rd motorbound street car track; that the street car overtook him and he proceeded north he was driving between the rear end and the [illegible] was the fluxin result of the clause of the ordinance; that he [illegible] the plaintiff could be driven his motorcycle from 83rd street, injured.

The [illegible] truck, and the motorcycle and truck collided and he was severely

[illegible] driving his motorcycle west of the street car, all but are the [illegible] sudden stop and the truck passed in front of it. Darpbin, who was

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. Loutman v. Chicago City Ry. Co., 198 Ill. App. 329; Hale v. Chicago Junction Ry. Co., 259 Ill. 476; Kelly v. Chicago City Ry. Co., 283 Ill. 644.

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 court continuing 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 own safety. He testified that he saw the defendant's truck being driven south some distance north of 57th place when his motorcycle 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 motorcycle, 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 rational

for his own safety and that his conduct was "violative of all reasonable
[illegible] the conclusion that he was not in the exercise of due care
[illegible] circumstances we think all reasonable minds would
until the collision.

In these circumstances we think all reasonable minds would
[illegible] of a defendant and the question of contributory negligence as the
[illegible] part of the plaintiff, in a case such as the one at bar, was ques-
[illegible] tions 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. Lenhoff v. Chicago
City Ry. Co., 198 Ill. App. 329; Hale v. Chicago [illegible] Co.,
238 Ill. 476; Kelly v. Chicago City Ry. Co., 202 Ill. 84.

In the Kelly case, cited immediately one half that in a
personal injury case the question of contributory negligence is
generally one of fact for the jury, the court continuing, said
(p. 88S): "But cases occasionally arise in which a person is so
careless or his conduct so violative of all rational standards of
care may, 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 evi-
dence, that plaintiff was not in the exercise of due care for his
own safety. He testified that he saw the defendant's truck being
driven south [illegible] of 87th Place when its motor[illegible]
and the street car were some distance south of 87th 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 colli-
sion. Moreover, he testified that he did not see the truck at all

standards of conduct applicable to persons in a like situation," and therefore the court properly directed the verdict.

We are further of the opinion 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.

36149

HARRY RINGER,
Appellant,

vs.

IRVING OIL AND SUPPLY COMPANY, a Corporation, et al.
MARIE MOSS,
Appellee.

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY.

263 I.A. 632

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

By this appeal the complainant seeks to reverse a decree of the Superior court of Cook county sustaining a demurrer 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 Oil 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 bore 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 Bank of Chicago, as trustee; that the complainant was not informed as to which of the notes and interest coupons had been paid; that he is the owner and holder of one of the principal promissory notes for $1500 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

HENRY KIDDER,
Appellant,

vs.

IRVING CIT AND SURETY COMPANY,
a Corporation, et al.
MARIE JONES,
Appellee.

No. 3847 I.A. 052.

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

By this appeal the complainant seeks to reverse a decree of the Superior court of Cook county sustaining a demurrer 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 25, 1928.

Briefly stated, the substance of the allegations of the bill is that on June 21, 1928, the defendant, Irving Cit and Surety Company, a corporation, being indebted in the sum of $30,000, executed its three 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, 1938. The notes bore interest at 6 per cent per annum until maturity and 8 per cent thereafter. To secure the payment of the indebtedness the Irving Cit and Surety Company executed its trust deed of the same date conveying certain property, together with the rents, issues and profits thereof, to the Citizens State Bank of Chicago, as trustee; that the complainant was not informed as to which of the notes and interest coupons had been paid; that he is the owner by the terms matured on November 21, 1931, and that it had not been paid.

"Time on information and belief, interest coupons maturing June 21, 1928, secured by said trust deed, were not paid;" that by

reason of the default in the payment of complainant's note for $1500, complainant "has declared and does hereby declare the entire indebtedness secured 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 himself 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 holder 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.

A copy of complainant's $1500 note and of the trust deed are 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:

"If default be made in the payment of said indebtedness or 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, *** the whole of said indebtedness including principal and accrued interest shall, at the option 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

of the covenants" of the trust deed, the "Trustee or the legal
either upon majority of said principal notes, or by reason of any
"that in case a right of foreclosure *** shall arise hereunder
and that in such a case a gift of foreclosure might be lifted;
thereof at once, without notice, become and be due and payable."
and accrued interest shall, at the option of the legal holder
thereof," *** the whole of said indebtedness including principal
at the time and in the manner above specified for the payment
any part thereof, or in the interest thereon, or any part thereof,
"If default be made in the payment of said indebtedness or
deed, the pertinent parts of which are as follows:
ate payment of all the indebtedness, it must be found in the trust
no that if there is any authority for the legal holder to accelar-
in the note for the accelaration of the payment of the indebtedness,
attached to and made a part of the gift. There is no provision

A copy of complainant's gift and of the trust deed are
note
related hereto like.

The prayer for relief was the usual one contained in the foreclosure suits and there was a prayer that a receiver be appointed pending the suit.

The prayer for relief was the usual one contained in the foreclosure suits and there was a prayer that a receiver be appointed pending the suit.

A copy of complainant's gift and of the trust deed are attached to and made a part of the gift. There is no provision in the note for the accelaration of the payment of the indebtedness, no that if there is any authority for the legal holder to accelaration thereof, in the manner and in the manner above specified for the payment thereof, at once, without notice, become and be due and payable," and accrued interest shall, at the option of the legal holder of the covenants" of the trust deed, the "Trustee or the legal either upon majority of said principal notes, or by reason of any "that in case a right of foreclosure *** shall arise hereunder and that in such a case a gift of foreclosure might be lifted; thereof at once, without notice, become and be due and payable," and accrued interest shall, at the option of the legal holder thereof," *** the whole of said indebtedness including principal at the time and in the manner above specified for the payment any part thereof, or in the interest thereon, or any part thereof, "If default be made in the payment of said indebtedness or deed, the pertinent parts of which are as follows:

ate payment of all the indebtedness, it must be found in the trust no that if there is any authority for the legal holder to accelaration thereof, in the manner and in the manner above specified for the payment of the indebtedness, in the note for the accelaration of the payment of the indebtedness, attached to and made a part of the gift. There is no provision

A copy of complainant's gift and of the trust deed are note related hereto like.

The prayer for relief was the usual one contained in the foreclosure suits and there was a prayer that a receiver be appointed pending the suit.

It is further alleged on information and belief that Marie Stone is the owner and holder 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 description 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 pending the suit.

A copy of complainant's gift and of the trust deed are attached to and made a part of the gift. There is no provision in the note for the accelaration of the payment of the indebtedness, no that if there is any authority for the legal holder to accelaration thereof, in the manner and in the manner above specified for the payment thereof, at once, without notice, become and be due and payable," and accrued interest shall, at the option of the legal holder thereof," *** the whole of said indebtedness including principal at the time and in the manner above specified for the payment any part thereof, or in the interest thereon, or any part thereof, "If default be made in the payment of said indebtedness or deed, the pertinent parts of which are as follows:

ate payment of all the indebtedness, it must be found in the trust no that if there is any authority for the legal holder to accelaration thereof, in the manner and in the manner above specified for the payment of the indebtedness, in the note for the accelaration of the payment of the indebtedness, attached to and made a part of the gift. There is no provision

A copy of complainant's gift and of the trust deed are note related hereto like.

The prayer for relief was the usual one contained in the foreclosure suits and there was a prayer that a receiver be appointed pending the suit.

It is further alleged on information and belief that Marie Stone is the owner and holder 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 description of "unknown owners."

It is further alleged on information and belief that Marie Stone is the owner and holder 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 description 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 pending the suit.

It is further alleged on information and belief that Marie Stone is the owner and holder 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 description 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 pending the suit.

It is further alleged on information and belief that Marie Stone is the owner and holder 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 description 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 pending the suit.

It is further alleged on information and belief that Marie Stone is the owner and holder 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 description 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 pending the suit.

It is further alleged on information and belief that Marie Stone is the owner and holder 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 description 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 pending the suit.

It is further alleged on information and belief that Marie Stone is the owner and holder 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 description 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 pending the suit.

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 grantor.

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 demurrer 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.

We think the decree sustaining the demurrer and dismissing 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 legal holder of part of the indebtedness. We must construe the trust deed as it is written. There is apparent ambiguity only when the provisions 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 provision of the trust deed above quoted has reference to the expenses and

of the trust deed above quoted has reference to the expenses and different owners and holders of the notes. The other provision does not appear to be right in its case, there being a number of holders to whom the trust deed was applied. There is apparent ambiguity only when the provisions of the trust deed are considered as a whole. We must construe the trust deed as it is written. We think the decree sustaining the demurrer and dismissing 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 legal holder of part of the indebtedness. We must construe the trust deed as it is written. There is apparent ambiguity only when the provisions 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 provision of the trust deed above quoted has reference to the expenses and legal or equitable proceedings for the collection of the moneys paid or incurred in connection with the foreclosure by the "trustee or legal holder thereof" and all costs paid by the trustee or holder of said principal notes or either of them may bring such "any holder of any part of said indebtedness," shall be paid by the grantor.

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 $1,500, secured by the trust deed, has the right to accelerate the payment of $98,500 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 demurrer on the ground - (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.

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 holder 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 Seidel case. We are entirely satisfied with our holding in that case, and the decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

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

36159

E. R. SCHULTZ,
Appellee,

vs.

J. SEIDSCHER, Doing Business as EUREKA TALKING MACHINE CO., JOSEPH DUNAS, EUREKA TALKING MACHINE CO., a Corporation,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 632

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

Plaintiff brought an action against the defendants to recover the value of certain radio cabinets, consoles, completed and uncompleted radios, claiming that defendants removed them from 2247 South LaSalle 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 $900, and the defendants, Seidscher and the Eureka 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 selling radios at wholesale; that he knew the defendants, Seidscher and Dunas, and had business dealings with them; that he had some radios at 2247 LaSalle 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 owndd by himself and the defendant Seidscher; that plaintiff owned the stock of goods and at that time there were about 75 radios practically com-

E. B. MONTAZ,
Attorney,

vs.

F. ATTORNEY, Doing business as
SUPERB TAILORS RADIUS CO., DOMINO
BRAND, DOUBLE TAILORS RADIUS CO.,
a Corporation,
Appellants.

Appellant's Opening Brief.

Filed this ____ day of _____, 1933.

FRANK H. SCHMID,
Clerk of Supreme Court.

By _____
Deputy.

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

Plaintiff brought an action against the defendants to recover the value of certain trade fixtures, including, specifically and enumerated radios, claiming that defendants removed them 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 $800, and the defendants, Leibacher and the Eureka 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 selling radios at wholesale; that he knew the defendant, Leibacher and Dunne, and had business dealings with them; that he had some radios at 6527 Lonsdale street, Chicago, which premises were used for warehouse purposes and for the manufacture of radios by himself and the defendant Leibacher; that plaintiff owned the aforesaid and at that time there were about 75 radios immediately completed and ready for the assembling of radios and other material owned by plaintiff and the defendant Leibacher; that about April 15, 1932, he went to the premises and that there

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 LaSalle street and found that the radios were gone; that he called up defendant Seidscher and asked where the radios were and that Seidscher said they were at Dunas' warehouse on Wabash avenue; that the witness then asked why that was, and Seidscher 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, Seidscher 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 Seidscher 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 radios to see how much it would cost to complete them, and Jensen testified he went to the warehouse on Wabash avenue and saw the Minerva 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 him 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 Mr. Simmons in April but that there was a delivery of only 25 radios. He further testified that he was president of the defendant Eureka company; that defendants did not buy the radios in qupstion 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.

Defendants contend that the judgment is wrong and should be

plaint which pertained to the plaintiff; they were known as the "Minerva" radio; that about five days thereafter he again went to the premises of Jacobi, asked and found that the radios were there; that he called and identified himself and asked where the radios were and that Goldenberg told him they were at Jones' residence on Tyrone Avenue; that the witness then asked Mr. Jacobi, and Jacobi replied that plaintiff would see the defendant, Jones; that shortly thereafter plaintiff went to Jones' residence on Wyman Avenue and there saw the defendant, Goldenberg and Jones; that Goldenberg and there saw the defendant, Goldenberg and Jones; that he demanded the radios from them, which they said were there, but which he did not see; that later he again asked Goldenberg about the radios and he said they had been sold by defendants for $15 unless that before this last conversation plaintiff had sent Lennon to the premises and he said they were sold by defendants for $15 unless Lennon returned warehouse to look over the radios to see how much it would cost to complete them, and Jones benefited he went to the warehouse on Wyman Avenue and saw the Minerva radios there; that he could not be mistaken because the Minerva radio was a "monster;" that it was "homely."

The defendant Goldenberg, alone, testified for the defendants; Jones was not called. Goldenberg denied that he told plaintiff that defendants had sold the radios for $15 unless and in answer to a question put to him 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 $25 apiece; that the defendants bought 100 radios from plaintiff and a Mr. Simmons in April but that there was a delivery of only 25 radios. He further testified that he was president of the defendant Bureau company; that defendants did not buy the radios in question and did not have them; that he did not remove any radios from the Pelham street premises without anyone's consent; he introduced evidence to show that the premises Pelham Parkway could be entered by anyone as the door was open; he denied that he ever told plaintiff that he would be damned if he would pay for the radios if they were not delivered within a week and that plaintiff was a nuisance around the premises and that he had to call the police to get him off the premises; that plaintiff was told that he would be paid for the radios as soon as defendants received the money from Jones; that he had no agreement with plaintiff that he would pay for the radios in any event; that he did not remove any radios except when he owned, but that he did not remove any radios.

Defendants contend that the judgment is wrong and should be reversed, and that plaintiff should be remitted to the Municipal Court for the Borough of Manhattan, the First District, for a trial de novo, because the amount involved is within the jurisdiction of that court, and that the plaintiff should not be permitted to split his cause of action.

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 Seidscher and Dunaz. 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. National Bond & Investment Co. v. Rukos, 230 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 manifest weight of the evidence. The court heard and saw the witnesses testifying 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.

We are also of the opinion that the contention made that the judgment is wrong, as against the defendant corporation, is untenable. It appears that Seidscher 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 merit in this contention. While the court did take part in the examination of the witnesses, we think his action was entirely proper in this respect, and that although he did at times indicate

that he was going to decide the case without hearing further from the defendants, he later permitted defendants to go ahead and offer in evidence what they might have.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

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

36049

WILLIAM M. COLLINS, (Plaintiff) Appellee,

vs.

GEORGE L. SCHMIN, (Defendant) Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

268 I.A. 632

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

This is an action in assumpsit 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 Oscar F. Mayer was the lessee, under a 99 year lease of the property at 37-39 West Randolph street, Chicago, under which he was obliged to pay the taxes. The property prior to May 1, 1921, was occupied by the King Joy Lo Restaurant, under a sub-lease from Mayer. May 1, 1921, Mayer sublet the premises to plaintiff for a period of ten 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 King Joy Lo Company on the same terms that the property had been sublet to him. Under the provisions of these various leases the taxes of 1921 were to be prorated, plaintiff to pay two-thirds and Mayer one-third. These taxes were paid in November, 1922, with money furnished by plaintiff. In all these transactions defendant, who is a member of the Bar 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 Lo Company for the payment of the taxes for 1921. February 3, 1923, defendant gave the check sued upon,

[illegible] property.
[illegible] Property.
[illegible] Property.
[illegible] property.
[illegible] property.
[illegible]

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 Mayer 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 Mayer ever paid any part of the taxes.

One of the defenses 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) denied 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 defense was Ernest Schein. He testified that he was around when O'Toole and defendant were discussing the matter of taxes; that he heard O'Toole say defendant owed some money as a part of the contribution that the King Joy Lo Company was to make, and defendant said that the King

assignment by a letter addressed to Plaintiff, in which he said he was enclosing his check for $2,750 with which to pay the taxes on the Brooklyn street property. If,000 of which he had received from Mayor and $1,750 from the Ring Day Co Company, and in this letter he agreed, if evidence was submitted that he had received more than $2,750, to pay the difference to Plaintiff. No check was made in the letter that the check was being delivered conditionally.

There are also [illegible] of Plaintiff that neither defendant nor Doyle ever paid any [illegible] of the taxes.

One of the defenses 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 could 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 E. O'Toole (Plaintiff's agent to whom the check had been delivered) denied 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, sufficient although evidence [illegible] there is room to establish the defense? If it does, the court erred in directing a verdict.

The only witness to testify in support of this defense was Samuel Lapidus. He testified that he was present when O'Toole and defendant were discussing the matter of taxes; that he heard O'Toole say defendant owed some money as a part of the consideration that the Ring Day Co Company was to make, and defendant said that the Ring

Joy Lo 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 endeavored by the testimony of Ernest Schein to prove its nonfulfillment. 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.

AFFIRMED.

Gridley, J., concurs.

Seanlan, J., took no part in the decision.

A

36058

JOEL D. HUNTER, administrator of the estate of JAMES L. CANTY, deceased, (plaintiff), Appellee,

v.

THOMAS LOWERY, (defendant), Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

268 I.A. 633

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

This was an action on the case under the statute by Joel D. Hunter, as administrator of the estate 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 alleged 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 29, 1928. The second count alleged that while plaintiff's intestate was a passenger on said street car 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 shot him with a revolver; that plaintiff's intestate did 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

Filed

Clerk, Cook County.

Henry Rose Clerk

In the Superior Court
of Cook County, Illinois.
Term, A.D. 1888.

Plaintiff,

vs.

Defendant.

Henry Ingram,
(Defendant)

Mr. Henry Ingram, Kindly notice the return of this writ.

This was an action on the case under the statute of limit-
ations, to recover damages for the estate of James D. Hardy, de-
ceased, against Thomas Jacoby, for unlawfully causing the death of
James D. Hardy. The case was tried before a jury and plaintiff
recovered a judgment for $5,000. To reverse this judgment defendant
has appealed.

The declaration consisted of three counts. The first
count alleged that on January 28, 1888, while James D. Hardy
was riding as a passenger on a street car on 47th street in
Chicago, the defendant with great force and violence unmanned,
beat and injured James D. Hardy, as a result of which he died
January 29, 1888. The second count alleged that plaintiff's
intestate was a passenger on said street car 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 violent
just arose or pretension, with force and arms assaulted plaintiff's
intestate and ejected him with a revolver; that plaintiff's intestate
did 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

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 crime 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 demesne, and molliter manus imposuit, and the plaintiff filed replications to these pleas.

Only three witnesses testified to the occurrence. Tony Nemont, 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 car at 47th street and Wentworth avenue and when the conductor asked him for his fare he searched his pocket 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 rear 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 defendant and Canty fighting;

examination be permitted in case the defendant and Candy Lightning just hesitate to the time that he heard the murder." On cross did not see anything between Benson Candy and the defendant on his back in the room of the hut that he had been dirty that he when he heard three shots after the shots he saw Candy lying naked minute." He also testified that he was underneath the bed there." He further testified: "I heard something and I heard outside with the coroner," and the defendant told Candy to put his statement remained in regular status except changes made to the fact that the gun by this time had arrived at Fairbanks station agents, where the had my file from be returned his people for about four minutes or 4:30 stood the interval between me when the coroner explained that Candy," she was present, "for the plaintiff, testified that on the morning of January 28th, he passed a street car at 6th street and Cushman avenue, paid his fare and walked into the car and learned Only three witnesses testified to the occurrence. They Plaintiff cited authorities to these points.

plaintiff's impeachment. Both counsel and the Court, the defendant Richard Plaintiff's testimony of any crime or the conviction of felony," the defendant then and there unilaterally and with a (Pledge, and was not then a fugitive from justice indicted for riding in a wagonette direction on a street car on 6th street, counsel offered that while Plaintiff's interpreter was a Russian the plaintiff's interpreter immediately thereafter also. The trial

that defendant struck the first blow; that he did not see who fired the shot; that he saw the gun in defendant's hands.

John Smolarek testified for the plaintiff that he boarded a 47th street car going west at 47th street and Wentworth 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) got 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 Wentworth 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 fare; that this passenger started to use vulgar language and inquired 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 beat 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 arose

the Ajoux." He bit his mustache down there and when he spoke he was so pallid." Dandy leaned over and struck him, knocking him to [illegible] down like his father's knees." [illegible] in Alajuela orphans from the inside of the car and Dandy [illegible] and said, "I will pay for my food myself now." [illegible] one foot on the back step and one hand [illegible]. Dan then determined, leaned by Dandy's side to assist the man and Dandy replied to Dad all," pointing [illegible] and was then [illegible] Dandy [illegible] (the witness) wanted him (Dandy) to get all the more that he said "Yes" [illegible] on the Pittsburg Dodgers as a newcomer (Dandy) who had wanted the [illegible] that he would not be able to be removed a pal- [illegible] and made a mock of Montmorrit manner since the violation had applied in [illegible] on January 22nd 1922" he was a newcomer on the 41st Kansas line [illegible] Edmund F. Dandy" a witness for the defendant, testified [illegible] above the cha-

[illegible] after the opening statement within the next his face was covered [illegible] that he heard three shots and saw Dandy fly out on the pitcher's [illegible] almost that statement was a lie. It was Dandy [illegible] that defendant walked to the pitcher's box and Dandy dropped [illegible] (Dandy) for when the one and started an argument with the newcomer) after the game had proceeded since or four innings Dandy [illegible] that defendant was in first attempt that was in the right and then the pitcher Dandy [illegible] a right knock to left and [illegible] and Montmorrit rushed [illegible] John Montmorrit testified for the plaintiff that he boarded the same car from the Pittsburg's league.

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, smart 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, Admr. etc., 48 Ill. 410; Ohnesorge v. Chicago City Ry. Co., 259 Ill. 424.) It is not an action for personal injury. (Prouty v. City of Chicago, 250 Ill. 222.) The measure of damages as fixed by the statute (sec. 2, ch. 70, Cahill's Illinois Revised Stats. 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 widow 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 R. R. Co. v. Brodie, 156 Ill. 317.) The statute makes the pecuniary loss to the widow and next of kin the sole measure of

the Decretorial Zones to the Afghan and Hand of Kin the note Secretary of
[Change to Ir. Or. Indict," 132 III. 342.] The private notice
(Ir. to Ir. Or. Inform" 42 III. 800, 1887. The Daily Chronic
Time the night and hand of Kin Jack" in a manor Alan" of the county
Then one estimate changes in a Decretal Infant" that is" that
of Kin of most deceased Decree." The only Infant for which the
Decretal Infantine reconfigure Case may doubt to the wife and hand
1232)" in "a Suit and Hand communication with relevance be the
of the private Inst. in. 20" Corbit's Illinois District Decre.
State of Interior, 80 Ill. 488.) The minutes of Inquire to Plane
Ill. 181.) It is not an virtue for personal Infant. (Indict v.
Index, Entry 42 Ill. 4101 Commissioner Jr. Interest Ill. Ir. Inst. 144
Counsel warranty of the Decretal. (Counsel v. Ir. Indict,

This notice is the meanings of the notwide and must be
Instrument given in the Ind. the employed the Counsel.
the amount Stated in the decision." Court Case an other
112." But Sch. notice Counsel" in which discarded not sustained
amount of Counsel necessity Decree to have been mentioned of Decre-
mined", and that in answering Counsel Sch. note not continued to Sch
Date said that Sch. the Decretal Although Counsel" would
of Case not not Date Ill.[LOC." not of motion Instrument that
Time it Ind. Issue for the Decretal Ind. will Assess Sch Counse

The count of Decretal's Subject Instrument the Ind.
Instrument the Ind.

to be considered Decreased of Sch. Ind the court ex-
se wit the Judgment should be Assessed. The only Question necessary

The defendant Jon assigned and Asked Plan Examine as
Appointed and Counsel Case and Civil.

to be Civil Sch the Case Sch Decide Original Attorney" not and
the Count Ind be Case Sch Decrease and Civil Sch the Ind.

damages - and the satisfaction of that loss is the sole purpose for which an action can be instituted. (Chicago & Rock Island R. R. 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 Coal 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 prospects of life and his means, opportunities, ability and habits with reference to the making and saving of money or money's worth. (C. P. & St. L. R. R. Co. v. Wooldridge, 174 Ill. 330.)

In the case of Crawford v. Zachary, 235 Ill. App. 122, the jury was told 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 C. B. & Q. R. R. Co. v. Kuck, 112 Ill. App. 620.)

After a consideration of the authorities we hold that because the injury for wrongful 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 smart money. Damages 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 REMANDED.

Scanlan and Gridley, JJ., concur.

36067

CHICAGO NEON TUBE CORPORATION, a corporation, (plaintiff), Appellee,

v.

DUNBAR FUNERAL PARLORS, INCORPORATED, (defendant), Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 633[2]

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

This action was commenced by the confession of a judgment on August 5, 1931, in favor of Chicago Neon Tube Corporation, plaintiff, against Dunbar Funeral Parlors, 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. Motions 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:

"THE CONDITION OF THE ABOVE OBLIGATION IS SUCH That whereas, the said Chicago Neon Tube Corporation, a corporation, did on the 15th day of January, A. D. 1932, in The Municipal Court of Chicago, in the State aforesaid, recover a Judgment against the above bounden Dunbar Funeral Parlors, Incorporated, a corporation for the sum of One hundred and ninety-five ($195.85) Dollars and eighty-five Cents, besides costs of suit, for which said judgment of the said Municipal Court of Chicago, the said Dunbar Funeral Parlors, Incorporated, a corporation has prayed for and obtained an appeal to the Appellate Court of the First District of the State."

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 complied 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. Wormley, 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. Where 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

The right of appeal is purely optional and the opposite party may refuse to accept a writ unless the time limit for the appeal has expired.

The appeal notice must be served within the time limited by the court's order, and must, either on the face upon the appeal is filed or as a subsequent memo before the expiration of the time fixed in the order. The order fixing the appeal may be varied on summons at any time before the appeal is filed. The order fixing the appeal must fix the time within which the appeal must be filed, but if the time fixed in the order be so much as 30 days, the appellant may file the appeal at any time within such time, unless the court otherwise orders. Where the order is silent as to the time for filing the appeal is 30 days. (Section 27, Rule 1, 1909.)

If no time for filing the appeal is fixed, the appellant may file the appeal at any time within 30 days after the order appealed from is entered. (Section 27, Rule 2, 1909.)

The appeal is taken by filing a notice of appeal in duplicate with the clerk of the court from which the appeal is taken. The notice must specify the parties to the appeal, the judgment or order appealed from, and the grounds of appeal. (Section 27, Rule 3, 1909.)

Upon the filing of the notice of appeal the clerk must transmit to the appellate court the papers in the case, including a certified copy of the judgment or order appealed from, and a certified copy of the docket entries. (Section 27, Rule 4, 1909.)

The appellant must, within 10 days after the filing of the notice of appeal, serve upon the respondent a copy of the notice of appeal, and a copy of the bond or undertaking on appeal, and must file with the clerk of the court proof of such service. (Section 27, Rule 5, 1909.)

The appellant must, within 30 days after the filing of the notice of appeal, file with the clerk of the court from which the appeal is taken a bond or undertaking on appeal, with sufficient sureties, to be approved by the clerk, conditioned that the appellant will prosecute his appeal to effect, and will pay all costs and damages that may be awarded against him on the appeal. (Section 27, Rule 6, 1909.)

The appellant must, within 30 days after the filing of the notice of appeal, file with the clerk of the court from which the appeal is taken a bond or undertaking on appeal, with sufficient sureties, to be approved by the clerk, conditioned that the appellant will prosecute his appeal to effect, and will pay all costs and damages that may be awarded against him on the appeal. (Section 27, Rule 6, 1909.)

extended has expired the jurisdiction is lost and the act of the court in approving the bond is a nullity. (Hill v. City of Chicago, 218 Ill. 178; Hall v. First National Bank, 330 id. 234.)

APPEAL DISMISSED.

Sunman and Gridley, JJ., concur.

36086

FAITH MANUFACTURING COMPANY, a corporation, (plaintiff), Appellant,

v.

THOMAS J. BENDER, (defendant), Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 633

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

Action was brought by plaintiff, Faith 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 defendant 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 earned $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 $136.51. Tried before a jury and a verdict and judgment in favor of defendant and against plaintiff for $136, from which the plaintiff has 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,

Insert-remarks continue. Previous Entry: Insertions of Plaintiff's documents were a much foremost for the Fifteenth Hundred & five Plaintiff was employed in the manufacture of dye ovenlids and the Plaintiff's estimate discovered that in March, 1922, the machinery.

deferment and obtained Plaintiff for $156, from which Plaintiff was $1748.27. Later passed a fish meal a contract was finished in favor of one $11728.30. Leaving a payment due delivered from Plaintiff of $1720.27. Insertions-matter - Entry at $1722.27: upon Plaintiff being delivered during ended 1928-30 to which, and $1722.27 on which Plaintiff was employed for Plaintiff on said manufacture do to July of 1928, and machine on examination at time, but only on all shelves; item deferment after Plaintiff claimed to back delivered $80 a week and a machine of Deferment of "Insurance" entries upon Cash, Inc. Plaintiff's complaint" signed sign on March 8, 1923, be was employed and reported to the Plaintiff in his answer. He also filed a bond. The defendant filed an affirmative of matter excluded be in deferment of his checking instance was later and an answer Insert, claiming Items 1, Denied, be because for week claimed Plaintiff. Upon Insert-claimed

IN, MISTAKING INSIDE MEMORY MISTAKEN AND CLAIMED OF THE COURT.

learning that the defendant possessed a secret process for tempering steel golf club shafts, sent Herman Bachli, to induce him to disclose the process, and at Bachli's request, on March 20, 1931, defendant came 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 pay defendant a royalty for his work in processing golf club shafts; that about a week or two later Faith inquired of defendant what amount defendant would need to live on; that after some discussion plaintiff agreed to advance defendant $60 a week to be charged to defendant's earnings; that shortly after this conversation defendant came to plaintiff's plant and superintended the processing work; that from April 10, 1931 to July 31, 1931, plaintiff advanced in weekly installments of $60 a week the total sum of $998, and in addition, on July 22, 1931, $400, which latter sum 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 royalty was $536.54.

Defendant's version is that after the signing of the contract of March 20, 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 Faith asked defendant to quit his job at the Illinois Bending 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

learning that the defendant possessed a secret process for tempering steel golf club shafts, with Herman Reddig, to induce him to disclose the process, and at Reddig's request, on March 20, 1931, defendant came 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 pay defendant a royalty for his work in processing golf club shafting; that about a week or two later Faith inquired of defendant what amount defendant would need to live on; that after some discussion plaintiff agreed to advance defendant $60 a week to be charged to defendant's royalties; that shortly after this conversation defendant came to plaintiff's plant and superintended the processing work; that from April 10, 1931 to July 31, 1931, plaintiff advanced in weekly installments of $60 a week the total sum of $960, and in addition, on July 28, 1931, $400, which latter sum was paid defendant because an old 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 royalties was $138.54.

Defendant's version is that after the signing of the contract of March 20, 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 shafting; that about two weeks later Faith asked defendant to quit his job at the Illinois Bending 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 "hardening" 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 sum

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 accrued; 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, when 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." (Bola v. Piepenbrink, 318 Ill. 525.)

After examining and considering the testimony and the 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 foreman 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 exhibits were handed to him by some one in plaintiff's office; that it was his duty as foreman to check the time of the men working under him. Both

received being ready that on July 24, 1933, he (defendant) presented to plaintiff a statement showing the amount of skeins produced by his persons and requested plaintiff to pay him the royalties thereon; that the amount due was $40.00; that plaintiff agreed to pay him on account and gave defendant a check for that amount. This check did not bear the legend "pay check"; that on July 24, 1933, which said defendant his salary was reduced to $40 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 sharp 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, when 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." (Gale v. Pietrzykowski, 352 Ill. 540.)

After examining and considering the testimony and the 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 foreman he received four payroll records of the "spooling" department, showing the amount earned by the employees in that department, among which was the name of the defendant. Defendant testified these exhibits were handed to him by some one in plaintiff's office; that it was his duty as foreman to check the time of the men working under him. Both

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 salary. 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. Cobb, 343 Ill. 78, 83; Harvester Co. v. Industrial Board, 282 id. 489, 492.)

Finding no reversible error the judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

Public and Government and perhaps those municipal uses allowed in mu-
nicipal zones constitute no to the Trust. Public ownership the fact
ensure maximum, while deferment clause: that zone is followed by
be exist the ordinance in existence.

Other cases are analogous, but since the public have not
been enjoyed that will be denied it must also extend the new zone
elsewhere. (Jewell v. Cobb, 321 Ill. 104; City Bloomington Co. v.
Illuminating Power, 340 Ill. 488, 494.)

Trading is prohibited since the Ordinance is unknown.

Dunham and Grinder, 23, comment

36095

A

RALPH H. POORMAN,
(plaintiff),
Appellee,

v.

F. LANDON CARTAGE COMPANY,
a corporation, (defendant),
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

263 I.A. 633

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

Ralph H. Poorman sued 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 Government, 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 alleged that any damage suffered by plaintiff was due to plaintiff's negligence.

As grounds for reversal defendant contends that plaintiff

was guilty of contributory negligence and that the judgment is not supported by competent and sufficient evidence as to damages.

It appears from the evidence that the accident occurred at about 4:30 p. m., November 22, 1929, at the intersection of Wabash avenue and 30th street, Chicago. It was a clear day and the pavement was dry. The northeast corner of Wabash avenue and 30th street 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

of counterpoised workfingers celebrants' assault outfit was enough to
In midheart of the conversation first the Dymphilk was knocked
pasting the small trunk.

Settled with the small trunk Dymphilk's trunk into Dwining
trunk." It further observes that the celebrants's trunk not
three or four seconds after celebrants's trunk had struck the small
stop his trunk." The trunk end of his trunk hit the small trunk
point to collide he dropped his counterpunch punch," but was unable to
them." When Dymphilk saw the small and defendants's trunk were
contained up 4 or 5 miles an hour was between 10 and 15 feet north of
the west Exit tunnel of the small trunk when Dymphilk's trunk becomes
that the center of the front end of defendants's trunk collided with
in the path of Dymphilk's trunk." The witness Carolyn eloquent
small the two collided in the center of the intersection' and crashing
and as the Dymphilk continued continued' he stopped the small trunk
south at 30th street' else Examiner 14 or 15 miles an hour'
was 30 feet north of 30th street' and defendant's trunk was 100 feet
stopped approximately 10 to 15 miles an hour. A shot summons be (Dymphilk)
small be one the small trunk 25 or 30 feet east of Common Kansas
Iand of soul' was proceeding at a speed of upon 30 miles an hour'
stand away on 30th street." The Dymphilk's trunk' with a 17-ton
stand south on Upper Kansas and a Cities Speed small trunk was going
from the eleventh on 30th street." The Dymphilk was driving his
is indicated with a two-ton sentence seated pump 80 or 90 feet
ane day." The motorcycle account of Common Kansas and 30th ept. 2
Kansas and 30th street' Citizens." It was a clear day and the roadway
ed upon trip 2- ." Examiner 80' Fire' to the intersection at Common
It vehicle from the opinion that the resulting wearing
embodied by competent and sufficient evidence as to damages."
ane Dartly of counterstruck workfingers and that the Judgment is not

subdivision 4 of section 34, Ch. 95a, Cahill's Revised Statu. 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 minds will arrive at different conclusions, then it is a question of fact for the jury. In C. & E. I. R. R. Co. v. Schmitz, 211 Ill. 446, 452, it was said:

"'It is not a rule of law that the omission 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. (Waitrovich v. Black, 254 Ill. App. 49; Ames v. Armour & 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 prima facie the extent of the damages to

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 prima facie sufficient, and it was not error to admit the bill in evidence. (Byalos v. Matheson, 328 Ill. 269, 272; Sunbeam Beverage Co. v. Cunningham, 242 Ill. App. 401, 403, and cases cited; Finch v. Carlton, 249 Ill. App. 15, 18.)

Finding no reversible error the judgment of the Municipal Court is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

36116

EMMA THERESA DINKEL,
(plaintiff),
Appellee,

v.

HOME MORTGAGE & INVESTMENT CO., a corporation,
(defendant),
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 633

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

Emma Theresa Dinkel sued Home Mortgage & Investment Co., 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 December 8, 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 payment 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

36334

ANNA THERESA DIEBEL,
(plaintiff),
Appellee,

v.

MOHR BUILDING & INVESTMENT
CO., a corporation,
(defendant),
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

269 I.A. 633

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

Anna Theresa Diebel sued Mohr Building & Investment Co., 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 $1000. To reverse the judgment defendant appealed.

In her statement of claim filed December 4, 1931, plaintiff alleged in substance that March 11, 1931, by its president and countersigned by another officer of the corporation, the defendant issued a check for $1000, payable to plaintiff, drawn on the United American Trust & Savings Bank of Chicago, in payment 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

of deposit signed by Hatterman & 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, _____ Hatterman and Louis D. Glanz, copartners, were conducting a mortgage bank business at 1110 Milwaukee avenue, Chicago, and that on that date plaintiff deposited with them $1000 for investment 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 "Home 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 18, 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 & Glanz 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

of defendant Edmund de Montmorency to Plaintiff, dated February 17, 1894, further stating that it was and is hereby agreed by and between the parties hereto that a copy of said deed may be used in evidence on the trial of this cause, and that the original deed may be withdrawn from the files of this court and returned to the defendant, and that a copy thereof may be substituted in its place and stead, and that the Clerk of this court may certify to such copy as though it were the original deed.

It is further stipulated by and between the parties hereto that the following facts may be taken as true for the purpose of this trial, and that no proof need be offered by either party hereto in relation thereto, to-wit:

That on the 15th day of March, 1892, the defendant Edmund de Montmorency executed and delivered to the plaintiff, Pleasant Valley Land Company, a corporation, a deed conveying to said plaintiff the following described real estate, situated in the County of Tulare, State of California, to-wit:

[illegible] Section 2, Township 17 South, Range 24 East, Mount Diablo Base and Meridian, containing 640 acres, more or less, according to the official plat of the survey of said land returned to the General Land Office of the United States, and that said deed was duly recorded in the office of the County Recorder of said Tulare County, on the 17th day of March, 1892, in Book 47 of Deeds, at page 17, and that said deed was executed and delivered by the defendant Edmund de Montmorency, and that the signature of said defendant thereto is genuine, and that the Englishman known as Lord Edmund de Montmorency, mentioned in said deed, is the same person as the defendant Edmund de Montmorency, and that the said Edmund de Montmorency was at the time of the execution of said deed a married man, and that his wife's name was Elizabeth de Montmorency, and that she did not join in the execution of said deed, and that the said Edmund de Montmorency was not at the time of the execution of said deed a resident of the County of Tulare, State of California, but was a resident of the City of London, England, and that the said deed was executed and delivered by the said Edmund de Montmorency in the City of London, England, on the 15th day of March, 1892, and that the said deed was not acknowledged before any Notary Public or other officer authorized by the laws of the State of California to take acknowledgments of deeds to be recorded in said State, and that the said deed was recorded in the office of the County Recorder of said Tulare County, on the 17th day of March, 1892, in Book 47 of Deeds, at page 17.

presented and delivered the certificate of deposit to Louis D. 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. K. Kempski, and thereafter she presented the check for payment on the bank on which it was drawn, but payment thereof was stopped.

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. K. 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 the accounts which the person keeping them 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." (Coulson v. Hartz, 47 Ill. App. 20, 27.) In the instant case the undisputed evidence discloses that the amount due upon the

the qualified evidence that the amount due upon the
note." (Gentzen v. Bowden, 47 Ill. App. 80; 82.) In the instant case
appears fraud, it materially is evidence against the person making
some minor character as a credit in and subject. "An admission,
condition of the account, and one tendered as an admission that the
-ghone name a Judge account in book, was not produced to show the
account which the person possible [illegible] him with cash payment in
[illegible]tion

Under the head [illegible] the burden of [illegible] rests at all
times on the [illegible] to prove [illegible] assumed in fact the validity
of the [illegible].

The only points raised by defendant in its brief are (1)
that the defendant never assented to the certificate of deposit;
(2) that the certificate at issue was barred by the statute of
limitation, and (3) that the defendant could not escape by the
certificate of deposit because only some commission could be [illegible]
It is undisputed that Lucio Ximon was president of the
defendant; that B. H. Humphrey was in the employ of the defendant
solicited to countersign checks and that the check upon which suit
in the instant case was brought was given to the plaintiff and that
upon plaintiff received the check the instrument to defendant the
validity of deposit and that it was issued 'risk' and that the
amount due plaintiff appeared on a credit due her on the books of
the defendant. It is also true that if the issue that defendant's
contention with the evidence was insufficient to hold that defendant
assumed in fact the validity of deposit.

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 Ins. Co. v. The People, 209 id. 42, 48.) Had the plaintiff sued Hatterman and 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, 82 id. 134, 135; Edwards v. Harper, 234 Ill. App. 296, 301, and cases cited; American Steel Foundries v. The Railroad Supply Co., 235 Ill. App. 238, 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, 1931, plaintiff "wanted 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

without the authority of the Board of Directors." He was then one to apply to carry out I paid a woman,[4] issue a check of deposit" x x x." I brought it to the attention of Mr. Glenn [1937] Plaintiff "worked me to give her a check for the certificate [illegible] without the authority." Testified that to [illegible] a witness for the defendant, Testified that to [illegible] me to note that the defendant did receive to back the certificate of deposit.

It is most convenient that we to Defendant's Opinion, the [illegible] and that the agreement to lock Plaintiff the amount of the certificate of deposit by the execution of the check, did not [illegible] the law. In this view we cannot agree for the reason that the plea of the Statute of Limitations in a Personal Property 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 [illegible]. (Kirk v. Murrell, 160 Ill. 122, 128; Mechanics Life Ins. Co. v. The People, 208 Ill. 48, 49.) And the Plaintiff was Estopped from [illegible] when upon the certificate of deposit and

but upon the check given to the Plaintiff. The fact that the Limited was that the Plaintiff would, but on the certificate of deposit check might have Plaved the Statute of Limitations, but in the defendant assumed the debt was [illegible] to [illegible] the return of the check. (Hopkins v. Clark, 84 Ill. 341; Kirk v. Murrell, 60 Ill. 124; 128; Kennedy v. Kenney, 204 Ill. 466, 468, and [illegible] Defendant's counsel also urges that the court erred in [illegible] to allow defendant to introduce evidence of the Book of [illegible] on the part of the president to issue the check. Martin testified that the [illegible] was [illegible] authority to issue the check. (Ill. Rev. Stat. 1937, ch. 32, sec 157, 158, 159.)

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, 157 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. (Peoria Life Ins. Co. v. International Life & Annuity Co., 246 Ill. App. 38, 49.) No such evidence 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 vires, 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 Hatterman & Glanz for investment in a mortgage. The defendant was incorporated for the

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 legal wrong. We think the following language of the court in Bradley v. Ballard, 55 Ill. 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.

36400

CHARLES ROPPELT,
(complainant),
Appellee,

v.

CLAYTON ADDIE et al.,
Defendants.

ON APPEAL OF OAK PARK
TRUST & SAVINGS BANK, a
corporation, as trustee,
Appellant.

INTERLOCUTORY
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

268 I.A. 634

MR. PRESIDING JUSTICE KNIGHT 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 securing the principal sum of $40,000 and for the appointment of a receiver pendente lite. 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 Eichenbaum 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 Oak Park Trust & Savings Bank, a corporation, as trustee, upon real estate in Cook County,

Dear Sir:

Enclosed please find check for $ 1.00 in payment of your account.

Yours truly,

Per

Enclosure.

Dear Sir:

Enclosed please find check for $ 1.00 in payment of your account.

Yours truly,

Per

Enclosure.

Illinois, in which trust deed the grantor assigned the rents, issues and profits of said real estate; that bond No. 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; bonds numbered 59 to 78, both inclusive, for $500 each, and bonds numbered 79 to 98, both inclusive, for $1,000 each, matured April 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 said 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 unpaid; that the interest on all of said bonds fell due on April 20, 1932, and has not been paid, and that all of the bonds secured by the trust deed have matured 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 possession of said premises; 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 scant security for the indebtedness, and in the event of a decree of foreclosure 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 8, both inclusive, aggregating $5,000 have been paid.

temperature 7 to 9° below freezing, sufficient for 60,000 tons pour point, for both Brownlee with excess $50,000 it after thousand weight. Even the city was already seen as economic, the price operating cheap coal, and that when made sure' that to a material change in the temperature 4 to 6° high initially, the 1000 weight pressure reading 2 and 3° for $17,000 would, because 30° 1000 pressure and pressure 4 to 6° high initially, the 1000 weight pressure temperature 7 to 9° below freezing, sufficient for 60,000 tons pour point, for both Brownlee with excess $50,000 it after thousand weight. Even the city was already seen as economic, the price operating cheap coal, and that when made sure' that to a material change in the temperature 4 to 6° high initially, the 1000 weight pressure reading 2 and 3° for $17,000 would, because 30° 1000 pressure and pressure 4 to 6° high initially, the 1000 weight pressure temperature 7 to 9° below freezing, sufficient for 60,000 tons pour point, for both Brownlee with excess $50,000 it after thousand weight. Even the city was already seen as economic, the price operating cheap coal, and that when made sure' that to a material change in the temperature 4 to 6° high initially, the 1000 weight pressure reading 2 and 3° for $17,000 would, because 30° 1000 pressure and pressure 4 to 6° high initially, the 1000 weight pressure temperature 7 to 9° below freezing, sufficient for 60,000 tons pour point, for both Brownlee with excess $50,000 it after thousand weight. Even the city was already seen as economic, the price operating cheap coal, and that when made sure' that to a material change in the temperature 4 to 6° high initially, the 1000 weight pressure reading 2 and 3° for $17,000 would, because 30° 1000 pressure and pressure 4 to 6° high initially, the 1000 weight pressure

A number of grounds are urged for the reversal of the order. 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 mortgagee, unless it appears that the premises are inadequate security and that it is not inequitable to make the appointment. (Strauss v. Georgian Bldg. Corp., 261 Ill. App. 284, 288; Frank v. Siegel, 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 decree of foreclosure 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. 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.

REVERSED.

Scanlan and Gridley, JJ., concur.

A number of grounds are urged for the reversal of the order. 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 mortgagee, unless it appears that the premises are inadequate security and that it is not inequitable to make the appointment. (Gleason v. Sangamon Bldg. Ass'n, 261 Ill. App. 294, 298; Dunn v. Youmans, 224 Ill. 34, 39, 40.) 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. Kaplansky, 267 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 decree of foreclosure and sale, there will not be sufficient money realized from said sale to satisfy the indebtedness secured by the trust deed, and that upon such 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 $25,000. 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 20, 1933, appointing a receiver of the premises is reversed.

REVERSED.

Gridley and McSurely, JJ., concur.

36021

JOHN A. TAGGERT,
Plaintiff in Error,

v.

JOHN E. KILEY and
THERESA KILEY,
Defendants in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

268 I.A. 634

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error the complainant and cross-defendant, 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 want of equity;" (2) that the statement of claim for a mechanic's lien (No. 136,398), filed by Taggert in the office of the clerk of said 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 defendants and cross-complainants within 20 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 quitclaim in the name and stead of said complainant" (Taggert); and (4) that the costs of this suit, including the fees of the master to be

the cover of this work, including the face of the warrant to be the same one dated of such conveyance. (Continued) and (1) that purpose of executing and delivering said release or discharge in order to release to a mortgage in exchange of this note, for the time of said mortgage's time" and that in default thereof this instrument shall be void or cease to have in and to said premises by the entry of this decree, thereby releasing and quit-claiming all good to said defendants the above-described within 30 days from entire and clear of said lease or tenancy and leave a balance of indebtedness in the premises hereinbefore (3) that failure on the part of the said to vacate and surrender the said premises as aforesaid, then and in that event the Sheriff of Cook County is directed to put the said defendants out of said premises and put the complainant in possession thereof.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complainant recover of the defendants the costs of this suit.

Entered in Docket.

JOHN F. KIRST, Clerk.

Deputy.

Presented by

JOHN V. LYDECKER.

Solicitor for Complainant.

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." No 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 authorization 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, 1929, 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 complainant "the sum of 3% of the cost of the building upon the completion and approval of the drawings, and an additional sum of 2% to become due and payable 90 days from the

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 agreement" there is now due from defendants 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 doing 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 $9,000;" that on June 25, 1929, in accordance with the statute complainant caused to be filed in the office of the clerk 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 $9,000," 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 as follows:

"I hereby authorize you to prepare preliminary drawings for a fire-proof apartment hotel bldg., to be erected on my property at 331 N. Austin Blvd., Chicago."

Exhibit B, is a copy of the claimed "counter-proposition in writing." It is dated May 15, 1929, is addressed to John E. Kiley, is signed by complainant and is as follows:

"This is a verification of our telephone conversation, and your letter to me, dated May 11th, signed by you and Mrs. Kiley, authorizing me to proceed with drawings for an apartment hotel to be erected on your property at 331 No. Austin 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 90 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 satisfied 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, 1929, they were the owners in joint tenancy of the premises involved; allege that they are not advised except by the bill, and hence demand strict proof, that they gave to complainant the said "written authorization" of May 11, 1929, (Exhibit A) or that complainant prepared any plans, etc.; deny that on May 15, 1929, or at any other time, complainant made to them his so-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 plans and specifications mentioned; deny that defendants are indebted to complainant in the sum 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 erecting an 8-story building on the premises, that Murphy said that his friend, Taggert, an architect, "would

Typewriter" is a node on the system "computer-keyboard-system

make a thumb-nail sketch of the proposed building," for which no charge would be made, that thereafter Murphy took defendants to Taggert's office, where conversation was had as to the erection of a building of a certain type upon the premises and where defendants signed 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 erected on the premises, and that defendants also then signed, upon request of complainant and Murphy, an application for a loan; further allege that thereafter, about May 13, 1929, at defendants' home, complainant and Murphy presented to Theresa Kiley a certain paper, 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 complainant 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 premises; 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 impracticable and unwise and would involve defendants in financial difficulties;" that after they ascertained that defendants would not go ahead with said project they further conspired together to

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 allegations as in their answer, and praying that the statement of claim for mechanic's lien, filed by complainant in the clerk'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 K. 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 thereto. 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

report on July 28, 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 53½ 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 two-story frame dwelling house, then occupied by the Kileys as their home; that early in that month a building, known as the "Columbus Park Hotel," and located about 4 blocks east of the Kiley property, had been completed, and John M. Kiley, thinking that a similar building might to advantage be erected on his and his wife's property, went to examine the new hotel building. While 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 Murphy called at the Kiley home and saw both defendants, urged them to erect an apartment hotel on the property, said that it would be necessary to employ an architect to "prepare sketches and make preliminary 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 Murphy presented said "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 preliminary 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 complainant testified that shortly after this conference he on May 15, 1929, mailed to Kiley his "counter proposition in writing," set forth in his amended 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 building at a cost of $180,000; that on June 4, 1929, at

Murphy's solicitation, both defendants signed an instrument, designated as an "Application for Loan" (introduced in evidence), wherein they sought 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 Holzer 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 specifications were prepared by Taggert in connection with the above matter;" that the plans as prepared (exhibits 2 to 12) "were not complete plans, and a building such as proposed could not be constructed from said plans;" that the plans as prepared "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 plans or specifications covering the erection of a building such as was contemplated;" that no building ever was erected 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 clerk 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 $180,000, that claimant has completed all plans, specifications and blue prints required, and is ready and willing to proceed with the superintendence herein, and he therefore claims a lien for the sum of Nine Thousand ($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 now 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 cost 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. After 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 complainant for a reversal of the decree. They are in effect that the findings

and conclusions of the master or special commissioner are contrary to the evidence, and that the decree, following these findings and conclusions, is not sufficiently supported by the evidence or the law. After a careful consideration of the documentary evidence and of the testimony of the various witnesses, which is conflicting in some important particulars, we are of the opinion 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 ahead with 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 building; that such plans as were made by complainant and considered by the parties were incomplete, faulty and in violation of the zoning 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. And we think that the facts of the present case are somewhat similar to those in the case of Ehrenstein v. Howell, 227 Ill. pp. 215, where a decree allowing a lien for certain architect's services was reversed, and where in the opinion of the court it is said (p. 219): "We * * find that the services rendered by appellees 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 appellees were not used by appellant in the improvement of the lot, and no use was made of

of obligment in the endeavorment of the jote" and he was more of an improvement. The mysterious knocking of obligors were not what deployment with information sampling to show the possibilities of many instruments of the jote" but merely the limits of investment [illegible] "We + = find that the earliest knowledge of obligors were not for the heavens" and whose in the opinion of the court it is only (Pp. 123)} where a course offering = item for certain accountant's notation was it there in the case of Dunstable v. Dunstall 321 Ill. App. 119" and we state that the Terms of the present case are somewhat similar = item for its sake of making with privileged dwellers or obligors" the case considered is not needed to represent an examplification. Credit and it violations of the world Jones that some have developed in relations of accountant [illegible] plans and descriptions for the initiant that books. Certified plans and descriptions for the initiant that case contained accountant" either orally or in writing. In fact the accountant did not to cross the bookbook omitting of his interest that [illegible] that should be there with it and that other obligations that operation" also constituted the bookside book at the [illegible] business books putting on their books". In order that they might be delegated in Sierra Contingency accounts or elsewhere the [illegible] that it should exercise this accountable only one authorized that it should be fully delivered of the [illegible] and the jote. As mentioned [illegible] are individually assigned to the evidence" and in some important participants as are of the opinion that it of the evidence's principle of the evidence" which is completed [illegible] in fact misleading [illegible] to show the possibilities

them by appellant except in so far as they enabled him to determine the character of the improvement that the lot was capable of sustaining. The claim of appellees does not come within the terms of the statute. (See Cahill's Stat. 1929, chap. 82, sec. 1, pp. 1658-9.) The fact that appellees may be entitled to recover in an action at law for their services in preparing the sketches does 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. Bergmann, 255 Ill. App. 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 Crowen 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 Marsh v. Mick, 159 Ill. App. 393, 407, it is said: "Where a party seeking a lien knowingly and willfully claims more than his due, he forfeits his lien." (See, also, Christian v. Allee, 104 Ill. App. 177, 188.)

Our conclusion is that the decree of the circuit court of January 23, 1932, should be affirmed, and it is so ordered.

AFFIRMED.

Kerner, P. J., and Scanlan, J., concur.

Statut c. 7: 2: une demande 3: commune

Tammuz 32, 1892: should be "claimed" and it is not explored.

One conclusion to that the decree of the circuit court of

3AA, 1932.)

tenants his time." [Inv. 2pm: Compliance to Title 334 (1)- 1dbn-
awarded a time mentally and willfully elapses once time his time, be
Morgan v. Miles, 360 U.S. Abn. 1967, 69, it is said: "Upon a party
for this reason, also, the Supreme Courts has broadly entered. In
Farmington" and known to be much of contingency upon "Zed" and that
entered upon the property, that said claim for Zack was accepted and
circuit court on June 22, 1960) in connection with the evidence
Hyatsmel's enjoyment of title for five (five) with the study of the
factor of the claims, also considered the "interests of com-
mencing provisions from there in the Second case. See is not
66, but the Parts is that case not to be eliminated by Jackson
decision of one Supreme Court in the case of Thomas v. Bonds, 360 U.S.
for compliance. In ending a statement of the trial Thomas, when the
Mr. Justice," 113 Ga. 894. Such relations in Brown de Jennings
Notice of Building & Loan," 367 U.S. Ohn. 1967, 831, and Building
opinion and decisions of the first division of this court in the
that for short analysis in Rochester the situation does not exists
time to a municipal's Zion upon the Pleasure in Pennsylvania. And he
The fact that objective may be entitled to recover in an action of
the statute. [See Capitol's Corp. 2nd, made it was 1; Jan. 1966-c.]
training. The claim of obligations does not come within the terms of
the duration of the judgment that the Zed was entered at once
time be entered merely to be Zed on that mention Zack to extension

36034

MABLE G. BARKER, administratrix of Estate of Bertrand D. Barker, deceased,
Appellee,

v.

THE BELT RAILWAY COMPANY OF CHICAGO, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

263 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.

Plaintiff's declaration consisted of four counts, to 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

Dear Sir:

Enclosed please find check for $ [illegible] in payment of [illegible] for the Young Men's Association Lecture Course.

Yours truly,

[illegible]

Secretary.

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, Mable 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 a locomotive and train of cars along and upon its tracks at said place, without ringing a bell or sounding a whistle 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 highway, being a long distance behind the automobile which plaintiff's intestate was driving. Eugene Hulton, 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 Chester 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 nasal bones, numerous bruises and contusions of the forehead;

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. Knox, 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 crew 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 southerly 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 roadway was about forty-five (45) feet wide. It ran northeasterly and

was about forty-five (45) feet wide. It was approximately one

by 1pm. Corporal Dempsey was duly sworn, and the below recited

testimony of defendant's witnesses and the other evidence introduced

The following facts in dispute were disclosed from the

part, he was not a witness at the trial, as he had died prior thereto.

employed by defendant, was on duty on the night of the accident,

accident, both in the daytime and at night. The evening weather

prior. He had driven over the crossing 15 or 18 times prior to the

the trucks and the character thereof operated by the Company at that

defendant's employer the type of construction of the roadway over

junction to the completion of the new Boulevard he had discussed with

operator and location of defendant's trucks at and past the crossing

Highway Engineer of Cook County. He was well acquainted with the

character was good. He was and had been for several years Chief

Mathis's testimony was in parts old. His hearing and

after the accident were admitted in evidence.

Exhibits, who identified certain photographs of the place of

accident and surroundings, which photographs rather show that there

fit after witnesses testified for defendant, including a Sheri-

dan truckman and about 200 feet west of the crossing, testified that

the lighting was of medium intensity pointing on the most northerly

standing away of and not far from the crossing; and the railroad

track in the cap of the Locomotive at the freight train at the

Three employees were: The fireman, engineer and a member of the

regular crew of Pittsburgh's Locomotive, who are employees of defendant.

Three witnesses for the defendant testified for defendant.

Structure with sheet and locomotive of the train."

and that he was of the opinion that such "resulted from a small

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 director. 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. About 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 east 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 crossing 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 Boulevard 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;

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 director. 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. About 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 150 feet south of the tracks and east of the Boulevard there was a red lantern on a stand-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 crossing 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. The rays could be seen ahead for a distance of more than 500 feet. The watchman was at the crossing and in the Boulevard waving a red lantern.

Defendant's witness, Ferry, a superintendent for the Commonwealth Edison Co., testified he was driving his automobile northeasterly on the Boulevard at a speed of about 25 miles an hour;

that when he was about three blocks south of the crossing another automobile, which he afterwards learned was that which plaintiff's intestate was driving, passed him, going at a speed of about 45 miles an hour; that he did not then see any other automobiles travelling on the Boulevard; that when he was a block or two from the crossing he saw the headlight of the locomotive and the freight train approaching from the east; that when he arrived at the crossing the train was blocking the highway; that upon investigation he learned an accident had occurred; that he did not at first see any flagman; that after he had alighted from his car he saw a flagman come out through the standing train with a lantern in his hand; that as he was approaching the crossing he did not hear any locomotive 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 crossing, at first "turned around and started to go the other way;" but that "he came back with his car when he saw there was an accident."

Clarence Hauert, the fireman on the locomotive, 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 locomotive approached the Boulevard he noticed an automobile travelling northeasterly 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

of the front pilot beam" of the locomotive, when the locomotive was on the west side of the Boulevard; 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 locomotive and sitting on the north side of the cab, 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 collision; 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 crew 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 locomotive 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 oncoming locomotive; and that after the accident he went and saw the automobile "right near the pilot beam at the side of the locomotive." William N. Petersen, 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

that the automobile was kind of driving in between the pilot beam
qualified that after the accident he went to the scene thereof, and
Patterson, the "engine foreman" of the Illinois Central Railroad Co.,
near the pilot beam of the side of the locomotive. Illinois R.
and that after the accident he went and saw the automobile "right
was not relevant in the question of the operating locomotive
approach the crossing at a speed of about 60 miles an hour, which
and be the cause of it was unobstructed that in the automobile
last west of the Boulevard, testified that his view of the westbound
other locomotive standing on the most southerly track and about 200
man driven into the front pilot beam," and that the headlight of
the automobile "was about on the front pilot beam the evening
nearly otherwise be alighted from the only that he then noticed
cap of the locomotive at the time of the accident, testified that

Thomas Murray, a resident of the South Side and in the
bell ringing and that immediately ahead of the locomotive,
of the whistle," that shortly prior to this time he saw the automobile
first from the crossing, he noticed "the left and two short blasts
"westbound body" of his overall that when he was "about 200 or 300
fixtures showed to said that immediately thereafter he made an
that his first intimation of an impending collision was when his
right, that he did not see the automobile prior to the collision
first knew of the Boulevard he "saw the Illinois Central engine a rod
of the main side of the car," described that when he was about 40

Henry Stanton, the engineer on the locomotive and sitting
it (the automobile) "dragged out."

the automobile and pushed right completely the about 50 feet, when
was on the west side of the Boulevard, and that in that position
of the front pilot beam of the locomotive, when the locomotive

and the cylinder head."

Wesley Lapell, plaintiff's witness, testified on direct examination that he "saw the accident where Barker was injured and killed;" 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 crossing;" 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 away; 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 locomotive "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 streaming from the locomotive; that the crossing was dark and "was only lighted from the lights of the automobile (Knox'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 cross-examination of the witness that he was a considerable distance south of the crossing when the accident happened, and not in a position to

and the Ogilvie party."

observe all of the details thereof, as testified to on direct examination. Indeed, on his cross-examination, he testified: "I did not get to the scene of the accident until several minutes after it happened; when I got there I found that there had been a collision; I do not know how far back of the tracks I was when I stopped; the car ahead of me had stopped, and I coasted up to it, and then, when I seen it, I pulled over; * * the man in the automobile had hit the piston, where the arm goes in * *, on the side of the engine, - the drive shaft or whatever it is; * * when I arrived at the crossing after the accident, the automobile that collided with the train was facing west, about 30 feet west of the crossing; * * when I got up to the crossing, after the accident had happened, I did not see a watchman or flagman there; about five minutes afterwards a watchman came through between the freight cars * * carrying a lantern; * * that was the first time I had seen him; I had not looked for him before."

One of the contentions of counsel for defendant is that 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 details thereof, as testified to on direct examination. Indeed, on his cross-examination, he testified: "I did not get to the scene of the accident until several minutes after it happened; when I got there I found that there had been a collision; I do not know how far back of the tracks I was when I stopped; the car ahead of me had stopped, and I coasted up to it, and then, when I seen it, I pulled over; * * the man in the automobile had hit the piston, where the arm goes in * *, on the side of the engine, — the drive shaft or whatever it is; * * when I arrived at the crossing after the accident, the automobile that collided with the train was facing west, about 50 feet west of the crossing; * * when I got up to the crossing, after the accident had happened, I did not see a watchman or flagman there; about five minutes afterwards a watchman came through between the freight cars * * carrying a lantern; * * that was the first time I had seen him; I had not looked for him before."

One of the contentions of counsel for defendant is that 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 track or most southerly track there was no obstruction to his view of the oncoming train on the most northerly track. He should either

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 north, attempted to pass in front of the train, evidently misjudged its speed and the distance up to and across said northerly track, and propelled his automobile head-on against the side of the locomotive, resulting in such injuries to him as caused his death shortly thereafter.

The judgment of March 19, 1934, appealed from, should be reversed and the cause remanded. Such will be the order.

REVERSED AND REMANDED.

Kerner, P. J., and Scanlan, J., concur.

36101

LEWIS MEYERS,
Plaintiff and Appellee,

v.

MORRIS RIFKIN, JENNIE RIFKIN,
MORRIS DAVID EPSTEIN and
FANNIE EPSTEIN,
Defendants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

268 I.A. 634

LIBERTY TRUST & SAVINGS BANK,
a corporation, Garnishee,
An Appellant.

LOUIS TUCKER, Intervening Petitioner,
An Appellant.

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 Rifkin 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 September 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 amended 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

jury, during which two witnesses testified for Plaintiff and two
vening Petition." There was a hearing before the court without a
on the same day, At Reno at court, Tonia Tucker filed an "Inter-
Summitone. It filed its second answer on September 17, 1923, and
the fifth Trust & Savings Bank (hereinafter called the Bank), as
after the present Counterclaim petitioner were Institutes opening
At the Petition "as here pertained" on December 3, 1923, and there-
ney return. The execution issued on the Judgment was returned
turning to the Orleans Title & Trust Co., an attorney
shows upon its face that it is secured by a certain trust deed,
interest note for $130, due on the same day. The principal note
note for $4,000, due on September 1, 1923, and the other is a common
notes, each dated September 1, 1922. One is a principal Judgment
Elkin and wife and Marvin David Epstein and wife, on their two
confession for $4000 to be entered against the defendants, Morris

On November 3, 1923, Plaintiff caused a Judgment by

letters and said trust deed were introduced in evidence. The Bank, as garnishee, introduced a certain "Trust Agreement and Declaration 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 amended 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 Rifkin, Epstein and Tucker, a partnership 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 held to be partnership funds, that the garnishee 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

Joyners and said Hunt were introduced in evidence. The Hunt' on Exhibit 'Hunt -Document and Description of Trust' dated July 15, 1930' and known as Trust No. One'." No [illegible] in this trial relating to testimony," the Burke Mrs Booker' owned by said Pronounce jointly' and owning for the said jointly' (at which at the first meeting to [illegible] one "more deponent is cannot for a specific purpose of said Burke- and explained the petition and Brandon Exhibit in Trust No. One', the "Jane Booker et ville', Phenix and Trustee' a hereinafter counsel the Bonds attached with the said as "Pertinently Under", and the

In the interrogatory petition of Lewis Tucker he alleges that said trust.".

Dr Harris Pitts" to be held by it under the terms and conditions of its contract and possession ($20'.00' which was deposited with it since "it is trustee under Trust No. 8884' and that it must in the

[illegible] in the counter claim of the Bank." in particular, it appears and bankrupted by Tucker and the Bank."

(the Bank) on the finding- [illegible] claim was barred, although properly in hands of the Receiver" and ordered judgment against it Tucker, as to $1500' and for the plaintiff' as to $2000.00' as to 1928', the court found the issues "for the intervening claimant' Epperin and Tucker would hardly be entitled thereto. on March 19' his attorney, at the suggestion of the court, agreed that Pitts' intervened on behalf of Tucker' [illegible petition]" stating that Tucker' evidence was introduced by the Bank' and no evidence was

stated in substance that plaintiff owned 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 N. 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 (title 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 $5, total $786.25.

You will please advise the Meitman Trust Co. that you are holding the above sum to be forwarded to them, subject to the above instructions."

Plaintiff's attorney also introduced in evidence, as Plaintiff'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

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 mortgage trust deed, executed by the defendants, dated September 1, 1926, and duly recorded, also was introduced in evidence, as Plaintiff's Exhibit 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 mortgage; 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 Bank; 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 extension; that he (the witness) stated that the funds deposited were not sufficient, that there were 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 plaintiff would not agree to any extension of the mortgage unless the unpaid taxes were satisfied, all due interest paid and the Heitman Co. would agree to continue their said guaranty; that Epstein said he would talk to Rifkin; 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.

to do.

A. M. Miller, plaintiff's witness, an assistant to Levinson in the Bank, testified in substance that the $786.25 was left with the Bank by Rifkin; 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 No. 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. Levinson, its vice president. It is a mere naked 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 Epstein - 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 premises, 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 Bank "will deal with said real estate only when authorized to do so in writing, and that it will * * on the direction of Rifkin, Epstein and Tucker, * * make deeds for, or otherwise deal with the title to said real estate," * *; that "the beneficiary or beneficiaries hereunder shall have the

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 assessments or in respect to insurance, litigation or otherwise, except on written 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:

"MR. LUSTER: (Attorney for the Intervening Petitioner.) I have Messrs. 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 $280 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.

MR. AKERMAN (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

not applies to Continuously" (2) when after it appears that the of the mortgage "use a stamp that is free of the Bolsmen Co." and disputed to the Eriksen Trust Co." upon its presenting an expression in anywhere (1) what the monies deposited with the Bank, to be court exits it asserts the Debtors herein the creditor whose

Counsel for the two applicants have contend that the Debtors is first where mentioned continued.

It rather reiterate all important the trading and

the first of them was the Debt "first".

on the chart, they would hereby in those Cases, but I am not aware was planned by Parke.

B. " [illegible the Operation]. I mean, it ground

Debtor's Lawyer Eriksen Eriksen Eriksen" and the Debtors because be exactly into to exist be employee the land the trade from the Debtors, and that be was short side of the mining it first on the Debtors street.

Mr. Eriksen: They will really that Debtor was retaining be and Debtors counsel will there that they really what and I would like to put them on the stand.

The Court: Make a statement as to what they will testify to.

Mr. Eriksen: Yeah, I have the Debtor will really what he is going to testify to and I would like to put them on the stand.

"B." Eriksen: (Interrupting the the interrupting Christopher.)

the Debtors counsel.

Under the Instruction of Attorney of the First Chairman, have an old Eriksen counsel in this court."

sign the one at 12 o'clock the Debtor will there they is," Eriksen to conclude this issue and in Debtor cities Documents the non at Eriksen instrument," and that the Bank "shall receive for its services in after the Debtors to its of all money documents in court any suit or otherwise" except by written direction or instructions received," and Debtors of these or accounts on it Corpus to Insurance," Litigation in the documents or counsel of said Eriksen or in reboot to the Debtor," and said trustee shall be called upon to do anything Debtor the texts thereof and the Debtors Attorney of any notice of said Debtor's counsel, one the Debtor," as put on the right," shall documents of said Eriksen and counsel of the matter," reading and

Heitman 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, Rifkin, Epstein 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 Rifkin, Epstein 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 "partnership." (Cahill's Stat. 1931, sub-sections 2 and 3 of Section 7 of the Uniform Act relating to partnerships, Chap. 106-a, p. 2134.) Nor 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 Heitman Co., so as to prevent a garnishment proceeding as against the fund. (See, Kelsay v. Taylor, 56 Oregon 13, 18; Commercial Nat. Bank v. Kirkwood, 172 Ill. 565, 569.) And when the negotiations as to the proposed extension of the mortgage failed and ceased, 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 Tucker, in his intervening petition, 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

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 practice (Glover v. Wells, 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, $686.25, to plaintiff.

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 so ordered.

AFFIRMED.

Kerner, P. J., and Scanlan, J., concur.

36070

MYRTLE KUDER SPEYER,
conservatrix of the estate
of ANNA KUDER, Insane,
Appellant,

v.

LILLIAN GERISCHER and
JOHN GERISCHER,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

268 I.A. 635

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action of the 4th class in the Municipal 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 appointed conservatrix of the estate of Anna Kuder, insane, and that there is due to said estate from defendants the sum of $525 for rent for the premises at 5313 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 reasonable rental value of said premises for said period of time so occupied, that the fair and reasonable 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

[illegible]

[illegible], Conservatrix of the estate of [illegible], Insane, Appellant,

v.

[illegible] and JOHN [illegible], Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

268 I.A. 635

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action of the 4th class in the municipal 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 appointed conservatrix of the estate of [illegible], Insane, and that there is due to said estate from defendants the sum of $[illegible] for rent for the premises at [illegible] avenue, Chicago, from December 1, 1927, to August [illegible], at a rental of $[illegible] a month; that defendants occupied said premises for the said time and agreed to pay therefor the sum of $[illegible] 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 reasonable rental value of said premises for said period of time so occupied, that the fair and reasonable rental value of the premises was $[illegible] 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

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; deny that they agreed to pay for the occupation of the said premises the sum of $25 a month or any other sum; "state the fact to be that they occupied the premises above described for the period from December 1, 1927, to August 31, 1929, under an oral agreement with plaintiff whereby plaintiff employed defendants as care-takers to occupy and care for the premises, * * * 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; deny that the fair and reasonable value of said premises was $25 per month; deny that plaintiff has been damaged in the sum of $525 or any other sum."

The evidence shows that Anna Kuder was adjudged insane on December 2, 1915, and that she had been incarcerated in the Elgin State Hospital for the insane 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 Kuder Speyer individually could have made no binding contract with

Minor checks indistinctly could have made no pinning contract with me and cancellation from December 1, 1937, to August 31, 1938. Write to find position until May 30, 1937, and on the unit in promote the enforcement. It will be noted that the conservatrix was not appointed to take care of land in addition that made more to be paid $10 a month as rent for the said premises) that stay agreed to pay the rent for the said premises from the sum of $100 or any other sum due to the said estate from then the sum of $100 or any other sum The defendants, in their affidavit of merits, deny that they in damage of plaintiff' an conservatrix' ede', in the sum of $500',

defendants, and it is hardly necessary to state that Anna Kuder 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 defendants agreed to pay rental for the premises, and the trial court found for the defendants upon the assumption that it was necessary for the plaintiff to prove such an agreement. Such is not the law. "On proof of ownership of plaintiff and occupation by defendant, 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 Ill. 99, 105.) In the Walsh case the court also called attention to the fact that under section 1, ch. 80, Cahill's Ill. Rev. St., 1931, "the owner of lands * * * may sue for and recover rent therefor, or a fair and reasonable satisfaction for the use and occupation thereof * * *. Second - When lands are held and occupied by any person without any special agreement for rent." (See also Jackson v. Hester, 201 Ill. App. 29, 31; Lurie v. Brewer, 240 Ill. App. 525, and cases cited therein.) The trial court, in making his finding, seems also to have been influenced somewhat by the fact that the amended 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 reasonable rental value of said premises, and that as plaintiff had failed to prove any agreement her case failed. The court erred 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 evidence makes it. (See Chicago, T. T. & P. R. Co.

claim in what the evidence means it." (See Ohio Nat'l L. & T. Co. v. Ft. Dearborn Realty Corp. of Chicago, in which no pleadings are required, the court acted in no hedging. In this is a forum clause in the et plentiful bed fodder is there any shortage. The Bar the fair and reasonable notary value of said premises, and that of $250 a month, and that it further alleges that defendants current in amount of said rental to the plaintiff, to pay the sum seems also to have been influenced somewhat by the fact that the case and cases cited therein.) The first count, in making its findings Interstate Nat III., 2de 27, 111 Cir. L. & T. Co. v. Ferry, 238 Ill. App. 548, 550; Bennett v. Dearborn Realty Corp. of Chicago, * * *. Second - When Lands are held and occupied by any at a fair and reasonable rental/ation for the use and enjoyment 1922, "the owner of Lands * * * may sue for and recover rent thereof" to the fact that under section 1, ch. 80, Smith's Ill. Rev. St. 1929 Ill., 69, 3308.) In the Lands case the court also cited with/with and cases cited therein: Chapman v. Chapman, 345 Ill., 1ab. 49, 47, and cases also showing that the contract was to be mutual ones." (Brief & Abs. p. 7.) contract," unless an agreement is proven to exist between the parties justified in issuing the writ/order for the time of such insolvency of plaintiff and occupation by defendant, the cause is to have only an interest. Such is not the law. "In favor of bringing/ does the Declaration imply it was necessary for the Plaintiff both respect for the Premises, and the writ cannot issue for the plaintiff's benefit. Plaintiff is not here shown that defendants entered to be protected, for as to notice all of the conditions relied on will not

In the like case no such notice of this object is will not

v. North American C. S. Co., 244 Ill. App. 522, 533; Brunner v. Grand Trunk Western Ry. Co., 319 Ill. 421, 425; Lurie v. Brewer, 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 conservatrix 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 Kuder, and that the husband therefore was disqualified from testifying in the cause. As 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 Ewing v. Cox, 158 Ill. App. 25, 26, the court said: "Where witnesses have been excluded from the court room while other witnesses are testifying, and a witness disobeys 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 disobeys an order of the court he may be proceeded against for contempt but he is not disqualified from testifying; a litigant not a party to such violation of a rule should not be punished by being deprived of the evidence of the witness and be cast in a law suit because of an innocent violation of a rule of court, which the party did not know was being violated and of which rule the witness had no knowledge. Kota v. People, 136 Ill. 655; Sullivan v. People, 93 Ill. 384; Row v. People, 160 Ill. 438; Palmer v. People, 112 Ill. App. 627; 3 Enc. Evi. 240." (See also Smith v. Dubois, 198 Ill. App. 563.) In view of the fact that the real

plaintiff in the case was an insane 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 theretofore 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 Myrtle Kuder Speyer was appointed conservatrix of the estate of Anna Kuder, 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 Myrtle Kuder Speyer individually had no interest in the claim. The argument of defendants that a recovery in the instant case would swell the assets of the estate and increase the commission of the conservatrix and that therefore she was interested in the claim and her husband disqualified, is without the slightest 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.

36119

EMMA GIOVACCHINI,
Appellee,

v.

KLEIN BROS. CORPORATION,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

268 I.A. 635

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Emma 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 $7,500. 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 Halsted 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 soap 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

its duty in the premises, carelessly and negligently permitted the floor of said aisle 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 aisle, she slipped and fell upon the floor of said aisle 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. When she was eighteen months old she became 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 knee up." Plaintiff, in 1927, while still wearing the appliance, had an infection in the foot of her left leg, due to the infantile paralysis. "There were atrophic sores below the knee." It then became necessary to amputate 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 waist 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 walked. 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.

use of the multiplot Tag. Symbolic used a case when one wanted a blank' which was more convenient in the training manual of the multiplot Tag a second description was declared as the Symbolic Notion. Thereby allow Symbolic commands to function to the multiplot Tag. This multiplot Tag beat we the Tag's major work "resume the stack of the Tag" was more than we of a Tag means of a Tag was by which Tagboard to transform into which the stack of Symbolic's Tag was blank' and made an multiplot Tag. This Tag was Data in Description of a Instead become accustomed to manipulate the Tag of the Name' and therefore Description an Instruction in the Tag of the Tag's Tag' one to the Multiple Name on. Symbolic' is Tag' other until accessed the existence' mentions. "It was another from the Name down time it was Tags the Tag and Zero Beat of the Time' Pointer of the division' Pointer "multiplot Application" on Tag Tag's to another Tag to Beg Name' Multiple Description and be a concatenate the are completed to Name or the. Once the new eighteen number by the Pointer allotment with

Symbolic' is the size of the multiple' an Stack Data

Division of Tag'100'. Interface Pointer the Boundary Items.

left down the items of this write and the Pointer' to the example of and the write Symbolic was multiple stand main check' the Tables and and the until Pointer's Tag a reason of the multiplication and multiplexed of declaration the existing of machine were would not Pointer been considered Pointer' and Pointer Name' been known' more major more maximum to Symbolic' and Pointer Name may known to declaration' as Pointer the successor of successful case Name' filtered and dependent' 227 of which Tables and statement Pointer of next steps in items of said much amount to be and pointer data Tag in the Business' completely and modification Description the

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, soap, and it was chiefly unwrapped soap in bulk. This soap from the handling by customers and sales people, shed such considerable quantities of its dust * * * that part of this dust escaped from the soap on the table and reached the floor alongside it; * * * that it had so long maintained that method of displaying and handling its soap 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 sooner or later produce a condition of danger, threatening dangerous slipping for its patrons passing over that aisle in front of the soap table; * * * that the defendant from its upwards of 20 years' use of that method of handling soap 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 smooth white and worn floor in front of the table was slippery by reason of the presence on it of soap 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 soap 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

Ivanovna has never even thought much thereof in relation
with the Ivans' but that the Ivan' may really be Leonov of Bar
common to Ivit be such condition of the Ivan' and they the did not
and on the Ivans or the time of the acceptor' that Plotnyitl men may
ima-cone' Peter city' that written each ever has not after Napoleon
in the Ivit after wrote common the Italian manuscript of.' Statement
Plotnyitl written on it and Ivit' Ben Ivit ink operation the Ivan
and ultimate pl account of the Because an it of hand many' and the
in direction the among wrote not anon Ivan in Ivans of the Ivgin
anon name of the Because in with and Ivit' they on the another
speaking of each many on on the write dance-in Ivan wrote night
Ingiyi on Bronnaiian notice and incorporate that there are comment
the chanal of by Jacob' and on last number of Ivanitsk each Ben
cycle in there of the hand report . . . that the treatment them
Chekmarevich syndicate written the its Between Bennet ever the'
under Ivan and common of. Ivan Because a commission of conduct'
Bits on night Ivan are Ivgin it nearly superior Ivit on the white
hand of that Democratic that and that it are Between to Ivan that
Plotnyitl and Ivanitsk the hand that it are Between to Ivan that
etcommune rit . . . that is Ben we Ivan mutation-that and nature of
them according from the hand on the Ivgin and Ivanov the Ivan
most temperature communities of the that . . . that Ben of the
Ivit hand Ivan the Ivanitsk of national the Ivgin hand' why
the contained' under it are epistle communication hand to only'
Plotnyitl' for Because of Because hand Ivanov Ivitsken to this Ivgin the
Ivit" Ben I Because Ben hk neighe on it".

Ivgin Ivan a Ivanov to national Ivanovna to national Ivan' a Ivitsk
va the Ivanitsk! Ivan Ivan a Ivanov to national Ivanovna a Ivitsk

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 analyzing 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 made 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.

Korner, P. J., and Gridley, J., concur.

Kramer: "Is you crazy?" cousin

HOLDING THE INVISIBLE

examined and the scene is recorded.

The Defendant of the Theatre could not deny simply to
influence, although he avoided in another into?"

commonly indicated that the defense had intimated" an attempted to
fix physic evidence. There apparently exists in this state the
for physical made indecent and beautiful expression to the Jury in

Redirect examination, and not without force, that counsel
is itself, constitute assertable error.

One in question" made without fault on the part of counsel" mouth,
Another was not successful to many paid that a statement Like the
state's physical's bond was necessarily after the counsel of the
verdict. Counsel" is do not mean to indicate that on an ordinary
question of defendant that the mentioned influenced the jury in its
in view of the rights of the evidence, there is force in the con-
ent had no reason to object that he might do so" misconstrue"
physical did not intend that the attempt" to the evidence
indicate of objection. Still is as willful that counsel in
back of the fact that material not immune defining the
Taylor's counsel, the alleged made a statement into injured the

During the examination of a witness the physical by the
opinion in evidence.

Again that modified and commented also the facts and circum-
in a motivation was. In the mind may be like again an intended
sentence, as pay pass there is the accordion that like material
of all the evidence that pause then manner and cause of the
the multiple weight of the evidence. Upon a pointmaking study
been when only time.

Also that no time of this remove it will be necessary for me is
of the conversation that a man should be mended, put in the

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. 635

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. 8486. Ag. No. 17.

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

Supreme Court of Illinois.

HENRY DOLL,
Appellee,
vs.
CHARLES HAAS, and
ANDREW HAAS,
Appellants.
Appeal from the
Circuit Court of
Stephenson County.

MR. ---.

Henry 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 pumitting their cows, which were known to them at that time to be diseased, to mingle with the cows of the

The counts are similar in substance and charge that on March 1st, 1902, and for a period of two years thereafter, the appellee was a tenant of appellants' under and pursuant to a certain lease, whereby, among other things, it was agreed between them that said tenant should furnish sufficient cattle to properly stock said farm; that the stock furnished by each party should be of equal value. The counts charge that appellee owned and possessed twenty-four milk cows and heifers, among

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', contagious 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."

consumption, and entirely unobjectionable."

part-skimmed milk, blotted, bloody and impure milk, not fit for human

The disease in general terms being one cause of im-

case is also known and referred to as inflammation of the

udder." contagious and infectious mastitis; that said dis-

to as 'garget'; also commonly known and referred so as

appellee's cattle is sometimes known and defined and referred

disease, clumsy, ill-defined, or lingering

a bill of particulars was filed in substance as follows: "The

appellants to this order of the court. On motion of the appellants

pulsed by the court. Proper exceptions were preserved by the

defendants filed a general demurrer, which demurrer was over-

Do each of these counts of the declaration the

fendant, whereby the appellee has sustained damages to the amount

of $10,000.00.

amount of the appellants, the cattle of the appellee were in-

the appellee; that because of said negligent, willful and wanton

fected cattle owned by them to mix with the healthy cattle of

facts did knowingly, wantonly and negligently permit said in-

the statutory exempted the facts from the appellee; that appel-

lands in said town or in the cattle of the appellants, but, on

of the appellants told appellee of the existence of said disease

herd, in said cattle owned by the appellants; that neither

the appellee did not know of said disease germ in said cow

that the test 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 said cows from infections or contagious disease;

and health and free from infectious and contagious diseases;

electric tester of cows which were not then and there, sound

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 numercus 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.

The appellee introduced evidence tending to show that soon after he had moved onto the premises and the cows 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 case. The evidence in support of the allegation that the defendants, or either of

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 $139.00 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., 321; 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

'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 medicine and the medicine was never used for anything except as a tonic for their cattle. During all this 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.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and 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, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

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.

10

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8497. Ag. 8

IN THE

APPELLATE COURT OF ILLINOIS.

SECOND DISTRICT.

February Term, A. D., 1932.

C. R. HEDRICK, Appellee,	)	
vs.	)	Appeal from Circuit Court, Peoria County.
W. W. MERCER, Appellant.	)	

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 C. 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

IN THE

SUPREME COURT OF JUSTICE.

[illegible] Term.

[illegible],

Appellee;

vs.

[illegible],

Appellant.

Appeal from
Olmsuit County;
Peoria County.

NOTES ** [illegible] J.

C. W. Hedrick started suit in a Justice of the Peace court in Peoria County against [illegible], 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 8th, 1907, in the City of Peoria, Illinois.

At the trial of the cause before the Justice of the Peace, Hedrick recovered damages against Mercer for the sum of $247.80. 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 $247.80. 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 C. W. Hedrick, appellee, which was being driven by his son, and the automobile owned and driven by the [illegible], W. W. Mercer. The collision occurred on the

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

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.

The 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 Madison 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.

supported by a number of
witnesses.

The appellant claims that he was driving on the right
side of the street going south; that he approached the 2800
block of Madison street he noticed the dim lights of a car parked
in the 2800 block on North Madison street in front of the first
store north of Vine street; that he noticed a car approaching
Vine street, which was appellee's car, being driven west
on Madison street; that he was
proceeding at least thirty miles an hour when he first saw it;
that as the car of appellee approached the corner
come within a distance of eight or ten feet of the same, then
the feet of the parked car and was traveling at about 30 miles
per hour; that he attempted to increase the speed of his car to
avoid a collision, but the cars came together with
full force and violence. There is evidence in the record
sufficient to support the conclusion of 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 Company 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

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.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and 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, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

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:

No. 8504 Ag. No. 11

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

At the time the court gave this instruction, the defendant

the jury to find the issues in favor of the plaintiff and assess

per damages at $[illegible].

[illegible]

[illegible]

[illegible]

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 peremptorily 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 weigh the 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 Ill. 581; Lake Shore Ry Co. vs. Richards 152 Ill. 72.

The defendant in errore 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 furthe r 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."

in the separate count of book account, limited
one claim, his claim should be filed as the statute provides,
which cannot be done; and for the further reason that if he has
a meritorious defense which the plaintiff claims in this case,
there's reason that it is an attempt to set forth the claim
and made in the examination by counsel. We object for the
witness in his place and sufficient consideration of the state-
ment, that is any part of it, for the reason here
in failure: "Now, your honor, we object to the introduction of
the items in evidence the defendant in error put her objection
and exception to the ruling of the [illegible].

It is first urged that the court erred in directing
verdict in favor of the plaintiff as there was
evidence there to 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 in-
ference which may be deduced from it, tends to support the
contention of plaintiff's case, the court should not peremptorily
instruct the jury to find for the plaintiff, or the defendant.
When the evidence is conflicting on the question as to which one
more credible, it is a question for a jury. It is not within
the province of the judge to weigh the evidence and ascertain
where the weight is. Peremptory instructions should be given
only when a question of fact is not involved. [illegible] Oregon
Oregon vs. [illegible] 181 211. Bell; Lake Shore Ry. vs.
Michigan 181 111. 73.

The defendant in error contends that this is the [illegible]
one claim that was an equitable defense to the action by
plaintiff for claim. The defendant then, 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
in failure: "Now, your honor, we object to the introduction of
this book as evidence, or any part of it, for the reason here
the witness in his place and sufficient consideration of the state-
ment, that is any part of it, for the reason here
should be received, but it is [illegible] of all
those points is not necessary if a proper pleading of the case

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

that the judgment should be reversed." Wenona Coal Co., vs. Holmquist, 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 in 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.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and 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, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

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:

No. 8508. Ag. 14.

IN THE

APPELLATE COURT OF ILLINOIS

Second District.

May Term, A. D., 1932.

BELVIDERE NATIONAL BANK of BELVIDERE, N. J., Appellant, vs. KARL ZEPP, Appellee.	)	Appeal from the County Court of Peoria County.

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 National Bank), and that the defendant promised the plaintiff to pay said sum of money, according to the tenor and effect of said trade acceptance.

In the

Supreme Court of Victoria.

New Term, A. D., 1920.

DELVALDEMO MAIN HAL BANK
of DELVALDEMO, N. J.,

Appellant,

vs.

KENT KEMP,

Respondent.

Appeal from the
County Court.

This is a suit in assumpsit brought by the appellant, Delvaldemo National Bank of Delvaldemo, N. J., against the appellee Kent Kemp, in the County Court of Peoria County, to the February term, 1920.

The amended declaration alleges that on April 20, 1920, the Asbestos Products Corporation made its certain draft or trade acceptance, and thereby requested the defendant (next page)

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, a nd 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

National Bank, which stated that the demand of the plaintiff is for $420.00, 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 theplaintiff 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 Corporation 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 said 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 ob-

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.

"3. Said plea is in substance the same as plea filed by the defendant on June 27, 1951, to which the Court has already sustained a demurrer.

"4. The alleged fraud, device, trick or circumvention 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

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

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.

There is another reason why the demurrer should have been sustained to this plea, and that is, that the facts set 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., Railroad 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.' -- Kopf vs. Yordy, 200 Ill., 409.--

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.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and 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, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

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

13

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

No. 8018 P. IV.

IN CAR

AFFIDAVIT BEFORE J. P. [illegible]

DECIDED [illegible]

May Term, A. D., 1898.

MARY PRUDENTY CARSWELL, Administratrix of the Estate of Corrine May Shelton, deceased,

vs.

CITY OF PEORIA, a municipal corporation, Appellee.

Appeal from the [illegible] of Peoria County.

NOTE ** P. 4.

The appellee as administratrix of the estate of Corrine May Shelton, deceased, averred 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, 1898. 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 returned a verdict in favor of the appellee for the sum of $8500.00. Judgment was entered upon the verdict for $8500.00, and the City of Peoria brings the case to this court for review.

Corrine May Shelton was riding in the autom[illegible] with her sister when she was injured on February 27, 1898. She had been invited to ride as a guest by her sister Mrs. [illegible] the car. The deceased was sitting on the right-hand side of the [illegible] mobile in the front seat as it was being driven along Adams 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 street-car 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

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 Ill., 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

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

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 th at 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.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and 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, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

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:

No. 8523. Ag. No. 20.

IN THE

APPELLATE COURT OF ILLINOIS.

SECOND DISTRICT

May Term, A. D., 1932.

IN RE: THE ESTATE OF IRVING 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 be 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 Cassingham, 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 duly 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

In the

Appellate Court of Illinois.

[illegible]

[illegible], A. D., 1[illegible].

In re: Last Will and Testament of) Appeal from the
[illegible]) Circuit Court of
[illegible], Deceased.) [illegible] County.

NOLAN: ** p. 2.

This cause involves the question of whether or

petitions praying to have the wills of the deceased admitted to probate.

Irving T. Cassingham died July 2, 1931, at the St. Francis Hospital in Macomb, Illinois, of pernicious anemia. He 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 admit 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 time, 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

petitions praying to have the will of the deceased admitted to
probate.

Irving E. Cass/Hughes died July 8, 1951, at the
St. Francis Hospital in Leeward, Illinois, of pernicious anemia.
He first entered the hospital April 17, 1951, 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 Cass/Hughes the sole
heirs at law were his brother and three sisters. On December 22,
1950, he executed the instrument as his will which has been pro-
bated in this proceeding. There is no question as to the legality
of this will, unless the probating of the same has been super-
seded and set aside by the later instrument, dated June 30, 1951,
which is sought to be probated in this proceeding. The Court
refused to admit 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 entitle him, under the law of
the State of Illinois, to make a will. It is 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 time, 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
later 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, 1951. That the deceased had been at the [illegible] on
some time in April [illegible]

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 mentality 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 30, 1931. No 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 Nora Downs, subscribing witnesses to

condition at the time of the execution of the instrument bearing date of June 30, 1881, there can be no doubt.

On June 30, 1881, Mrs Baker and other relatives were at the hospital. Some of these parties called an attorney by the name of Quiggaby to come to the hospital with a view of having a will executed by Irving K. Cassingham. Nobody save Quiggaby who called him, but from what is disclosed by the record, apparently it was one of his aides. Mr. Quiggaby, 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 execute and duly execute a will. He conversed with him, or endeavored to, and received the conclusion that Mr. Cassingham did not possess sufficient mentality 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 returned to as the nurses, but whether they were doing nursing work at the time of the execution of the will it is not known. 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 30, 1881. No solicitation claims to have been made on the instrument to be the will in question. The witnessed simply subscribed their names by [illegible]. Quiggaby then left.

Mary Dowd and Nora Dowd, subscribing witnesses to the will, signed his mark with the assistance of Mr. Quiggaby.

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 testator 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

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 30, 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.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and 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, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

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. 63

15

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:

General No. 8505 Agenda No. 12

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.

General No. [illegible] Agenda No. [illegible]

In the Appellate Court of Illinois

Second District

[illegible] Term, A.D. [illegible]

Theodore Goldsmith, et al

(Complainants) Appellees,

vs.

Jane Lewis, et al

(Defendants) Appellants,

Interlocutory Appeal from the Circuit Court Lake County

[illegible], J:

This is an appeal by Jane Lewis, 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, 1951 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 affected 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, 1951 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.

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

took place occurred in open court in a proceeding in which the no sufficient showing has been made," etc., thus that whatever [illegible] etc.," and avers that [illegible] decree also recites "the solicitation for the defendant," Jane Doe, statement that no evidence was received by the court. The matter the recitals in the decree can be contravened by the findings of the trial court expressed in the decree entered and "testimony and facts in support of said petition." Neither petition, verified amended petition and second amended petition said cause was heard upon the bill of complaint, the verified evidence was taken. By the said decree it is recited that the applicant asserts that none could be filed because she acts no certificate of evidence is filed in this cause and facts presented to it.

The decree entered herein by the court recites the various findings of fact as made by the trial court from the testimony of the petitions.

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.

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 applicant asserts that none could be filed because she acts 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 matter the recitals in the decree can be contravened by the findings of the trial court expressed in the decree entered statement that no evidence was received by the court. The decree also recites "the solicitation for the defendant," Jane Doe, no sufficient showing has been made," etc., thus that whatever took place occurred in open court in a proceeding in which the

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 Ill. 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

Under the circumstances the findings of fact contained
the finding."

evidence record and not preserved was sufficient to authorize
evidence is not fully preserved, it will be presumed that the
the record, and time prompt before the court. Where the
unless all of the evidence heard on the trial is preserved in
and recited in the decree, the finding can not be traversed
base by the court said "where the facts are found by the court,

Again, in the case of Allen vs. Perkins, 130 Ill. 82
sufficient evidence to warrant and sustain the finding."
heard by the trial court, it must be presumed that there was
In the absence of a certificate preserving all of the evidence
that the findings were warranted by the proofs heard by the court.
of exceptions or certificate of evidence, it will be presumed
in the decree justify its rendition. In the absence of a bill
with other facts on which it is based. The facts thus found
executed the note and mortgage, and finds that fact, together
The decree recites that John Brown was of sound mind when he

In passing upon the question the court will "look only
in the decree can not be contradicted or overcome by the clerk's
certificate that there is no report of the Master in the file.

having been made by the master.
the proof taken and reported by the master in chancery to this
court; and testimony heard in open court" it was contended
where the decree entered in the case recited that the said
cause was heard upon the bill, answers, replications and "also

In the case of Brown vs. Miner, 123 Ill. 148, page 158
ing from the evidence.
cerning findings from the evidence stated.

The chancellor the recitals of the decree are to be taken as
tified in such decree, should have been presented herein and in
the motion record of such proceeding. If other than is set-
ment, if not properly presented, was recognized by counsel

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.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and 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, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

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. 637

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 Railway 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-

In the
SUPREME COURT OF ILLINOIS
Second District

January Term, A.D. 1922.

Docketed No. 8848 Lands 72

CHARLES DOYLE,

Appellee

vs.

CHICAGO & NORTHWESTERN
RAILWAY COMPANY,

Appellant

Appeal from the Circuit
Court of Lake County.

MR. [illegible]:

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.

REVERSED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois. and 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, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

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.

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

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 taxing 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

Defendants in error.

JAMES SIMPSON, et al,

vs.

Error to the District Court of Knox County.

Plaintiff in error,

J. [illegible],

Dec. 20, 1902.

Opinion [illegible]

Delivered June [illegible], 1903.

Error from the District Court of Knox County.

Before Judges [illegible].

[illegible], J:

This suit is in which by reason of a writ of error duly issued by the plaintiff in error, directed to the District Court of Knox County, to reverse a decree of that court rendered [illegible], 1902, dismissing plaintiff's in error bill for want of equity and taxing the costs against her.

The record discloses that the plaintiff in error filed her bill in the District Court of Knox County against James Simpson, J. F. Taylor, J. J. Nolan, Ben B. Beard, B. K. Burr, the Gainsburg National Bank and T. K. 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 occasions in a corporation alleged to have been organized under the laws of South Dakota, and in which it was charged it was organized for fraudulent purposes. 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 [illegible] or Blue Sky Law. It is alleged [illegible] the plaintiff in error paid [illegible] of stock on [illegible], 1901; that she made purchases [illegible], 1902, and on September 5th, 1902, she purchased [illegible] stock, all of which purchases were induced by fraudulent representations made by defendants in error E. B. Taylor and James Simpson. The fraudulent

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

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 Dakota 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

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 conclusively 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, 1917. The evidence shows that the plaintiff in error was one of the original subscribing stockholders of The Sheridan County Land Company and

that she signed the proposal with other subscribing stockholders for 200 shares.

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 Sanitary Manufacturing 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.

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 ignorance 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

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-

that it was given in payment of a 30% assessment against her subscription for 800 shares. At the same time Taylor as secretary-treasurer gave her a receipt for this money which recited that it was in payment of a 30% 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 1st, 1907, 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 30%. At this time she put up six notes of other persons as collateral security; on the note was endorsed a notation signed by W.B. Taylor, secretary-treasurer, that it was given in payment of a 30% assessment against her subscription by Taylor were not only sufficient to constitute fraud but they become 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 30 to 50 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 we are inclined though to make reference to the statements.

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 shareholders paid or not was immaterial to her and no defense to the notice on her subscription.

It is shown by the record that on July 20th, 1917, plaintiff in error gave to Taylor, secretary-treasurer, her check for $4,

scription 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

committee was appointed to investigate property in Chicago which had been offered in exchange for land belonging to the company; and also, the president was authorized to arrange with Geiger for an audit. At this time Luchsinger talked with Simpson 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 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 Ash, 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,

"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 successor 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 Exhibit "A", and by reference 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 Will alleges, and of course by such allegation admits, the
entry by the city county of Alton of a "pretended decree" appoint-
ing Tate as successor to said Cooper in said trust. A pleading
charges in a decree essentially as plain facts exist, and the
complainant having admitted the entry of such decree, the Court
was clearly upon him to show that such decree was invalid, an
unnecessary, a pretense." In view of this rule the plaintiff in
error having designated The Brenham 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 in reality a pretense. Furthermore,
plaintiff in error in addition to designating in her bill the
supposed corporation as a "pretended corporation" also alleged "that the
aforesaid 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 Exhibit "A", and by reference
made a part hereof." In addition to these allegations plaintiff
in error introduced in evidence as Exhibit "2" articles of in-
corporation of The Brenham 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 incumbent upon her to prove
there was no corporation known as The Brenham County Land Company
organized under the laws of South Dakota. We are not impressed to
say that she has made such proof.

It is urged that the evidence shows that the Underwood National
Bank was not the owner of the Plaintiff's in error note at the time
it took judgment on the note in the District 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 fraud,
representations, against the defendants in error with whom she dealt

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 the 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 Cartage Co. vs G.T.R. Co., 162 Ill. App. 448-452.

In Nolan vs. Bates, 268 Ill. 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.

at the time the proceeds for the check in question, she will
likewise fail as to the Gotham Savings Bank being liable.
In other words, if the plaintiff in error has failed to prove
her charge 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 conversion of plaintiff's
in error, as to whether or not the Gotham 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. Overleht, 302 Ill. App.
602; Bates vs. Gronin, 198 Ill. App. 178. Plaintiff in error having
introduced the declaration of the Gotham National Bank and the
affidavit of Peter Brown, its president, attached thereto evidencing that the note contained therein " was received before
maturity" by the bank. In accordance with the rule stating that the
Gotham National Bank is not a bona fide holder for value before
maturity. A. M. Purdee Storage Co. vs. U.S.E. Co., 282 Ill. App.
418-422.

In Nolan vs. Nunnee, 288 Ill. 318-322, the court held that
where appellee, having introduced in evidence an order of the
Probate Court as to Notarbi, 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 pur-
chase 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.

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.

It is stated by the plaintiff in error that the defendants were liable under the Incorporation Act of Illinois which provides that 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. Nowhere does the Sheridan County Land Company was not organized under the laws of Illinois.

It is said that the defendants in error are liable on promises because The Sheridan County Land Company did not have a certificate to do business in Illinois as a foreign corporation. It have examined this connection 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, 1919.

We have examined the other questions argued by the plaintiff in error and we are of the opinion that the counsellor was within the rule in discharging the bill for want of equity.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and 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, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

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.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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.

The declaration consists of two counts. The first averred 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-

IN THE
SUPERIOR COURT OF CLAYBURN
Second Division

October Term, A.D. 1921.

January 25, 1922

COUNTY CLERK,

Plaintiff in error,

vs.

MICHAEL MCMANUSMAN,

Defendant in error.

WRIT, to:

This cause is in this court on a writ of error to the Clayburn County of Imbalia County, to review a judgment of this court in an action of trespass, instituted by Rosella Dean, plaintiff in error, injuries received in an elevator, against Robert Simmons, defendant in error, heretofore called defendant, on account of an assault alleged to have been committed upon her at her home in Sylvester, Illinois, by the defendant on or about the 28th day of August, 1920.

The declaration consists of two counts. The first averred that the defendant on the 28th day of August, 1920, 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 spoke and uttered 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 was then and there wore and by means of which assault

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 P.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.

waiting for affairs and business and was obliged to and did necessarily lay out diverse 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 28th, 1920, the defendant with force and arms assaulted the plaintiff and then and there violently seized her and left arm 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 second shows that the plaintiff on the time of the said acts forty-five years of age; that she had been married three-and-one-half years to her husband Clarence Tice and of her issue.

The plaintiff claims that the defendant, Robert Simpson, came to her home on August 28th, 1920, at about the hour of 4 P.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 is stated he was clothed as Boy Scout Officer dressed in Brewster, Illinois; that it was a hot, bright day; that there were two entrances to the house and that both front doors and the screen doors unlocked; that the defendant there if he rooms 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 Brewster; 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 Main City of Brewster; that a Frank M the name of Gurney lived next door east and only about eight feet from the home of the plaintiff; that the Women's Club Building was next door west, then the American Legion Home, the Post Office, the Brewster Bank, the City Hall and Police Station, the Masonic Temple and the Mike Club. It appears that Hickory Street is a much travelled street; that numerous peoples were in the park across the street from the home of the plaintiff.

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 neighborhood 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 Hickory 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.

had separated and that she was going to divorce him then it was that he offered her two dollars.

She testified that she did not tell him that she was through with Deeon; that her husband had accused her of being intimate with her roomate and of going out with other men; that it was a hot day and Simmerson 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, Dan 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, 1938, but that he came to her house that day. When she told him that she and her husband

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, Admr. vs. Noble & Co., 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

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 for plaintiff 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

because it said: "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 (meaning a suit to recover a penalty) it is now well settled that a preponderance of the evidence is sufficient." 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

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.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and 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, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

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.

19

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE

APPELLATE COURT OF ILLINOIS

Second District

MAY TERM A. D. 1932

8502 Agenda 10

HAZEL R. BATSON, Appellee,	)	Appeal from the
vs.	)	Circuit Court of
HERBERT M. BATSON, Appellant.	)	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.

Term, T.

In July, 1920, Henry R. Watson, appellee, filed a bill against Margaret W. Watson, appellant, praying for temporary maintenance and support money. In due time 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 $4,500 a year; that she had property of her own, 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. On July appellant entered 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 stated and exceptions at appeal to this court. The cause was reviewed in this court and the order of the Circuit Court was affirmed. Watson v. Watson, 292 Ill. 149.

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 failed 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, 1930, 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 employed 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; that since the filing of the said bill she has been informed that he

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-

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 married counselee while they were living together that he had certain assets and bonds of the value of $30,000.00, but of late years he has refused to give her any information concerning his ownership of stocks, bonds and other securities; that he had fraudly advised her he had sold and disposed of all of them.

The petition further alleged the filing of the petition on the 15th day of July, 1930, the order entered thereto and the appeal by the said appellant to this Court. Appellee further avers 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 is unable to pay court costs and costs of printing briefs and abstracts to be presented to this Court, and avers that the appellant might be ordered and directed to pay her reasonable sum to pay her necessary attorney and solicitor's fees.

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 $30.00 each Saturday, the 8th day of December, 1930, and a further and like sum of $30.00 each Saturday of each and every week thereof until the further order of the court as temporary alimony, and a further sum of $50 as temporary solicitor's fees. From this order appellant has

fected an appeal to this court but failed to prosecute the appeal and sued out a writ of error. At the May Term, 1931, 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 petition 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 her 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 Company, and is a vice-president; That he is abundantly able to pay the amount

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, 1930, 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 23rd 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 answer 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 ~~day~~ 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,

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

answer of the appellant to said rule to show cause set forth facts that were in existence 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. His answer 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 petitioned 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 to 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

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.

The only way appellant could purge himself of contempt for failure to comply with the order of July 18th, 1930, 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, 1930, 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, 1930, is res judicata of all the facts existing at the time the order was entered by the court. Smith vs. Smith, 334 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 praecipae 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

order and filed what purported to be a cross-bill. There is nothing
to the time of the filing of the cross-bill showing when it
allegations of an alleged accord-bill. The cross-bill is therefore
by the appellant does not purport that any accord-bill is inserted
in the record. At the time the cross-bill was filed in this court no
cross-bill was there inserted. It appears, however, that
va. Smith, 284 Ill. 200-206; Cole vs. Cole, 140 Ill. 18-24; Dean
va Mooney, 198 Ill. 414-420.

The appellant in his argument seems to contend

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 against 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. Had 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. We 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.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and 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, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

General No. 8647 Agenda No. 22

April Term, A. D. 1932

ROBERT G. EARLEY, Receiver of JOHN B. COLEGROVE & 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.

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,

vs.

A. G. HOLLINGSWORTH, Appellant.

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 view 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 Appellee. 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 modified, 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 properly 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.

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.

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 verdict, 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.

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 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 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. McCullum, 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 in 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 tunc**, 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 conveyance 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

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 tunc**, 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 filed - Vacated

4

268 I.A. 639

General No. 8589 Agenda No. 7

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.