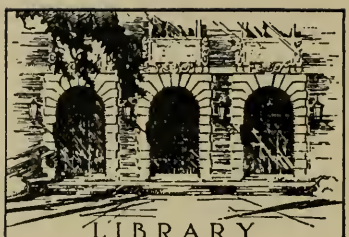

Moot Court Bulletin

College of Law — University of Illinois

Vol. XI. — October 27, 1913. — No. 1.

PURPOSE AND SCOPE OF THE MOOT COURT.

The Moot Court Bulletin will appear regularly during the academic year, and will contain the rules of court, the cases and various pleadings and briefs of counsel. The publication will be in fact, as well as in theory, the bulletin or journal of the Moot Court. A copy of the bulletin will be kept by the clerk of the court and filed among the records; copies will be placed and preserved in the library, so that they may be open to students for examination at any time.

The cases are intentionally practical. They are actual cases—cases that have arisen and are pending in the Circuit, Appellate and Supreme Courts of the State, and at the time of argument in the Moot Court the cases in question are either undecided or the judgments of the respective courts have not been reported. The venue and the names of parties are necessarily changed, and not infrequently the facts of the cases are modified in the interest of simplicity.

In this way, fanciful or fictitious cases are not considered, and the student has the advantage of preparing and trying actual cases in his undergraduate days. It is felt that this practical training should be of great service to the young practitioner.

Dean Oliver A. Harker takes entire charge of the Court and will regularly preside.

MOOT COURT RULES.

1. The Moot Court will be held at 1:00 o'clock p. m. on Mondays and Tuesdays.

2. All members of the second and third-year classes will be required to attend regular sessions of the Court.

3. The clerk will keep a docket of all cases, and keep on file and open for inspection all papers in pending cases.

4. Two students will be appointed as counsel on each side of every case.

5. Immediately after receiving the statement of facts, the attorneys for the plaintiff or complainant shall draw the declaration or bill and file two copies of the same with the clerk before 9:00 a. m. the Monday following. Attorneys for the defendant must file two copies of plea, answer or demurrer, by the Friday following.

6. The case must be called during motion hour on the second Monday for the settlement of issue.

7. Counsel holding the affirmative must, on or before the third Monday following the assignment of the case, furnish one copy of their brief to the clerk of the Court and one copy to opposite counsel. Counsel holding the negative will furnish one copy of their brief to such professor and one copy to the opposite counsel by the Friday following.

8. Oral arguments will be limited to thirty minutes on a side.

9. Students not engaged as counsel will be required to draft pleadings, motions and affidavits on statements given out by the judge of the Moot Court, and to comment on cases after trial.

10. All freshmen in the College of law are subject to juror duty.

Henry Baker
vs.
Norton Printing Co. } Case No. 1

On the 24th of September, 1912, the plaintiff for a period of 12 months leased the first floor of his two story brick building situated at No 28 Main street, Champaign, Illinoss, to the defendant at a rental of $75 per month, The leased property to be used by the defendant, an Illinois corporation, for its printing and binding business.

The lease contained the following provision:

"Said lessee agrees that at the expiration of this lease, it will surrender said premises together with all locks, keys, knobs, doors, glass, shutters, water pipe, plumbing and all other appurtances whether of the same or of a different kind so far as it is responsible therefor, in a condition similar to and equally good with the condition thereof at the commencement of said term, except natural wear and decay, the effect of accidental fire and tempest and damage from the acts of God and the public enemy."

It also contained the following:

"Said parties mutually agree that the total destruction of said building without the fault or negligence of lessee shall work a termination of this lease."

On the 24th of June, 1913, after the defendant had been occupying the premises for 9 months the building was struck by lightning and set on fire. The fire totally destroyed the machinery and other equipment of the defendant which was in the building at the time, or so materially altered it that the material is of no value to the lessee. No steps were taken by the defendant to remove any of the property, because it was worthless.

The plaintiff decided to rebuild on the first of August, and on several occasions, a few days afterwards demanded of the defendant's superintendent that he remove the worthless machinery and equipment; but the superintendent declined to do so, saying that the defendant had no use for the property. The plaintiff replied that he would then remove the stuff and would expect the defendant to pay for the cost involved in doing so. The superintendent replied that the defendant was under no obligations to remove the remains and would not pay anything for its removal.

At an expense of $140 the plaintiff removed the injured machinery and other matter and now brings suit to recover. The attorneys for the plaintiff will prepare a lease and declaration and file the same with the clerk within ten days after receiving a copy of this statement.

For Plaintiff, Britton & Cassidy.

For Defendant, Caffee & Essington.

First National Bank
of Rantoul, Illinois,
vs.
Henry Clay Casualty
Company. } Cas

Statement.

On the 6th of May, 1912, the defendant, an Illinois corporation, executed and delivered to the plaintiff a safe burglary policy, insuring it against loss for two years to the amount of $15.000. The policy recited that the insurance was "For all loss by burglary of money, bonds and bank notes in consequence of the felonious abstraction of the same from the safe located it the banking room of the insured by any person or persons who shall make entry into such safe by use of tools or explosives directly thereon." Attached to this clause was an asterisk reference to a note appearing at the bottom of the page in small type as follows: "Note. This company shall be liable for loss of money, bonds or bank notes from a burglar proof safe containing an inner steel burglar proof chest, unless the same shall have been abstracted from

the chest after entry into the chest effected by the use of tools or explosives directly thereon." The plaintiff's safe was a so-called burglar proof safe, and also contained an inner steel burglar proof chest

On the night of June 10, 1913, the plaintiff's banking house and safe were burglarized and there were abstracted from the safe $12496. The amount of $446 in silver nickles and pennies was taken from the outer compartment of the safe and the rest from the inner chest. The entry of the safe was affected by tools and explosives. Neither tools nor explosives were used to enter the chest. Either the combination lock to it was not turned on or the burglar understood the combination The defendant insists that it is not liable and suit is brought upon the policy. The attorneys for the plaintiff will draft policy of insurance in accordance with statement and file declaration in assumpsit.

For Plaintiff, Anderson & Barlow.
For Defendant, Brannan & Button.

William R Miller, vs. Stephen McCord. } Case No.

Statement.

Plaintiff recovered judgment against defendant in the Circuit Court of Johnson County, Mo., July 6, 1906, for $690. In June, 1909, the judgment not having been satisfied, the plaintiff sued the defendant in Wayne County, Indiana, basing his suit upon the Missouri judgment and recovered to the amount of $824.

The plaintiff has always resided at Warrensburg, Missouri. The defendant who resided in Warrensburg when judgment was recovered against him there and who resided in Wayne County, Indiana, when judgment was recovered against him there, now resides in Champaign, Illinois. He has never paid any of his indebtedness to the plaintiff.

The plaintiff now sues the defendant in the Circuit Court of Champaign County, alleging as course of action the Missouri judgment and interest on same.

It will be defended upon the ground that the Missouri judgment has been merged into the one recovered in Indiana.

For Plaintiff, Finfrock & Fisher.
For Defendant, Mehl & Kepler.

William Avery, vs. Charles Drake. } Case No. 4.

Statement.

The defendant had been negotiating with James French for the exchange of lot 6, block 4, Logan's Addition to the city of Peoria, Illinois, for the N. ½ of Sec. 13 T. 10-R. 4, Williamson County, Illinois. On July 26, 1911, he called at the plaintiff's office and told him that he would pay him a commission of $600 if he would procure French to make the deal. Thereupon the plaintiff drew up a written proposition in which Drake proposed to French to convey his Peoria property to him and pay him $1,200 for a conveyance of French's land in Williamson County. The proposition was in regular form and signed by Drake. Avery then drew up a short agreement (which was duly signed by him and Drake) in which it was recited that "When the said Avery has secured from said French an acceptance of the proposition made by said Drake to exchange his lot 6 in block 4, Logan's Addition to the City of Peoria, Illinois, for the N. ½ of Sec. 13, T. 10, R. 4, in Williamson County, Illinois, owned by said French, dated July 26, 1911, said Drake will pay said Avery $600."

On the following day Avery procured French to accept the offer and to sign a written statement endorsed upon the proposition, accepting Drake's offer and agreeing to furnish an abstract of title to the Williamson County land within 30 days,

and then to execute a deed to the land to Drake. On the same day Drake deposited with the Peoria Savings Bank in escrow $1,200, and a deed to the Peoria property, to be delivered to French on his depositing in the bank for Drake within 30 days a deed to the Williamson County land with abstract of title to the same.

French did not deposit the deed or abstract within the 30 days, and notified Drake that he would not do so, and declined to make the conveyance upon the ground that it had been discovered that the land was underlaid with a rich deposit of coal, a fact of which he was ignorant at the time Avery procured his agreement. Thereupon Drake withdrew the $1,200 and deed left with the bank.

Avery now sues Drake for the $600. Drake claims that at the time Avery procured from him the agreement to pay him the $600 he stated that if the trade was not consummated he would not expect him to pay the commission, and that the $600 would be due only in the event of the trade being made. That is not disputed by Avery, who is a shrewd real estate broker, with a license to practice law.

For Plaintiff, Brown & Bye.

For Defendant, Clapp & Coffee.

Mary Carter,
vs.
Henry Bates, Executor. } Case No 5.

Statement.

On May 3, 1913, Jane Lowle, a resident of Champaign, Illinois, died leaving a will by which she disposed of all her property—executed March 2, 1913.

To her brother Henry Bates she devised lots 4 and 5, block 6 in Haden's Addition to the City of Champaign,

To her sister, Mary Carter, all the furniture valued at $3000, used in the two rooming houses located on said lots 4 and 5.

To her grandson, James Lowle, 20 shares of stock in the Champaign National Bank.

The will named Henry Bates as executor to serve without bond, and directed him to collect all claims due her estate and out of the same to pay all debts and costs of administration

The houses with the furniture mentioned were leased to tenants until July 1, 1914, and it was recited in the will that the rents as collected from month to month should be paid to the said James Lowle to meet his expenses while attending the University of Illinois as a student. The will also contained the following clause: "It is my will that all money when collected, no matter from what source, shall be divided equally between my sister Mary Carter and my grandson, James Lowle." The will was admitted to probate in the county court June 4, 1913, and Bates qualified as executor,

The furniture was covered by a fire insurance policy for $1500 running to July 21, 1913, and on that day, Bates renewed the insurance for one year, taking the policy in his own name as executor and paying the premium out of money collected for the estate. On Sept. 1, 1913, the two houses and furniture were destroyed by fire and 30 days after Bates collected $1500 on the policy covering the furniture. That sum now he holds together with $6500 other money collected for the estate. All debts against the estate and cost of administration have been paid and all claims due the estate have been collected. Bates reports that there is nothing futher for him to do as executor and contends that the $8000 in his hands should be paid in equal parts to Mary Carter and James Lowle. Mary Carter contends that she is entitled to the entire amount of insurance money collected and files a petition in the county court in which she asks that it be paid to her, and that the remaining $6500 be paid to her and James Lowle in equal parts.

For Petitioner, Brannon & Dillon.

For Executor, Esselborn & Lee.

Moot Court Bulletin

College of Law — University of Illinois

VOL. XI. — NOVEMBER 10, 1913. — No. 2.

Henry Baker, vs. Norton Printing Co, } Case No. 1.

Brief for Defendant.

In the absence of an express covenant to remove distinguishable property after a fire which destroyed the premises leased, and rendered the property worthless, a tenant is not bound under a general covenant. "to return the premises in as good a condition as when they were recei ed by him, natural wear and the act of God or destruction by fire excepted," to remove such distinguishable property or repair the damages done to the premises by the fire or act which terminated the tenancy.

Fleischman vs. Toplitz, 31 N. E. 1089, 91.
Bordman vs. Howard, 64 L. R. A. 648.
52 N. Y. Sup. 172, Decker vs. Morton.
Warren vs. Wagner, 75 Ala. 188.

Such tenant is not bound as between himself and the landlord, to do any act of repair which the act or fire made necessary.

Fleischman vs. Toplitz, 31 N. E. 1089.
Boardman vs. Howard, 64 L. R. A. 649.
Decker vs. Morton, 52 N. Y. Sup. 172.

Essington & Coffee,
Attorneys for Defendant.

Henry Baker, vs. Norton Printing Co. }

Brief for Plaintiff.

When a lessee covenants with his lessor hat upon the termination of the lease he vill surrender the premises in a condition imilar to and equally good with the condition thereof at commencement of the term, except natural wear and decay, the effects of accidental fire and tempest and damage from the acts of God and of the public enemy, the lessee is liable to the lessor for the expense incurred by the latter in the removal of debris and rubbish from the leased premises after the lease has been terminated.

Boardman vs. Howard, 90 Minn. 273, 64 L. R. A. 648.

Fleischman vs. Toplitz, 31 N. E. 1089 (N. Y.)

49 Mo. App. 631, cited in 64 L. R. A. 648 (Note) at page 662.

Note in 64 L. R. A. 648 at page 662.

Respectfully submitted,
Britton and Cassidy
Attorneys for plaintiff.

Opinion by Samuels, A. J.

In this case the Norton Printing Company leased premises for one year from Henry Baker under a lease containing a general covenant that at the expiration of their lease the lessee would surrender said premises together with all locks, keys, knobs, doors, glass, shutters, water pipe, and all other appurtenances whether of the same or of a different kind so far as it is responsible therefor, in a condition similar to and equally good with the condition thereof at the commencement of said term, except natural wear and decay, the effect of accidental fire and tempest and damage from the acts of God and the public enemy."

The lease also contained the following:

"Said parties mutually agree that the total destruction of said building without the fault or negligence of the lessee shall work a termination of the lease."

Thereafter and before the expiration of the lease the building was struck by lightning and totally destroyed by fire. The fire totally destroyed and rendered worthless defendant's machinery and equipment which was in the building at the time of the fire Plaintiff several times demanded of defendant that he remove same, but no steps were taken by the defendant to do this, defendant insisting that he was under no such obligation.

Later the plaintiff, deciding to rebuild, and being told by defendant that he would not remove the stuff, because worthless, went ahead and removed same at an expense of $140. This action is brought to recover of defendant the money so expended.

The case comes before us on demurrer, hence no question arises as to the termination of the lease, such being admitted by the demurrer.

It appears that this precise state of facts has never been before the courts of this State. Counsel for both sides have, however, cited several cases adjudicated in other States. Two of these cases are chiefly relied upon by both sides as authority for their respective contention. The first of these is a Minnesota case. Boardman, vs. Howard, reported in 90 Minn., 273. There the tenant held under a lease with a covenant for the surrender of the premises in as good condition as when received. There was a partial destruction of the building, and relation of landlord and tenant was terminated by agreement. The tenants were licensed by the landlord thereafter to enter for the purpose of taking away their property, and continued to do so until it became apparent that the debris and rubbish resulting from the partial destruction of the injured furniture which had been their property were valueless. when they ceased to remove it, but left it in the building. The court held on these facts that the tenant, under the privilege to take away their goods, could not enjoy it so far as beneficial and leave a part of their damaged property in the building to encumber plaintiff's possession, and the expense incurred by the landlord in removing the rubbish which defendant left and declined to take away, is a legal obligation against them.

It will be observed that this case is not precisely in point with the case before us, for here the tenants did not refuse to take away part, after having been licensed and after having resumed to carry away all of the rubbish. The court, however, said by way of delta that "the exaction relating to the injury of the building by fire, while it would excuse the tenants from repairing or rebuilding, would not justify them in imposing burdens upon the landlord arising strictly from the tenants occupying and use of the premises

The New York case, Fleishman vs. Toplitz reported in 31 N. E. 1089 is also not in point. This was an action by a tenant vs. his landlord to recover money expended in removing carcaner and debris from leased premises after their destruction by fire. The lease provided that the tenant at his own cost will comply with all the orders of the board of health. The building burned and under a statute providing that on the destruction of the building without fault of tenant the latter may thereupon quit and surrender possession. It was held that the relation of landlord and tenant ceased at the time of fire. The board of health

served notice on the defendant to remove the debris and he sent the notice to plaintiff too with request that he remove it without prejudice to the liability. It was held that the plaintiff could recover for the expense incurred in removing same on the grounds that the tenancy had ceased and the covenant ergo did not apply.

But the court goes on to say by way of dictation: If the lease was terminated by the State upon the destruction of the building, it is clear that the tenant, or between himself and his landlord was not bound by its terms to perform any act in respect to the premises which the fire made necessary to perform. Such performances could not be made until after the relation of landlord and tenant had ceased. Nor would the tenant in such case, apart from the terms of the lease, be obliged to remove dead bodies of the house." But it should be noticed that the covenant in this case did not provide for a surrender of the premises in the same conition as when the lease began. "Manifestly" in such a case, representing the court, "the damage to the real estate and the burden cast upon it by the fire, be borne by the landlord and not by the tenant."

We come now to a consideration of the covenant, its proper construction and meaning. It provided that the premises should be returned in equally good condition as when acquired, barring fire, etc. Now if the lease had expired by due course, surely the tenant would not have been allowed to leave the premises scattered over with rubbish, for that would not be returning them in equally good condition. If the tenant had destroyed or injured the building, negligently, he would have to rebuild or repair at the expiration of the lease, else he would be violating his lease to turn over in equally good condition. But surely he would not be permitted to leave the premises scattered over with debris and rubbish, for this too would be in violation of his covenant. Now if the building is destroyed by fire without the tenant's fault, as in this case, he is not obliged to rebuild, i. e., and turn over in equally good condition, for in such event, the term of his covenant, he is excused from doing that, But is he in this case, any more than in the other, excused from leaving the premises scattered over with rubbish? We think not. What is the reasonable contention of this covenant? What was the intention of the parties as manifested by its terms? Is it not reasonable to say that the parties meant in case of fire, only to excuse failure to turn over the premises in equally good condition? Does not the covenant have reference only to condition of the premises as they were when first leased (———— repairing and rebuilding caused by fire) and not to conditions arising strictly from the tenants' occupancy and use of the premises.

The fire is a good excuse for not turning over a perfect building, but is not an excuse for the tenant imposing additional burdens upon the landlord by his failure to remove his effects. The tenant was requested to remove his valueless property so that an entry by him upon the premises could not have constituted a trespass. He should have removed this rubbish, for he could, *despite the fire*, do that much toward turning over the premises in equally good condition which he was to do. The fire excused him from turning over *what he received* in equally good condition, but it did not excuse him for leaving his rubbish on the premises, although this rubbish was caused by the fire, any more than it would have excused him for leaving it there if the fire had destroyed his machinery and equipment and left the building untouched.

Therefore, the tenant being under obli-

gation to remove this rubbish, by the terms of his covenant, and refusing to do so, he is liable for the expense incurred by another who does for him that which he himself is legally bound to do.

Demurer sustained.

Samuel Jones,
vs
James Dudley and Ira Mott, partners as Dudley and Mott. } Case No. 6.

Statement.

The defendants are stock brokers in Chicago, Illinois. Prior to October 1, 1912, the plaintiff had thru the defendants bought and sold a great deal of railroad stock and bonds. In some of the deals the names of the defendants' principals were disclosed. In others they were not. On the day mentioned he told them he had 200 shares of stock in the Illinois Central Railroad Company that he desired to sell and asked whether they had a client willing to pay $26,000, to which Mott replied that they had not but that they would see what they could do for him. On the afternoon of the following day Mott called up the plaintiff by telephone and after referring to the conversation of the previous day said: "We can take that stock off your hands at $25,000." After some parleying it was agreed between them that plaintiff should have the certificate of stock properly assigned in blank in his office at 12 o'clock of the following day, when the defendants would receive it and pay him $25,000.

The plaintiff made the assignment as directed and remained in his office from 12 o'clock until 2 o'clock on the following day, but neither of the defendants appeared. He then called them on the phone and asked why they had not come to take up the stock and pay him the $25,000. Mott replied, "The purchaser of the stock has not come in. It looks very much as if he was trying to back out. I. C. went off several points in New York this morning, you know." The plaintiff responded that he should expect the defendants to comply with their agreement and take the stock off his hands at the $25,000.

Two days later (after I. C. stock had recovered from the drop) the plaintiff received thru the mail a letter from the defendants stating "We have not yet seen the purchaser of your 200 shares of I. C. stock, but you can depend upon our making it all right at the price named.

Yours, etc.,
Dudley and Mott."

The stock market was quite nervous at the time, and on the 10th of the month the plaintiff called at the defendant's office; tendered to Mott the stock certificate and demanded payment of the $25,000. The defendants declined to take the stock or pay the money, but a few days afterwards wrote the plaintiff as follows:—

10—17—1912.

Dear Jones:—

In the present state of the market we have been unable to get a bid on your I. C. stock. We advise you to sell it if you have an opportunity. We are sorry our man has gone back on his promise, but can not understand why you should consider us liable, as we did not buy it on our own account.

In a few days the plaintiff sold the stock for $23,500, the price quoted in the market and the highest that he could obtain for it. He now sues in the circuit court of Cook County to recover $1500.

For Plaintiff, Corbly & Cummins.
For Defendants, Du Hadway & Glover.

Peter Cofer,
vs.
Walter Bates, Chairman, and Henry Fox and James Holt, Commissioners of Jefferson County, Illinois. } Case No. 7.

Statement.

On September 4, 1910, the county board of Jefferson County, Illinois, passed an order fixing the salary of the county clerk at $1,500 and allowing him $1,000 for a deputy for the four years beginning with the first Monday in December, 1910.

Eli Brown having been elected clerk was duly installed as such official on December 4, 1910, and appointed Easton Rude his deputy.

The salary of Rude was paid in quarterly installments of $250, at the end of each quarter. The method of procedure was for Rude to file his claim with a certificate from Brown that he had served for the quarter, whereupon, Brown was directed to issue an order on the county treasurer to pay Rude the $250.

After Rude had been in service about a year he began the practice of discounting his quarterly claim in advance of its allowance. Sometimes he would discount to Brown, and at other times to Peter Cofer. That was accomplished by Rude making out his claim against the county in regular form and endorsing on the back of it a request that the order for $250 be issued to the person who had advanced him the money. At the end of the quarter the county board after receiving the certificate of Brown as to service would allow the claim, and direct the order to issue to the person named by Rude in the endorsement.

On July 1, 1913, Cofer paid to Rude $240, and received from him a claim, made out on the usual blank, as follows:

September 1, 1913.

County of Jefferson, Illinois, To Easton Rude, Dr.

"To service as Deputy County Clerk for quarter ending September 1, 1913, $250."

On the back of which was endorsed:

"For value received, I assign the within claim to Peter Cofer, and request the county board of Jefferson County to direct order for the amount to be issued to him.

Easton Rude."

Following the course taken by him on three previous occasions, in which the orders had been issued to him on like endersements, Cofer, on the morning of September 1, filed his claim. On the same day Brown filed the usual certificate that Rude had served for the quarter ending then. The claim was not paid that day for the reason that there were other matters engaging the attention of the board. On that night Rude, after delivering to one John Edwards a claim made out like the one delivered to Cofer, with an endorsement to Edwards signed "Rude," (instead of Easton Rude) absconded.

When Cofer called up his claim on September 2, Brown informed the board that Rude had left but before going had made some kind of an assignment to Edwards. The board refused to allow the claim and direct order to issue to Cofer as requested.

For Petioner, Howe & Strong.

For Defendants, Martin & Mercer.

Henry Healy,
vs.
Albert Hobbs. } Case No. 8.

Statement.

The defendant lives on Second street, Champaign, Illinois, near East Side Park. He has a son 12 years of age for whom he procured some time in May, 1913, an arch-

ery outfit, consisting of two bows, twelve arrows and a target. The target consisted of a circular piece of soft wood, three feet in diameter with a painted bull's eye in the center. When used in practice it rested on a pedestal about eighteen inches from the ground. The arrows were pointed with steel so they would stick in the target when shot from the bow.

For the first two or three weeks after receiving the outfit the boy was content to use it in defendant's back yard. After that he with the knowledge and consent of the defendant began practicing with it in company with other boys in the adjacent park. Almost every afternoon, after school hours it was so used.

On the afternoon of June 3, 1913, the defendant's boy, while practicing in the park with other boys shot an arrow which missed the target and struck the plaintiff in the right eye, thereby destroying its sight. The plaintiff was not witnessing the target practice but was simply passing along the walk which leads from the northwest corner to the southwest corner of the park.

For Plaintiff, Gunnel & Hannah.

For Defendant, Keran & Lewis.

Elliot C. Johns
vs.
Susan Johns
} Case No. 9.

Statement.

Frank Cox Johns was the son of Elliot C. Johns and Jennie Johns. In April, 1889, he being three years of age, was adopted by his maternal grandfather, Frank Cox. The adoption proceedings, which took place in the County of Sacramento where all the parties concerned then resided, were regular and valid, being conducted according to statute. The father and mother consented in writing to the adoption, as did the wife of Frank Cox. Frank Cox was engaged in business in Sacramento, and was a man of some wealth. Elliot Johns who had formerly resided in Illinois was disatisfied with life in California and had arranged to take up his permanent residence in Illinois when the child was adopted by his wife's father. March 25, 1906, Frank Cox died bequeathing a legacy of $20,000 to his adopted son. In June, 1909, Frank Cox Johns, the aaopted son, died intestate, owning no property except the legacy which had been bequeathed to him by Frank Cox. It consisted entirely of personal property, the most of it in bank stock. He left surviving a widow, Susan Johns. The only relatives he left were his father in blood, this plaintiff, and his grandmother, Jennie Cox.

The plaintiff had no information of death of his son (which occurred at Los Angeles, California) until some time during the year 1912. His wife had been dead several years and he had not made any inquiry concerning his father-in-law or his child. The defendant, widow of Frank Cox Johns, administrated upon the estate of her husband and under the order of the probate court at Los Angeles, after representing to the court that there was no heir but herself, received the entire estate, amounting to $20,000, and was duly discharged. In December, 1911, she left California to take up her permanent residence in Macon County, Illinois. The plaintiff resides in Peoria. As soon as he ascertained the defendant's place of residence and what desposition had been made of his son's estate he made demand upon the defendant for one-half of the $20,000 received by her, claiming it as a right in succession as the father of Frank Cox Johns. Payment was refused and plaintiff presents suit in the Circuit Court of Macon County, Illinois.

For Plaintiff, Pogue & Samuels.

For Defendant, Seidenberg & Stephens.

Henry Clark
vs.
Oakland Auto Company, a Corporation.
} Case No. 10

Statement.

On January 2, 1911, plaintiff and defendant entered into an agreement whereby the defendant, a corporation engaged in manufacturing automobiles at Detroit, Michigan, gave to the plaintiff "the exclusive right to sell the Oakland Auto cars in the counties of Champaign, Douglas, Macon and Piatt, Illinois." The cars were to be delivered f. o. b. cars at Champaign, Tuscola, Decatur or Monticello, from time to time as ordered. For all sales made the plaintiff was to have a commission of 25 per cent. In consideration of the giving of such exclusive right to sell the plaintiff agreed to sell no other make of automobile within the territory mentioned, for the period of three years. The plaintiff immediately established garages at Champaign, Tuscola, Decatur and Monticello, where he has kept Oakland cars on exhibition and from which he has sold about 400.

On July 24, 1913, Amos Price and Leonard Watts, residents of Urbana, Illinois, visited the defendant's sales room in Detroit and purchased two Oakland cars, one for $1375 and the other for $1575, being the prices for which such cars were billed to the plaintiff plus the freight charges to Champaign. Price and Watts had become familiar with the Oakland in seeing them driven and in driving them in Champaign and Urbana, and so drove the machines to Urbana after paying for them.

As soon as the plaintiff learned from Price and Watts of their purchases he wrote to the defendant claiming $737.50, commission on the sales. The defendant refused so allow it upon the ground that he had neither made nor assisted in the sales. As a matter of fact, he had never offered to sell Price or Watts a machine.

For the Plaintiff, Luney and Newell.

For the Defendant, McKnight and Patterson.

Mary Woods
vs.
James Carson.
} Case No. 11.

Statement.

The defendant is the husband of the plaintiff's aunt, Jane Carson. For a number of years the defendant has been the proprietor of a department store in Danville, Illinois. From 1907 utiil 1911, Henry Woods was in the employment of the defendant as a salesman. On the 4th of June, 1910, the plaintiff who at the time was residing at the home of the defendant was married to Henry Woods. After they were married the defendant and Henry Woods quarreled, when Henry Woods left his employment and engaged with a jobbing house inChicago, as a traveling salesman.

The parties continued to live in Danville. Beginning September, 1911, the defendant began making false representation to the plaintiff as to the conduct of her husband, alleging that he was intimate with immoral women, and on several oecasions reported to her of specific instances occurring in the cities of Peoria, Chicago and Springfield. These statements were made to her from time to time during the entire fall of that year. The defendant enjoined upon her that she would not give the name of the informer. During the months of November and December she accused her husband of these acts of which her uncle had told her He de nied them and insisted upon the name of her informer, which she refused to tell. She believed her uncle and did not believe her husband.

Some time in February 1912, Woods after a severe trip through Southern Indiana, returned to Danville, sick. When he reached his home his door was locked and his wife denied him admittance, saying that she intended to sue him for a divorce. He was then taken to the Plaza Hotel and there confined to his bed quite sick for

three weeks. Messages were sent to the plaintiff, asking, that she visit him in the hotel but she refused. As soon as he regained his health he resigned his position and left for California. After he had been gone six of seven months the plaintiff ascertained from her aunt, who had recently separated from her husband, that the representations made by the defendant to the plaintiff concerning the immoral acts of her husband were false, and that they were wilfully made by the defendant out of malice toward Henry Woods!

The plaintiff now brings suit against the defendant alleging her damages at $10,000. In a declaration it will be charged that Henry Woods left the plaintiff because of the cruelty of the plaintiff toward the husband in refusing to visit him while sick, and because of the false representation made toward him by the defendant and which she believed. The defendant will file a general demurrer upon which the argument will be heard.

For Plaintiff, Stambaugh & Shobe.

For Defendant, Swanson & Switzger.

Charles Gray
vs.
Henry Enos and
John Church and
The Central Trust
Company
} Case No. 12.

Statement.

During the spring of 1912 a movement was started to consolidate all of the local telephone companies of the twenty-two counties in the extreme southern part of Illinois. As result of the movement two corporations were formed, The Central Trust Company and the Southern Trust Company. They were formed solely to purchase and hold stock and bonds of the Southern Illinois Telephone Company. The stock of both was to be equal in value, share for share, and was to be based upon the stock and bonds of the Telephone Company and nothing else. Each share of stock in the Central Trust Company will represent the same number of stock and bonds of the Telephone Company as would each share of stock of the Southern Trust Campany. The only difference between the two companies was that the principal place of business of the Central Trust Company will be at Centralia and that of the Southern Trust Company at Cairo. There are to be two sets of officers, excepting the president, and he is to be president of each corporation. The capital stock of each was $200,000.

Enos and Church were agents for the company at Cairo and Reed and Brown were agents for the company at Centralia. It was the custom of these firms to receive subscriptions for stock and the certificate would be issued from the company's office either at Cairo or Centralia. Books were opened by these agents in December, 1912, and all the stock was subscribed by the 20th of January, 1913. On the 4th of January, 1913, the plaintiff paid to Enos and Church $1,000 and attached his signature to the following instrument:—

"We the undersigned hereby agree to pay to Enos and Church, agents, the sum set after our names on the following terms and conditions; 50 per cent cash and the balance as called for, being payment on account of purchase of stock of the Central or Southern Trust Company. Said Central or Southern Trust Company stock represents bonds and stock of the Southern Illinois Telephone Company."

NAMES.	AM'T TO BE PAID.
John Clark	$ 3,000
Jasper Amos	2,000
Frank Horn	30,000
Charles Gray	2,000
etc., etc., etc,	

At the time that the plaintiff attached his signature to the subscription paper and paid to Enos and Church the $1,000, he stated that he wanted his stock in the Southern Trust Company, that his reason for so desiring was that he knew the local officers and resided nearer Cairo than Centralia. To this statement Enos replied that that was all right and that he should have his stock in any company desired. On the following day Enos and Church learned through the president of the two companies that all of the stock in the Southern Trust Company had been taken. They then sent the $1,000 less their commission to the Central Trust Company which issued to the plaintiff a certificate for 20 shares of the stock and stated to him that the other $1 000 would be due March 1, 1913. Immediately upon receiving the certificate, the plaintiff returned it to the office of the Central Trust Company at Centralia, stating that he had not subscribed for stock in that company and called upon Enos and Church, asking that they return the $1,000. Enos and Church replied that he was bound by his subscription, and the Central Trust Company claimed that they had no information as to the subscription excepting what appeared in the subscription list when they received the money. They decline to return the money.

Gray brings suit joining the Central Trust Company with Enos and Church.

For Plaintiff, Ratcliff & Ruth.

For Defendants, Enos and Church, Searing & Seed.

For Defendant, Central Trust Company, Ferril & Wansorough.

Moot Court Bulletin

College of Law **University of Illinois**

VOL. XI. NOVEMBER 24, 1913. No. 3.

First National Bank of Rantoul

vs.

Henry Clay Casualty Company.

No. 2.

Brief for the Plaintiff.

An insurance contract is construed most favorably for the insured especially where the conditions or stipulations will defeat the purpose of the contract as a forfeiture of the insurance.

100 Ill. 649.

Commercial Ins. Co., vs. Robinson, 64 Ill. 267.

Providence Saving Life Ins. Co., vs. Cannon, 103 Ill. App. 534, affirmed 201 Ill. 260.

National Accident Society vs. Ralston, 101 Ill. App. 192.

19 Cyc. 657.

May on Insurance. Vol. 1, Page 342.

That a tool as used in burglary insurance contract where policy provides that burgiary must be effected by the use of tools or explosives directly thereon, may be merely the use of the thieves hands.

Fidelity & Casuality Co. of N. Y. vs. Sanders, 32 Ind. App. 448.

Rosenthal vs. American Bonding Co., 124 N. Y. Sup. 905.

Printed conditions in small type on back of policy should not be deemed part of it and not to bind him unless brought to his notice.

Bassel vs. American Fire Ins. C. 2 Hughes (Fed.) 531.

Stipulations on back of policy are to be construed as part of it, if by terms of policy they are made a part thereof.

19 Cyc. 658

Signed,

Barlow & Anderson,
Attorneys for the Plaintiff.

Opinion by Harker, P. J.

This is a suit upon a burglary insurance policy to recover for a loss of $12,496. stolen from the plaintiff's banking house and safe in the night time.

The policy recited an insurance to the amount of $15,000, "For all loss by burglary of money, bonds and bank notes in consequence of the felonious abstraction of the same from the safe located in the banking house of the insured, by any person or persons who shall make entry into such safe by use of tools or explosives directly thereon."

Attached to the clause was an asterisk reference to a note appearing at the bottom of the same page in small type as follows: "Note. This company shall be liable for loss of money, bonds, or bank notes from a burglar proof safe containing an inner steel burglar proof chest, unless the same shall be abstracted from the chest effected by the use of tools or explosives directly thereon." The safe was a so-called burglar proof safe and contained an inner steel burglar proof chest. Entry to the outer compartment was effected by tools and explosives. Neither tools nor explosives were used to enter the inner chest.

Either the combination lock to it was not turned on or the burglar understood the combination.

As to $446 there can be no question, because that amount was taken from the outer compartment. The real contest is over the $12,000 taken from the inner chest, the insistance on the part of the defendant being that absence of proof that the inner chest was entered by the use of tools or explosives relieves it of all liability, for the money stolen from the chest. In other words, the defendant contends that the facts attending the entry of the inner chest brings the case within the provision contained in the note above quoted.

Before one can recover upon a policy of insurance it is essential that he bring himself within the express provisions of the policy. I fully recognize the general trend of counts to construe all doubtful provisions of an isurance policy in favor of the insured. But where the terms of the policy are plain and explicit no forced construction should be indulged in to fix a liability on the insurance company which it has not assumed. The policy sued on was not a general one against burglary, but against burglary committed by the use of tools and explosives, not only upon the safe itself but upon the inner chest also. The defendant took the precaution to limit its liability to acts of violence (the use of burglar tools or explosives) and did not insure against loss arising from negligence of defendant's servants in failing to turn on the combination or loss through the use of the secret combination on the chest lock known to the burglar.

Counsel for the plaintiff urge that as the condition was not in the body of the policy, but was in a foot note printed in very fine type, it for that reason should be disregarded. They cite decisions bearing out that contention. I confess that I have never been favorably impressed with the idea that a condition should be read out of an insurance contract simply because it appears in smaller type than that used in the rest of the instrument.

We all know that a foot note, whether used in a book, magazine, or other publication is put in smaller type than the text. The office of the asterisk is to challenge attention to something in the margin of bottom of the document in which it is used. I see no merit in the point.

Under the terms of the policy and the facts of the case, the plaintiff is entitled to recover only for the amount stolen from the outer compartment, $446.

Judgment against the defendant for $446 and costs.

William R. Miller,

vs.

Stephen McCord.

Case No. 3.

Brief of Plaintiff.

1. Where an existing judgment is sued upon as a cause of action, and a new judgment recovered on it, there is no merger of the first judgment or is it extinguished without satisfaction of the second.

23 Cyc. 1473.
Griswold vs. Hill, Federal case 5836.
Mumford vs. Stocker, 1 Cow. 178.
Lawton vs. Perry, 18 Se. 861.
Lilly Bracket Co. vs Sonnerman, 163.
California, 632.

2. No merger takes place where the two securities are equal. If the securities of the last judgment were of superior degree, to those of the first, it would be logical to merge them, but where they are the same, there is no principal upon which they should be merged.

Lawson on Rights, Remedies and Practice.

McLean vs. McLean, 90 N. C. 531.

3. A judgment does not constitute a cause of action in another State, and suit should be brought on the original judgment. So long as the indebtedness is unsatisfied, successive suits in different States may be prosecuted.

Evans vs. Reed, 2 Mich. N. P. 212.
Spring vs. Pharrall, 131 N. C. 193.
Mumford vs. Stocker, 1 Cow. 178.

4. It may be inconvenient for two judgments to subsist in the same State against the same person, but no such inconvenience exists where the two judgments are in different States. Any hardship arising from successive judgment will be avoided by the defendant paying the debt.

Ames vs. Hoy, 12 Calif. 19.
Lilly, Bracket Co. vs. Sonnerman.
163 Calif. 632.

Fenfrock & Fisher,
Attorneys for Plaintiff.

William Miller,
vs.
Stephen McCord.

Case No. 3.

Brief for Defendant.

A second judgment on the same debt, though for a less amount than that recovered in the first, is a waiver of the remainder and an extire extinguishment of the first judgment.

Price vs. First National Bank, 63 Kan. 735, 1901.

Where two judgment, of the same purport have been rendered in the same cas it will be presumed that the first merged in the second and was constructively vacated by it, and the first judgment won't support a plea of Res Adjudicata.

Johnson vs. Hesser, 61 Neb. 631 (1901.)

A judgment rendered in Indiana, on which a judgment was subsequently recovered in a court of competent jurisdiction in Ohio, was thereby merged in the latter, so as to release all liens and priorities of the former on lands in Indiana and the owner was entitled to an injunction upon sale.

Gould vs. Hayden, 63 Ind. 443.

The merger occasioned by one judgment sued upon as a cause of action also destroys its effect as a lien as well as destroying the right to sue upon the first judgment again.

Deuegre vs. Haun, 13 Iowa, 240
Whiting vs. Beebe, 7 Eng. 421, 549.
Chitty vs. Glenn, 3 Mon. 425.
Gould vs. Hayden, 63 Ind. 443.
Frazier vs. McQueen, 20 Ark. 68.
Neale vs. Jeter, 20 Ark. 98.
Bank of U. S., vs. Patton, 5 How. Miss., 200.
Brown vs. Clarke, 4 How. U. S. 34.
Armstrong vs. McLaughlin, 49 Ind. 370.
Freeman on Judgments, Sec. 115 and 215.
Black on Judgments, Sec. 674.

Respectfully submitted,
Kessler & Mehl.
Attorneys for Defendant.

Opinion by Harker, P. J.

The plaintiff has declared upon an unpaid judgment recovered by him against the defendant for $690, July 6, 1906, in the Circuit Court of Johnson county, Missouri.

The defendant has filed a special plea in bar, setting up that the plaintiff in June, 1909, sued the defendant on the same judgment in Wayne county, Indiana, and

recovered against him, whereby his right of action on the judgment now sued on was merged. To the plea the plaintiff interposes a general demurrer.

The question presented is whether a judgment recovered upon an unsatisfied judgment, certified from another State, has the effect to end or destroy the vitality of the prior judgment. It is a new one in Illinois, so far as I am advised, and there is a conflict of opinion upon it in other jurisdictions. Courts which hold in the affirmative upon the proposition are moved to that conclusion by the general rule that a cause of action is merged in the judgment recovered on it and the thought that a debtor should not be harrassed in various States by judgments over the same subject matter. The editor of the American State Reports in volume 92, at page 778, in a note reviews the decisions and announces as the better rule the extinguishment of the first judgment on the recovery of the second. To the same effect is the expression in 15 Am. and Eng Ency. of Law at page 336. A contrary view is taken by the author of "Judgments" appearing in 23 Cyc at page 1474, and a review of the authorities will show that the modern trend of decision is in that direction. The most recent case on the question is Lilly Brackett Co. vs. Sonnerman, decided by the Supreme Court of California a short time ago, 163 Cal. 632. That was a suit based upon a judgment recovered by the plaintiff against the defendant in Massachusetts, which has also been sued on in the State of Washington and a judgment recovered. It was contended that the second judgment barred any further right to recover on the Massachusetts judgment, but the Court took a contrary view and held that a judgment obtained in one State does not become merged in a judgment based upon it in favor of the plaintiff in another State.

The reason for the general rule that a recovery for the same cause of action is a bar to a second action does not apply. The reason, as universally understood, is that the action has passed in rem judicatum and is determined by the judgment. That reason does not exist where a judgment is sought upon a judgment of another State. One judgment is of the same dignity as the other.

The contention that a debtor should not be harrassed in various States by several existing judgments, the product of one original cause of action, does not appeal to me. The debtor may end the harrassment and satisfy all the judgments by paying off one of them.

The plea does not present a valid defense and the demurrer to it will be sustained.

William Avery
vs.
Charles Drake.

Case No. 4.

Brief for the Plaintiff.

1. Statement of the case.

Plaintiff, a real estate broker, brought defendant and one James French into a contractual relationship. The contract was binding and was capable of being enforced by either party by specific performance. By weight of authority, this entitles the broker to his commission.

Easter vs. Newbury, 170 Ill. Ap. 494.
Davis vs. Pauler, 170 Ill. Ap. 317.
Wilson vs. Mason, 158 Ill. 304.
Fox vs. Ryan, 240 Ill. 390.
Parmly vs. Head, 33 Ill. Ap. 134.
Nagl vs. Small, 138 N. W 849.

2. The meaning of the written contract is clear. The terms "acceptance of the

offer" must be construed in their natural and most obvious sense, i. e, in the sense in which the word "acceptance" is used in the law of contracts.

Cameron vs. Sexton, 110 Ill. App. 381.

3. It is well settled in this State that parol evidence is not admissible to vary the terms of a written instrument, but that all prior negotiations leading up to the execution of the writing are merged therein. "A contract can not exist partly in writing and partly in parol."

Lane vs. Sharp, 3 Scammon 573.

13 Ill. 689 O'Reer vs. Strong.

Marshall vs. Gridley, 46 Ill. 247.

Winnesheik Ins. Co. vs. Hazelgrafe, 53 Ill. 523.

Boylan vs. Cameron, 126 Ill. Ap. 432.

Clark vs. Mallory, 185 Ill. 227.

Davis vs. Fidelity Ins. Co., 208 Ill. 375.

4. The written instrument is, therefore, exclusive evidence of the terms of the contract and oral statements which may have been made incidental to the drawing up of the written contract form no part thereof.

Brown and Bye,
Attorneys for Plaintiff.

Case No. 4.

Brief for the Defendant.

In construing a contract the Court will admit parol evidence to explain ambiguous terms, in order to ascertain and give the effect as was intended by the parties at the time of making the contract.

Barret vs. Stow, 15 Ill. 423.

Sigsworth vs. McIntyre, 18 Ill. 127.

Alexander vs. Tolleston Club, 110 Ill. 65 at 76, 77.

Starr vs. Milliken, 180 Ill. 458.

Osgood vs. Skinner, 83 Ill. App. 454.

Parish vs Vance, 110 Ill. App. 57 at 61.

Walker vs. Johnson, 116 Ill. App. 145.

Cameron vs. Sexton, 110 Ill. App. 381 at 386.

Cochran vs. Vermillion County, 113 Ill. App. 140.

Thomas vs. Wiggers, 41 Ill. 478.

Crane vs. Clemens, 135 Ill. App. 81.

Curtis vs. Hawley, 85 Ill. App. 429.

Whalen vs. Stephens, 193 Ill. 121.

Vt. Street Church vs. Brose, 104 Ill. 206 at 212.

Lehndorf vs. Cope, 122 Ill. 317 at 322

Holmquest vs. Dacer, 170 Ill. App. 101.

Kuecken vs. Voltz, 110 Ill. 264.

Piper vs. Connelly, 108 Ill. 646 at 651.

Turpin vs. Balt. O. & Chicago R. R. Co,, 105 Ill. 11.

Leavus vs. Cleary, 75 Ill. 349.

Where one party to a contract holds out a situation and induces the other party to act upon that situation and thus making an irrevocable change in his condition, if such representation is not true in fact and such is known to the party making the representation, then the party so making the representation will be stopped from denying that such representations are not true. This can apply to the use of a word as held out in a contract as to its meaning therein intended.

(The doctrine of Estoppel.)

Clapp and Coffey,
Attorneys for the Defendant.

William Avery
vs.
Charles Drake.

Case No. 4.

Opinion by Harker, P. J.

This is a suit to recover $600, the amount of commission claimed by the

plaintiff, a real estate broker, for procuring the acceptance of a written proposition made by the defendant to one James French to convey certain property in Peoria to French and pay him $1,200 for a half section of land situated in Williamson county, Illinois.

The demand is based upon the following clause in a written agreement signed by the plaintiff: "When the said Avery has secured from said French an acceptance of the proposition made by said Drake to exchange his lot 6 in block 4, Logan's Addition to the city of Peoria, Illinois, for N ½ of Sec. 13, T. 10, R. 4, in Williamson county, Illinois, owned by said French, dated July 26, 1911, said Drake will pay said Avery $600."

The plaintiff induced French to sign a statement endorsed upon the defendant's written proposition accepting the offer and agreeing to furnish an abstract of title to the land within thirty days and execute a deed to the defendant. On the same day the defendant, in compliance with his part of the agreement, deposited his deed to the Peoria property and $1,200, in escrow with the Peoria Savings Bank, to be delivered to French on his depositing in the bank for the defendant, within thirty days, a deed and abstract to the Williamson county land

French, instead of depositing his deed and abstract within the thirty days, notified the defendant that he would not do so, and has ever since refused to convey to the defendant. His excuse for refusing is that the land is underlaid with a rich deposit of coal, a fact of which he was ignorant at the time he accepted the defendant's proposition. The defendant has withdrawn from the bank the $1,200 and his d ed, and refuses to pay the $600 to Avery upon the ground that the latter undertook a consummation of the deal with French. He testifies that at the time he signed the agreement Avery told him that unless the trade should be consummated he would not require a payment of the $600, and that is not disputed by Avery.

I am of the opinion that the defense interposed should not prevail. The clause quoted from the writing constituted a valid contract binding upon Drake to pay Avery the commission sued for upon his procuring an acceptance of Drake's offer to French. It could be impeached only by showing that its execution was obtained by duress, fraud, undue influence, or that it was without consideration. There is nothing in the facts stated to show either fraud or mistake Drake does not pretend that he did not understand the contract before signing it or that he was ignorant of its contents. His recollection as to what was said negatives any such idea, because he testifies that at the time he and Avery signed the instrument, Avery said to him that unless the deal was put through, he should not expect commissions. Such statement upon the part of Avery was not a representation that the agreement showed anything else than the words employed in the instrument. It was at most a voluntary promise on his part that he would, to that extent, disregard or waive the agreement. It is a familiar rule of evidence that all contemporaneous agreements are merged in the written instrument and that parol testimony will not be heard to modify or change its terms. There are cases in which there is such ambiguity in the writing as justifies the introduction of parol testimony. That is done for the purpose of arriving at the intention of the parties, but in this case there is no ambiguity, whatever.

There are cases in which parol testimony may be allowed where the contract

ing parties are not on an equal footing, as where the relationship between the parties is of a fiduciary character and one party has overreached the other. But that is done upon the ground of fraud and is usually accomplished through a bill in equity to reform the written instrument or to cancel it. No such case is presented by the facts as will justify the Court in allowing the statement made by Avery at the time he and Drake signed the contract to control.

The judgment will therefore be for the plaintiff for $600.

James H. Root
vs.
William Morton and Amos Ray, Partners as Morton and Ray.

Case No. 14

Statement.

The plaintiff is an architect doing business at Indianapolis, Indiana, making a speciaty of drafting plans and specifications for elevators and mills. The defendants are dealers in grain, conducting an establishment at Chicago, Olney, Carbondale and Nashville, Illinois. Desiring to erect two elevators, one at Nashville and the other at Olney, they applied to the plaintiff at his office in Indianapolis for the plans and specifications for an elevator at Olney with a capacity of 100,000 bushels of grain and one at Nashville with a capacity of 150,000 bushels. It was agreed between the parties that if the buildings should be constructed according to the plans and specifications furnished, the plaintiff should receive 5 per cent of the cost, but if the buildings were not constructed then he was to receive as a flat rate for the plans of the Olney elevator $500 and for the Nashville elevator $600. The plans were drawn and delivered to the defendants. The Olney elevator was contracted for a cost of $22,000 for which the plaintiff received the commission of 5 per cent.

The defendants advertised for bids as to the Nashville elevator and the lowest bid being much in excess of $30.000, the amount which the plaintiff estimated would be the cost of its construction, the erection of the building was given up. The defendants claimed that the building could not be constructed according to the plans and specifications because it violated certain ordinances of the city of Nashville When the plaintiff was notified that the building would not be erected he demanded payment of the $600, which was refused by the defendants upon two grounds: first, because the plaintiff had guaranteed that the cost of construction would not exceed $30,000; second, because the plans and specifications were drawn in such a way that the elevator could nor be operated without violating an ordinance of the city of Nashville.

For plaintiff, Whiteside & Wright.
For Defendants, Zetterholm & Anderson.

Case No. 15.

Statement.

On the 1st of October. 1911, James Clark was by the mayor of Urbana appointed City Collector of special taxes and special assessments for the term of one year. The appointment was with the advice and consent of the City Council, and Clark was directed within ten days to execute a bond in the sum of $3,000 to the City of Urbana, with two sureties to be approved by the City Council, conditioned for the faithful performance of his duty.

On the 8th of October, 1911, Clark presented his bond for the amount requested, signed by himself as principal and by Jos

eph Clark and Eli Rood, two farmers living in the south part of Champaign county, us sureties, and the City Council approved it.

During the winter and spring of 1912, Clark collected a large amount of special taxes and paid the most of it into the city treasury, but appropriated to his own use $2,400 over and above what was due him as fees and commissions. He was unable to make good his defalcation and early in 1913 he absconded. When the sureties were called upon to pay the amount embezzled, they employed an attorney who discovered on examining the bond that it was made to the City of Champaign instead of to the City of Urbana. The mistake occurred by reason of using a printed blank used in the City of Champaign, in which the words "Know all men by these presents that——— as principal and ——— as sureties, of the county of Champaign, State of Illinois, are held and firmly bound to the City of Champaign, Illinois, in the penal sum of -——— dollars, which payment well and truly to be made, we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally by these presents" were printed. In the condition part of the bond it was correctly recited that Clark had been appointed to his office by Frank Boggs, Mayor of the city of Urbana. In fact, the word "Champaign" wherever it appeared in print in the condition part was erased and the word "Urbana" inter.ined in its stead. That the word "Champaign" in the first part of the bond was not so changed was a mere oversight and the sureties, when they signed, understood they were obligating themselves for the faithful performance of Clark in his duties as a special tax collector for the city of Urbana. The sureties refuse to make good Clark's defalcation. They contend that as they are sureties only the obligation must be strictly construed in their favor and can not be made to include an obligee not named in the bond.

For the City of Urbana, Cassidy & Dillon.

For Joseph Clark and Eli Rood, Coffee & Esselboen.

Moot Court Bulletin

College of Law — University of Illinois

Vol. XI. December 8, 1913. No. 4.

Mary Carter
vs.
Henry Bates, Executor.

Brief for the Petitioner.

Case No. 5.

An administrator succeeds to the legal title to the personal estate of his intestate and the title takes effect by relation from the death of the latter.

Makepeace vs. Moore, 5 Gilman 474.

There is no doubt that an executor or administrator may effect an insurance of the personal chattels of the deceased whom they represent.

McLaughlin vs. Penny, 65 Kansas 523.

That the executor or administrator became the absolute owner of a decedents personal estate never was the law in this country. The right of a distributor attaches upon the death of the decedent.

Perryman vs. Greer, 39 Alabama 136.

Bufford vs. Hollerman, 10 Texas 571.

Lewis vs. Lyon, 13 Ill. 117.

The administrator, it is true, may have the legal title to the personal estate, not, however, in his own right but as trustee and for a particular purpose.

When the debts are paid the cestui que trust is entitled to the assets.

Lewis vs. Lyons, et al, 13 Ill. 117.

Every will furnishes its own law. The language of such instruments is so various that only the most general rules can be laid down for guidance in this interpretation.

MuLaughlin vs. Penney, 65 Kansas 523.

A will should be construed in the light of surrounding circumstances and parol evidence is admissible to prove the circumstances.

Pert vs. Pert, et al, 229 Ill. 341.

To the same effect, Little vs. Giles, 25 Neb. 313.

Doe vs. Hiscock, 5 M. & N. 363.

Hawhe vs. Chicago & Western Inc. R. R. Co., 165 Ill. 651.

Such evidence is admitted not for the purpose of introducing new words of a new intention into the will but so as to give an intelligent construction to the words actually used consistent with the real state of the testator's family and property—in short so as to enable the Court to stand in the testator's place and read it in the light of those surroundings under which it was written and executed.

Schanler on Wills.

Respectfully submitted,

Brannon and Dillon,
Attorneys for Petitioner.

Brief for Defendant.

1. A special legacy is one which arises from the manifestation of the testator that the legatee shall have a particular thing.

Gardner on Wills, P. 556.

Or it is a bequest of a particular thing distinguished from all other things of the same kind.

40 Cyc. 995.

2. A specific legacy can only be satisfied by turning over the particular thing bequeathed.

Thomlinson vs. Finke, 145 Mass. 346.

And the burden of proof is on the legatee its existence and identity when title is to vest in him.

Barbour vs. Davidson, 73 Ill. App. 441.

3. Title to chattels goes first to the executor and vests only in the legatee upon distribution.

Jaques vs. Ballard, 111 Ill. App. 567.

Gardner on Wills, P. 613.

4. An executor has an insurable interest but need not insure as a matter of course.

Rubaltom vs. Morrow, 24 Ind. 202.

Dortch vs. Dortch, 71 N. Car. 188.

Lewis vs. Lyons, 13 Ill 117.

5. The well established principle in the construction of wills is that the intention of the testator, to be gathered from the words of the will, must prevail.

Jennings vs. Jennings, 44 Ill. 488.

Engelthaler vs. Engelthaler, 196 Ill. 230.

Respectfully submitted,

Esselborn and Lee,
Solicitors for Defendants.

Opinion by Harker, P. J.

On May 3, 1913, Jane Lowle died leaving a will by which she disposed of all her property as follows:

To her brother, Henry Bates, she devised lots 4 and 5, block 6, Haden's Addition to the city of Champaign.

To her sister, Mary Carter, all the furniture valued at $3,000, used in the two rooming houses located on said lots 4 and 5.

To her grandson, James Lowle, twenty shares of stock in the Champaign National Bank.

The houses with the furniture mentioned were leased to tenants until July 1, 1914, and it was recited in the will that the rents as collected from month to month should be paid to James Lowle to meet his expenses while attending the University of Illinois as a student. The will also contained the following clause: "It is my will that all money when collected, no matter from what source, shall be divided equally between my sister, Mary Carter, and my grandson, James Lowle." The will was admitted to probate in the county court June 4, 1913, and Bates qualified as executor.

The furniture was covered by a fire insurance policy for $1,500 running to July 21, 1913, and on that day Bates renewed the insurance for one year, taking the policy in his own name as executor and paying the premium out of money collected for the estate. On September 1, 1913, the two houses and furniture were destroyed by fire and Bates collected $1,500 on the policy covering the furniture. That sum he now holds together with $6,500 other money collected for the estate. All debts against the estate and cost of administration have been paid and all claims due the estate have been collected. Bates reports that there is nothing further for him to do as executor and contends that the $8,000 in his hands should be paid in equal parts to Mary Carter and James Lowle. Mary Carter contends that she is entitled to the entire amount of insurance money collected and files a petition in the county court in which she asks that it be paid to her and that the remaining $6,500 be paid to her and James Lowle in equal parts.

The will specifically bequeaths to the petitioner all of the furniture in the two rooming houses devised to Henry Bates. Title to the furniture vested in her upon the death of the testator. It is true that

she was not, under the terms of the will, entitled to its immediate enjoyment. The tenants under the leases running to July 21, 1913, were entitled to the possession. Bates, as executor, was no more entitled to the possession of the furniture than the petitioner when we take into consideration that there was no necessity of selling personal property to pay the debts The rents with which the tenants were chargeable under the leases were to be turned over to the grandson, James Lowle, to meet his expenses. So, it may be said that while title passed to the legatee, she was not in a situation to have immediate possession.

When Bates renewed the policy and took the same in his own name as executor, it was for the purpose of protecting the property to the end that James Lowle should have the rents until July 21, 1913, and that Mary Carter would be indemnified against loss by fire. There would be no equity in depriving the legatee of the insurance indemnity and in giving it to the estate to be divided between the petitioner and James Lowle. It did not belong to them. In equity it belonged to her.

It has been repeatedly held that the insurance money takes the place of the personal property destroyed.

Wyman vs. Wyman, 26 N. Y. 253.
Haxall vs. Shippen, 10 Leigh 536.
Culbertson vs. Cox, 29 Minnesota, 309.
Estate of Robl, deceased, 163 California 801.

The clause in the will which provides that all money when collected, no matter from what source, should be divided equally between the petitioner and the grandson clearly has reference to money due the estate at the time of her death. It certainly was not intended to include any money that might be collected by the executor. Such a contention would require the rents under the lease to be divided equally between them when a specific provision of the will was that the rents, when collected, should all be paid over to James Lowle to pay his expenses while attending the University.

The petitioner is entitled to $1,500 insurance collected, less the amount of the premium. The amount paid as premium should be added to the $6,500 and the aggregate divided equally between the petitioner and James Lowle. I deduct the premium because it is not equitable that James Lowle should be charged with any part of the insurance expense. Judgment accordingly.

Samuel Jones
vs.
Dudley and Mott.

Case No. 6.

Plaintiff's Brief.

Where an agent contracts with a third party without disclosing the name of his principal the agent is liable on the contract.

Wheeler vs. Reed, 36 Ill. 81.
Porter vs. Day, 44 Ill. App. 256.
McDonald vs. Bond, 195 Ill. 122.

Where the third party has reasons to believe that a broker is acting for an undisclosed principal, yet if he does not know who that principal is, he may hold the broker personally on the contract.

Scaling vs. Knollin, 94 Ill. App. 443.
Ye Seng Co. vs. Corbitt & Macleay, 9 Fed. 423.
Cobb vs. Knapp, 71 N. Y. 348.
Knapp vs. Simon, 96 N. Y. 284.
Windsor vs. Griggs, 5 Cush. 210.
Welsh vs. Goodwin, 123 Mass. 77.

Machem on Agency, Par. 554.

Huffcut on Agency, page 260.

Story on Agency, Sec. 26.

A broker may be the agent of both the vendor and the vendee.

Lincoln vs. Cotton Mills Co. 128 Fed. 865.

Pollatcheck vs. Goodwin, 75 N. Y. 86.

Where vendee of goods sold at a specific price refuses to take and pay for the goods vendor may resell them and charge vendee with the difference between the contract price and that realized at the sale.

Roebling's Sons' Co. vs. Lock Stitch Fence Co. 130 Ill. 660.

White Walnut Coal Co. vs. Crescent Coal Co., 254 Ill. 368.

Gray Harbor Commercial Co. vs. Turner Joice Lumber Co., 163 Ill. App. 231.

Kingman & Co. vs. Hanna Wagon Co., 162 Ill. App. 545.

Morris vs. Wicaux, 159 Ill. 627.

Rice vs. Penn Plate Glass Co., 88 Ill. App. 407.

Olcese vs. Mobile Fruit Co., 112 Ill. App. 281.

Benjamin on Sales, 6th Ed. 744.

Corbly and Cummins,
Attorneys for the Plaintiff.

Samuel Jones
vs.
Dudley and Mott.

Case No. 6.

Defendant's Brief.

1. Plaintiff must prove a binding contract of sale between himself and the defendant.

One purchasing goods for another makes himself personally liable if he contracts in his own name without disclosing his principal; and this, altho the seller supposes the purchaser is acting as an agent, it is not sufficient to clear the agent from liability that the seller has the means of ascertaining the name of the principal; he must have actual knowledge.

Chase vs. Dubalt, 7 Ill. 371.

Scaling vs. Knollen, 94 Ill. App. 443.

Cobb vs. Knapp, 71 N. Y. Rep. 348.

Mead vs. Attgred, 136 Ill. 298.

But it is quite immaterial whether the agent discloses his character or his principal himself if it be actually known at the time to the other party. In such case the agent will not be bound, unless he enter into such a contract as will bind him at all events.

Chase vs. Dubalt, 7 Ill. 371.

Wheeler vs. Reed, 36 Ill. 81.

2. If there is any relation of contract between the plaintiff and the defendant at all, it is one of agency and not of sale. It was customary for defendants to act for plaintiff in this relation; and in this case and with regard to this particular transaction sued upon they assume relations of agency before the defendants come in contact at all with the third party (the so-called undisclosed principal). It was their intention. (See facts.)

A broker for certain purpose is the agent of both buyer and seller, but for all other purposes is the agent of the party originally employing him; he only becomes the agent of the other party when the bargain between the principals is definitely settled.

19 Cyc. 191.

Wood vs. Rocchi, 32 La. Am. 210.

Boarman vs. Jenkins, 18 Wend. (N. Y.) 566.

Schlessinger vs. Texas Ry. Co. 87 Mo. 146.

(To the effect): Admitting that there is nothing improper in a broker taking a

commission from both buyer and seller with knowledge and consent of both parties, still defendants would not be allowed to become agent of the plaintiff and then work in interest of third party adverse to interest of plaintiff.

45 L R. A. 33. Note and cases cited.
Cotton vs. Holliday, 59 Ill. 179.
Hafner vs. Herron, 165 Ill 242.

(To the effect): Nor may he in his own right purchase from his principal, unless the transaction is clearly free from fraud; there is constructive fraud upon the owner presented in such case.

4 Am. and Eng. Enc. 966.
128 Sw. 431 (Texas).
Hughes vs. Washington, 72 Ill. 84.
Hinckley vs. Colom, 233 Ill. 140.

3. Damages The measure of damages is the difference between the value of the article on the day and at the place named in contract and the contract price; and if vendor fails to accept the commodity contracted for and pay the purchase price, there being no agreement for a delivery by the vendor, the vendor may resell it if he sees fit and the measure of damages will be the difference between the contract price and the price realized at the re-sale; but the sale must be in good faith and the price brought, the fair market value at the time and place of delivery.

Phelps vs. McGee, 18 Ill. 155.
Saladin vs. Mitchell, 45 Ill. 79.
Roebling Sons' & Co. vs. Lock Stitch Fence Co., 130 Ill. 670.

Respectfully submitted,

Glover and DuHdaway,
Attorneys for Defendants.

Opinion by Harker, P. J.

On October 1, 1912, the plaintiff informed the defendants, stock brokers in Chicago, that he desired to sell 200 shares of stock in the Illinois Central Railroad Company for $26,000 and asked whether they had a client willing to pay that for them. The defendants replied that they had not, but that they would see what they could do for him. On the following day defendant, Mott, called the plaintiff by telephone and said: "We can take that stock off your hands for $25,000." Plaintiff accepted and it was agreed that the parties should meet at his office at 12:00 o'clock next day for delivery of the stock and payment of the $25,000. Although plaintiff was on hand at the appointed hour defendants did not appear. In reply to a phone call as to why they had not come to take the stock and pay the $25,000 Mott said that the purchaser of the stock had not come in and it looked as if he was trying to back out. Plaintiff responded that he should hold the defendants to their agreement to take the stock off his hands for the $25,000. A few days later plaintiff made formal tender of the stock certificate and demanded payment of the $25,000. Defendants refused to accept the stock or pay the money. Plaintiff then sold the stock for $23,500, its market price, and now sues the defendants for $1,500, the difference between the contract price and what he was able to get for the stock when sold. The suit is defended upon the ground that the defendants did not agree to take the stock for themselves, but were merely acting as agents for another.

In support of their contention counsel for the defendants point to the fact that the plaintiff had many times before this transaction bought and sold railroad stocks and bonds through the defendants as

brokers and urge that he must have understood that they were not undertaking to buy the stock but were merely acting for another. In corroboration they refer to Mott's telephone reply that the purchaser had not put in an appearance and that they feared he would back out and to the two letters which followed, clearly indicating that they considered themselves as agents and not purchasers.

It would appear that the rights of the parties should be determined by the agreement of October 2, made over the telephone. Without losing sight of the fact that the plaintiff did on the day before apply to the defendants as brokers for a sale of his stock I find there was nothing in the agreement or defendants' offer indicating that they were not purchasing for themselves. The defendants' proposition came in these words: "We can take that stock off your hands at $25,000;" and it was accepted.

Furthermore, in no manner, through letter, telephone, or personal interview, was the name of the defendants' principal disclosed. If the defendants in fact were acting as agents for one who had authorized them to offer $25,000 for the stock. why did they not disclose his name when pressed for a performance of the agreement, so as to enable the plaintiff to have recourse on the principal?

In the words of the eminent law writer, Chancellor Kent, "If a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf, so as to enable the party with whom he deals to have recourse to the principal in case the agent had authority to bind him."

The agent becomes personally liable where the principal is not known, or where there is no responsible principal, or where the agent becomes liable by an undertaking in his own name.

2 Kent vs. Cone, 630.
Anson on Contracts, 345.
Benj. on Sales, 235.
Wheeler vs. Reed, 36 Ill. 81.
Scaling vs Knollin, 94 Ill. App. 443.

The finding will be for the plaintiff and his damages fixed at $1,500. Judgment accordingly.

Peter Cofer
vs.
Walter Bates, Chairman, and Henry Fox and James Holt, Commissioners of Jefferson County, Illinois.

Case No. 7.

Brief for Defendants.

I.

The assignment of the unearned salary of a public officer is void both in law and equity.

City of Chicago vs. People, 98 Ill. App. 517.
Dickinson vs. Johnson, 61 S. W. 267.
Holt vs. Thurman, 63 S. W. 280.
Bank vs. State, 94 N. W. 633.
State vs. Barnes, 73 N. W. 80.
Dunkley vs. McCarthy, 122 N. W. 626.
Walker vs. City of New York, 129 N. Y. Supp. 1059.
Anderson vs. Branstrom, 139 N. W. 40.
In Re Wilkes et al, 97 Pacific 677.
Bliss vs. Lawrence 58 New York 442.
Nelson vs. Townsend, 111 S. W. 894.
Township of Wayne vs. Cahill, 6 Atlantic 621.

II.

The intention of the parties and the rate of discount in excess of 7 per cent determines questions of usury and not the form or device used.

Cooper vs. Nock, 27 Ill. 301.

Missouri Valley Life Ins. Cs. vs. Kittle, 2 Federal 113

III.

This assignment comes within the provisions of the Illinois Statute on Usury.

Chapter 74, Section 6, Hurd's Revised Statutes 1912.

IV.

A board of supervisors is a judicial, discretionary body and can not be coerced to audit accounts against county in a specific manner in absence of fraud.

Fitzgerald vs. Harms, 92 Ill. 372.

Chapter 34, Sections 25 and 46, Hurd's Revised Statutes 1912.

V.

If an answer is filed to complainant's bill traversing his bill and denying his relief in equity, and plaintiff goes to trial upon bill and answer, the answer stands admitted in all respects where it traverses the bill.

Derby vs. Gage, 38 Ill. 27.

Fordyce vs. Shrives, 115 Ill. 530.

Roach vs. Glor, 181 Ill. 440.

Respectfully submitted,

Martin & Mercer,
Attorneys for Defendants.

Brief of Complainant in Cofer vs Walter Bates et al.

Assignment of wages to be earned in future, by a public officer appointed for an indefinite time, may in certain cases be enforced in Equity.

A city marshal.

Brackett vs. Blake, 7 Metc. 335.

Unearned salary of a school teacher.

Johnson vs. Pace, 78 Ill. 143.

A jailer or a policeman elected for a term of four years, with a fixed monthly compensation, may assign fees or wages payable in the future.

Webb vs. McCauley, 4 Bush (Ky) 8.

Manly vs. Bitzer, 91 Ky. 596, 16 S. W. 464.

Conway vs. Cutting, 51 N. H. 407.

Costs due a clerk of a court are assignable in Equity.

Ciples vs. Blair, Rice Eq. (S. C.) 60.

Salary of an officer to become due is a possibility coupled with an interest and as such is capable of being assigned.

State vs. Hastings, 15 Wis. 75.

Brackett vs. Blake, 7 Metc. 335.

Conway vs. Cutting, 51 N. H. 407.

McLellan vs. Walker, 25 Me 114.

Blin vs. Pierce, 25 Vt. 15.

Mulhall vs. Quinn, 1 Gray 105.

Hartley vs. Tapley, 2 Gray 562.

2 Kent's Lecture 39, Page 602, 8th Edition.

The right of appeal from the decision of a county tribunal rejecting a claim in whole are in part, doesn't operate as a bar to the right to maintain an independent action against the county at law or equity.

11 Lyc 599.

8 Ill. App 34.

Respectfully submitted,

H. James Howe,
A C. Strong.

Opinion by Harker, P. J.

One Easton Rude was deputy county clerk for Jefferson county, Illinois, at a salary of $1,000 per year, payable quarterly in installments of $250. The method of paying him was by warrant on the county treasurer after Rude had filed with the county commissioners his claim for $250 with certificate of the county clerk that he had served for the quarter. After he had been in service a year he began the practice discounting his claim in advance of its allowance. He accomplished that by endorsing on the back of his written claim a request that order issue to the person named. He had done that several times in favor of Peter Cofer and the commissioners had recognized that method of procedure by directing the order to issue to Cofer.

On July 1, 1913, Cofer advanced Rude $240 for the quarter ending September 1, 1913, and took from him Rude's claim, made out in regular form, with the following endorsement on the back. "For value received, I assign the within claim to Peter Cofer and request the county board of Jefferson county to direct order for the amount to be issued to him.

Easton Rude."

On September 1 Cofer presented to the county board the claim which was accompanied by the certificate of the county clerk, that Rude had served for the quarter. Owing to the board being occupied with other matters it was not acted upon that day. That night Rude, after delivering a like claim to one John Edwards with a like endorsement to Edwards, absconded.

When Cofer called up his claim on September 2, the clerk informed the board that Rude had absconded and that Edwards held a claim and endorsement like that held by Cofer. Therefore, the board refused to allow the claim and direct order to issue to Cofer.

This suit is by Cofer to test the validity of his claim and to procure a warrant in his favor upon the county treasurer. There has been some discussion as to the remedy open to him. There are several. Having failed to obtain an allowance by the board he could have prosecuted an appeal to the Circuit Court as provided by Sec. 35 Ch. 34 of the Revised Statute. He may proceed by mandamus. Perhaps mandamus is the most appropriate under the circumstances. It was the one selected by the petitioner in the case from which this one was modeled. Counsel for Cofer have elected to begin in a Court of equity. Without stopping to consider whether the remedy is in law or equity, we will pass at once to the substantial merits of the case. Under our present statute a person having misconceived his remedy may be allowed to transfer his case from law to chancery or from chancery to law.

Sec. 40 Ch. 110 P. 1744 Rev. Stat. 1911 Ed.

As to whether the assignment by a public official of his salary before it becomes due is contrary to public policy and void is a question on which the authorities are not harmonious. The English rule is in the affirmative and that has been followed in New York.

Bliss vs Lawrence, 58 N. Y. 442.

But in Wisconsin the rule is otherwise.

Bank vs. Hastings, 15 Wis. 78.

California follows New York and the English holding.

Bangs vs. The Auditor of San Francisco, 66 Calif. 72.

In Illinois the rule and its reasons are stated by Mr. Justice Waterman in city of

Chicago vs. People ex rel, 98 Ill. App. 517 as follows: "The doctrine is well settled that a municipal officer can not assign his unearned salary. His undertaking so to do is but an undertaking uninforcible and of no validity." * * * * * * * * * *

"The performance of public service is secured by protecting those engaged in performing public duties and it is not upon the ground of their private interests, but upon the necessity of securing an efficient pnblic service, by seeing to it that the funds provided for the maintenance of government officials should be secured by them at such period as the law has appointed for their payment.

If assignments of the salaries of public officers were permitted then the assignees would be entitled to receive the salaries directly and thus to take the place of the assignors in respect to the emoluments leaving the duties by said officers, a barren charge, to be borne by the assignees. Such a condition of affairs would eventually produce results disastrous to the efficiency of the public service."

It is contended that the rule does not apply to the case at bar for the alleged reason that Rude was not a public official. I can not so hold. A deputy county clerk takes the same oath as his principal, discharges, in most instances, the same duties, and is paid from the county treasury. He is a public official and the reasons for the rule as set forth by Judge Waterman apply as forcibly to him as to his principal.

The finding is for the defendants.

Lucretia Allen
vs.
The Missouri State Life Insurance Company.

Case No. 13.

Statement.

On May 21, 1910, Phillip Allen, a residence of St. Clair county, Illinois, made a written application to defendant for insurance. The application was returned by the company to Allen for amendment, and on the 24th of June, 1910, Allen signed his second application. A medical examiner's report, dated May 22, 1910, was attached to the first application. No such report was attached to the second.

On July 6, 1910, the defendant caused to be executed and issued, a policy insuring the life of Allen with the plaintiff, his wife, as beneficiary for $2,000. It bore the date, May 22, 1910, and referred to the first application, a copy of which was annexed. The policy recited that it was issued in consideration of a premium of $80, receipt thereof was acknowledged, and payment of a like sum upon the 22nd of May in succeeding years. Each of the applications contained the following statements:

"During the period of one year following the date of issue of the policy of insurance for which application is hereby made, I will not engage in any of the following extra-hazardous occupations or employments: retailing intoxicating liquors, handling electric wires and dynamos....., unless written permission it expressly granted by the company.

"I also state that I will not die by my own act, whether sane or insane, during the period of one year next following said date of issue."

Among the conditions of the policy itself were these:

"Occupation. This policy is free from any restriction as to military or naval service, and, as to other occupations of the insured, it is free from any restriction after one year from its date as set forth in the provisions of the application indorsed hereon or attached hereto."

"Suicide. The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of this policy, and set forth in the provisions of the application indorsed hereon or attached hereto."

On May 22, 1911, Allen paid the defendant the second premium. On June 12, 1911, he committed suicide. His death, consequently, occurred less than one year after the day when the policy was in fact signed by the officers of the company, but more than one year after the day designated in the policy as its date.

All proofs as to death, etc., were regularly made by the plaintiff but payment was refused under the suicide clause. Attorney for the plaintiff will draft a policy of insurance and also a declaration for the Circuit Court of St. Clair county, Illinois. Under the plea of non assumpsit cause will be submitted.

For Defendant, Watson & Wilburn.
For Mrs. May, Coffee & Corbly.

Anna Troll, Administratrix of the Estate of Arthur Troll,
vs.
Cairo Electric Company, a Corporation.

Case No 16.

Statement.

Defendant owns an electric power and lighting plant in the city of Cairo, and as a part of its equipment, there was located on Washington avenue at its junction with 12th street an arc lamp, suspended over the center of Washington avenue, with a pole on either side of the avenue and wires extending between. Along the west side of Washington avenue, extended on poles, were the feed wires for the various lamps located on the avenue. Two such were extended from the west side pole at 12th street to the lamp at that place. They were fastened tight at the pole, but swung sufficiently loose to allow adjustment of the amp.

The pole was about thirty feet tall and fastened to it, near the top, were two cross-arms, one extending north and south and the other extending east and west. The function of the cross-arms was to bear the small feed wires, several in number. Another wire, called the hoisting wire, extended from the lamp mentioned to a pulley at the top of the pole, five or six feet above the topmost cross-bar. It passed through the pulley along the south side of the pole, and within four or five inches of the two wires which fed the lamp, to a small iron lock attached by staple to the pole, about four feet from the ground. About seven feet above the fastening was an insulator. The hoisting wire was used to raise and lower the lamp. Prior to July 7, 1913. the insulator had become so impaired that it was no longer a non-conductor of elictricity. The insulation on the wires running to the lamp was worn off, also, and for a period of five or six weeks immediately before that time there was frequent flickering of the lamp.

In the locality of Washington avenue and 12th streets boys, between the ages of 10 and 15 years were wont to gather of summer evenings to play hide and seek and kindred games, using the pole in question for their goal. Arthur Troll, 12 years old,

and the only child of a widowed mother, the plaintiff, was among the number.

On the night of July 7, 1913, at about 9:00 o'clock he was so engaged with fifteen or twenty other boys. Just after he had made the goal, he picked up a piece of tin, and crying out to his playmates that he was going to play "electric man," seized the hoisting wire, pulled it in contact with the feed wire and received a shock which resulted in his immediate death. He and other of his playmates had on a number of previous occasions received slight shocks through the hoisting wire. It had been seized by them for the purpose of being shocked, and was considered quite a sport. At those times, evidently, the wires were not heavily charged. On this occasion the wires carried 6,000 volts.

The defendant had no actual knowledge of the condition of its wires at the place in question, but the condition described had existed for six weeks before the accident.

The deceased, when not attending school, was engaged in selling newspapers, by which means he was enabled partially to support himself and his mother, a poor woman who followed the occupation of a seamstress

For the Plaintiff, Barlow & Brannon.

For the Defendant, Britton & Brown.

John W. Jones and Alva Y. Jones (husband and wife,) Plaintiff,

vs,

Alma Z. Voss, Defendant.

Case No. 17.

Statement.

Samuel W. Voss, a resident of Champaign county, State of Illinois, and the owner of considerable land in W. ½ N. W. ¼ of Sec. 19, T — R — in the said county, died intestate on the 20th day of May, 1910. He was survived by his widow, the defendant above, three unmarried children, and a married daughter, the plaintiff above, who resides at Carbondale, Illinois.

The defendant was appointed administratrix of the estate. She obtained from her daughter, the plaintiff above, a deed to all of her daughter's interest in the estate. The defendant represented that she could more easily administer the estate, by having this title in her, and that she would upon the settlement and distribution of the estate, deed back to her daughter, whatever interest she would be entitled to under the distribution. The deed is a straight deed of conveyance, and does not set forth the purposes for which it was given.

The other three children also had assigned or conveyed their interests in and to their father's estate to their mother. Upon the settlement and final distribution, the order of distribution recited that she is entitled to the residue of the estate after payment of the costs of administration and of debts. This distribution was made upon the strength of the conveyance to her of the interest of the children. This order was made in January, 1912. The defendant has continued in possession of all the residue of the estate, and though often requested has failed and refused, and still fails and refuses to convey to the plaintiff, the interest that she as a daughter and an heir of the decedent had in his estate, and which she, by the deed had conveyed to her mother.

The plaintiff being unable to get her mother to convey her the property she would be entitled to her under the law, as heir of her father, and which the mother promised to convey upon the final distribution, is desirous of enforcing her rights and

recovering her interest in her father's estate. Her mother claims there was no promise on her part to re-convey. There was no consideration paid by the mother to the daughter on the execution of the deed, although the deed recites as eonsideration "Ten dollars, and other valuable consideration." The deed is a regular deed used for the purposes of conveying lands or interest therein, and is regular in form, and prop erly executed.

Attoyneys for plaintiffs will select the proper remedy to be pursued to recover the interest of the plaintiff in her father's estate. and will draft and file the proper pleading.

Attorneys for Plaintiff, Essington & Finfrock.

Attorneys for Defendant, Fisher & Kessler.

In the Matter of the Estate of Samuel Adams, deceased.

Statement.

Case No. 18.

Samuel Adams died testate April 9, 1897, in the City of Champaign, County of Champaign, State of Illinois. At the time of his death he was the owner of large tracts of land within the said county from which there was no income on account of the poor condition of the land, the same being what is commonly called swamp land.

By his will, Mrs. William May, of Rochell, Illinois, was left a legacy of $800. David Adams, a son of the decedent for whom no provision was made in the will, contested the same when offered for probate. After nine years of litigation, during which time the case was taken to the Supreme Court twice, the will was declared valid and the probate thereof allowed.

Shortly after the probate of the will, John Williams, the executor named therein, died. Thereupon James Johnson was appointed administrator with the will annexed. On account of the real estate, which was practically the only asset of the estate, not bringing in any revenue, the estate was really insolvent. In order to get the account of the estate properly adjusted, James Johnson was compelled to bring an action against Weston King, the executor of the estate of John Williams, for an accounting of the estate of Samuel Adams. The controversy over the account was in litigation for about five years, and also went to the Supreme Court for final adjudication.

By the establishmens of a drainage district and the completion last year of a successful drainage system, the real estate belonging to the decedent's estate, which was practically useless theretofore, has become very valuable, and by farming the land a large income has been paid into the estate this year.

The administrator in settling the estate by making distribution of the same according to the terms of the will, on the 12th of September, 1913, sent to Mrs. William May a check for $800, which check was refused, and no payment of the legacy to Mrs. May has been made. To the final account of the administrator filed in the Probate Court on the 15th day of September, 1913, Mrs. May has filed an objection, claiming that in addition to the sum of $800, she is entitled to legal interest on the said sum from the date of decedent's death until paid. Argument on the objection heard at the time of the hearing of the final account of the administrator.

For Administrator, Bye & Clapp.

For Mrs. May, Coffee & Corbly.

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Henry Healy

vs.

Albert Hobbs

Case No. 8

Brief for Plaintiff

One who places in the hands of an infant an article of such a dangerous character that an ordinary prudent and careful man would have realized it to be likely to result in injury to the child himself, or to others, is guilty of negligence.

Binford vs. Johnson, 82 Ind., 427.
Palm vs. Ivorson, 117 Illinois, App., 536.
Dixon vs. Bell, 5 M. & S., 198.
Carter vs. Towne, 98 Mass., 567.
Meers vs. McDowell, 110 Ky., 926.
29 Cyc. 460.
Dowell vs. Grafton, 22 Out L. R., 550.

To make one liable for negligence it is not necessary that he should have contemplated or even been able to anticipate the particular consequences which ensued, or the precise injuries sustained.

Dixon vs. Scott, 181 Ill., 116.
Benton vs. City of St. Louis, 154 S. W., 473.
21 A. & E. Encyc. of Law 487.

Defendant, by his negligence in permitting and consenting for the child to use a dangerous weapon in a public place so as to endanger the safety of the public, in effect becomes an insurer of the public against the injuries suffered in consequence of the act.

1. Thompson on Negligence, 725.

The placing of such a dangerous instrument in the hands of a child and permitting him to practice with the same in a public park, is tantamount to a nuisance.

Jenni vs. Sutton, 43 N. J. Law 257.
Conklin vs. Thompson, 29 Barb. 218.
Dowell vs. Guthrie, 99 Mo. 653.
1. Thomson on Negligence, I. 725.

Respectfully submitted,

Gunnell & Hannah,

Attorneys for Plaintiff.

Henry Healy

vs.

Albert Hobbs

Case No. 8

Brief for Defendants

I. A father is not liable for the toils of his minor children by reason of his relationship to such minor child, but only in case the act was committed with the father's consent or in course of father's business.

Paul vs. Hummell, 43 Mo. 110.
Poulin vs. Howser, 63 Ill. 312.
Wilson vs. Garrard, 59 Ill. 51.

II. A party injured by the negligence of another must seek his remedy against the person whose negligence it was that caused the injury and that person alone is liable even though he is a minor.

Paul vs. Hummel, 43 Mo. 119.
Wilson vs. Garrad, 59, I.. 51.

III. According to modern judicial conception the father of a small boy violates no social duty, commits no nuisance and is guilty of no negligence in placing into the hands of a small boy a toy gun or revolver with which he injures another.

Thompson on Negligence, S. 790.
Haggarty vs. Powers, 66 Cal. 368.
Johnson vs. Glidden 74, Am. St. 795.
Baker vs. Haldeman, 24 Mo. 219.

IV. Negligence is a question of fact in this case for the detrmination of the tribunal, the father not being liable unless personal negligence is shown from the facts of the case.

Defendant submits that under the facts of this case that negligence is not shown.

Johnson vs. Glidden, 74 Am. St. 795.
Harris vs. Cameron, 81 Wis. 239.
Authorities previously cited.

Respectfully submitted,

Lewis & Keran

Attorneys for Plaintiff.

Opinion by Harker, P. J.

This action is brought to recover damages sustained by the plaintiff in the loss of an eye, directly caused by the negligent act of the defendant's twelve year old boy. A recovery is sought upon the following facts: The defendant, residing near the East Side Park, in Champaign, procured for his boy an archery outfit, consisting of two bows, twelve arrows, and a target, the target consisting of a circular piece of soft wood, with a painted bull's eye in the center, and, when in use, rested upon a pedestal about eighteen inches from the ground. The arrows were pointed with steel, so they would stick into the target when shot from the bow. After the boy had used the outfit in the defendant's back yard for a few weeks, he, with the knowledge and consent of the defendant, began practicing with it in the East Side Park. He and other boys were wont to so use it almost every afternoon. One afternoon last June, the boy, while so practicing in the park, shot an arrow which missed the target and hit the plaintiff in the right eye, thereby destroying its sight. The plaintiff was, at the time, simply passing along the walk which leads through the park.

The common law rule that a father is not responsible for the torts of his minor child has been very generally recognized by the courts of this country. As far as I am advised, there is but one state which has announced a different rule, and that is the state of Louisiana, where the civil law prevails. The rule is different according to the civil law. Under it, the doctrine that fathers and others should be responsible for acts of children under their care, which it is their power to prevent, prevails. The civil law rule appears to me to be the most reasonable, but of course the decision of a case in a state where the common law, except where modified by statute, prevails, must be based upon the common law rule.

If the boy, without the knowledge or consent of the defendant, had gone into the park for archery practice, and while so engaged put out the ye of the plaintiff, I should, following the common law rule, hold that the defendant was not liable. There is an element in this clause, however, which in my opinion should take it out of the common law rule. It seems that the boy entered into this public park for the purpose of practicing with other boys, with the knowledge and consent of the defendant. If he consented to the use of this dangerous instrument, then, because of the control which the parent has over the child, he became in a sense, an accessory. What do we understand by the term "consent?" The latest lexicographers term it, "A voluntary accordance with, or concurrence in, what is done or proposed to be done by another." In law, consent is defined to be,

"Capable, deliberate, and voluntary assent or agreement to, or concurrence in, some mental power." I take it, that the boy, after using the outfit in his back yard, asked his father permission to use it in the public park, and that the father granted him such permission. Under such circumstances, it is clear to my mind that the father should be held liable.

This case is very much like the case of Hagarty vs. Powers, reported in 66 California, 368. In that case the defendant demurred to a complaint in which he was charged with willfully, carelessly, and negligently suffering, permitting, countenancing, and allowing his son, eleven years of age, to have in his possession, a loaded pistol, which the boy afterwards so carelessly used as to shoot the infant child of the plaintiff. A majority of the court decided that there was no cause of action, but there was a dissent and I think the better reasons are with the judge filing the dissent.

The only remaining question is whether the instrument which put out the plaintiff's eye may be regarded as a dangerous weapon. Of course, a father would not be liable for an injury occasioned by his minor son, while in play with an instrument not necessarly dangerous. For instance, his consent to the boy playing baseball in the park would not render him liable for an injury done by the boy in the use of an ordinary baseball. This instrument was pointed with steel. It was necessarily dangerous in the same sense that a loaded pistol is dangerous when used in shooting at a mark. I think that point is well substantiated by arrow missed the target and struck the the evidence, which shows that when the plaintiff, the force was sufficient to destroy his eye.

The finding will be for the plaintiff and damages essessed at $3,000.00 judgment accordingly.

Elliot C. Johns

vs.

Susan Johns

Case No. 9

Brief for Plaintiff

Law of California governs this case for the succession to personal property is governed by the law of the actual domicil of the intestate at the time of his death, no matter what was the country of his birth, or his former domicil, or the actual situs of the property at the time of his death.

Russell vs. Madden, 95 Ill. 485.

Susan Johns is not entitled to all of this money for—

If the decedent leaves no issue, the estate goes one half to the decedent's father and mother in equal shares, and if either is dead the whole of said half goes to the other.

Sec. 1386. Par. 2, Civil Code of California. Under this statute Jennie Cox, his foster mother, was entitled to one half of the intestate's estate. She, however, has renounced her share, by allowing the defendant to administer the estate as she did—for

The share in an nntestate's estate can be released by an heir, and no formal documents are necessary to do this.

Riddell vs. Riddell, 70 Neb. 472.

Therefore, the plaintiff, natural father of the intestate, is entitled to one half of his deceased son's estate.

Sec. 1386, California Civil Code.

Submitted by

Pogue & Samuel

Attorneys for Plaintiff.

Elliot C. Johns

vs.

Susan Johns

Case No. 9

Assumpsit

Brief for Defendant

1. Conflict of laws:

The succession to personal property is governed by the law of the actual domicile of the intestate at the time of his death.

Russell vs. Madden, 95 Ill. 485.

Cooper vs. Beers, 143 Ill. 25.

14 Cyc. 21.

Therefore, the laws of descent and distribution of California apply in this case.

2. Descent and Distribution in California:

When a person dies intestate leaving no issue, but leaving a husband or wife as the case may be and a surviving parent or parents, the husband or wife is entitled to one half the estate of the intestate and the parent or parents the other half.

Cal. Civil Code, Sec. 1386 (2).

3. Effect of adoption on the rights of the parties:

(a) The effect of adoption is to confer upon the parties the legal relation of parent and child and entitle them to all the rights and imposes all the duties of that relation.

Cal. Civil Code, Sec. 227, 228, 229.

And the relation between the natural parents and the child are forever severed.

In Re Jobsons Estate, 128 Pac. 938.

Younger vs. Younger, 106 Cal. 379.

(b) A legally adopted child bears exactly the same relation and is entitled to exactly the same rights with respect to the adoptve parents, as if born to them in wedlock.

Warner vs. Prescott (Maine) 17 L. R. A. 435.

In Re Jobson's Estate, (Supra).

Tiffany, Dom. Rel. 222.

(c) When an adopted child inherits from an adoptive parent and later dies intestate, the other heirs of the adoptive parents will take in preference to the blood relatives of the adopted child.

Humphries vs. Davis, 100 Ind. 275.

Estate of Evans, 106 Cal. 562.

Swick vs. Coleman, 218 Ill. 33.

(d) An adopted child inherits from the adopting parents.

In Re Newman, 75 Cal. 213.

A priori, the adoptive parent inherits from the adopted child.

Respectfully submitted,
Seidenberg & Stephens,
Attorneys for Defendant.

Opinion by Harker, P. J.

In this case the plaintiff seeks to recover $10,000, being one-half of the amount of a legacy which his son, Frank Cox Johns, received under the will of his grandfather, Frank Cox.

The son was adopted by his maternal grandfather under the laws of California in 1889. The plaintiff was, at that time, living in California with his wife and consent for the adoption was formally entered. The son continued to reside with his grandparents up to the time of the death of his grandfather, in 1906. The plaintiff, shortly after the adoption of the child, removed to Illinois, where he has lived ever since. The adopted son married the defendant in California, and died in 1909, owning no property except the legacy bequeathed to him by his grandfather. It consisted entirely of personal property. The only relatives left by him at his death were his widow, the defendant, this plaintiff, and his grandmother. The defendant administered upon his estate,

and after paying all costs of administration, received the entire $20,000, in 1911, when she left California and took up her residence in Illinois.

Quite uniformly have the states where adoption legislation has been passed provided that the adopted child shall, for the purpose of inheritance, be regarded in the same light as a child by lawful wedlock, and the adopting parents regarded in the same light as a parent in wedlock. In other words, a child adopted in conformity with legislative provision comes to full rights of inheritance as a natural child, and the parent to the full rights, not only of control of the child, but of inheriting from the child. By the adoption proceedings, a new relation is established and the parent consenting to the adoption of the child, unless there is statute to the contrary, releases his right of inheritance.

The adoption in this case having been under the laws of California and the property in dispute being situated in California at the time of the death of the plaintiff's child, the rights of the parties must be determined according to the laws of California. In that state, it is held by the courts that the right of inheritance of the subject of adoption, with the rights and obligations springing therefrom, are purely matters of statutory regulation. In that state, it is held that where there has been a regular adoption that the natural relationship between the child and its parents by blood consenting thereto is suspended. The courts there are in harmony with the courts elsewhere, where the adoption legislation is similar, and take the view that as the act of adoption confers upon the adopted child the right to succeed to the estate of his adopting parent, it follows that upon the death of the child, the adopting parent is entitled to inherit as a parent to the exclusion of the parent by blood. The courts there also hold that the death of the adopting parent does not have the effect to revive in the natural parent a right of inheritance. In other words, upon the death of an adopted child, after the death of the adopting parent, the parents by blood have no statutory right of inheritance in the child's estate.

If when this child died, one-half of the estate belonged to the widow and the other half belonged to the grandmother, the natural father, the plaintiff, could lay no claim to it, even though the defendant took the entire $20,000.

Judgment for the defendant.

Luney & Newell,
Attorneys for Plantiff.

Henry Clark

vs.

Oakland Auto Company

Case No. 10

Brief for the Plaintiff

When a principal grants a right of exclusive agency in a certain territory for a specific period, that right given is exclusive of the prinlipal as well as of other agents appointed by the principal.

La Favorite Rubber Mfg. Co. vs. Channon Co., 113 Ill Ap. 491.

Marshall vs. Canadian Cordage Etc. Co., 160 Ill. App. 114.

Wiggins vs. Consolidated etc. Shoe Co., 161 Mass. 597.

Cincinnati etc. Co. vs. Western etc. Co., 152 U. S. 200.

The sale by the principal need not be made in the territory where the exclusive right exists to allow the agent to recover for a breach of an agreement for the ex-

clusive agency if the sale be made by the principal to a resident of the agent's territory while that purchaser is temporarily residing outside the agent's territory, the agent may recover the commission.

Garfield vs. Peerless Motor Car Co. 189 Mass. 395.

Marshall vs. Canadian Cordage Etc. Co., 160 Ill, App. 114.

Henry Clark
vs.
Oakland Auto Company
A corporation
Brief for Defendant
Case No. 10.

If the principal grants a right of exclusive agency in a certain territory for a specified time, and the principal sells goods within the territory within the time designated in the contract, he is not liable to the agent for the commissions on the sales.

Goldengate Packing Company vs. Farmers' Union, 55 Cal. 606.

Thomas Houston Electric Co., vs. Berg, 30 S. W. 454.

If the principal gives the agent the exclusive right to sell the former's products within a certain designated territory for a specified time, and the principal sells his products, outside the territory, to a resident thereof, and that person takes the product into the territory, the principal is not liable to the agent for commissions on such sales.

Wycoff vs. Bishop, 115 Mich. 414.

Haynes Automobile Co. vs. Woodill Auto Co., 163 Cal. 102, 40 L. R. A. (NS) 971.

Gay Oil Co. vs. Muskogee Oil Co., 97 Ark. 502.

In an exclusive agency contract where the principal does not expressly bind himself not to sell within the specified territory he may sell his product to a resident of that territory and not be liable to the agent for the commissions on the sales.

Golden Gate Packing Co. vs. Farmers' Union, supra.

Thomas-Houston Electric Co. vs. Berg, supra.

Wycoff vs. Bishop, supra;

Gay Oil Co. vs. Muskogee Ooil Ref. Co., supra.

Haynes Automobile Co. vs. Woodill Auto Co., supra.

The owner of real estate, though he grants to an agent the exclusive right to sell, may sell the same himself and not become liable to the agent for commissions unless the agent has produced a buyer who is ready and willing to purchase.

Woolf vs. Sullivan, 224 Ill. 509.

Dickinson vs. Owens, 134 Ill. App 561.

Gilbert vs. Coons, 37 id. 448.

Metzen vs. Wyatt, 41 id. 487.

Sievers vs. Griffin, 14 id. 63.

Dole vs. Sherwood, 41 Minn. 535.

4 Am. & Eng. Ency. of Law 979.

31 Cyc. 1517.

To entitle an agent to his commissions he must be the procuring cause of the consumation of the transaction.

Attrill vs. Patterson, 58 Md. 226, and cases cited.

Burkholder vs. Fonner, 34 Neb. I.

Blumberg vs. Sterling Bronze Co., III N. Y. S. 529.

Odum vs. J. I. Case Co., 36 S. W. 191 (Tenn.).

Commercial Nat'l Bank vs. Hawkins, 35 Ill. App. 463.

If a sale by a principal works a breach of contract with the agent, the action by the agent should be for damages and not for commissions.

Metzen vs. Wyatt, 41 Ill. App. 487.

Dickson vs. Owens, 134 Ill. App. 564.

Clark & Skyles on Agency, P. 356.

Roberts vs. Minn, etc. Machine Co., 59 Am. St., Rep. 777.

The agent who alleges that his exclusive territory has been invaded by the principal must show that the parties making the purchases would, but for the act of the principal, in selling to them, have purchased from the agent in order to recover his commissions on such sales.

Hall vs. Spencer & Sewart, 58 Ia. 681.

Wilson Sewing Machine Co. vs. Sloan, 50 Ia. 367.

Clark & Skyles, P. 356.

Roberts vs. Minn. etc. Machine Co., supra.

And see Sedgwick on Damages, 9th ed. P. 170.

Respectfully submitted,
McKnight & Patterson,
Attorneys for the Defendant.

Opinion by Harker, P. J.

This suit is to recover $737.50, commission on two sales of automobiles manufactured by the defendant and sold to Amos Price and Leonard Watts, residents of Urbana, Illinois. It is based upon the following contract and facts. In January, 1911, the defendant appointed the plaintiff its agent to sell the Oakland auto cars in the counties of Champaign, Douglas, Macon and Piatt, on a commission of 25 per cent. In consideration of the exclusive right to sell, the plaintiff agreed to sell no other make of automobile within the territory mentioned, for the period of three years. Something over two years after the plaintiff had established garages at Champaign, Tuscola, Decatur and Monticello, where he kept the cars made by the defendant on exhibition, and after he had sold a large number of them, Amos Price and Leonard Watts, who had become familiar with the Oakland by driving them about Champaign and Urbana, visited the factory of the defendant and bought two machines, one of them paying $1375 for one and the other one paying $1575 for the other. The prices were the same as those fixed for the plaintiff, plus the freight charges to Champaign. The purchasers drove the machines to Urbana. After the plaintiff had learned of the purchase, he made demand for the $737.50 as commissions, which was refused.

The plaintiff does not contend that he had anything to do with negotiating the sales to Price and Watts. It does not appear, even, that he had by solicitation, demonstration of the good qualities of the Oakland car, or otherwise, led them toward a decision to make the purchase of that particular make of automobile. He bases his claim for compensation solely upon the contract which gave him the exclusive right to sell within the district embraced by the counties of Champaign, Douglas, Macon and Piatt.

The plaintiff contends, First: That when a manufacturer gives to another an exclusive agency to sell its product in a certain territory for a specified period, the company is excluded as well as other agents, and Second: That if it sell to a resident of the territory while the purchaser is temporarily without the territory, the agent is entitled to commission on the sale. As to the first contention, there can be no serious dispute. Where there is an exclusive agency, and the principal violates the contract by making sales directly within the exclusive territory, he ought to be and certainly is liable. In this case the plaintiff, in consideration of the exclusive right to sell the Oakland machine in the four counties mentioned, relinquished all right to sell another make of automobile in the territory for three years.

The serious contention is the second one made. The sales were not made within the district. They were made to men living

within the district it is true, but without aid, solicitation or advice of the plaintiff, so far as the evidence discloses. To reach a correct decision of the case, therefore, we must look to the peculiar language of the contract. "The exclusive right to sell' was in the counties of Champaign, Douglas, Macon and Piatt, not the exclusive right to sell to people in those counties. In the absence of any trade usage to the contrary, the plaintiff would be entitled to recover where sales were made to parties living within the district who had been induced by the efforts of the plaintiff to make the purchase. What is meant is that the defendant should not be allowed to take the sale out of the hands of the plaintiff, after he had, by solicitation, demonstration, and other efforts, brought a resident of the district up to the point of buying. Such case is not presented. Under the facts presented, there does not appear to be a breach of the contract and for that reason the finding is for the defendant..

In the Matter of the Estate
of
William F. Benson, Deceased
Case No. 19
Statement

William F. Benson died intestate on the 3rd of May 1912, in the City of Champaign, State of Illinois. On the 6th of June, 1912, his widow, Ida May Benson, is appointed administratrix, and after qualifying, letters testamentary are issued to her. The decedent at the time of his death, had very little personal property, but did have considerable real estate. In order to pay the debts of the estate, the administratrix obtained an order from the court to sell at private sale a certain piece of the real estate belonging to the estate.

The property was listed with James Going a real estate man in the City of Champaign, and a net price of $6,000 was placed upon the same. The property was listed with Gordon by one of the heirs, Stanley Benson. Gordon knew it to be property belonging to an estate, but did not know it belonged to the estate of Benson. Gordon showed the property to Max Schmidt, and negotiated a sale. Schmidt offered $5,500 for the property and made a deposit of $450 on the purchase price. Gordon notified the testatrix that the only offer he could get for the property was one for $4,500.

The administratrix sent over a blank form of bid to be filled out by Gordon. Unknown to and without the authority of Schmidt, the bid was made by one Dan E. Hall, an employe of Gordon, for $4,500, and thus $450 paid by Schmidt on the purchase price, was deposited in Court with the bid of Hall. After the bid had been filed in Court, Schmidt made an additional payment of $2,300 on the prchase price to Gordon.

The administratrix filed her return of the sale and petitioned the court to confirm the same. The property has been appraised, and the sum of $4,500 is under the law a high enough sum for the property. Before the day set for the hearing of the return, it was learned by the heir, Benson, and by the administratrix, that the property in question had been sold by Gordon to Schmidt for the sum of $5,500. It is to the interest of the estate that a sale to Schmidt be made. He is willing to pay $5,500 for the property upon the delivery to him of a good deed. Gordon wants his $1,000 as a commission.

Attorneys for the administratrix will take the necessary steps to protect the estate.

Attorneys for the heir will take the necessary steps to protect his interest in the estate.

Attorneys for Hall and Gordon will object to any steps taken by the administratrix or the heir, which will entail upon Gordon the loss of the $1,000 commission he is trying to make on the deal.

Attorneys for Administratrix,
Howe & Strong.
Attorneys for Heir,
Lee and Martin.
Attorneys for Hall and Gordon,
Mehl and Mercer.

Hary Walton
vs.
The County of Champaign
Case No. 20.

The plaintiff, a surgeon practicing in Urbana, was, on the 4th of October, 1912, summoned to attend a man by the name of John Scott, who, while trying to mount a moving freight train on the Illinois Central, was injured near Tolono. Scott was a tramp without means. When the plaintiff arrived at the place of the accident, he found Scott's leg badly crushed and the blood flowing profusely. Prompt action was necessary to stop the flow of blood and save his life. He remained with him until morning, when he had him removed to the Burnham hospitalin Champaign. When he visited him on the next day, he found it necessary to amputate his leg to save his life, so he called to his aid another physician and two days later amputated the leg. After the amputation he visited Scott at the hospital twenty times. After Scott's discharge from the hospital, he filed a claim with the County Board of Supervisors for $200. His bill was itemized as follows: $75 for attending Scott through the night, $75 for amputating the leg, and $50 for the subsequent visits. The Board of Supervisors refused to allow the claim because the services were rendered without authority from an overseer of the poor, resident in the township. An overseer of the poor resides four miles west of Tolono, and an overseer of the poor resides in Urbana. The plaintiff brings suit to the Circuit Court to recover $200 for his services.

For the Plaintiff,
Cummings and DuHadway.

For the Defendant,
Glover and Gunnell.

Moot Court Bulletin

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Mary Woods

vs.

James Carson

Case No. 11

Brief for Defendant

Fraud which gives rise to an action of deceit exists where a person makes a false representation of a material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge when he does not know whether it is true or false, with the intention to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, and the deceived person acts with reasonable prudence

20 Cyc. 10, Sec. 6.

Eames vs. Morgan, 37, Ill., 274.
Busternd vs. Farrington, 36, Minn., 320.
Ley vs. Insurance Company, 120 Iowa, 203.

No one can maintain an action for a wrong when he has consented or contributed to the act which causes his loss.

Rea vs. Tucker, 51 Ill., 110.
resentation for the purpose of maintaining
Lowe vs. Massey, 62 Ill., 47.

A person cannot complain of false representation in an action of deceit, unless the representations were made with the intention that they should be acted upon by him.

14 Am. and Eng. Ency. of Law, 148.

Where a man who has equal opportunity with the other to judge of a particular fact, voluntarily shuts his eyes, he must charge his misfortune to his own credulity. The maxim caveat emptor applies.

I Street's Foundations of Legal Liability, 413.

Brennan vs. Brennan 19, Ontario Reports, (Canadian) 327.

Respectfully submitted,

E. T .Switzer,
C. M. Swanson,
Attorneys for Defendant.

Mary Woods

vs.

James Carson

Case No. 11

Brief for Plaintiff

1. A demurrer to a declaration admits to be true all the facts pleaded.

Samuel Arenz vs. County of Franklin, 43 Ill., App., 267.

2. Where untrue representations have been made to influence a person's conduct, and the person to whom such representations were made relying on them acted as was desired and, as a result, suffered damage which was a proximate result of such untrue representations such person may have a remedy for the deception.

Cooley on Torts, page 905.

3. Where one person makes a statement to another which is untrue; and which the person making it does not believe to be true, whether knowing it to be untrue, or being ignorant whether it is true or not;

and which the preson making it intends or expects it to be acted on in a certain manner, by the preson to whom it is made, or with ordinary sense or prudence would expect it to be acted upon; and on reliance of which the person to whom it is made does act in that manner to his own harm; then the person making the statement is said to deceive the person to whom it is made.

Burdick on Torts, pages 365-366.

4. In an action of case for deceit a declaration which sets out the false representations, his knowledge of the defendant that they are false, their falsity in fact, the materiality of the representations, the reliance upon them of the plaintiff, and consequent damage is sufficient.

Brown vs. Lobdell & Co., 50 Ill., App. 559.

5. If a person damage another by false representations made with intent to deceive, knowing same to be false, he will be liable to the person injured, in an action for deceit, notwithstanding he may derive no benefit for the deceit.

Endsley vs. Johns 120 Ill., 469.

6. To recover in an action for deceit, it is only necessary for the plaintiff to prove that the representations were false, that the party making them knew them to be false, and that the plaintiff relied upon them as true and induced to act upon them to his loss and injury.

John Formell Co. vs. Nathonson, 99 Ill., App. 185.

7. Where one knowingly makes an untrue statement, with regard to anything then existing, or which has previously occurred, material to the matter in hand, and he to whom it is made, not knowing its untruth, relies upon it and sustains damage, the person making such false statement is liable for damages accruing to the party injured.

Potter vs. Potter, 65 Ill., App. 74.

8. If a man represents as true that which he knows to be false, and makes the representation in such a way, or under such circumstances as to induce a reasonable man to believe it is true and is meant to be acted on, and the person to whom the representation has been made believing it to be true, acts upon the faith of it, and by so acting sustains damage here is fraud to support an action for deceit.

Nolte vs. Reichelin, 96 Ill., 425.

9. Where the representations relate to a material fact within the knowledge of the person making them, or he assumes to make them upon his personal knowledge, and with respect to which the person to whom they are made has not the present opportunity or ability to test or verify, the latter will have the right to rely upon such representation in the absence of facts apparent to reasonably arouse suspicion and throw doubt upon their truth, and he will not be bound to go further and make inquiries thereof. ffi

Engley vs. Johns, 120 Ill., 469.

10. The motive which actuates a person in making false representations are wholly immaterial. The law infers an improper motive, if what the party states is false, within his own knowledge, and is the cause of injury to the other.

Formal vs. Nathonson, 99 Ill., 185.

11. A person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on.

Pesley vs. Freeman, 3 T. R. 51.

Respectfully submitted,

Stambaugh & Shobe,

Attorneys for Plaintiff.

Opinion by Harker P. J.

In this suit the plaintiff seeks to recover damages sustained by her through the loss of her husband, who abandoned her because of her abuse and neglect.

The facts as alleged in the declaration are as follows: After the plaintiff's husband, who had for several years been an employe of the defendant, quit his service, the defendant on several occasions made false statements to the plaintiff concerning her husband's constancy. He stated to her specific instances of illicit relations with lewd women in Chicago, Peoria and elsewhere. When confronted with the accusations the husband denied them strenuously and demanded of the plaintiff the name of her informant, which she refused to divulge, being under pledge to the defendant not to do so. The defendant is an uncle of the plaintiff by marriage. His influence over her was great, evidently, because she believed his false statements rather than her husband's truthful denials. She continued to accuse the husband, denied him admittance into their home and refused to visit him when dangerously sick at a nearby hotel. Because of such treatment the husband, as soon as he was able to travel, departed the state, and has not been heard of by her since.

The case is a novel one, the like of which has never been presented to the courts of this state, so far as I am advised. There is abundant authority for sustaining the recovery of damages against a party for alienating the affections of a husband or wife, and if this was a suit by Henry Woods against the defendant, undoubtedly he should recoved. But this is a suit by one concerning whom the false and slanderous statements were not made. They were made not for the purpose of injuring the plaintiff, but to injure one who is not a party to the proceeding. When first presented, I was inclined to hold that the action would not lie, but upon mature reflection, I have reached a different conclusion.

While it is true that the immediate cause of the separation was the cruel treatment of the plaintiff, the cause of the cruel treatment was the false and slanderous report made by the defendant concerning the plaintiff's husband. As a general rule, an action for damages for deceit will lie wherever a party has made a false representation of a material fact, knowing it to be false, with the intention to induce the person to whom it is made to do or refrain from doing something to his pecuniary loss, when such person, acting with reasonable prudence is thereby deceived and induced to so do to his own damage. The case presented by the declaration shows the separation of the husband from the wife and that it was caused by her cruel treatment to him, induced through the action of the defendant in making to the wife willfully false representations concerning her husband, for the purpose and with the design on his part to so influence her as to bring about such separation. The defendant used the wife as an instrument to wreak his revenge upon the husband. The result of his conduct was injurious to both and I feel convinced that either has a cause of action against the defendant.

The demurrer will therefore be overruled.

William Benson

vs.

Archibald Coolidge

Case No. 21

Waite was hired as a clerk in William Benson's grocery store, and had served there many years. His duties consisted of making

sales to customers, taking cash in payment, and depositing it in the cash register. He was often sent by Benson to the bank to make deposits and to draw money on Benson's checks, to be used as change in the store. He had instructions from Benson never to borrow money in the name of Benson.

One of Benson's customs was to exchange goods with a neighboring merchant, Archibald Coolidge, when necessary for their mutual accommodation. Waite was often sent to get goods from Coolidge and received such goods without a written order. The difference between the two merchants were settled at the end of each month by a sight draft drawn on the party who stood debtor by the other.

Coolidge did not know that Waite was not allowed to borrow money. He did know that Waite was a trusted clerk who was frequently sent to the bank by Benson as above. For some reason Benson suddenly discharged Waite, on June 30, 1912, paid him in full, and told him to leave that noon, as he might lawfully do. Waite, angered, wished to cause Benson some loss, and shortly after banking hours the same day went to Coolidge's store, where the fact of his discharge was not yet known, and told Coolidge that he was sent by Benson to the bank for $100 change, but had arrived too late and that he would like to borrow it from him. Coolidge gave him the money. Before this transaction the balance for the month had stood in Coolidge's favor. On the evening of June 30th, Coolidge prepared an account of the month's transactions and mailed it to Benson, with a note stating that he was drawing on Benson for the balance, $234.50. The account contained the entry of the loan to Waite that day. Benson did not take time to examine the account when it was received, but when the draft was received he paid it. When he checked the account up, he saw the entry, "June 30th, cash loaned per Waite, $100", and demanded that Coolidge repay him on the ground that Waite had no authority to borrow money for him. Coolidge refuses to do so and Benson brings this suit.

Attorneys for Plaintiff,
Pogue & Samuels

Attorneys for Defendant,
Switzer and Watson.

A. J. MacDonald

vs.

The Peerless Restaurant

Case No. 22.

A. J. MacDonald was the owner of a one story and basement building in Champaign, Ill., which was leased on June 1, 1910, to the Peerless Restaurant for the term of five years at a rental of $100 per month. The following are some of the provisions of the lease:

1. "It is mutually agreed between the above named parties that the premises herein demised are now in good, safe, and tenantable condition, and that all repairs which may subsequently become necessary shall be made by the lessee."

2. "In the event that the said premises shall become untenantable through fire or other cause, the said lease shall not become void, but the lessor shall have sixty days in which to restore the premises to tenantable condition and the lessee shall not be liable for rent for such period as he is unable to occupy the premises. In the event that the lessor is unable to put the premises in proper repair within the said sixty days, then this lease shall terminate and become void."

Due to improper construction of the building and defects existing at the date of the execution of the lease, the basement was at times flooded with water and sewage, was improperly ventilated, and in an unsanitary condition generally. On May 1, 1912 it was condemned by the health officers and the lessee was forced by them to vacate. A dispute arising between MacDonald and the lessee as ot who should make the repairs, three months elapses before the building is rendered satisfactory to the authorities. MacDonald finally repairs, but the lessee refuses to re-enter, and on January 1, 1913, MacDonald brings this action for seven months' arrears in rent and lets the premises to other parties.

For Plaintiff,
Hannah and Keran.

Hannah & Keran
For Defendant,
Lewis and Luney.
Lewis & Luney.

Allen
vs.
Haynes
Allen
vs.
Lyman

Case No. 23

Casper Allen is the owner of a hotel, Bud Haynes, a servant of his, while sweeping one morning, found a gold ring in the hotel lobby and a nugget of gold worth $5.00 in a room occupied by a guest the night before. The nugget of gold he sold to Tony Lyman, a fellow servant and bona fide purchaser. The former owner of neither article appearing, Allen demands the ring of Haynes and the nugget of Lyman. Allen now brings action of replevin against Haynes and Lyman.

Attorneys for Plaintiff,
Seidenberg and Shobe.
Attorneys for Defendant,
Stambaugh and Stephens.

People of the State of Illinois
vs.
Andrew White
Case No. 24

Andrew White, seeing Jones, his old enemy, going down town, went up behind Jones and gave him a blow on the side of the head. This blow so affected Jones' brain as to deprive him of hearing. Jones turned on White, drew his knife, and grappled with him. White called to Jones to stop, that he had no desire to fight, and that he would acknowledge Jones the better man, but Jones, being unable to hear, held White, and was on the point of stabbing him when White pulled a pistol and killed Jones by a shot. Prosecution of White for murder.

Attorneys for the People,
Newell and McKnight.
Attorneys for Defendant,
Patterson and Ratcliff.

A. B. White
vs.
George Smith

Case No. 25

On May 1, 1913, A. L. Jones hired an automobile from the Smith garage for the afternoon for $10.00. Not being able to drive the machine, he requests that a driver be furnished. Smith, the owner of the garage,

thereupon detailed Brown, who worked for him in the garage, to take the car out. Jones promised to pay the driver $2.50. After leaving the city limits, Jones leaned over to the chauffer and said "Go as fast as you can. I want to see how fast you can go."

Brown replied, "My employer does not allow me to break the speed limit."

Jones answered, "Do as I tell you, damn you, I am your master now." Brown accordingly put on full speed and while driving at a reckless rate, ran into and injured A. B. White, the plaintiff, who was driving along the road using due care.

Plaintiff sues Smith, the owner of the garage, for damages.

Attorneys for Plaintiff,
Swanson and Ruth.

Attorneys for Defendant,
Wilbourn and Searing.

Moot Court Bulletin

College of Law **University of Illinois**

Vol. XI. FEBRUARY 16, 1914. No. 7.

CASE NO. 12

Charles Gray
vs.
Enos and Church and the Central Trust Company.

Brief for Plaintiff.

I.

Parol evidence is admissible to explain the terms of a written contract when the same are ambiguous or capable of two constructions.

17 Cyc., 662.
Walker vs. Tucker, 70 Ill., 527.
Walker vs. Douglas, 70 Ill., 445.
Gray vs. Ellis, 129 Pac., 791.
Babcock vs. Deford, 14 Kan., 408.
Brown vs. Markland, 16 Utah, 360.

II.

Whenever one has received money which in equity and good conscience ought not to be retained, an action for money had and received will lie to recover back such money.

Town of Bleeker vs. Balje. 123 N. Y. Sup., 809.
Allen vs. Stenger, 74 Ill., 119.
First National Bank vs. Gatton, 172 Ill., 625.
Board of Highway Commissioners vs. City of Bloomington, 253 Ill., 164.
Wilson vs. Turner, 164 Ill., 398.

III.

Money which has been paid to a party for a particular purpose, but which has not been so applied, may be recovered back in an action for money had and received.

Critzer vs. McConnell, 15 Ill., 172.
Gray vs. Callender, 181 Ill., 173.
Gray vs. Ellis, 129 Pac., 791.

IV.

Both principal and agent are liable in an action for money had and received, when agent has wrongfully appropriated the money received, and the principal has received the benefit.

Gray vs. Callender, 181 Ill., 173.
Shipherd vs. Underwood, 55 Ill., 475.
Commercial National Bank of Chicago vs. Soloman, 106 N. Y., Sup., 508.
Slaughter vs. Fay, 80 Ill. App., 105.
Hoyt vs. Paw Paw Grape Juice Co., 158 Mich., 619.
Gray vs. Ellis, 129 Pac., 791.

Respectfully submitted,
RATCHCLIFF and RUTH.
Attorneys for Plaintiff.

CASE NO. 12.

Charles Gray
vs.
Henry Enos and John Church and The Central Trust Company.

Brief for Agents, Enos and Church.

I.

There was only one contract between plaintiff and principal negotiated by the agents of the principal. That this contract is not ambiguous on its face, and in view of this fact the oral evidence can not be admitted. Oral evidence is only admissible to change the term of a written con-

tract, when the contract upon its face shows a patent ambiguity.

13 Ill., 689.
46 Ill., 247.
185 Ill., 227.
53 Ill., 522.

II.

The agents are not liable on a contract made for their principal when they act within their authority, unless the agent agrees to be bound.

77 Ill., 372.
169 Ill., 482.
111 Ill. App., 10.

III.

That agent was acting within his authority. That his authority was implied by custom; that by custom the agents were in the habit of contracting in like manner for principal. Therefore, since the agents were acting within the scope of their authority, and disclosed their principal, they cannot be held responsible.

82 Ill. App., 77.

SEED and SEARING.

Brief of Defendant, Central Trust Co.

I.

Oral evidence is inadmissible to vary the term of written contract, and all previous agreements are merged into the written instrument.

O'Rear vs. Strong, 13 Ill., 689.
Marshall vs. Gridley, 46 Ill., 247.
Urnesheik Ins. Co. vs. Holzgrafe, 53 Ill., 522.
Clark vs. Mallory, 185 Ill., 227.
Davis vs. Fidelity Fire Ins. Co., 208 Ill., 375.

II.

A special agent cannot bind his principal beyond the scope of his agency, and the third party dealing with such agent is bound at his peril to determine the extent of the agency.

Day vs. Snyder Brokerage and Storage Co., 130 S. W., 716.
Peabody vs. Hoard, 46 Ill., 242.
Baxter vs. Lamont, 60 Ill., 237.
Dumser vs. Underwood, 68 Ill. App., 121.
Forbis vs. Reeves & Co., 109 Ill. App., 98.
Young vs. Harbor Point Club House Association, 99 Ill. App., 290.
Thornton vs. Boyden, 31 Ill., 200.

Respectfully submitted,
TERRIL & WANSBROUGH.
Attorneys.

OPINION BY HARKER, P. J.

This is a suit to recover $1,000 paid to Enos and Church, agents for the Southern Trust Company, and turned over to the Central Trust Company.

The Southern Illinois Telephone Company is an operating company formed by the consolidation of a number of local telephone companies which had been operating in twenty-two counties in Southern Illinois. The Central Trust Company and the Southern Trust Company are holding companies for its stock and bonds, each capitalized for $200,000. Each has a distinct board of directors and a distinct set of officers, except that both have the same man for president. Subscription books for stock were opened at Cairo and Centralia. Enos and Church were selling agents at Cairo.

The plaintiff desiring $2,000 of stock in the Southern Trust Company, applied to Enos and Church, and paid them $1,000 in advance, being fifty per cent of the purchase price. At the same time he signed a subscription instrument used by subscribers and which had been signed by others, reciting an agreement to pay Enos and Church the sum placed opposite his name.

$2,000, fifty per cent cash and the balance when called for, being payment on account of purchase of stock of the Central or Southern Trust Company. On the following day, Enos and Church, learning that all the stock of the Southern Trust Company had been taken, sent the $1,000 less their commission, to the Central Trust Company, which issued and mailed to the plaintiff a certificate for 20 shares of its stock to the plaintiff. The plaintiff immediately returned the certificate and called upon Enos and Church for a return of the $1,000. They refused upon the ground that under his written subscription he authorized the purchase of stock in either company.

It may be observed that the written instrument did not specifically authorize Enos and Church to select the stock in either of the companies.

The words, "purchase of stock of the Central or Southern Trust Company" are used merely in connection with and as explanatory of what the subscription of $2,000 was for. Enos and Church were agents authorized to obtain subscriptions to the capital stock of two different corporations and as the subscription paper signed by the plaintiff did not specifically authorize them to place the stock in whichever of the two they might elect there is no violation of the rule of evidence contended for by them and the other defendant in allowing proof that the plaintiff gave specific instructions as to which company the stock should be in. When the plaintiff applied to them he made it clear that he wanted stock in the Southern Trust Company, assigning as a reason that he knew its officers. The placing of the money with the other company was an unauthorized diversion of it. I see no reason to doubt their liability to the plaintiff.

In behalf of the Central Trust Company it is urged further that it had no information concerning the subscription other than what appeared in the subscription list signed by the plaintiff. If there was an unauthorized diversion of the money to it by Enos and Church, its agents, ignorance of the specific instructions given by the plaintiff cannot shield it from liability. It cannot profit by reason of the unauthorized acts of its own agents and must be held to hold plaintiff's money without right and under an implied promise to repay the same.

Judgment against the defendants for $1,000 and costs.

CASE NO. 13.

Lucretia Allen vs. Missouri State Life Insurance Co.

Brief for Plaintiff.

I.

Suicide is no defense to a suit on a life insurance policy by the beneficiary, unless so stipulated in the policy.

Supreme Lodge vs. Kutscher, 72 Ill. App., 462.

II.

Issuance and delivery of policy is conclusive proof of approval of application.

Van Ardale vs. Osborne Brokerage Co., 115 Pacific, 779.

III.

Policy becomes effective for insurance purposes from the day of its date.

Monahan vs. Fidelity Mutual Life Insurance Company, 148 Ill. App., 171.

IV.

The life insurance policy with application attached must be construed as a single contract.

Satterfield vs. Fidelity Mutual Life Insurance Company, 55 So., 200.

Blasingame vs. The Royal Circle, 111 Ill. App., 202.

V.

As in the case of other contracts the express intention of the parties control in the interpretation of the contract of insurance.

Minnesota Life Insurance Co. vs. Link, 230 Ill., 273.

WATSON & WILBOURN.
Attorneys for Plaintiff.

CASE NO. 13.

Lucretia Allen
vs.
Missouri State Life Insurance Company.

Brief for Defendant.

I.

No contract of insurance arises until there has been a valid acceptance of the application therefor, and an application for an insurance policy is not a contract until a policy has, in fact, been issued.

10 Ill. App., 348.
53 Ill. App., 530.
72 Ill. App., 569.
102 Ill. App., 348.

II.

While the parol evidence rule forbids the introduction of evidence for the purpose of varying or contradicting the terms of a written agreement it is a well established exception that the date of a document's execution may be established by proving the actual time of the contract, regardless of any statement of the date contained in the writing.

Greenleaf on Evidence, 16th Ed., Vol. 1, Art. 285.

Wigmore on Evidence, Vol. 4, Art. 2410.

171 Ill., 612.

61 Ill., 46.

BRANNON & RUTH,
For the Defendant.

OPINION BY HARKER, P. J.

This is a suit upon a life insurance policy issued to Philip Allen, in which it was stipulated that the company should not be liable "in the event of the insured's death by his own act, whether sane or insane during the period of one year after the issuance of this policy." The policy was dated May 22, 1910, but was not really executed and delivered until July 6, 1910. On June 12, 1911, less than one year after the delivery of the policy but more than one year after its date, Allen committed suicide. The defense is under the condition mentioned.

Written application for the insurance was dated May 21, 1910. A medical examiner's report was attached to it. Because of some informality the application was returned for amendment and on the 24th of June, 1910, Allen signed and sent in a second or amended application. The policy recited as consideration an annual premium of $80, payable on the 22nd of May of each year. The second premium was paid on the 22nd of May, 1911.

A decision of the case hinges upon whether the date of the policy or the physical fact of its execution determines its issuance. Of course the words "issuance of this policy" are not in ordinary acceptation synonymous with the words "date of this policy." But in considering a written contract the usual definition of a single

word or term is not a conclusive test of the meaning to be attributed to it. The true intention of the parties is to be ascertained from an examination of the entire instrument, read in the light of the circumstances attending its execution, and the interpretation placed upon the contract by the parties themselves.

While it is true that the company returned the application received by it on May 22, because it was defective, it afterwards, when it exercised the physical act of executing the policy, elected to adopt that date as the beginning of the insurance. It accepted the first premium of $80 as of that date and accepted the second annual premium of the 22nd of May, 1911, and specified that the premiums for the successive years should be payable on the 22nd of May. It is entirely competent for parties to agree that a policy shall be antedated, and when that is done, it takes effect from its date. City of Davenport vs. P. M. & F. Ins. Co., 17 Iowa, 276; Lightbody vs. North American Ins. Co., 23 Wend., 18; Anderson vs. Mutual Life Ins. Co., 164 Cal., 712.

As the suicide was committed more than one year after the date agreed upon as the commencement of the insurance, the defense must fail and judgment be entered for the amount of the policy.

CASE NO. 15.

City of Urbana
vs.
Joseph Clark, et al.

Brief of Plaintiff.

I.

Penal bond is valid, though wrong obligee is named. The naming of the obligee is a mere formality.

1 Brandt on Suretyship, Sec. 32.
Bay County vs. Brock, 44 Mich., 45, 6 N. W., 101.
City of Orlando vs. Gooding, 34 Fla., 244, 15 So. 770.
Skellinger vs. Yendes, 12 Wend, 306.
Stephens vs. Crawford, 3 Kelley (Ga.) 499, at page 508.
Riggs vs. Miller, 52 N. W., (Neb.), 567.
Thomas vs. Hinkley, 19 Neb., 324.

II.

A provision in a contract totally repugnant to the contract itself is void.

Banjamin vs. McConnell, 4 Gilman, 536.

III.

Contract for suretyship must have a reasonable interpretation according to intention of parties.

Ewen vs. Wilbor, 99 Ill. App., 132.
McDonald vs. Harris, 75 Ill. App., 111.

IV.

Where a contract is capable of two constructions, construe it so as to make it operative.

Thompson vs. Seavor, 189 Ill., 158.
Doyle vs. Teas, 4 Scam., 202.

V.

Contract will be construed strongly against maker.

McCarty vs. Howell, 24 Ill., 341.
Norton vs. Brophy, 56 Ill. App., 661.
Walker vs. Kimball, 22 Ill., 537.

VI.

Parol evidence is admissible to explain ambiguity.

First National Bank vs. Rothschild, 107 Ill. App., 133.

H. W. CASSIDY.
OWEN DILLON.

OPINION BY HARKER, P. J.

Joseph Clark and Eli Rood, sureties on the bond of James Clark, collector of

special taxes in Urbana, are sued to recover a shortage of $2,400, which the collector appropriated to his own use.

They defend upon the ground that the bond did not run to the City of Urbana, but to the City of Champaign. While the recitals in the bond show that James Clark was appointed collector of special taxes for the City of Urbana, and that the condition was for him to faithfully discharge the duties of that office and pay over to the proper custodian all taxes so collected, it recites that the principal and sureties are "bound to the City of Champaign, Illinois, in the penal sum of Three Thousand Dollars." The mistake occurred by using a printed blank used by the city officials in Champaign and by failing to erase the word "Champaign" and insert the word "Urbana."

It is a familiar rule in suretyship that a surety is not to be held beyond the precise terms of his contract. His liability is **strictissimi juris** and cannot be extended by construction. Field vs. Rawling, 1 Gilm., 581; Stull, et al, vs. Hance, 62 Ill., 52; Cooper et al vs. The People, for the use of Madison County, 85 Ill., 417.

Through an application of this rule these defendants, sureties on the bond in suit, seek to escape a recovery against them. The defense is purely technical. It is not claimed that the defendants were misled by the recitals in the bond. They knew that James Clark had been appointed City Collector of Special Taxes for the City of Urbana, and that the bond required of him was to be to that city—not to the City of Champaign.

Looking solely at the intention of the parties the obligation was to the City of Urbana, and the defendants should not escape liability because of this purely clerical mistake.

Judgment in debt for $3,000 to be satisfied on payment of $2,400 damages and the costs of this suit.

CASE NO. 26.

Logan vs. Brondon.

First Count:

Plaintiff had a contract to work for Mitchell & Company, which the defendant induced him to break.

Plea.

Defendant wished to obtain the plaintiff's position for himself and offered to work for lower wages without any malice toward the plaintiff, but knowing that such an offer would probably result in the plaintiff's discharge. Demurrer—rejoinder.

Second Count:

The plaintiff was desirous of obtaining and applied for a position with Watson & Company, which he would have obtained but for the defendant, who threatened to call out Watson's other employees if plaintiff were employed.

Plea:

Defendant was an officer of the Mechanics' Union and adopted this course of action in discharge of his duties, in bona fide belief that it was for the best interest of said Union, and without any personal desire to injure plaintiff. Demurrer—rejoinder.

SEED, WANSBROUGH and WHITESIDE,
Attorneys for Plaintiff.

TERRIL and ZETTERHOLM,
Attorneys for Defendant.

CASE NO. 27.

Horace J. Schindler
vs.
E. S. Cox.

Schindler made a verbal agreement with one L. E. Dunn, in October, 1911, to cut and haul lumber for Dunn during that winter. Schlinder performed his part of the agreement, receiving frequent advances for Dunn, and on Dec. 28, of the same year, the contract was reduced to writing and signed by Schindler and Dunn. In fact Dunn was the agent for the defendant Cox and so informed Schindler at the time of the making of both the oral and written contracts, and the contracts were made by him for Cox, but the written agreement described himself (Dunn) therein as the party with whom the plaintiff contracted and did not mention the defendant. There being a default in payments under the contract, the plaintiff now brings this action against E. S. Cox for the amount due, $1,000, and seeks to hold him liable as Dunn's principal.

For the Plaintiff:
CASSIDY, RATCLIFF, NEWELL.
For the Defendant:
BRANNON, ANDERSON, BARLOW.

CASE NO. 28.

Edwin R. Harris, Thomas Whalen, and Robert Leiter
vs.
William Worthington, Frank T. Hayes, and Samuel Worthington.

Statement.

William R. Jones was elected to the office of County Clerk of Clinton County, State of Illinois, at the regular election in the year 1906, and entered upon the duties of his office on December 1, of that year. He gave a bond in accordance with the form of the statute, for the sum of $5,000, upon which the plaintiffs in this case were his sureties. On July 1, 1908, he appointed William Worthington, one of the defendants, as deputy County Clerk and Deputy Clerk of the County Court of Clinton County, and the said Worthington served in that capacity for the balance of Jones' term of office. Before entering upon his duties as deputy, the said William Worthington, as principal, and Frank T. Hayes and Samuel Worthington, the other defendants, as sureties, executed and delivered to the plaintiffs the following bond:

"Know all men by these presents that William Worthington, as principal, and Frank T. Hayes and Samuel Worthington, as sureties, of the County of Clinton, and State of Illinois, are held and firmly bound unto Edwin R. Harris, Thomas Walen, and Robert Leiter, in the sum of $5,000, good and lawful money of the United States of America, to be paid to the said Edwin R. Hayes, Thomas Walen. and Robert Leiter, or to their certain attorneys, executors, administrators or assigns; for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly by these presents.

"Sealed with our seals and dated this 1st day of July, in the year of Our Lord, 1908.

"The conditions of the above obligation are such that if the said William Worthington, who has been appointed Deputy County Clerk and Deputy Clerk of the County Court of Clinton County, Illinois, which save and keep harmless the said Edwin R. Harris, Thomas Walen. and Robert Leiter, and each and all of them

from all loss and damage and from the payment of any sum of money on account of them, or any of them, being sureties upon the bond of William R. Jones, as County Clerk and Clerk of the County Court of said County of Clinton; and if the said William Worthington shall well and truly perform the duties of such offices of Deputy County Clerk and Deputy Clerk of the County Court of said County of Clinton, and shall turn over all moneys which may come into his hands by reason of said offices; then this obligation to be void, otherwise to remain in full force and virtue.

WILLIAM WORTHINGTON (Seal)
FRANK T. HAYES. (Seal)
SAMUEL WORTHINGTON (Seal)

"Signed, sealed and delivered in the presence of William R. Jones."

Suit is now brought by the obligees on the above bond against the obligors to recover the sum of $2635, which the said William R. Jones collected as fees during his term of office over and above his salary and other proper allowances, and failed to pay over to the County Treasurer, in accordance with the law. The plaintiffs, as sureties for the said Jones, were compelled to, and did pay the above sum to the said County of Clinton, on October 1, 1911. Of the said sum, $2,000 was for fees collected after the said William Worthington became deputy, and $635 was for fees collected prior to that time. There is no claim that any of the shortage was due to the acts or defaults of the deputy, but were due entirely to the wrong doing of the said William R. Jones.

Evidence of facts not included in the above statement to be introduced at the trial and for guidance in preparing pleadings, will be furnished to the attorneys for the respective parties, concerning which they shall apply for information to Professor Decker at as early a date as possible. The trial will be before a jury.

For the Plaintiff:
BRITTON, GUNNELL and PATTERSON
For the Defendant:
POGUE, SAMUELS and WRIGHT.

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THE COLLEGE OF LAW.

ITS ORIGIN AND GROWTH.

This is the first of a series of articles that will appear in the various issues of the Moot Court Bulletin during the remainder of the school year. The chief purpose of the articles is to acquaint legal practitioners and others interested in legal education with the plans under which the law school is being conducted, the methods of instruction used and what it as a department is doing to aid the State University in the field of endeavor undertaken by it.

Upon the recommendation ot President Draper, the school was authorized by the Board of Trustees in 1897, and opened for student enrollment in September of that year. The sum of $2,500, only, was available for equipment and the most of that was expended in the purchase of about 500 volumes of law books Four rooms on the second floor of University Hall were assigned to its use and two law teachers were retained to give instruction. President Draper was acting Dean for the first two years, but was unable to do more than exercise a general supervision over the school. The course of study covered a period of two years—the length of time then required by the Supreme Court for admission to the bar. The courses offered were about three-fourths in number of those now appearing in the law school curriculum. The total enrollment for the first year was 39.

The teaching force was increased to three the next year and in September, 1899, Dr. James B. Scott was retained as Dean. Dr. Scott remained in the school for four years, during which time the attendance increased to 110. The law library had not been generously treated, as the limit of the ap proplition which he was able to secure was only $500 per year. In September, 1903, a newly elected Dean was able to secure an appropriation of $3,000 for law books, and the aunual appropriation since that time has been $4,000. Ten years ago, the library was only rudimentary in character, and consisted of a few text books and copies of reports of courts of last resort in about one-fifth of the States of the Union. Th sum total of the volumes did not exceed 5,000. Today it has 17,000 volumes and is an excellent working law library.

Two years after the law school was established, the Supreme Court of the State, in its amended rules for admission to the bar, took an advanced stand in legal education. Students were required to have a general education equivalent to that of an Illinois high school and three years of law instruction. The faculty of the law school welcomed the change and at once increased its curriculum to three years and added a number of new courses. The requirement for admission to the law school at that time was a certificate from an accredited high school showing four years of successful work, although special students were admitted. The requirement for admission has since been raised to the completion of one year of college work. The number of

special students has been reduced from 33 in 1904-5, to 14 in 1913-14. The raising of requirements for admission has had the effect to bring to the school a much better class of students. Of 52 first year students registered in the law school this year, 3 have degrees, 10 have had three years of college work, and a number have had two years. The standard of scholarship has been distinctly raised. The students work more earnestly, and leave the school much better equipped for practicing the profession than formerly. The faculty has been increased so that it now consists of six teachers besides the Dean, who devote their entire time to the work.

That the standard of student work is high is shown by the fact that the percentage of students who were not accorded passing grades last year was greater in this college than in any other of the University; that the percentage of students dropped has been greater in this than in other colleges; and yet a much larger per cent of the students remain in the school and complete the course than in any other college. A recent report issued from the registrar's office shows that undergraduates who did not return after the summer vacation of 1912 were, in the College of Engineering 33 per cent, in the College of Literature and Arts 26 per cent, in the College of Science 18 per cent, and in the College of Law less than 10 per cent. This indicates that the law students prosecute their studies earnestly, persistently, and with final success.

The school is now conducted in a building devoted to its sole use. It is the old Chemical Laboratory remoddled and refurnished. While not so large as some of the law school buildings at other Universties, it is admirably arranged for law school work. In addition to a number of class rooms, it has a commodious lecture room, a large, well-lighted, reading room with consultation rooms attached, offices for the Dean and professors, and a five story fire proof book stack, capable of holding 22,000 volumes.

Anna Troll, Administrator of the Estate of Arthur Troll,

vs

Cairo Electric Company, a Corporation.

Opinion by Ratcliff, J.

This is an action brought by the administrator of Arthur Troll to recover damages for the benefit of the intestate's mother for his death, which is alleged to have been due to the wrongful and negligent conduct of the defendant. The action is supported under Chapter 70 of the Revised Statutes of Illinois. The facts so far as they are necessary to state are these: The defendant owned and operated an electric light plant in the city of Cairo. At the junction of 12th street and Washington avenue an arc light was suspended across the street. The electric current was carried to this and to other lights by means of several feed wires which were attached to poles situated at various intervals on the west side of Washington avenue. Two of the feed wires led from the pole at 12th street to the lamp in question. The lamp was raised and lowered by means of a hoisting wire which extended from the lamp to a pulley at the top of the pole; thence down the pole to a point about four feet from the ground, and was there fastened by means of a small iron lock attached by staple to the pole. An insulator was attached to the hoisting wire about ten or twelve feet from the ground.

The deceased was a boy about twelve years of age, and had been accustomed of summer evenings to play with other boys of the neighborhood under the light at the corner of Washington avenue aud 12th street. On the evening of July 7, 1913, the deceased together with fifteen or twenty other boys was playing at the game of hide and seek, using the pole which bore the hoisting wire as their goal.

Prior to this date several of the boys at different times had touched the hoisting wire, and received a slight electric shock. This was due to the fact that the insulator on the hoisting wire was so impaired that it was no longer a non-conductor of electricity. The insulation on the feed wires which were connected with the lamp was also worn off. and this allowed leakage of the electricity which had charged the hoisting wire.

On the night in question, the deceased picked up a piece of tin, and telling his playmates that he was going to play "electric man," seized the hoisting wire, and swinging on it, brought it in contact with the feed wire. He received an electric shock which resulted in his immediate death.

The case presents two principal questions: first, was the defendant so negligent in maintaining its lighting system that it is liable to respond in damages for the injury complained of; secondly, did the negligence of the deceased contribute to the injury so as to bar this action.

There seems to be but little doubt about the first question. The defendant contends that it had no knowledge of the imperfect state of repair of the wires, and was. therefore, not negligent in failing to replace the defective parts. There was evidence that there had been frequent flickerings of the light in question for a period of five or six weeks prior to July 7, but there was nothing to show that the defendant knew of this. The fact, however, that the defendant did not have actual notice of the defects, does not excuse its liability. The system it is maintaining is one of a dangerous character, and it will be held to a high degree of care not only in repairing any defect it may know about, but also in inspecting the system. In the case of the City of Pana vs. Broadman, 117 Ill. App. 139. the court held that the owners of an electric lighting system would be charged with constructive notice when such system became defective, even for a short time. This case is supported by other authority, and the general rule which it states seems to be based on good policy and sound reasoning. In the case before us the defect had existed for five or six weeks; so we think it clear that the defendant was chargeable with notice of its existence, and that it was negligent in not repairing the same.

The second question is one that requires more careful consideration. It is evident that if the deceased had been an adult, his conduct was such that he would have been guilty of contributory negligence. In this case the deceased was but twelve years of age. Was he of sufficient age to be chargeable with contributory negligence? In the case of City of Pekin vs. McMahon, 154 Ill. 141, at page 154, the court uses this language: "But where a child has passed the age of seven years, as was the case of the appellee's deceased intestate, that he is bound to use such care as children of his age, capacity, and intelligence are capable of exercising." The rule of this case makes it evident that the plaintiff's intestate was of sufficient age to be chargeable with contributory negligence. The case also points out the test of the degree of

care which the deceased was bound to exercise; that is, such care as children of his age, capacity, and intelligence are capable of exercising.

The evidence shows that the deceased and other boys had often taken hold of the hoisting wire in question, and had on these occassions received only slight shocks. Undoubtedly the deceased as well as the other boys knew that the wire was charged with electricity, but their conduct would seem to show that they had no apprehension of the real danger. If boys of this age, and with intelligence such as the deceased and his playmates had, really understood the danger that existed in this case, it is only natural to suppose that some of them would have reported the defect to the proper authorities. It is unreasonable to suppose that all boys in this neighborhood were reckless of their lives. It seems reasonable to believe in this case that the deceased acted as a boy of his age and experience would ordinarily act. To him the charged wire was only a plaything. It had never been dangerous, and there was nothing in his experience or knowledge to warn him of the danger. So he used it as we should naturally expect a youth of his age to use a thing which to him was interesting and unusual.

Therefore, as there is not sufficient evidence to show that the plaintiff's intestate's death was due to his own negligence, judgment will be given for the plaintiff for the amount of three thousand dollars.

In the Matter of the Estate of Samuel Adams, Deceased.

Case No. 18.

Opinion by Harker, P. J.

Under the will of Samuel Adams, who died in 1897, Mrs. William May was bequeathed a legacy of $800. The estate consisted of a large body of unproductive swamp land. Soon after qualifying, the executor named in the will died, and one James Johnson was appointed administrator with the will annexed. The will was contested by a son of the deceased, and the litigation continued for nine years, at the end of which time the will was held valid by the Supreme Court. The administration was delayed five years longer because of litigation for an accounting against the estate of the executor, who had died.

Because of the establishment and completion of a drainage system in 1912, the land became quite productive and has yielded a rich income for one year.

Out of it the administrator now proposes to make distribution in accordance with the terms of the will and asks the sanction of the court to that end. He proposes to pay Mrs. May the $800 legacy left her and settle up the estate. Mrs. May, appearing as objector, declines to accept the $800 in full of her legacy, and insists that she is entitled to that amount and interest on the same since the probate of the will. The sole question is over the matter of interest.

It is not contended that the will makes any provision for interest. The claim of the legatee must rest, therefore, upon some provision of the statute or the common law. Section 114 of the Administration Act provides for interest charge against an administrator or executor as follows: "All moneys, bonds, notes and credits which any

administrator or executor may have in his possession or control as property or assets of the estate, at a period of two years and six months from the date of his letters testamentary or of administration, shall bear interest, and the executor or administrator shall be charged interest thereon from said period at the rate of ten per cent, or after two years and six months from any subsequent time that he may have discovered and received the same, unless good cause is shown to the court why such should not be taxed."

The objector can not base her claim upon this provision. It was intended as a penalty. Its purpose was to make it unprofitable for executors and administrators to hold the funds of an estate in their hands and use them in their own business and for their own benefit, instead of distributing such funds to those entitled thereto.

The administrator in this case has been guilty of no such conduct. At the first opportunity after receiving money from which to discharge the legacy, he has applied to the court for authority to pay it.

If the objector is entitled to interest, it must be at the rate of 5 per cent upon the theory that the legacy was due and payable at the end of one year following the probate of the will. Under the statute quoted, the interest is payable by the executor or administrator personally, and an order requiring that of him does not have the effect to diminish the estate. If the allowance is made under the other theory, it does diminish the estate, and the contest is really one between the objector and the residuary legatee.

Whether legacies bear interest under conditions like the one presented in this case is a question which has never been presented to the Appellate or Supreme Courts of this State, so far as I am advised. A few years ago, Judge Cutting, of the Probate Court of Cook County, in the matter of the estate of one Jane A. Greene, deceased, held that a legacy should bear interest at the rate of 5 per cent after the same became due and payable, even if there was no provision in the will to that effect. Conditions there were not the same as here. As a matter of first impression, I am inclined to hold that a legatee is entitled to interest at the end of one year from the probate of the will, provided the postponement is found to have been of benefit to the residuary legatee. The most frequent cases of postponement in distribution arises from the inability of the collector to collect assets, and it follows that in the majority of cases, such postponement is to the advantage, rather than the disadvantage of the residuary legatee. The postponement in the case at bar was occasioned by the protracted litigation instituted by the testator's son and the litigation attending the efforts of the administrator with the will annexed to secure an acoounting and a settlement with the administrator of the executor named in the will. The legacy was a charge upon the land; but at no time during the nine years consumed by the litigation could the administrator have obtained an order to sell land to pay off the legacy. Had there been no contest, either over the will or over the accounts of the deceased executor, and had the administrator seen fit to apply for and obtain an order to sell land, it would have been sold at a sacrifice; because it was then unproductive. It has become productive and valuable because of the completion of the drainage district. In other words, the postponement of the administration and the postponement of the payment of the objector's legacy has redounded to the benefit of the residuary legatee. I feel quite sure then, that he should

bear the interest charge, and the administrator elect is authorized to pay Mrs. May out of the funds in his hands the $800 and the interest at the rate of 5 per cent since the end of the first year following the probate of the will.

Adamson

vs.

Illinois Central R. R.

Case No. 30.

Henry Adamson, having transacted certain business at the depot of the Illinois Central R. R., was standing upon the platform of the depot to allow an approaching east bound freight train to pass, before crossing the tracks. After the train had passed, he was found lying between the tracks and the platform with his skull fractured by a blow received upon the forehead. Adamson brings suit against the railroad company for damages for personal injuries. At the trial plaintiff's evidence shows the above facts, and further, that the train was travelling at about thirty miles per hour, that there was a round wound upon plaintiff's forehead "like a fifty cent piece." that plaintiff's left hip was bruised, that there was a round hole in the front of the crown of plaintiff's hat, and pieces of the hat and a splinter of wood were removed from the wound in the head. Plaintiff's testimony was that after the engine and two or three cars had passed him "as he looked at the train, he saw something, the outline of which he could not exactly describe and he couldn't tell what it was that hit him." When I saw the thing that I saw the hazy outline of it, it seemed very clear to me. * * * * I couldn't say how near it was to me when I saw it, because as I saw it, that was the last I can remember." No other evidence was given as to negligence in the operation of the train or defects in any of the cars.

Upon examination it was shown that the platform was 7½ feet wide and its edge was 5½ feet from the nearest rail To the west of the station 94 feet on the same side of the track was a mail craine. the post of which stood 4½ feet from the nearest rail.

At the conclusion of plaintiff's case, the defense moved that the plaintiff be nonsuited. The motion was denied, the jury found for the plaintiff, and upon this appeal it is urged that the court was in error in denying the motion for nonsuit.

Attorneys for Plaintiff, Finfrock, Hannah and Lee.

Attorneys for Defendant, Watson, Glover and Clapp.

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The College of Law.

No. 2.

Its Aims and the Methods of Attaining Them

No enterprise can justify its existence which does not have for its object a substantial contribution to the welfare of society. The law school can attain this object The law school can attain this object in no small degree by devoting its energies primarily to the production of an increasngly better-trained, broader-minded and h gher-principled lawyer. The report comes from almost every side that the legal profession is overcrowded. But such report is usually accompanied by the assurance that there is always and everywhere room, yes, a real demand for a high-principled, able and well trained lawyer. Quality not quantity is the need. We render our service, therefore, at once to society and to the individual whom we send out, by insisting that he be a superior product and by devoting our energies to making him such.

Society is interested in having its lawyers trained into breadth of vision. Narrowness, extreme technicality, reactionism, and pettifoggery go hand in hand. The law student should, therefore, be imbued with the consciousness that the legal profession is but one small unit in the great structure of society and that each individual member of the profession is in a larger sense a member of society as a whole. And thus he should be brought to the more important realization that every rule of law promulgated and every principle advocated should be examined in the light of social need and its worth determined on the basis of whether, on the whole, it serves or fails to serve such need. In other words, the training of the lawyer does not consist in teaching him law only, nor in teaching him, parrot-like, rules handed down to us from a former generation, but rather in providing him with a general education as a foundation, and later in impressing upon him the principle underlying the rule of law and leading him to inquire as to the correctness of such principle. If it is found that the rule does not accord with correct principle and sound reason, the foundation is laid for securing a change of the rule when the stage of practice is reached. Thus a lawyer of the constructive type is developed, one prepared to contribute to the growth of the law along the right lines. Society receives its benefit through the elevation of such men to the Bench and other positions of trust and through their honest and efficient labors as counsellors in business and advocates at the Bar.

To accomplish this object in the case of the individual student, and especially to see that the one by disposition somewhat slow is given the needed personal attention and assistance so that he may not be weeded out without sufficient cause. and further to see that the best in the more able student is brought out, requires the services of a teacher whose heart is in his work and who is willing and able to devote sufficient time to the work of teaching alone. With this purpose in mind, the work of the school is

carried on by those who devote their entire time to teaching and whose energies and thoughts are not diverted by the absorbing demands of active practice. The careful supervision that can thus be maintained over the work of the student from day to day by those who are devoting all their time to the work of teaching, enables them to be more exacting, to require more careful preparation by the student and to see that the student lacking in honest endeavor, as well as the one deficient in legal ability, is eliminated before he has proceeded far in his course. The student, as well as the profession and society as a whole, is thereby the gainer.

To this same end entrance requirements have been repeatedly raised. When the school was founded, a high school graduate was admitted as a regular student and candidate for the degree of Bachelor of Laws. Thereafter it was provided that a degree would only be conferred upon a student who had obtained one year of college credits before entering upon his third year of law study, or who had, in lieu of such year of college work, demonstrated his special legal ability by securing an average of 85 per cent in all his law courses. (The passing grade is 70). The next step was to require the year of college work as a condition precedent to entering the law school as a candidate for a degree. This is the rule now in force. Beginning with the school year 1915-16, one more step in this march of progress will be taken. The new Law School announcement, soon to be published will contain the following notice:

The requirements for admission to the College of Law for the year 1915-16 and thereafter will be as follows:

"For admission as a regular student and candidate for the degree of Bachelor of Laws, an applicant must be matriculated and have 60 hours of credit in a college of this University; or have completed two full years of work as given at another college or university of recognized standing; or have received by transfer 60 hours of university credit here.

The faculty of the College of Law may, in its discretion, prescribe from time to time subjects which shall be required as part of the preliminary college work, subject to approval by the University Senate.

A student who is 21 years of age and is entitled to admission as a regular student to another college of this University, will be admitted as a special student in the college of Law. If he attains in the courses of the first year an average grade of 80 or over, he will be admitted to regular standing, and he may receive the degree of Bachelor of Laws if in all the courses he presents for the degree his average grade in 80 or more."

In line with the increase in entrance requirements are our efforts to encourage men to acquire voluntarily even more of a preliminary education than is actually required and to do even more than a passing grade of work. This is done, in part, by offering a special degree to such men as demonstrate superior legal talent and in addition secure an A. B. degree or its equivalent before entering upon the second year of law work. This degree is called Doctor of Law (J. D.) and is granted only to those who comply with the following conditions:

1. Complete the course of law study required for the degree of Bachelor of Laws.
2. Secure a Bachelor's degree in Arts or science prior to the completion of the course in law.
3. Obtain a minimum average grade of 85 in the College of Law.
4. Present a thesis approved by the Faculty of the College of Law.

In this particular Law School of the University of Illinois is setting a higher standard for this degree than has been

established generally in the better law schools of the country.

Mention should here be made of the fact that a student may attain a degree both from the College of Literature, Arts and Science and from the College of Law in six years. This is made possible by the fact that a senior in the College of Literature, Arts and Science is permitted by registering in the Law School to count substantially all the first year of law work toward his literary as well as toward his law degree. This is what is known as the combined six year course in Literature, Arts and Science, and Law.

Another and not unusual means of encouraging better work is the offering of prizes to a limited number of students who excel in their law work. Eight scholarship prizes are open to matriculated students of the first and second years. These prizes—four for $50 each and four for $25 each—are awarded at the end of each year and are available in discharge of tuition fees the year following.

The American Law Book Company, of New York offers an annual prize consisting of the Students' Edition of Cyc., which is awarded to the member of the senion class making the highest average during his senior year. Callaghan & Company, of Chicago, offers an annual prize consisting of the Cyclopedic Law Dictionary which is awarded to the member of the second year class making the highest average during his second year.

Membership in the Order of the Coif is also offered as inducement to better scholarship. Each year ten per cent of the Senior Class (or a minimum of four) are eligible to election to the Order of the Coif, an honorary law society organized to promote scholarship in law. The University of Illinois has the distinction of having given this organization its inception. The first chapter was formed here in 1907. In 1912 it was reorganized and given the distinctive legal name above indicated. It now has chapters in the leading law schools of the United States.

In conclusion it is believed that through these various means, we have been turning out from year to year a more efficient lawyer, a more profound student, and a better citizen.

This article is to be followed by one dealing more in detail with our courses, and our method of instruction, known as the case method.

William Benson

vs.

Archibald Coolridge

Case No. 21

Plaintiff's Brief.

1. Money paid under a mistake, tho' due to carelessness, can be recovered. It would be inequitable not to allow such recovery.

Woodward on Quasi Contracts Sec. 15. Wilson vs. Turner, 164 Ill. 398 at p. 403.

II. This money was paid under a mistak of fact; Benson tho't, when he paid it that he was paying a debt.

III. Benson didn't owe Coolridge this money, for Waite had no authority to borrow it,

1. Waite was a mere servant, and not an agent of Benson. Mechem's Agency p. 6.

2. Assuming that Waite was an agent, he was not a general one. A general agent has power to transact all of his principal's business.

Halladay vs. Underwood. 90 Ill. App. 130.

Waite had only special authority, given at different times.

IV. Assuming that Waite was an agent of Benson, still he was expressly forbidden to borrow money. The power to borrow

money is very closely guarded, and it is not implied power of an agent.

Wider vs. Branch 12 Ill. App. 358. Undisclosed P

Martin vs. Great Falls Mfg. Co. 9 N. H. 51. Court said no general authority.

1 The volume of business transacted by an agent does not determine the extent of his authority.

52 Ill. App. 214.

2. Every agent in the execution of his express authority has implied authority to act (only) in accordance with the established usages and customs of the particular business which he is employed to transact or of the particular agency in which he is employed, unless his principal has indicated a contrary intention.

Tiffany on Agency. p. 174—par. 44.

V. It would be inequitable to allow the defendant to retain this money.

1. Waite is liable to Coolridge. Even an agent who has obtained money from third person illegally will be liable to the person paying it, tho' he has paid it over to his principal.

2. A person dealing with an agent, knowing him to be such, takes the risk of the extent of the agent's authority.

Schneider vs. Lebanon Creamery Co. 73 Ill. App. 612.

Reynolds vs. Feree. 86 Ill. 570.

Davidson vs. Porter. 19 Ill. 456.

VI. The burden of proof is on the third person to show that the agent had authority

Typewriter Co. vs. Sears Roebuck Co. 86 Ill. App. 621.

Submitted by
Pague and Samuels.

Benson

vs.

Coolridge,

Brief of Defendant.

1. Quasi Contracts.

To recover in this case the plaintiff must show that it would be inequitable for the defendant to keep the money in question.

Keener on Quasi Contracts. Page 43 et seq. and cases there cited.

Woodward on Quasi Contracts Sec. 9 (2)

Whether it is inequitable must be determined by applying the rules of agency to see whether Coolridge could have received the $100.00 from Benson not paid the draft made on him by Coolridge.

II. Principal and Agent.

1. A former agent may bind his former principal to parties knowing of the apparent scope of the agent's authority, whether such apparent scope is true or not, until notice of the termination of the relation of Principal and Agent.

Union Bank & Trust Co. vs. Long Lumber Co., 74 SE (W.VA.) 674.

Meeker vs. Mannia, 162 Ill. 203.

2. A person may be estopped to deny that another is his agent if his course of conduct would lead one to that conclusion which a third party has acted upon.

Meechem Outline of Agency Sec. 67 et seq.

Huffcut on Agency, Sec. 50 et seq.

Union Stock Yards Co. vs. Mallory 157 Ill 554.

Applying the facts of this case to the law as set out, supra, it follows that judgment should be entered for the defendant.

Respectfully submitted.

Watson, Cassidy and Stephens,
Attorneys for the defendant.

Willam Benson

vs.

Archibald Coolridge.

Opinion by Pillsbury, J.

This was an action to recover the sum of $1000 paid by the plaintiff to the defendant under an alleged mistake of fact, the mistake consisting in the payment of an account without noticing the prescence of an item which the plaintiff alleges he did not owe. The defense is that the sum in question was in fact owed by the plaintiff by reason of its having been borrowed by the agent of the plaintiff, one Waite, for use as change in the plaintiff's store the next day.

The facts showed that Waite had in fact been discharged by the plaintiff a short time prior to the borrowing of the money as stated above, and that Waite had been instructed never to borrow money, but that neither of these facts were known to the defendant. The defendant did know, however, that Waite was a trusted employee of the plaintiff, was accustomed to make sales in plaintiff's store for cash and to deposit the money in the cash register, to take money to the bank and deposit it for plaintiff and to draw money on plaintiff's checks, also to get goods from the defendant's store without an order for the accommodation of plaintiff's business under an arrangement for the mutual accommodation of two stores.

It is well settled that money paid under a mistake of fact, even though due to carelessness, can be recovered back by the action of indebitatus assumpsit, on principles of quasi-contract. Recovery is not allowed, however, where the money is justly due the defendant in law for equity, though paid by mistake. The sole issue to be here decided is whether on ordinary principles of agency the plaintiff is bound by the acts of his former employee and so owes the money to the defendant. No equitable principles are involved except as stated above, and the equitable maxim of "clean hands" or the doctrine of balancing of equities are inapplicable to action in quasi-contract.

Did Waite have real ostensible authority to borrow this money on behalf of the plaintiff? The fact of his previous discharge may be disregarded. Coolridge was entitled to rely upon all representations made to him by Benson, either expressly or by implication from the known course of his business, as to the authority of an employee, until notified of the discharge of that employee. The fact that Waite was forbidden by Benson to borrow money may also be disregarded for the same reason.

The burden of proof is upon the defendant to establish the agency. The plaintiff has sued upon a payment made under a mistake the fact that the defense is that plaintiff is bound by the act of his agent and really owes the money, though paid by mistake. The defendant having set up the agency, must prove it. This he has failed to do. The act of making cash sales implies no authority to extend credit to customers or contract with them. Similarly, depositing the employer's money in the bank or cashing the employer's checks involves no extension of he credit of the employer. The only argument open to the defendant was that obtaining of change for the next day's business until the bank opens is not in substance the borrowing of money or capital for investment in the business but is instead to be classed under the known power of the agent to borrow or exchange goods for the mutual accommodation of the two businesses. While this view was strongly urged at the trial and might well prevail if the amount borrowed were smaller, I am of opinion that it is not a valid inference under the circumstances. The more reasonable inference of fact would be that Coolridge advanced the money suposing it were need-

ed to pay bills early in the morning, and not for use as "change" as such.

The defendant failing to make out an ostensible or actual authority in Waite to make the loan in question, judgment must be for the p'a ntiff.

A. J. MacDonald,
vs.
The Peerless Restaurant.
Case No. 22.
Brief For Plaintiff.

In order for the Plaintiff to recover the rent for the period from May 1, 1912 to January 1, 1913 it is necessary that he show a liability on the part of the Lessee under the terms of the lease.

It is admitted that prima facie, the defendant is liable for the rent under the terms of the contract.

The contention of the defendant cannot be maintained that the defendant is relieved from such liability by reason of the terms of the covenant, viz:—that "In the event that the said premises shall become untenantable through fire or other cause, the said lease shall not become void, but the lessor shall have sixty days in which to restore the premises to tentanable condition and the lesse shall not be liable for rent for such period as he is unable to occupy the the premises"

1. When this covenant is read in connection with the other covenants of said lease and in connection with the common law it does not appear that the plaintiff was under any duty to make this repair,

A. By a rule of construction, where the partis have reduced their agreement to writing, purporting to set forth all the terms, the extent of the liability of each shall be determined from this writing, and in terpreting it we must look to the intention of the parties, interpreting that intention in the light of the common law govening such contracts.

Reinhart vs Holmes 143 Mo. App. 213.

Buckhorn etc. vs. Consol.dated Co. 47, Colo. 516.

B. Where the tenant has agreed to make "all necessary repairs which may subsequently become necessary" he is obliged to make all such rep irs, even though they be such as are ordered by the municipal health officers, and even though their necessity be due to original defects.

Simk ns vs. Cordelle, Compress Co. 39 S .E. 407.

C. In order to render the lessor liable for repairs, it is necessary that the lessee notify him of their necessity; and where the tenant fails to do so, but continues in possession and pays rent for several months after the existence of the condition whic hcaused the alleged breach, he will be regarded as waiving his object on.

Orcutt vs. Osten 70 Ill. App. 102.

Leiferman vs. Osten 167 Ill. Ap.p 97.

Higbie & Co. vs Wayman 126 Ill. App. 243

Barrett vs. Boddie, 158 Ill. 479.

Boston & Corp. vs. Ripley, 13 Allen 41.

2. The Lessor of premises in the absence of express stipulation is under no duty to make repairs.

A.

Quinn vs Crowe 88 Ill. App. 191.

Sunasack vs. Morey 196 Ill. 569.

Beedle vs. Reed. 33 Ind. 539.

B. There is no warranty on the part of the Lessor that the premises are in good tinue so

Gridley vs. City of Bloomington, 68 Ill. 47.

Mondell ve. Fink. 8 Ill. App. 378.

Watson vs. Moulton 199 Ill. 560.

Taylor vs. Finnagan 189 Mass. 568.

Onsley vs. Mumpe 128, Iowa 675.

Lazarus and Cohen vs. Parmley 33 Ill. App 624.

C. The mer efact that the landlord later by agreement entered and made repairs is no admission of his liability to make repairs.

Gridley vs. City of Bloomington 68 Ill. 47
McKeon vs. Cutter, 156 Mass. 396.

The premises were never at any time rendered untenantable since.

A. In order to become "untenantable" it is necessary that there be a total distruction, or such a distruction of the premises that they no longer exist as premises, capable of being tenanted. The mere fact that they become unpleasant, unsanitary, or condemned by mun cipal authorities is no defense.

Smith vs. McLean, 123 Ill., 210.
Huniston, Keeling & Co., vs Wheeler, 175 Ill. 514.
City Bank of Sherman vs. Dugan, 24 S. W 954.

B. The fact that the Lessee continued to occupy the premises for two years, the cause of the alleged untenantableness having always existed, is evidence that the premises were never rendered untenantable at any time.

Suyden vs. Jackson 54 N. Y. 450.
Talliman vs. Murphy, 120 N. Y. 345.

Where the parties have expressly agreed to consider the premises, in their present condition at the time of the letting as tenantable, as between Lessor and Lessee they shall be so regarded irrespective of any existing defects, and such shall be the criterion of tenantableness, and thus all present defects, viz: defective walls, are waived.

Friedman vs. Schwabacher 64 Ill. App. 422
Cycle Works vs. Fraser etc. 110. App. 126.

In order that the premises be rendered untenantable through fire or other cause within the meaning of the lease so as to render the Lessor liable for repairs it is necessary that they be rendered untenantble by some cause arising subsequent to the time of the letting: thus where the alleged untenantableness arises from causes viz:- defective walls, existing at the date of the demise it constitutes no defense.

Reedy vs. Chicago Vinegar & Yeast Co. 50 Ill. App. 153.
Daly vs. Wise, 132 N. Y. 306.
City Bank of Sherman vs. Dugan 24 S. W. 954.

By the terms of the lease the Lessor was under no duty to make this particular repair, for where a document or contract enumerates a class or classes of persons or things, and immediately following and classed with such enumeration the clause embraces "other" persons or things, the word "other" should be read as "other such like" so that persons or things therein comprised may be read as ejusdem generis, with and not of a quality superior or different from those specifically enumerated.

Sacediman vs. Breach 1 B & C. 96.
Saner vs. Belton, 7 Ch. D. 815.
Manchester & Co. vs. Carr, 5 C. P. D 507.
Everth vs. Smith, 2 M. & S. 278.
Philpott vs. Swann, 30 L. J. C. P. 358.
Ins. Co. vs. Adler, 65 M D. 162.
Brush vs. Lemma, 77 Ill. 496.
Misch vs. Russel, 136 Ill. 22.
Benton vs. Benton, 63 N. H. 289.
2 Arnold on Insurance 3rd. Ed. 27.
Stroud's Judicial Dictionary Vol. 2 p. 1359 et seq.

Respectfully submitted,

H. J. Hannah & P. C. Keran
Attorneys for Plaintiff.

Brief for Defendant.

The Plaintiff cannot recover in this case if the Defendant can show that the premises became untenantable from fire or other cause.

1. Although there is no implied contract on the part of the landlord that the premises demised are tenantable or that the premises are fit for the purposes for which they were let, and thus no liability on the part of the landlord to put the premises in tenantable condition, such liability arises when lessor covenants that the premises are

in tenantable condition at the time of the demise.

1 Wood on Landlord and Tenant, Sec. 303
Cromwell vs. Allen, 151 Ill. App. 404.
Watson vs. Moulton, 100 Ill., App. 560.

(a) In view of the common law rule, we construe covenant No. 1 merely as a covenant on the part of the lessor that premises are in tenantable condition.

2. The operation of the last clause of the lease providing that in case the premises should be rendered untenantable by fire or other cause the lease should become void if premises were not put in tenantable condition by the landlord in sixty days, is entirely consistent with the other clause of the lease and simply amounts to a proviso in case the premises, by fire or other cause should be rendered untenantable.

John Morris Co. vs. Southworth, 154 Ill. 118
Bolman vs. Lohman, 79 Ala., 63.
McCarty vs. Howell, 24 Ill. 341.
Walker vs. Tucker, 70 Ill. 527.
Parker vs. Roberts, 140 Ill. 9.

3. Where the performance of a covenant depends on an act to be done by the lessor, and parties have expressly stipulated that lessee shall not be bound unless the lessor perform such act, the doing of that act by the lessor is a condition precedent.

Surplice vs. Farsworth, 7 M. & G. 576.

4. The construction of these covenants is a question of law for the court. The court must endeavor to place itself in the position of the parties at the time they entered into the lease and in the light of surrounding circumstances give effect to each provision in the lease according to the intention of the parties.

Spragins vs. White, 108 N. C. 449.
2 Parsons on Contracts, 516, 517.
Watters vs. Snow, 32 N. C. 292.

We contend that the premises became untenantable and since the lessor did not restore to tenantable condition within sixty days the lease became void, under which circumstances the lessor could not recover for rent under the void lease.

Respectfully submitted,
Lewis & Luney,
Attorneys for Defendant.

A. J. McDonald,

vs.

Peerless Restaurant.

Case 22.

Opinion by Pillsbury, J.

This is an action for arrears in rent under a lease. The due execution of the lease held by the defendant and subsequent failure to pay the installments of rent sued for are admitted. The defense is made that the building was in an unsanitary condition from and prior to the time of the execution of the lease, and was condemned by the municipal health officers, the defendants being forced to vacate. That the plaintiff was called upon to make the necessary repairs and refused to do so for over 60 days, that under these circumstances the defendant was justified in refusing to resume possession and pay rent for the remainder of the lease period.

It is clear that the facts, as stated, do not entitle the defendant to avoid the lease in the absence of special provisions in he lease to the effect. In Smith vs. McLean, 123 Ill. Rep. 210, and in Humiston vs. Wheeler, 175, Ill. Rep. 514, it is held that the destruction of a building by fire not caused be either party does not relieve the tenant from paying rent in the absence of a covenant by the landlord to rebuild or repair.

Of course, if the landlord were under a duty to repair the premises and the condemnation by the health authorities was caused by his failure to do so, he could not exact rent from the defendant for the period

for which the building was idle or thereafter, but there is no covenant here that the landlord shall repair, and in the absence of such stipulation, the landlord is under no duty to make repairs, Humeston vs. Wheeler Supra, and Sunasack vs. Morey, 196 Ill. Rep. 596. In the latter case, the court said. "The tenant takes the premises as he sees them, subject to his own risk, and there is no implied covenant on the part of the landlord that they are fit for the purposes for which they are rented or that they are in any particular condition."

These authorities dispose of all defects in existence at the time of the execution of the lease, and by express covenant in the lease, the tenant has assumed the duty of repair of defects arising subsquently. The defendant therefore properly rested his case upon a covenant in the lease to the effect that "if the premises should become untenantable through fire or other cause," the lease should become void unless the landlord should restore the premises within 60 days. The question is therefore presented whether condemnation by health authorities for unsanitary condition not the fault of either party can be brought within "fire or other cause."

The defense has cited no case in their brief in support of this contention. In Tays vs. Ecker, 24 S. W. Reports (Texas) 954, cited by plaintiff, a provision for avoiding a lease after the premises became untenantable by reason of "fire or other unavoidable casualty" was held not to apply to defects of construction of the building at the time of the lease whereby it was later condemned as unsafe. The court emphasizes, the words "unavoidable casualty" as to extend to sudden and violent natural force. The wording of the covenant therefore stronger than in the case at bar, although both are apparrently designed to accomplish the same purpose, I believe the decision to be in point in the present case. The phrase "fire" or other cause" should, under the ejusdem generis rule, be read "fire" or other like cause," which clearly means some sudden, external and violent source of damage, and excludes the idea of ordinary delapidation or unsanitary condition existing for a long period of time. By interpretation of the lease, the same result is obtained, inasmuch as defects existing at the date of the lease are waived by Clause 1, and ordinary repairs later becoming necessary are also covered in the same clause. The provision avoiding the lease for fire, etc., should therefore only to causes of damage not otherwise covered, namely extraordinary damage arising suddenly during the term.

Provision 2 of the lease is as much an acknowledgement by the lessee of present good condition as a warranty by the grantor to the same effect and does not effect the rights of the parties.

Judgment must be rendered for the plaintiff.

Moot Court Bulletin

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THE COLLEGE OF LAW

No. 3.

Its Aims and the Methods of Attaining Them

It has been well said by some one that "System is only the anatomy of the law. Its lifeblood is reason." Rules of law as stated in an encyclopedia or text book, no matter how carefully committed, are not long remembered. Their very number puts it beyond the power of the human mind to retain them all. Again, it is one thing to know a rule of law and quite another thing to be able to apply it. Divorced from the methods by which the rules are evolved and the reason and principle back of them, rules of law are at best but as "sounding brass and a tinkling cymbal." It is the purpose of the law school, therefore, to give to the student not merely the hollow husks of information but first and primarily to familiarize him with methods of legal reasoning and to equip him with legal habits of thought—in short to develop in him, so far as is possible, the socalled "legal mind." This accomplished, the student is prepared to evolve anew the forgotten rule, to evolve new rules where they are needed, and to apply correctly the old rule or principle to a new situation. It is believed that these objects are best accomplished by the case method of instruction. The case method of instruction and its advantages are so clearly set forth in an article, published a few years ago by Professor Elliott J. Northrup, then a member of the faculty, that the subject is now presented again in his language. Professor Northrup says:

"The power of legal reasoning is an absolutely essential part of the equipment of a lawyer. One might have so prodigious a memory and such indefatigable industry as to memorize all of the statutes and opinions of Illinois, but if he could not apply legal reasoning to the solution of the questions submitted to him, he would be a failure as a lawyer.

We find, then, two things that the students should get from the law school; first a knowledge of the settled legal principles, and second a power to reason with those principles in a legal way concerning a new state of facts. The latter is by far the more important. It is the principle business of his teacher to so guide him as to enable him to acquire that power. I use the phrase "enable him to acquire" advisedly, because a teacher cannot directly impart that power. He could with some degree of success state to his class the course of reasoning applicable to a particular case. But the students would acquire slight power of doing the same thing by listening to such expositions and taking notes on them. The only way to learn legal reasoning is to reason legally.

The way in which that is sought to be done at Illinois is by the study of cases. The students use collections of decided cases. In studying the case the student

learns the legal principle decided by it and something at least of the process of reasoning by which the decision was arrived at. Thus he is getting the two things a lawyer needs to acquire. The more legal principles he knows the better. They are the tools of his trade. A knowledge of them comes largely as an incident to the study of the reason of the case.

In the preparation of his lesson the student is supposed to read the case carefully and in the light of the rasoning of the opinion determine just what facts are essential to the decision as made by the court in accordance with his line of reasoning. He usually makes a brief written abstract stating those essential facts, the decision and the grounds upon which it is placed by the court. He should also consider whether he thinks the decision right and whether he agrees with the court's reasoning.

In the class room a student is called upon for a case. He "states" it as we say. That is, he states substantially the contents of his abstract, perhaps reading it verbatim. The chief function of the instructor is to call forth and, if need be, to guide a discussion of the case by the students themselves. So far as they will do it, this is left to their spontaneous action. When they do not undertake it the discussion must be stimulated by questions from the instructor. He asks, for example, the student who stated the case whether he thinks it right; meaning rightly decided. He is asked for his reasons for his answer. Another is asked if he agrees, and if not, why. Others may volunteer opinions. The best results are achieved when a genuine argument ensues between the members of the class or with the instructor. The lataer often must defend his opinion quite as if he were one of the students.

Thus, either on the initiative of the class or as a result of questions by the instructor the discussion is pursued until all points of view that may profitably be taken of the case are brought to the attention of the class. The different grounds upon which it can be placed and the different conclusions that can be reached by pursuing different lines of reasoning are examined, and opinions as to which should be regarded as correct are expressed. To aid in this, some variation of the facts of the case may be suggested and the case discussed on that hypothesis. The holdings in previous and analogous cases are referred to and compared with the reasoning and result in the case under discussion to test the correctness of the latter.

Perhaps it will appear that the case was wrongly decided, i. e., that the decision is not consistent with settled principles of the law; or, it may be rightly decided but on wrong grounds. Facts regarded by the court as immaterial may prove to be the decisive ones and vice versa. Questions by members of the class will develop additional lines of inquiry not brought out by the instructor, perhaps not thought of by him. In this way the discussion is carried along and becomes on the part of the students a genuine original investigation of the principle of law involved in all its phases. Questioning by the instructor should be a cross examination. Nothing is taken for granted; no statement of opinion goes unchallenged; the student must always give his reasons for his answers. The constant effort is to stimulate an independent spirit of inquiry into the correctness of all decisions considered and intelligent criticism of them from the point of view of principle. With such methods it is seldom that any important phase of a case escapes the attention of a class interested in the subject and always encouraged to object to any views advanced by instructor

or student. Indeed, our difficulty is usually, not to create discussion but, rather, to confine it within such bounds as are absolutely prescribed by the limits of the time at our disposal.

The discussion on a series of cases touches other points than just those involved in the cases taken up. The principles developed are fitted into their proper places in the scheme of the law and their relation to others shown. * * * * * *

And the method is the historical one. Our law is a growth. It was never a perfected system newly created. It has been developed as cases arose calling for decision. To understand it rightly its history must be studied. The cases on a particular doctrine are taken chronologically. The student works it out just as it has been developed by the courts. Of course, the further the subdivision of subjects is carried, the more the chronological approaches to the logical order. This method differs radically from the use of illustrative cases in which the student studies the principles of law from a text book by which they are presented to him in their completed form, and then, by way of illustration, is referred to a case where some specific doctrine was applied.

That is the antithesis of the true case system. With us the student goes to the original sources and from each case he gets the principle there decided, and out of the individual principles he constructs for himself the general scheme. It is the laboratory method applied to the study of law. There is a certain plausibility in the argument that as the courts have worked out these results it is time lost for the student to do it over again, since we can place in his hands text books in which able men have done this very work and reduced the results of the cases to an orderly system and stated the law as it is and he can learn it from such books. The difficulty is that he does not learn it or remember it so well when he tries to get it from text books, and he certainly does not acquire skill in reasoning by reading the results of others' reasoning. Just as in those sciences in which laboratory work is feasible it has been found to be the most successful method of teaching to have the student perform for himself experiments that have been done thousands of times and the results of which can be found in many books, so in law the surest way to knowledge and ability to use it is for the student himself to go through the same process of developing the law that has been followed by the courts and to work out the principles for himself from the original sources.

What I have attempted to describe as the teaching of law is, perhaps, the ideal. It may not always be possible to realize it to its full extent. With some students it falls far short of that. With some it is nearly if not quite reached. It requires men interested in their work, attentive in class, industrious in preparation and, above all, an absolute essential, the power to perform the mental processes. You cannot teach that power. If a man has it you can help him to learn to use it if he is willing to pay the price; but you cannot supply brains. If he lacks the power to reason all you can really do is to teach him some rules of law as you would a parrot. He ought not to try to be a lawyer. * * * * *".

It is a further purpose of the law school to prepare men, primarily, for practice in the state of Illinois. We are especially impressed with the idea that a state university should teach the law of the state which supports the school, and to that end, while the broad and deep study of the general principles that lie at the foundation of the common law are by no means neglected, especial attention is given in all

courses to grounding the students thoroughly in the law as determined in the courts of Illinois. Throughout the entire course, the students are required to consult frequently Illinois decisions and statutes, which are made the basis of discussion in class by students and instructor. In the Moot Court and through the course in Illinois Procedure, especial attention is paid to the rules of pleading and practice that obtain in the State of Illinois.

Professor Northrup, with reference to this branch of our work, says:

"I have spoken thus far principally of the teaching of the substantive law. The work of the student in practice and court procedure is a rather distinct branch and requires different treatment. The fundamental principle and the ultimate purpose is, of course, the same in teaching practice as in teaching substantive law; namely, to equip the student for the successful practice of his profession. The application of the principle, however, varies as the nature of the subject to be taught. As legal reasoning power is the most important element of a mastery of substantive law, so the object of the teaching of the latter is to train the student's reasoning power and ground him thoroughly in theory. The purpose of the practice work, on the other hand, is to acquaint him with the machinery of the law. There is not much theory about it to be learned. The rules of procedure and the methods by which a party presents his case to the court, prosecutes an appeal and practically secures the relief that the court has awarded him and, in general, the details of the forms of legal proceedings have been developed as the result of what experience has shown to be convenient and expedient. What the students needs, therefore, is a knowledge of what is actually done, e. g., how a lawyer draws his papers, what the rules require him to file and serve upon his opponent, what motions he may and should make to bring before the court for its consideration points he thinks to be in his favor.

It is obvious that what is here required is not reasoning but knowledge and a facility in the application of more or less arbitrary rules.

The object of all the work in the school is ultimate practicality. We believe this to be best secured in the realm of substantive law by training in theory and reasoning. On the same principle we ought to give the student a detailed knowledge of the rules of procedure and develop in him skill in applying them. In other words, in both branches of the work the student should learn as a student to do the things he will have to do as a lawyer.

With respect to practice work and procedure, the means employed to accomplish this result is the practice court work in what we call the Moot Court, supplemented by a course on procedure.

In the court work, cases that have arisen in actual litigation before the courts are assigned to the students, counsel being appointed for each side. They perform the duties in respect to the preparation for trial and the argument of appeals that would devolve upon attorneys conducting the case. Pleadings, motion papers and briefs are prepared in accordance with the rules of practice. While, generally, the actual trial of the case is omitted and the cases are argued only as if on appeal, sometimes trials, involving the selection of a jury, examination of witnesses, summing up to the jury and the other incidents of a trial are had.

The court is presided over by the dean of the school, who renders written decisions. Students are also appointed to hear arguments and deliver opinions. A student

is selected to act as sheriff and another as clerk who keeps the docket and with whom papers are filed. The proceedings of the court, containing statements of the facts in the cases to be argued and the opinions of the presiding judge, are published in the Moot Court Bulletin. All students in the upper two classes are required to attend the sessions of the court and are quizzed upon the cases argued. The student's attention and work, therefore, are not confined to only those cases in which he is engaged as counsel.

A two-fold object is served by the Moot Court. The student learns the details of practice and in the preparation of his argument further trains himself in legal reasoning. Oftentimes, cases are purposely selected on which he can find no authorities directly in point. He is compelled to argue them on principle. He is brought into direct competition with others and his ability as a lawyer tested and improved by doing a lawyer's work. In the Moot Court the theory of the class room work in substantive law is subjected to the test of practical use.

The work in substantive law is a necessary foundation for the practice work and the latter is an equally necessary complement to the former."

BRIEF FOR PLAINTIFF.

Allen

vs.

Haynes.

Case 23.

In order to win his case, the plaintiff must show that his guest lost the article replevied in the hotel and that the plaintiff is responsible for its safe return to the owner and therefore entitled to possession.

1. The finder of a lost article is entitled to possession as against all the world except the true owner only when there is no responsibility on the part of another to see it returned to the true owner.

Bridges v. Hawksworth, 7 Eng. L. & Eq. Rep. 430.

McAvoy v. Medina, 11 Allen (Mass.) 549.

2. Innkeepers are bound to protect the property of their guests and in case of loss can only absolve themselves from liability by showing that they are not at fault.

Johnson v. Richardson, 17 Ill. 302.

3. An innkeeper is liable for the goods of his guests, including money and if they are brought within the inn a responsibility is created.

Houser v. Tully, 12 P. F. Smith 92.

Packard v. Northcroft's Admin. 2 Metc. 439.

Berkshire Woolen Co. v. Proctor, 7 Cush. 417.

Edwards on Bailments, 2nd Ed. Sec. 459.

Story on Bailments, Sec. 471.

Jones on Bailments, 95.

Addison on Torts, Wood's Ed. Vol. 1, pp. 755, 752.

4. He is bound to keep honest servants, and is responsible for their honesty.

Houser v. Tully, supra.

Gile v. Libby & Whitney, 36 Barb. (N. Y.) 70.

5. To allow servants to retain money found in an inn would encourage them to be dishonest. The better rule is to require them to deliver property so found to their employer to be held for the true owner.

Mathews v. Harsell, 1 E. D. Smith's reports (N. Y.) 394.

Respectfully submitted,

STAMBAUGH & SHOBE,

Attorneys for Plaintiff.

Allen
vs.
Lyman.

Case 23.

For the plaintiff to recover in this action of replevin he must show that the servant Haynes acquired no title to the chattel as a finder, and that he transferred no title to the defendant.

1. To acquire title to a chattel by finding it must be shown that the chattel was lost or abandoned.

Regina vs. Peters, 1 Car. & K. 44.

not lost in the sense that he who picks it

An article that has been misplaced is up gets a good title. McAvoy vs. Medina, 11 Allen (Mass.) 548.

2. When an article is found on the property of another and not in a public place the article belongs to the owner of the locus in quo and not to the finder.

South Staffordshire Water Co. vs. Sharmon, 2 A. B. 44.

Elmer vs. Briggs, 33 Ch. Div. 562.

Hence Bud Haynes, the servant, by picking up the chattel acquired no title and having no title himself, he could transfer none to the defendant.

Dyer and Bones, 29 Ill. App. 166.

Klein vs. Siebold, 89 Ill. 540.

Respectfully submitted,

STAMBAUGH & SHOBE.

BRIEF FOR THE DEFENDANT.

Allen
vs.
Lyman.

Case 23. Replevin.

Allen
vs.
Haynes.

Propositions.

(1) In order for the plaintiff to recover in this action of replevin, the burden of proof is upon him to show a right to possession of the article claimed. This is axiomatic, and needs no citation of authority. If the plaintiff is to recover in this action, it is because he is an inn-keeper, and as such is responsible to his guest for the article in question.

(2) Conceding for the purpose of argument what may well be doubted to be the law in Illinois, that an inn-keeper is an absolute insurer of his guests' goods, there is an exception to this rule, whenever the goods of the guest are lost or destroyed by the negligence of the guest, and whenever a case falls within the exception, the inn-keeper is not liable.

(a) Johnson v. Richardson, 17 Ill. 302.
(b) Kelsey v. Berry, 42 Ill. 468.
(c) Eden v. Drey, 75 Ill. App. 102.

The cases which hold an inn-keeper liable to the guest because of a loss do so on the theory that the goods were in the possession of the inn-keeper, **even though the guest never surrendered the actual possession of the goods.** This is but a fiction of law raised to protect the guest and is of negative application so far as the inn-keeper is concerned. That is, he cannot deny it when it is alleged in the declaration. But the inn-keeper can never make use of the fiction affirmatively by making

it the basis of an action to recover possession of the article. If this be true, it is apparent that the reason of the fiction was to hold the inn-keeper to the liability to his guest which the law thought was due the guest. **Hence, when the reason of the rule fails, the rule itself fails,** and with it, the plaintiff's cause of action.

(3) With respect to the finding of lost articles, the finder has the right to possession against the whole world except the true owner.

(a) McAvoy v. Medinia, 11 Allen (Mass.) 548.

(b) Lawrence v. Buck, 62 Maine 275.

And the place of finding is immaterial.

(a) Bowen v. Sullivan, 62 Ind. 281; 30 A. S. R. 172 (with a very instructive note).

(b) Haymaker v. Blanchard, 90 Pa. 377.

(c) Tatum v. Sharpless, 6 Phila. 18, (Nisi Prius).

(d) Bridges v. Hawkesworth, In the Queen's Bench, unofficially reported, 15 Jur. 1079.

(e) Durfee v. Jones, 11 R. I. 588.

(f) Schouler Per Prop., Section 14, et seq.

The conclusion is therefore irresistable, that as plaintiff cannot show a right to possession, first, because he is not liable ever to his former guest, and second, because the rights of the defendant's vendor, as finder, were superior to all the world except the true owner, that the plaintiff is not entitled to prevail in this suit.

Respectfully submitted,

STEPHENS & CORBLEY.

Allen
vs.
Haynes. Case 23. Replevin.

Allen
vs.
Lyman.

Opinion by Pillsbury, J.

Both of these cases involve the right to the possession of lost property as between the finder and the owner of the premises where the goods were found, either by reason of such ownership or because of special privileges given him by the law in view of his occupation as an innkeeper. In neither case has the real owner appeared to claim the lost article.

The distinction is often drawn between lost and mislaid property. In the former case the first person to assume actual possession of the articles is said to have a right of possession good against every one but the true owner, while in the latter case, existing where the owner has laid the goods down intentionally in some particular place and latter forgotten to resume possession, the courts say that the owner of the place where they were mislaid is entitled to the possession as against the actual finder. This result is reached on the theory that the owner impliedly made a bailment of the property in the place where found, and it is the privilege, and perhaps the duty as well of the proprietor of the premises to take and preserve the property for his customer. In the cases at bar, however, the goods must be treated as lost, the ring because found on the floor of the lobby of the hotel while sweeping, where the true owner could not have deposited it intentionally. As to the nugget found in the hotel room occupied by a guest the night before, it is possible that it may have been discovered on a washstand, in which case the inference would be that it had been mislaid, or it may

have been found upon the floor. The burden is upon the plaintiff however to show that he has the better right, and he has not succeeded in establishing the fact of its having been mislaid.

Assuming both to have been lost, the defendants are entitled unless the plaintiff can show a better right by reason either of his ownership of the hotel building of of the privileges of his occupation as innkeeper. The first ground cannot well be asserted in the United States, as the weight of authority here, though otherwise in England, is that the finder of goods lost in a public, semi-public or even private place, is entitled as against the owner of the premises.

Is an innkeeper entitled to lost property found in his hotel because of his duties and privileges in such calling? If this be true, it is because of the presumption that it was lost by a guest, combined with the duty to protect the property of guests. The burden is therefore upon the plaintiff to show that the article was presumably lost by a guest. This burden the plaintiff fails to establish in the suit against Haynes, as the ring sued for in this action was found in the hotel lobby, where many persons other than guests are accustomed to congregate. Judgment must therefore be for defendant Haynes in the first action.

As to the nugget found in a bedroom of the hotel, the inference clearly would be that it had been lost by a guest. No cases have been cited by either side holding directly that an innkeeper has the right to such lost as distinguished from mislaid property. It seems reasonable to hold, nevertheless, that insofar as he is liable to the guest for the safekeeping of his property, the owner should also have the right to reclaim such property where taken or found by others within the hotel. Such liability can exist, however, only while the relation of innkeeper and guest continues, and is terminated by the departure of the guest after paying his bill. As to property intentionally left with the innkeeper by the guest on departing, the liability of the former is only that of a gratuitous bailee. (22 Cyc. 1088) The liability would seem to arise from the fact of the receipt of the goods on principles of ordinary bailments, rather than from any duty as innkeeper. In the present case the former owner had apparently left the hotel so it would seem as if the innkeeper were under no obligation as to the safety of forgotten property of a departed guest, before he had actually taken possesion of it, and consequently had no right to the possession of it as against the finder thereof.

I believe that the superior right of the innkeeper to that of the finder can nevertheless be established upon another ground. In McAvoy v. Medina, 11 Allen (Mass.) 549, it was held that the owner of a barber shop was entitled to the possession of goods mislaid therein by a patron and not called for, as against the finder. If a constructive bailment can be made out in such case from the fact of the mislaying of goods by a patron within the shop and the presumed intention of the owner that the property of the shop should keep them for him there would seem to be no reason why the same constructive bailment could not be found from the losing as well as mislaying of an article within a private room of a hotel. Guests habitually look to the proprietor of a hotel to search for and send to them property supposed to have been mislaid or lost at the hotel, and such intent can be inferred without the grant of express authority as easily where articles have been presumably lost in a hotel as where mislaid in a barber shop, and forgotten. Judgment will therefore be for the plaintiff again defendant Lyman.

Case No. 31.

STATEMENT.

James Wilts executed a will March 4, 1909, 30 days before his death, which contained the following clause: "I give, devise and bequeath my farm of 160 acres, being the Northwest Quarter (N. W. 1-4) of Section Twenty-two (22), Town Nineteen (19) North, Range Eight (8) East, to my son, Albert Wilts, and his bodily heirs; but in the event that he should have no bodily heirs, then to Jane Wilts and Mary Brown, my sisters." Two years after the death of James Wilts, Albert Wilts conveyed his estate in the premises to Walter Hays, a stranger, for the expressed consideration of $30,000. One year thereafter, Hays reconveyed to Albert, who now files a bill in the Circuit Court to quiet title to the land. Albert Wilts was the only child of deceased and the will contained no residuary clause.

For the Complainant: Howe, Strong and Keran.

For the Defendants: Kessler, Lewis and McKnight.

Hays E. Passow vs. Fidelity & Guaranty Co.

Case No. 32.

James Bowman bought from H. E. Passow certain tables for his place of business at a cost of $1000, paying a deposit of $100. The contract contained the provision that upon breach by the vendee, the full purchase price should become due and payable and the vendor would be entitled to recover the whole of said purchase price. Before the arrival of the goods, Bowman was pursuaded by the salesman for a rival supply house to break his contract, which he did, refusing to accept delivery of the tables when they arrived. Passow sued upon the contract for $900, the balance due upon the purchase price, and attached Bowman's stock in trade. To release the attachment, Bowman procured the Fidelity and Guaranty Company to execute a release of attachment bond for $1800, the bond undertaking and guaranteeing "that Bowman would, on demand, pay any judgment that might be rendered against him in said action." The bond being duly approved and filed, the attachment was released. At the trial the above facts were shown in evidence, also that the tables were still at the freight depot and the shipping documents in the possession of Passow. The attorney for Bowman then stipulated that title to the tables was in Bowman free from all liens or incumbrances of any sort and accepted delivery thereof. Passow's attorney assented, stating that he was relying upon the bond, and judgment was accordingly entered by consent for plaintiff for $900 and costs of $75. A year having elapsed since then, Bowman and the tables having disappeared, and the judgment being unpaid, Passow demands that the Fidelity & Guaranty Company pay the amount of the judgment, and upon their refusal brings this action.

Attorneys for Plaintiff, Luney & Leopold.

Attorneys for Defendant, Swanson & Grigg.

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The People of the State of Illinois vs. Andrew White — Indictment for Murder.

BRIEF FOR THE PEOPLE.

I.

When the People have proved the corpus delicti they have established a prima facie case of murder (The People vs. Hotz, 261 Ill. 239) and the burden of showing excuse or extenuation is on the accused. Murphy vs. The People, 37 Ill. 457.

II.

When excuse is shown, the People must show malice aforethought.

III.

In the case at bar, premeditated malice is shown

1. By deliberate injury inflicted upon the deceased. Davison vs. People, 90 Ill. 221; Spies vs. People, 130 Ill. I, 123 U. S. 131.
2. By the fact that the accused was armed without any apparent reason therefor. Steffy vs. People, 130 Ill. 98, 101.
3. By the fact that the accused was engaged in an unlawful act by striking and injuring the deceased without excuse. Adams vs. People, 109 Ill. 444; Morello vs. People, 226 Ill. 388; 1 Whar. Crim. Law (11th ed.) §146. In such a case it is not necessary that the accused intended to kill.

IV.

The accused's plea of self defense avails him nothing in this case because

1. The evidence shows he was the assailant, and furthermore that he did not endeavor really and in good faith to decline further struggle before the mortal blow was given People vs. Hubert, 251 Ill. 514. The rule applies however iminent the danger was in which the accused found himself during the progress of the affray. Mackin vs. People, 214 Ill. 232; Kinney vs. People, 108 Ill. 519, 526.
2. He was actuated by a motive of revenge, the deceased being his old enemy. Com. vs. Drum, 58 Pa. St. 9; State vs. John, 30 N. C. 330, 335; 49 Am. St Rep. 397; Whar. on Hom. (3d ed.) §163, §328.
3. He did not notify the deceased of his desire to abandon the contest. his apparent attempt at notification; however imminent the danger or however fierce the return assault, does not relieve him, even though it should have been made in good faith, when it is because of his own wrongful act that the deceased is unable to comprehend his meaning. People vs. Button, 106 Cal. 628. 28 L. R. A. 591, 46 Am. St. Rep. 259, 39 Pac. 1073 (citing Stoffer vs. State, 15 Oh. St. 47, 86 Am. Dec. 470; State vs. Smith, 10 Nev. 106); People vs. Hecker, 109 Cal 451, 30 L. R. A. 403; Whar. on Hom. (3d ed.) §335.

Respectfully submitted,
M. E. Newell and
T. I. McKnight,
Attorneys for the People.

The People of the State of Illinois vs. Andrew White } Indictment for Murder.

BRIEF FOR DEFENDANT.

1. Murder is the unlawful killing of a human being in the peace of the people, with malice aforethought, either express or implied. (Chap 38, Sec. 140, I. R. S.) And where the act may or may not be malicious, it is for the government to show that it is malicious; otherwise the defendant is entitled to the most favorable construction of which the facts will admit. (May on Crim. Law, 207, 210.)

2. Malice aforethought is an essential element of murder, and the burden of proving malice, like any other fact, beyond a reasonable doubt, rests upon the prosecution. (Clark on Crim. Law 194.)

3. The malice necessary and requisite to the crime of murder is not an inference of law from the act of killing, but must be found by the jury on competent evidence. (Wharton on Homicide, 117. State vs. Greenleaf, 71 N. H. 606.)

4. Though the killing is admitted, if the admission is coupled with a declaration showing justification, no presumption of malice or that the homicide is murder arises. Wharton on Homicide, 117, 124 Ga 6.)

5. In order that a party may avail himself of the plea of self-defense, he must reasonably believe that there is danger of losing his own life or of receiving great bodily harm. (Healey vs. People, 163 Ill. 372.)

A. In this case the defendant did not commit an assault on the deceased that would have justified the deceased in taking his life. Therefore, the defendant was not the aggressor in the sense that he is deprived of his right of self defense. (People vs. Hecher, 109 Calif. 451. State vs. Evans, 128 Mo. 406. State vs. Foutch, 95 Tenn. 711.)

B. Whenever an aggressor in good faith withdraws from the conflict, his right of self defense revives. (Stoffen vs. State, 15 Oh. St. 47. McSpatton vs. State, 30 Tex. App. 617. Cotton vs. State, 31 Miss. 504. People vs. Bush, 65 Calif. 129.

(a) The question of faith of the retreating party is of the utmost importance and should generally be submitted to the jury with the fact of retreat, especially where there is room for conflicting inferences on the point from the evidence. (Parker vs. State, 88 Ala. 4.)

(b) It is necessary only that the adversary have reasonab'e grounds to believe his assailant has withdrawn. (State vs. Dillon, 74 Ia. 653. People vs. Button, 106 Calif. 628)

6. The fact that the defendant was armed should not be taken against him. (Cotton vs, Hale, 31 Miss, 502. Alford vs. State, 33 Ga. 303.

7. The burden of proof is not on the accused to prove self defense, or any other defensive fact, but it is on the prosecution to prove that accused was not acting in self defense. (State vs Bone, 114 Iowa 557. People vs. Coughlin, 5 Mich, 704.) And malice not necessarily implied from an intent to do a personal injury. (Field vs. State, 50 Ind. 15.

Respectfully submitted,

Paterson and Ratcliff,
Attorneys for Defendant.

People of the State of Illinois } Prosecution
vs. } for Murder
Andrew White }
Case No. 24.

OPINION BY PILLSBURY, J.

The facts in this case are, briefly, that the defendant, seeing Jones, an old enemy, going down the street, went up behind Jones and gave him a blow on the side of the head. This blow so affected Jones' brain as to deprive him of hearing. Jones thereupon turned upon the defendant, drew his knife and grappled with him. The defendant called to Jones to stop, that he had no desire to fight and that he would acknowledge Jones the better man, but Jones, being unable to hear, held White and was on the point of stabbing him when White drew out a pistol and killed Jones by a shot.

Two questions arise in this case. First, whether the defendant is to be acquitted on the ground of self defense. Second, if self defense is not established, whether the defendant is guilty of murder or manslaughter, the latter question depending upon whether the element of malice aforethought is present.

In regard to the second question, I am of the opinion that the prosecution have not succeeded in establishing malice to the exclusion of a reasonable doubt. The prosecution admit in their brief that where facts tending to show excuse are in evidence, the state must prove malice as a fact. Deliberate or unlawful injury inflicted upon the deceased at a time antecedent to the killing will not in itself prove malice unless it amounts to a felony, which was not shown in this case. or unless it be by an act likely to cause death or serious bodily injury. Some of the facts in evidence do tend to show malice, such as the prior enmity, the carrying of a deadly weapon without reason shown therefore, and the assault itself by defendant. Nevertheless it may reasonably be doubted whether the defendant contemplated anything more than assault and battery until placed in a position where his own life was at stake. The conviction should be for manslaughter, if at all.

The remaining question is whether the defendant was entitled under all the facts to act in self defence. If defendant had not been the assailant at the outset there would be no difficulty in acquitting him,as he was in immediate peril of his life and had no other means of escape. The defendant was the assailant, however, perhaps not with murderous intent, but this appears to be immaterial in Illinois. A person obliged to kill to save himself after starting a mere assault (non-murderous) is however guilty of manslaughter instead of murder. Adams vs. The People, 47 Ill. 379. Kinney vs. The People, 108 Ill. 526.

Defendant has therefore forfeited his right to self defense, unless it be shown that "he had really and in good faith endeavored to decline any further struggle before the mortal shot was fired." Kinney vs. The People. supra. While it is possible that the whole affair was deliberately planned by the defendant for the purpose of killing the deceased under the pretense of self defense, in which case his right to protect himself would not be restored, such intent is not established beyond a reasonable doubt, and we must therefore assume that the defendant in good faith did all in his power to decline further struggle. Were it not for the holding in People vs. Button, 106 Calif. 628, the defendant should be acquitted.

By this case, however, the rule is enunciated that where an aggressor has so injured his adversary that the latter is rendered incapable of appreciating that the former is endeavoring in good faith to

withdraw, and the prior aggressor is compelled to kill to save himself, the plea of self defense can not be asserted. Whether this rule is sound or not may well be questioned, but in my opinion the case is not here applicable, as it is not shown that the deceased was incapable of receiving notice of defendant's attempts to withdraw through other senses than that of hearing. Defendant's actions doubtless gave the impression of his desire to withdraw, even if his words were not heard. The defendant should therefore be acquitted.

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State of Illinois, Champaign County, } ss. Case No. 25.

In the Moot Court, to the March Term, A. D. 1914.

A. B. White, Plaintiff,
-vs.
George Smith, Defendant.

Trespass on the Case.

PLAINTIFF'S BRIEF.

The master is liable for the torts of his servants done in the course of the employment.

Johnson vs. Barber, 5 Gillman 425.
Tuller vs. Voght, 13 Ill. 285.
Moir vs. Hopkins, 16 Ill. 313.
Cutler vs. Callison, 72 Ill. 113.

Where the owner of an automobile hires out his machine with a driver, to be used for conveyance of the hirer from place to place, the driver does not become the servant of the hirer, but remains subject to the control of his general employer, the owner, who is liable for his negligence in driving.

Shepard vs. Jacobs, 204 Mass. 110.

Because the hirer of an automobile orders the driver to drive slower or faster is not such an exercise over the driver as to create the relation of master and servant between hirer and driver.

Johnson vs. Coey, 237 Ill. 88.

Though the driver to whom an automobile owner intrusts with the running and management of his car is paid by the hirer, yet the owner is liable for the driver's negligence.

Yeates vs. I. C. R. R. Co. 241 Ill. 205.
Linquest vs. Hodges 248 Ill. 491.

Swanson & Ruth,
Attorneys for Plaintiff.

DEFENDANT'S BRIEF.

1. General Proposition: That a master is liable for the torts of his servant committed while acting within the course of his employment, and while upon his master's business. — Plaintiff's brief.

2. No relationship of Master and Servant between the owner of the car and the driver with reference to the particular act complained of has been shown.

A. One who is the general agent of another may be loaned or hired by his master to a third party for some special service, and as to that particular service, he will become the servant of the third party. Consolidated Fire Works Co., vs Koehl, 190 Ill. 145. Grace & Hyde Co. vs. Probst, 208 Ill. 147.

B. The master is the one who has the direction and control of the servant in the particular service. Grace & Hyde Co. vs. Probst (supra).

C. The question of direction and control of the servant at the time of the particular injury is always a question of fact for the jury. Buckler vs. City

of Newman. 116 Ill. App 546. Little vs. Hackett, 116 U. S. 366.

D. The method and means by which a chauffeur in charge of an automobile receives his compensation is material upon the question whether he is the servant of the owner, so that the latter will be liable for his acts, or an independent contractor for whose acts the owner is not liable. Minor vs. Stevens, 65 Wash. 423 (42 LRA ns 1178).

E. Where the negligent act of the driver causing the injury is the direct result of the active interferance or command of the hirer, the owner of the vehicle is not liable.
M'Laughlin vs. Pryor 4 M & G 48.
Standard Oil Co. vs. Anderson, 212 U. S. 215.

Webber vs. Becker, 136 N. Y. Sup. 119.
Ewing & Gains vs. Shaw & Co., 83 Ala. 333.
Little vs. Hackett, 116 U. S. 366

Respectfully submitted,

Essington, Cummins and DeHodway,
Attorneys for Defendant.

A. B. White,
vs.
George Smith.

Case No. 25.

Opinion by White and Esselborn.

The facts in this case are, briefly, that on May 1, 1913, A. L. Jones hired an automobile from the Smith garage for the afternoon for $10.00. Not being able to drive the machine, he requests that a driver be furnished. Smith, the owner of the garage, thereupon detailed Brown, who worked for him in the garage, to take the car out. Jones promised to pay the driver $2.50. After leaving the city limits. Jones leaned over to the chauffeur and said: "Go as fast as you can. I want to see how fast you can go." Brown replied: "My employer does not allow me to break the speed limit." Jones answered: "Do as I tell you, damn you, I am your master now." Brown accordingly put on full speed and while driving at a reckless rate, ran into and injured A. B. White, the plaintiff, who was driving along the road using due care. Plaintiff sues Smith, the owner of the garage, for damages.

The question for determination in this case is, whose servant was the chauffeur at the time of the accident.

The question being argued before the court without a jury. the court is called upon to determine a question of fact, having regard however to all the principles of law pertaining to the matter involved, some of which are the following:

The relation of master and servant is the relation existing between two persons, one of whom (the master) has authority over the other (the servant), with the power of directing his services as to time, manner and place.

The general rule as to liability of the master for the negligent act of his servant is that the master is liable for all injuries caused by the act of his servant while acting within the scope of his duties as such, whether the injury results from acts of commission or omission.

Another rule laid down in the case of Consolidated Fire Works Co.. vs. Koehl, 190 Ill. 145, is: One who is the general servant of one party may be lent or hired by his master to another for some special service, so as to become, as to such service, the servant of the other, the test in such cases being whether, in the particular service, the servant continues to be under the

direction and control of his master or of the other party. This rule is upheld in the case of Coughlan vs. Cambridge, 166 Mass. 268. Also by Pioneer Fireproof Construction Co. vs. Hansen, 176 Ill. 100 at p 108, where it is said: "He is the master who has the choice, control and direction of the servant. The master remains liable to strangers for the negligence of his servant, unless he abandons their control to the hirer."

With these principles in mind we now proceed with the discussion and decision of the case.

The burden of proof in this case is upon the plaintiff, hence he is calle upon to show that the relation of master and servant existed between the defendant (garrage owner) and the chauffeur. The facts of the case do not show how the defendant carried on his business. He may have been in the business of simply hiring automobiles to parties, who wished to use them as they pleased. On the other hand it might have been his rule to always send a driver with every car rented, at the same time retaining complete control over machine and driver. There is no evidence in the case pointing to the exact way in which he carried on his business.

I think we are not justified in holding there is a presumption upon this particular point. Then what evidence is there to support the plaintiff's case?

The facts show Jones hired the automobile for ten dollars. This part of the transaction seems to have been settled when Jones saying that he was not able to drive a car requested that a driver be furnished. The fact that the garage owner had made no allowance for a driver when he named his price as ten dollars, would seem to indicate that no one in his employ should be in charge of the machine. So far the control of the machine seems to have been put in the hands of the hirer and points to the idea of complete control in him. If the defendant had been in control of the machine there would have been no need of asking for a driver. Does the request for a driver and a promise in any way negative this idea? No, it rather seems to strengthen the defendant's position. Jones did not expect to have a driver furnished him at the price of ten dollars, so he decides to hire one of his own accord, and he naturally turned to the garage owner to find a man for him. The garage owner detailed a man who was working in the garage and to this man the hirer promised to pay two dollars and fifty cents.

Minor vs. Stevens, 65 Wash. 423, points out that the means and method by which a chauffeur in charge receives his compensation is material upon the question whether he is the servant of the owner, so that the latter will be liable for his acts. The payment in this case was by the hirer, and must be regarded as compensation for the driver's service. The fact of the promise before the undertaking and the relation of amount paid to the services rendered clearly show that this was a compensation and not a mere "tip". This evidence by the defendant clearly shows that the servant was not within hi control, and the hirer could give any direction to the chauffeur that he pleased, whether as to direction or speed, and the chauffeur was bound to obey. The test of control solves the issue as to the relation existing between the chauffuer and the hirer.

Also the courts say that the hirer can instruct the driver when and where to drive, but that when the hirer attempts to say how to drive, it is a different thing, and is said to be an assumption of control sufficient to hold the hirer for injuries resulting from his active interference or his commands. He thereby specifically directs and brings about the negligent act. Here

the orders to drive faster came from the hirer; therefore the hirer actually assumed control, specificially directing and bringing about the negligent act.

The fact that the chauffeur thought that he was in the employ of the garage owner does not alter the case. Previous acts and agreements have fixed his duties to the hirer. His refusal to drive fast can have no greater meaning in this case than a manifestation to drive in no other way than that in which his general employer permits him to drive.

Since the driver in this case was the special agent of the hirer and completely under his control, the relation of master and servant between the said hirer and driver was created.

Therefore, judgment must be rendered for the defendant.

DISSENTING OPINION.

Brannon, J.

In determining whether in a particular act the servant is the servant of the old master or the one to whom he is temporarily lent, the test is as to which is the person in control as a proprietor, so that he can at any time step in or continue it, and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result. Or shortly, to whom does the "particular and detailed management" belong. In a case directly in point, Shepherd vs. Jacobs, 204 Mass 110. where the owner of an automobile let it with a licensed chauffeur in charge of it under an agreement by which he was to receive $50 for the use of the car with the driver for two days, the owner was held liable for an injury to a third person caused by the negligence of the driver in operating the car during the period of hiring and when the driver was obeying the orders of the hirer, as to when and where he shall drive.

The condition that the driver was to be paid by the hirer and not by the defendant does not avoid the conclusion that the driver was not the defendant's servant at the time of the accident; the detailed management and control of the driver was still in the defendant as was evidenced by the reply of the driver, when told by Jones to drive faster; it was, "my master does not allow me to drive faster than the speed limit," and it was only when actually threatened by Jones that he broke the defendant's instructions to him.

The plaintiff should recover.

John Logan,
vs.
Richard Brondon.

Case No 26.

BRIEF FOR PLAINTIFF.

First Count.

I. The defendant in his plea states that he had no malice but that he desired the position for himself, (for his own benefit) knowing such act would probably result in the plaintiff's discharge. It is well settled, however, that injuring the plaintiff or benefiting the defendant at the expense of the plaintiff, is in itself malicious and actionable if injury ensues,

Lumley vs. Gye, 2 Ellis & Blackburn 216.
Bowen vs. Hall, 6 Q. B. Div. 333.
Walker vs. Cronin, 107 Mass. 555.
Doremus vs. Hennesy, 176 Ill. 608.

II. The plea is double in that the defendant has put in a plea of not guilty, and immediately thereafter sets up matter that amounts to a special plea.

III. The plea is argumentative, to-wit: the defendant alleges that he wanted the position for himself, that he knew the plaintiff would probably be discharged, which as a matter of law he had a legal right to do, that he had no malice, etc.

Second Count.

I. That the defendant only desired to benefit his union and had no ill will toward the plaintiff is not a sufficient justification.

Doremus vs. Hennesy, 176 Ill. 608.

O'Brien vs. People, 216 Ill. 353.

Barnes vs. Typographical Union, 232 Ill. 424.

Respectfully submitted,

Jno. W. White and O. V. Seed,
Attorneys for the Plaintiff.

BRIEF FOR DEFENDANT.

Since the defendant in answer to the first count of the Plaintiff's declaration, alleged as his sole and only ground of defense the want of malice on his part and his action to procure the plaintiff's position being caused by his desire to procure the position for himself and since the plaintiff has admitted these facts to be true by his demurrer to the said plea of the defendant, it is incumbent upon him to show that lack of malice and a proper motive in doing the act are not a good defense.

Secondly, since the defendant in answer to the second and last count of the plaintiff's declaration answered as a defense, that he, the defendant, acted in bona fida belief that his actions were for the best interest of the Union of which he was an officer and that the strike was to be carried upon legally and peacefully, and since the plaintiff has by demurrer admitted these facts to be true, it also is incumbent upon him to show that that does not constitute a good defense to the said second count.

A demurrer admits all such matters of fact as are well pleaded.

City vs. Water Co. 178 Ill 299.

Where one party has interfered with another's business or has induced a breach of contract of employment, said act in order to be actionable must have been done maliciously and with the sole purpose of injuring or destroying that person's business, or of inducing third persons to break their contract of employment.

J. F. Parkinson vs. Building Traders' Council, 154 Cal. 581.

Doremus vs. Hennessy, 176 Ill. 608

O'Brien vs. People, 216 Ill 354.

Mahoney vs. Roberts, 86 Ark. 130.

Wells etc. Co. vs. Abraham, 146 Fed. 190. Affirmed 149 Fed. 408.

Hine vs. Hodge vs. Lumber Co. 121 La. 658.

Legris vs. Marcotte, 129 Ill. App. 67.

Men can combine to increase their wages and can use their influence the same in argument, persuasion, and bestowal or refusal of these advantages which they would not otherwise control.

Guether vs. Altman, 26 Ind. App. 587.

Nat Pro. Ass. vs Cummings, 70 N. Y. 315.

Threat to strike, or boycott or withdraw patronage is not coercion in the legal sense.

Boutwell vs. Marr. 71 Vt. 1.

Burdick on Torts, page 72.

A Union may accomplish things for its benefit by a peaceful strike, or by promises or solicitation, by a peaceful strike, meaning where no force or coercion is used, as picketing or physical force.

Wilson vs. Hey et al. 232 Ill. 389.

Barnes vs. The Chi. Typo. Union No. 16, 232 Ill 424.

Individual liberty would be unduly and improperly infringed were union to be denied the right to strike, that is to cease

work, in order to secure closed shop—to demand other workmen to join union or to be discharged. When the purpose of the threat of the strike is to secure the advantage which the union men honestly are to derive from a closed shop or discharge of work men.

London Guarantee Acc Co. vs. Hone, 206 Ill 493,

Ulery vs. Chi. Live Stock Co. 54 Ill App 233.

Kemp vs. Division No. 241. 153 Ill App. 637.

Vegelahn vs. Gunter (Holmes dissenting Opinion) 167 Mass 92.

Plant vs. Woods 176 Mass 492. (Holmes dissenting opinion.)

A'len vs. Flood 1898 A. C. 1.

Kemp vs. Division No. 241, 255 Ill. 213.

Labor unions acting through agents by threatening to call out men if non-union men are not discharged are not liable for damages as suit of discharged workmen.

Kemp vs. Division No. 241. 255 Ill 213.

Respectfully Submitted,

Mehl, Mercer and Terril,
Attorneys for Defendant.

OPINION BY SHOBE, J.

The declaration in this case consisted of two counts. The first stated a contract between the plaintiff and Mitchell & Co. and charged that the defendant induced Mitchell & Co. to break the contract. The defendant pleaded to this count that he wished to obtain the plaintiff's position for himself and offered to work for lower wages without any malice toward the plaintiff, but knowing that such an offer would probably result in his discharge. The second count charged that the plaintiff was desirous of obtaining a position with Watson & Co., which he would have obtained but for the defendant who threatened to call out Watson's other employes if the plaintiff were employed. To this count the defendant pleaded that he was an officer of the Mechanic's Union and adopted that course of action in the discharge of his duties in the bona fide belief that it was for the best interest of the union, and that he had no personal desire to injure the plaintiff. To both pleas the plaintiff and the defendant filed a rejoinder.

The plaintiffs have depended much on Lumley vs. Gye, 2 Ellis & Blackburn, 216; and Bowen vs. Hall, 6 Q. B. Div. 333, in support of their first count. In Lumley vs. Gye the defendant induced a singer to break her contract with the plaintiff, who was a theatrical manager, and the Court allowed the plaintiff to recover. In Bowen vs. Hall the plaintiff had contracted with one Pearson to furnish the plaintiff with glazed brick for which Pearson had a patent process. The defendant, Hall, induced Pearson to break his contract with the plaintiff and work for him. The plaintiff sued Hall and was allowed to recover.

In the case before us counsel for the defendant have strongly maintained that there should be no recovery because there was no malice on the part of the defendant, Broudon, but they have failed to distinguish between criminal and civil malice. In Lumley vs. Gye the Court said: "It must now be considered clear law that one who wrongfully and maliciously or, what is the same thing, WITH NOTICE, interrupts the relation subsisting between master and servant, commits a wrongful act for which he is responsible at law." And in Bowen vs. Hall the Court said: "If the persuasion be used for the indirect purpose of injuring the plaintiff or benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrongful act, and therefore

an actionable act if injury ensues from it." These cases show that an act need not be done with the malicious intent required by our criminal law but only with a knowledge of the facts and a belief that the act, if carried out, will cause an injury to the plaintiff. Both the cases of Lumley vs. Gye and Bowen vs. Hall are cited with approval by the Illinois Supreme Court in Barnes vs. Typographical Union, 232 Ill. 424, and can therefore be assumed to be the rule in Illinois and to be followed in the case before us. The demurrer of the plaintiff to the defendant's plea to the first count will therefore be sustained.

The extensive authorities cited by counsel for the plaintiff in support of their second count are reviewed by the Illinois Supreme Court in the recent case of Kemp vs. Div. No 241, 255 Ill. 213. It is true that every employee has a right to protection in his employment from the wrongful and malicious interference of another resulting in damage to the employee, but if such interference is but the consequence of the exercise of some legal right by another it is not wrongful and can not therefore be made the basis for an action to recover the consequent damages. Kent vs. Div. No 241 Supra, "Labor unions have been formed in our country by the workmen for their protection against unscrupulous employers and their only source of strength is their banding together. So to remain alive they must compel workmen in the several grades to band with them or suffer non-employment. The only way they can enforce such membership is to require the workman to join them or, by striking, force the employer to discharge him." In this light striking, so long as it is carried on in a peaceful manner, is lawful, since it gives life to the labor unions which are the only hope of the laboring man for conditions under which his burden becomes bearable and the iron hand of the employer over him forced to relax. Whatever one has a right to do another has no right to complain of. A laborer may quit the employ of his master at the end of his contract and refuse to renew it if he wants to and make as a condition of his new contract the discharge of a fellow employee beside whom he objects to work. The Courts of this State have objected to the above views in some instances, but those cases were reviewed and overruled in the case of Kemp vs. Div. No. 241, supra, and we choose to stand by the majority opinion in that case and therefore the demurrer to the defendant's plea to the second count will be overruled. But on the first count,

Judgment for the Plaintiff.

Essington and Dillon, J. J. concur.

Case No. 27.

Horace Schindler

vs.

E. S. Cox.

PLAINTIFF'S BRIEF.

1. If an agent, while acting within the scope of his authority, enters into a contract, his principal being known, the presumption is that the contract is for the principal, and the principal will be bound, even though the agent contracted in his own name.

Hopkins vs. Laconture, 4 La 64.
Cooper vs. Ratcliff, 116 S. W. 748.
James vs. Lewis, 26 La. Ann. 664.
Davis & Co. vs. Gemmell, 70 Md. 356.
Dyer vs. Burnham, 25 Me. 9.
Edwards vs. Gildemeister, 60 Kan. 141.
Eustis Mfg. Co. vs. Soco Brick Co. 198 Mass 212.

Anderson vs. Timberlake, 114 Ala. 377.
Hearne vs. Chillocothe, etc., R. R Co., 53 Mo. 324.
Jones vs. Wattles, 66 Neb. 533.

Jones vs. Gould, 108 N. Y. S. 31.
Lowe vs. Penn Iron Works Co., 54 So. 742.
Fountain vs. West Lumber Co., 76 S. E. 533.

2. When an agent discloses his principal the burden of showing that exclusive credit has been given to the agent is on the party asserting it.

John Spry Lumber Co. vs. McMillian, 77 Ill. App. 280.
Anderson vs. Timberlake, 114 Ala. 377.
Meeker vs. Claghorn, 44 N. Y. 349.
Butler vs. Evening Mail Assn., 61 N. Y. 634.

Respectfully submitted,
Cassidy, Newell & Ratcliffe,
Attorneys for Plaintiff.

DEFENDANT'S BRIEF.

1. A party although an agent and acting within his authority who contracts in writing in his own name, is liable on the contract himself, the fact of agency having been disclosed, and the principal can not be made liable by setting up by parole evidence that the contract was made for the principal.

Chandler vs. Coe, 54 N. H. 561.
Harvey Silver vs. Eben D. Jordan, 136 Mass. 319
William vs. Journal Printing Co. 43 Minn. 537

2. If an agent contracts with a third party and the third party knows he is an agent but the parties see fit to make a written contract that names the agent and third party as the contracting parties with no allusion to the principal, then the agent and not the principal is bound by the contract.

Sealing vs. Knowlin 94 Ill. App. 443.
Savage vs. Rix 9 N. H. 269.
Arfridson vs. Ladd 12 Mass. 173.
Dokarty vs. Tillotson 64 Neb. 432.
Watte vs. Thayer 56 Ill. App. 282
Vail vs. Northwestern Life Ins. Co. 192 Ill. 567.

3. Parol evidence is not admissible to vary or explain the terms of a written instrument.

Town of Kane vs. Farrelly 192 Ill 521.
Kempshall vs. Vedder 79 Ill. App. 369.
Snow et al. vs. Macfarlane 51 Ill. App. 448.

5. After the parties have reduced their agreement to writing all prior negotiations leading up to the execution of the writing are merged in the writing and cannot be brought in by parol to explain or vary it.

Lewis H. Davis vs. Fidelity Ins. Co. 208 Ill. 375.

5. Agency is a fact the burden of proving which rests upon the party affirming its existence.

31 Cyc. 1643 authorities there cited.

Respectfully Submitted,
Brannon, Anderson and Barlowe,
Attorneys for Defendant.

OPINION BY MERCER. J.

This case arises upon a verbal agreement made in October, 1911, between the plaintiff, Schindler, and one L. E. Dunn, the latter acting as agent for E. S. Cox, the defendant in this case. By this verbal agreement Schindler undertook to cut down trees located upon Cox's premises, cut them into logs and haul them to a designated place. Schindler performed his part of the contract, receiving advances from Dunn from time to time. On December the 28th the contract was reduced to writing, but unfortunately the agency of Dunn or the principalship of Cox was not mentioned. There was nothing in the writing to indi

cate but that Dunn was the real party to the contract. The language in fact nomi nated Dunn as "the party of the second part." Default having been made in the payments to Schindler, he brought this action against Cox, seeking to hold him liable as Dunn's principal. One thousand dollars remains due and unpaid.

According to all principals of law and justice, Cox is liable upon the contract if the verbal agreement can be taken into consideration. Counsel for the defendant insisted that the parol evidence rule prohibited the introduction of the verbal agreement. As a general rule a written contract can not be explained or altered by parol evidence if the written contract is clear and unambiguous on its face.

Admitting this well established rule of evidence, one feature of this case negatives its application. The party relying upon this rule is the defendant, who was not a party to the written contract. It is fundamental law that one not a party to a written instrument or privy to it can not urge the parol evidence rule as a defense.

Wigmore on Evidence Vol. IV. Sec. 2042 and authorities cited.

Judgement will be for the plaintiff.

Mehl and Stambaugh J. J., concur.

Moot Court Bulletin

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Walter Ross
vs.
James Green.
} Case No. 1.

STATEMENT

On May 1, 1914, James Green, who had undertaken to construct a grain elevator with a capacity of 80,000 bushels of wheat at Elkville, Jackson County, Illinois, and have it ready for the reception of the wheat crop of 1914, made a proposition with Walter Ross, that if he did not have the elevator finished and ready for the reception of grain by July 15, 1914, he would pay Ross the sum of $500, and that if the elevator should be finished and ready for the reception of grain by that date, Ross should pay him $500. The proposition was accepted and there was deposited with the Elkville National Bank, by Green, a note as follows:

"Elkville, Ill., May 1, 1914.

For value received, I promise to pay Walter Ross or order Five Hundred Dollars on July 15, 1914, if the grain elevator now being constructed by me under contract with the Board of Managers of the Wheat Grower's Association of Elk Township is not finished by that date.

James Green."

At the same time Ross deposited with the bank a note for a like sum, payable to Green, if the elevator should be finished by July 15, 1914. The elevator was not finished or ready for grain until July 25th, and on the following day the bank delivered the two notes to Ross. Suit is now brought on the note executed by Green.

The Elk Township Wheat Grower's Association had voted a bonus of $400 to Green to be paid in the event of his having the elevator ready to receive the first wheat threshed by a member of the Association. Henry Wolf, a member, was the first to finish threshing, which was on July 23d, and on the 25th he began delivering at the elevator. He had not offered to deliver earlier. The bonus, which was raised by voluntary assessment of members, was paid. Ross was a member of the association and had contributed to the bonus. He was not one of the Board of Managers, which contracted with Green for the construction of the elevator.

For the plaintiff: Anderson and Barlow.
For the defendant: Britton and Brown.

Case No. 2.

STATEMENT.

Samuel Bates and William Carr, from 1904 to 1913, were engaged in buying and selling live stock as partners at Champaign, Ill. Their contract provided that they should share equally in the profits and losses.

In 1913 the firm became insolvent. Judgments were recovered against them and all the partnership property was taken and sold on execution. The firm owed Henry Horn $2400, but no steps were taken to collect his debt because he was "abroad" when the firm failed. When he returned in November, 1913, he had an interview with Bates and Carr in which he pressed them to pay or secure his debt. The only property owned by Carr not exempt from execution was an automobile worth about $1100. The only property owned by Bates was forty shares of stock in a cold storage company of doubtful value. Carr offered to turn his automobile over to Horn in satisfaction of his part of the debt, and Bates offered to assign his shares of stock to Horn in satisfaction of his part of the debt. Horn was willing to accept the automobile and release Carr, but was unwilling to accept the proposition of Bates, because he did not regard the stock as of any value. Bates insisted that the stock had a fine prospective value, and would be worth par in less than six months. Carr then said

"I will turn the automobile over to you if you will release me, and you can wait on Bates until such time as the stock does become valuable. Bates can hold his stock, and just as soon as he can satisfy you that it is worth half the debt, or $1200, you can take it," to which Horn replied. "That is satisfactory." The automobile was turned over to Horn and he gave to Carr the following receipt:

"Champaign, Ill., Nov. 30, 1913.

Received of William Carr, his automobile, being a five-passenger Buick, valued at $1200. In consideration of which I release him from further liability on the partnesship debt of $2400 which I hold against the late firm of Bates & Carr.

Henry Horn."

Bates did not formally assent to this arrangement, but heard the entire conversation, saw Horn write the receipt, and deliver it, and saw Carr deliver the machine to Horn.

In about six months after the delivery of the machine, the cold storage stock belonging to Bates became valuable and was selling at par. Horn made a demand upon Bates for the stock, but Bates refused to deliver any part of it to him, sold the stock to third parties, and now refuses to pay anything.

For the Plaintiff: Bye and Corbly.

For the Defendant: Cummins and DuHadway.

Case No. 3.

STATEMENT.

On the 4th of April, 1914, James Pettis who was the president of the Atlas Coal Company, an Illinois corporation, engaged in mining coal in Sangamon County, Illinois, executed and delivered to the Springfield State Bank a promisory note of which the following is a copy:

Springfield, Ill., April, 4, 1914.

Four months after date we promise to pay to the Springfield State Bank, or order, two thousand dollars, with interest from date at the rate of seven per cent

And we hereby constitute and appoint any attorney of this State, our attorney to appear for us in any court, in term time or vacation, at any time hereafter, and waive the issue of process, and confess judgment against us for the amount of the above note including interest then due and ten per cent of the principal sum above mentioned for attorney's fee, and costs, file a cognovit for that amount and an agreement releasing all errors, and waiving all appeal in said cause, and that no bill in equity shall be filed to interfere with the operation or said judgment or any execution issued thereon.

Atlas Coal Company,
By James Pettis, President.

The note was given for borrowed money which was used by the coal company. When Pettis applied for the money for the company, he represented to the cashier of the bank that he was willing to endorse the note personally and guarantee its payment. Accordingly, when he signed the note as president of the company, he endorsed his name on the back of it in blank, "James Pettis". On the 23rd day of September, R. C. Glover, attorney for the bank, filed declaration in vacation of the Circuit Court of Sangamon County, for judgment on the note against the coal company and against Pettis by reason of his endorsement, and interest at that time due and $200 attorney's fees. At the same time, William Watts filed cognovit for the bank and for Pettis confessing judgment for the amount of the note and interest and $200 attorney's fees. A vacation judgment was thereupon spread of record by William Horn, Clerk of the Circuit Court of Sangamon County.

On the 10th of October, at the instance of the bank's attorney an execution issued from the judgment and was placed in the hands of William Jones, Sheriff of Sangamon County. On the 14th day of October, 1914, the Sheriff levied upon an automobile, a piano, and a saddle horse belonging to Pettis, and advertised the same for sale as of the 10th day of November.

Claiming that the judgement against him is void, and that the execution is void, the plaintiff employs R. E. Leopold and T. G. Lewis, attorneys at law, to take such steps as should be taken to protect his legal rights.

Attorneys for the bank: Glover and Gunnell.

Attorneys for Pettis: Leopold and Lewis.

The attorneys for the bank will prepare all papers necessary for a vacation judgment in accordance with the facts above stated. They will also psepare a judgment and an execution. These papers will be filed with the Clerk on or before the 20th day of October. It will be presumed that the presiding judge of the Moot Court is the presiding judge of the Circuit Court of Sangamon County, Illinois.

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Merton B. Coburn
vs.
Eli Harvey
} Case No. 4
Jury trial.

STATEMENT.

The defendant owns a large farm near Nashville, Washington county, Illinois, where he is engaged rather extensively in raising cattle and sheep. During the spring and early summer of 1914, he was greatly annoyed by dogs chasing his cattle and sheep while grazing in pastures where he kept them confined. About the middle of June of that year a valuable Hereford calf was chased, killed and devoured by dogs. On the week following a local newspaper published a notice as follows:

"A Warning

If the owners of dogs in Nashville do not keep their animals off my premises I shall adopt means that will prevent their coming more than once.

ELI HARVEY."

A witness will testify that he heard Harvey say on two occasions that when a dog next came to his pasture for fresh meat, he would not have to run it down, that he would find it ready, but that it would be the last that he would eat.

On the morning of July 2, 1914, two recently poisoned dogs were found dead in the outskirts of Nashville on a road passing by a woods pasture where Harvey kept his cattle. One of the animals was an English Coach dog which the plaintiff imported from Liverpool at an expense of $200. An autopsy showed that he died from poisoned meat. Two pieces of meat containing the same character of poison were found in the pasture near the road.

The plaintiff sues for the value of his dog, laying the damages at $500. Four witnesses will testify for the plaintiff and two for the defendant.

For the Plaintiff, Hannah & Luney.

For the Defendant, McKnight & Newell.

James Ball
vs.
People's State Bank of Decatur.
} Case No. 5.

STATEMENT.

The plaintiff was the principal stockholder in an Illinois corporation engaged in buying and selling coal at Peoria. To secure a loan of $10,000 the corporation in 1913 placed a chattel mortgage on all its teams, wagons and office equipment, worth $18,000 or $20,000, due September 1, 1914.

Some time during the month of June, 1914, the plaintiff began negotiations with a Mrs. Nannie Towle looking to a purchase from him of 300 shares of stock in the corporation for $20,000 in cash. The purpose of the plaintiff was to use the $20,000 in lifting the mortgage mentioned and in furnishing working capital at Peoria. Mrs. Towle lived in Indianapolis and promised the plaintiff to furnish the money at that place on the 10th of July. On the 1st of July a check drawn by the plaintiff on the defendant for $500 was presented by a brother of Mrs. Towle's but was not

honored. The plaintiff at that time had a balance in checking account with the defendant of $1,250, but the bank held his note for $2,000, payable on the 6th of July. The check was not honored for the reason that the bank had learned that the plaintiff was in hard lines financially, and was in danger of being thrown into bankruptcy. The brother of Mrs. Towle at once notified her that the plaintiff's check had been dishonored and it would be unwise to purchase the stock and she refused to purchase. Had the stock been purchased and the $20,000 placed in the plaintiff's hands he would have been able to lift the chattel mortgage mentioned and successfully continue the business of the corporation at Peoria. The money market became quite stringent, the plaintiff was unable to procure money elsewhere than from Mrs. Towle and as a result the mortgage was foreclosed and the property covered by it it sacrificed at forced sale, it bringing only $8,500.

Claiming that the action of the defendant in refusing payment of his check influenced Mrs. Towle to decline to fulfill her agreement, and resulted in the sacrifice of the property of the corporation, the plaintiff now brings a tort action against the defendant, naming the damages at $40,000.

For Plaintiff: Patterson, Terrill.

For Defendant: Ratcliff, Ruth.

James Barton
vs.
The Peoria Life Insurance Company } Case No. 6.

The defendant is a life insurance company, incorporated under the laws of Illinois. On the first of March the mother of the plaintiff, Mary Barton, a resident of Champaign county, State of Illinois, procured a certificate of insurance upon her life for the sum of two thousand dollars, payable to the plaintiff within ninety days after her death and within thirty days after receiving satisfactory proofs of her death. As premium she paid the sum of fifty dollars, cash, and agreed to pay the sum of five dollars on the first day of each month following for the period of twenty years and the additional sum of thirty dollars on the first day of March of each year for the period of eighteen years. It was provided in the policy that any failure to pay a monthly payment within ten days, after due, would work a forfeiture of the policy and that any failure to pay an annual payment within thirty days after due, would work a forfeiture of the policy. The defendant maintained a local office at Champaign, in charge of one David Rodgers. All cash, monthly and annual premiums made by policy holders in Champaign county were made to Rodgers, who receipted for them in pass books furnished by the company and held by the insured. The policies issued to holders in Champaign county required payments to be made to Rodgers at his office or to the company's general office at Peoria. For the convenience of patrons, however, collections from residents of Champaign and Urbana were made by Rodgers calling at their places of business and homes. It was the custom of Rodgers to call upon a policy holder living in one of the towns named on the day or the day following the maturity of any payment, and if payment was not then made the holder would be required to pay at Rodgers' office. All payments on the certificate of Mary Barton were promptly met up to the one due June 1st, 1913. When Rodgers called at her house in Champaign for the purpose of collecting it, on the second of that month Mrs Barton tendered him a twenty dollar bill, but he could not make change. He told her he would mark it paid in her pass book if she would have the money ready for him when he made his "rounds" for collection the following week. She promised to have the money

ready for him when he should come the following week: whereupon he entered in her pass book the payment of five dollars for that month. Rodgers called at Mrs. Barton's the following week, but she was not at home. He called the week following and then learned that she had gone on a short visit to Indiana.

Mrs. Barton met her death in a railroad accident on the 3rd of July, 1913, while returning from Indiana. The plaintiff, on the 10th of July, 1913, called at Rodgers' office with the information that his mother was dead and asked for blanks with which to make proofs of death. Rodgers then told him that because of default in the June payment the company had the right to insist upon a forfeiture of the policy. He told the plaintiff, however, that he could leave his policy and pass book with him and that he would report to the head office and get blanks for proof of death. The plaintiff thereupon delivered his policy and pass book to Rodgers. In a few days thereafter, he called in Rodgers' office and was then informed that the company had elected to declare a forfeiture and declined to furnish blanks for proof of death. On the first of August, the plaintiffs wrote to James Batson, the secretary of the company at Peoria, and received in reply a letter from the secretary to the effect that the company did not consider itself liable because the policy had been forfeited for the non-payment of the June dues.

The plaintiff brings this suit in the Circuit Court of Champaign county. To the declaration the company pleads the general issue and a special plea of forfeiture, to which the plaintiff replies by way of traverse and specialty that the condition with reference to forfeiture was waived.

For Plaintiff: Anderson and Britton.
For Defendant: Barlow and Brown.

Jane Day and Ward Day
vs.
Jos. Day, Nathan Day and John Day
} Case No. 7.

STATEMENT.

On March 1st, 1897, Thomas Day borrowed from one John Black $400 and delivered to him his promissory note for that sum and interest at 7 per cent payable two years after date with Robert Day as surety. He and his wife, Mattie Day, on the same day executed and delivered to Black a mortgage on the northwest quarter of the southeast quarter of section 2, town 15 north, range 2 west of the 3d P. M. in Morgan county, Illinois. The west half of the said track was then owned by Mattie Day and the east half by Thomas Day. On February 21st, 1898, Mattie Day died intestate leaving her husband, Thomas Day, and, as her only heirs at law, the complainants and defendants in this suit. On February 6, 1900, Thomas Day conveyed to the complainants the east half of the above described land. On February 7th, 1911, Thomas Day paid $100 on the principal of the above mentioned note and the interest to that date. On February 14, 1911, Black assigned the note to complainants and delivered to them a formal assignment of the mortgage given to secure it. On February 28, 1911, Thomas Day died intestate, leaving as his only heirs at law the five children named as complainants and defendants. On February 5th, 1913, complainants filed in the circuit court of Morgan county their bill in equity against the defendants, praying for an accounting of the amount due on the note and mortgage and that the defendants be required to pay their equitable and pro rata share of the amount so found to be due, and in default thereof, that their interest in the west one-half of the said tract be sold. The defendants filed an answer setting up that the mortgage and note were barred by the statute

of limitations, and upon that answer with the replication filed thereto, the cause is to be submitted for a hearing.

For Complainants: Bye and DuHadway.
For Defendants: Corbly and Cummins.

Marion State Bank
vs.
Charles Cole. } Case No. 8.

STATEMENT OF FACTS.

On February 15, 1913, the plaintiff recovered a judgment of $1,260 against the defendant. After having an execution issued and returned "no property found," the plaintiff filed a creditor's bill in aid of execution against the defendant and his son, John E. Cole, to set aside as fraudulant a deed of the defendant, conveying to his said son the south half of the southeast fourth of section 30, T. 10 S. R. I. E. in Williamson county, Illinois, executed and recorded January 4, 1913. Answers simply denying the allegations of fraud and setting up that the conveyance was for a valid consideration, were filed by both defendants. A trial was had before the circuit court of Williamson county, resulting in a decree setting aside the deed as fraudulent and ordering the land to be sold to satisfy the execution. The sheriff sold the propererty as directed by the decree on October the 18th, 1913, to the plaintiff, for the sum of $1,460, eight hundred dollars of which was bid upon the southwest fourth of the seutheast quarter of said section of land, and $660 on the southeast of the southeast.

The defendant has lived upon the southwest of the southeast of said section as his homestead for twelve or fifteen years. It does not exceed in value $1,000. At the time of the sale, however, he was temporarily absent, but left his household furniture stored in one of the rooms of the dwelling house situated on the land and intended to return at the expiration of two months. He now files a written motion to set aside the sale of the southwest fourth of the southeast quarter of said section, upon the ground that the real estate constituted his homestead and is exempt from sale under execution.

The plaintiff files an answer to the motion, resisting upon the ground that as the defendant failed to set up in his answer to the creditor's bill any claim of homestead, he is estopped from doing so afterwards and is concluded by the decree rendered in that case.

For Plaintiff: Glover and Leopold.
For Defendant: Gunnell and Hannah.

Moot Court Bulletin

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Springfield State Bank
vs.
Atlas Coal Co. and James Pettis
Case No. 3.

Opinion by Harker, P. J.

This is a motion to set aside a vacation judgment entered by the Clerk of the Circuit Court rendered against the Atlas Coal Co., and James Pettis, and to stay execution which issued from the judgment. The motion is made by the defendant, James Pettis.

The judgment in question was entered upon a promissory note executed on the 4th of April. 1914, by the Atlas Coal Co., whereby it promised to pay to the plaintiff four months after date, the sum of $2000, with interest at the rate of 7%. The note contained power of attorney authorizing any attorney in the state to appear in any court. in term time or vacation and confess judgment to the amount of the principal and interest, with attorney's fees. The note was delivered to the plaintiff to secure a loan of $2000 borrowed by Pettis as the president of the company. When he applied for the loan, he stated to the cashier that he was willing to endorse the note personally, and guarantee its payment, and when he signed the note as president, he endorsed in blank on the back of it, his own name. "James Pettis."

The note remaining unpaid, on the 23rd of September. 1914, the attorney of the bank filed a declaration in vacation of the Circuit Court, making Pettis a joint defendant with the Atlas Coal Co. When he did so, he procured William Watts, an attorney at law to file a cognovit for the defendants, which he did, confessing judgment in favor of the plaintiff and against the coal company and Pettis for the amount due and $200 attorney's fees. Execution issued from the judgment and was levied upon certain personal property belonging to Pettis.

Pettis alone files motion and he does so upon the ground that the judgment against him is void, he contending that no authority was ever given to confess it. In other words, he bases his motion entirely upon want of proof of execution of a power of attorney to confess judgment. In resisting the motion attorneys for the bank assume that the guarantor of the payment of a promissory note must be regarded as an original promissor, and bound by all the terms of the original undertaking. They insist that as the note was endorsed in blank, parol evidence is proper to show that the undertaking was that of a guarantor, and there was considerable argument upon the hearing as to the admissibility of parol evidence to show that.

In the light with which the court views the case. the question of whether Pettis was a guarantor or an ordinary endorser makes no difference. A decision of the case must hinge upon the legal right to enter judgment by confession against one who has endorsed a promissory note without in the endorsement specifically authorizing a confession of judgment.

We will assume, therefore, that the undertaking of Pettis was that of a guarantor. Our courts have repeadedly held that authority to confess judgment without process must be clear and explicit.

Chase v. Dana, 44 Ill. 262
Tucker v. Gill, 61, Ill. 236
Keith v. Kellog, 97 Ill. 147
Little, et al. v. Dyer. 138 Ill. 272
Fry v. Jones. 178 Ill. 627

The contract of guarantor is merely a collateral undertaking to pay a debt owing by a third party in case the latter does not pay.

Grindley v. Capon, 72 Ill. 11.

The court is unable to see why there should be included in the guarantor's contract a power of attorney to a third person to confess judgment for him. In the light of the authorities cited, it is clear to my mind that Pettis did not authorize Watts

to enter his appearance and confess judgment. The execution will therefore be quashed and the judgment vacated.

Edwin Barr.

vs.

Illinois Central Railroad Co.

Case No. 9

Trial by Jury

STATEMENT.

Since October 1, 1914. the plaintiff has been engaged in buying horses, to be resold and delivered by him to an agent for the French government, at Chicago, Illinois. On the 20th of that month, he had ready for shipment at Tolono, 20 horses. When the plaintiff applied to the defendant's agent at Tolono, for a car, the agent told him that he had not any regular stock cars in the yards. and that if they went on that day they would have go in an ordinary box car. Rather than wait a day or two till a regular horse car could be furnished him, he shipped on that day. When the horses arrived in Chicago on the following morning, four of them were badly injured. Two of them had legs broken, and were necessarily killed. They were worth $150 each. The other two were considerable injured. He brings suit against the company, alleging as negligence that the car furnished him was defective in that the floor and the sides of the car were rotten, whereby the horses got their legs through the sides of the car and were injured. To the plaintiff's declaration, the defendant will plead the general issue, and upon the trial, it will be contended that the car was in good condition when it left Tolono, that the sides of the car were broken because of the wildness of the horses. It will also be contended that the freight car used was one of the plaintiff's own selection, preferring to use an ordinary box car instead of waiting a day or two for a stock car.

For the Plaintiff:

Siegel & Patterson

For the Defendant:

Terril & Ruth

James Atwood

vs.

William Dale and John Barth.

Case No. 10.

STATEMENT.

On January 2, 1914, James Atwood, the owner of the S. E. ¼ of Section 19, Town 9, S. R. 1 E., executed and delivered to John Barth, his promissory note for $3000. with interest from date at 6%, payable in two years. and his mortgage on the land to secure it The mortgage provided that if Atwood should not pay the taxes against the land before becoming delinquent, that Barth might pay them and charge the same as part of the mortgage debt.

For delinquent taxes the land was sold to Joseph Carr for $94, on June 30, 1911, under order of the County Court, and a certificate was duly issued to him as provided by statute. In July, 1914, Barth took an assignment of the certificate from Carr, paying its face and the amount of the penalty. Barth held the certificate about 6 months, and then assigned the same to William Dale. Dale paying him the face of the certificate and the penalty attached in case of redemption.

There being no redemption from the sale and Dale having complied with the statute with reference to publication of notice, he, on the 10th of July, 1913, obtained from the County Clerk, a deed to the premises. The land was vacant and unoccupied, and Atwood was at the time residing near South Bend, Indiana. On January 20. 1914, he applied to Barth to know how much he owed

him on the note and mortgage. He had made payments of interest from time to time, and on one or two occasions had paid part of the principal. Barth told him that there was due him all told, $2466. Thereupon they went to the county seat, where the mortgage was recorded; Barth satisfied the mortgage on the record, and Atwood paid him the amount of $2466. Early in February Atwood began the erection of a house and barn on the place and did a considerable amount of clearing of the land, getting it ready for cultivation before the 20th of April. At that time he moved with his family into the house and began cultivating the land which had been cleared. He had not knowledge of the tax sale certificate that was issued to Carr and afterward assigned to Barth and by Barth to Dale. Dale had no actual knowledge of the provision in the mortgage which permitted Barth to pay taxes or redeem from taxes and charge the same as a part of the mortgage debt. Atwood, when apprised of the situation, offered to pay to Dale the $94 and the 100% penalty thereon, the expense of recording a deed. and interest at 6% on the whole sum due on the 30th of October, 1913, but Dale refused, claiming that the land belonged to him. He began action of ejectment in the Circuit Court. Atwood now brings a bill to enjoin the prosecution of the suit of ejectment and also for the purpose of having the deed to Dale set aside as a cloud upon his title. The bill will contain an offer to pay what has been paid out by Dale, together with interest on the same.

The attorneys for the defendent, Dale, will file a declaration in ejectment, bringing the same in the Circuit Court of the County where the land is located. Atwood will file a bill in the same court.

For the Complainant:
Lewis and McKnight.

For the Defendant:
Luney and Ratcliff.

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Case No. 1.

Walter Ross
vs.
James Green

Opinion by Patterson, A. J.

This is an action on a promisory note. The material facts are as follows: James Green had made a contract with the Board of Managers of the Elkville Township Wheat Growers Association, of which the plaintiff, Walter Ross, was a member, to build an elevator of a certain capacity at Elkville, Jackson County, Illinois, and to have the same completed and ready for the reception of the 1914 wheat crop. The plaintiff was not a member of the Board with which the contract had been made. James Green, the defendant, made a proposition to the plaintiff that if he did not have the elevator finished and ready for the reception of the wheat crop by July the 15th, 1914, he would pay the plaintiff the sum of $500, and that if he did complete the elevator and have it ready for the reception of grain on that date, Ross should pay him the sum of $500. Ross accepted the proposition. Green deposited a note in the Elkville National Bank of which the following is a copy:

Elkville, Ill., May 1, 1914.

For value received, I promise to pay to Walter Ross, or order, five hundred dollars, on July 15, 1914, if the grain elevator now being constructed by me under a contract with the Board of Managers of the Wheat Growers Association of Elk Township is not finished by that date.

James Green.

The present action is on that note.

Ross deposited a note payable to Green if the elevator should be finished.

The elevator was not finished by the date agreed upon. The Bank turned the notes over to Ross who brought this action upon Green's refusing to pay the note according to the contract.

The Association (not the Board of Managers) had raised a bonus by contribution from its members, which was to be given to Green upon the condition that he have the elevator completed in time to receive the first wheat threshed by any member of the association. To this bonus the plaintiff contributed.

Obviously the question is whether the plaintiff and defendant have made a valid contract.

The plaintiff contends that it is a valid contract because it is a contract with a third party to do some additional act, other than those already required by an exsiting contract and that such a contract is valid. He contends that since the defendant was only bound to complete the elevator in time to receive the first wheat threshed by any member of the association and since, by his contract with the plaintiff, he undertook to finish it by July 15, a thing which he was not bound to do, there is a good consideration for his contract with the plaintiff and the contract is valid. That general rule is correct where the third party will be materially benefited by the performance of the original contract. Abbot v. Doane, 163 Mass. 433, and Smith v. Finch, 3 Ill. 321 are cited for the proposition. In both of these cases the third party with whom the second contract was made would be materially benefited by the performance of the original contract.

But the facts in the case at bar, as they appear from the face of the record, do not show that the plaintiff would be so benefited. It is not shown that Ross had wheat which had to be in the elevator on July 15, or that he was, in any way, so interested that he was willing to pay $500 to get the elevator completed on that date. On the

contrary, the inference to be drawn from the evidence is that he was not so interested.

He had already contributed to a bonus to be given to Green in case he completed the elevator, not July 15, but in time to receive the first wheat threshed by any member of the association. Is it reasonable to suppose that the plaintiff would have contributed to the bonus which was to be given to Green in case he completed the elevator at a time which may be one or two months later than July 15, if he had any special reason or interest in wanting the elevator finished at that date? If the plaintiff did have such an interest would he not have hunted up Green and made the proposition to him rather than have waited until Green hunted him up and made the proposal?

An Illinois statute, Sec.131 of the Criminal Code, provides; "All promissory notes, executed---------- where the whole or any part of the consideration thereof, shall be for any money won by wager on ---------- any contingent event whatsoever, shall be void and of no effect." The defendant contends that this note is void by reason of this provision.

At common law even though it was shown that a given debt was the result of a wager, nevertheless an action could be maintained, and the money recovered. That rule still obtains in States which have adopted the common law and which have not changed the rule by statute. So, if the statute does not apply, the plaintiff has a good cause of action even if we determine that this was in fact a wagering contract, because Illinois has adopted the common law.

An Illinois case, The Merhants Saving, Loan and Trust Co. v. Goodrich, 75 Ill. 554, considering the above section of the statute, says: A wager is a contract by which two or more parties agree that a certain sum of money or other valuable thing, shall be paid or delivered to one of them upon the happening or not happening of an uncertain event." It seems to me that we have that exact situation here, having come to the conclusion that Ross had no interest in having the elevator completed by July 15. Green went to Ross and said, in effect; "If you will give me $500 if I get this elevator done on July 15, I'll give you $500 if I do not complete it by that date." It is uncertain that he will be able to finish it, and it is therefore a contract to pay money on the happening or not happening of an uncertain event. The Statute, therefore, governs the case and by its effect the note is rendered void. The action on it cannot be maintained and judgment must be for the defendant.

Case No. 13.

Mary Jones
vs.
Leonard Jones

STATEMENT OF FACTS.

Mrs. Mary Jones, a widow, on June 5th, 1910, made to her son, Leonard Jones, a deed in fee simple with warranty, of her farm, worth about $20,000, and described as the N. E. ¼, S. W. ¼, Section 14, T. 4, N., R. 3 E., Marion Co., Illinois. The consideration recited in the deed was $100, which was paid. The chief consideration for the deed was Leonard's oral promise to apply the income of the farm to the support of Mary in the degree of comfort to which she had been accustomed, until her death, to provide a home on the farm for her, and a suitable burial after her death. Mary, at the time of making the deed was 70 years old, and had no other property than the farm. Leonard continued to comply with his promise until the summer of 1914, when, influenced by his wife, who dislikes Mary, he ceased to provide any support for his mother, and threatens to turn her out of the house. Mary now brings her bill in equity, seeking a cancellation of the deed, offering to return the consideration, $100, and further relief. No evidence was offered to show that Leonard's promise was not made in entire good faith and with the intention of performing it, unless his breach of the promise constitutes such evidence. On this ground the court dismissed the bill, without prejudice to an action at law by Mary on the promise. Mary moves for rehearing.

Illinois cases may be cited, but the cause is to be argued in the light of cases elsewhere, as well.

For the Complainant,
Belnap and Billman.

For the Defendant,
Bleisch and Casner.

Case No. 14.

Johnson Music Co., Complt.
vs.
Patrick Gannon

STATEMENT OF FACTS.

On Jan. 2d, 1914, one Anna Thompson, a music teacher, leased from the defendant, Patrick Gannon, a small apartment in the Francisco apartment building in Chicago for one year. On the same day she leased from the complainant, also for one year at the monthly rent of $3.00, a piano which is the subject matter of the present suit. By the terms of the lease, the piano was to be delivered and taken away at the expiration of the lease at the complainant's expense. It was found that the narrow hall leading to the entrance of the apartment did not permit the piano to be brought into the apartment in the usual way. Miss Thompson therefore obtained the consent of the defendant to enlarge a window of the apartment temporarily by removing a portion of the outer wall for the purpose of bringing the piano in through the opening so made; this was done, the piano hoisted in, and the wall and window restored to its former condition. Miss Thompson's lease of the piano and of the flat have now expired and she has left the premises. The defendant refused to permit the complainant to tear down the wall or otherwise deface the building, even temporarily for the purpose of removing the piano. There is no evidence that the defendant ever promised to allow this to be done. The piano cannot be taken to pieces without destroying it. The defendant asserts no dominion over the piano, has done no act amounting to a conversion of it, in fact is anxious to get rid of it. The piano is worth $500 and has no extraordinary or unique value.

Bill in equity by complainant asking in effect that it be permitted to enlarge the window for the purpose of removing the piano, on giving bond to restore the wall and window to its present condition.

Demurrer by defendant.

For the Complainant,
Clements and Day.

For the Defendant,
Fiero and Freels.

Case No. 15.

Charles Anderson
vs.
James Sheffield

STATEMENT OF FACTS.

The defendant Sheffield owned a house in a choice residence suburb of Chicago. There was an understanding (not amounting to contract) among the residents that an owner on moving away would sell out only to a person of good reputation, acceptable to the other residents. The complainant Anderson contracted in writing with Sheffield to purchase the latter's house for a residence, representing that he (the complainant) was a person of unblemished reputation. The contract price was the full value of the land. The defendant believing Anderson's assurance, made no investigation into his past history. As a matter of fact, Anderson had served a term in prison in a distant state for an infamous crime. This fact coming to light, the defendant refused to convey, and Anderson having tendered the balance of the price, brings suit for specific performance. Defence, complainant's fraud. Defendant has not succeeded in proving that he will suffer any pecuniary injury if he is compelled to convey to complainant, nor that the value of his neighbor's property will be diminished on account of Anderson's residence in their midst. He has shown, however, that he has suffered much social ostracism at the hands of his friends and neighbors on account of his carelessness in accepting Anderson as a purchaser, and will suffer still more if he is compelled to convey to Anderson.

Hearing will be on bill and answer.

For the Complainant,
Glover and Henson

For the Defendant,
Gunnell and Froman.

Case No. 16.

William Kent
vs.
Elizabeth Kent, et al

STATEMENT OF FACTS.

James Kent died June 5, 1914. His will was admitted to probate in Champaign County, and letters testamentary issued to his

widow, and sole divisee and legatee, Elizabeth Kent. Their only child, William, within a month thereafter, brought this bill in chancery to contest and set aside the probate of the will, on the ground that the will was not attested as the statute requires.

It appeared, by uncontradicted evidence, that the two witnesses, John Webb and Mary Pickett, saw the testator sign the will, and were in the room with him at the time; that they signed it as witnesses after the testator in the room adjoining that in which the testator lay, and at a distance of ten feet from him; that the testator was in bed, and in such a position that if he had been able to turn his head around he might, merely by so turning it, have seen the backs of the witnesses as they were signing the will, though he could not have seen the will itself; but that in fact, owing to an injury to the spine, he was unable to move or turn his head; and that the witnesses immediately after signing, showed their signature to the testator, who expressed himself satisfied.

Jury waived and trial by the court on pleadings and proofs as above.

For the Complainant,
Gilbert and Grace.

For the Defendant,
Grossman and Hart.

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James Barton
vs.
The Peoria Life Insurance Co.

BRIEF FOR THE PLAINTIFF.

1. An agent who solicits insurance, collects premiums, receives and forwards applications, receives and delivers policies, is a general agent and as such has power to waive conditions.

Milwaukee Mechanics Insurance Co. v. Schalman, 188 Ill. 213.

2. A general agent has power, also, to extend credit to the insurred and to mark the premium paid so as to satisfy the policy in this regard, either on behalf of the Company, or on his own behalf.

Missouri Valley Life Ins. Co., v. Dunkle, 16 Kans. 158. Lebanon Mutual Ins. Co. v. Hoover, Hughes & Co. 113 Pa. St. 591.

Bouton v. Amer. Mutual Ins. Co. 25 Conn. 542. 2 May on Insurance (3rd ed.) 360.

3. In this case the agent of the defendant, by the arrangement on the second of July whereby he marked the pass book of the plaintiff paid in respect to the June payment, and said that he would collect the money the next week, in reality extended credit to the insurred.

This may have been done either on behalf of the Company which he represented, or on his own behalf. In either case the policy was satisfied even tho the insurred was liable on a separate contract to pay the amount of the premium, a failure to pay which would not in any way work a forfeiture of the policy.

4. Waiver of condition of policy of an Insurance Co., outside of a special agreement may be inferred from such a course of conduct on the part of the Company as is calculated to lead the assured to believe that the company did not require its performance. Dwelling House Ins. Co. v. Dowdall 159 Ill. 179 Durekorfpul Fire Ins. Co. v. Orter 74 Ill. app. 139.

Respectfully submitted,
Attorneys for the Plaintiff.
Anderson and Britton.

James Barton
vs.
The Peoria Life Insurance Co.

BRIEF FOR THE DEFENDANTS.

1. The tender of a larger sum than the amount due, when coupled with a demand for the balance, will not be a good tender; if the creditor refuses to give change and objects to taking the money for that reason.

20 American and English Encyclopedia 18
Patterson vs. Cox 25 Ind. 261

2. A mere receipt for the premium is like other receipts, only prima facia evidence that the premium was paid.

Knickerbocker Life Ins. Co., vs. Pendleton 112 U. S. 696
Scurry vs. Cotton State Life Ins. Co., 9 R. I. 346

3. A person accepting a receipt acknowledging the payment of an advance premium, can not claim that the company is estopped to deny that receipt; if that person knew as a matter of fact that he was not entitled to the receipt because the premium was not paid.

Brown vs. Mass. Mutual Life Ins. Co., 59 N. H. 298
Baker vs. The Ins Co., 43 N. Y. 283
Sheldon vs. Atlantic Co., 26 N. Y. 460
Pitt vs. Birkshire Ins. Co., 100 Mass. 500
Bergson vs. Builders Ins. Co. 38 Cal. 541

4. An agent, although capable of waiving stipulations in an insurance contract by words, acts or other representations made to the insured, does not effect a waiver of

any stipulation unless he grants to the holder of the policy some concession inconsistent with the articles of the insurance contract.

5. An insurance contract should be construed in accordance with the rules generally applicable to other contracts.

145 Ill. 469 and 49 Ill. 106

Respectfully submitted,

Attorneys for the Defendant.

Barlow and Brown.

Case No. 6.

James Barton

vs.

The Peoria Life Insurance Co.

OPINION BY HARKER P. J.

This is a suit upon a certificate of insurance for $2000, issued upon the life of Mary Barton, payable to the plaintiff within 90 days after her death. She paid for the certificate $50 in cash and agreed to pay the sum of $5 on the first day of each month following, for the period of 20 years, and the additional sum of $30 on the 1st day of March of each year for the period of 18 years. It was provided in the policy that a failure to pay any monthly payment within 10 days after it was due would work a forfeiture of the policy. The defendant maintained a local office in Champaign in charge of David Rogers. Monthly and annual premiums were paid to Rogers, who receipted them in pass books furnished by parties insured. For the convenience of the company's patrons in Champaign and Urbana, Rogers was in the habit of calling monthly at their homes or places of business.

All payments on this policy were promptly made by Mary Barton until one falling due June 1, 1913. On that day, Rogers called at her house and was presented with a $20 bill, which he could not change. He told her he would mark it paid in her pass book if she would have the money ready for him when he came the following week and the entry was made. When he called the following week, she was gone on a visit to Indiana. She met her death in a railway accident as she was returning on July 3, 1913.

Proofs of death were made, but the defendant refused payment of the policy and elected to declare a forfeiture because of the non-payment of the June dues. The plaintiff brings this suit in the Circuit Court of Champaign county to recover the amount of the certificate of insurance.

It has ever been the policy of the courts in Illinois to look upon forfeitures with disfavor and they have declined to enforce them unless a clear case is made to appear from the evidence.

Voorhis v. Renshaw, 49 Ill. 425

Hartford Fire Insurance Co. vs. Walsh, Ill. 154

Palmer vs. Ford, 70 Ill. 365

Coverdale vs. The Royal Arcanum, 193 Ill. 91

Forfeiture is a harsh mode of terminating contracts, and he who insists upon it being done must be held strictly within the limits of authority which gives the right. If an insurance company neglects to declare a forfeiture when the right to do so accrues, and any act is done by it indicating to the party against whom a forfeiture would work that the same will not be insisted upon, then its right to declare one shall be regarded as waived, and it cannot afterwards avoid the policy upon that ground.

Totonia Life Insurance Co. vs. Anderson, 77 Ill. 384

Insurance Co. vs. Warner, 80 Ill., 410

In this case, it appears to me there was a clear waiver upon the part of Rogers, the agent, when he made the entry in the pass book and agreed with Mrs. Barton to her paying the week following. Under the arrangement thereby made the claim become one of Rogers against her. So far as the insurance company was concerned, the monthly due was paid. Such being the case there was no right in the company to a forfeiture. The question of tender was not involved, because the duty of Mrs. Barton to pay the exact amount when first called upon by him had been waived under that arrangement.

The judgment will therefore be for the plaintiff for $2000, and interest.

Case No. 17

Henry Peters,

vs.

James A. Veatch.

JURY TRIAL.

The plaintiff is the owner of a large farm situated in Johnson County, Illinois. He has a woods pasture or park of 20 acres

in which he has for several years kept five or six deer. One of the animals, a male, had wandered upon the highway. The plaintiff is a neighbor to the defendant, his residence being about half a mile from that of the defendant. On the 20th of October, 1914, the deer in question escaped from the park and wandered along the highway until it reached the home of the plaintiff. The plaintiff at the time was in his garden digging potatoes. The deer leaped the garden fence, and while the plaintiff unaware of the presence of the animal, was stooping, picking up potatoes, the deer attacked him from behind and threw him on some fencing, whereby he sustained injuries. The plaintiff brings suit against the defendant, laying his damages at $2000.

For the Plaintiff:
Cummins and Hinshaw
For the Defendant:
DuHadway and Hostetler.

Case No. 18

James Allen
vs.
Richard Bundy.

STATEMENT OF FACT.

The plaintiff and the defendant are farmers. In April, 1914, the defendant sold to the plaintiff four hogs for $65. The hogs had been kept in a pasture where three or four other hogs had sickened and died with cholera. When the four were delivered to the defendant, they gave evidence of being healthy hogs, but they became sick of cholera a few days after being purchased and communicated the disease to the other hogs of the plaintiff. The hogs purchased were placed in a pasture with the plaintiff's hogs immediately after being purchased The plaintiff's other hogs did not come in contact with any other hogs, but those purchased by the defendant. As a result of the disease, the plaintiff lost 50 head of hogs, worth $700.

There was no guarantee that the hogs were free from disease, but the defendant knew that they had been in the pasture with the hogs that had died of hog cholera. In the defendant's pasture, where the three or four that had died before the sale were kept were 60 other hogs, none of which had died although some ten or fifteen of them were sick for a time.

For the Plaintiff:
Hough and Jarnigan

For the Defendant:
Kelly and Kenshalo

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Case No. 2.

Henry Horn
vs.
Samuel Bates.

OPINION BY ANDERSON, A. J.

The defendant, Samuel Bates, was a partner of one William Carr in the business of buying and selling live stock. The firm later became bankrupt and owed the plaintiff, Henry Horn, $2,400. The only property owned by Carr, not exempt from execution, was an automobile worth about $1,000, and the only property owned by Bates was forty shares of stock in a cold storage corporation of doubtful value. Bates offered to turn over the shares of stock for his part of the debt that they owed Horn, and Carr offered to turn over the automobile for his share of the debt. Horn refused this offer. Then Carr said, "I will turn over the automobile if you will release me. and you can wait on Bates until such time as the stock does become valuable. Bates can hold his stock. and just as soon as he can satisfy you that it is worth one-half of the debt, or $1,200, you can take it," to which Horn replied, "that is satisfactory." The automobile was turned over to Horn, who gave the following receipt:

Champaign, Ill., Nov. 30, 1913.

Received of William Carr, his automobile, being a five-passenger Buick, valued at $1,200. In consideration of which I release him from further liability on the partnership debt of $2,400, which I hold against the late firm of Bates & Carr.

HENRY HORN.

Bates did not formally assent to this arrangement, but heard the conversation and saw the receipt written and the machine delivered. The stock becoming valuable, Horn made a demand for the stock, but Bates refused to deliver any part of it, and sold it to third parties. Horn now brings suit against Bates, alleging a promise to pay Horn the remainder of the debt owed to him by the partnership.

The chief point of contention relied on by the plaintiff in this case, was that in the facts of this case we have an estoppel by silence against Bates that will not allow him to set up that he is not liable on the agreement made between Horn and Carr. I do not think this contention is justified by the existing law on this subject. Bigelow on estoppel, sixth edition, at page 661, says: It follows that it is not enough to raise an estoppel, that there was an opportunity to speak which was not embraced; there must have been an imperative duty to speak. Nor is any duty generated by the mere fact that a man is aware that some one may act to his prejudice, if the true state of things is not disclosed. Again, it is said, in Perry vs. Dow, in 59 Vt. 61, that the mere fact of being present and hearing a conversation between others may not create the duty to speak. Applying these principles, which I regard as sound to this particular case, I do not think here there was any imperative duty to speak here. Bates was an outsider to the agreement going on between Carr and Horn, and if Horn wanted to make an agreement with Bates he should have gotten his express assent to it. Carr and Bates at this time were separate individuals, and contracting as such, as the partnership between them was dissolved. Also, we have nothing else to bear our estoppel on here, but the mere silence of Carr here was no previous deceiving conduct or representations of any kind made by him that would make Horn rely on his conduct at this time. It is only where there is the most imperative duty to

speak, coupled with other conduct which is misleading in its nature, that a party will be charged on an agreement by estoppel through silence. Any other rule would have serious results; would have people surprised into contracts, and liable on agreements, where all the terms were made by one side, and in this case no such conclusion as this would be justified.

So the release of one Partner Carr, by rules of Partnership, releases other.

As there is no estoppel, and therefor no contract binding Bates, the other questions raised in the case as to the consideration of the agreement need not be discussed.

Judgment for the defendant.

Case No. 7.

Ward Day and Jane Day, Complainants,
vs.
Joseph Day, Nathan Day and John Day, Defendants.

BRIEF FOR COMPLAINANTS.

1. Hurd's Revised Statutes of Illinois, Chapter 83, Section 11, which bars foreclosure of mortgage, unless within ten years after right of foreclosure accrues, shall be construed in connection with Section 16 of the same chapter, which provides that if any payment or new promise to pay shall be made within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment.

Houston vs. Workman, 28 Ill. App. 626
The Aetna Life Ins. Co. vs. McNeely, 166 Ill. 540
Kraft vs. Holzman, 206 Ill. 548
Stem vs. Koun, 244 Ill. 32
Lathrop vs. Carroll, 155 App. 653

2. Where a wife pledges or mortgages her separate property to secure the debt of her husband, she occupies the position of a surety, and the husband is the principal debtor.

24 A. & E. Cyc. of Law, Page 720
46 New York 17
22 Kansas 363
77 Indiana 48
24 Michigan 465

3. A payment by either the principal debtor or the surety is an acknowledgment of the debt by both, and is sufficient to take it out of the Statute of Limitations, when made while their joint responsibility continues.

8 Pennsylvania State 337
4 Pickering (Mass.) 382
9 Minnesota 13
30 Indiana 289

A. If a wife mortgages her real estate for the debt of her husband, the land remains liable after her death.

24 Penn. St. 491

B. Where the contract of suretyship is intended by the parties to cover a future liability, the death of the surety will not end the contract.

Green vs. Young, 8 Greenl. (Me.) 14

4. Where the debt is a continuing one, and the default occurs after the death of the surety, the estate of the surety is liable.

24 Penn St. 491
1 Brandt, Suretyship & Guaranty 197
29 N. E. Reporter 503
113 Illinois 390

5. A surety is not discharged merely because the cause of action against the principal debtor is barred.

82 S. W. Rep. 460
10 Texas Civil App. 439
69 Federal 798
16 C. C. A. 425

A. Although the action against the principal debtor is barred by law, this does not discharge the surety.

11 Illinois 341
111 Indiana 74
12 Kansas 105
103 Wisconsin 348

6. While the surety may be discharged by lapse of the period of limitation specially applicable to sureties, a mortgage given by a surety will not be barred until the debt itself is barred.

61 S. W. 22
71 Kentucky 665

Respectfully submitted,
BYE & DUHADWAY,
Solicitors for Complainant.

Jane Day and Ward Day
vs.
Defendants James Day, Nathan Day and John Day.

BRIEF.

1. No person shall commence an action or make a sale to foreclose a mortgage unless within ten years after right of action accrues. Chap. 83, Sec. 11, Ill. Revised Statutes.

2. After statute has completely run

against mortgage, no judgment, acknowledgement, no promise, or new payment will waive it against a purchaser of premises or any other person whose rights accrued prior to the revivor.

18 Kan. 104
2 La. Ann. 927.
17 Wash. 553
86 Wis. 6489
34 Iowa 380
52 Conn. 434
90 Ky. 178
97 Iowa 464
18 Cal. 482
36 Ill. App. 238
88 Ill. 486
41 Ill. 517

3. Partial payment by widow of the mortgagor will not prevent running of the statute against mortgage of the deceased.

65 Ill. App. 222

4. Debt once discharged can not be revived as against the surety by any agreement of the principal and the creditor.

121 Ala. 373; 37 Ind. 258

5. When the debt is barred as to the principal, the surety is released, and if once released the debt can not be revived as against the surety.

70 Iowa 642; 63 Kan. 105

6. The fact that the surety has undertaken to be liable until the debt is paid does not continue the obligation beyond the time provided by the statute for barring the action.

71 Conn. 733.

7. If the statute provides a period in which the action must be brought, payment by principal will not extend it.

56 S. W. 722 Ky.

8. Failure to register the mortgage relieves the surety.

Am. & Eng. Ency. 508.

Respectfully submitted,
CORBLY & CUMMINS,
Attys. for Defendants.

Case No. 7.

Jane Day and Ward Day
vs.
George Day, Nathan Day, and John Day.

OPINION BY HARKER, P. J.

This is a suit in equity by the complainants to compel an accounting from their brothers, the defendants.

The facts which the complainants aver, as entitling them to an accounting, are as follows: In 1897 Thomas Day, the father of the parties to the suit, borrowed $400 from one Black and delivered his note, payable two years after date, with Robert Day as surety. To further secure payment of the note, Thomas Day and his wife, on the same day, executed a mortgage to Black upon forty acres of land. The east half of the land was owned by Thomas Day, and the west half by Mattie Day. Mattie Day died in February, 1898, and Thomas Day died in February, 1911. In February, 1900, Thomas Day conveyed to the complainants the east half of the land, and a year later paid $100 on the principal of the note to Black. Shortly afterwards the death of Thomas Day the complainants paid Black the amount of the note, and took an assignment from him. The contention is that as all of the parties were the heirs at law of Thomas Day, that the complainants by taking over the note from Black have a right to compel a contribution, because thereby the land was relieved from all encumbrance. The defence set up is that the note and mortgage is barred by the Statute of Limitations.

The statute provides that actions on promissory notes and other written contracts shall be commenced within ten years after the cause of action accrues, unless a new payment, or promise to pay, shall be made in writing within or after the said period of ten years, in which event an action may be commenced thereon at any time within ten years thereafter. The only evidence of a payment which it can be said took the case out of the Statute of Limitations was the payment made by Thomas Day on the 7th of February, 1911. The payment was made by the principal debtor, and certainly had the effect of taking the case out of the Statute, so far as he was concerned. It could not have that effect so far as concerned Mattie Day or heirs claiming under her. It is a firmly established rule of law in this state that a partial payment upon a joint and several promissory note by one of the makers will not stop the running of the Statute, as to other makers not assenting to such payment. The doctrine announced in the celebrated English case of Whitcomb vs. Whiting (1 Smith's Leading Cases, 703) that a payment by one should be regarded as a payment by the agent of

others, and that a new promise was thereby raised as against the others was early repudiated in the history of jurisprudence in the United States. Bell vs. Morrison, (1 Pet. 351)

Most of the states have followed Bell vs. Morrison. In an exhaustive opinion delivered by Justice Scofield in Kallenbach vs. Dickinson, 100 Ill. 427, our Supreme Court expressly held that a partial payment of one of two joint makers of a promissory note without the knowledge, assent, or ratification, of the other will not operate to bind the later so as to authorize the inference of a new promise on his part, and thereby preclude his right to defend under the Statute of Limitations. In that case, Dickinson, the appellee, was but a surety on the note which he had made jointly with one Wenzel, the principal debtor. Wenzel had made payments which were sufficient to take the case out of the Statute as to him, and it was contended that it did so as to Dickinson. The court held that as they were made without the knowledge or assent of Dickinson, it did not have the effect of reviving the obligation as to him.

In the case at bar, Mattie Day joined in the note to Black as a mere surety for her husband, and the payment by the husband more than ten years after the note had matured and after her death, could not have the effect to revive the obligation as against her heirs. When she by mortgage pledged the twenty acres of land owned by her as her separate property, she did so as a surety. When a third person pledges his property as security for the payment of another's debt, such property will stand as the surety of the debtor, and any change in the contract of the principal which would discharge a surety will operate to release and discharge the property so pledged. The rule applies to mortgages made to secure the debt of another.

Ryan vs. Trustees of Shawneetown, 14 Ill. 20

Price, et al., vs. Dime Savings Bank, 124 Ill. 317

If Mattie Day were living, the payment of February 7, 1911, could not have the effect to extend the lien on the land owned by her. She could invoke the aid of the Statute in a bill to foreclose the mortgage by Black or his assignee. Her heirs, claiming title through her, can do the same. The complainants, by purchasing the note and mortgage from Black and taking an assignment thereof, obtained no equities against the defendants which cannot be defended against under the Statute of Limitations. The bill is therefore dismissed for want of equity, and judgment will be rendered against the complainants for costs.

Case No. 11.

William K. Hendricks
vs.
City of Sitka, et al.

STATEMENT BY PROF. POMEROY.

The state of South Alaska has a provision in its constitution similar to the Illinois Const., Art. 9, Sec. 12, limiting the amount of indebtedness that may be incurred by cities. In 1908 the complainant brought this bill in the Sitka Circuit Court, averring that he is a resident taxpayer of the City of Sitka; that the municipal officers are about to let a contract to the defendant—the Wrangell Water Co.—for supplying the city with water at an annual rental of $6000; that the indebtedness of the city exceeds five per centum of the assessed value of the taxable property therein, and that there is no money in the city treasury. The complainant prays for an injunction restraining the corporate authorities from entering into the contract. The defendants answer, admitting the averments of the complaint, but averring that the city has a population of over 5,000, and is rapidly increasing in wealth and population; that it has no facilities for extinguishing fires except three cisterns, which are wholly inadequate, and that the safety of the city demands that a supply of water be secured; that the assessed value of taxable property in the city amounts to $1,500,000; that from other sources than taxation the revenue of the city is $3000 per annum; that the ordinary current expenses of the city are less than $6000 per annum, and that the current revenues of the city during the next twenty years will be amply sufficient to pay all the ordinary expenses of the city, and the water rentals under the proposed contract.

Exception to the answer.

Argument on the exception.

Illinois cases may be cited, but will not be considered more binding upon the court

than authorities from other jurisdictions.

John Hart will be named in the bill as Mayor.

Eli Carter, William Jones, George Perry and Rudolf Steckman, Commissioners.

Suit in the Sitka County Circuit Court, South Alaska.

For the Complainant,
ANDERSON & BYE.
For the Defendants,
BARLOW & BRITTON.

Case No. 12.

First National Bank of Urbana
vs.
John Gray, et al.

STATEMENT (BY PROF. POMEROY.)

John Gray, owning a house and lot in Urbana, mortgaged it on June 1, 1913, to the First National Bank, to secure $1000 then loaned by the bank to Gray, and such further sums, not exceeding $1000 in the aggregate, as the bank might, at its option, advance to Gray. This mortgage was recorded on the same day. On June 10, 1913, Gray mortgaged the same premises to George Buck, to secure the sum of $900 loaned by Buck on that date; this mortgage was immediately recorded, but the Bank received no actual notice of it until the day before foreclosure proceedings were begun. On June 20, 1913, Gray mortgaged the same premises to Adolph Beard, to secure $800; this mortgage was never recorded, but the Bank and Buck were notified of it the day after it was executed. On June 30, the Bank advanced a further sum of $700 to Gray. In January, 1915, the Bank brought suit to foreclose its mortgage, making Gray, Beard, and Buck parties to the suit. The proceeds of the foreclosure sale, after deducting all costs and expenses, are $3000; there are no other liens than the mortgages of the parties mentioned. The question to be argued is that of the privity of the several mortgages, and the method in which the fund should be distributed among the three mortgagees. It is agreed that for the purpose of this computation, seven per cent interest may be added to the principal of each mortgage.

It is assumed that Gray paid nothing on either mortgage; that the bill was presented at the September Term of the Circuit Court, 1914; that Gray was defaulted; that Buck and Beard set up their respective mortgages in answer; that a money decree in favor of each mortgage was rendered against Gray, who is insolvent, and that the Master in Chancery was directed to make sale and report.

January 25, 1915, Master reports sale, and asks for order of distribution.

For Complainant,
J. F. BROWN.
For Defendant Buck,
L. CORBLY.
For Defendant Beard,
J. SIEGEL.
Master in Chancery,
M. E. NEWELL.

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Case No. 8.

Marion State Bank
vs.
Chales Cole.

OPINION BY HARKER P. J.

To the creditor's bill of the Marion State Bank to set aside a fraudulent conveyance of eighty acres of land made by the defendant to his son, the defendant answered simply denying the allegations of fraud and setting up that the conveyance was made in good faith and for a valid considreation.

A trial resulted in a decree setting aside the conveyance and the sheriff, as authorized by the decree, subsequently advertised and sold the land under execution from the plaintiff's judgment. The plaintiff was the purchaser of the land, it being knocked off to it as follows:—the east forty acres of the tract for $660, and the west forty acres for $800. The defendant had occupied the west forty as a homestead for twelve or fifteen years. It did not exceed in value $1000. At the time of the sale, he was temporarily absent, but his furniture was stored in one of the rooms of the dwelling house situated on the land, and it was his intention to return in two months. He now files a motion to set aside the sale as to his particular forty acres upon the ground that it is his homestead, and is therefore exempt from sale on execution.

The motion is resisted upon the ground that the defendant, having failed to set up any claim of homestead in his answer to the creditor's bill is now estopped from doing so In support of the contention, counsel for the bank insist that in a suit in equity where the right of a defendant in land is involved, and the defendant answers without disclosing all claim he has, he will not be allowed to set up afterwards a claim that could have been set up in the answer.

It must be admitted that there are expressions in the opinions rendered in Lofquist v Errickson, 152 Ill. 486, and First National Bank v. Vest, 187 Ill. 389, which seem to support the view of estoppel here contended for; but a careful examination of the facts involved in those cases and of the particular questions involved will show that the decisions announced are not decisive of the question here involved. The real question decided in those cases was that a claim of homestead as against and in preclusion of a creditor's bill must be set up in the answer. The extent of the holding upon the subject in each case is that a court of appeal will not consider a claim of homestead where no such claim was set up in the court from which the appeal was taken.

Ever since we have had a homestead exemption act in Illinois, our Supreme court has held that the right of homestead can be extinquished only in the mode provided by statute. The law exempts it from debts, and the homesteader is required to perform no act nor manifest any intention to avail himself of its benefits until an attempt is made to

deprive him of it. Green v. Marks, 25 Ill. 204; Pardee v. Lindley, 31 Ill. 174; Wing v. Cropper, 35 Ill. 256; Hubbell v. Canady, 58 Ill. 425; Leopold v. Krause, 95 Ill. 440; Gruhn v. Richardson, 128 Ill. 178.

Under these cases, Cole is entitled to the benfits of exemption which the statute has given him even tho he set up no claim of homestead in the suit brought to divest his grantee of title and to subject the land to the payment of the judgment against him.

The sale of the forty acre tract in question was illegal, and the motion to set it aside will be sustained.

Case No. 10.

James Atwood

vs.

William Dale and John Barth.

BRIEF FOR COMPLAINANT.

A title originating in tax sale may be affected with equities the same as any other title (Ragor v. Lomax, 22 Ill. App. 628); and the tax deed, which is only prima facia evidence, may be set aside in equity on proper showing. 133 U. S. 471.

An assignment of a certificate of purchase given on a sale of land for delinquent taxes to one under a duty to pay the taxes operates as a redemption only. Busch v. Houston 75 Ill. 343; McChesney v. White 140 Ill. 330; Bassett v. Welch 22 Wis. 175; Bennett v. White 140 Ill. 330; Bassett v. Welch 22 Wis. 175; Bennett v. Keehn 57 Wis. 582; Bowman v. Eckstein 46 Ia. 583; Cooley on Taxation 969, n. I, and numerous cases there cited.

The mortgagee, whether in or out of possession, cannot, by the acquisition of a tax title, bar the right of the mortgagor to redeem. Such title when so acquired at once and by operation of law attaches to the security and becomes liable to redemption on equitable terms. Moore v. Titman 44 Ill. 367 and cases cited; Stinson v. Conn. Mutual Life Ins. Co. 174 Ill. 125, affirming 62 Ill. App. 319; Ragor v. Lomax 22 Ill. App. 628; Woodbury v. Swan 59 N. H. 22; Brown v. Simons 44 N. H. 475; Maxfield v. Willey 46 Mich. 255; Martin v. Swofford 59 Miss. 328; McLaughlin v. Grier 48 Miss. 175; Fair v. Brown 40 Ia. 210; Eck v. Swennenson 73 Ia. 523, 35 N. W. 503; Middletown Bank v. Bacharach 46 Conn. 513; Fish v. Brunette 30 Wis. 102; Hall v. Westcott 15 R. I. 373.

When a tax deed is set aside, the holder is not entitled to the full statutory penalty, but only to the amount he has expended with interest thereon. 124 Ill. 502; 128 id. 523; 137 id. 652; 135 id. 128; 190 id. 547; 194 id. 35; 113 Ill. App. 355.

And the holder of the tax deed must pay costs of suit if he declines a tender of more than he is entitled to. 213 Ill. 325; 257 id. 112; 209 id. 517; 235 id. 584.

Burden of proof rests on party claiming under a tax deed to establish the affirmative facts. Gage v. Nichols 135 Ill. 128.

Respectively Submitted,

Lewis and McKnight

Attorneys for Complainant.

BRIEF FOR DEFENDANT DALE.

1. In the absence of an agreement, a mortgagee not in possession is under no duty to pay taxes.

Williams v. Townsend 31 N. Y. 411

Conn. Life Ins. Co. v. Stinson 174 Ill. 125.

Lomax v. Ragor 22 Ill. App 628.

2. One who stands in mere relation of mortgagee is not precluded from acquiring tax title based on a sale made before he went into possession.

Waterson v. Devoe 18 Kans. 223.

McLaughlin v. Acom 58 Kans. 514.

Reimer v. Newell 47 Minn 237.
Jones v. Black 18 Okla. 344.
Williams v. Townsend 31 N. Y. 411.
Cornell v. Woodruff 77 N. Y. 203.
Harrison v. Roberts 6 Fla. 711.
Walthall's Exr v. Rives 34 Ala. 91.
Jones on Mortgages (6th Ed) Vol I No. 713.

3. Mortgagee not in possession may purchase a tax certificate for taxes accruing before the mortgage was given.

Allen v. Dayton Hotel Co. 95 Tenn. 480.

4. Mere holding of tax certificate by mortgagee does not render it invalid.

Lomax v. Ragor 22 Ill. App. 628.

5. Assignee of a certificate of purchase at tax sale acquires all rights thereunder which original purchaser had.

Illinois Rev. St. 1913 Chap 120, No 207

Respectively Submitted,
Luney and Ratcliff,
Attorneys for Defendant.

Case No. 10.

James Atwood
vs.
William Dale and John Barth.

OPINION BY HARKER P. J.

The complainant borrowed of the defendant Barth $3000 for a period of two years and mortgaged 160 acres of land to secure payment of a promisiory note given for that amount to Barth. The mortgage contained a provision that if the mortgagor should not pay the taxes against the land before becoming delinquent, Barth might pay them and make the same part of the mortgage debt. As a matter of fact, the land had been sold for taxes and a certificate of sale was then in the hands of the purchaser, one Joseph Carr, all of which was unknown to the complainant. He was a non-resident of the state and the land was vacant and unimproved. Barth bought the certificate from Carr and held it six months, when he sold it to Dale. He did not tell Atwood what he had done in that regard, and Atwood was in ignorance of the tax sale and certificate until after he had paid to Barth the mortgage debt, had cleared a large part of the land, and had moved into a house constructed by him on it. As soon as he learned of the situation, he at once went to Dale and offered to pay him the amount paid by Carr at the tax sale ($94), the 100% penalty thereon, the expense of recording deed, and interest on the whole sum at 6% after Oct. 30, 1913. Dale refused, and brought action of ejecment against Atwood.

Atwood now sues in equity to enjoin the ejectment suit, and have Dale's tax deed set aside, and deposits in court the sum of $300, out of which he requests the court to pay Dale all which the court may deem he is in equity entitled to.

It was my direction that the issues be presented and the case argued without reference to and independent of the provisions of the Illinois Act, of June 14, 1909, providing for the reconveying of tax titles under certain conditions therein named. I so directed because I desired a development of argument upon purely equitable grounds and because the case was sent to me by a former graduate of this school now practicing in a state where there is no statute like that named.

Had Barth instead of disposing of the certificate to Dale, retained it and procured a tax deed to himself, there would be little trouble in reaching a conclusion that the deed be set aside. The doctrine is well settled in Illinois that a mortgagee cannot affect the rights of the mortgagor by purchasing the property at a sale for delinquent taxes accruing upon the premises. His relation towards the property and the mortgagor so far as concerns the removal of a tax encumberance is that of a trustee.

The mortgagor and mortgagee have a unity of interest in the protection of their respective titles against a sale for non-payment of taxes, and against oustanding tax titles, and it is inequitable for either of them to so act as to acquire such a title, Moore v. Titman, 44 Ill. 367; Stinson v. Ins. Co., 174 Ill. 125; Ragor v. Lomax, 22 Ill. App. 628; Ins. Co. v. Stinson, 62 Ill. App. 319.

The same is held in the states of Iowa, Michigan, Mississippi, New Hampshire, and Wisconsin. It is the generally accepted rule in this country.

A different question is presented here, however. Here the holder of a tax title was under no contractual relations whatever with Atwood, and it would be unsafe to announce that there was a trust relation between them. If Dale is to be divested of his title, it must be upon the theory that when Barth acquired title to the certificate it destroyed its efficiency as a foundation for tax title, and must be considered as becoming a part of and being merged in the mortgage debt. I am inclined to take that view of it. Under the view held by me, Dale is entitled to all the rights of the holder of tax a certificate just before the expiration of the period of redemption. No great injustice is done him thereby. It cannot be said that he was misled in any way by lack of information concerning the relations between Atwood and Barth. The mortgage executed by Atwood to Barth was of record at the time he received the certificate. He therefore had constructive notice that the relation of mortgager and mortgagee existed between Atwood and Bath. He knew, therefore, that when Barth acquired the tax certificate, he acquired it as a trustee, and that no title could vest in him because of Atwood's failure t o redeem. In other words, he was in no better situation than Barth himself.

The finding, therefore, is in favor of the complainant. The ejectment suit is permanently enjoined. Dale is awarded out of the $300 on deposit, the $94 purchase money, 100% on the same, in addition thereto, 6% on the whole amount since the taking out of the deed, aggregating the sum of $202.70. Each party will be required to pay the costs made by him.

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James Ball
vs.
Peoples State Bank of Decatur.

BRIEF OF THE PLAINTIFF.

1. Malice in its legal sense means a wrongful act, done intentionally, without just cause or excuse;

Schaffner vs. Ehrman, 139 Ill. 109.

3rd National Bank of St. Louis vs. Ober, 178 Federal 679.

2. A bank has no such lien upon its depositors' funds as to authorize its application of such fund upon an indebtedness not yet due;

Merchants National Bank vs. Ritzinger, 20 Ill. App. 27.

Commercial National Bank vs. Proctor, 98 Ill. 558.

Elzy et al. vs. Morrison, 180 Ill. App. 711, at 716.

3. Where depositor's check has been dishonored, he has a two-fold remedy, suit for deposits, or suit in case for damages.

Zane, Banks & Banking, Page 241 and cases there cited.

First National Bank vs. Shoemaker, 117 Pa. 94.

4. In an action on case for dishonoring a check, when a depositor had sufficient funds in the bank with which to pay it, the plaintiff has a right to allege and prove special damages.

Metropolitan Supply Co. vs. Bank & Trust Co., 114 Ill. App. 318.

Patterson vs. The Marine National Bank, 130 Pa. 419.

5 La, NS. 871 note.

5. Jury may also take into consideration the natural and necessary consequences of the bank's refusal to pay check of the plaintiff and hold defendant for more than nominal damages.

Schaffner vs. Ehrman, 139 Ill. 109.

Metropolitan Supply Co. vs. Banking & Trust Co., 114 Ill. App. 318.

Patterson vs. Bank, supra. Atlanta National Bank vs. Davis, 96 Ga. 334.

Respectfully submitted,
Patterson and Terril,
Attorneys for Plaintiff.

James Ball
vs.
People's State Bank of Decatur.

BRIEF FOR DEFENDANT.

1. A stockholder of a corporation cannot contract for a corporation; consequently cannot recover damages resulting from the breach of such contract.

Bonton vs. McDonough County, 84 Ill. 384.

Crown Coal Co. vs. Taylor, 184 Ill. 250.

Sellers vs. Greer, 172 Ill. 549.

Beardstown Pearl Button Co. vs. Oswald, 130 Ill. App. 290.

Coal Belt Railway Co. vs. Peabody Coal Co., 230 Ill. 164.

2. Before a stockholder can sue for a wrong and injury to a corporation, he must first show that the officers of the corporation have refused to bring suit.

Perry County vs. Stebbins, 66 Ill. App. 427.

Babcock vs. Farrell, 146 Ill. App. 307.

Babcock vs. Farrell, 245 Ill. 14.

3. When the plaintiff has been injured by a breach of contract, he can recover only damages for the natural and probable consequences of such breach.

Snell vs. Cottingham, 7 Ill. 161.

Alvion Foundry Works vs. Columbia Iron & Steel Co., 112 Ill. App. 183.

4. For a breah of contract by the defendant, the plaintiff can recover only such damages as may reasonably be supposed to

have been in the contemplation of the parties at the time of making the contract.

Union Foundry Works vs. Columbia Iron & Steel Co., 112 Ill. App. 183.
Rode & Son vs. Arney, 115 Ill. App. 629.
Hawley vs. Florsheim, 44 Ill. App. 320.
Weaver vs. Penny, 17 Ill. App. 628.
Western Union Telegraph Co. vs. Martin, 9 Ill. App. 587.

5. Before a plaintiff can recover damages for loss of a collateral contract he must show that defendant had actual notice of such contract, and in no case can mere prospective profits from such contract be recovered.

Lapp vs. Illinois Watch Co., 104 Ill. App. 255.
Cobb Chocolate Co. vs. Crocker-Wheeler Co., 125 Ill. App. 241.
C. I. & W. Ry. Co. vs. Baker, 130 Ill. App. 414.

Respectfully submitted,
Ratcliff and Ruth,
Attorneys for Defendant.

Case No. 5.
James Ball
vs.
The People's State Bank of Decatur.

OPINION BY HARKER, P. J.

The plaintiff was a depositor in the defendant's bank. He was also the principal stockholder in a corporation engaged in selling coal at Peoria. There were 400 shares of stock, par value $100, of which the plaintiff owned 350. To secure a loan of $10,000, the corporation had placed a chattel mortgage on its entire equipment, worth about $20,000. In the month of June, last, the plaintiff began negotiations with Mrs. Nannie Towle, of Indianapolis, for the sale of 300 shares of the stock to her for $20,000 in cash. It was the purpose of the plaintiff to use the $20,000 in lifting the mortgage, and in carrying on the business. The negotiations reached the stage of Mrs. Towle consenting to take the stock and furnish the $20,000 in cash on the 10th of July. On the 1st of July, a check drawn by the plaintiff, in favor of a brother of Mrs. Towle for $500 was presented for payment. The plaintiff had a checking account of $1250 in the bank at the time. The bank held his note for $2000, payable six days later. It therefore refused to pay the check, fearing that the plaintiff and his company would be thrown into bankruptcy. Mrs. Towle's brother immediately notified her of the dishonor of the check and advised her not to let the plaintiff have the $20,000 promised. When the plaintiff applied to Mrs. Towle for payment of the $20,000 on the 10th, she declined, and as the money market was so stringent that the plaintiff could not get the money elsewhere, the chattel mortgage was foreclosed, and property worth $20,000 was sacrificed at a forced sale, it bringing only $8500.

The plaintiff now brings suit against the defendant because it refused payment of its check, whereby Mrs. Towle was influenced to decline fulfillment of her agreement, all of which resulted in the property of the corporation being sacrificed and the plaintiff's stock being rendered worthless.

I have encountered no difficulty in reaching the conclusion that the bank had no legal right to decline payment of the $500 check, nor have I had any difficulty in reaching the conclusion that its wrongful act in that regard resulted in injury to the plaintiff.

It has been repeatedly held in this state that a bank cannot refuse payment of a check drawn by a depositor upon a fund deposited with it on the ground that it holds the depositor's note which will mature at some future date. Fourth Nat. Bank v. City Nat. Bank, 69 Ill. 398; Commercial Bank v. Proctor et al., 98 Ill. 558; Merchant's Nat. Bank v. Ritzinger et al., 60 Ill. App. 27; Elzy v. Morrison, 180 Ill. App. 711. The danger of bankruptcy of the plaintiff or his company could not constitute any exception.

I agree with counsel for plaintiff that where a depositor's check has been wrongfully dishonored, he has a two fold remedy—an action ex contractu to recover his deposit, and an action on the case for damages growing out of the bank's tortious act. The plaintiff has resorted to the last named, and that he is entitled to recover is clear in my opinion. The difficulty arises over the measure of damages.

It may be stated as a general rule that where the evidence shows a commission of the alleged wrongful act by the defendant, all the natural consequences flowing therefrom should be considered in fixing the dam-

ages. Counsel for the defendant contend that the plaintiff can recover only such damages as may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract and cite a long list of authorities in support thereof. It is a sufficient answer to that contention to say that this is not a suit in debt or assumpsit to recover for a breach of the contract. Altho the initial relation between the parties was contractual, the basis for recovery in this suit is a tort. The rule relied upon by counsel and announced in the cases cited does not apply.

Convinced, as I am, that the defendant's wrongful act caused to the plaintiff the loss of the fruits of his contract with Mrs. Towle, it occurs to me that the damage should be based on the value which his remaining stock would have attained had that contract been carried out and the amount to be received less the mortgage debt. I cannot adopt the view that because Mrs. Towle had agreed to pay him $20,000 for his 300 shares he is entitled to recover $20.000. $10,000 of the money was to be used in liquidating the mortgage debt and $10,000 was to be used as working capital. It was upon that agreement alone that she consented to furnish the money. Neither can I adopt that other view, that because an extinguishment of the company's indebtedness and its possession of $10,000 in working capital would have put the company on its feet, damages should be based upon the par value of the stock. That the stock would have reached par in actual value is mere speculation.

As I view it the only safe method of fixing the value of the stock is to base it upon the tanglible assets. Had the arrangement contemplated by plaintiff and Mrs. Towle been carried out the company would have had $20,000 in teams, wagons. etc., and $10,000 cash. Deducting the $10,000 mortgage debt, the tangible property would have been worth $20,000, and the stock worth $50 per share. Under the arrangement with Mrs. Towle his claim against the company when he should put in the $10,000 for working capital would be to that amount, and the 50 shares still held by him worth $2500. I therefore fix the damages at $12.500, and the direct judgment for that amount and costs to be entered against the defendant.

Case No. 19.

Frank M. Nobles,

vs.

George W. Jenks.

JURY TRIAL.

George W. Jenkins, a resident of Chicago, was the owner of a piece of real estate situated in Urbana, known as the Holbrook Mill property. He desired to sell it, and in May, 1914, agreed to pay Nobles, who is a real estate agent in Urbana, $300 to sell it for $8500, or find a purchaser who would give that for the property. In pursuance of the agreement, Nobles took Jenks to the office of White & Todd, dealers in lumber and real estate in Urbana, and introduced him to Todd and made an effort to sell the property at the price mentioned. The three went together to examine the property. Todd seemed pleased with it, but declined to take it without the concurrence of his partner, who was temporarily absent in Michigan. He agreed to telegraph his partner and upon his reply to notify Nobles. Jenks was very anxious to dispose of the property, and so on the same day placed the matter of its sale in the hands of William George, a real estate agent in Champaign. The same contract was made with George that had been made with Nobles. Quite a sharp contest ensued for the $300 prize between Nobles and George in the race for a purchaser. On the 27th of May, 1914, Jenks told Nobles of his own efforts to sell the property and that George was trying to sell it, and that unless he, Nobles, could sell by the 28th of May, the field would be open to anyone to sell. On the 29th of May, Todd received a telegram from his partner, consenting to his buying the property. He visited Nobles' office. He ascertained through a phone message that Jenks was still in Champaign, and started out to find him. He found him at George's office. A sale was there made for the $8500. Jenks paid George the commission of $300. Nobles subsequently demanded $300 of Jenks, which was refused, and Nobles therefore brings this suit.

For the Plaintiff:

Klingler and Krebs.

For the Defendant:

Lawyer and Lowe.

Case No. 20.

STATEMENT.

On the 23d of July, 1914, Adam Smith was convicted before the police magistrate of the city of Zeigler for violating an ordinance of the city by an assault and battery upon one Rose Smith. He was tried before a jury which in addition to finding him guilty, assessed a fine of $100, and upon that the police magistrate, William W. Brown, rendered judgment, which, including costs, amounted to $109.45. Smith prayed an appeal to the Circuit Court of Franklin County, Illinois, and perfected his appeal by filing appeal bond and having the transcript directed to the Clerk of the Court. The case not being placed upon the docket because Smith had not payed the advance fees, the city advanced the fee and placed the same upon the docket. Subsequently the appeal was dismissed for want of prosecution, with a writ of procedendo to the police court at Ziegler to proceed to collect the judgment.

On the 27th of February, 1915, a writ against the body of Smith for the satisfaction of judgment was issued and placed in the hands of Walter Pete, a constable of Franklin County. On failure of Smith to discharge the judgment, Pete placed Smith in charge of Henry Bates, keeper of the jail in Franklin County. Smith applied to the Hon. Henry Mott, Judge of the City Court of Benton, for a writ of habeas corpus. He alleges in his petition that the judgment of conviction rendered against him is void because the jury of six empanelled to try him was composed entirely of women.

A writ will be issued and served upon Bates and Pete, and in answer to the same, they will plead the writ issued by the police magistrate. Upon the trial the evidence will show that Dora Newton, Ella Ward, Jane Spring, Edith Crow, Lilly Watson, and Sarah Clark were empanelled as a jury. Upon the hearing, it will be admitted that the jury were composed entirely of women.

For the Petitioner:

Ratcliff, Leonard & Robinson:

For Bates and Pete:

Leopold, Mourning, and Rang.

Counsel for Petitioner will prepare transcript of docket of Police Magistrate in addition to the petition and writ of habeas corpus.

Counsel for respondents will prepare writ issuing from Police Magistrate in addition to the return.

Moot Court Bulletin

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Case No. 21.

Albert N. Keen

v.

Safety National Bank

On September 1st, 1914, William R. and James W. Keifer, doing business as partners in East St. Louis, Illinois, under the partnership name of Keifer Brothers, in payment for merchandise, executed and delivered to Charles Pemberton their negotiable promissory note for $500.00, to his order, due and payable sixty days after date, with interest from date at 6 per cent.

On the next day Pemberton duly indorsed and sold the note to plaintiff, living in St. Charles, Missouri. On October 15th, plaintiff indorsed the note for collection and sent it to defendant (incorporated as a national bank and having its place of business in East St. Louis) with instructions to collect it when due and place the proceeds to his credit, he being a depositor in defendant's bank. In the latter part of October, Keifer Brothers got into difficulties, and at the instance of creditors, on October 20th, a receiver was appointed by the United States court to wind up its affairs.

The receiver took possession of Keifer Brothers' place of business and stock of goods, employing the two brothers as clerks.

On the day of maturity of the above described promissory note, the president of defendant bank handed it to the cashier of the bank, telling him that the makers were probably insolvent, and unable to pay, but to make the proper demand and protest. The cashier of the bank was a notary public and as such usually made the protests necessary in the bank's business. The cashier went to Keifer Brothers' former place of business, and meeting Jas. W. Keifer there, asked if the receiver was in, and on being told that he was in the back office, went to him and presented the note and demanded payment thereof. The receiver refused. The cashier notified Pemberton at once that the receiver had refused to pay the note, and drew up a protest and notice of protest in the usual form, affixing his notarial certificate and seal, and reciting therein that due demand had been made on that day of the receiver of Keifer Brothers, and that said receiver had refused to pay the note.

For Plaintiff:

Hannah, Rogers, Slater.

For Defennant:

Patterson, Mills, and Whitnel.

Case No. 22.

John F. Wallace

v.

George C. Warren

STATEMENT

In 1895 George C. Warren occupied and owned in fee simple the northeast quarter of section sixteen, in township sixty-six, range five, in Lincoln County, Missouri. His dwelling stood about four rods north of the south boundary line of said tract. South of

the dwelling lay a forty-acre tract, the northwest quarter of the southeast quarter of said section, which was of little value and sparsely timbered. On inquiry among his neighbors he learned that said forty acres was school land, belonging to the state and would be by it offered for sale at some future day. Intending to buy said land when offered, he took immediate possession thereof, by erecting stables thereon, grazing his cattle there, and cutting trees for fuel. In 1905, he fenced the forty, broke up ten acres of it, and from 1906 to the present time has raised crops thereon. Warren always claimed the land as his, saying that he intended to buy it of the state, and that he took possession so as to have the first right to buy as an actual settler.

In June, 1914, John F. Wallace demanded possession of said forty acres under the following claim of title:

1. Patent, issued by United States to Alexander White, dated December 1, 1880.

2. Warranty deed from Adah M. Allen, sole surviving heir of Alexander White, who died intestate March 16, 1903, in St. Louis, to William B. Allen, dated and delivered July 20, 1906, in Cleveland, Ohio. On July 20, 1906, Adam M. Allen was a married woman, and said William B. Allen was her husband. She died intestate May, 1908, in Ohio, leaving an adult unmarried daughter, Evalyn Allen, only heir, now living and unmarried.

3. Warranty deed, by William B. Allen, widower, to John F. Wallace, dated June 9, 1910.

All of said deeds were duly recorded, but the patent, now in Wallace's hands, was never put on record.

During all of the times mentioned the following statutes are to be deemed to have been in force in Missouri.

An action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within ten years after the cause of action arose.

A married woman shall be deemed feme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued.

The testimony will show that Warren first learned, when Wallace demanded possession, that said forty acres was not school land and had never been the property of the state.

Attorneys for Plaintiff:
Siedenberg, Belnap, and Grossman.

Attorneys for Defendant:
Luney, Billman, and Hart.

Case No. 23.

STATEMENT.

Charles Smith for the last ten years has conducted a hardware store in the town of Clinton, Illinois, in which his name only was used. For the last three years, Smith also has conducted an undertaking business in the same town, under the name of Smith & Still. Still has no interest in the business, but worked in it on a salary for Smith. The firm name was over the door, and on the bill heads and letter heads. The whole business was conducted in the firm name, as was known to Still.

On June 1, 1914, Smith's indebtedness was concentrated in the hands of William Black and Henry Cone. Black had a claim for $5000, based wholly on goods sold to Smith for his hardware business. Cone had a claim for $4000, based wholly on goods sold to Smith and Still for the undertaking business. All the claims were overdue. On June 2, 1914, Smith turned over the hardware business to Black, who took immediate

possession for a credit of $2000 on the debt (a fair valuation) and gave his note to Black at ten month for the balance of $3000, and secured the same by a chattel mortgage on the goods and chattels of the undertaking business. The mortgage was executed by Smith alone, without the knowledge of Still and contained a recital that Smith was conducting the business under the name of Smith and Still. The mortgage was regularly acknowledged and recorded. Smith remained in possession and Still continued on a salary as before. Henry Cone learned from some source of the recorded mortgage and most of the goods covered by the mortgage had been sold by Cone to Smith. On March 15, 1915, he made a demand on Smith, who acknowledged that he was insolvent. Cone turned to Still and said to him, "I shall hold you responsible, because this business was conducted under the firm name of Smith & Still, and I shall proceed to collect from you."

Still is worth, above liabilities and exemptions, about $2000. The goods and equipment used in the undertaking business is worth $4000. Cone and Still went in company to Black and stated to him that inasmuch as the entire indebtedness due Cone was for goods sold by him to Smith and Still, that he should release the mortgage so that the property might be sold and the proceeds applied in the extinguishment of Cone's claim. Black refused, stating that his chattel mortgage was good.

On the following day Black, learned that some of the property was being disposed of by Still, took immediate possession under his mortgage, and has advertised the same for sale. Henry Cone brings a bill in equity to enjoin the sale and asks that the mortgage may be cancelled. On the 21st day of February, 1915, he had taken judgment on a note against Smith & Still which contained power of attorney to confess judgment. The judgment was entered in the Circuit Court of DeWitt County for the sum of $4320.

In the bill, Cone will make Black, Smith, and Still parties defendant. Smith, who is insolvent, will be defaulted. Black will answer, setting up his claim under the chattel morgage. Still will answer separately and in the cancellation of the chattel mortgage.

For the Complainant:
Bleisch and Clements.
For the Defendant Black:
Casner and Day.
For the Defendant Still:
Henson and Hinshaw.

Case No. 24.

STATEMENT.

On August 20, 1914, J. W. Schuyler was acting as freight agent for the Chicago & Alton Railroad Company, at its station at Brighton, Illinois. The company was incorporated under the general laws of Illinois. Schuyler had general authority to receive goods for shipment over the company's lines and to issue bills of lading therefor. On the above date he issued to Charles F. Griswold a bill of lading for 1000 sacks of wheat to be shipped to Arlington, Missouri. Griswold was named as consignee in the bill. He transferred the bill of lading by endorsement and delivered thereof on the same day to Caldwell & Company, millers,

of St. Louis, they paying him $2000 therefor. The firm of Caldwell & Co. was composed of James C. and Robert A. Caldwell, in business as partners. The bill of lading was upon one of the regular blanks of the railroad company and was signed for them by Schuyler as agent. It described the wheat as No. 2, and stated the value to be $2100. In due course, such shipment should have reached Arlington on August 22nd. Caldwell & Co., on August 23rd, presented the bill of lading to the company's agent at Arlington and demanded the wheat for which it called. No wheat was in fact delivered by Griswold to the railroad company, and the bill was falsely and fraudulently issued by Schuyler acting in collusion with Griswold. Caldwell & Co. brings suit against the railroad company.

For the Plaintiff:

Fiero and Hostettler.

For the Defendant:

Freels and Hough.

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Case, No. 25

Emily New, By Chas. New, her Next Friend,

vs.

Delia Brabant

Orland New was a widower with one child only, Emily New, five years old, when he married his second wife, Portia Brabant, on January 2, 1910. On January 4, 1911, from jealousy which had no foundation in fact, he murdered his wife and shot himself. He died at Burmham Hospital six days later.

The only blood relative surviving Mrs. New was an unmarried sister, the defendant, Delia Brabant. Mrs. New and her sister, Delia, prior to the marriage with Orland Drew, had owned as tenants in common, in fee simple, the N. W. ¼ of the S. E. ¼ of Sec. 22, Tp. 19 N, R. 8 E., in Champaign County, Illinois They had inherited the land from their father. Delia has been in continuous possession of the property from January 1904 up to the present time, under an arrangement whereby she was to pay the taxes on the property, keep the improvements in repair, and pay to her sister $125 per year. She made the successive annual payments of $125 under the agreement up to the time of the death of Mrs. New. Since the death of Mrs. New, Delia Brabant claims the property as hers in fee simple, and refuses to pay anyone rent or permit anyone to interfere with her exclusive possession. The attorneys for the complainant will file bill for partition and for an accounting.

For the Complainant
Gilbert & Jarnagin

For the Defendant
Kelly & Klingler.

Master in Chancery
F. S. Stroheker.

After filing of the answer and replication, the cause will be referred to the Master in Chancery to take proofs and make findings of the facts and law with recommendation for decree.

Case No. 26.

George Britton

vs.

Frank E. Wilde and Sidney A. Colter

In consideration of a loan of $2000, the defendant Colter executed and delivered to the plaintiff, May 1, 1909, a promissory note for that sum, due two years after date, with interest from date at 6% per annum, and secured the same by pledging 100 shares of stock in the Luminous Gas Co., a corporation doing business at Janesville, Wiscon-

sin. On October 10, 1910, Colter, having learned of the utter failure of the gas company, with the intent to hinder and defraud the plaintiff in the collection of his note, conveyed to the defendant Wilde, lots 7 and 8, in Block 66, in the City of Bloomington, Illinois. The lots at the time were and are now vacant and are worth about $3000. Defendant Wilde claims that he did not know of Colter's fraudulent intent, but he did know that he bought the lots for ½ of their fair value. Wilde still owns the lots. His deed was filed for record October 15, 1910. At the time he paid the $1500 and accepted the deed, it was agreed between the grantor and the grantee that the consideration in the deed should be placed at $3500. On June 15, 1913, the plaintiff first actually learned of the conveyance of the two lots, and that the stock of the Luminous Gas Co., was utterly worthless. He thereupon began an action against Colter in the Circuit Court of McLean County, on the note and on the 4th of October, recovered judgment against Colter for $2000, and interest since May 1, 1913. He had execution issued and returned unsatisfied because of the inability of the officer to find property belonging to Colter. As a matter of fact, Colter was at that time and is now insolvent.

Attorneys for the complainant will file a creditor's bill and seek to set aside the conveyance to Wilde, so that the property may be levied upon and sold upon execution issuing from plaintiff's judgment against Colter.

For the Complainant
Kenshalo & Krebs

For the Defendant Wilde
Mourning & Slater

Master in Chancery
F. B. Leonard.

Colter will make default and Wilde will answer. After filing replication to the answer, the cause will be referred to the Master in Chancery for proofs and findings of fact and law.

Case No. 27.

Mary K. Hamilton
vs.
Arthur Bolton

The defendant has for many years been a mine prospector and mine operator. In June, 1911, he visited his friend, James Hamilton, the plaintiff's husband, then residing at Evanston Illinois, and told him that he had made a great discovery of copper in northern Michigan, and was undertaking to develop it, but that he had exhausted all of his means in doing so, and was likely to lose the whole advantage of his discovery because of lack of means to make the necessary development. Hamilton had known Bolton for a great many years, and had confidence in his integrity. He told Bolton he would help him get the money, provided Bolton would make a substantial settlement upon Hamilton's wife out of the proceeds of the mining enterprise. Bolton readily assented to that and stated that he was willing to make a settlement upon her of $15000 if Hamilton would endorse his note to the First National Bank of Chicago for $7000. Hamilton was a man of means and had excellent credit with the First National Bank

of Chicago. Accordingly, the following agreement in writing was made and delivered to Hamilton by Bolton:

"Evanston, Illinois, June 10, 1911. In consideration of the promise of James Hamilton to endorse my promissory note for $7000 to the First National Bank of Chicago, it is agreed that the proceeds of said note shall be used in the development of my copper mines in Michigan. I further promise the said James Hamilton to pay unto his wife, Mary S. Hamilton, the sum of $15000, out of the proceeds of said mine, it being my intention to sell the mine as soon as it may be developed and a purchaser can be found.

Arthur Bolton"

Hamilton placed his name on Bolton's note to the bank, and through it Bolton procured the $7000 with which he proceeded to work on his mining property. The note was made payable in 90 days. It was renewed at the end of the 90 days and again at the end of the second 90 days, Bolton paying the quarterly interest earned by the money. Hamilton signed each one of the renewal notes. Hamilton died in December, 1912, and in the same month, Bolton was able to make such a showing with his mine that certain parties bought it of him for $200,000 cash. Bolton paid his note at the bank, but has done nothing in the way of carring out his agreement with Hamilton to pay the latter's wife the $15000 according to the terms of the above agreement. The plaintiff has repeatedly called upon Bolton to pay.

For the Plaintiff
Lawyer, Mills, and Rogers

For the Defendant
Lowe, Robinson, and Whitnel

The argument will be on the demurrer to the declaration.

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Case No. 13.

Mary Jones
vs.
Leonard Jones

BRIEF FOR THE COMPLAINANT.

1. When a parent has deeded land to her son in consideration of a promise of the son to apply the income of thefarm to the support of the parent in the degree of comfort to which she had been accustomed, and the son later refuses or fails to carry out such promise, equity will decree a cancellation of the conveyance because of the peculiar nature of the contract which renders the legal remedy if damages inadequate.

Houston v. Greiner, 144 Pac. 133.
Patterson v. Patterson, 81 Ia. 626.
Diggins v. Doherty, 4 Mackey 172.
Scott v. Scott and McClure, 3 B. Mon. 2.
Reeder v. Reeder, 89 Ky. 529.
Sheparson v. Stevens, 77 Milh. 226.
Frazier v. Miller, 16 Ill. 48.
Cash v. Cash, 41 S. W. 579.
Grant v. Bell, 26 R. I. 288.
Wampler v. Wampler, 30 Gratt. 454.
Lowman v. Crawford, 79 Va. 688.
Peck v. Hoyt, 39 Conn. 9.
Bruer v. Bruer, 109 Minn. 260.
Whittaker v. Tramell, 86 Ark. 251.
Tomisk v. Tomisk, 78 Neb. 103.
6 Pomroy Eq. Jur., sec. 686.

2 When the grantee refuses to perform the contract to support the grantor, which contract was the consideration of the conveyance, a presumption arises that there was a fraud in the inception of the contract and equity will decree a cancellation of the conveyance.

Frazier v. Miller, 16 Ill. 48.
Oard v. Oard, 59 Ill. 46.
Jones v. Neeley, 72 Ill. 449.
Knush v. Knush, 143 Ill. 353.
Cooper v. Gum, 152 Ill. 471.
McClelland v. McClelland, 176 Ill. 83.
Frabrice v. Von der Brelie, 190 Ill. 460.
Stebbins v. Petty, 209 Ill. 29.
Sherrin v. Flinn, 155 Ind. 422.
Spangler v. Yarborough, 23 Okla. 806.
Wampler v. Wampler, 30 Gratt. 454.

3. The retention of the property and the refusal of the grantee to perform the promise to support, is in itself such fraudlent conduct that equity will take jurisdiction and decree a cancellation of the conveyance.

Diggins v. Doherty, 4 Mackey 172.
Barnes v. Barnes, 9 Mackey 479.
Reid v. Burns, 13 Ohio St. 49.
Bogie v. Bogie, 41 Wis. 209.
Bresnahan v. Bresnahan, 46 Wis. 385.
Bishop v. Aldrich, 48 Wis. 619.
Blake v. Blake, 56 Wis. 392.

4. Conveyances made by aged people in consideration of support and care are deemed to be conveyances upon condition subsequent, and will be set aside by a court of equity upon proof of a substantial failure to perform.

Blake v. Blake, 56 Wis. 392.
Gilchrist v. Foxen, 95 Wis. 428.
Delong v. Delong, 56, Wis. 514.
Knutson v. Bostrak, 99 Wis. 469.
Glock v. Glock, 113 Wis. 303.
Wanner v. Wanner, 115 Wis. 196.

2 Washburn Real Prop. p. 7.
Blum v. Bash, 49 N. W. 142.
Mansfield v. Mansfield 52. N. W. 290.
Cree v. Sherfy, 37 N. E. 787.
Young v. Young. 147 N. W. 361.
Richter v. Richter, 12 N. E. 698.
Hefuer v. Yount, 8 Blackf 455.
Wilson v. Wilson, 38 Me. 18.
Drew v. Baldwin, 48 Wis. 529.
Cros v. Carson, 8 Blackf 138.

5. While a conveyance of property upon an agreement for support of grantor is not often in the form of a trust, it is usually such in fact, and upon breach, it is more consonant with the principles of equity to treat it as an implied trust renounced by grantee than as a mere contract.

A bill in equity seeking a reconveyance of land conveyed upon an agreement to support of grantor will, after breach by grantee, be sustained, the latter being placed in statue quo.

Grant v. Bell, 26 R. I. 288.
Wampler v. Wampler, 30 Gratt. 454.
Lawman v. Crawford, 99 Va. 688.
Penfield v. Penfield, 41 Conn. 474.
Cooper v. Gum, 152 Ill. 471.
Chadwick v. Chadwick, 59 Mich. 87.
Reid v. Burns, 13 Ohio St. 49.
Lane v. Lane, 505 W. 857.
Patterson v. Patterson, 81. Ia. 626.
Barnes v. Barnes, 9 Macky 479.
Towle v. Ambs, 123 Ill. 410.
Henschel v. Mamero, 120 Ill. 660.

Respectfully submitted,
N. D. Belnap
E. B. Billman
Solicitors for the Complainant.

Mary Jones vs. Leonard Jones Case No. 13.

BRIEF FOR THE DEFENDANT.

1. Fraud must relate to fact existing or which had previously existed.

149 Mass. 188.
121 Ind. 231.
34 Wis. 250.

(b) Mere breach of a promise does not in itself raise a legal presumption of fraud.

42 N. C. 19.
34 Texas 218.
31 Amer. St. Rep. 39 (notes).

(c) Purchase of property by a child from its parents is no badge of fraud; rather the presumption is that it is made in all fairness.

22 Ala. 751.
88 Wis. 438.
19 La. 594.
20 Mo. App. 176.

11. Mere failure by a grantee to perform a promise which forms a whole or part of the consideration, inducing an executed conveyance gives rise to no right of recission in grantor either in law or equity unless such promise amounts to a condition.

96 Ala. 389.
84 Texas 218.
131 Iowa 268.
Pom. Equity Jurisd. sec. 686.

111. Where a parent deeded land to a son in consideration of a promise to give parent a home and support for life and the latter refuses or fails to carry out such promise equity will not grant recission of the contract.

124 Ala. 273.
110 Ga. 572.
33 Ore. 159.
62 Ga. 576.
48 Tenn 567.

IV. In cases where the language is doubtful or the intention of the parties is doubtful the promise or obligation of the grantee will be construed as a covenant limiting the grantor to an action thereon, and not a condition subsequent with a right to defeat the conveyance.

73 Iowa 328.
115 N. Y. 361.
96 Mo. 174.
43 Kansas 148.
120 N. Y. 447.
124 Ala. 273
Pom. Equity Jurisd. sect. 686.

V. A condition subsequent is not created where the consideration of a deed is an agreement of the grantee to support the grantor.

109 Minn 260.

Respectfully submitted,

Bleisch and Casner.

Attorneys for the Defendant.

Case No. 13.

Jones

vs.

Jones

STATEMENT.

In 1910, the complainant deeded a farm in Marion County, worth $20,000, to her son, the defendant, in consideration of $100, and his oral promise to apply the income of the farm to her support during life and provide for suitable burial at her death. She was 70 years old at the time and had no other property. For three years, the defendant complied with his promise, but afterwards, through the influence of his wife, declined to provide for any further support of his mother. She brought her bill in the circuit court for the purpose of cancelling the deed. There was no evidence offered to show that that the son's promise was not made in entire good faith. The court dismissed the bill without prejudice to an action at law by the complaintant. She now moves for a rehearing.

Opinion by Pomeroy, J.

The question whether equity may take jurisdiction to rescind and cancel a "support deed," that is to say, a deed whereby an aged person conveys all his property to a son or other relative on the faith of the latter's promise to furnish care and support to the grantor—because of a mere failure of the consideration, is a question that has usually received an affirmative answer in the numerous jurisdictions where it has arisen. 2 Pom. Eq. Rem. 686. There is, however, a curious divergence of opinion among the courts as to the reason on which this conclusion shall be based. In Illinois the rule and its reason are settled by a long series of dicisions. The bad faith of the grantee, manifested by the unexpected breach of his promise to the grantor, is carried back to the inception of the agreement, and the presumption is indulged that he obtained the conveyance with the fraudulent intention fro mthe outset to fail in the performance of his promise at some time in the future. Frazier v. Miller, 16 Ill. 48; McClelland v. McClelland, 176 Ill. 83; Domeracki v. Janikowski, 255 Ill. 575, and many other cases. This view has some following outside of Illinois: Spangler v. Yarborough,23 Okla. 806; 101 Pac. 1107; Gustin v. Crockett, (Wash.) 97 Pac. 1091.

A few courts hold that the grantee's promise, though oral, is a condition subsequent, giving the grantor a right of re-entry for its breach, and the consequenctial remedial right in equity to the removal of the cloud caused by the conveyance: Glocke v. Glocke, 113 Wis. 303; 57 L. R. A. 458; Mash v. Bloom, 130 Wis. 366; 118 Am. St. Rep. 1028; Cree v. Sherfy, 138 Ind. 354.

The artificial character of the reasons assigned by the Illinois and Wisconsin courts is apparent, however desirable may be the result attained. The majority of the courts, on the other hand, state no definite reason fo rtheir conclusion, being content, it would seem, to rest their decisions upon the hardship of the situation and the inadequacy of the legal remedy by periodic suits for damages. To the present writer, the silence of these courts is more persuasive than the labored reasoning of the Illinois or Wisconsin courts. To attribute a fraudulent intention to one who admittedly made his promise in good faith simply contradicts the basic fact of the case for the sake of reaching a foregone conclusion; and to call a mere oral promise accompanying a deed a condition subsequent, and treat it as if written with the deed is to violate element-

ary rules of construction. It is better to face the situation squarely, and admit that we have here an equity that is sui generis, one that it is difficult to find a place under existing catagories and classifications, but neverless a sound illustration of the inherent power of equity to extend its beneficent jurisdiction to a novel state of fact. Compelled by the multitude of decisions, we must accept it (and without serious regrets) as an established rule of American equity, that it has an independent jurisdiction over aged persons as a class to protect them from the results of rash and improvident contracts of this particular sort; and may, if we like, find some analogy in the time-honored jurisdiction to avoid the contracts of expectant heirs (Pom. Eq. Jur. Sec. 953) of sailors (Pom. Eq. Jur. Sec. 952), and of other classes of persons who are deemed to be exposed to peculiar temptation to improvidence. The appeal of the over-trustful parent to a court of conscience may well be considered as potent as that of the extravagant heir.

The suggestion (Patton v. Nixon, 33 Oreg. 159) that the court of equity; instead of rescinding the transaction should enforce the grantee's promise by giving the grantor a lien or charge upon the land, has as yet, but little following. The rule which it disregards, viz., that no grantor's lien exists where the demand is uncertain or unliquidated (3 Pom. Eq. Jur. Sec. 1251, n. 1; Peters v. Turnell, 43 Minn. 473, 19 Am. St. Rep. 252) is itself an arbitrary and unimportant exception. It is true, therefore, that the Oregon holding does violence to no cardinal principle, as do the reasons assigned by the Illinois and Wisconsin courts. If the contract calls for the grantor's support only, it may secure effectively enough the performance of the contract. But in the majority of the cases, the oral contract provides that the grantor shall retain a "home" on the premises conveyed, and this, of course, is to him the most vital and essential feature of the contract. Full justice, therefore, requires that he be restored in specie to the possession and enjoyment of that of which the grantor's breach has deprived him. For this reason, it may be doubted if the compromise view of the Oregon court will ever obtain wide acceptance.

Re-hearing granted and decree for complainant according to the prayer of the bill.

Case No. 15.

Charles Anderson, Complainant

vs.

James Sheffield, Defendant

BRIEF FOR COPLAINANT.

I. Reputation is a mater of opinion.

II. Reputation being a matter of opinion, a representation by a person that he has a good reputation is not fraud, a misrepresentation of fact being an essential element of fraud.

III. If such could be construed as fraud it is no defense in this case, for fraud without damage is no defense.

ARGUMENT.

I. Reputation is a matter of opinion.

Webster's definition of reputation is, "The character imputed to a person in a community, society or public. The reputation of a person is the estimate in which he is held by the public in the place where he known."

Anderson's law dictionary says, "Reputation is the general opinion in the community, not the declaration of a person as to a particular fact not of public nature."

II. Reputation being a matter of opinion a representation by a person that he has a a good reputation is not fraud, a mis representation of fact being an essential element of fraud.

"A misrepresentation to constitute fraud must contain the following essentials elements: (1) Its form is a statement of fact (2) Its purpose of inducing the other party to act (3) Its untruth (4) The knowledge or

belief of the party making it (5) The belief trust and reliance of the one to whom it is made, and (6 Its materiality."

II Pom. Eq. Jur. par 876.

Thus one of the essential elements of fraud. There are two reasons for this rule fraud is lacking. So the general rule is opposite party has no right to rely on it, that a mere expression of opinion is not advanced by the courts. The first is, the and having no right to rely on it, he cannot be mislead by it, and not having been mislead, one of the necessary elements of fraud is lacking. This is a very logical and reasonable rule.

Puffing and trade talks, statements of value, quality, title,credit, and the like are regarded as expression of opinion, rather than statement of fact. The reason given by the courts why a party should not put too much reliance on opinion is that, a party is likely to puff his wares, and the listener knowing this should not be mislead. The courts recognize this frailty of human nature. The reason is much stronger where a person makes a statement as to his own reputation. A person is more likely to overestimate his reputation than he is his wares.

To hold a man strictly to the literal meaning of his expression of opinion would open a great field for fraud in law, instead of being a remedy. It would open litigation at public expense and is against sound reasoning and the policy of the courts. It would allow one to overthrow or get around his contracts at will.

A recommendation is giving an opinion of another. Lord v. Colley, 6 N. H. 99 25 Am. Dec. 447, holds, recommendations are generally understood to be nothing mire than the opinion of those who give them, resting upon common reputation an dthe apparent circumstances of the individual recommended, and not upon a minute examination of his affairs. A person giving his own reputation is likewise givng a matter of opinion.

Also in 27 Vt. 415, Jude v. Woodburn, it was held that a statement by a person asking for credit, that he is safely to be trusted is a mere opinion. Whether he is safely to be trusted, and whether or not he has a good reputation are analagous. Yet a representation of reputation is clearly mere a matter of opinion than a reputation that a person can safely be trusted.

The second reason given by the courts for the rule that a mere expression of opinion is not fraud is, there is no adequate means of proving opinion as expressed, was not truly entertained, and it could scarcely be said to be fraudulent if it is an honest opinion.

To say whether or not it was an honest opinion would be a matter of guess work for the court, which courts intend to avoid.

In Bell v. Byerson, 11 Iowa 77 Am. Dec. 142, a case very analagous to our own, the statements to defendant as to price of flour fraud charged was, that plaintiff made false at Iowa City, by representing that he had come from certain mills in that place, and the pirce named in the contract was the market price in that city. Held that defendant could have found out the facts and the law will not interfer to protect the negligent. This case goes further than is necessary to sustain the compliments cause in the case at bar.

Merely showing the statement false does not prove fraud. As held in Hubbel v. Meigh, 50 N. Y. 480, "Fraud is not established by proving the falsity of the statements, which were simply expressions of opinion and belief founded upon information derived from others." A person's own reputation must necessarily be derived from others. "The party alleging fraud must show that he who made the statement knew them to be fause at the time of making them.

Fulton v. Hood, 34 Pa. St. 365, 75 Am. Dec. 664, holds a false affirmation of a matter resting on opinion or even on a fact equally open to the knowledge or inquiry

of both parties, is available for any such purpose (fraud).

The very idea is that reputation is a matter of common knowledge. Common knowledge is a matter equally open to both parties. Defendant, was negligent i snot finding out and cannot invoke the aid of a court of equity to aid him in his own negligence or carelessness.

Fish v. May, 2 Bibb 44, 85 Am. Dec. 626. is a case of disputed title to land. The defendant represented that he had a better title and that plaintiff had better compromise, and plaintifl did so. This is a bill in equity and plaintiff alleges fraud. Logan, J. says "Fraud can never be mputed where mere opinion calculations, and detuction, shall constitute the essential grounds for imputing it.

III. If such could be constructed as fraud it is no defense in this case, for fraud without damages is no defense.

II Pom. Eq. Jur., par. 898, "The last element of misrepresentation in order that it may be the ground for any relief affirmative or defensive, in equity or law, is its materiality. The statement of facts of which it consists must not only be relied upon, as an inducement to some action, but it munst also be so material to the interests of the party, thus relying and acting upon it that he is pecuniarily prejudiced by its falsity, is placed in a worse position than he otherwise would have been. The party must suffer some pecuniary loss or injury as the natural consequences of the conduct induced by the misrepresentation. Inshort the misrepresentation must be so material that its falsity renders it unconsciencious in the person making it to enforce the agreement or the transaction which has caused. Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal. Courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral."

The facts of the case at bar admit there is no pecuniary loss resulting to the defendant or to his neighbors if the contract is ennforced specifically. Thus an essential element of fraud is lacking.

To the same affect as to the materiality of a misrepresentation, in order that it may constitute grounds for any relief whatever, are the following authorities.

Bigelow,—Fraud, page 54.
Story,—Eq. Jur.—13th ed. par 203.
Pomeroy,—Spec. Perf. of Contracts, Sec. 227.
Bispham, Equity, par. 217.

We cite the following cases, to sustain our general proposition, that courts of law or equity, do not sit to judge the moral right or wrong of a misrepresentation, where there is no damage from such misrepresentation.

Smith v. Richards—13 Peters 26 (US).
Hill v. Bush, 19 Ark 522.
Buckner v. Street, 15 Fed. 365.
Rogers v. Higgins, 57 Ill. 244.
Braham et al. v. Record, 42 Ind. 181.
Fellows v. Lord Gwyder, 1 Simmons 63, 1 Russ & M. 83.
Marsh v. Cook, 32 N. J. Eq. 262 at page 266.
Wuesthoff v. Seymour, 22 N. J. Eq. 66.
Marr's Appeal, 78 Pa St. 66.
Marrimer v. Dennison, 78 Cal. 202, at 216.
Hall v. Johnson, 2 N. W. 55, 41 Mich 286.
Morrison v.Lods, 39 Cal. 381.
Reay v. Butler, 69 Cal 572.
Britton v. Supreme Council, 46 N. J. Eq. 102, 19 Am. St. 376.

Respectiveiy presented,

Glover & Henson,
Solicitors for Complainants.

James Sheffield, Defendant
ads.
Charles Anderson, Complainant

BRIEF FOR DEFENDANT.

1. Equity may refuse specific perform-

ance of a contract when it would not decree recission or grant affirmative relief.

Pom. Eq. Jur. 1405 and note.
Malby vs. Thews 171 Ill. 264
Taylor vs. Merrill 55 Ill. 52 at 61.
Jackson vs. Ashton 11 Pet. 229 at 248.
Cadman vs. Horner 18 Ves. 11.
Fry Spec. Per. par. 650 page 304.
Pom. Spec. Per. par. 228.

2. Fraudulent misrepresentations is a defense to a suit for specific performance.

Kelly vs. Kendall 118 Ill. 650.
Cowan vs. Curran 216 Ill. 605 at 622.
Smith vs. Richards 13 Pet. 26 at 37.
Kerr, Fraud and Mistake 358-9.

3. Misrepresentation such as will be a defense to specific performance consists of:

a. A positive statement or representation.
b. Must be made for the purpose of procuring a contract.
c. Must be untrue.
d. Party making it need not know of its falsity nor intend to deceive.
e. The one to whom it is made must believe and rely upon it.
f. It must have been material to the contract.

Pom. Spec. Per. sec. 210-229.
Fry Spec. Per. sec. 697.

a. Pom. Spec. Per. 212 (Opinion vs fact).
d. Pom. Spec. Per. 217 (Knowledge & belief.)
Kelly vs. Cent. Pac. R. R. 74 Cal. 557.
Cadman vs. Horner 18 Ves. 10.
See Rogers vs. Mitchell 41 N. H. 154 at 158.
f. Fry Spec. Per. par 697 page 304.
Pom. Spec. Per. par 227.
Knatchbull vs. Grueber 1 Madd. 153.

4. The Complainant must come into Equity with clean hands: Any unjust, unfair, inequitable or unconscionable act of the Complainant is sufficient for Equity to refuse him aid.

11. Pom. Eq. Rem. par. 1308-1309.
Kelley vs. Cent. Pac. R. R. 74 Cal. 557.

5. A statement of reputation is a statement of fact.

11. Pom. Eq. Jur. par. 878.
22 Ill. App. 180.

6. In Ill. the duty is on the Complainant to show that he is entitled to specific performance; that damages at law are inadequate; that a decree of specific will not be unjust toward the defendant.

82 Ill. 242 at 244.
140 Ill. 597 at 602.
III Pom Eq. Jur. Par. 1404-5.

Respectively submitted,
Guwnell & Stroheker,
Attorneys for Defendant.

Case No. 15

Anderson
vs.
Sheffield

STATEMENT.

The complainant contracted in writing with the defendant to purchase the latter's house for a residence, representing that he was a person of good reputation. The defendant, believing the plaintiff's representation, made no investigation into his past history. Complainant had served a prison sentence in another state, which fact coming to the knowledge of the defendant, he refused to convey, basing his refusal on the complainant's fraud. It does not appear that the defendant will suffer any pecuniary injury if compelled to convey to the complainant, but in view of an understanding among the residents of the neighborhood, that any person desiring to sell should sell only to a person of good reputation, and the fact that he has already suffered social ostraction on account of accepting Anderson as a purchaser, he refuses to comply with his agreement, whereupon complainant brings bill for specific performance.

Opinion by Pomeroy, J.

We have here presented the question whether a misrepresentation inducing the

contract but productive of no pecuniary injury may be a defense to specific performance. The cases directly involving the question are not numerous. In support of the negative we have the statements of the leading text writers: see Story Eq. Jur., Sec. 203; Fry Spec. Perf. (4th Eng. Ed.) Sec. 697; Pomeroy, Spec. Perf. Sec. 227; 2 Eq. Jur. Sec. 898. In support of the affirmative we have the views of Commissioner Hagne in Kelly v. Central Pac. R. R. Co., 74 Cal. 557, and the decision by Baldwin, J. in Britt v. Cooney, 75 Conn. 338. The facts of these two cases are similar to those of the case at bar. In each of them the vendor, relying on the misrepresentation, sold to a person with whom he would have refused to have dealings if certain facts concerning that person had been known to the vendor. But the authority of the Kelly case is weakened by the fact that the decision is in part rested by the court upon another ground which is indisputably sound. The learned commissioner appears to assume that his view is the prevailing rule, but the cases on which he relies are found, on examination, to have no bearing upon the question. The decision in the Connecticut case is a strong one in favor of the defendant in the present case, since there the misrepresentation was not set up by way of defense, but as the sole ground for cancellation of an executed deed. The scheming individual who sought to intrude upon the privacy of the fashionable suburb in that case was not an ex-convict, but a boarding house keeper in a college town. Can we wonder at the white heat of moral indignation that glows in the opinion of the distinguished jurist? Unfortunately, the court furnshes us with no authorities in support of its decision. and takes no notice of the statements countra of standard writers and of the cases on which they rely.

In this state of the authorities, we believe that to adopt the defendant's contention would be to yield to an innovation plausible, perhaps, but unconvincing. If the rule in its new form permits a purely social, emotional, or sentimental detriment resulting from the contract into which a party is entrapped to operate as a bar to its enfordement, how far shall that rule carry us? Shall equity take cognizance of every whim or fancy of the defendant, no matter how unreasonable? If we apply the supposed rule consistently, it is easy to see that it may (without advancing much further that the Cooney case) lead to absurd results; if we do not apply it consistently when shall we stop?

Decree for specific performance in accordance with the paryer of the bill.

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James Allen
vs.
Richard Bundy

Opinion by Harker, J.

The defendant sold to the plaintiff four hogs form a pasture where three or four other hogs had recently sickened and died from cholera. When sold the hogs appeared to be healthy. Plaintiff had no knowledge that they had been exposed to the disease and placed them in a pasture with other hogs. In a few days they sickened with cholera and communicated the disease to other of his hogs, fifty of them dying as a result.

The defendant sold without a guarantee, but he knew that the hogs had been in a pasture with hogs that had died of cholera.

Clearly the proper action for the plaintiff in this case is **ex delicto.** The substantial loss to him was the fifty hogs lost by cholera contracted from the hogs purchased by the plaintiff from the defendant. The real question is whether the defendant is liable, not because of a guarantee but because, at the time he sold the four hogs to the plaintiff, he did not make known to him the fact that they had been exposed to cholera. Cholera is universally recognized as a contagion disease. It is more often fatal than any disease to which the hog is subject.

The facts in this case show a clear case of fraud. True, there was no fraudulent representation concerning the healthfulness of the hogs sold, nor affirminative act by the defendant for the purpose of throwing the plaintiff off his guard; but fraud may consist in the suppression of the truth as well as in a false statement. The suppression of a fact material to be known is equivalent to the assertion of a falsehood.. Lockridffe vs. Foster 4 Scam. 569; Aorston v. Ridgeway and Anderson, 18 Ill. 38; Stewart V. Wyoming Cattle Ranch Co., 128 U. S. 383.

These men were neighboring farmers. The danger that would attend the placing of the hogs sold with others of the plaintiff, the defendant must have known. It is true that the hogs sold did not have the appearance of being afflicted at the time but they had been running with hogs that had died. Notwithstanding the fact that a number of his hogs that had been afflicted had recovered it was the plain duty of the defendant to disclose the fact that the hogs sold had been exposed. That duty rested upon him so as to enable the plaintiff to exclude from his other hogs the ones purchased until such time as would preclude all danger of communication.

On principle the case is much like French v. Vining, 102 Mass. 132. In that case the defendant sold to the plaintiff hay to be fed to the plaintiff's cow. The hay was unwholesome and poisonous because of paint which had been dropped or sprinkled upon it. The defendant knew that paint had been upon a part of the hay and had made an effort to separate that which had become

saturated and at the time of the sale, supposed he had succeeded in separating from the good all the contaminated hay.

He was in error however, and the hay sold to the plaintiff contained such quanities of the poisonous matter that after the plaintiff's cow had eaten it she sickened and died. The court sustained a recovery because the defendant did not disclose the fact that paint had been upon the hay. In the Supreme Court it was urged as error that the trial court held that if the cow died in consequence of eating the paint adhering to the hay sold the plaintiff might recover although the defendant did not know or believe there was paint upon the hay. In apporving the holding of the trial court, thet Supreme court used the following language: "Deceit may sometimes take a negative form and there may be circumstances in which silence would have all the legal characteristics of actual misrepresentation." * * * * *

"If he the defendant, knew that the hay had a defect about it or had met with an accident that rendered it unsuitable for that use, and dangerous or poisonous, it would plainly be a violation of good faith and an illegal act to sell it to plaintiff without disclosing its condition.'

To prevent the spread of contagious and infections diseases among hogs the Illinois legislature in 1895 passed an act which makes it the duty of the owner of hogs having knowledge of, or reasonable grounds to suspect the existence of hog cholera, or any contagious or infection disease, among his hogs, to use all reasonable means to prevent the spread of the disease. The act further provides that a person convicted for a violation of the act shall be fined and shall also be held liable in damages to any person suffering loss on account of such violation.

The defendant was guilty of a flagrant violation of the statute. Instead of using "all reasonable means to prevent the spread of the disease," he did a firmative act conductive to its spread. The plaintiff has suffered damages because of such violat on and the defendant is liable for all loss occassioned by his wrongful act, liable under the statute as well as at common law. The judgment will be for $700.00 the value of the hogs lost by the plaintiff.

Pete Bates
vs.
People

Petition for Habeas Corpus

1. The jury which tried the prisoner was illegal and unconstitutional.

Art. 2, Sec. 5, Ill. Const. 18
George v. People. 167 Ill. 447.
Gage v. Ewing, '07 Ill. '1.

B. At common law the jury must be composed of males. Men is not used in the generic sense.

3. Bl. Com. 362.
Harland v. Territory, 13. Pac. 453

C. In Illinois a woman cannot serve as juror under Ch. 78, Sec.

Hurds Revised Statutes, because he is not a legal voter.

N. Chicago R. R. Co. v. Mossman.
82 Ill A. 172.

2. No statute can give women right to serve on jury, either expressly or by implication, because it would be unconstitutional.

II. Since the jury was illegal and unconstitutional, if this was the only fatal error in the proceedings, habeas corpus should be allowed because the petitioner has no other adequate remedy to gain his freedom.

A. Appeal does not lie since case has been dismissed in the upper court for want of prosecution.

B. Certiorari is inadequate for it will only

lie where there has not been negilgence in prosecution of appeal.

Gibson v. Ackerman, 70 Ill. A. '99.

Chapman v. Kane, 97 Ill A. 567.

C. Paymeint of fine may be impossible, and in any case would acknowledge that the proceedings under which he was tried are legal.

D. City did have an adequate remedy by satisfaction of the judgment on the appeal bond.

III. This is more than a reversable error. This trial by jury unknown to the law and unsanctioned by it made the court an illegally constituted court.

A. The term court in its general and enlarged sense, comprehends within its purport both the judge and the jury.

70 N. Y. Supplemene 744.

2 Ill.

12 A. M. Dec. 665.

People v. Molineaux 2 Yeag 96 at 104.

Gold v. CVermount.

B. When a court having jurisdiction of the prisoner denies to him a constitutional right or immunity, its purisdiction ceases, and a judgment rendered in the case may be attacked on habeas corpus.

8 Wyo. '92.

131 U. S. 176.

C. Under no circumstances could this jury of women render a verdict which the law can respect. In Illinois, in a criminal case, the jury is judge of the law as well as the facts. Since this tribunal is absolutely incompetent, its judgment is void.

IV. Judgment rendered by an illegally constituted court is void and habeas corpus lies.

People v. Whitson, 74 Ill. 20.

People v. Murphy, 222 Ill. 493 Dictum.

A. This is not a waiver of trial by jury.

B. No real reason on principle why distinction should be made, as regards right to trial by jury, in case of a felony and in case of a misdemeanor.

C. A grand jury empanneled by a court having no authority to do so is illegally constituted and judgment rendered in trial by indictment returned by them is void and habeas corpus lies.

Ex Parte Farley, 40 Fed. 66.

D. Where defendant was convicted of jury of eleven men, it was held to be void and habeas corpus lies.

W. B. Leonard
M. S. Robinson
I. G. Radcliffe
Counsel for Petitioners.

BRIEF FOR THE RESPONDENTS.

1. It will be presumed that the persons selected as jurors are qualified and the burden of proving a disqualification is upon the party alleging it.

State v. Weaver 58 S. C. 106.

San Antonio R. R. v. Lester 84 S. W. 404.

2. A jury composed of women is legal and constitutional.

Hurds Revised Stat. Chapt. 78 Sec. 1 and 2.

Hurds Revised Stat. Chapt. 79 sec. 48.

Illinois Court 1870 Art. II. Sec. 5.

3. Assuming for the sake of argument that the jury was wrongfully arrayed, this fact alone did not constitute an illegal court; nor render the judgment void.

Kavanaugh v. Hamilton 30 Colo. 157.

People v. McRelvey 74 Pac 533-534.

4. Petitioner had other adequate remedy which precludes him from resorting to the remedy of Habeas Corpus.

(a) Any objections to a writ of certiorari are addressed to the sound discretion of the court, and will be awarded or refused according to whether it will promote the ends of justice or not.

(b) There are two classes of cases in which common law certiorari will lie.

1. Where it is shown that the inferior court or jurisdiction has exceeded its jurisdiction.

3. Where it is shown that the inferior court has proceeded illegally, and no appeal or writ of error will lie.

Hyslop v. Finch. 99 Ill. 171.

5. A judgment erroneous but not void is no ground for a writ of Habeas Corpus.

People v. Allen 160 Ill. 400.

6. Habeas Corpus does not lie to reach errors of law in proceedings, resulting in conviction, which are properly reviewable by a writ of error.

People v. Allen 160 Ill. 400.

People v. Murphy 202 Ill. 493.

7. A writ of Habeas Corpus will not operate as a writ of error, and cannot be used to review a judgment entered by a court which had jurisdiction of the person and the subject matter of a suit, where the judgment was rendered.

People v. Zimmer 252 Ill. 9.

Ex Parte John, S. Smith 117 Ill. 63.

8. No person shall be discharged by virtue of the writ of Habeas Corpus if he is in custody by virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgement or decree, unless the time during which such party may be legally detained has expired.

2 Starr and Curt. Stat. 1896 page 2104.

203 Ill. 99.

9. To allow petitioner after having prosecuted a valid and adequate remedy, and having thrown aside his prerogative to continue that remedy and later to assert the same right by a writ of Habeas Corpus, is contrary to all ideas of procedural justice and sound policy.

People v. Jimer 252 Ill. 9.

Paul W. Mouring
R. E. Leopold
Paul K. Rang

Case No. 20.

The People, ex rel Adam Smith
vs.
Walter Pete and Henry Bates

Opinion by Harker, P. J.

The petitioner seeks by **habeas corpus** his discharge from custody by virtue of an execution against the body which issued from a judgment of conviction for violating an ordinance of the city of Zeigler.

Smith was charged with assault and battery upon a woman, and was tried before a police magistrate by a jury composed of women. He was found guilty and a fine of $100 assessed against him. From the judgment of conviction he prosecuted an appeal to the circuit court, but the appeal was subsequently dismissed by the circuit court for want of prosecution with an order for **procedendo** to the police court at Zeigler. Soon after a writ of **capias ad satisfaciendum** issued and under it Walter Pete, city constable, took Smith into custody and delivered him to Henry Bates, the keeper of the county jail, to hold until the judgment should be satisfied.

A discharge is sought by **habeas corpus** up the ground that the judgment of conviction is void, it being based upon a verdict rendered by persons not competent to sit as jurors. Two questions are presented—1. Are women legally competent to serve as jurors in Illinois? 2. Is the petitioner entitled to a discharge by the **habeas corpus** route, if it be held that women are not competent to serve as jurors?

I have not experienced much difficulty in reaching a conclusion on the first question. Section 5, Article 2, of our State Constitntion reads, "The right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law." In construing

this provision, our Supreme Court has repeatedly held that the right guaranteed was trial by jury as that existed at common law.

Jones v. Fortune, 128 Ill. 518.
Parmelee v. Price, 208 Ill. 544.
Turner v. Brenckle, 249 Ill. 394.
People v. Rodenberg, 254 Ill. 386.

Women were not eligible to jury service at common law. Furthermore, it is evident that the framers of the constitution had no intention of vesting in the legislature the power to make women competent to serve as jurors; because in the last clause, where the power is given to provide in a certain class of cases for a less number of jurors than that known at common law, the word "men" is specifically used. In this case six jurors were used, the authority vested in the legislature having been exercised; but in the selection of the individuals the court, as to kind, went beyond authority of constitution and of legislation, given or attempted. If the legislature should pass a bill expressly making women competent to serve as jurors the act would in my opinion be unconstitutional. The jury that tried Smith was not a legal jury and the judgment entered upon its verdict was erroneous.

Whether the validity of a judgment of conviction may be tested by habeas corpus depends upon whether the court had jurisdiction of the defendant's person and jurisdiction of the subject matter. As I understand the Habeas Corpus Act and the construction which our Supreme Court has placed upon its various provisions, a convicted defendant may not secure his discharge thru it, however irregular and illegal the proceedings which resulted in his conviction, unless it appear that the court was without jurisdiction of his person or of the offense charged against him.

Section 21 of the Habeas Corpus Act provides that no person shall be discharged under it, if in custody "By virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree, unless the time during which such party may be legally detained has expired." Section 22 reads, "If it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes:

1. Where the court has exceeded the limit of its jurisdiction, either as to matter, place, sum or person.

2. Where, though the original imprisonment was unlawful, yet, by some act, omission, or event which has subsequently taken place, the party has become entitled to his discharge.

3. Where the process is defective in some substantial form required by law.

4. Where the process, though in proper form, has been issued in a case or under circumstances where the law does not allow process or orders for imprisonment or arrest to issue.

5. Where, although in proper form, the process has been issued or executed by a person, either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him.

6. Where the process appears to have been obtained by false pretense or bribery.

7. Where there is no general law, nor any judgment, order or decree of a court to authorize the process if in a civil suit, nor any conviction if in a criminal proceeding. No court or judge, on the return of a habeas corpus, shall, in any other matter, inquire into the legality or justice of a judgment or decree of a court legally constituted."

If a petitioner, in custody under order of a court does not bring himself within some

of the provisions above named, no other court has the power to discharge him.

People v. Foster, 104 Ill. 156.

In the case cited the petitioner who had been committed to the county jail in default of payment of certain fines assessed against her sought discharge by **habeas corpus** in the Supreme Court on the ground that the circuit court had erroneously refused to discharge her under a certain section of the Criminal Code. In passing upon the power to review the action of the circuit court on **habeas corpus,** Justice Mulkey, speaking for the Supreme Court, said, "To allow this application would be simply to review, upon **habeas corpus,** the decision of that court, for the purpose of correcting merely an alleged error, which we are not permitted to do. It is, therefore, unimportant to inquire whether the ruling of the circuit court in rejecting petitioner's evidence was proper or improper; for, conceding it was erroneous, this is not a proceeding in which we are authorized to correct it. It is clear that the court had jurisdiction both of the subject matter of the suit and of the parties before it, and hence the order in the case, however erroneous, can not be set aside or reversed on an application of this kind. In this proceeding we can only act when the court has acted without or exceeded its jurisdiction."

The doctrine there announced has been reaffirmed in: **Ex parte** Smith, 117 Ill. 13; People v. Allen, 160 Ill. 400; People v. Jonas, 173 Ill. 316; People v. Murphy, 212 Ill. 584; People v. Superior Court, 234 Ill. 186; People v. Zimmer.

In People v. Jonas, the petitioner had been convicted before a justice of the peace and committed to the county jail because of his refusal to pay the fine imposed,—in that respect like the case at bar. He claimed the act under which he had been convicted was unconstitutional. His writ was to the Supreme Court direct. In holding that it would not lie it was pointed out that the justice of the peace had jurisdiction to hear the case and render judgment against the petitioner, that in doing so he had full authority and jurisdiction to decide all questions involved in the case, including the constitutionality of the statute. The learned judge who delivered the opinion used the following language: "The fact that the court was an inferior one, and that its decision of a constitutional question might not be of great authority as a precedent, does not change the case in any degree. The petitoner could have appealed from the judgment of the justice and have had a trial **de novo** in a proper court of record, in which trial he could, if he chose, by presenting propositions of law, have preserved for revlew in a still higher court the constitutionality of the law under which the judgment was rendered. The statute above quoted was evidently framed to meet just such a case as is here presentes. The effect of granting writs in cases of this kind would be to allow defendants in all convictions under ordiaces or statutes the validity of which might be questioned, to come directly to this court by a proceeding in **habeas corpus** instead of appealing or prosecuting writs of error, as the law contemplates. Such a practice contravenes the statute, and is not to be permitted. In this case the remedy by appeal was complete, and the writ of **habeas corpus** is denied."

In the most recent of the cited cases, People vs. Zimmer, **supra,** Justice Hand stated the doctrine concisely as follows: "It has never been the office of the writ of **habeas corpus** to operate as a writ of review, and we take it that no well considered case can be found where it has been held that the writ may properly be used to review the judgment of a court where the judgment sought to be reviewed had

been rendered by a court which had jurisdiction of the person and subject matter of the suit in which the judgment had been rendered."

The police magistrate of the city of Zeigler had jurisdiction to try a case for personal assault in violation of city ordinances; he had jurisdiction of the petitioner's person, and, although he erroneously asumed that a jury of women might try the case and rendered judgment upon a verdict, habeas corpus will not lie to test the validity of the proceedings.

Petitioner remanded.