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528 - 21926

217 I.A. 638

MARIA P. BARNES, Appellant,

vs.

MARY C. BARNES et al., Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

217 I.A. 638

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant (complainant below), filed a bill for an accounting against appellee (defendant below), who was the administratrix of the estate of Erastus A. Barnes, her deceased husband, brother of the complainant, for certain moneys and securities claimed to have been intrusted by complainant to him for investment and safekeeping. After the issues were formed, the cause was referred to a master in chancery for hearing, with directions to state his conclusions of law and fact. At the close of complainant's testimony before the master, defendant moved the court to dismiss complainant's bill for want of equity, which motion was also referred to the master. In his report based solely on the complainant's testimony, the master recommended to the court that defendant be required to account to the complainant in accordance with the prayer of her bill; pursuant to which the court overruled defendant's motion to dismiss the bill. By stipulation of the parties, all further proceedings were had before the court, at the conclusion of which the court dismissed the complainant's bill for want of equity. This appeal brings up for review the final order of dismissal.

From an examination of the pleadings and the character and extent of the testimony heard before the court, it appears that the cause proceeded to a full hearing both on the preliminary question involving complainant's right to an accounting and on the accounting between the parties as well. Under well-settled principles of chancery practice, in certain cases the court should in the first instance, hear only such evidence as is necessary to determine whether or not an accounting should be had. But there are well-recognized exceptions to that rule, as stated in Henderson's Chancery Practice, sec. 293: "Where items are numerous, the testimony questionable, the account complicated, the superior advantage of a general reference, with directions to the master to state specially such matters as either party may require, or which he may deem necessary, will readily be perceived." The record discloses that this is a case of that character, and therefore the matter was properly referred to the master in the first instance, with directions to report his conclusions both of law and fact which, if he found there should be an accounting, required him to state the account.

The hearing evidently did not proceed before the court on the theory of a preliminary hearing, for the court heard testimony on items of account. Had the case proceeded before the master, so that specific objections and exceptions taken to the master's report might have been presented for review, we should not now be called upon to examine the voluminous record before us, covering some 10,000 pages, and thereby assume a burden that should have been imposed upon the master.

In Penniman v. Finke, 175 Ill. App. 284, the court in passing upon a like situation, held, p. 295:

> "In order to ascertain whether this decree is right, we must state practically a book account between the owner and the builder, and pass upon a mass of details and items. In our opinion, this detail work should not have been performed by the chancellor, and a review of the mass of evidence therefore cannot be cast upon this court in this way. The court should have sent the case to a master, with directions to take and report the evidence, and to state and report an account between the parties and then upon objection and exception, particular items would be open to investigation, and we would not be required to examine the face of the whole account."

To the same effect are: Patton v. Patton, 75 Ill. 446; French v. Gibbs, 105 Ill. 523; Daly v. St. Patrick's Catholic Church, 97 Ill. 19. Nor can this be done by stipulation of the parties or otherwise. Moss v. McCall, 75 Ill. 190 and cases there cited.

But appellee argues that complainant, in seeking to avail herself of certain alleged forgeries, did not come into equity with clean hands, and hence the court properly dismissed the bill for want of equity on that ground alone.

We have no way of determining upon what particular ground the bill was dismissed; but, assuming that the court was justified in finding that proof to establish certain items consisted, as alleged, of forged documents, still appellee's point is not well taken.

Where a cause of action has its origin in iniquity, a court of chancery will not lend its aid to a complaining party, because "He who comes into equity must come with clean hands." But where the iniquity does not go to the right of action itself but affects only the proof of certain items incidentally connected therewith, the rule cannot be extended to preclude the complaining party from obtaining the relief sought as to other items which the evidence clearly

shows to be untainted with such iniquity. Goodwin v. Hunt, 3 Yerg. (Tenn.) 124; Shaver v. Holley, 48 C. C. A. (U. S.) 48, 108 Fed. 821; Mossler v. Jacobs, 66 Ill. App. 571; Winsfield v. Grossman, 98 Ill. App. 180; Cohn v. Pitzele, 117 Ill. App. 342, affirmed, 217 Ill. 30; City of Chicago v. Stock Yards Co., 164 Ill. 224.

In this view of the case, it becomes necessary to reverse the decree and remand the cause, with directions to re-refer the same to a master to resume the hearing where the court erroneously took it up.

If, in the interest of economy it is desired to withdraw the record filed in this court to use the evidence therein contained in the hearing to be had before the master, the parties may do so.

Inasmuch as the hearing proceeded before the chancellor by stipulation of the parties, the costs of this appeal will be taxed, one-half to the complainant and one-half to the defendant, as administratrix etc.; the latter to be paid in due course of administration.

The decree of the Circuit Court will be reversed and the cause remanded for further proceedings not inconsistent with the views hereinabove expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

120 - 25374

(977)

SAMUEL RUSNAK, Trustee in Bankruptcy of Estate of the GARDEN CITY PARLOR FURNITURE CO., a corp., Bankrupt,

Appellant,

vs.

ISAAC FISH, THE L. FISH FURNITURE CO., a corp., etc., MORRIS KRAUS and JOSEPH KLOUD,

Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

217 I.A. 640

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

Plaintiff brought an action on the case charging that defendants entered into a conspiracy to defraud the Garden City Parlor Furniture Co., bankrupt, and its creditors. At the conclusion of plaintiff's case the court instructed the jury to find for the defendants. Judgment was entered upon this verdict and plaintiff has appealed to this court.

We are not disposed to agree with the contention that the declaration fails to state a cause of action by omitting to allege that claims of creditors had been filed and allowed in the bankrupt court. McKey v. Smith, 255 Ill. 465, did not involve the amendment of June 25, 1910, sec. 47 a (2), giving additional powers to trustees as follows: They are "vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." This has been held to give a trustee the rights and remedies of a creditor armed with process so that the inadequacy of assets and allowance of claims are immaterial where the action is one which the bankrupt itself might have maintained. In re Pittsburg-Big Muddy Coal Co. et al., 215 Fed. 703; Remington on Bankruptcy, (2nd ed.), secs. 1731 and 1732.

We hold that the trial court correctly instructed for the defendants for the reason that plaintiff's proof failed to support the charges of the declaration. The declaration charged that the defendants, Kraus and Kloud, were the officers and directors of the Parlor Furniture Co.; that they fraudulently sold to Isaac Fish and the L. Fish Furniture Co. large amounts of merchandise for an inadequate consideration, for the purpose of bringing about the insolvency of the Parlor Furniture Company and defrauding its creditors; that thereby the Parlor Furniture Company lost money and became insolvent and was adjudged bankrupt, by reason whereof the company and its creditors lost large sums of money, to-wit, $100,000; that in pursuance of the conspiracy to wreck the Parlor Furniture Company and acquire its assets and business for a small and inadequate consideration, Fish acquired its business and property at a trustee's sale for himself and the other defendants for a consideration of $30,000 below its real value; and that Kraus and Kloud participated in said acts as co-conspirators with defendants Fish and the Fish Furniture Co.

The evidence tended to show that Isaac Fish owned or acted for the L. Fish Furniture Co., operating stores selling furniture; that the Garden City Parlor Furniture Co. was owned or controlled by the defendants Kraus and Kloud and conducted a business of manufacturing and upholstering furniture at its factory plant. There is no evidence that either company or its officers were connected in any way with the other company. For a period extending over two years preceding the filing of the petition of bankruptcy, the Parlor Furniture Co. sold to the L. Fish Furniture Co. merchandise, sometimes without any discount and sometimes with a discount ranging from ten to forty per cent from the list price. It was also shown that Fish frequently advanced money to the Parlor Furniture Co. prior to the receipt of merchandise. The evidence

further tends to show that this was the usual and customary practice of the Parlor Furniture Co. not only with the Fish Furniture Co. but also with other concerns; that virtually the same discounts were made during this period with The Twelfth Street Store, L. Klein, Sol Klein, and the General Furniture Company, which are other stores in Chicago dealing in furniture. It is also shown that these concerns also advanced money to the Parlor Furniture Company prior to the receipt of merchandise in order to help that company meet its pay roll or purchase supplies necessary to manufacture furniture. While the evidence shows that sales were made to Fish at large discounts and in some instances at a net figure lower than the cost of manufacture, yet there is an absence of proof that such prices were substantially if any lower than the market value of the goods at the time of the sale. The evidence does show that it is the practice in the furniture business for the manufacturer to give large discounts from the list prices in making sales to dealers. It does not appear that Fish in this respect was treated in any different way from other dealers, or received any terms better than those usually accorded by the Parlor Furniture Company to its customers. The evidence indicates that the transactions between Fish and the officers of the Parlor Furniture Co. prior to the bankruptcy were consistent with good faith and fair dealing and certainly fall short of proving the existence of anything fraudulent and illegal.

Plaintiff further introduced evidence tending to show that before the bankrupt sale Fish had a secret understanding and agreement with Kraus and Kloud, that he, Fish, would attempt to obtain the assets of the Parlor Furniture Company at the sale for a low price and they would thereafter carry on the business. There seems to have been opposition on the part of some of the creditors to Kraus acquiring any part of the bankrupt stock or having anything

to do with the new business. It is shown that Kraus and Kloud gave Fish some $5,000 as their contribution towards the purchase at the trustee's sale. The sale was at public auction to the highest and best bidder for cash and was made by the trustee, Rusnack, to the L. Fish Furniture Co. for $10,100, which sale was approved by the U. S. District Court. Creditors were present and some of them bid. One of them testified that he had examined the assets with the view of making a bid; that he bid $10,000 which he regarded as a high bid, and that he was of the opinion that this was all the property was worth. There was evidence tending to show that Fish attempted to influence the bidding but there is a failure of evidence to show that the price paid by him was grossly inadequate. The sale was under the jurisdiction of the U. S. District Court and has been approved by it; this would seem to bar any question in this court as to its fairness. So long as the sale was fairly conducted, how can it be of any legal concern to the creditors that Fish in part represented Kraus and Kloud? We see nothing more in the above circumstances than a desire by creditors to prevent Kraus from continuing in business and the successful effort on the part of Fish and Kraus to continue to manufacture furniture. This cannot be made the basis of the claim here asserted by the plaintiff.

Evidence was introduced touching certain fires of the Parlor Furniture Co. and adjustments prior to the bankruptcy, and also concerning certain transactions between it and one I. Marcus, but we find nothing whatever in the recital of these transactions connecting in any way Fish or the L. Fish Furniture Co. with them.

Our conclusion from the record is that there is an utter failure of evidence establishing any fraudulent or illegal conduct on the part of the defendants, Isaac Fish and the L. Fish Furniture Company.

The gist of plaintiff's claim is the conduct of Fish

in cooperation with Krause and Kloud. The proof having failed as to Fion, it follows that the charges as to the other defendants must fall.

Proof of conduct which might give rise to suspicion is not sufficient to establish charges of a conspiracy to commit fraud or any other illegal act.

We hold that the conclusion of the trial court was correct and the judgment is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

221 - 25477

JOHN WALSH,
Appellant.

vs.

CHICAGO CITY RAILWAY COMPANY and CHICAGO SURFACE LINES,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

217 I.A. 640

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

Plaintiff brought suit to recover compensation for personal injuries alleged to have been caused by the negligence of the defendants. Upon trial the jury returned a verdict assessing his damages at $125 and judgment was entered for this amount. Plaintiff is not satisfied with this and is here asking for a reversal.

Plaintiff brought his suit as a common law action on the case, alleging that the accident was caused by the unsafe condition of the paving between defendants' street car tracks; general issue was pleaded. Upon the trial it developed from the evidence that at the time of the accident, May 4, 1916, plaintiff and his employer, the Illinois Malleable Iron Co., were under the Workmen's Compensation Act, that plaintiff was injured while engaged in the line of his duty as such employee, and had received from his employer compensation in accordance with the provisions of the act. There was no evidence as to any election of the defendants not to be under the operation of the Act. A street railway company is covered by the Compensation Act and, in the absence of evidence to the contrary, will be presumed to be operating under it. Chicago Rys. Co. v. Industrial Board of Illinois, 276 Ill. 112. The record thus presents the case of an employer paying compensation to an employee, under the Workmen's

Compensation Act, because of an injury caused by other parties who are also under the act.

This identical situation was presented to this court in the case of Bishop, administrator, v. Chicago Rys. Co., 25163, petition for certiorari denied February 11, 1920. opinion filed October 27, 1919./ we there held that under the provisions of section 6 and the first part of section 29 of the Compensation act, plaintiff was not entitled to maintain his action. The reasons and decisions supporting this conclusion are given in that opinion and we shall not repeat them.

Plaintiff would not be aided by any assumption that the defendants were not under the Compensation Act, for the reasons stated in the recent opinion of this court in O'Brien v. C. C. Ry. Co., 25167, filed December 8, 1919.

Plaintiff contends that the Compensation Act has no application in his case for the reason that the suit was commenced not under the act, but as an action at common law; that defendants pleaded only the general issue, and that unless the Compensation Act is made an issue expressly by the pleadings, plaintiff may proceed as at common law wholly apart from any of the provisions of the Compensation Act. We do not agree with this contention. In the O'Brien case supra we held that section 6 of the Compensation Act was designed as a substitute for all previous rights of action of employees covered by the act and that the rights of an injured employee against a negligent third party are conditioned upon section 29. We are of the opinion that this must be true even where the pleadings make no mention of the Compensation Act, otherwise its purpose might be defeated by intentional matters of form. The operation of the act cannot be avoided by merely calling a suit for compensation for injuries by any special name.

We understand the Supreme court to hold that the Compensation Act may be invoked as a defense without pleading it and

that it is available under the general issue. Von Beckmann v. Corn Products Co., 274 Ill. 605.

For the above reasons we are of the opinion that plaintiff was not entitled to recover against the defendants in this action.

It has been many times held that where the plaintiff is not entitled to recover he has no right to have a verdict set aside because it is less than he claims. Frith v. Chicago Ry. Co., 205 Ill. App. 298, and cases therein cited.

The defendants state their willingness to pay the judgment in this case rather than to incur the expense of another trial, hence the judgment is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

246 - 25503

WILLIAM BUSSE, Jr., ALBERT H. BUSSE, MATHILDA EHARD, MARTHA FROEHLING, SOPHIA MUELLER,
Appellants,

vs.

CAROLINE BARTELS, MATHILDA BUSSE, CAROLINE BARTELS, CAROLINE BARTELS, Executrix of the Estate of CONRAD BARTELS, Deceased, EMIL BARTELS, HENRY BARTELS, FRIEDA WILKENING, ARNOLD WILKENING, LINDA WILKENING, ALFRED BARTELS, WILHELMINA BARTELS, EDWIN BARTELS, FREDRED BARTELS, WILLIAM BARTELS,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

217 I.A. 640 3

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

Complainants filed their bill seeking to have the last will and testament of Conrad Bartels declared void on the ground that at the time of its execution the testator was mentally incompetent to make a will. Upon a hearing before a jury an instructed verdict was rendered finding that the will in evidence was the last will and testament of Conrad Bartels, and a decree was accordingly entered ordering the bill dismissed for want of equity. This appeal seeks the reversal of this decree.

The will is dated April 19, 1913. The undisputed testimony shows that Bartels for years prior to 1913 was an active and capable man; he was a farmer and acquired several farms; he divided certain farms between two of his sons and retiring in 1909 from active work, purchased a home in the village of Roselle, twenty-three miles from Chicago. In the fall of 1913 he sold his farm and his home in Roselle and went to live with a son near Palatine. He remained there until the spring of 1915, when he suffered a paralytic stroke, dying in the summer of that year.

By the will testator's property was bequeathed to

his wife for her life, certain sums of money were given to his grandchildren, including the complainants, and legacies to two daughters and a son. The will recited that provision had already been made for his other two sons. The residue was bequeathed to the children of his daughter Lina and to his sons and daughters.

Complainants produced as a witness Dr. Starck, who undertook to give his opinion that Bartels was suffering from impaired mental faculties for a period of two and one-half years prior to April 26, 1915, making it impossible for him to have had testamentary capacity during this period. This would include the date of the execution of the will. The trial court struck out this opinion testimony and we think properly. Dr. Starck became acquainted with Bartels in 1905 but did not attend him professionally until 1915. During that period he saw him occasionally and in 1913 noticed an impediment and hesitancy of speech and a paralytic condition of an arm. A number of witnesses contradict this statement as to the impediment in speech and paralysis. The doctor said that when he called professionally in April, 1915, he found Bartels in a stupor and suffering from a hemorrhage of the brain and that he had a degree of arterio-sclerosis. He based his opinion as to the mental incapacity of Bartels in 1913 largely upon the condition of the arteries in 1915. This hardly comports with our understanding of this disease, and we have some doubt; however, it developed that Dr. Starck was basing his opinion partly upon the history of the case given to him by members of the family. In view of this fact the court properly struck out his testimony.

In Austin v. Austin, 264 Ill. 299, the court said: "It has never been held in this State that the testimony of doctors upon the subject of mental capacity is entitled to any greater weight than that of laymen who are men of good common sense and judgment." See also Martin v. Beatty, 254 Ill. 615.

William Busse also undertook to express his opinion on the sanity of Bartels at the date of the will, but this was refused by the court. The rule is that non-expert witnesses knowing and having opportunity for observing the mental condition of a testator may give an opinion as to the soundness or otherwise of his mind, but only after stating facts upon which this opinion is based, and the weight of such an opinion depends upon the facts stated. Coleman v. Marshall, 263 Ill. 350. Mr. Busse stated no such facts; he simply says that when he talked with him in April, 1913, he, the witness, "could not make it out," and that there was "a very marked difference in his physical condition" and his "face did not seem to be exactly the same." These facts of course furnish no real basis for arriving at an opinion as to mental capacity.

The testimony of the witness Quindel was also refused for the same reason. He simply says of Bartels, whom he saw in July, 1913, "He sat there like a man who did not know anything. I watched him. He looked healthy and strong."

Dr. Davis, testifying as an expert in nervous and mental diseases, gave as his opinion that under certain conditions a patient would be of unsound mind for a period of two years prior to a paralytic stroke, but this opinion would change if it was shown that the patient during this period was attending to his business, making real estate deals and sales at reasonable prices.

The law presumes that a testator at the time of executing a will is of sound mind and memory, and this presumption obtains until it is shown otherwise by a preponderance of evidence. Wickes v. Walden, 228 Ill. 56. Even if the chancellor had permitted the evidence of complainants' witnesses to stand, this would have fallen far short of the quantum of proof necessary to overcome the

presumption in favor of the will.

The manifest preponderance of evidence shows that the testater was of sound mind at the time of the execution of the will. This condition was shown by the testimony of two attesting witnesses, the lawyer who drew the will, and ten other witnesses who were business acquaintances or neighbors of Martels at the time the will was made. It appears that about this time he carried on his business in his usual able manner, that shortly before the will was made he sold his farm and conducted the deal himself, obtaining a good price for it. Shortly thereafter he sold his home in Roselle, obtaining a good price for this, and calculated the cost of various articles that he purchased; he did his shopping unassisted, sold eggs in Chicago, and did many other things, all indicating a man of normal qualifications to transact his usual business.

Upon consideration of all the evidence, including that which was stricken, a just decree was entered which is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

246 - 25503

WILLIAM BUSSE, Jr., ALBERT H. BUSSE, MATILDA KRAUS, MARTHA FROMMLING and SOPHIA MUELLER,
Appellants,

vs.

CAROLINE HULKE, MATILDA BUSSE, CAROLINE BARTELS, CAROLINE BARTELS, Executrix of the Last Will and Testament of CONRAD BARTELS, deceased, et al.,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

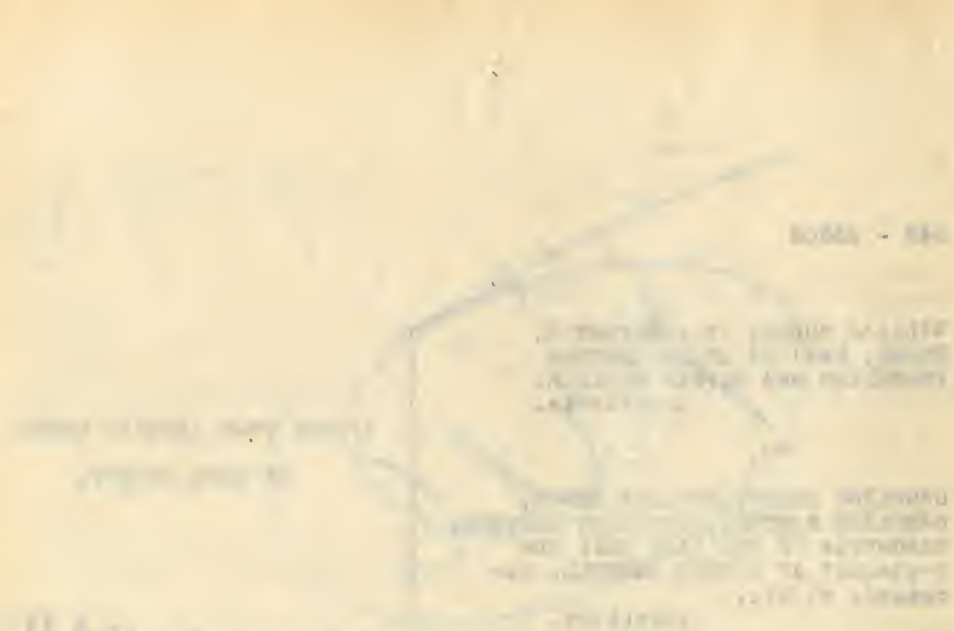
217 I.A. 640 341

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

This is an appeal from a decree dismissing complainants' bill for want of equity.

By the bill complainants sought to have the last will and testament of Conrad Bartels declared null and void on the ground that at the time of its execution the testator was mentally incompetent to make a will. At the time of his death Bartels owned his home in the village of Roselle, DuPage County, Illinois. By the will this was devised to his wife, Caroline, who was given a life estate in all other property, real, personal or mixed, the remainder to be divided among certain of his heirs.

We are of the opinion that this case involves a freehold. If the will should be set aside, the devise of the real estate in Roselle to the wife of the testator fails, and the heirs would take title subject to the dower and homestead of the widow. Also other real estate referred to in the will would pass to the heirs, including two of the testator's sons, Herman and Emil, for whom no special provision is made in the will. Also the power given by the will to Caroline Bartels to sell and convey all real estate of which the testator should be seized at the time of his



death would be void.

This court has no jurisdiction of cases involving a freehold, sec. 8 (as amended) of "An Act to Establish Appellate Courts," in force July 1, 1887. Under such circumstances it is our duty to order this transferred to the Supreme court; sec. 102, chap. 110.

The clerk of this court is therefore directed to transmit the transcript and all files therein, together with the order of transfer, to the clerk of the Supreme court.

TRANSFERRED TO THE SUPREME COURT.

Holdom and Dever, JJ., concur.

265 - 25523

FRANK A. BROWN,
Appellee.

vs.

CHICAGO & ILLINOIS MIDLAND RAILROAD COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

217 I.A. 640

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

Plaintiff while employed as a brakeman by defendant met with an accident resulting in the loss of his left arm and fracture of the bones of the feet. He brought suit and upon trial had a verdict for $10,000. Judgment was entered, from which defendant appeals. The declaration consisted of seven counts but the case was submitted to the jury on the sixth and seventh counts only. In view of our conclusion it is unnecessary to discuss the disposition of the first five counts. The counts submitted charge that the defendant had violated the Federal Safety Appliance Act in using a car on a highway of interstate commerce without having such car equipped with automatic couplers coupling by impact and which could be uncoupled without the necessity of men going between the cars.

Defendant's railroad is twenty-eight miles long, running between Taylorville and Compro, Illinois, and connects with a number of other railroads along its length. On the morning of September 18, 1918, the freight train in question left Taylorville and arrived at Pawnee station. The crew undertook to switch about seventeen more cars from the storage tracks there, so as to add these to their train. The engine was detached from the train, attached to the cars on the storage track, and the crew proceeded to cut out the desired cars. In "kicking"

cars the engine pushes them while the brakeman usually rides at the end or side of the car next to the one which is to be kicked, disconnects the coupling and signals to the engineer, who slows or stops the engine, leaving the uncoupled car to run under its momentum.

From the evidence before it, the jury could properly believe that in the instant case the engine was pushing six cars towards the west. The end car was an Illinois Midland car which was to be kicked down the track. The car next to it was an Illinois Central car. It was plaintiff's duty to uncouple these at the proper time. He was working on the north side of the train so that he could signal the engineer, who was on that side. Plaintiff first attempted to make the uncoupling by riding on the Midland car with his foot in the stirrup and when the cars were moving gave the engineer the "stop" signal, at the same time pulling the coupling lever extending to the north side of the Illinois Central car. This failed to uncouple for the reason that the chain usually connecting the lever rod with the pin was missing. There was no lever on that side of the Midland car. The train was then stopped and plaintiff got upon the end of the Illinois Central car using a ladder on that car at the point where the uncoupling was to be made. There was no such ladder on the Midland car, and but a three-inch space upon which he could stand, while on the Illinois Central car he had three or four feet. The cars then began to move and plaintiff gave the engineer the "stop" signal so as to make the kick and reached down with his hand to pull the pin of the Illinois Central car, but as no chain was attached to it he could not get hold of it. He therefore reached over to the opposite coupling pin on the Midland car and pulled it and the Midland car was kicked down the track. After the kick had been made and the Midland car had gone about a car's length, the engine

with the cars came to a sudden stop causing a jolt, throwing plaintiff from his place and under the wheels of the Illinois Central car, whereby he received the injuries in question. The Illinois Central car ran about six feet after plaintiff fell.

Defendant asserts that plaintiff was guilty of contributory negligence which bars a recovery. We do not so conclude. It was plaintiff's duty to uncouple the cars. Being prevented by the defective coupling device, he was called upon to exercise his judgment quickly as to what should be done. It was proper for the jury to determine whether or not he exercised reasonable judgment in the matter. As was said by Mr. Justice Caldwell in a dissenting opinion in Dawson v. Chicago, R. I. & P. Ry. Co., 114 Fed. 870:

> "The standard of care required of the brakeman is the brakeman's standard of care, and not the ideal standard of care of a judge reposing in security and comfort in an upholstered chair in his chambers."

The only other thing suggested by the defendant which plaintiff might have done, was to stop the train and climb over or under it or go around it to the other side and use the coupling lever on the Midland car. This would have delayed the work, also made it difficult if not impossible for the plaintiff to give the engineer the proper signals; furthermore, there is no proof in the record that the lever on the Midland car was in proper order. The plaintiff did nothing under the circumstances and emergency of the situation which requires us to set aside the conclusion of the jury as to his conduct. Almost identical conduct on the part of train employees has been held not to be contributory negligence in a large number of cases. Among them are Hutton, Admr. v. C. & E. I. R. R. Co., 160 Ill. App. 77; Chicago, R. I. & P. Ry. Co. v. Brown, 229 U. S. 317; Nichols v. Chesapeake & O. Ry. Co., 195 Fed. 913; Donegan v. Baltimore & N. Y. Ry. Co., 165 Fed. 869; Taggart v. Republic Iron & Steel Co., 141 Fed. 910; Baltimore & Ohio S. W.

R. Co. v. Davis, 149 Fed. 191; Pierson v. Northwestern Ry.Co., 127 Iowa, 13; Brady v. K. C., St. L. & C. R. R. Co., 206 Mo. 509; Illinois Central R. R. Co. v. Cosby, Admr., 174 Ill. 109, and many others.

We are of the opinion that the defective and broken coupler was the proximate cause of the plaintiff's injury. The more convincing evidence supports plaintiff's testimony that he was thrown from the car by the sudden jerk, due to the quick stopping of the engine and cars, and not pulled off by catching his glove or finger in the coupler of the Midland car. It would be illogical to say that the sudden stop of the engine was the proximate cause of the accident. Such a stop was a necessary part of the operation of kicking the cars, and was no more the proximate cause than the fact that defendant was operating engines and cars on a railroad. The proximate cause was the defective coupler which moved plaintiff to place himself where the ordinary operation of kicking cars resulted in the accident. This view is supported by the cases above cited and also by Curran v. Chicago Short Line Ry. Co., 198 Ill. App. 154 (certiorari denied by Supreme Court); Burke v. Minneapolis & St. L. Ry. Co., 121 Minn. 326; Erie R. Co. v. White, 187 Fed. 556; York v. St. Louis, I. M. & S. Ry. Co., 86 Ark. 244. Cases holding to the contrary are concerned with different facts. In Devine v. Chicago & Calumet River R.R.Co., 259 Ill. 449, it was held that the proximate cause of plaintiff's injuries was the derailment of the locomotive engaged in kicking cars. That is not true of the case before us. The defective coupler was the cause producing the accident without the intervention of any new and independent cause.

We see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

274 - 25332

EDWARD F. LE GENDRE,
Appellee,

vs.

BANKERS-COMMERCIAL SECURITY COMPANY, Inc., a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 641

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

In their abstracts and briefs, both counsel have failed to observe the statute which requires that cases in this court be entitled as they were in the trial court. The correct title is given above.

Plaintiff, LeGendre, brought suit claiming $180.32 for attorney's fees. Defendant says that $75 would be fair and reasonable. The jury returned a verdict for $125 and from the judgment for this amount defendant appeals.

The points presented in defense are technical. The action was originally commenced against the "Bankers Commercial Corporation" and process was returned "Not served." The proper name of the defendant was then learned and an order was entered changing the name to read "Bankers-Commercial Security Company, Inc." Alias summons was issued and served on the defendant, which entered its general appearance and contested the suit on its merits. There was no error in this. Such an amendment is proper. Redlowski v. Grossfeld & Roe Co., 192 Ill. App. 534.

It is next said that the services were performed by a partnership of which plaintiff was a member, hence he cannot bring this suit alone. Under such circumstances the burden of proving the ex-

istence of a partnership was upon the defendant. Smith v. Knight, 71 Ill. 148; 5 Jones and Addington, Ill. statute, p. 4801, and cases there cited. It was not proven that the services were performed by a partnership. There is no presumption of the existence of a partnership from the use of the firm name. Robinson v. Hagarity, 28 Ill. 423. The correspondence between the parties constitutes the acknowledgment by the defendant of an indebtedness for the services rendered, to the plaintiff alone.

Regardless of any testimony concerning the schedule of charges of the Commercial Law League, there was sufficient evidence as to the reasonableness of plaintiff's charges. The evidence showed that the claim sent by defendant to plaintiff for collection was $2983.17. Plaintiff wrote many letters to the debtor which resulted in a settlement between the defendant and the debtor.

We see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

283 - 25541

MARTHA ZANTARA,
Appellee,

vs.

R. J. EDERER COMPANY, A corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

217 I.A. 641

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

Plaintiff brought suit alleging that while employed by the defendant she received personal injuries and was then under sixteen years of age and worked at a certain dangerous and unprotected machine or loom for weaving fish nets, in violation of the Child Labor Act of 1903. Upon trial she had a verdict and judgment for $5,000. Defendant asks that this judgment be reversed.

There is considerable argument concerning the age of the plaintiff, but this was properly submitted to the jury and we cannot say from the record that she could not have been under sixteen years of age at the time of the accident.

It is unnecessary to narrate or comment upon the facts for the reason that we are of the opinion that for errors upon the trial the judgment must be reversed and the cause remanded.

We are inclined to sustain defendant's point that the plaintiff purposely got before the jury the fact that an insurance company was interested in the defense. Plaintiff's counsel evidently understood the danger of this and attempted to have the jury apprised of this fact without openly doing so. It is unnecessary to repeat the extensive examination and colloquy between the parties; it was clearly the desire of plaintiff's

counsel to obtain an advantage from the jury's knowledge of the interest of the insurance company, and this desire overcame his discretion. To paraphrase what was said in McCarthy v. Spring Valley Coal Co., 232 Ill. 473, it is as strange as it is unfortunate that this fact should have been elicited through mere inadvertence. Questions and statements were "well adapted to indicate strongly to the jury that the appellant was insured against liability for accidents of this character, and that the party which would have to respond for any judgment which might be rendered was the.....Insurance Company. Evidence of this character was not competent. ***** The only effect it could have would be to convey an improper impression to the jury."

A physician testifying on behalf of the plaintiff was handed some X-ray plates which purported to show the condition of plaintiff's hand and wrist. The witness examined them before the jury and testified as to what was shown by them. They were marked for identification and plaintiff's counsel promised to introduce evidence that these were correct X-ray photographs of the plaintiff's hand and wrist; however, this connection was not made. Another witness also testified as to conditions predicated upon the showing of these plates. In the absence of any evidence tending to connect these plates with the plaintiff, such testimony was inadmissible. Part of it was stricken out, but this would not remove from the jury the impression made by the witnesses who told what was shown on the plates. For the error in this respect there must be another trial.

It was also error to permit the physician testifying for the plaintiff to tell the jury that plaintiff's hand grip had been lessened or lost to a certain degree. Under the cir-

cumstances of this case, we are of the opinion that this was not an objective symptom. There were also answers by the physicians which tended to invade the province of the jury.

It was also error to instruct the jury that in assessing damages they should include plaintiff's loss of time during her minority. Such an instruction has under similar circumstances been held erroneous in C. C. Ry. Co. v. Schaefer, 121 Ill. App. 334; W. U. Tel. Co. v. Woods, 86 Ill. App. 375; Boggs v. Iowa C. Ry. Co., 187 Ill. App. 621; Orr v. Wahlfeld Mfg. Co., 179 Ill. App. 435; Am. Car Co. v. Hill, 226 Ill. 227. Instruction 29 is rightly subject to criticism. We cannot approve of instructions to the jury conditioned on plaintiff proving "her case as alleged in the amended second count of her second amended declaration." This means nothing to the jury.

Other errors occurred which will probably not be repeated upon a second trial.

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

REVERSED AND REMANDED.

Holdom and Dever, JJ., concur.

292 - 25550

SARAH E. PECK,
Appellant,

vs.

A. D. COMFELT,
Appellee.

APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

217 I.A. 641

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

Plaintiff brought suit claiming that defendant had collected certain items of rent for her, but had appropriated them. Upon trial the jury returned a verdict for the defendant upon which judgment was entered, from which plaintiff appeals.

The questions are solely of fact. Five items of rent are involved; the first three are $32.50 collected from R. Park, $15 from Miss Marsh, $65 from Miss Merrick. Defendant admitted that he made these collections but testified that he turned them over to plaintiff, part of the Park rent being in the form of a money order from Miss Park. Plaintiff denies that defendant paid her these items, although she admits the receipt from defendant of the Park money order at that time. She attempted an explanation of this which could hardly have impressed the jury. In view of all the circumstances, including plaintiff's admission of receiving at this time the money order, and the opportunity of the jury to see both witnesses, we cannot say that the jury was not justified in holding with the defendant on this point.

The next item was the Buckwater rent, $65. Defendant denies that he ever collected this. His story is contradicted by

a Mrs. Sandstrom, a caretaker for the plaintiff, who testified that she had collected the Buckwater rent, and on November 4, 1918, had paid it over to the defendant. Support is given to her story by the testimony of her husband and her ten year old son. We think, however, that the testimony of these two witnesses was considerably shaken on cross-examination. The defendant denied this occurrence and testified that he was not in the city upon the day to which Mrs. Sandstrom and the other witnesses testified. Here was a direct conflict in the testimony. We are unable to tell from the record which party was telling the truth. Under such circumstances we must leave it to the jury and abide by its judgment.

The last item in dispute is the Vanderkelin rent, $65. Defendant admits that he collected this. He testified that some time before he had erroneously thought another tenant had paid some rent amounting to $65, and under this mistaken impression he paid that amount to plaintiff; that upon discovering his mistake he retained the Vanderkelin collection to reimburse himself and attempted to collect the other rent but did not succeed and left it for plaintiff to collect after he ceased to act for her. There is no contradiction of this explanation, although in argument it is termed unreasonable. We do not think it necessarily unbelievable, and if the jury thought best to give it credence we do not find sufficient grounds for holding this was improper.

Upon the whole record we find nothing which would justify this court in holding that the verdict was manifestly against the weight of the evidence, and must rest upon the superior opportunities of the jury to pass upon questions of credibility.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

305 - 25563

(Certiorari denied) (1104)

MARY E. MERWIN et al.,
Complainants,

AINSLIE ANTHONY,
Appellant,

vs.

LYMAN A. FURBECK et al.,
Defendants.

D. I. JARRETT and JOHN HEIST,
Administrators of the Estate
of ELMER D. DUFF, Deceased,
Receiver,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

217 I.A. 641

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

Appellant, Ainslie Anthony, has appealed from an order entered in a foreclosure proceeding approving a receiver's report and the payment by him of $10,337.80 to Mary E. Merwin, the complainant, on account of a deficiency decree.

On February 24, 1916, the bill was filed to foreclose a trust deed executed by Lyman A. Furbeck to secure notes aggregating $25,000. This trust deed was subject to a prior one securing bonds of $110,000. Personal service was had on the mortgagor, and after proper notice Elmer D. Duff was appointed receiver of the premises. Reference was had to a master in chancery, who reported recommending a decree in accordance with the prayer of the bill. On January 20, 1917, the decree was entered which found that by the trust deed the rents, issues and profits from the real estate were conveyed as security for the payment of the amount found due by the decree; that the grantor waived all right to the possession of and income from the premises after default, and pending foreclosure proceedings, and until the period of redemption expired, and consented that a

receiver might be appointed to collect the rents, etc., and make repairs and pay general taxes and special assessments. The decree also provided for the entry of a deficiency decree in case the premises did not sell for a sufficient sum to pay the indebtedness. On February 24, 1917, the master's report of sale distribution was filed reporting a deficiency of $11,042.86, and upon the same day an order was entered approving this report, which recited that Furbeck, the mortgagor, had no real or personal property out of which said deficiency could be satisfied; that complainant was entitled to a lien on the rents for the amount of such deficiency and was given a lien thereon for the full amount of said deficiency until the expiration of the period of redemption. It was further ordered that the net rents then in the hands of the receiver be paid to the complainant to be applied on said deficiency, and the receiver was continued in possession with the same powers as before and ordered thereafter to pay complainant out of the net income a sufficienct sum to satisfy the deficiency with interest thereon.

There was no appeal from the aforesaid decree or orders.

On January 16, 1918, the appellant filed an appearance and a petition stating that she was the owner of the equity of redemption under a deed from Furbeck dated November 20, 1916, and recorded January 20, 1917.

On January 29, 1918, the receiver filed an account, showing receipts and disbursements and the payment of $7,500 to the complainant to apply on her deficiency decree.

On January 27, 1919, the receiver filed his final account, showing a net balance of $2,835.80 which had been paid to complainant on her deficiency decree. On the same date objections were filed by the appellant, Anthony, which came up for a

hearing on February 10, 1919, at which date they were overruled, the final account of the receiver approved and the receiver discharged. The appeal before us is from this order.

Appellant raised various questions touching the propriety of the order appointing the receiver, the allegations in the bill of complaint, findings in the decree and other matters included in orders entered prior to February 10, 1919. These questions are not properly before us, as this appeal brings up only the order appealed from and so much of the record involved in that order. Ellguth v. Ellguth, 250 Ill. 214.

A decree of foreclosure is final and settles all questions between the mortgagee and the owner of the equity of redemption. Kirby v. Bunals, 140 Ill. 289. The order which fixed the amount of a deficiency decree and made it a lien on the rents is a final and appealable order and cannot be put in issue by appealing from the order approving the distribution of the funds of the receiver. Henry v. Wolf, 187 Ill. App. 129; Owsley v. Reeves, 179 Ill. App. 61. A purchaser pendente lite from a mortgagor is in the same position as a grantor and is bound by all the orders entered therein. Morris v. Ile, 152 Ill. 190; Torrence v. Shedd, 202 Ill. 498.

Objection was made to the receiver's payment of $221.21 for taxes. The court found that this was made on September 20, 1916, for the general taxes of the year 1915, which were a lien at the time of the appointment of the receiver and paid prior to the entry of the decree of foreclosure and a proper expenditure. We approve of this. The trust deed provided that such taxes should be paid; furthermore it appears that the mortgagor consented to this. Similar payments were upheld in Atwood v. Knowlson, 91 Ill. App. 265; Boyd v. Magill, 100 Ill. App. 316.

Objection was next made to the expenditure by the

receiver of the sum of $3,300 for interest on the first mortgage. The court found that the owner of the equity of redemption had directed the receiver in writing to pay this interest, and with his consent an order was entered November 29, 1916, directing the receiver to make this payment to avoid threatened foreclosure of the first mortgage. No objection was made to this order nor appeal taken from it. Appellant cannot now question its validity. First National Bank v. Ill. Steel Co., 174 Ill. 140; Hearion v. Youngquist, 189 Ill. App. 3.

Appellant also objects to the payment by the receiver of moneys in his hands on account of the deficiency decree. The propriety of these payments is not before us. The order directing the receiver to pay the deficiency decree was final and appealable, and no appeal having been taken we cannot consider its validity upon an appeal from an order approving the report of the receiver of his compliance with that order. Henry v. Wolf, 187 Ill. App. 129.

The propriety of a payment by the receiver upon a deficiency decree, under similar circumstances and with like provisions in the trust deed, has been upheld in many cases. Schaeppi v. Bartholomae, 217 Ill. 105; Prussing v. Lancaster, 234 Ill. 462. See opinion, with cases cited, of this court filed March 10, 1919, in Continental and Commercial T. & S. Bank v. Leven, 24218. The provisions of the instant trust deed touching the conveyance of rents as security are virtually identical with the provisions of the trust deeds involved in these cases, in which like orders were approved.

We find no error in the order of the Chancellor, and it is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

348 - 25608

1005a

ANNA LASHER,
Appellant,
vs.
CHICAGO RAILWAYS COMPANY and CHICAGO CITY RAILWAY COMPANY,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

217 I.A. 641[5]

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

Plaintiff claims to have received injuries in an accident while a passenger on one of the street cars of the Chicago City Railway. She brought suit for compensation and upon trial the jury returned a verdict finding the defendants "not guilty" and judgment was so entered. From this plaintiff appeals.

Southport avenue runs north and south in Chicago. It has two lines of street car tracks with a terminus near Clark street. At this terminus is a cross-over switch. The car in question ran on the east or north-bound track, stopped, and then moved southward on the cross-over switch to the west or south-bound track. The front trucks took the switch in the regular way, the car at the time going about three and a half miles an hour. The rear trucks did not take the switch but kept on the north-bound track, causing the east side of the car toward the rear to collide with the northwest corner of a car of the Chicago Railways Company which was on the north-bound track. Plaintiff was a passenger on the south-bound car, sitting upon the west side at about the center. The glass in the three rear windows on the east side of this car was broken and the upright between the second and third windows was

bent. The conductor and a police officer who was on the car made inquiries of the passengers to ascertain who was injured. The only person who claimed to have been injured was a Mrs. Nitchberg, who was seated on the east side of the car at the point of the collision. Four witnesses testified this was the only passenger who received injuries in the accident. Plaintiff was accompanied by her husband and theirs is the only testimony tending to support plaintiff's claim as to the occurrence. They testified that the collision knocked down the box which is on the west side and in the center of the car and contains the name of the street; that a piece of board or moulding underneath the car rack struck plaintiff on the head. It was positively denied by witnesses that anything was broken at the point described by the plaintiff and her husband. The jury evidently was of the opinion that plaintiff failed to prove her theory of the occurrence and we cannot say this conclusion was manifestly contrary to the preponderance of the evidence.

It was claimed that the injuries received resulted in deafness. Plaintiff, however, failed to show by sufficient evidence that the deafness or fracture of the ear drums was caused by any injury received at the time of the accident in question.

It was not necessary to state all the evidence in detail. The jury saw the witnesses and was in a better position to determine their credibility than are we. Whatever irregularity may have occurred upon the trial are not of sufficient importance to justify a reversal and a new trial, which in all probability would result in no different verdict. We do not see how it is possible for plaintiff to make out a case of liability against the defendants; hence the judgment is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

366 - 25626

KANSAS CITY SHOOK & MANUFACTURING CO., a corporation,
Appellant,

vs.

ELMER L. ARMINGER,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 642

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

Plaintiff brought suit for a balance claimed to be due for goods sold and delivered to the defendant who filed a claim of set-off. Upon trial by the court the plaintiff was allowed $4463.65 and the defendant $5659.09 on his set-off and judgment was entered against the plaintiff for the difference, $1195.44, from which plaintiff has appealed.

The court allowed substantially the amount of plaintiff's claim shown in its statement. The real controversy concerns defendant's set-off.

Plaintiff was a manufacturer, at Wilson, Arkansas, of box shooks, called by some witnesses "knocked down boxes," used in shipping poultry and other commodities. The defendant was engaged in the produce dealers' supply business in Chicago, supplying shippers of dressed poultry, butter and eggs in various parts of the United States with boxes in which to ship their produce. Defendant would contract with a factory for a definite number of carloads of box shooks and then sell to the produce dealers. The greater part of such boxes would be shipped in cars direct from the manufacturer to the consumer, although defendant maintained warehouses in Chicago and other cities. Plaintiff sometimes sold direct to produce dealers. On June 9, 1915, the parties entered into a written contract for fifty

carloads of poultry box shocks, deliveries to be made by plaintiff within ten days from the receipt of orders and sooner if possible. The period of the contract was until June 30, 1917.

Defendant says there was a subsequent verbal contract calling for the delivery of ten additional carloads of boxes on the same terms and conditions as stated in the written contract, except that the price was to be one dollar per thousand less.

The defendant claims he is entitled to set-off damages suffered by reason of the failure of the plaintiff to ship cars within the ten days provided by the contract, thus compelling defendant, in order to fill his contracts, to purchase boxes in the open market at a higher price; that there is also due under the written contract six cars and on the verbal contract four cars. The total amount of set-off claimed was $7372.12.

Plaintiff denies the existence of the alleged oral contract for ten additional cars. This rests upon a conversation between the defendant and a Mr. Cullom who represented the plaintiff. Their testimony differs as to what was said but the fact is not important, for the trial court reduced the amount of defendant's claim by about $2,000, approximately the loss claimed on the alleged verbal contract. Defendant assigns no cross errors.

The substantial controversy concerns delay in the shipments called for by the written contract of June 9th. Plaintiff does not contest the fact of delays but asserts they were not caused by any negligence on its part and were covered by the contingencies specified in the contract, namely, "strikes, fires, floods and other causes beyond the control of either or both parties." Plaintiff claims this includes shortage of labor, and that it was one of the causes of the delays in shipments. There

was evidence tending to show that while there may have been a shortage in what is called common labor, other laborers could be procured to do their work; also the letters written during the alleged shortage of labor give other reasons for the delay, principally the difficulty in finding lumber, and that plaintiff was crowded with orders.

Car shortage was claimed. Plaintiff's plant is on the line of the J. L. C. & M. R. R.; the vice president ofplaintiff, Mr. Wilson, is the president of this railroad. There is evidence tending to show there was an ample number of cars available at Wilson, Arkansas, during the period in question. There is also evidence that defendant had the Frisco railroad deliver cars for use in his shipments and these cars were appropriated by Mr. Wilson for other enterprises; that defendant also arranged to have other cars set on the siding for loading and to procure teams for hauling, but plaintiff refused to load the cars, claiming it was too much trouble; although defendant made provisions for cars and hauling,the plaintiff's general manager said this would not be of any use because plaintiff could not load them.

It is also said that plaintiff was prevented from making deliveries because on November 7, 1916, a fire occurred at a lumber yard owned by Mr. Wilson at Armorel, thirty-five miles from the village of Wilson, and plaintiff was depending on this yard for its raw material, which was destroyed. It appears, however, that at the date of the fire plaintiff had orders from the defendantwhich were more than two months old and if it had ordered the raw material as it received the orders from defendant it would have had nearly enough material to fill them; plaintiff ordered none of the material from Armorel until its supply at Wilson was exhausted.

We are of the opinion that plaintiff failed in its

attempt to excuse its delays by reason of the contingencies referred to and that while these things may have affected the situation somewhat, the underlying and substantial cause was that it was attempting to fill more orders than the capacity of its mill would justify. It is said that during this period the market was rising and plaintiff was able to sell its goods at the market price for more than its contract price with the defendant and that the more profitable orders were filled.

The record supports the defendant's testimony as to the number of cars delivered under the contract of June 9th and plaintiff's argument on this point is not convincing. Both parties treated the word "carloads" appearing in the contract as meaning the ordinary railroad cars, and as this meaning has not been heretofore questioned by the parties, it is too late now to claim any uncertainty in that respect.

Shortly after making the contract defendant began sending plaintiff orders. The shipments being delayed, the defendant wrote repeatedly presenting the necessity to have these shipments in order to fill his contracts. This was followed by notice that defendant would be compelled to purchase upon the market to fill his contracts,and after the ten days provided for in the contract with plaintiff had expired defendant cancelled the order and purchased the boxes on the market and immediately charged plaintiff with the difference and mailed it a debit memorandum. In the instances where defendant did not buy until sometime after the ten day period, it was shown that the parties at the request of the plaintiff had postponed the deliveries and therefore the market prices were governed by the market price at the time to which the deliveries were postponed. Defendant testified as to the market price, upon which he was a competent

witness, having been in this business seventeen years, buying and selling goods all over the United States. On the whole the prices charged against plaintiff were to its advantage, being less than the market price. The measure of damages is the difference between the contract price and the actual cost of the goods where such cost is less than the market value.

The correctness of the respective amounts due each other as found by the court is questioned, but no particulars of alleged inaccuracy are presented. We cannot undertake to change the computation of the trial court upon the general statement that it is not understood by one of the parties.

The questions involved are entirely those of fact and we are satisfied that the trial Judge gave the conflicting evidence careful attention and consideration and we see no reason to disagree with his conclusion. The judgment is therefore affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

376 - 25636

LEAH BYRNES,
Appellant,

vs.

CONRAD CEDERBORG and LILLY CEDERBORG,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 642

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

Plaintiff claimed that while she was a guest of the defendants in their hotel some of her clothing and other personal property to the value of $240 were stolen from her room; that as innkeepers defendants were liable and also were guilty of negligence in failing to take proper precautions in protecting plaintiff's belongings.

Upon trial by the court judgment was entered in favor of the defendants, from which plaintiff has appealed.

The defendant Lily Cederborg kept a rooming house at 60 East Walton Place, Chicago. Plaintiff occupied a room on the third floor at an agreed price of $3.75 a week. Upon these facts defendants cannot be held liable as innkeepers. Plaintiff was a mere lodger and the keepers could only be held to the use of ordinary care in relation to the property of the plaintiff left in her room during her absence. Clifford v. Stafford, 145 Ill. App. 247, and cases therein cited; also Grey v. Drexel Arms Hotel, 146 Ill. App. 604.

It is earnestly urged that defendant Lily Cederborg was negligent. The building was a three story and basement and in the basement or lobby is a desk or counter. Near this, on the wall, is a box with pigeonholes used for mail and keys of the rooms. Some of the roomers leave their keys in this box when they go out.

others take their keys with them. Plaintiff, upon the morning in question, left her key in the box. When she returned in the evening she did not find the key there, but on going up to her room found the key on the outside of the room door and the door slightly open. Upon entering she found the room in disorder and discovered certain personal belongings were missing. She notified Mrs. Cederborg and shortly after that the police officers were notified. Mrs. Cederborg testified that in the morning when she went upstairs to make the beds she saw the key to plaintiff's room on the outside of the door and thought that plaintiff was in the room and did not pay any more attention to it.

The trial court correctly found that this did not constitute actionable negligence. Plaintiff left the key in the box downstairs at her own risk and defendant's explanation as to why she did not enter plaintiff's room is reasonable.

Complaint is made of inaction on the part of Mrs. Cederborg in notifying the police officers and in attempting to recover the property, but even if this conduct might be called negligent, it had no connection with the loss in the first instance, which is the thing of which complaint is made.

The finding of the court was proper and is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

408 - 25669

(1108a)

L. MARKLE COMPANY,
Appellee,

vs.

McKENZIE CLELAND,
Appellant.

APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

217 I.A. 642[3]

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

Defendant by this appeal asks the reversal of a judgment against him of $278.69. Plaintiff's claim was on three promissory notes given in part payment for a Studebaker automobile, and also on a check which the defendant had given in payment of the notes but had subsequently ordered payment stopped.

Defendant moved for a continuance to procure the testimony of an absent witness. No diligence was shown in attempting to procure this witness or his testimony and the motion was properly denied.

The offer of proof of certain matters by the defendant contained much that was incompetent and was rightly excluded.

The controversy centers around alleged defects in the car which defendant bought of plaintiff which defendant asserts constitute a breach of the warranty made by plaintiff at the time of the sale. The contract between the parties, which is said to contain the warranty, was introduced in evidence but no suggestion as to its contents appears in the abstract. With the failure to present to us the contract of the parties, we are wholly unable to determine their mutual obligations. So far as it is made to appear in this court, the judgment was consistent with and justified by the contract.

We are not shown sufficient grounds for a reversal, and the judgment will be affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

443 - 25704

(1072)

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. ANGELA BLAA,
Appellee,
vs.
WILLIAM KRISON,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

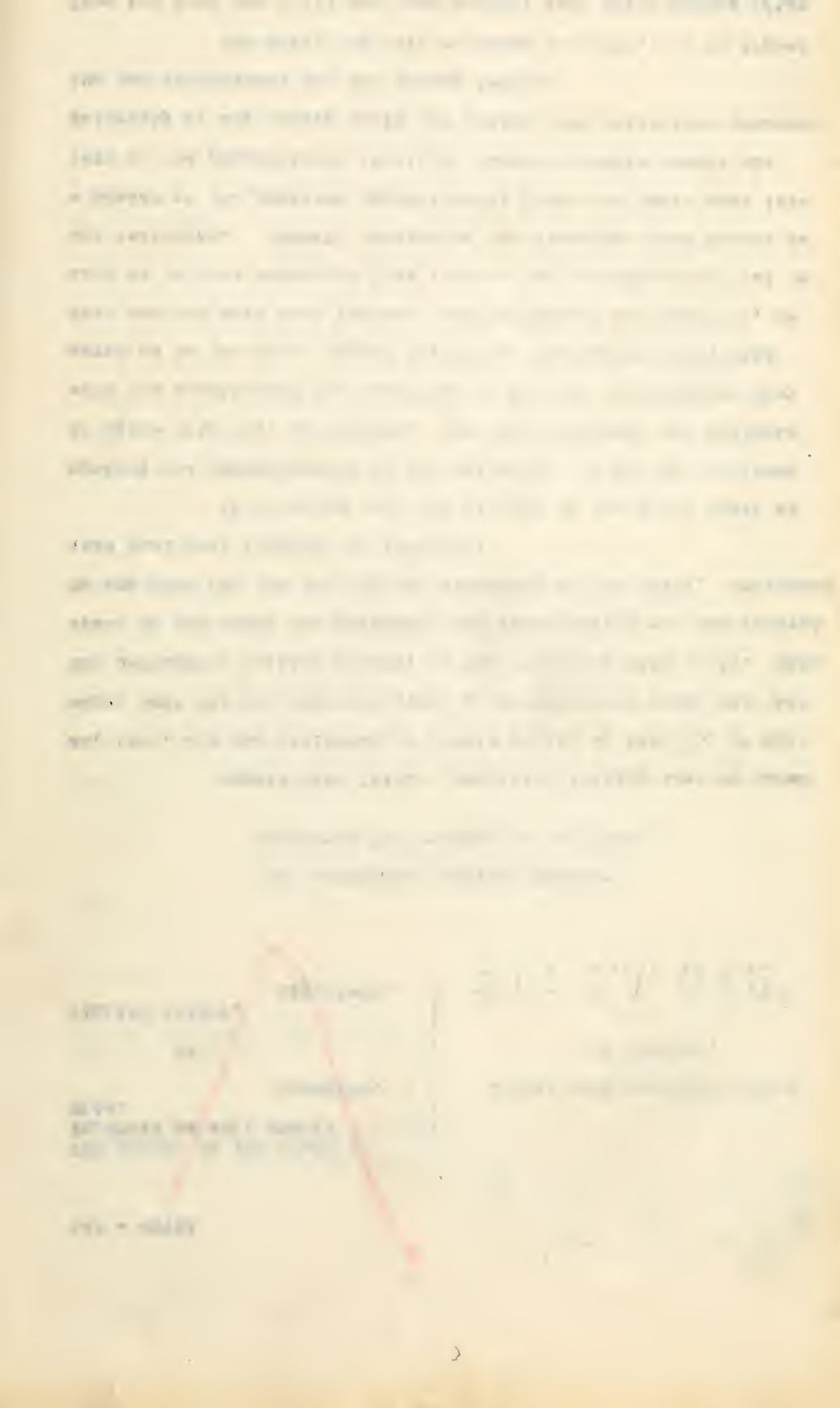
217 I.A. 642

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

Angela Blaa filed a complaint stating that on March 30, 1919, she was delivered of a male child, in the City of Chicago; that she was then and still is an unmarried woman and that the defendant, William Krison, is the father of said child. Upon trial by the court the defendant was found guilty and was ordered to pay $550 for the support and education of the child. Defendant asks that this judgment be reversed.

It is urged that the finding of the trial court is against the preponderance of the evidence. We are not inclined to agree with this contention. That the defendant was intimate with the complainant was testified to by both the parties; they agree as to the date, August 24, 1918. Complainant testified that she had also been intimate with defendant on August 17, so that as to this essential fact there is no important conflict in the testimony. Shortly thereafter the defendant went abroad as a member of the American Expeditionary Force and wrote many letters to the complainant; in all of these he admits freely his paternity of her unborn child and writes with solicitude concerning the complainant and the coming infant.

The child was born on March 30, 1919. It is argued from the fact the child was born shortly over seven months after



the parties were intimate and its appearance at the time of birth was normal, that the defendant is not the father. Complainant testified to lifting a heavy object which caused her to become sick, and the birth followed. The doctor who attended complainant testified that it was impossible to tell from the appearance of the new born babe whether the period of gestation was seven or more months. This evidence does not negative the paternity of the defendant.

Defendant produced three other young men who testified they had been intimate with complainant in the summer and fall of 1918. Their testimony was categorically denied by the complainant. We place no confidence in the statements of these witnesses, whose motive evidently was to aid their friend, the defendant.

We hold that the finding of the court was justified upon the record, and the judgment will be affirmed.

AFFIRMED.

Holdom and Dwyer, JJ., concur.

455 - 25716

SOUTH PARK COMMISSIONERS.
Appellee,

vs.

SAMUEL WESTERFIELD,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 642

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

On July 26, 191s, complaint was filed charging the defendant with indecent exposure and asserting that the offense occurred on the "25 day of July, A.D. 191..." Motion to quash was made and overruled and defendant tried and found guilty and fined forty dollars.

Defendant appeals; complainant does not appear in this court.

The motion to quash should have been allowed and the error in this regard may be presented to this court. The complaint does not definitely state the date of the offense. In People v. Weiss, 168 Ill. App. 502, after consideration of a large number of cases, it was held that an information is fatally defective which fails to show upon its face that the offense charged was committed within the statutory period of limitation, and this notwithstanding no objection was raised in the lower court and a plea of guilty entered. To the same effect are: People v. Hallberg, 259 Ill. 502; People v. Weinstein, 255 Ill. 530; Dreyer v. People, 176 Ill. 590; Lumpkin v. People, 94 Ill. 501; Garrison v. People, 87 Ill. 96; People v. Jackson, 178 Ill. App. 355; People v. Wagner, 172 Ill. App. 84.

For this reason the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Holdom and Dever, JJ., concur.

477 - 25738

1911

NORTH ELECTRIC COMPANY,
a corporation,
Appellee,

vs.

E. JOHNSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

217 I.A. 643

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

Plaintiff brought suit claiming that it had performed electrical work for the defendant at an agreed price of $100, which had not been paid. Upon trial the court peremptorily instructed the jury to find for plaintiff. Such a verdict was returned assessing the damages at $100 and judgment was entered thereon, from which defendant appeals.

The evidence tends to show that in November, 1917, the president of the plaintiff company made a verbal contract with defendant's son to install seven wall lights in a building number 1229 West Huron street belonging to the defendant at an agreed price of $100; that the son was authorized by the defendant to make this contract and it was approved by the defendant. There is considerable controversy as to whether the work was properly done, but we are inclined to hold that the preponderance of the evidence shows that the work covered by the contract was properly installed. There is evidence tending to show that an inspection made about a year after its completion disclosed one or two minor deficiencies which could be supplied in a few minutes. Certain witnesses testified that no lights were turned on after the work was installed and it is argued this demonstrates

that the work was improperly done. It appears that the Edison Company would not supply electricity until a deposit of approximately $200 had been made and the defendant would not make this, neither would he pay the bill of the plaintiff until the lights had been turned on. Manifestly until the current was supplied there could be no illumination. That this was the real crux of the controversy is shown by the testimony of the defendant himself. He stated in answer to questions by the court that the pipes were where they were wanted and that if the Edison Company had furnished current he would have been satisfied with the work done by the plaintiff, and that any complaint he might have as to the work was entirely due to the refusal of the Edison Company to supply the current.

The pendency of a suit in the Circuit court brought by the defendant against the plaintiff, arising out of the installation of this work, is said to constitute a defense to the instant suit, and that the statute requires the consolidation of all demands against each party in cases commenced before a justice of the peace. This statute has no application to a suit commenced in a court of record/ Ward v. The People, 77 Ill. App. 522.

Complaint is made of the action of the court in refusing to issue an attachment for a Mr. Towsley, Chief Electrician of the City, who it was claimed would testify that no certificate approving this work had been issued. Mr. Towsley himself made no inspection, so that his testimony in this regard would not have been competent. However, an inspector from the City Electrician's office appeared and gave his testimony as to conditions. He testified to an inspection on January 14, 1914, when he found that the wiring and conduit were in good condition and installed in a workmanlike manner; that the only thing out of order was one ground wire broken and one link fuse missing; that

one bolt would make this good. He also testified as to the absence of a time clock and a switch, but there is no evidence that these were included in the original contract; witnesses testified that the lights would burn in the condition then existing.

Other errors upon the trial are suggested but we do not deem any of them to be of sufficient importance to require a reversal. The essential facts are admitted by the pleadings and the testimony of defendant. There is no question but that the lights were installed and $100 was the agreed price. The evidence proves that the work was done in a substantial and workmanlike manner. Defendant himself admits this and, as above noted, testified that the only thing of which he had any complaint was the failure of the Edison Company to furnish current.

Under such circumstances there was nothing to submit to the jury and it was not error for the court to instruct as was done.

For the above reasons the judgment is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

(1012a)

496 - 25757

FRANK H. DAVIS,
Appellant,

vs.

KATIE WOLF and THEO. B. W. ZUMSTEIN,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 643

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

This is an appeal from a judgment of nil capiat entered upon a verdict of a jury in a trial wherein plaintiff sought to recover upon a promissory note dated July 20, 1916, for $1,085 due sixty days after date to the order of plaintiff and signed by the defendants.

Judgment by confession under power of attorney in the note was entered but vacated and defendants given leave to appear and defend. Subsequently upon trial before a jury a verdict was returned finding the issues against the plaintiff. A new trial was allowed and a second trial had, and again a verdict returned against the plaintiff. Judgment was entered thereon and plaintiff has appealed therefrom to this court.

The only questions involved are those of fact. By the introduction of the note plaintiff made a prima facie case and it devolved upon the defendants to establish their claim that the note was executed and delivered solely for the accommodation of the plaintiff and without consideration.

Plaintiff is a dentist and says he first met defendant Zumstein in the spring of 1916 when he called upon plaintiff for professional services; that they discussed a

proposition to purchase ten acres of land in Florida for $3,000, each to take five acres; Zumstein paid plaintiff $1,500 to cover his share of the transaction and received a receipt dated June 26, 1916, by which plaintiff agreed to procure a deed within sixty days or refund the money; that some time in July, 1916, plaintiff received a communication from Florida offering an additional ten acres at a lower price and after discussion he and Zumstein decided to submit an offer of about $2,000 for this. Zumstein did not have the money to pay for his one-half interest in the additional ten acres and informed plaintiff that if the deeds and abstract were sent to one of the banks in Chicago with a sight draft attached for the amount due, his money would be ready at that time; that plaintiff told Zumstein such an offer could not be made because plaintiff did not want the land and if the money was not ready when the sight draft appeared it would jeopardize the ten acres already bought and paid for, and he did not know Zumstein financially well enough to take the risk; that Zumstein must give absolute security that he would carry out his part of the contract when the deeds arrived at the bank; Zumstein said he would give plaintiff a judgment note signed by himself and a wealthy woman whom plaintiff knew; on that agreement plaintiff took the note in question and ordered the papers sent up from Florida; that when they arrived plaintiff notified Zumstein but was told that he did not have the money, with the result that plaintiff had to pay for Zumstein's share, who informed plaintiff that he could hold the note as security; that a receipt was dictated, signed by plaintiff and given to Zumstein, which was dated August 16, 1916, and recited the receipt from Zumstein of $1,500 and the note in question, and that when the note should be paid the proceeds.

with the $1,500, should constitute payment in full for ten acres of land in Florida and plaintiff would execute a deed therefor. Plaintiff's secretary corroborates the story of the receipt. Plaintiff paid the sight draft in August, 1916, and acquired title to the property. He says he repeatedly demanded payment of the note and tendered a deed to Zumstein for ten acres of the property and that he was ready to deliver such a deed upon payment of the note.

Zumstein's story tends to show that while he was being treated professionally by plaintiff, plaintiff was endeavoring to induce him to invest in Florida lands and on June 26th he did make an investment of $1,500 for five acres of land as testified to by the plaintiff; that after he had made this investment plaintiff continued in his attempt to have Zumstein make other purchases butwas told that defendant had already gone as far as he could and would make no further investment in Florida; that when he flatly refused to invest in any additional land plaintiff asked him to sign the note in question with an indorsement on it so that plaintiff could get the additional ten acres of land in the vicinity of the acres first purchased, promising Zumstein "some sort of profit out of it" for this accommodation; that Zumstein responded that he did not know whom to get as an indorser and plaintiff suggested that he get the defendant Katie Wolf, another patient of his and a friend of Zumstein; that plaintiff assured him that nothing would be done with the note because he could dispose of the property before the note matured; the note in question was given with that understanding; that the defendants received nothing for signing the note and Zumstein did not at that time or at any other time agree to join with the plaintiff in the purchase of any more

property in Florida; and that neither at the time of signing the note nor at any other time did he see or receive the receipt which plaintiff claims to have given him on August 16th. There was also testimony tending to show that shortly after August 26th defendant Zumstein, in company with C. C. Lawbaugh, an attorney, and John J. Ryan called upon plaintiff in his office and demanded the deed for the five acres purchased by Zumstein, and that plaintiff did not deliver it but promised in a few days he would have it; that at this time plaintiff said nothing about any receipt of August 16th. Zumstein is corroborated in this testimony by Lawbaugh and other witnesses and circumstances.

There have been two trials of this case in which the variant stories of the parties have been submitted and considered, and the jury in each trial has arrived at the conclusion that the greater weight of the evidence supported the version of the defendants. The credibility of the witnesses is virtually the sole matter to be determined, and the jury with its opportunity of seeing the witnesses upon the stand is much better qualified to pass upon this than is a court of review. There is nothing inherently impossible or improbable in Zumstein's version of the transaction and he is supported by apparently disinterested witnesses whose stories are consistent with each other and the circumstances, while a justifiable doubt was raised as to many particulars of plaintiff's testimony. However, it is not necessary for this court to determine definitely which of the parties is telling the truth. We are called upon to determine only whether the conclusion of the jury was manifestly against the weight of the evidence. It would unduly extend this opinion to narrate the many details which might properly have persuaded the jury

to its conclusion. Having these in mind, together with all the circumstances involved, we are unable to say that the jury clearly was in the wrong.

We find no adequate reason for disturbing the judgment and it is affirmed.

AFFIRMED.

Heldom and Dever, JJ., concur.

508 - 25769

JEANETTE DELSON,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY and CHICAGO CITY RAILWAY COMPANY,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

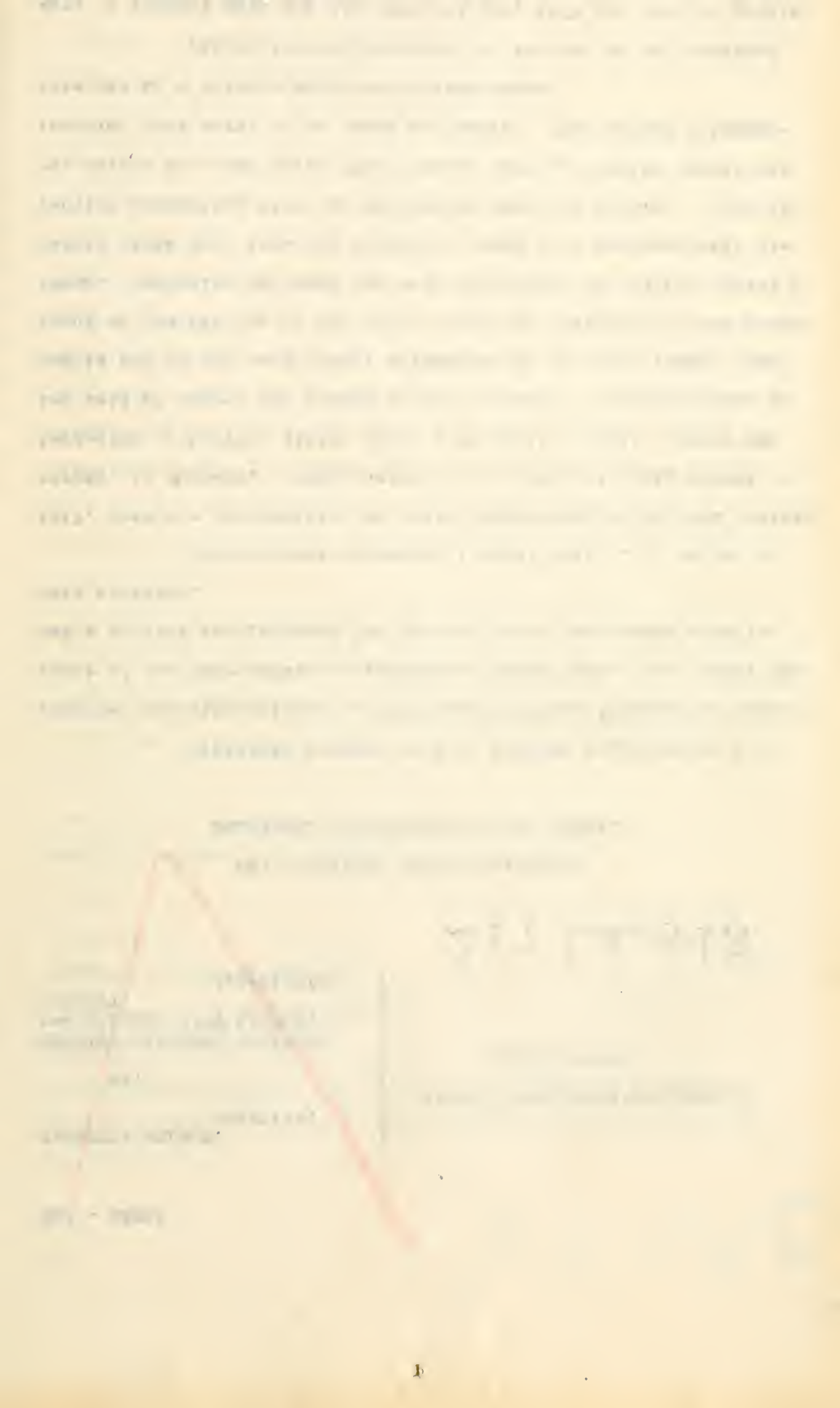
217 I.A. 643

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

Plaintiff brought suit to recover compensation for personal injuries alleged to have been received through the negligence of the defendants in operating a street car. Upon trial she had a verdict and judgment for $1,000, which defendants seek to have reversed.

The accident happened at about 7:45 p. m. on May 5, 1917, near the intersection of South Pedzie avenue and East Twelfth street, in Chicago. Pedzie avenue is a north and south street intersected by Twelfth street which runs east and west. There are two sets of street car tracks on each street. Southbound cars on Pedzie run on the west track, northbound on the east track; westbound on Twelfth run on the north track and eastbound on the south track. Beginning at about the east cross-walk on Twelfth street a curved track runs from the westbound track in a southwesterly direction connecting with the southbound track on Pedzie. Plaintiff was struck by a car which after coming west on Twelfth street was rounding this curve to go south on Pedzie. This street intersection was in a thickly populated neighborhood.

Plaintiff testified that on the day of the accident she, in company with her six year old boy, left her home in Austin



to visit her mother who resided on the east side of Kedzie just south of Twelfth street; that to reach this point she rode on one of defendants' street cars south to Twelfth. This car stopped on the north side of Twelfth street to allow passengers to alight. Plaintiff with her boy alighted and crossed over to the southwest corner; the streets were quite crowded and it was dark or dusk; before crossing to the east side of Kedzie she looked to the north to locate the southbound car from which she had just alighted; she saw it standing and people boarding it, and supposing that she had plenty of time to cross she took her child by the hand and started east on the cross-walk, when she was struck by a car which was coming around the curve; she was not well acquainted with the turning and curving of the cars at that point; had looked for a northbound car but saw none and did not see the car coming around the curve; there were a lot of noises there including the noise of street cars, but she could not distinguish any particular one.

Defendants produced only one witness who claimed to have seen the occurrence; he testified that the plaintiff was going from the east to the west side of the street at the time she was struck. His statement was considerably weakened by evidence showing conduct of doubtful propriety in connection with the case. The testimony of the motorman and other witnesses on behalf of the defendants does not necessarily conflict with the essential parts of plaintiff's story. Upon this record we cannot say that the jury was not justified in accepting plaintiff's version of the occurrence.

It is argued by defendants and supported by many citations that plaintiff was guilty of contributory negligence. Opinions in other cases are not of great assistance as the cir-

cumstances differ in each case. It cannot be said as a matter of law that plaintiff's conduct was negligence contributing to the accident.

Under the circumstances, where the plaintiff with a child in her care was at a corner with which she was not familiar, in the dusk, amid crowds of people and various noises and evidently attempting to guard against danger from street cars, the jury could properly find that when she started on the cross-walk and came into the path of a car coming unexpectedly around the curve she was not guilty of contributory negligence.

We are of the opinion that the jury properly found the defendants guilty of the negligence charged. Under the circumstances we do not see how the motorman could have failed to observe the plaintiff and child in time to avoid the accident if he had been maintaining a proper look out. The motorman testified that he did not see her at all until after the accident. The jury could rightly conclude that his failure to observe plaintiff was caused by his negligent conduct.

It is claimed that the damages are excessive. There was evidence tending to show that plaintiff was injured and bruised on many parts of her body; she had a large lump on the back of her head; was in the hospital two weeks, then taken to her mother's, where she remained about five weeks and was unable to walk all that time; left leg has a large "dent" in it; before the accident she did all her housework including laundering, scrubbing and cleaning, but since then has been unable to stand any exertion. The physician who treated her testified that she was suffering from shock and still suffered from palpitation of the heart and an enlarged and congested uterus; that $100 would be a reasonable

fee for his services. The amount of the award may be high, as the trial Judge seems to have said, but we do not think it can be reasonably called excessive. No errors are assigned with respect to rulings on evidence or instructions.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

160 - 25414

(1014a)

BELLE J. PIENKE,
Defendant in Error,

vs.

LAWRENCE T. GILMORE,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

217 I.A. 643

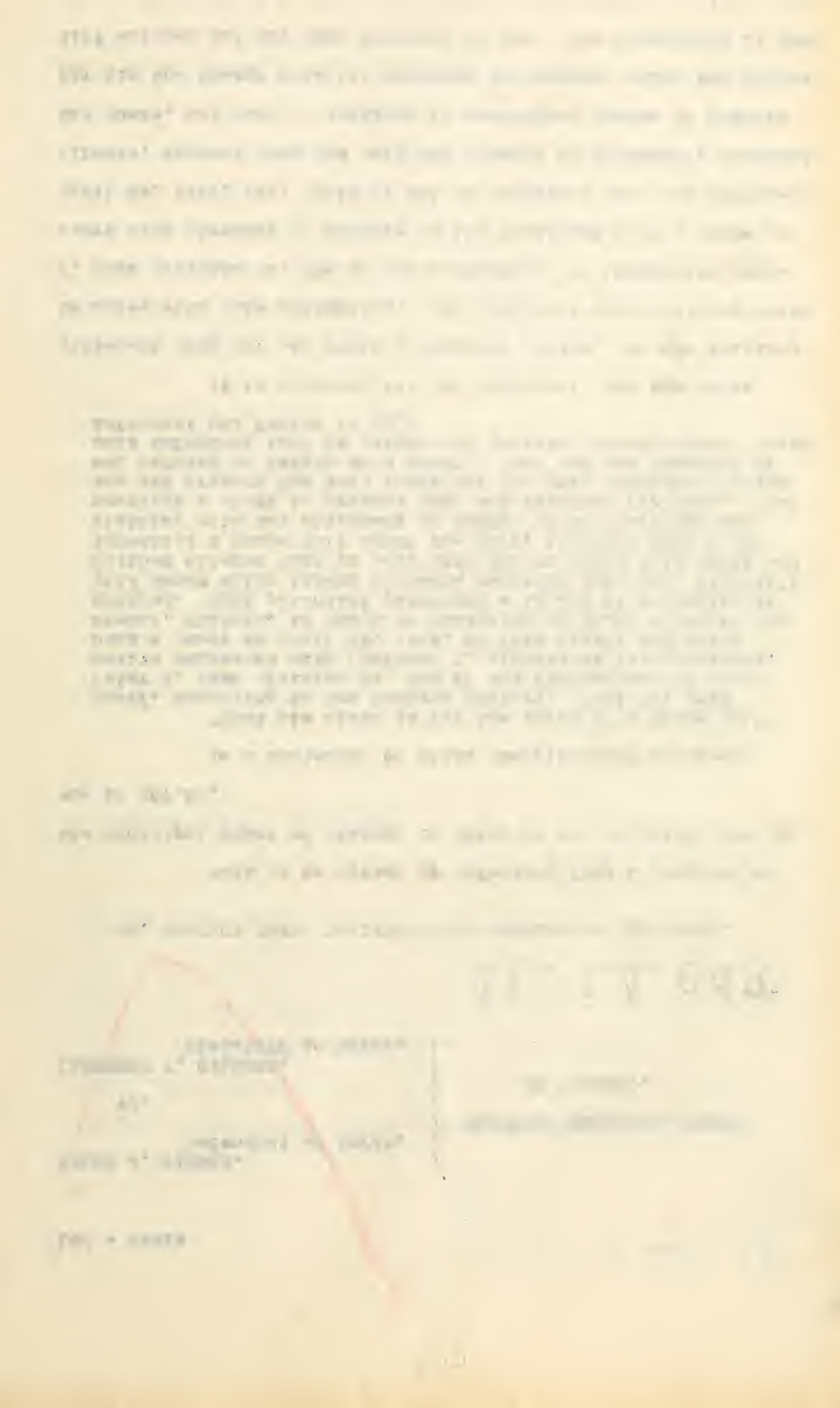
MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal court of Chicago in favor of the plaintiff for the sum of $67.50.

In a statement of claim the plaintiff alleged:

> "That his claim is for the value of a Taupe Wolf Scarf, amounting to One Hundred Dollars. That the said Peter H. Peck Division No. 394 of the Brotherhood of Locomotive Engineers with Lawrence T. Gilmore as its President, held a dance on April 23, 1919, at 78th street and Union avenue, Chicago, to which an admission of $1.00 a couple was charged. That plaintiff purchased a ticket of admission to said dance which ticket included wardrobe service. Plaintiff further alleges that on said date she attended said dance and deposited a Taupe Wolf Scarf she wore, together with other clothing with the attendant in charge of the wardrobe and received a check to present when she returned for same. That she did present the said check, but the said attendant failed and refused to return said scarf. That she had demanded of said defendant that he return and deliver up said scarf, which defendant has failed to do."

It is asserted for the defendant that the above statement does not set forth a cause of action. We are inclined to agree with this contention. The statement says that the Peter H. Peck Division No. 394 of the Brotherhood of Locomotive Engineers with Lawrence T. Gilmore as its President held a dance on April 23, 1919, etc. This is not an assertion that the defendant, Gilmore, against whom the suit was brought by plaintiff, operated the dance, nor that he received or authorized anyone to receive for him the charge made for checking the garment which the plaintiff alleged had not been returned to her. The allegation is that the Brotherhood of Locomotive Engineers with Gilmore as its presi-



dent operated the dance. This statement if true would not render Gilmore liable for the loss of the garment. It is not alleged that the defendant operated the dance either as a principal, a partner, or otherwise. The record does not disclose that a statement of claim was filed by the plaintiff which set forth that she had a legal claim against the defendant. It does not appear in the statement that any contractual relationship existed between the plaintiff and defendant. The plain purport of the statement is that the Brotherhood of Locomotive Engineers with Lawrence T. Gilmore as its president held the dance.

The statement of claim is insufficient to support a judgment against the defendant.

In the case of Lyons v. Kanter, 285 Ill. 336, the Supreme court said:

> "A statement of claim in actions of the fourth class in the Municipal court, which does not state a cause of action, does not require an answer from the defendant, and if a judgment by default is rendered upon such a statement, it may be reversed and such a statement of itself cannot sustain a judgment."

The statement of claim did not reasonably inform the defendant of the nature of the case he was called upon to defend. On the face of the statement the defendant was not required to make any defense to the action brought against him. Lyons v. Kanter, 210 Ill. App. 78. The defendant was not charged with a breach of a contract nor with the commission of a tort.

The judgment of the Municipal court will be reversed and judgment of nil capiat entered here.

REVERSED AND JUDGMENT OF NIL CAPIAT HERE.

McSurely, P. J., and Holdom, J., concur.

168 - 25422

(1015a)

C. F. KERN,
Appellee,

vs.

MARSHALL & HUNCHART MACHINERY COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 643[5]

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff recovered a judgment in the municipal court against the defendant for the sum of $257.46 and the defendant brings the case to this court by appeal for review.

The suit was based upon a contract which provided for the sale by defendant to plaintiff of a second-hand lathe for the sum of $1,400. Four hundred dollars was paid by the plaintiff to defendant at the time the contract was entered into, and it was agreed that the balance was to be paid by sight draft against the bill of lading. Delivery of the lathe was to be made f. o. b. Chicago. Some days after the execution of the contract the plaintiff directed defendant to ship the lathe to plaintiff at Cincinnati, which defendant did, but plaintiff refused to accept it. The defendant thereupon sent the machinery to Chicago, where it was sold for $1,400, the same sum that plaintiff agreed to pay for it.

The defendant by way of set-off insists that it was compelled to and did expend the sum of $142.54 in freight charges, cartage, cleaning, repairs, etc., in sending the lathe to and from Cincinnati and putting it in proper condition for sale in Chicago.

Plaintiff brought suit for the recovery of the $400 paid by him on the contract. The court allowed defendant

on its claim of set-off the sum of $142.54 and judgment was entered in favor of the plaintiff for the sum of $257.46, being the balance of the $400 which the court held was due plaintiff by defendant.

The defendant also claimed that in addition to the expenses incurred by it, it was entitled to receive from plaintiff a further sum of $280 on the theory that defendant was entitled to recover of plaintiff 20 per cent of the purchase price of the lathe, that sum being the usual and customary commission and reasonable charge in Chicago for the re-sale of second-hand machinery.

For the plaintiff it is insisted that he was not responsible to defendant for commission on the re-sale of the lathe and that the true measure of damages chargeable against plaintiff for the breach of the contract, aside from the damages for freight charges, etc., was the difference between the price which plaintiff agreed to pay for the lathe and its market price at the time it was resold in Chicago, and that, in that the evidence shows that the lathe was sold for precisely the same sum the plaintiff agreed to pay for it, the plaintiff cannot be held for any loss incurred by the defendant except to remunerate it for its freight charges, etc.

Paragraphs 1 and 2 of Section 64 of the Uniform Sales Act provides as follows:

> "(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract."

It is admitted that the lathe was sold in the Chicago market for precisely the same sum which the plaintiff agreed to pay for it. Assuming that the defendant in executing

the contract with the plaintiff was acting merely as an agent for the owner, the question arises whether it is entitled to recover $280 by way of commission which the evidence shows was the usual amount paid in the Chicago market to agents on the re-sale of second-hand machinery. The evidence shows that the defendant was not in fact, and it at no time assumed to be, agent for the plaintiff. It may be quite true that the commission loss to the defendant was the result of plaintiff's breach of the contract, but our attention has not been directed to any authority which holds, and the statute quoted does not provide, that the buyer of goods may be held legally responsible for this kind of loss. If the defendant was in fact the owner of the goods, it would be entitled to recover only the difference between the contract price and the market price. Bagley v. Findlay, 82 Ill. 524.

In the case of Esch v. Schager, No. 25111, (not yet reported) this court, speaking through Mr. Justice Holdom said:

> "The controversy arises upon the liability of defendant for damages to plaintiff arising from defendant's failure to take the limousine body and Victoria top at the prices agreed upon. The real question rests in the measure of damages, if any, plaintiff is entitled to recover under the law.
>
> It is admitted that the prices fixed for the Victoria top and limousine body are standard prices, and defendant contends that as there is no difference between the contract value and the market value of the limousine body and Victoria top, plaintiff has not suffered any damage recoverable in an action at law.
>
> Plaintiff contends that the goods were contemplated to be bought from a manufacturer from whom he would receive a commission in the amount of the judgment, and that as defendant failed to take and pay for the limousine body and Victoria top according to his agreement, this commission is the measure of his damages for defendant's breach of his contract. It is stipulated that unless plaintiff is entitled to a commission from defendant, under the agreement, of 20 per cent on $2400 for the limousine body and $400 for the Victoria top, plaintiff is not entitled to recover anything in this cause."

Notwithstanding the earnest contention of defendant in its reply brief, it is our opinion that the Esch case is directly in point.

In the Bagley case, supra, the measure of damages applicable where a purchaser of goods has committed a breach of a contract of sale is stated as follows:

> "First. That the vendor may store them for the vendee, give him notice that he has done so, and then recover the full contract price;
> Second. He may keep the goods and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery; and
> Third. He may, upon notice to the vendee, proceed to sell the goods to the best advantage and recover from the vendee the loss if they fail to bring the contract price."

It is insisted that in the present case the defendant has elected to look for its remedy under the third paragraph above quoted. Even so, under the authority of the Bagley case, as stated in that paragraph, it was defendant's privilege to sell the lathe to the best advantage and to recover from the plaintiff the loss if it failed to bring the contract price. The natural inference is that if the goods did bring the contract price, then loss did not result from the breach of the contract. The evidence shows that the lathe when sold in Chicago did not fail to bring the contract price.

We assume that the defendant, the seller of the lathe, was in fact its owner. Defendant insists that it is in the business of selling machinery. Counsel for defendant say: "What is it, then, that the appellant has sold which the lawyer likewise sells? It is service, - time, energy and endeavor. That was what was sold in this case." We do not so understand it. The defendant was not engaged in selling a service. The breach of the contract was the result of a failure on the part of the plaintiff to accept a commodity or thing that the defendant had agreed to sell and deliver to plaintiff. The contract which was breached in no sense required the performance of a service by defendant for the plaintiff.

It is our opinion that damages such as are claimed by the defendant are not allowable either under the common law or the quoted statutes; that the case is in fact, as stated in the Nach case, one of *damnum absque injuria*, and that even if it be conceded that defendant has sustained loss as alleged by reason of the failure of the plaintiff to comply with the terms of the contract, the loss is one which cannot under the law be charged to the plaintiff. If the defendant acted as agent in the re-sale of the lathe at Chicago, its fair commission is chargeable against the owner. If it did not act as such agent but re-sold the lathe as owner thereof, it is only permitted to charge the plaintiff with the actual loss sustained by it as the result of the breach of the contract; and this loss is the difference between the contract price and the price at which the lathe was sold and such reasonable expenses as were incurred by defendant in its re-sale.

The judgment of the Municipal court will therefore be affirmed.

AFFIRMED.

McSurely, P. J., and Holdom, J., concur.

180 - 25435

1016a

ELIZABETH McGOUGH, Administratrix of the Estate of MICHAEL McGOUGH, Deceased,
Appellee,

vs.

CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

217 I.A. 644

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

A judgment was entered in the Circuit court of Cook County against the defendant, Chicago and Western Indiana Railroad Company, a corporation, in a suit brought by the administratrix of the estate of Michael McGough, deceased.

The evidence admitted on the trial shows that plaintiff's intestate was assaulted and killed by one Michelletti, who at the time was in the employ of the defendant as a watchman along its right of way. The case was tried before a jury which rendered a verdict in favor of the plaintiff for the sum of $5000. Judgment was entered thereon and the defendant seeks by this appeal to reverse the judgment.

It is insisted for the defendant that the judgment should be reversed for the reason that the record contains no proof that the assault on plaintiff's intestate was committed while the defendant's servant Michelletti was engaged in the furtherance of defendant's business.

On December 7, 1917, plaintiff's intestate was employed by the City of Chicago as a police patrolman. Deceased's body was found about two o'clock in the morning of that day lying near the center of Wallace street, about 150 feet north of 81st street; at the same time there was discovered a small cart which contained a quarter ton of coal standing in Wallace street near the corner of

81st street. Michelletti, defendant's watchman, was employed on the right of way of defendant south of 83rd street. The deceased met Michelleti about two o'clock in the morning of the day in question as he, Michelletti, was pushing a cart loaded with coal along Wallace street. Micheletti shot and killed deceased as deceased attempted to place him under arrest.

At the close of plaintiff's case the defendant moved the court to instruct the jury to return a verdict for the defendant. This motion was denied and the case went to the jury on the plaintiff's evidence alone.

On the facts of the case as shown by the evidence introduced on behalf of plaintiff, the defendant cannot be held liable for the death of deceased; the admitted facts in the case show that Michelletti's act was not committed within the scope of his employment or in the furtherance of his employer's business. There can be no doubt about the legal principles applicable to the case. Where a servant commits an unlawful and unauthorized act beyond the scope of his employment and without any direction so to do, or knowledge thereof on the part of his employer, such employer cannot be held liable in damages for injuries resulting from such unlawful and unauthorized conduct on the part of the employee. The authorities in support of this principle are numerous. There is, as contended by counsel for plaintiff, a line of authorities to the effect that where an act complained of is not the act of a servant alone, but involves also the conduct of the employer in employing and retaining in his employ a man whom the employer knew, or in the exercise of reasonable care should have known, would be likely to commit vicious and wrongful acts, that the employer thereby becomes a party to the act complained of and will be held liable therefor. Western Stone Co. v. Whalen, 151 Ill. 472; it is said that this principle is invocable in cases

where an act complained of is committed by a servant outside the scope of his employment.

In the case of I. C. R. R. Co. v. King, 179 Ill. 91, relied upon by plaintiff, a trespasser on a railroad train was injured by the wrongful act of a brakeman who wilfully dragged the trespasser from a moving train. This case is easily distinguishable from the case at bar. In the King case the act was committed while the servant was employed on the train within the scope of his authority. It is true that the evidence showed that the brakeman was not directed or authorized to wilfully and intentionally injure the plaintiff, but the wrongful act was committed while the servant was engaged in and about the business and work of the master. In the present case the only relationship which the evidence shows that the act complained of bore to the defendant or its business was that it was committed by one of its employes. It was not the result of an attempt on the part of Michelletti to protect, by a wilful trespass or otherwise, the property of his employer. The act was committed on a public street. Defendant's railroad tracks near the place where deceased's body was found are elevated and it is admitted that deceased met his death while attempting to place Michelletti under arrest, presumably for stealing the coal which was found in the cart.

The evidence tended to show that Michelletti prior to the time of the shooting had a reputation for being quarrelsome; that he had displayed a gun at numerous times during the course of his work for defendant, and one witness testified that he had seen Michelletti take the defendant's coal on other occasions. But whatever Michelletti's reputation or his true character may have been, the defendant was no more responsible for the death of deceased than if it had occurred while Michelletti was in the act of committing a burglary upon the premises of a private citizen.

In the case of Johanson v. The William Johnston Printing Company, 265 Ill. 236, the Supreme court said:

> "Outside the scope of his employment the servant is as much a stranger to his master as any third person, and an act of the servant not done in the execution of services for which he was engaged cannot be regarded as the act of the master. If the servant steps aside from his master's business for some purpose wholly disconnected with his employment, the relation of master and servant is suspended. The act of the servant during such interval is not to be charged to his master. This doctrine is established by substantially all of the authorities."

In the case of Heelan v. Guggenheim, 210 Ill. App. 1, the court said:

> "That in order to make a master liable in tort for the acts of his servant, it must be made to appear that the servant at the time of the alleged tortious act was acting within the scope of his employment is elementary and needs no citation of authority."

The evidence shows that the wrongful act was committed while both the deceased and Michelletti were off the right-of-way of defendant. Michelletti was not in the performance of any duty imposed upon him by his employment for defendant; on the contrary, he was apparently engaged in a criminal act when deceased attempted to place him under arrest.

It would be extending the rule very far indeed to hold, under facts such as exist in the present case, that an employer is liable for wrongful acts of an employee wholly disconnected from the services which the employee is engaged to perform, and this is so even in a case where the employer has negligently employed an incompetent or vicious person.

The judgment of the Circuit court will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

180 - 25435 FINDING OF FACT.

We find as an ultimate fact in this case that Michelletti, defendant's employee, did not assault and kill deceased while he, Michelletti, was engaged in the course of his employment for defendant or in furtherance of defendant's business.

224 - 25481

1017a

THE FAIR, a corporation,
Appellee,

vs.

CHARLES DOWNING and MRS.
CHARLES DOWNING.
On Appeal of CHARLES DOWNING,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

217 I.A. 644

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment of the Municipal court in favor of the plaintiff.

Suit was brought by the plaintiff against the defendant, Charles Downing, and Mrs. Charles Downing, to recover the sum of $55.60, being a balance due, as alleged, on a sale of certain articles of household furniture. The evidence shows that the goods were purchased by Mrs. Charles Downing on the installment plan and that she gave a chattel mortgage thereon to secure the payment thereof.

It was alleged in the statement of claim that the goods constituted family expenses under Section 15, chap. 68, Revised Statutes of Illinois, for payment of which husband and wife are liable jointly and severally.

Charles Downing testified that he was the husband of Mrs. Charles Downing, who died April 19, 1918; that prior to her death his wife had no independent means of her own.

The goods when purchased were charged to the account of Charles Downing and Mrs. Charles Downing, and by a receipt introduced in evidence it appears that they were delivered to No. 6815 Emerald avenue, the home of Charles Downing and his wife; this receipt bears the signature of Mrs. Charles Downing. The record shows that a paper was handed to Charles Downing on the witness stand and he was asked the question, "Is that the signature

of your wife?" and he answered, "No sir." He was further asked, "Do you know your wife's signature?" and he answered, "Yes." It does not appear from the record what paper was handed to the witness; it might be assumed that it was the receipt in question, but it does not so appear.

Charles Downing's testimony is, "I never received any goods or the furniture in question from the Fair to my knowledge. I do not know if my wife did." . It was not legally necessary that Charles Downing should have knowledge of the receipt of the goods at his home. The receipt in evidence was some proof of the fact that the goods were delivered at No. 6815 Emerald avenue, Downing's home, and his testimony that he never received the goods to his knowledge was under the circumstances unimpressive.

It is shown by Downing's testimony that he sold most of his furniture a short time after his wife's death. The evidence for the plaintiff is not as strong as it might be, but if it be true, as asserted, that the goods were delivered at Downing's home and were there receipted for by his wife, the property became a family expense and under the statute Charles Downing was liable therefor.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

McSurely, P. J., and Holdom, J., concur.

249 - 25507

(1018a)

MAYME EMONSON,
Appellee,
vs.
JESSE BINGA,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

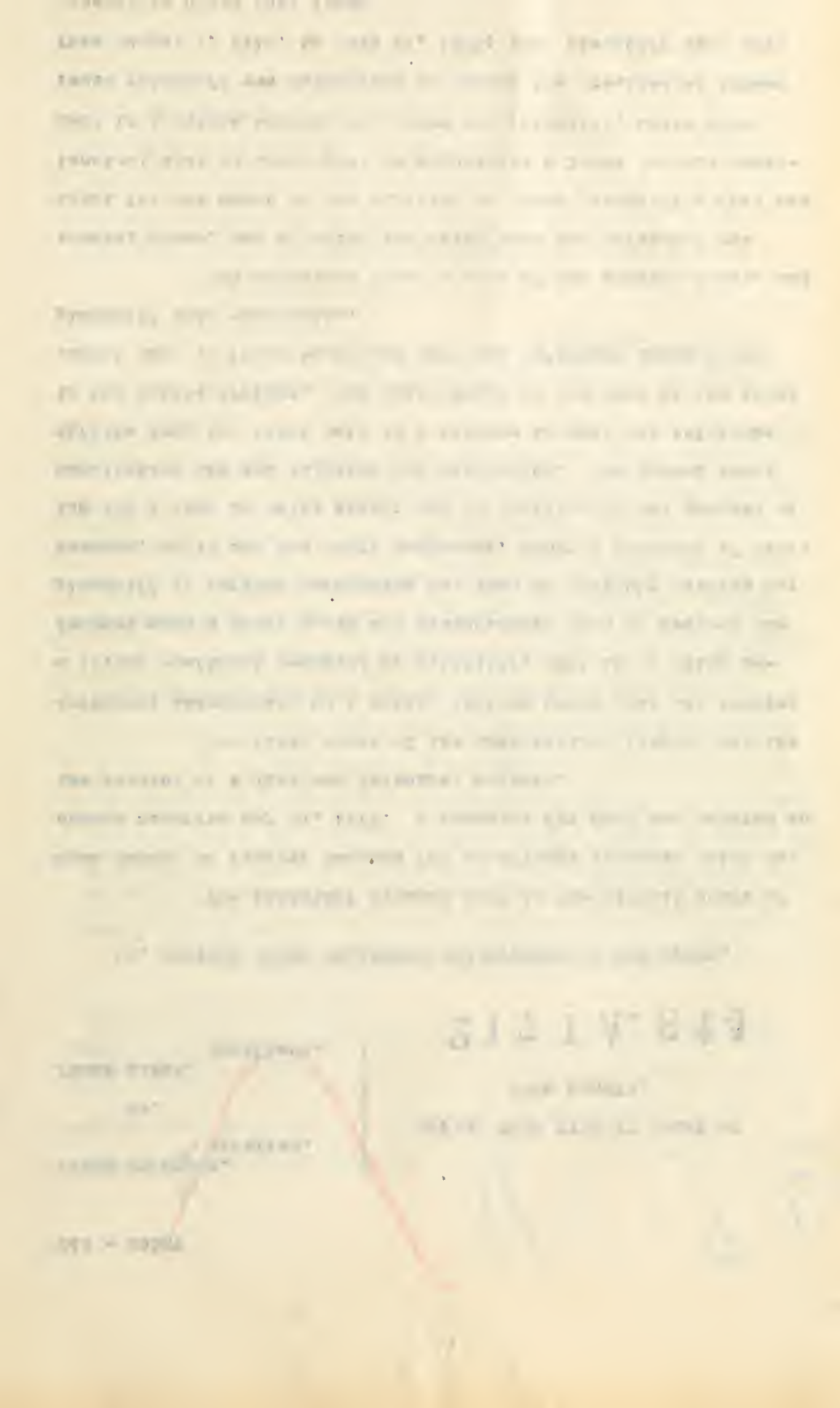
217 I.A. 644[3]

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff brought suit in the Circuit court of Cook County to recover damages for an alleged trespass which she claims occurred May 21, 1917. A judgment for $500 was entered on the verdict of a jury and defendant appeals.

The first count of the declaration alleges that the defendant, accompanied by a police officer, broke into and entered a living apartment occupied by plaintiff; that in so doing defendant made a great noise and disturbance; that he accused the plaintiff of serious wrongdoing and that he forcibly entered her bedroom, while she was there undressed, under a pretense of looking for a leak in water pipes; but in reality for the purpose of humiliating her and injuring her reputation. The second count differs from the first only in a failure to make any reference to the police officer. The third count is the same as the first except that it fails to allege that the defendant charged the plaintiff with wrongdoing.

The defendant filed a plea of the general issue, and special pleas, one of which set forth that the defendant was agent for the owner of the building in which plaintiff's flat was located; that as such agent he negotiated a lease for the apartment in question between the owner and plaintiff, under which lease plaintiff was authorized to occupy the premises as lessee from August 1, 1916, to July 31, 1917; that plaintiff went into possession under this lease.



The lease contained, among other provisions, the following:

> "To allow the party of the first part free access to the premises hereby leased for the purpose of examining or exhibiting the same, or to make needful repairs to, or alterations of said premises, which said first party may see fit to make;
>
> "The lessee hereby expressly waives all right or rights to any notice or demand under any statute of this state relative to forcible entry and detainer, or landlord and tenant and agrees that the lessor, his agent or assigns may begin suit for possession or rent without notice or demand. And notice of election to terminate this lease, or notice of any election hereunder is hereby expressly waived."

The plaintiff testified that the defendant, accompanied by a police officer forcibly broke into her apartment on the 21st day of May, 1917; that no rent had been paid for the use of the premises for that month; that after the two men had entered the apartment the police officer went to her bedroom and inquired, "Where is that man that was in here?" that the officer also stated, "There is a leak, there is a leak and the plumber must find it;" that at this time Ringa, the defendant, was standing about 15 feet away in a room opening off the bedroom.

The plaintiff in direct examination testified as follows:

> "Q. Had there been a leak? A. Never.
> Q. Had a plumber ever been up there to look for leaks?
> A. Yes, he had the week before because it was an old building and all the pipes was under the floor and they were exposed and they were leaking, they were all leaking."

The testimony of plaintiff, her husband, and another witness is to the effect that the lock in the outer door of the apartment was forcibly broken at the time the defendant and the officer entered the premises. Ringa, the defendant, testified that he had never seen the plaintiff except on the occasion when she signed the lease on July 22, 1916; that on May 21, 1917, and before that date he had complaints from other tenants about the plumbing in the building; that he went into the apartment "under

the Edmonson flat and found the water running continuously; the place was flooded, plastering part way down;" that on May 21, 1917, he went to the building and found a plumber there; that he went into the flat below the plaintiff's and found that the water was running very freely from the flat above; that he went to the back door of plaintiff's apartment and rapped thereon; that there was no response and that he didn't hear any movement inside of the apartment; that he went to the front door and rapped but received no response; that he then went to the police station and procured an officer who went with the plumber to the Edmonson flat; that the defendant stayed in the flat below and at no time entered plaintiff's apartment; that he gave no authority of any kind to the officer to enter plaintiff's apartment and that he did not know he was going to enter it; that he and the plumber both rapped on the back door and were unable to gain admission to plaintiff's apartment.

On cross-examination the defendant stated that he explained the condition of things as they were to the police lieutenant, who sent an officer back with him to the building; that whatever instructions the officer had received had been obtained from the lieutenant.

Caldwell, the plumber, testifying on behalf of defendant, stated that there was a leak in the water pipes in plaintiff's apartment prior to May 21st; that the water was running all the way to the first floor; that this condition had lasted for more than a week and had caused plastering to fall; that he got to the premises at 8 o'clock in the morning for the purpose of repairing the pipes; that he knocked on the door of plaintiff's apartment and could get no reply and that he called several times. This witness testified that he could hear someone walking in the apartment, but could get no response to his calling or knocking at the door.

He also testified that he was with the officer when he, the officer, finally broke into the flat but that this was not done until the officer had knocked on the door and had called out that he was an officer and desired to gain admission to the premises.

Lucy Newsom, who occupied the apartment under that occupied by the plaintiff, testified as to the leaking of water, "down through our flat from the flat above;" that she had informed the plaintiff of this condition and had told her that the plumber had been there before and that plaintiff said she would let him in the next time. She further stated, "I know the plumber and I heard him go up to the Edmonson flat and knock. The leak continued for about a week. I called up Mr. Binga's office every day." This witness also testified that at the time the officer and the plumber entered the apartment occupied by the plaintiff, the defendant was in the witness' apartment; that after the door in plaintiff's apartment was opened, the plumber went in and stopped the leak and the officer went away. A witness who lived in the apartment above that occupied by the plaintiff testified that he heard the police officer knock on the door; that he "saw the plumber after they had gotten into the flat."

On the whole evidence we think the judgment of the trial court should be reversed. Only one witness, the plaintiff, herself, who seems to be contradicted in almost every particular by several witnesses, testified that Binga, the defendant, was in the flat at the time the alleged trespass was committed. The evidence is overwhelming that Binga's presence in the building at the time was due to the defective condition of the water pipes, which caused water to flow continuously from the apartment occupied by the plaintiff down through the building causing serious damage to the property which it was the business of the defendant to protect. The terms of the lease gave defendant a

legal right to enter the premises for the purpose of making repairs, and we think the evidence shows without question that that was his sole purpose at the building on May 21, 1917. The denial by plaintiff of the fact that the pipes were leaking in her flat is not supported by the preponderance of the evidence, which shows that the plumber had attempted on several occasions to gain access to the flat for the purpose of making repairs which would protect the property and the tenants therein. The building was concededly an old one and the plaintiff flatly contradicted herself with reference to whether there were in fact any leaks in the water pipes in the apartment occupied by her. On direct examination she first stated that there never had been any leaks in the water pipes in her apartment and in answer to the next question put to her after she had made this statement she affirmed that "it was an old building and all the pipes was under the floor and they were exposed and they were leaking, they were all leaking."

The evidence shows that the defendant and others had made reasonable efforts to gain access to plaintiff's apartment without breaking in the door. Under the circumstances shown by the record an emergency existed which called upon the defendant to act promptly. So far as the actual conduct of defendant is concerned, even if the testimony of plaintiff be true, his only act was to stand in a room adjoining that in which the plaintiff was at the time the officer talked with her. There is much reason to doubt the truth of the story of the plaintiff concerning her conversation with the police officer.

On the whole evidence we are convinced that the defendant neither intended to, nor that he did, commit any trespass such as is charged in plaintiff's declaration. Defendant had a legal right to enter the premises to make repairs and in so doing

he had a further right to use as much force as was reasonably necessary to gain access thereto. Fabri v. Bryan, 60 Ill. 182.

The evidence does not show that any ill feeling existed between the plaintiff and defendant, and there was no reason, so far as the evidence shows, why the defendant should wish to impose any unnecessary hardship upon her. There can be no doubt about the defective condition of the water pipes in her apartment, and she had an opportunity, if she saw fit to exercise it, to allow the plumber and the police officer to enter the apartment without compelling them to do so forcibly. We think the defendant acted in good faith, without malice, and with reasonable prudence in the exercise of a right reserved under the lease. Lister v. Day, 35 Ill. App. 248.

The judgment of the Circuit court will be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

McSurely, P. J., and Holdom, J., concur.

249 - 25507

FINDING OF FACTS.

We find as an ultimate fact in the case that the defendant, Jesse Binga, did not enter the living apartment occupied by the plaintiff and that he did not commit the acts and trespasses alleged against him in the plaintiff's declaration.

277 - 25535

SAM FLUG,
Appellee,

vs.

JOSHUA STEIN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

217 I.A. 644

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant seeks by this appeal to reverse a judgment for $500 and costs of suit entered against him in the Municipal court of Chicago.

The plaintiff on January 30, 1919, brought a replevin suit against the defendant to obtain possession of a stock certificate for five shares of the capital stock of the State Commercial & Savings Bank which plaintiff alleged the defendant on October 2, 1918, wrongfully took and detained from him.

The certificate was not obtained from defendant under the writ and the action proceeded as an action in trover for the value of the property alleged to have been wrongfully detained by him. The case was tried by the court without a jury, and defendant was found guilty of having maliciously, etc., converted the certificate of stock to his own use and plaintiff's damages were assessed at the sum of $500.

It seems to be conceded that one Joseph Biatta obtained the certificate of stock from defendant by fraudulently delivering to him in payment therefor a worthless check. There is some testimony in the record which if believed might warrant a conclusion that the plaintiff was not a bona fide holder of the certificate, but there is other evidence, which the trial Judge evidently did believe, to the effect that the plaintiff received

the certificate without any notice of the fraud which had been imposed upon the defendant. The evidence touching this question was for the trial Judge, and we cannot say that his conclusion thereon was erroneous.

Some time after the plaintiff received the certificate of stock from Biatta he called at the State Commercial & Savings Bank, of which the defendant was at the time president, and inquired of defendant concerning the value of the stock. The defendant asserting that plaintiff had no right or title to the certificate took possession of it and refused to return it to the plaintiff.

It is insisted for the defendant that the record contains no evidence of the value of the certificate of stock, the alleged conversion of which constituted a basis for the action. There is, however, some evidence in the record, aside from what appeared upon the face of the certificate, touching the value of the stock. An attorney for plaintiff testified that the defendant had told him about three months before the present cause of action arose that the stock was worth $150 a share.

It has been held that as against a wrongdoer the face value of the stock may be taken as a proper measure of damages for its wrongful conversion. Barth v. Union National Bank, 67 Ill. App. 132. But whatever the law of this question may be, we are inclined to the view that there is some evidence in the record which otherwise tends to prove the value of the stock. The defendant, at one time president of the bank, was placed upon the witness stand by plaintiff and interrogated as to his knowledge of the value of the stock. His testimony in this particular was not impressive; he denied having any knowledge as to the value of the stock and he was unable to state whether it had any value at the time the suit was brought. Under the circumstances

we are unable to say that the court was in error as to its conclusions concerning the value of the stock.

The defendant, as the result of the fraud imposed upon him, voluntarily parted with the certificate of stock. He saw fit to accept in payment therefor a check which subsequently was found to be worthless. He could, had he seen fit to take certain precautions, have prevented the imposition of the fraud, as the result of which Biatta procured possession of the certificate and, according to the testimony of plaintiff, thereafter transferred it to an innocent holder.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

McSurely, P. J., and Holdom, J., concur.

295 - 25553

1020a

DR. J. V. NYSTROM,
Appellee,

vs.

C. A. VALENTIN and
C. A. LOFGREN,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

217 I.A. 644[5]

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

A judgment by confession was entered in the Municipal court of Chicago on April 15, 1919, against the defendants for $709.81. May 10, 1919, an order was entered of record in the cause opening the judgment and permitting the defendants to file affidavits of merits to the statement of claim upon which the judgment was entered. Affidavits of merits were filed by both defendants.

Upon a hearing of the issues the trial court on May 16, 1919, found "that at the date of the rendition of judgment by confession in this cause there was due from the defendants, C. A. Vallentin and C. A. Lofgren, to the plaintiff the sum of Seven Hundred Nine and 81/100 Dollars." The record shows that the judgment was entered upon a judgment note dated June 8, 1909, and signed by both defendants as makers; that the defendants delivered to plaintiff a certain water rights contract of the Orlando Canal and Reservoir Company as security for the payment of the note.

The defendant Lofgren's affidavit of merits sets forth that on March , 1917, plaintiff asked Lofgren to pay the note, at which time he, defendant, said that he was willing and ready to pay the note provided plaintiff would return the contract; that plaintiff did not in fact return the contract to defendant.

The defendant Valbentin's affidavit of merits was substantially the same as Lofgren's except that it was further alleged therein that on one occasion plaintiff had requested this defendant to execute an assignment of the water rights contract and that plaintiff said that if he, Vallentin, would assign the contract to him, he, plaintiff, would be able to sell it and that he would cancel the note in question and also another note which the affiant had executed and would pay the affiant any surplus arising from the sale of the contract; that at this time the affiant executed the said assignment, and that the plaintiff said that the note upon which judgment in the present case was entered was paid.

The evidence tends to prove that both defendants were makers of the note in question and that at the time of its execution and delivery a contract for two water rights was delivered to the plaintiff. Vallentin testified that about two years after the delivery of the note the plaintiff said to him: "You make that assignment and if I do anything with that contract and sell that contract, I will settle that account and pay you the difference that the contract calls for more than the note;" that he, Vallentin, then assigned the contract to plaintiff. The contract had to do with a certain irrigation scheme in Colorado in which Vallentin was interested. He gave it as his recollection that the water rights contract was put up as collateral security for the payment of the note. Lofgren testified that he signed the note in question and that Rhenstrom delivered to Vallentin a check for $500; that the contract was put up by him, Lofgren, and that Vallentin signed the note as the result of plaintiff's statement that he desired two signatures to the note.

Mr. Rhenstrom, the plaintiff, testified that the water rights contract, some years prior to the trial, was delivered by

him at the request of defendants to a Mr. Johnson and that he, plaintiff, never knew what became of it thereafter, although he supposed it had been sent to Colorado; that he never sold the contract nor had ever made any money out of it. He denied the testimony of both Lofgren and Vallentin so far as it related to alleged statements made by the witness. Mr. Johnson, an attorney who received the contract from plaintiff, testified that the contract had been turned over to him by Rehnstrom; that the "Canal Company's" business and affairs were placed in the hands of a receiver who sold the company's property rights to pay certain receiver's certificates; that the contract held by the plaintiff was, with other contracts, cut out by foreclosure; that nothing was ever realized on the contract and that it had no value.

The evidence abundantly shows that the note was executed by the defendants as makers; that it has not been paid and that the collateral security given to secure its payment was worthless. While there is a direct contradiction in the evidence as to certain conversations between the parties, there is sufficient evidence in the record to warrant the finding and judgment of the trial court. The evidence satisfactorily shows that the contract which was held as security for the payment of the note was delivered to Johnson at the request of the defendants.

The judgment of the trial court is not erroneous and it will therefore be affirmed.

AFFIRMED.

McSurely, P. J., and Holdom, J., concur.

370 - 25630

(1021a)

ADOLPH ZEIGLER,
Appellee,

vs.

E. ROBERT RIEDEL,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

217 I.A. 645

MR. JUSTICE DEVEN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of the Superior court entered in favor of the plaintiff for the sum of $400.

The first count of the declaration filed in the cause alleges that defendant so carelessly shot and discharged a loaded rifle that he "then and there shot and wounded the plaintiff while driving on Addison street, as aforesaid." The second, third and fourth counts charge that while plaintiff was driving in an automobile on Addison street in Chicago the defendant in violation of certain ordinances of the City of Chicago shot "a rifle loaded with powder and bullets in such manner that he shot and wounded the plaintiff."

It is insisted on behalf of the defendant that the evidence introduced on the trial was not sufficient to warrant the verdict and judgment against him. The evidence shows that the plaintiff about 6:30 o'clock in the evening of May 5, 1916, was driving an automobile west on the north side of Addison street, an east and west street, in the City of Chicago, when he suddenly felt a pain and discovered that he had been shot. The defendant, Riedel's, residence was located on the south side of Addison street, about 150 feet east of the point where the plaintiff was shot. Two witnesses testified that at or about the time plaintiff was shot they saw the defendant in an alley at the rear of his residence with a rifle in his hands. One of the witnesses, Mrs. Nelson, testified that she was in

her home which was situated 25 feet from that of defendant's, when she heard a shot; that she looked out and saw Riedel "come in his alley gate with a rifle in his hands." The testimony of Miss Lach is substantially the same as that given by Mrs. Nelson.

Defendant, when on the witness stand, admitted that about the time plaintiff was injured he, defendant, was in the alley and he said:

> "I got the rifle and some bird shot, and put the bird shot shell in the rifle; by that time the rat was gone. I went out the back gate and walked to my neighbor's barn and stood five or ten minutes, waiting for the rat. The rat then stuck his head out under the structure and I shot at him with the scattered shot. I then walked back to my yard and looked over and saw two automobiles, and then two men came walking across the prairie and up to the fence on the west side of my lot, back of my house. I had my rifle in my hand. One of the men said, 'You shot a man.' I says, 'You are crazy. I could not shoot a man with scattered shot.' Scattered shot is little bit of shot, about as big as a pinhead."

The evidence offered on behalf of the plaintiff, would, if taken by itself, authorize the verdict against the defendant even though no one saw the defendant fire his rifle in such manner as would cause the injury to plaintiff. The evidence, however, introduced on behalf of the defendant preponderates so overwhelmingly over plaintiff's theory of the case that the judgment of the trial court must be reversed.

Six witnesses testifying for the defendant say that at the time plaintiff was shot two boys riding on bicycles and armed with rifles were seen shooting at automobiles passing on Addison street. It is shown that defendant was not one of the two boys. Elizabeth Hoffman testified as follows:

> "About 6:30 in the evening of May 5, 1916, I saw two boys on wheels shooting at autos on Addison avenue. They had been shooting around there for several days before, and then that same evening. Was just coming from the house and going down to the corner, when I seen two boys on wheels, and two automobiles coming from east going west, and those two boys were behind them and I heard a shot, and then I heard a scream; was then at the corner of Central Park avenue and

Addison. I was going up to the automobiles to see who it was, but they kept going. They stood for a long time up at the corner and then moved away. The boys then rode west on Addison avenue."

Elizabeth Nevara testified that she saw the two boys riding on bicycles on Addison avenue; that they had rifles and were shooting at automobile tires and had been so engaged for about two hours; that "they were riding up and down, and when an automobile came past they would shoot." When asked if the boys had hit anything she answered, "I only heard when the ladies screamed." Sophia Smith's testimony is substantially the same. She said, "They were aiming at the tires, at the back of automobiles, and all of a sudden I heard a woman scream in one of the automobiles; then these boys ran west on Addison street." This witness also said that she saw an automobile stop after the boys had run west on Addison street and had seen "them carry a boy out of that automobile." Clara Lewandowski and her husband also testified that they saw the boys shooting at automobiles about 6:30 o'clock on the evening in question. The testimony of Peter Graff was to the same effect. All of the witnesses who testified for defendant lived in the immediate vicinity where the shooting took place and their testimony as it appears in the abstract is positive and unqualified that at or about the time the plaintiff was injured the two boys were shooting at the tires of passing automobiles.

Police officers who talked with defendant shortly after the shooting testified that he, defendant, denied shooting plaintiff and that he said he had been shooting at a rat in the yard; that he "shot scattered shot" and not a bullet; that after this conversation they went into defendant's home where they found two boxes of cartridges, one of scattered shot and the other of leaden bullets; that several cartridges were missing from the box of bullets.

The record contains no positive or direct evidence that the defendant injured the plaintiff. The six witnesses who testified for the defendant were, so far as the record shows, disinterested, and their testimony is of so positive a character as to leave no doubt that the injuries plaintiff sustained were not caused by any act of the defendant, but by the unlawful conduct of the two boys who, the evidence shows, were at the time the shooting took place endeavoring to explode tires of passing automobiles by shooting at them. The fact that at about this time the defendant happened to be shooting at a rat in the alley back of his home is perhaps an unusual circumstance, but under evidence so strong and satisfactory as that introduced for the defendant it must be held to be a mere coincidence.

The judgment of the Superior Court will therefore be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

McSurely, P. J., and Holdom, J., concur.

370 - 25630 FINDING OF FACT.

We find as an ultimate fact in the case that the defendant was not guilty of any unlawful or negligent act which caused the injury to plaintiff.

379 - 25639

10222

MAX MICKEL et al.,
Appellees,

vs.

EDWARD J. LEINHARTZ,
Appellant.

APPEAL FROM SUPERIOR COURT OF
COOK COUNTY.

217 I.A. 645

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior court directing a receiver to pay to Max Mickel, complainant, the sum of $1034.82 with interest thereon in full payment of a deficiency due Mickel on certain notes and a trust deed foreclosed in the cause, and to pay a balance of $273.36 in the hands of the receiver to petitioner, appellant here.

March 29, 1917, the complainant filed a bill to foreclose a trust deed upon real estate in Chicago. A receiver was appointed to collect the rents and profits of the property, who during his administration collected a total sum of $4997.30.

But one principal question is in controversy between the parties, and that is whether the Chancellor erred in ordering the receiver to apply a part of a balance of the rents and profits in his hands in payment of a deficiency which was decreed to be due complainant. The note and trust deed foreclosed were executed by Charles D. Stuart and Pearl P. Stuart, his wife. While the bill was pending Charles D. Stuart died. Stuart and his wife held title to the property in question as joint tenants; the title of Charles D. Stuart, therefore, vested in Pearl P. Stuart upon his death. The trust deed foreclosed was subject to a prior mortgage of $9,000. The cause was referred to a master, who reported his findings and conclusions to the court.

It appears from the report of the master and the decree of the court that Pearl P. Stuart had failed to pay interest

on her indebtedness to complainant and that he, in order to protect his lien, had been compelled to pay money due on the first mortgage, as well as taxes, special assessments and other indebtedness which constituted liens against the premises. The property was sold under the decree and a deficiency decree was entered in favor of the complainant. A short time before the expiration of the equity of redemption period Pearl P. Stuart assigned to defendant whatever rights she had to the rents and profits issuing out of the property in the hands of the receiver; she did not, however, convey her equity in the premises to him.

The trust deed which was foreclosed conveyed to a named trustee, for the purpose of securing performance of the covenants in the deed, real estate which was described, "together with all rents, issuing from and profits of said premises," etc. The trust deed also provided that the grantors therein should pay the principal indebtedness which the deed was given to secure, all taxes, assessments, etc., and it contained the covenants usual in trust deeds of like character. It provided in case of default for foreclosure and the grantors waived "all right to the possession of and income from said premises, pending such foreclosure proceedings, and until the period of redemption from any sale hereunder expires, and agrees that upon filing of any bill to foreclose this trust deed a receiver shall and may at once be appointed to take possession or charge of said premises and collect such income, and the same, less receivership expenditures, including repairs, insurance premiums, taxes, assessments and his commission, to pay to the person entitled to the deed under the certificate of sale, or in reduction of redemption money if said premises be redeemed."

No question is raised touching the legality of the decree, nor the order appointing the receiver to collect the

rents and profits. The decree, which was confirmatory of the master's report, found that the assignor of the rents to defendant, Pearl F. Stuart, had failed to pay interest on the indebtedness due by her under a first mortgage and that she had not paid taxes on the premises for the year 1917 and 1918; that she also had failed to pay a special assessment due thereon. A few days before the equity of redemption owned by Pearl F. Stuart had expired, she assigned whatever interest she had in the rents in the hands of the receiver to petitioner and he filed a petition asking that the rents in the hands of the receiver be turned over to him. We are unable to see any merit in petitioner's claim. The rents and profits issuing out of the property were pledged under the trust deed to secure the payment of the indebtedness. The petitioner is not in the position of a purchaser of a certificate of sale under a decree; he is merely the assignee of whatever part of the rents collected by the receiver became the property of the assignor, the owner of the equity of redemption. The defendant stands precisely in the place of Pearl F. Stuart, who owned the equity of redemption in the premises at the time the assignment was made. As such owner, under the express terms of the trust deed she had no right to the possession of any part of the rents and profits in the hands of the receiver until the deficiency decree which had been entered against her had been satisfied. The complainant as against the owner of the equity of redemption or her assignee had a clear right to so much of the rents in the hands of the receiver as would satisfy the deficiency decree, and this is all that was awarded to him.

In the case of Schaeppi v. Bartholomae, 217 Ill. 105, relied on by petitioner, a question as to the right to the possession of certain rents in the hands of a receiver arose between the owner of the equity of redemption and the purchaser of the property

under the decree. The complainant in the cause was the purchaser and he sought to obtain possession of rents in the receiver's hands after a deficiency decree had been satisfied out of the rents. In that case, as in this, the original makers of the notes and mortgage were also the owners of the equity of redemption and were personally liable for the debt, and, as stated in the case of Stevens v. Pearson, 202 Ill. App. 22, the rents and profits were properly applied to satisfy the deficiency decree against them. In the present case the owner of the equity of redemption, Pearl F. Stuart, was the maker of the note the payment of which was secured by the execution of the trust deed. The indebtedness created by the note was not entirely satisfied by a sale of the property under the decree. She was, therefore, personally liable for the deficiency, in payment of which the receiver applied a part of the rents in his hands.

In the case of Cowell v. Gnatzig, 178 Ill. App. 482, the court said:

> "The facts in the case at bar serve to distinguish it from such cases cited as bear upon the precise question involved. In the case at bar, appellant, the owner of the equity of redemption, expressly assumed and agreed to pay the encumbrances upon the real estate, and he, as well as the makers of the notes, are shown to be insolvent."

Holding as we do that the assignee of the rents has no better title thereto than his assignor, who was the owner of the equity of redemption and personally bound to pay the full amount of the indebtedness created by the note which was secured by the foreclosed trust deed, we are constrained to hold that the defendant was equitably entitled to receive only so much of the rents in the hands of the receiver as remained after the payment in full of the deficiency.

In support of his contention that because complainant made no claim to the rents and profits in his bill the court could not award them to him in payment of the deficiency the

cases of Longley v. Wilk, 171 Ill. App. 419; Wickett v. Hastings, 209 Ill. App. 306, and Stevens v. Pearson, supra, are relied upon by counsel for petitioners, who assert that these cases are identical in principle with the present case. We do not think so. As we understand the decree in this case the complainant did not receive any of the rents and profits in the hands of the receiver as purchaser at the foreclosure sale. The only money ordered paid to the complainant was the amount due under the deficiency decree and the balance was ordered to be turned over to Lennartz. The trust deed provided that rents in the possession of the receiver should be paid to the owner of the certificate of sale. This provision does not abrogate other provisions in the trust deed which pledged the rents to secure the payment of the mortgage indebtedness. The court had ample power under the provisions of the trust deed to apply rents to the payment of the amount due under the deficiency decree.

Even if the trust deed conferred no express authority for the appointment of a receiver to collect the rents, a court of equity under facts such as exist in the present case would have power to afford this relief to complainant. First National Bank v. Ill. Steel Co., 174 Ill. 149.

Keeping in mind that this is an appeal from an order distributing rents in the hands of the receiver and that no appeal was prayed from orders appointing the receiver and approving his account and report, it is our opinion that the supplemental bill was sufficient to authorize the order appealed from. The complainant does not take the rents and profits awarded to him as holder of the certificate of purchase; his right thereto results from the deficiency decree in his favor and not otherwise.

The order of the Superior court is affirmed.

AFFIRMED.

McCurely, P.J., and Holdom, J., concur.

401 - 25662

(023a)

FERDYNAND URBANOWICZ,
Appellee,

vs.

THE CHICAGO DAILY NEWS COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

217 I.A. 645

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff recovered a judgment against defendant in the Circuit court of Cook County for the sum of $3,500 and defendant seeks to reverse this judgment by appeal to this court.

The declaration consisting of two counts charged that plaintiff sustained injuries while in the employ of defendant in the work of moving and lifting large rolls of paper; that while so employed the defendant, through its servants, negligently caused a roll of paper to fall against plaintiff; that plaintiff at the time of the accident was included within the provisions of the Workmen's Compensation Act in force July 1, 1913, and that defendant prior to the accident had filed notice of its election not to provide or pay compensation in accordance with the provisions of the act. The declaration also alleged that defendant negligently failed to provide plaintiff with a safe place in which to work and negligently and knowingly employed certain incompetent and unskillful servants to assist plaintiff in the work of moving and lifting large rolls of paper; that as a result of the alleged negligence on the part of defendant the said servants incompetently, unskillfully, suddenly and negligently caused a large roll of paper to fall on plaintiff, whereby he was injured. Defendant filed a plea of the general issue.

The defendant publishes a daily newspaper in Chi-

cago; it operates a printing plant with power driven machinery, and prior to the date of the accident it had elected not to pay compensation under the Workmen's Compensation Act. On September 1, 1916, plaintiff with certain of defendant's employees were engaged in the work of storing large and heavy rolls of paper in a basement, which had been rented by defendant for that purpose; this basement was in the vicinity of defendant's publishing plant, but was not connected therewith. The rolls of paper were lowered into the basement through a trap door in the sidewalk and were then taken, one at a time, on a hand-truck to a place in the basement where they were to be stored.

Plaintiff, a laborer, who had been in the defendant's employ for six years, on the day of the accident was assisting other men in the unloading and moving of the rolls of paper, some of which were 54 inches and others 74 inches in length. Plaintiff in the absence of the foreman sometimes acted as a "straw boss." The plaintiff was one of a gang of four men. The manner of doing the work and the circumstances attending the accident were about as follows:

> "When the roll of paper was taken to the place where it was to be stood on end, the end of the roll at the end of the truck would rest upon the floor. The truck would be steadied by the trucker and two of the other men in the gang would then place under the end of the roll which still remained upon the truck a stick about four feet long. A man would then sieze either end of this stick, the third man would get in front of the roll, and by their united efforts the roll would be hoisted into place so that it occupied an upright position. At the time of the alleged accident 75 inch rolls were being placed in position under the sidewalk at some distance from the sidewalk hoist. The four men above named had been working in the same gang all day on the 3rd of September and had placed in position 600 or 800 rolls in the manner described. About five o'clock in the afternoon one of these rolls was being placed in position in a space more confined than usual, there being on one side of the space in question a pillar, of which there were a number in the basement, and on the other side other rolls which had already been placed. Skebitis and John Zemecki were lifting the roll by means of the stick and the plaintiff facing them was assisting in this process with his hands upon the upper edge of the roll. When the roll was raised about five feet from the floor, Zemecki and Skebitis could not pull

longer upon the stick to advantage because of the position in which they were placed. They therefore dropped the stick, reaching around in front to assist the plaintiff in holding the roll and pushing it into place. As they did this the plaintiff uttered an exclamation and felt a pain in the region of his abdomen. He remained in the same position supporting the roll, however, until the three men pushed it into place in an upright position. Plaintiff then stepped to one side and sat down upon a roll of paper while the other three men, including the trucker, placed the remainder of the load, being from 2 to 5 rolls."

The evidence introduced on the trial tends to prove that the plaintiff sustained a double hernia as a consequence of the accident.

It is our opinion that the evidence does not show that the plaintiff received injuries while engaged in an extra hazardous employment. The basement which had been rented by defendant to store the rolls of paper was not directly connected with its publishing plant. So far as the evidence shows, no machinery was used in the basement and the work which the plaintiff was engaged in cannot be said to have been in any sense extra hazardous; he and his co-employees were engaged in moving the rolls of paper upon a truck and standing them upon end in the basement. This work required the use of no machinery nor any exceptional skill. The laboring work was of a common kind and had no special elements of danger connected with it. It is true that the defendant operated a large publishing plant where machinery was employed, but this plant and the work done therein was not in any way connected with the service plaintiff was rendering for the defendant at the time of the accident.

In the case of Marshall v. City of Pekin, 276 Ill. 187, the court said:

"An employer who is engaged in an extra hazardous occupation and who has made no election to come under the Workmen's Compensation Act cannot be compelled to pay compensation under said act to any employee injured in an occupation not deemed extra hazardous under said act simply because such employer is also engaged in an extra hazardous employment and in which said employee is not engaged."

In giving certain instructions to the jury at the request of the plaintiff the court told the jury that it was not permissible for the defendant to set up the common law defenses of the assumption of the risks of the negligence of a fellow servant or the contributory negligence of plaintiff. In this we think the court erred. The defendant had elected not to be bound by the Compensation Act, and had the evidence shown, as we think it did not, that the plaintiff at the time he received his injuries was engaged in an extra hazardous employment for defendant, these defenses under paragraph A of Section 3 of the Act would not be allowable to the defendant.

In the case of Brennan v. Industrial Commission, 289 Ill. 49, the Supreme court said:

> "It is possible that some parts of the work of spreading cement in road construction or repair may be extra hazardous, such as preparing and mixing the material to be spread upon the road, but the defendant in error's (employee) employment and duties did not require him to engage in or come in contact with this kind of work. His sole employment was to pull the float over the cement after it had been placed on the roadway. This was not extra hazardous within the meaning of the statute, and because some other employees may have been engaged in some other part of the work that was extra hazardous would not change the character of the defendant in error's employment or bring him within the provisions of the Workmen's Compensation Act."

And so it may be said here, the plaintiff's sole employment was to aid in the placing of the rolls of paper in assigned places in the basement. This work was not extra hazardous within the meaning of the statute.

In the case of Compton v. Industrial Commission, 288 Ill. 41, it was held that a board of education in maintaining a school building was not engaged in a hazardous occupation under paragraph B of section 3 of the Compensation Act.

We are of the opinion that the point made that the record discloses a variance between the allegations of the declaration and the proof is good. The declaration charges that be-

cause of the negligence of the defendant in negligently providing incompetent and unskillful servants and in failing to furnish plaintiff with a safe place to work, and that through the negligence of certain servants of the defendant, etc., a large roll of paper fell against the plaintiff injuring him. The testimony of the plaintiff and other witnesses satisfactorily shows that the roll of paper did not fall upon him and that his injuries were not due to that cause. In testifying the plaintiff said:

> "While we were lifting, somehow those two fellows on the side let the roll down and it was too hard for me and I felt the pain at the same time and started hollering and they grabbed the roll and stood it up. When they dropped the stick on the floor I held the roll in the meantime and before they turned around I caught the roll and stood it up. **** I held it all the time I tried to put the roll of paper up, but these two fellows stood it up. I felt a pain right in the lower part of the abdomen on both sides. After the roll of paper was up I felt full of pain and I walked down two steps and sat down on a roll of paper."

The evidence very clearly shows that the plaintiff was compelled unexpectedly to support a weight which was probably beyond his strength. At all events the evidence is clear that the roll did not fall and strike against him in such manner as to cause the injury. Lake Street Elevated Ry. Co. v. Shaw, 203 Ill. 39.

No appearance has been filed in this court for the appellee.

We do not deem it necessary at this time to indicate any opinion as to whether the defendant was or was not guilty of any negligence which proximately contributed to cause the accident. The authorities are unanimous that a party plaintiff cannot recover a judgment upon a cause of action not stated in the declaration.

The judgment of the Circuit court will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, J. J., and Holdom, J., concur.

411 - 25672

(1024a)

WILLIAM SCHRAMER,
Appellant,

vs.

CHARLES BOLIN,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

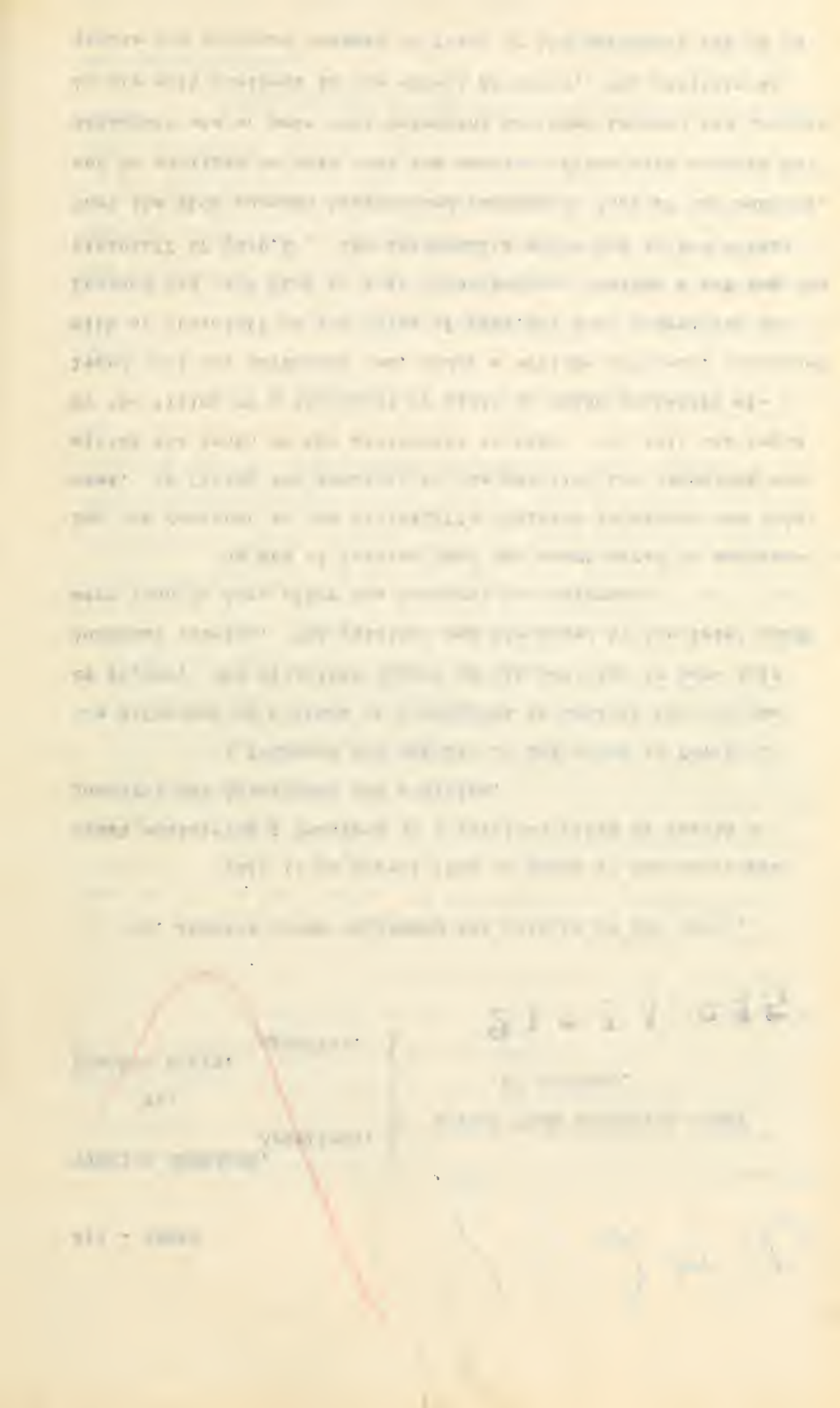
217 I.A. 245

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal court sustaining a demurrer to a petition filed to vacate a judgment and dismissing the petition.

A judgment was entered in the cause in favor of the defendant on a claim of recoupment or set-off for the sum of $1,000. The plaintiff sought by his petition to have this judgment vacated. The petition was dismissed by the trial court more than 30 days after the judgment was entered.

We are of opinion that the court erred in sustaining the demurrer to the plaintiff's petition to vacate the judgment. By filing the demurrer to the petition the defendant admitted the truth of the statements therein. The suit was begun by the filing of a statement of claim in which plaintiff alleged that the defendant had, under a written contract, purchased milk of plaintiff of the value of $499.50; that thereafter defendant had paid $100 on this indebtedness, leaving a net sum due plaintiff of $399.50. The defendant's claim was to the effect that the $100 payment constituted payment in full of the account, and in addition to this that the quality of the milk shipped to defendant was so poor that defendant had been injured and damaged in his milk business to the extent of $2000. The petition to vacate the judgment entered in favor of the defendant set up in



substance that after defendant had refused to pay more than $100 of the sum due plaintiff, he, plaintiff, in February, 1917, retained an attorney of Wheaton, Illinois, to collect the balance due; that this attorney employed a Chicago attorney to bring the suit which was begun against defendant on February 23, 1917; that on March 19, 1919, a Chicago attorney filed an affidavit of mailing of notice of withdrawal of the attorney of record for plaintiff in the cause; that on March 21, 1919, plaintiff not being represented in court, the case was tried by the court without a jury and an ex parte judgment for $1000 was entered in favor of the defendant on his counter claim; that plaintiff first became aware of the judgment against him on May 29, 1919.

The petition to vacate the judgment is too lengthy to incorporate in this opinion, but it may be stated that if the statements therein contained are true, then an injustice has been done the plaintiff. It appears from the petition that the plaintiff had a meritorious claim against the defendant and that the defendant has no valid counter-claim against the plaintiff. It appears also by the petition that the plaintiff had no knowledge that the Wheaton attorney had employed a Chicago attorney to represent him in the cause, and as a consequence he, the plaintiff, had no knowledge or notice of the withdrawal of the attorney who assumed to represent him. The petition shows that the plaintiff is a farmer; that he is and always has been a resident of DuPage County, Illinois; that he operates a farm owned by his father and that he was inexperienced in any business except that of farming. It is alleged in substance that the plaintiff had no knowledge of either the appearance in the cause of F. C. Ferguson, the Chicago attorney, as his attorney or the subsequent withdrawal of Ferguson as such, and that the plaintiff had no knowledge of the judgment

entered against him until he was served with a writ of execution on the judgment by the sheriff of DuPage County, and that he took prompt steps thereafter to have the judgment vacated. The judgment in the cause was entered after the withdrawal of the Chicago attorney. The notice as shown in the record does not appear to have been addressed and mailed to plaintiff, nor does it appear to bear the signature of the attorney who assumed to act for the plaintiff in the cause. More than 30 days having elapsed between the date of the judgment and the filing of the petition to vacate the order, the case is one where the order should be vacated if it can be held that the petition set forth grounds for vacating the order which would be sufficient to cause the same to be vacated by a bill in equity under section 21 of the Municipal Court Act.

In the case of Foote v. Desgain, 87 Ill. 25, the court said:

> "We understand the rule to be well settled that where a judgment had been obtained by fraud, accident or mistake, courts of equity have jurisdiction to grant a new trial at law, or otherwise relieve against the judgment unless the party against whom a judgment has been rendered is guilty of negligence.
>
> We are of opinion that the allegations in complainant's bill are sufficient if they are true, and their truth was admitted by demurrer, to authorize a decree awarding a new trial in the action at law."

There can be no doubt that the judgment in the instant case was entered as the result of accident or mistake. The plaintiff, situated as he was, seems to have used reasonable diligence to press and to protect his suit against the defendant. The judgment was not the result of any negligence on his part. As said in the case of Walker v. Kretsinger, 48 Ill. 502:

> "If it appears that the judgment complained of is unjust and that the party in good faith has used or endeavored to employ the means given him by the law to assert his rights, and has been active and vigilant in his efforts to make his defense, and is still prevented from presenting a meritorious defense, equity will grant a new trial at law."

It will not be necessary to discuss other questions presented by counsel for the plaintiff.

The order of the Municipal court is reversed with directions to allow the motion to vacate the judgment.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

McBurely, P. J., and Holdom, J., concur.

490 - 25751

(1025a)

TONY SMITH,
Appellee,

vs.

FRANK O. BOSTELMANN and GEORGE H. WINTER, Copartners, etc.,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 645

MR. JUSTICE NEVIN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago in favor of the plaintiff for the sum of $293. Defendants appeal.

The statement of claim filed by the plaintiff alleged that he had been employed by defendants as an ice machine erector to erect and install a certain refrigeration plant and to repair a certain other plant for the defendants. It is shown by the pleadings filed in the cause and the evidence admitted that the plaintiff was employed by defendants on what was known as a "time and material" contract.

It was alleged in an affidavit of merits filed by defendants that plaintiff performed the work required of him under the contract so unskillfully that defendants were occasioned thereby serious loss and damage.

The case was tried by the court without a jury.

Plaintiff testified that he was an ice machine erector of 35 years experience; that under the contract defendants were required to furnish all the material and he, plaintiff, was to perform all the necessary work required in erecting and installing an ice machine.

The actual controversy between the parties to the suit is as to the manner in which plaintiff performed the work,

and the determination of this question was, we think, a question of fact which could best be determined by the trial Judge, who had an opportunity to see and hear the witnesses. There is a direct contradiction as to the manner in which the defendant performed the work required of him under the contract. It is conceded that the ice machine, which was to be installed in the plant by the plaintiff, and certain pipes connections therewith, were defective after the plaintiff had intimated to defendants that he had finished the work. With reference to certain leaks the plaintiff testified:

> "After the machine was put in Mr. Langhurst tested it at the request of Mr. Winter. I was there when the machine was being tested. There are a few leaks, there is always in an old machine. The leaks were just in the joints where the pipes were put back."

He was asked the question: "Now after you got these pipes into the tanks they worked all right?" He answered, "Yes, sir. ***** There is nothing wrong with the pipes ever since I tested them before they went up."

The leaks referred to by plaintiff were repaired by him. It is asserted that other leaks thereafter developed, but the trial court was apparently of the opinion that such leaks were not unusual and that they were not caused by unskillful work on the part of plaintiff. Plaintiff testified:

> "It was the fault of the machine; I saw that his motor would not turn the machine over because it was the fault of the machine. The machine would not turn it over because it was not built right.*** It was right in the valve. That valve was put in by Mr. Langhurst at Wapakoneta."

Witnesses for the defendants also testified that a valve in the machine was too long. There is force in the contention that the plaintiff did not hold himself out to be an expert ice machine mechanic and that he did not agree to repair defects existing in the machine itself. It was his duty under the con-

tract to erect and install the machine which had been delivered to the plaintiff by a manufacturer. Whether the plaintiff did in fact perform the work in a reasonably skillful manner, or whether the defects in the machine and its pipe connections were due to any negligence or lack of skill on his part were questions for the trial Judge, and while there is strong evidence in support of the claims of the defendants, we are not prepared to say that the conclusions of the trial court on the controverted questions were erroneous.

It is undoubtedly true that if it could be said that the evidence showed that damage did result to defendant from a lack of skill and care on the part of the plaintiff, defendants could recover any loss sustained by them thereby as against the amount claimed to be due the plaintiff; but this claimed right is predicated in the present case upon the assumption that the evidence showed that the plaintiff did in fact perform the work in an unskillful manner. This question of fact was resolved against the contention of defendants by the trial court.

The judgment of the Municipal court will therefore be affirmed.

AFFIRMED.

McSurely, P.J., and Holdom, J., concur.

511 - 25772

(1026a)

GORDON A. RAMSAY as Administrator of the Estate of JOHN F. GORMAN, Deceased,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CALUMET & SOUTH CHICAGO RAILWAY COMPANY and THE SOUTHERN STREET RAILWAY COMPANY, operating under the name and style of CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

217 I.A. 646

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment of $1,000 entered by the Circuit court of Cook County in favor of the plaintiff.

In a declaration consisting of two counts it is charged that the defendants so negligently and carelessly managed and controlled a certain street car that the plaintiff thereby sustained injuries which resulted in his death and that defendants negligently failed to give a reasonable and timely warning to plaintiff of the approach of the street car and that it also failed to use reasonable precaution to avoid a collision with decedent. The declaration in each count alleged that decedent at the time of the accident was in the exercise of due and proper care for his own safety.

The evidence introduced on the trial shows that the accident happened about one o'clock on the morning of October 15, 1916, at or near the intersection of 37th street and Halsted street in the city of Chicago. Halsted street is a north and south street and 37th street runs east and west. A jog exists in 37th street at this intersection, that part of 37th street extending west of Halsted street being a short dis-

tance north of its extension east of Halsted street. Plaintiff's intestate was struck by a southbound car on Halsted street as he, deceased, was crossing that street on his way to his home. The only other vehicle on the street at or near the time of the accident was a street car bound north on Halsted street. The evidence is undisputed that the street car was lighted and that its headlight was burning.

One Shannon, a policeman for the city of Chicago, in testifying for the plaintiff said that he saw deceased struck by the street car; that deceased at the time was walking east to the east side of Halsted street; that "when the man was in the center of the track the car was 15 feet away from him;" that the car was running about 10 or 12 miles an hour; that he, the witness, did not hear any noise or warning of any kind, "because I was not paying any attention;" that when the car stopped after the accident its front end was about 15 feet from where the body lay.

One Crowley, a police officer, testified that he was standing at the northeast corner of Halsted and 37th streets talking with Shannon at the time of the accident; that the weather was clear and the street dry; that he saw deceased as he fell to the street after the car struck him. This witness testified that he did not remember hearing any bell or gong at and just before the time deceased was struck; that "after the body struck the northbound track it lay about 20 feet north of the curb line of 37th street."

James Barrett, who testified for the plaintiff, said that he met deceased at 11:30 o'clock on the night of the accident at 38th street and Union avenue; that he and deceased went to a chop suey restaurant at 35th and Halsted streets and remained there until 12:30 o'clock; that thereafter the witness

and deceased walked south on Halsted street to 37th street; that it was the intention of the witness to take a street car home; that when they arrived at 37th and Halsted streets he said to deceased, "We will wait here and I will take the car here." He also testified that "Gorman and I were standing about in the center between the west car rail and the west curbstone line on the west side of Halsted, and about five or six feet north, directly in front of the center of the drug store;" that he, the witness, then moved north in order to get upon the approaching street car; that he got upon the car about 50 or 60 feet north of where he and Gorman had been standing; that he found the car well lighted and that "there was plenty of light on the street at this place; that was the last time I saw Gorman alive, when I left him. As I walked towards the car I believe it was slowing down." The car stopped almost immediately after this witness got upon it. He got off the car and went around its rear to the east side of the street, where he saw a crowd collected about the body of a man lying on the northbound tracks. He testified, "I did not know at the time who the man was; I could not get a very good look. I had to look over their heads,*** could see pretty well up and down the street. There was electric lights. You could see pretty well for two or three blocks." The witness also said that he and Gorman had been standing for 15 minutes at 37th and Halsted streets waiting for a southbound car and that Gorman, when he attempted to cross Halsted street, was on his way home.

It is our opinion that the evidence fails to show either that the plaintiff was in the exercise of ordinary care for his own safety at or just before the time the accident happened, or that the defendant's servants had been guilty of any negligence which proximately contributed to cause the injuries

which brought about the death of German. There can be no doubt from the evidence that deceased could have seen the approaching southbound car had he made any effort to do so. The weather was clear, the street well lighted, and the witnesses agree that objects could be seen for a distance of two or three blocks. That the car was going slowly or at a moderate rate of speed is shown by the testimony of all the witnesses in the case and by the fact that Barrett, deceased's friend, got upon the rear end of the car just before the deceased was struck. It is impossible from the evidence to give any reason why, under the circumstances which existed at the time the accident happened, deceased should have stopped in front of a car so plainly visible to him as was the car which struck him. The street and sidewalks were practically deserted at the time. There was no confusion of vehicles or pedestrians at the intersection, and it is perfectly clear from all the evidence in the case that the accident would not have happened had the plaintiff exercised any reasonable care for his own safety. While the evidence shows that there is a jog in 37th street at its intersection with Halsted street, this fact in no way interfered with deceased's view of the approaching southbound car on Halsted street. Deceased's body was found about 20 feet north of the north crosswalk on Halsted street.

It is urged by counsel for appellee that the facts and circumstances of the case indicate that deceased was led to believe that the car was about to come to a stop. Assuming this to be true, and Barrett's testimony shows that the car did come to a stop and that it had slowed down at the time he got upon its rear end, if deceased in fact expected the car to stop, then ordinary prudence would have required him to wait until he could have crossed in front of it in safety.

There is no proof in the record from which it can

reasonably be inferred that the defendant's servants who were operating the car in question were guilty of any negligence which contributed to cause the accident. The witnesses are agreed that the car was moving, as it approached the corner, at a moderate rate of speed - from 10 to 15 miles an hour. Certain of the witnesses testified that they did not hear a gong rung at the time, but other witnesses, including the motorman, are positive that the gong was rung. The testimony of some of the witnesses on this question is uncertain and it amounts, at most, to statements that the witnesses did not remember any ringing of the gong. Four witnesses, including the motorman on the car, testified that the gong was rung. One Austin testified that his attention was attracted by the loud sounding of the gong. Such evidence as there is on the subject tends to show that the motorman did everything possible to stop the car after deceased attempted to cross the tracks in front of it. Witnesses testified that Gorman was on the west side of Halsted street when the car was 20 to 25 feet away and that he suddenly started to cross the street walking fast in an easterly direction.

In the case of Roberts, Admr., v. C. C. Ry. Co., 262 Ill., 228, the court said:

> "The evidence, in the light most favorable to the plaintiff, with all the inferences that could be legitimately drawn from it, did not tend to prove any fault or neglect on the part of the defendant or the exercise of ordinary care on the part of Smith (the deceased.) *.* * * The evidence raised no issue of fact proper to be submitted to a jury, and the court erred in not directing the verdict."

No principle of law is more firmly supported by authority than the one which declares that at common law one assumes all risks that arise from his own contributory negligence and that where such negligence proximately contributes to cause an injury there can be no recovery therefor, even against a defendant guilty of negligence contributing to cause an accident.

In the case of Welch v. C. C. Ry. Co., 208 Ill. App. 161, a case much stronger upon its facts in favor of the plaintiff than is the present case, the court said:

> "Evidently she expected the eastbound car to stop at the southeast corner of Aberdeen and 63rd streets to take on the two women who stood there in the street at that corner.*** The testimony tends to prove that the car was, at the time, traveling fast and that no bell was sounded or signal given at or near the crossing.***
>
> "The evidence tends to show that the proximate cause of her injury was not the negligence of the defendant but rather that of herself.*** She may have expected the defendant to stop the car at the corner, but there is no rule of law which requires a street railway company to stop its cars at all points upon a signal to take on passengers; and it follows that the failure to stop for prospective passengers who may be standing at the street corner does not of itself prove actionable negligence. Westerman v. U. Rys. Co. of Baltimore, 96 Atl. 355; Winchell v. St. L. St. Ry. Co., 90 N. W. 1050."

The cases in favor of the contention of the defendants are too numerous even to cite in this opinion. There can be no possible doubt on the evidence that the deceased knew, or by the slightest effort could have known, of the approach of the car.

In Pienta v. C. C. Ry. Co., 264 Ill. 246, it was held that the failure to ring a bell or give warning of the approach of a street car could not be held to be the proximate cause of an injury resulting from a collision where it appeared that a person injured had notice of the approach of the car.

It is our opinion that the evidence fails to disclose any actionable negligence on the part of the defendants and that deceased was at and just before the time of the accident guilty of contributory negligence which contributed to cause the accident. The judgment of the trial court was for the sum of $1,000. Deceased at the time of his death was 40 years old. The amount of the verdict is so small as to lead us to believe that the jury were impressed with a substantial failure on the part of plaintiff to make out a case entitling him to a recovery.

The judgment of the Circuit court will therefore be reversed, with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

McSurely, P.J., and Holdom, J., concur.

FINDING OF FACTS.

We find as ultimate facts in the case that the deceased was not in the exercise of ordinary care for his own safety at the time he received the injuries resulting in his death, and that the defendant was not guilty of any negligence which proximately contributed to cause the accident in question.

174 - 25429

(1027a)

REINER COAL COMPANY, a corporation,
Appellee,

vs.

SAMUEL MEYEROWITZ,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 646

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for $149.96 against defendant on the finding of the trial Judge and defendant brings the record here for review and asks a reversal.

It appears from the proofs that plaintiff delivered coal to the value of $499.96 at a flat building at Fiftieth street and Wabash avenue, Chicago, which was consumed upon the premises. The title to the property is said to be in defendant, conveyed to him by one Matthew Stein. The coal was ordered by Stein, who gave a check to plaintiff on account in the sum of $200 which was signed, "M. Stein, trustee."

There was evidence from which the trial Judge might reasonably reach the conclusion that in the transaction Stein was acting as agent for defendant. It is in evidence that Stein was around the building where the coal was delivered, apparently in charge, collecting rent, etc. Defendant was likewise seen at the building. On the claim another payment of $150 was made, leaving due the amount of the judgment in the record.

The defenses are that defendant did not order the coal; that the building where it was delivered is not his; that he holds the naked title for convenience only and therefore is not liable to plaintiff for the coal delivered to and consumed at such building and that plaintiff failed to prove that Stein was

agent for defendant in the transaction.

We think that from all the environing circumstances in evidence the court might properly find that Stein was the agent of defendant bothwhen he ordered and when he received the coal in question, or at least that defendant knowingly permitted Stein to hold himself out as his agent. Treat v. Smith, 139 Ill. App. 362.

We hardly see how the court could have come to any different conclusion than it did from the evidence. Furthermore, the difficulty here presented, if any there be, is of defendant's own creation and the remedy is within his own grasp; he may compensate himself from the property which he holds, if it is not in fact his, before delivering or conveying the same to whomsoever it may rightfully belong.

We see no reason to disturb the record, and the judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

252 - 25510

1028a

NATIONAL IMPORT AND EXPORT CO., for use of NATIONAL TRADING CO., a corporation, Appellee,

vs.

A. J. HAGUE & CO., a corporation, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 646

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On a trial before the court and jury plaintiff had judgment on the verdict for $1100, and defendant appeals and insists that the judgment should be reversed.

We think plaintiff's proofs substantially support its last amended statement of claim. At least there is no such variance between the claim and the proofs given in its support as would justify the granting of a new trial on that ground as the whole situation was laid bare by the testimony.

The original contract was admissible in evidence as a part of the res gestae showing how the parties came together, their relations, their actions and doings under the original contract and their subsequent conduct in relation to the subject-matter of the contract. However, defendant in its affidavit of merits evidenced a most intelligent understanding of the real claim of plaintiff when it denied that plaintiff sold to it or that it agreed or promised "to purchase of the plaintiff on December 14, 1918, *** 250 gross of elastic silk hair nets or that it promised to pay the plaintiff therefor the sum of $4.40 per gross." It was in this particular deal between the parties, at that particular time, that plaintiff prevailed, the defense of defendant thereto being overcome.

It seems that the National Trading Company succeeded to the business of the National Import and Export Co., with which defendant made the original contract, and upon the trial plaintiff by leave of court amended the papers to conform to existing conditions. To this action of the court defendant makes violent protest. How this change could in any manner affect defendant's defense or minimize plaintiff's proofs, we are unable to fathom. Such an amendment could be made at any time, as it was only a matter of form. It might have been changed before the trial, during the trial, or at its conclusion.

That plaintiff had breached its contract of April 8, 1918, in several particulars there is no doubt. It failed to deliver the elastic silk hair nets at the time agreed and they were not wrapped in tissue paper as provided by the contract. However, defendant paid for all the nets which were delivered under said contract prior to December 12, 1918, when it ordered 250 gross of elastic silk hair nets at a price aggregating the amount of the judgment. These nets were delivered by plaintiff and received by defendant on the 24th day of December, 1918. This is the contract on which plaintiff based its right to recover, and we think rightfully so.

Defendant received the 250 gross of hair nets and retained them sixty days, when it attempted to rescind the transaction. This attempt to rescind came too late. It further appears that plaintiff drew a draft upon defendant for $1100, the amount of the shipment, which it did not pay, although it thereafter promised to do so.

Defendant, on the assumption that the action is brought for hair nets delivered under the contract of April 8, 1918, argues for reversal that there could be no recovery because plaintiff failed to allege and prove that it had complied

with all the provisions of the contract upon its part, and that if both are in default neither can maintain an action for the breach against the other.

There are two fallacies in this proposition. The first is that the action was not under the contract of April 8, 1918, but under an express agreement, resting in parol, of December 12, 1918. The latter contract and delivery thereunder were proven.

However, while he who breaches a contract cannot maintain an action for damages for a breach thereof by the other party, nevertheless an action may be maintained under such breached contract for the contract price of goods actually delivered and received. This question has been passed upon by this court in Consumers Mutual Oil Company v. Western Petroleum Company, general number 25368, in an opinion filed January 26, 1920, not yet reported.

We think defendant comes within the reasoning in Harber v. Moffat, 151 Ill. 84, because at the time it sought to rescind it was in default in not having paid for the nets delivered under the order of April 12, 1918, without regard to whatever rights it might have had to maintain an action for a breach of the April 8, 1918, contract.

The judgment of the Municipal Court does justice under the law between the parties, and it is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

262 - 25520

1029a

FLORENCE M. EVERITT and WALTER S. HOLDEN, Trustees under the Last Will and Testament of Margaret A. Mitchell, deceased, and FLORENCE M. EVERITT individually,
Appellees,

vs.

ANNA E. GOUGH et al.
On Appeal of ANNA E. GOUGH by ROCKFORD TRUST CO., a corporation, her guardian ad litem, and ROCKFORD TRUST CO., a corporation, Conservator of ANNA E. GOUGH, an insane person,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

217 I.A. 646

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Complainants' bill is primarily for a construction of the trust clauses of the will of Margaret A. Mitchell, deceased.

Testatrix made a will which was duly probated, in which she appointed the Merchants Loan and Trust Company of Chicago trustee of the trust thereby created, later by a codicil, which was also admitted to probate, ratifying the will but varying the same by appointing her daughter, Florence M. Everitt, and her attorney, Walter S. Holden, trustees in place of the Merchants Loan and Trust Company. The immediate beneficiaries under the will were testatrix' two daughters, Anna E. Gough and Florence M. Everitt. Florence M. Everitt divorced her husband and became thereby, under the terms of her mother's will, vested with title to an equal one-half of her mother's estate; so the other half only of the estate is now held in trust, the present beneficiary being the daughter Anna E. Gough, who has been adjudged insane and the Rockford Trust Co. has been appointed conservator of her estate. Anna E. Gough has a son, William Ellis Gough, who is also

mentally deranged. Florence M. Everitt has three minor children, the defendants Alfred Lawrence Everitt, Jr., William Ellis Everitt and Elizabeth Everitt.

Under the terms of the trust, if either of the daughters dies without issue her share goes to the survivor or to the heirs of such survivor.

The bill prayed for a construction of said will -

First - As to whether said trustees under the codicil have the same authority, duties, etc., as were by the original will given to the trustee therein named;

Second - As to whether, under the terms of said will and codicil, the trustees have authority to pay out directly to Anna E. Gough or on her behalf the necessary costs, in their discretion, of her maintenance and comfort, or whether they should pay such costs from the entire net income of the trust estate, including the accumulated securities on hand, to the Rockford Trust Company as her conservator.

Third - If the court should determine that under a proper construction of said will and codicil the trustees are authorized, in their discretion and to prevent waste, to pay out of said trust funds directly to said Anna E. Gough or on her behalf such amount as may be necessary for her maintenance and to retain and invest the balance thereof, then whether the surplus retained by said trustees, including the securities on hand, shall become a part of the principal of said trust fund.

The cause was heard by the chancellor on bill, answers of the respective defendants and replications to such answers, and a decree entered substantially as prayed for. From the decree entered the conservator, the Rockford Trust Company, brings the record here seeking a reversal and asking this court to decide that the in-

come and the accumulations of such income on hand should be paid directly to it as conservator of said Anna E. Gough, an insane person, and to hold that the conservator is not an assignee by operation of law and therefore the trustees are not warranted in retaining the earnings of the trust fund and declining to pay the same to such conservator, and to decide that the securities now in the hands of the trustees, and also such surplus of cash as has been withheld by the trustees, be paid and delivered to it as conservator.

We think it is clear that the trust created by the testatrix for her daughters was such as is known in law as a spendthrift trust, and that this clearly appears in paragraph 9 of the will, which reads:

> "For the purpose of protecting my said estate from waste or my daughters from debts, or any obligations which they, or either of them may improvidently incur, I hereby authorize and empower my said trustee, and its successor or successors in office, to withhold any or all of the income of my said estate held by them, and retain the same in their sole possession and control for such time as they may deem for the best interest of said estate, and said daughters, or either of them; or in case of any attempt to establish a lien upon, or claim to their income, or the income of either of them, by any creditor, receiver or assignee, either voluntary or by operation of law, my said trustee, and its successor or successors to the trust, are hereby authorized and directed to retain all of said income, which would otherwise come to such daughter, and to invest the same, and re-invest, and make it a part of the principal sum from which said income is derived to be held with said principal sum and to be disposed of as part of the same, and in the manner as herein provided."

It seems clear from this clause that it was the intention of the testatrix to create, in the strictest sense of the law, a spendthrift trust. So far as the present cestui que trustant is concerned, her improvident and dissolute habits, disclosed by the testimony in the record, evidence the wisdom of the testatrix in putting the interests of her unfortunate daughter in so firm a trust that while she could not intrench upon the principal, the income thereof was in apt terms and with much care provided to be applied to her comfortable maintenance and care during her natural life.

Paragraph 9 of the will speaks for itself and is its own interpreter. There is nothing ambiguous in the language used to express the intent evidently desired. The intention of the testatrix, to be ascertained by the court, is the cardinal principle in the construction of her will and the trust clause above quoted. Courts will give effect to the intention as expressed in the words used by testators. It was held in Deemer v. Kessinger, 206 Ill. 57, that where the words used by a testator have a settled legal meaning, the intention expressed by such words must be given effect; and again in Mills v. Teel, 245 ibid 483, it was held that the testator's intention must be ascertained from the words employed by him in the light of the situation and the attending circumstances. and that if by such means the intention becomes clear the court may disregard false words of description or restrict the application of words, but cannot change words of plain meaning and substitute therefor something else.

The intention of the testatrix in regard to the trust created by her will is so clearly expressed that there is no need of other construction than to apply to the words used their ordinary and accepted meaning; such is the context of the trust provision that it becomes unnecessary to eliminate words or to add anything thereto in order to arrive at the intention of the testatrix in this regard so definitely expressed.

The fact remains that the interpretation of the trust clause of the will is not seriously contested. The whole contest seems to gather around the claim of the Rockford Trust Co. as conservator of the estate of Anna E. Gough, insane, to itself receive and disburse all of the income from the trust estate belonging to its insane ward, together with all the accumulations of such income in the hands of the trustees; the chancellor holding in the decree

that an administration of the income of the trust fund by the conservator was unnecessary and wasteful, and that therefore the trustees have the power and authority to decline to pay any of the earnings of said trust fund to the conservator; the decree also found that the conservator is an assignee by operation of law, and that upon that ground the trustees were warranted in declining to pay the income of the trust fund to the conservator; and it was further decreed that any part of the income of the trust fund which has been held by the trustee should become a part of the principal of the trust fund, provided that if an emergency arose requiring the use of more money for the support of the insane ward than the current income could produce, that such trustees might in their discretion resort to such securities or the surplus cash on hand and expend the same for the use, care and benefit of said insane ward.

To us it would appear that in this regard the rights of the insane ward were by the decree abundantly, carefully and judiciously conserved and that the intention of the testatrix was made manifest by the provisions of such decree, and that the conservator could add nothing to the protection of its insane ward by being permitted to handle her funds. The interposition of the conservator in this regard would be plainly superfluous. A court of equity will not enforce a strict legal right where no good purpose is to be subserved thereby, and will not require the payment of money to any trustee in order to enable such trustee to retain, simply for his own benefit, commissions, fees or costs. Cotterell v. Coen, 246 Ill. 410; Moore v. Brandenburg, 248 ibid 232; People, use, etc. v. Abbott, 105 Ill. 588.

The record shows that Anna E. Gough is insane and is in the State institution for the insane at Elgin; that her wants

have been supplied by the trustees of her mother's will evidently in such ample way that no one is complaining. It is hard to understand what good purpose could be subserved by allowing the income of the ward to filter through the hands of her conservator; it is not apparent that any advantage would in any way accrue to the ward by so doing. As regards the surplus income, after paying for the ward's support and all of her necessities, becoming part of the principal of the trust fund, no feasible objection is apparent to us. The trustees may, when in their discretion necessary, intrench upon the capital for the support of the ward whenever the income proves insufficient for that purpose; and in so far as the final distribution of the capital of said trust fund is concerned, it will go to the same parties under the provision of the will whether the income is paid to the conservator or retained by the trustees; therefore there is no cogent reason why the conservator should take from the trustees any surplus income to hold for investment, as the only purpose of so doing that we can discern would be to increase unnecessarily the cost of administration of such trust fund. Such unnecessary expenses the law discourages.

We see no reason to disturb the decree of the Circuit court as it does justice between the parties and protects the rights of everyone concerned; therefore the decree is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

271 - 25529

1030a

BEAVER ELECTRIC CONSTRUCTION COMPANY, a corporation,
Appellee,

vs.

JOHN GRIFFITHS & SON COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 647

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

A judgment against defendant for $1987.94 was entered on the finding of the trial Judge to whom the cause was submitted, and defendant seeks a reversal by this appeal.

Defendant is engaged in the business of erecting buildings in Chicago. In the early part of 1915 it had a contract as general contractor for the erection of section 6 of the Boston Store building at Madison and State streets, Chicago. Plaintiff's business is that of electrician, as its name implies, and April 17, 1915, it entered into a contract under seal with defendant to install all the electrical wiring for section 6 of said Boston store building in accordance with the general contract which defendant had for the construction of section 6. The electric wiring contract contained the following provision:

> "that no new work of any description done on the premises, or any work of any kind whatsoever, shall be considered as extra, or a charge in excess of the amount herein agreed to be paid, unless a proper estimate in writing of the same before its commencement shall have been submitted and agreed to, and signed by said architects and said party of the first part." (Said first party being defendant.)

The dispute relates to a $1500 item for extras under the contract. The difference between that item and the amount of the judgment, viz, $487.94, is admitted by defendant to be due plaintiff and it insists that the judgment in the municipal court should have been for that sum and no more.

All the electrical wiring was covered by the contract of April 17, 1915, in specific and unmistakable terms. Plaintiff seeks to avoid this condition, contending that certain clauses of that contract were elimintaed by a verbal agreement and the letter of March 23, 1915, and that this letter and the contract under seal form in themselves the contract between the parties for the electrical work. It was said that these eliminated clauses were so marked in the contract, but if such was the fact the contract in evidence does not prove it, nor has such contention been substantiated by any other satisfactory evidence, and an examination of the contract in the record fails to disclose any such marking or memorandum. The letter of March 23, 1915, was written more than three weeks before the contract was executed and before the price at which plaintiff was willing to enter into the contract had been agreed upon. This letter is nothing more than part of negotiations which preceded the making of the contract, upon which the minds of the parties for the first time met. As a matter of law all contemporaneous writings and verbal understandings are merged into the contract as ultimately entered into and executed by the parties. Winneshiek Insce. Co. v. Holzgrafe, 53 Ill. 516.

It is quite plain from this letter that the subject-matter of the contract was being discussed and the letter is an evidence of one form of such discussion. There is no mention of estimate of cost or suggestion regarding such cost. It reads:

> "In looking over the alterations on the present switchboard, it seems to us that some of the electricians have the wrong idea of what is required in connection with the additions to this switchboard. The new generator which is being moved from the present Champlain Building to the engine room will be connected on to the old panel, marked 'A' on accompanying sketch, which is the same panel that controls the escalators in the building. The only new panels on this switchboard will be the two east ones marked 'new' on the accompanying sketch. Please let us know how much difference this will make in your figures, and oblige."

Here follows sketch marked "A."

Moreover, no reply was ever made to that letter, although the written contract soon followed. Certainly there is no determination of cost or suggestion of it in this letter, and we cannot see how it can be held to form any part of the contract ultimately entered into. We therefore hold that this letter is no part of the contract, but that the rights of the parties must be measured under the contract which they finally entered into April 17, 1915.

It is not necessary for us to determine in this case whether or not a contract in writing may be altered, varied or changed by parol, for the reason that the attempt of plaintiff to prove such alteration has utterly failed. It is not a question of secret intention on the part of defendant and what its intention might be is of no importance, as the rights of both parties under the contract rest in its interpretation.

Plaintiff argues that if the letter of March 23, 1915, is eliminated from the contract between the parties, the furnishing of labor and material for the 100 K. W. generator was an extra and that there was an agreement aside from the contract of April 17, 1915, to pay plaintiff $1500 therefor.

It is in evidence that plaintiff in its negotiations for the contract fixed its price first at $30,000 and that several efforts were made to induce defendant to let the contract at that figure. On the other hand, defendant met these requests with the contention that the figure was too high, and ultimately the contract price of $27,500 was agreed upon. Plaintiff has failed to maintain or prove any independent agreement by parol or otherwise as an addenda to the contract of April 17, 1915, for the 100 K.W. generator. Every material point regarding this contention is met and denied by defendant. Furthermore, a sealed executory contract cannot be altered, changed, varied or modified by a parol agreement.

Such is the rule of the common law, which has been followed in this State by an unbroken line of decisions, Alschuler v. Schiff, 164 Ill. 298.

It is not contended that the conditions regarding extras in the contract were complied with; no estimate was made in writing or submitted or agreed to or signed by the architects or defendant. Plaintiff's compliance with these preliminaries was essential before any work done by it can be deemed an extra. Nor is there anything in the record showing a waiver by defendant of performance of these conditions. The trial court therefore erred in refusing to hold the propositions of law tendered by defendant numbered 1, 4, 5 and 6.

For the reasons above indicated the judgment of the Municipal court is reversed with a finding of facts and judgment in this court for plaintiff for $487.94, the costs here and below to be taxed against plaintiff.

REVERSED WITH FINDING OF FACTS AND JUDGMENT HERE.

McSurely, P. J., and Dever, J., concur.

FINDING OF FACTS.

The court finds as the ultimate facts that the alleged extra work sued for, amounting to the sum of $1500, was included in the written contract of April 17, 1915, between the parties, and that there was no other contract between them in relation thereto.

319 - 25578

1031/2

MILWAUKEE CORRUGATING COMPANY, a corp., Appellee,

vs.

JAMES J. & KARAN and EDWARD KONAHAN, doing business as KONAHAN BROTHERS, Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 647

MR. JUSTICE MCILVAIN DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against it for $435 entered upon the verdict of a jury.

The controversy in this case hinges upon a dispute between the parties as to whether certain yards of metal lath should be paid for at the rate of 15 or 10 3/4 cents a yard. Defendants have paid plaintiff for said metal lath at the rate of 10 3/4 cents, which it accepted, but now sues for the difference between the amount paid at 10 3/4 cents a yard and 15 cents a yard.

It appears from defendants' affidavit of meritorious defense that they had contracted for the metal lath with the American Luxfer Prism Company at the rate of 10 3/4 cents a yard; that on November 24, 1916, being subsequent to January 19, 1916, the date of the order, plaintiff, as party of the first part, entered into a written contract with the American Luxfer Prism Company as party of the second part, in which is contained the following provision:

> "Now therefore, in consideration of one dollar ($1) and other good and valuable considerations, ** the party of the first part does hereby agree to and does assume and contract to fill and carry out the terms of the various orders for expanded metal, filed with and now upon the books of the party of the second part, which orders are to be filled by the party of the first part promptly and efficiently, the said first party hereby agreeing to insure and protect party of the second part from all manner of actions, causes of action,

suits, claims or demands arising from any breach of contract relating to the filling of such orders."

It appears that the material described in the statement of claim as metal lath is also known as expanded metal; that at the date of the contract between the Irism Company and the plaintiff the order given by defendants to the Irism Company had been filed with and stood on the books of the Irism Company wholly unfilled; that about the 15th of December, 1916, the Irism Company by its letter, the original of which is in the possession of defendants, notified plaintiff that said order received from the defendants for the 6,000 square yards of metal lath had been taken in January, 1916, and was still unfilled; that on December 26, 1916, the defendants ordered the plaintiff to deliver said metal lath in fulfilment of said order, as undertaken by plaintiff in the contract aforesaid; that said 6,000 yards of metal lath at the price of 10 3/4 cents so delivered, plus two other items mentioned in plaintiff's statement of claim under dates of December 4 and December 7, 1916, aggregate $682.43; that about March 15, 1917, defendants paid said sum to plaintiff, which it received.

Defendants further claim that an accord and satisfaction arose from the fact that a dispute between themselves and plaintiff existed when the check for $682.43 was sent to plaintiff, accompanied by a note stating that it was for the amount due to plaintiff in accordance with defendants' contract with the Irism Company, notwithstanding which notification of the terms upon which said payment was tendered plaintiff accepted the same and has never returned or offered to return such payment or any part thereof.

Other defenses are set forth which are not important in the conclusions at which we have arrived.

It is not seriously contended by plaintiff that the order in controversy was not given to and accepted by the Prism Company at the rate of 10 3/4 cents a yard. However, it does appear that a complication arose between them from the fact that in the list as originally furnished by the Prism Company to plaintiff the order of defendants did not appear; and it is the contention of plaintiff that in a conversation with one of defendants over the long distance telephone from Milwaukee to Chicago they gave an independent and direct order for 6,000 yards of metal lath at the price of 18 cents per square yard and that this order was the order filled. But defendants deny this telephone order. There were some negotiations between the parties and it was made known to defendants that their order did not appear upon the Prism Company list furnished plaintiff, although the existence of the order was subsequently by the Prism Company made known to plaintiff, as thereafter admitted.

It is our conclusion that the plaintiff has not sustained, by that preponderance of the evidence which the law requires, its contention that defendants gave an independent order over the long distance telephone for 6,000 yards of metal lath at the price of 18 cents a yard, as testified to by plaintiff's president, although that statement was categorically denied by the defendant with whom such president claimed he had the conversation. A statement by one party flatly contradicted by another, each of whom is equally credible, does not constitute a preponderance of evidence either way. One statement simply offsets the other, leaving the proof on such point in a negative condition. Before it was entitled to recover, it was incumbent upon plaintiff to maintain, by a preponderance of the proof on that point, its contention that an independent order for metal lath at 18 cents a yard was given. Peaslee v. Glass, 61 Ill. 94,

and a long line of decisions in this State grounded thereon.

Defendants were entitled to invoke in their own behalf as a defense to this action the stipulation of the contract between the Prism Company and plaintiff, by which it assumed to fill all orders for metal lath taken by the Prism Company appearing upon its books at the date of the contract, taking over all of the Prism Company's metal lath business and agreeing to fill all its booked orders. The fact that the Prism Company did not note defendants' order upon the list originally furnished plaintiff, in no way detracted from the terms of the contract that it would fill all orders appearing upon the books of the Prism Company, when in fact the order of defendants was upon the Prism Company's books. This provision of the contract defendants had a right to invoke in their defense. Webster v. Fleming, 178 Ill. 148, affirming 73 Ill. App. 434; Deam v. Walker, 107 Ill. 540.

We think the elements of accord and satisfaction are present in this case. At the time defendants sent their check for $682.43 to plaintiff, it was claiming that there was due it $1117.43. The nature of the dispute was known to both of the parties at the time plaintiff contended that it was entitled to be paid for the 6,000 yards of metal lath at 18 cents a yard, defendants on their part contending that there was only due 10 3/4 cents a yard under its contract with the Prism Company, which plaintiff had assumed and agreed to fill at the contract price. In the letter transmitting the check to plaintiff defendants stated that the check for $682.43 was for the amount due for metal lath furnished as per contract with the Prism Company, in which it enclosed a letter from the Prism Company of date February 6, 1917, to defendants, and in commenting thereon said, "in which they shift the responsibility to you."

The dispute was not only plainly apparent from the letter transmitting the check, but had been a bone of contention between the parties for some time previous thereto. This check was in good faith sent to plaintiff and plaintiff accepted it with full knowledge of the dispute and the bona files of the claim of defendants. It knew upon what premises the claim was based and had full knowledge of the existence of the order of defendants with the Irism Company at 10 3/4 cents a yard, which it had assumed to fill, and with such knowledge it accepted the check which was paid, and no offer was ever thereafter made before suit was commenced to put the parties in statu quo by returning the amount paid by defendants in good faith and in the honest belief that all they owed plaintiff was the amount of such check. In Janci v. Perny, 287 Ill. 368, the court say:

> "The payment of a part, only, of a debt which is due and the amount of which is certain will not satisfy the whole debt, but where there is a dispute in good faith as to the amount due, a payment by the debtor of the amount admitted to be due, in full settlement, if accepted by the creditor, is a satisfaction of his claim. (Ostrander v. Scott, 161 Ill. 339; Lapp v. Smith, 183 id. 179; Canton Coal Co. v. Parlin & Orendorff Co., 215 id. 244; Snow v. Griesheimer, 220 id. 106.) The fact that the settlement was made on the wrong basis or that the defendants in error received in the settlement amounts considerably less than they were entitled to, and the lack of information as to the legal rules which should govern settlements, are not sufficient reasons for disregarding the settlement made with full knowledge of the facts."

We are of the opinion that defendants have a right to succeed on the two propositions above stated, that the claimed independent order at the rate of 10 cents a yard was not sustained by a preponderance of the evidence; that all defendants in fact owed was the amount of their check accepted by plaintiff with full knowledge of the dispute, which in law worked an accord and satisfaction between the parties; therefore the judgment of the Municipal court is reversed and a judgment of nil capiat and for costs is entered in this court.

REVERSED WITH JUDGMENT OF NIL CAPIAT AND FOR COSTS.

[illegible] and Thayer, J., concur.

345 - 25605

10024

JOHN LUSSEM,
Appellant,

vs.

MICHAEL GREENSTEIN et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

217 I.A. 647

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Notwithstanding the validity of four orders entered by the Chancellor is discussed in the briefs of counsel, we shall ignore all of them except the one from which the appeal is prosecuted as recited in the appeal bond.

The order appealed from directed the receiver to pay to the owners of the equity of redemption the balance of moneys in his hands arising from the rents of the mortgaged premises amounting to the sum of $216.68. The receiver was originally appointed without notice to any of the parties in interest and on motion such order was vacated.

This order was clearly right. This case is controlled by Ruprecht v. Ruhlke, 225 Ill. 185, in which an order was entered appointing a receiver and was subsequently vacated, as in the case at bar, and it was held that the rents that accumulated while the improper appointment continued belonged to the owner of the equity of redemption. The $216.68 ordered paid was rents which accumulated during continuance of the improper incumbency of the receiver, as in the Ruprecht case, supra, in which the court said:

> "This being true, the plaintiff in error was entitled to receive said rents, issues and profits, as against the defendant in error, unless he could reach them through a receiver. This he attempted to do, but by reason of a defect in the pleadings the appointment of the receiver was improperly made and the appointment was vacated and set

aside by the Appellate ocurt. The receiver, under an order of court, obtained the possession of the premises from the plaintiff in error, and upon his appointment being set aside and vacated we see no reason why the possession of the premises should not have been restored to the plaintiff in error, and the rents, issues and profits arising from the premises collected by the receiver, less the receiver's legitimate expenses during the period intervening between his appointment and the annulment thereof, turned over by the receiver to the plaintiff in error. Had the possession of said premises not been taken from the plaintiff in error by the receiver under the order of the court she would have received said rents, issues and profits, and as it subsequently appeared the receiver was improperly appointed and he was removed, we do not think the defendant in error can avail himself of such appointment to deprive the plaintiff in error of the use of said premises during the time said receiver was improperly in the possession of said premises, but think that the receiver during that period must be held to have retained the possession of said premises for the use and benefit of the plaintiff in error."

In the Ruprecht case supra it was urged that by the trust deed a specific lien upon the rents, etc., was created. Such is the argument in the instant case. On this point the ocurt said:

"If it be conceded the Tripp trust deed created such lien, we think that lien could only be enforced, as against the plaintiff in error, who was in possession of the premises, in favor of the defendant in error through a receiver, and as the receiver caused to be appointed *** was improperly appointed, the defendant in error cannot, by reason of such illegal appointment, avail himself of such receivership to enforce against the plaintiff in error, who had been illegally deprived of the possession of said premises, said lien. 1 Jones on Mortgages, sec. 670."

So, under the evidence in this record, regardless of the fact of whether or not the rents were pledged by either the first or second trust deed, the owners of the equity of redemption are entitled to receive them, notwithstanding it might have been otherwise had a receiver been lawfully appointed.

The order appealed from is affirmed.

AFFIRMED.

McCurely, J. J., and Dever, J., concur.

354 - 25614

J. F. BUSELER, Jr., Appellee,

vs.

JOSEPH M. TODD, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 647

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The abstract presents naught for this court's consideration or review. As has been held by this and the Supreme court in innumerable cases, the abstract is the pleading of the parties and from it must appear sufficient to support the errors assigned on the record for reversal.

The abstract fails to inform us of the nature of the claim in suit; in this regard is the following: "2-3 Date of filing and statement of claim." This is extremely unenlightening, and while defendant has filed a supplemental abstract of record, no reference is made in it to plaintiff's statement of claim. For such failure to bring to the attention of this court the nature of the claim in controversy, the judgment of the Municipal court must be affirmed.

We have, however, notwithstanding the condition of the abstract, examined the transcript of the record, but discover no meritorious reason therein for reversing the judgment and it is consequently affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

363 - 25623

PETER PUCHUPIS,
Appellee,

vs.

MARCUS WEIL,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 647

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In the trial court plaintiff had a verdict and judgment for $800 against defendant and defendant is here by appeal seeking a review of the record and a reversal of the judgment.

The action is for damages for violation of a written agreement collateral to a lease from defendant to plaintiff of premises 3158 West Chicago avenue, Chicago, from October 15, 1915, to October 14, 1920. In the agreement defendant covenanted that in consideration of the above mentioned lease he would not rent or lease any other stores in the building at 3150-3160 West Chicago avenue for the purpose of using the same for a restaurant exclusively.

Plaintiff entered upon possession of said premises under his lease and therein conducted a lunchroom and restaurant. It is alleged that defendant breached the covenant in said agreement by renting and leasing premises 3158 West Chicago avenue to Giovanetti Brothers for restaurant purposes; that the lessees, with the knowledge and consent of defendant, entered upon the demised premises and opened and operated therein a cafe and restaurant, so advertising the same to the public and designating it as a "Cafe and Italian Kitchen;" that defendant subsequently rented a certain other portion of the premises, known as 809-811 North Kedzie avenue, for the purpose of using

the same as a cafe and restaurant in connection with the restaurant which Giovanetti Brothers were then conducting under their prior lease; that the last mentioned premises were connected with the former by means of doorways and swinging doors, so that entrance from one to the other could be easily made; that this latter leasing was also contrary to the agreement between defendant and plaintiff; that the continuance of the business of Giovanetti Brothers as conducted on the premises aforesaid resulted in irreparable injury to plaintiff; that divers of its customers who theretofore were wont to deal with plaintiff forsook it and dealt with Giovanetti Brothers; that much trade was thereby lost to plaintiff, depreciating the rental value of the premise, etc.

Defendant by his affidavit of merits did not deny the breach of the agreement averred in plaintiff's statement of claim, but denied that the business of Giovanetti Brothers was similar to that of plaintiff, because the latter dealt principally with what is known as "automobile trade," being persons who go to the said cafe in automobiles for meals, while the business of plaintiff is principally with the transient and neighborhood trade; that the articles of food sold by Giovanetti Brothers were entirely different from those sold by plaintiff; that at the time plaintiff entered into the lease with defendant, Giovanetti Brothers were conducting a restaurant and cafe on the premises; that they had engaged in such business from the 26th of July, 1915, and that the acts complained of by plaintiff were simply the enlargement and extension of Giovanetti Brothers' then existing business.

The effect of the sworn defense is to admit the

breach of the agreement in making a lease of premises adjacent to those leased by plaintiff for restaurant purposes.

The other defense arises upon the contention that the business of Giovanetti Brothers was not in competition with that of plaintiff.

It appears that Giovanetti Brothers before making the new lease conducted a saloon with a bar 50 feet long in a room 20 by 60 feet, with a cigar counter 5 feet in length at the front of the saloon, two small tables opposite the bar and twelve tables in the back room of the saloon. Besides liquor the only food dispensed was spaghetti, sandwiches and soup served from a small kitchenette opposite the bar and in the same room with it. The food was usually eaten at the bar by the customers. This was the existing condition at the time defendant made the lease and agreement with plaintiff. After the completion of the improvements on the premises last leased to Giovanetti Brothers a large sign was displayed on the Kedzie avenue front, reading, "Venetian Cafe, Italian Kitchen;" twenty-five additional tables were put in, accommodating 80 people; menus for table d'hote and a'la carte contained a list of all the viands served and the prices thereof, which ranged from 35 cents upward. Plaintiff's restaurant accommodated approximately 47 people at one time. He served steaks, chops, lobsters, short orders, etc. Before Giovanetti Brothers opened their new place plaintiff's patrons during the busy hours had to stand and await their turn to be served, but after the "Venetian Cafe and Italian Kitchen" opened there was a great falling off in his trade.

The amount of the judgment is not questioned, but defendant contends that plaintiff has no right of action for defendant's breach of the agreement made as collateral to plain-

tiff's lease.

We think it clear that the purpose of the agreement was to assure plaintiff against competition in the adjacent buildings owned by defendant; we further think it plain that the new leasing to Giovanetti Brothers and the construction of an adjacent building on Wedzie avenue, which was intended to be and in fact was used as one place of business, and that business the restaurant business, was in contravention of the covenant in the agreement not to do so. University Club v. Deacon, 265 Ill. 257, affirming this court in the same case reported in 182 Ill. App. 484, is very much in point. The Supreme court there said:

> "By covenanting with plaintiff in error not to rent any other store in this building, during the term of plaintiff in error's lease, to any tenant making a specialty of the sale of pearls, the defendant in error assumed an obligation which could not be discharged by simply inserting in the contract with the second tenant a covenant that such tenant should not make a specialty of the sale of pearls. It was incumbent on it to do more than to insert this provision in the lease." Pitchcock v. Anthony, 28 C. C. A. 86.

This case is much stronger for the plaintiff than is the Deacon case supra for the plaintiff there. In this case there was not only no inhibition but an actual consent to the conducting of a business contrary to defendant's covenant in his agreement with plaintiff. It is clear from the evidence that what Giovanetti Brothers were doing at the time defendant entered into the lease with plaintiff in connection with their saloon in the same building, was serving a luncheon of a very light character, consisting principally of spaghetti, sandwiches and soup, which could in no way be regarded as food served in a restaurant; it was food served in a saloon in conjunction with the dominant business there conducted of dispensing mainly liquid refreshment of a more or less intoxicating character. That defendant designedly broke its agreement not to lease any part of

said premises for a restaurant when it leased to Giovanetti Brothers, is patent from the proofs.

We do not find any material errors in procedure, and the record disclosing no reason justifying a reversal of the judgment of the Municipal court, it is affirmed.

AFFIRMED.

McBurely, P. J., and Dever, J., concur.

392 - 25653

(1035a

CLARA M. FESSLER,
Appellee,

vs.

CHICAGO CITY RAILWAY CO.,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

217 I.A. 648

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of $5,000 against it in a suit by plaintiff for personal injuries, entered upon the verdict of a jury.

The case is one of passenger and carrier, plaintiff being a passenger upon the streetcar of defendant at the time of the occurrences complained of.

The cause proceeded to trial under the second count of the declaration, which, after stating that plaintiff was a passenger and averring that the duty of defendant was to carry her safely, etc., proceeded to further aver the failure to perform such duty, and that while plaintiff with all due care and diligence on her part was in the act of alighting from said car, defendant by and through its servant carelessly and negligently then and there closed the door of said car upon the clothing of plaintiff, securely catching and holding the same between said door and said car, thereby then and there throwing plaintiff to and upon the street, by means whereof she suffered violent injuries to her head, left arm, left leg, etc.

The evidence was in sharp conflict, and plaintiff secured her verdict partly on the supposedly true evidence of two eye witnesses of the occurrence, who had before the trial made to the defendant company written statements at variance in

material aspects with their testimony at the trial. In this condition of the proofs the law requires accuracy of procedure. Erroneous rulings on evidence and faulty instructions to the jury where there is such a sharp conflict in the proofs will be sufficient to call for a reversal of the judgment obtained.

The first witness for plaintiff was the motorman of the car from which plaintiff fell in alighting, who was not at the time of the trial in the employ of the company. He made, at about the time of the accident, a written statement to defendant in regard thereto and he had also conferred with defendant's lawyer about the accident, giving him orally information concerning the same. His testimony is in many essential particulars contradictory of his written statement and his oral information. This surprise to defendant's counsel made it necessary for him to immediately withdraw as the attorney for defendant and entrust the further trial of the cause to his assistant.

The motorman in his signed statement of the accident made to defendant stated that he was on the car going south on Commercial avenue; that he got a bell to stop at 99th street and did so; that the platform was crowded; that two women were ready to get off the car; that he opened the door and one woman got off and the other followed; that a man stepped to the door; that as the second lady was getting off he got two bells to start the car; that on looking out he saw a lady lying on the street and not knowing what was wrong, went to the door; that the lady said he had closed the door on her skirt, but that the door wasn't moved; that the man closest the door might have stepped on her dress or it had caught in some unknown place.

On the trial this motorman testified that as plaintiff was in the act of alighting he attempted to close the vestibule door, which closed about six or eight inches and caught her skirt

so firmly that he could close it no farther; that she fell to the street and that he kicked the skirt out from under the door with his foot, after which he got off and assisted plaintiff to her feet.

Another witness for plaintiff, also an eye witness of the accident, made before the trial a written statement to the defendant, in which he stated that at the time of the accident he was on the front platform of the car, which had stopped at the cross-walk to let off passengers; that he did not notice any injury to plaintiff but that she dropped her eye-glasses and they were broken. In answer to the question, "Tell in your own way how the accident happened," he stated:

> "After the lady fell I tried to help her up, and she told me to let her alone, and she got sore. It seemed as if her skirt went under the door, and as she stepped off she slipped; did not fall heavy and walked away; some other woman with her. Motorman did not close the door, and it might have been the wind that blew her dress under the door. She was mean and would not let anyone touch her. Street was wet at the time. The car did not move while she was getting off and she was the last to get off. From what I saw of her actions, she was not hurt at all, and I do not think her dress was torn. She was so ugly about it, that everyone who tried to help her up let her alone, on account of her abuse."

He further stated that plaintiff was to blame for the accident to her. Upon the witness stand this witness gave evidence contradicting every material fact appearing in his signed statement to defendant.

At the time of the accident plaintiff was accompanied by a woman friend who preceded her to the street, where she alighted in safety.

Defendant argues for reversal that its motion to direct a verdict at the close of plaintiff's proofs should have been given, error in the court's rulings on the evidence and in its instructions to the jury, and that the damages are excessive.

The court did not err in denying defendant's motion for an instructed verdict. Whether the evidence supported the negligence charged in the declaration, that plaintiff's clothing was, while she was alighting from the car, securely caught and held between the door and the car, involves questions of fact which, under appropriate instructions, should have been submitted to the jury.

As there must be a new trial, we will not attempt to pass upon the weight of the evidence or the credibility of the witnesses testifying.

It is obvious that the purpose of allowing plaintiff to testify that she was a charity league committeewoman and was attending to her duties as such on the day of the accident, was to improperly influence the jury in her favor. The nature of her duties, whether charitable or not, would not tend to serve the purpose of elucidating any of the questions submitted for the jury's solution as to the manner of the occurrence of the accident to plaintiff, or as to defendant's responsibility therefor. In another trial it would be well for counsel to refrain from this line of examination of their client.

Allowing the medical men to testify regarding subjective symptoms of plaintiff, also as to her condition at times remote from the time of the trial, and the giving of opinions based on the opinions of others, constituted error and should not have been permitted. These errors will not, however, we presume, occur on another trial. Condon v. Schoenfeld, 214 Ill. 226; Lyons v. C. C. Ry. Co., 258 ibid 75; Grienke v. Yame, 234 ibid 564; Shaughnessy v. Holt, 236 ibid 485.

Dr. Adams was examined out of order, and before plaintiff was interrogated, as he wished to leave the city, and some of his testimony was admitted on a promise to supplement it by other

evidence. This put defendant at a disadvantage in cross examining him. On another trial defendant will be able to prevent a recurrence of this difficulty by not consenting to the Doctor's departure from the city before the conclusion of the trial.

There are errors in the instructions. No. 2 undertook to enumerate the elements which the jury should consider in determining the preponderance of the evidence, but omitted all reference to bias, fairness, candor or intelligence of the witnesses as they may have impressed the jury from their appearance upon the witness stand. The element of personal view of the witnesses and the conclusions of the jury therefrom is entirely omitted. While the element of conduct and demeanor while testifying is referred to in this instruction, it is virtually neutralized by the requirement that such must appear from the evidence, ignoring the observation of such witnesses by the jury. Zamiar v. Peoples Gas L. & C.Co. 204 Ill. App. 290; C. U. T. Co. v. Hampe, 228 Ill. 346.

By instruction 3 the jury was instructed that "the facts must be decided by the jury from the testimony which it received in open court," thus eliminating the very essential requirement that it find the facts with reference to the instructions of the court upon the law of the case. The facts could not be decided without applying thereto the law as given by the court. Maxwell v. C. & W. I. R. R. Co., 140 Ill. App. 156; N. C. St. R. R. Co. v. Kaspers, 186 Ill. 246. This instruction was tantamount to licensing the jury to ignore the instructions of the court in its determination of the facts.

In instruction 6 the jury were told that common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prosecution of the

business, to prevent accidents to passengers riding upon their cars. A better statement is that it is the duty of a common carrier to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical operation of its road, reasonably to guard against accidents. Ross v. Chicago Rys. Co., 212 Ill. App. 660.

By instruction 1. the jury was told that in determining the amount of damages plaintiff was entitled to recover, if any, it had the right to and should take into consideration all the facts and circumstances as proved by the evidence before it. This instruction should have confined the jury to such facts and circumstances as bore upon the question of damages. This form of instruction was condemned in I. C. R. R. Co. v. Johnson, 221 Ill. 42; Yates v. Blair, T. H. C. Co., 158 Ill. App. 578; Levitan v. C. C. Ry. Co., 203 ibid 441.

The amount of the damages awarded is criticised as being excessive. This may be obviated on a new trial.

The evidence seems to sustain the contention of defendant that after arising from the roadbed where she fell plaintiff was able to walk away from the scene of the accident without assistance; that she took another car and went to Dr. Webster's office, walking up the stairs to the second floor; that the Doctor did not then find any fractures or dislocations, nor was any such found on a later examination. After leaving the Doctor's office she went by streetcar to 61st street and Cottage Grove avenue, there transferring to another car, and rode to Calumet avenue. From there she walked two blocks to her home and up three flights of stairs without assistance. The next day the Doctor discovered

some discolorations on the left arm, side and leg. A week later he made another call - about three calls in all - but did little for her. This Doctor's opinion was that the extent of plaintiff's injury was a laceration of the tissues or bruising with subsequent inflammation. There is, however, much evidence of subjective symptoms.

The evidence discloses that plaintiff was a large, fleshy woman; that she had given birth to three children and that she had varicose veins in both legs for which she wore rubber stockings for years; that she had uterine trouble prior to the accident, also liver trouble, for which she was treated for more than two years; that she had also sustained prior to the accident a sprain caused by falling on her right side.

From these facts it is clear that the physical disabilities from which plaintiff suffered at the time of the trial were largely due to causes other than the accident in suit and did not wholly result from such accident.

A careful examination of the record convinces us that defendant has not been given a fair trial in this case under the law of the land, for which reasons and for the many errors in procedure in this opinion indicated, the judgment of the Circuit court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McSurely, C.J., concurs in the conclusion.
and Dever, J., concurs.

421 - 25682

EDWARD F. HAMMOND,
Appellee,

vs.

CITY MOTOR TRANSIT COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

217 I.A. 648

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $200 entered upon the finding of the court in an action for personal injuries, and defendant appeals.

Plaintiff's Ford motor delivery car came into collision with a motor bus of defendant, injuring the car. The decision of the case rests in the solution of two propositions - Was plaintiff in the exercise of due care at the time of the collision, or did such collision result from the negligence charged against defendant?

The evidence develops that the Ford car in collision was being driven by a minor nineteen years of age, of limited experience as a driver. The Ford car was at the time of the collision being used for the delivery of periodicals and magazines. One Dickerson, an employee of plaintiff, sat in the front seat beside the driver. It is quite conclusively demonstrated by the evidence that the driver acted carelessly; that he was not observing the vehicles in his pathway, but was engaged in conversation with Dickerson, and that neither of them was on the lookout for obstructions in the path of the Ford. While the driver testified that he turned out of the street car tracks because a street car was behind him, he is contradicted by several witnesses on this point who testified that no car was on the

street behind the Ford car either at the time of or immediately preceding the accident. Furthermore, it is in evidence that the Ford car was being driven fast and that Dickerson had cautioned the driver to go slower. The driver and Dickerson were so absorbed in conversation that neither of them saw the motor bus of defendant until the collision occurred. At the time of the accident the motor bus in collision with plaintiff's Ford car was engaged in the transportation of crippled children from the Spalding school to their several homes and was proceeding with due care; there is no evidence from which a conclusion can be reached that it was being driven in a careless or negligent manner.

We think it is fairly clear from the evidence that the Ford car ran into the motor bus and that the motor bus did not run into the Ford car. To entitle plaintiff to recover it behooves him to establish by a fair preponderance of the evidence that defendant was guilty of the negligence charged, that such negligence was the proximate cause of the collision, and, furthermore, that the driver of plaintiff's car was in the exercise of ordinary care in its operation at the time of and immediately preceding the accident. Hooper v. Adams Express Co., 289 Ill. 169.

From the facts in this record it is our conclusion that plaintiff's driver was not, at the time of and immediately preceding the accident, in the exercise of due or of ordinary care in his driving of the Ford car, that such lack of care was the immediate cause of the accident, and that defendant was not guilty of any of the acts of negligence charged against it.

For these reasons the judgment of the Municipal court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

McSurely, P.J., and Dever, J., concur.

FINDING OF FACTS.

The court finds as ultimate facts in this case that at the time of the collision between plaintiff's Ford delivery car and the motor bus of defendant, the driver of plaintiff's Ford delivery car was not in the exercise of due or ordinary care in driving such car; that the collision between plaintiff's Ford car and defendant's motor bus was solely caused through the fault of plaintiff's driver and that defendant was not guilty of any of the acts of negligence charged against it in plaintiff's statement of claim.

440 - 25701

DR. LILLIAN R. MORRS,
Appellant,

vs.

JAMES J. KELLY, Executor
of Estate of Rose A. Benson,
deceased,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

217 I.A. 648

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. The action is replevin for numerous articles of personal property. Plaintiff succeeded in part, and by this appeal asks this court to review the record and to award her the remaining articles to which she failed to establish her claim in the trial court.

We find a voluminous abstract and a somewhat confusing brief confronting us.

The articles in dispute were contained in a building called The Lincoln Hospital, to the possession of which building, plaintiff says, the "Vitapthic Hospital and Sanitary Association" had the right. There seems to have been some bargaining on the part of plaintiff looking to an acquisition of the hospital property, but in some way the negotiations proved abortive and the property went elsewhere.

Plaintiff contends that all of the articles claimed by her in the replevin proceeding were bought and paid for with her own money. However, upon a careful review of the evidence as abstracted, we think the trial Judge might reasonably find, as he did, that the title to part of said articles was rightfully in plaintiff, and that she neither owned nor was entitled to possession of the remaining articles.

We see no reason to disturb the judgment of the Municipal Court and it is therefore affirmed.

AFFIRMED.

McSurely, P.J., and Dever, J., concur.

473 - 25734

1038

HERMAN DUNTZ COMPANY,
a corporation,
Appellant,

vs.

GEORGE STRONER,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

217 I.A. 648[4]

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This case involves a confession of judgment upon a note, with warrant of attorney to confess judgment attached, in the sum of $500, dated December 2, 1918, upon which judgment was entered for the amount of the note with $10 for attorney's fees.

Defendant thereafter moved the court to set aside the judgment and supported his motion with an affidavit averring that he entered into a contract with plaintiff in substance to buy from it a peddler's route, known in plaintiff's business as Route "C", also one horse and wagon, for the sum of $300, on condition that a contract was signed by the parties by which plaintiff would agree to sell to defendant sausage of all kinds, all boiled hams and all loin rolls that defendant may require to supply his trade for ten years from the date of the contract at the market price prevailing in Chicago at the date of purchase, less one-half cent per pound, payment therefor to be cash the day following delivery of goods to defendant, Sundays and legal holidays excepted; and further, that no assignment or sale of the route or wagon should be made without the consent of plaintiff in writing, and further reciting that to secure prompt compliance with the terms and conditions of the contract defendant should deposit with plaintiff a note for $500, dated December....., 1918, secured by an assignment of a certain contract made the 9th day of May, 1918, between John and Louisa Koler and George and Mary Stroner,

to be forfeited as liquidated damages and not as a penalty in case defendant should fail to comply with each and all the terms and conditions of the agreement, and plaintiff was given power and authority to sell the security with or without notice.

It was then averred that defendant deposited with plaintiff what purported to be a note for $500; that it did not receive a copy thereof and does not know the contents of the same; that the note, while purporting upon its face to be payable upon a certain day, is in reality payable and due only upon the violation or breach of the contract by defendant, and that the note is due and payable only if defendant shall breach or violate the contract, and then only for the amount of damages sustained by the plaintiff.

It is further averred that on December 5, 1918, defendant proceeded to carry out the terms of the contract and did purchase, in accordance with its terms, all the sausage, hams, etc., required to supply his trade, but that plaintiff did not comply with its agreement to sell the same to him at the market price in Chicago less one-half a cent per pound, but that immediately after the execution of the contract plaintiff did take advantage of defendant by virtue of said contract and did charge him prices greatly in excess of the prevailing market price throughout the entire period of his dealings with it, and as an instance of such excessive charges recites that plaintiff did sell defendant minced ham at 21 cents per pound, when the market price thereof was 18 cents, citing a number of other instances where plaintiff violated its agreement and did not sell at the market price but charged more than the market price; and that in further violation of the agreement plaintiff sent salesmen into defendant's route in an effort to eliminate him from the route, etc.; that by reason of such breach defendant suffered damage and

that there is nothing due on the note.

Upon this affidavit the court sustained defendant's motion and entered an order vacating the judgment, whereupon defendant moved to dismiss the suit, which motion the court granted and dismissed the suit at plaintiff's costs and ordered the property levied upon released and returned to defendant, from which order plaintiff prayed an appeal to this court, which was allowed on the filing of a bond in the sum of $1500.

The dismissal of the suit and the judgment for costs against plaintiff were contrary to practice and the law governing such cases. The court might, in the exercise of its judicial discretion, have opened the judgment and let the defendant in to plead to the merits and allowed the judgment to stand as security to await the final determination of the case upon its merits. Should such defense prove successful, then is the time to set aside the judgment; if unsuccessful, all the orders entered on the motion of defendant should be vacated and the judgment allowed to stand as originally entered.

To try the merits of a case upon an affidavit has at least the merit of novelty in judicial procedure. Plaintiff had a constitutional right to a trial of his cause in open court and with the aid of a jury, if he made such a desire manifest in accord with the provisions of the Municipal Court Act. Counsel for plaintiff, who writes a very short argument, was justified in observing at the conclusion of his argument, that "It would be idle folly to take up the time of this Honorable Court in arguing that issues cannot be tried in courts of law on affidavits." With this we quite agree.

Counsel raises another point which we will settle for the guidance of the court in a retrial of the cause; it is that where a note and contract are in conflict, the note will govern as

being the principal obligation. Hunter v. Clark, 184 Ill. 158.

The judgment of the Municipal court is reversed and the cause is remanded to that court for further proceedings consistent with the views herein expressed.

REVERSED AND REMANDED.

McSurely, P. J., and Dever, J., concur.

493 - 25754

NATHAL RONNEBERG and RICHARD G. PIERCE, trading as RONNEBERG & PIERCE,
Appellants,
vs.
CHARLES L. ANDERSON,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 648[5]

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $334.07 entered against plaintiff, on a trial before the court, on defendant's claim of set-off.

Plaintiff's claim was for $300, and in the court's finding this was allowed as a credit against defendant's counter-claim, so that the merits of plaintiff's claim are not involved in this appeal.

This is a case of the fourth class and is therefore, as repeatedly held by this court, what the evidence makes it; therefore we are not concerned with technicalities regarding the pleadings argued by plaintiff.

The plaintiffs are architects and had a contract with defendant to draw plans and specifications for a building and to superintend its construction. Payments to contractors were to be made upon the certificates of the architects, which included certifying as to work done and the amount due and to be paid therefor.

Defendant filed three claims of set-off, which were on motion stricken, whereupon defendant filed an amended statement of set-off, the fourth in the series upon which the parties proceeded to trial. This was for damages claimed to arise out of a breach by plaintiffs of the contract between the parties in suit,

and

alleging that the plaintiffs agreed by their contract to prepare plans and specifications for and to superintend the construction of a machine shop building at the northeast corner of Walnut street and Oakley boulevard, Chicago; that plaintiffs neglected and wholly failed to superintenend the construction of the building and that in consequence thereof inferior material and faulty and poor workmanship were used in construction and that as a further consequence thereof the building was left in a faulty and unfinished condition; that the foundation walls were poorly and improperly constructed, so that in wet weather water seeped through the foundation walls; that said foundation walls were too narrow, causing the brick work to project more than four inches; that the centre pillars were out of place more than twelve inches and that several doors in the building were of such poor material that they were falling apart; that plaintiff failed to properly supervise payments due the various contractors as they had by their contract agreed to do in the course of the construction of the building, whereby various contractors in the course of the construction of the building, and particularly one Kirwin, were overpaid, so that these contractors, and particularly Kirwin, failed and refused to complete their work in accord with their several contracts, leaving the building and its construction in an unfinished condition, so that by reason thereof defendant was forced to pay out $1198.46 according to the six items therein set forth, and also claiming the sum of $500 as damages resulting from plaintiffs' neglect of duty in allowing a faulty construction of the foundation walls of the building.

In its judgment the court allowed two of the items above referred to in the set-off - one of $524.27 for excavating and hauling out dirt from the basement, and the other, $109.80, for

filling in boiler room, cinders, and bricking up piers; these two items aggregate $654.07, from which was deducted the amount of plaintiffs' claim, leaving the amount for which the court gave judgment.

An examination of the testimony sustains, in our opinion at least, the two items above specified which the court allowed against plaintiffs as a proper set-off. In this regard we are inclined to the opinion that the damage was minimized to plaintiffs' advantage. As a typical evidence of the manner in which plaintiffs neglected their duty in superintending the erection of the building and in making certificates to contractors for work done, we quote the following letter of plaintiffs to the contractor Merwin:

"Ref. C. L. Anderson Building.

May 11th, 1917.

Mr. Chas. T. Kirwin:

****************We have finally let the excavating contract, and the filling in of cinders, on the Anderson building. ** We have repeatedly requested you to finish your contract, and you have promised the owner a number of times to do so, but you have not kept your promises, and it is now nearly six months since you, under your contract, were to complete your work.

We received four bids from excavating contractors.** The highest bid for $750.00, from T. M. White & Company, and the lowest bid from Mr. Remaciti, for $330.00. We let the work to Him, and he started the work this morning.

We think you ought to take some interest in the work that you contracted to complete, and not run away from the job. without paying your material men. You have been overpaid on this job and you misrepresented things. You told me that all the material men had been paid, and that there was only about $200.00 worth of work left. On the strength of these misrepresentations we gave you certificates, and you collected on the certificates, far in excess of what was coming to you.

Having a reputation for being honest and fair** we think we ought to hear from you, and you ought to at least show some interest in the work. If you lost on the job it certainly was not out fault.

We trust that you will come in and settle up this job immediately.**"

This is a confession of negligent conduct and lack of proper supervision of defendant's building on the part of plaintiffs which was a violation of the express terms of the contract between them.

It is urged for reversal that the claim of set-off is for unliquidated damages and that therefore there could be no judgment in favor of defendant; that while such damages might be recouped and the claim of plaintiffs thereby defeated, there could be no independent judgment in defendant's favor.

We do not think, in the first place, that the damages set off were unliquidated in their nature, because the amount was easily ascertainable and did not rest in estimates or upon opinion evidence. The items were for materials necessarily furnished and for work and labor made necessary to be supplied to the building on account of the negligent architectural supervision of plaintiffs. They are damages growing immediately out of the contract and are, under well settled legal principles, subject of counter-claim.

It was not necessary to procure opinion evidence to establish the counter-claim. In Western Coal & Mining Co. v. Norvell, 212 Ill. App. 218, this court held that demands for work and labor performed, board, goods sold and delivered, money, etc., are such as may be set off in an action ex contractu whether they arise out of the subject-matter of the contract in suit or not; and in Selz v. Stafford, 284 Ill. 610, it was held that unliquidated damages growing out of the contract in suit may be set off in the same action; and it was there held that the rule that a claim for unliquidated damages cannot be set off in an action for rent under a lease applies only when the damages sought to be recouped grow out of a matter having no relation to the contract sued on. So that, even admitting the contention, which we do not, that the set-off in this case is for unliquidated damages, by parity of reasoning in Selz v. Stafford, supra, such damages growing out

of the contract in suit may properly be the subject of set-off.

The judgment of the Municipal Court is without error and is therefore affirmed.

AFFIRMED.

McGurely, P. J., and Dever, J., concur.

503 - 25764

W. F. HULTQUIST,
Appellee,

vs.

ELMER E. LINDQUIST and
GEORGE REMUS,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

217 I.A. 649

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This appeal is undefended. It appears from the record that defendant endorsed a note dated October 1, 1917, payable ninety days after date, to the order of plaintiff for $250, the maker of the note being Elmer E. Lindquist, who failed to pay it when due, as likewise did the defendant. Upon a trial before the court there was judgment against defendant for $272, principal and interest then due upon the note. Of this judgment defendant seeks our review.

Defendant in his affidavit of merits set up as defenses that there was nothing due on the note; that there was no consideration given to him therefor; that he was a licensed attorney and that he was engaged as such to perform certain services for plaintiff and others; that they agreed to pay him for such services, before the maturity of the note in suit, $3100, and that plaintiff promised to advance the sum of $250 if defendant would endorse plaintiff's note, and plaintiff also agreed that defendant should be liable on the note only if he failed to pay the same out of the $3100 fee when the same should be paid, and that such fee had not been paid.

No attempt was made to prove the first two defenses. The third defense resting in parol was unavailable as such because it attempted by an oral promise to vary and change

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שלום ר', ר'ומנקלי שם
הכתובת שמה.
מצורף.

ב.

ר'ומנקלי שם מנהל הכתובת הזאת
ב הכתובת.

[illegible]

the terms of the note and to vary the liability of defendant under the law as an endorser thereof.

Defendant argues for reversal that under the Negotiable Instruments act there must be proof of a presentation of the note to the maker and a notice of its dishonor to the endorser, (neither of which was done) and cites Tucker v. Mueller, 287 Ill. 551, in support of this contention.

The difficulty here is, however, that such a defense is not open to defendant when made in this court for the first time. His defenses are circumscribed within those set up in his affidavit of merits, which is his pleading.

It is admitted that defendant received the amount payable under the terms of the note, so that as between the defendant Remus, and the maker of the note, Lindquist, the note was given as an accommodation to Remus. As no judgment was taken against Lindquist, his liability is not involved in this appeal.

The judgment of the Municipal court is right and is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

(1041)

321 - 24672

FORSYTHE BROS. COMPANY,
Appellee,

vs.

THE BANKERS SURETY COMPANY
and LEOPOLD J. MENSCH,
Appellants.

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322 - 24673

LEOPOLD J. MENSCH,
Appellant,

vs.

FORSYTHE BROS. COMPANY,
Appellee.

217 I.A. 649

APPEALS FROM
SUPERIOR COURT,
COOK COUNTY.

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

These are separate appeals from two judgments entered by the trial court in two cases, which by stipulation of the parties were tried together, although neither the parties thereto nor the issues therein were identical. Both suits were in assumpsit. In one case Forsythe Bros. Company, a corporation, sued the Bankers Surety Company and Leopold J. Mensch upon a bond given for the faithful performance of a building contract, entered into between the plaintiff corporation and said Leopold J. Mensch. In the other case Leopold J. Mensch sued Forsythe Bros. Company for money claimed to be due him under several building contracts entered into between the parties, one of which was the same contract involved in the suit of Forsythe Bros. Company v. Mensch and the Surety Company.

The contract which the surety guaranteed was made between the parties on the 11th day of November, 1910. Mensch as contractor agreed with Forsythe Bros. Company as owner, that he, Mensch,

would provide all the materials and perform all the work "for the construction of plain and reinforced concrete work, tile, walls, plastering and miscellaneous work required for a new factory building at Harvey, Illinois, as shown on the drawings and described in the specifications prepared by Grossman & Proskauer, engineers, and F. K. Davidson, architect, * * *"

The contract further provided that the work should be done under the direction of the engineers, that their decision as to the construction of the drawings and specifications should be final, that they would furnish such additional drawings and specifications as should be necessary, that in so far as the same were consistent with the intent of the original drawings and specifications, the contractor would conform to and abide by them; that no alteration should be made in the work except upon the written order of the engineers; that the contractor would provide sufficient facilities for inspection by them; that he would remove within twenty-four hours after written notice, material condemned by them; that he would take down all portions of the work condemned by them as failing to comply with the specifications and drawings upon written notice; that upon their certificates that the contractor had failed to perform any agreement, the owner, after three days written notice, might have the engineers certify there was sufficient ground to terminate the employment of the contractor, and might take possession of the premises and material thereon, for the purpose of completing the work; that the contractor should not be entitled to receive any further payment until the work should be wholly finished, when, if there was any excess over the amount paid and expense incurred by the owner, it should be paid to the contractor, but if the expense exceeded the unpaid balance, such excess should be paid by the contractor; that the engineers

should audit and certify the amount and their certificates should be conclusive on the parties; that the work was to be completed not later than December 15, 1910; that the owner agreed to provide all labor and material essential to completing the work not included in the contract, that he also agreed to pay the contractor for this work and material the sum of $28,000, exclusive of first floor slab, only on the certificates of the architects, 85% as the work progressed, certificates to be issued monthly between the 1st and 10th days of the month for work done for previous month, that no certificates given or payment made, except the final certificate or payment, should be conclusive evidence of the performance of the contract, either in whole or in part, and no payment should be considered as an acceptance of defective work or improper material.

This contract was attached to the bond sued on, which recited the making thereof and stated that the condition of its obligation "is such, that if the principal shall indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract, then this obligation shall be void, otherwise to remain in full force and effect, Provided, however, and upon the express conditions, the performance of each of which shall be a condition precedent to any right of recovery hereon * * * etc.

Some of these conditions precedent are that written notice of the principal's default and particular facts and the date thereof shall be given by registered mail promptly, that the obligee shall faithfully perform all the terms, covenants and conditions of such contract on the part of the obligee to be performed, that the plans and specifications mentioned in said contract are not in any respect defective, and are and at all times will be kept adequate for the complete performance of such contract.

Forsythe Bros. Company assigned for breaches of this bond that Mensch failed to do the work or furnish material called for according to the terms of the contract, that in so far as the work was done, he did not comply with the terms of the contract or specifications or the directions of the engineers, that he used materials which were wholly defective and inadequate, that as a result of these breaches, the columns, girders, walls and roof of the structure as erected, were unfit for the purpose named in the contract, that large sums of money had been expended by the plaintiff in attempting to complete the buildings, and that, by reason of the defects mentioned, the plaintiff suffered a loss of "the difference between the value of said structure as the same was left by Mensch when his work was abandoned as aforesaid, and the value of the structure as the same would have been if erected in accordance with the contract."

Further damage was assigned by reason of the loss of the use of the building, and it was alleged that payments had been made in good faith, amounting to $22,000, but that the structure was worth far less than the amount paid because of the defects mentioned, and that the payment should be restored to the extent of $15,000.

It was also alleged that the plaintiff on its part complied with all the provisions and requirements of the contract and the bond.

A stipulation which provided for a consolidation of these cases also provided that the defendants under their separate pleas of nil debit should have the right to introduce "all defenses that they may have in said suit, the same as if all proper pleas to permit the introduction of such defenses had been filed * * * "

By another stipulation it was agreed that the suit should be tried before a jury, that the claims of Leopold J. Mensch

vs. Forsythe Bros. Company and the claims of Forsythe Bros. Company vs. Bankers Surety Company and Leopold J. Mensch should be submitted to the said jury, and that the court should submit separate forms of verdict to the jury, so that it might determine whether said Mensch was entitled to recover damages as against Forsythe Bros. Company or whether Forsythe Bros. Company was entitled to damages upon the bond of indemnity, and that the court should, upon receiving the verdict, enter judgment in conformity therewith if "under the law the party in whose favor the verdict is returned is entitled to the same."

At the conclusion of all the evidence motions were made by each of the defendants for instructions in their behalf, and a written instruction to that effect was tendered, which was denied. Certain agreed instructions were then given to the jury, in which the consolidation of the two causes was explained, and the jury was told that it should determine from the evidence whether Leopold J. Mensch was entitled to recover damages as to Forsythe Bros. Company, whether Forsythe Bros. Company was entitled to recover damages against Leopold J. Mensch, and whether or not the Bankers Surety Company was liable for damages, if any, from the failure of Leopold J. Mensch to fully perform his contract, dated November 11, 1910.

The court at the request of Forsythe Bros. Company and over the objection of the Surety Company further instructed the jury as follows:

> "And if you find from the evidence after applying the instructions of the court as herein stated, that Forsythe Brothers Company has paid to Leopold J. Mensch more than he is entitled to, then it is your duty to return a verdict in favor of Forsythe Brothers Company and against Leopold J. Mensch and the Bankers Surety Company, assessing as damages therefor the amount that you may find, if any, Forsythe Brothers Company have paid to Leopold J. Mensch in excess of the amount of the fair and reasonable value of the materials furnished, and the work performed by said Mensch under said contract of November 11, 1910."

You are instructed that any amount you may find, if any, Leopold J. Mensch is indebted to Forsythe Brothers Company for the failure to substantially comply with the contract, dated November 11, 1910, in furnishing materials and performing work, you should find a like amount is due to Forsythe Brothers Company from the Bankers Surety Company."

The jury returned the following verdict:

"We, the jury, find the issues in favor of Forsythe Brothers Company and against Leopold J. Mensch and the Bankers Surety Company and assess the damages at the sum of $10,000.00."

A motion for a new trial was made by the defendants, which the court, after receiving the report of an expert on the merits of the case, overruled upon the plaintiff remitting $5,000. This plaintiff did and the court thereupon entered judgment on the verdict against the defendant contractor and his surety for $5,000. The court also entered judgment against Mensch for costs in the suit of Mensch v. Forsythe Bros. Company.

The Surety Company contends that the motion by it for a directed verdict should have been granted, because the uncontradicted evidence showed that the plans and specifications were defective and wholly or in part caused the defects complained of because Forsythe Bros. Company failed to comply with the conditions precedent that 85% of the value of the work installed should be paid on certificates of the architect; because notices were not given as required by the bond; because material changes were made in the contract without the consent of the surety. It also claims that in any case the judgment must be reversed because of erroneous instructions given by the court at the request of Forsythe Bros. Company.

From the evidence it appears that before the formal execution of the contract of November 11th the contractor entered upon his work, that the weather was unfavorable, and that the

work did not proceed satisfactorily, and that from time to time, considerable friction developed between the parties. Their differences, however, were not serious enough to prevent the making of other contracts of the same nature between them, which was done on January 17th, January 21st and March 23rd, 1911. No bond was given for these additional contracts.

On February 14th the principal and surety agreed with the owner that the time within which a claim might be brought on account of default should be extended. About February 23rd, the surety agreed with Forsythe Bros. Company that the bond should remain in effect as if no controversy had arisen. On February 25th, an agreement was reached between Forsythe Bros. Company and Mensch that in order to ensure the safety of the building, and that all defects, whether previously mentioned or as they should be found, would be taken care of to the complete satisfaction of the owner, the sum of $10,000 should be held back out of the total of the contract for a period of three months after sufficient tests had been made to satisfy the owner as to the strength of the buildings, and after these tests showed the buildings to have the proper strength. The surety was not notified of these changes in the contract. Work which had been stopped by the contractor was then resumed.

On February 18th and April 8th certificates of the engineers for payments under the different contracts were delivered to the contractor. These certificates were presented to Forsythe Bros. Company and payment demanded, which was refused. On May 3rd the contractor notified the owner that by reason of their failure to pay these sums certified "* * * for more than ten (10) days after said sum of money became due me and was demanded from you by me * * * he elected to abandon the work

provided for by the contracts. On May 5th, the owner acknowledged receipt of these notices, and replied that if the certificates had been issued for these amounts, it must have been through an oversight, that a claim for $3,000 for mechanics' lien had been made against the building, and that under the agreement of February 25, 1911, by reason of "admitted defects in the building we are entitled to hold * * * the sum of $3,000 to cover the work necessary to remedy the defects present and the sum of $10,000 to be withheld by this company and to be in the nature of an indemnity bond to cover any defects which might be found to be present in the roof and other parts of the building." The letter said, "In spite of your having served us these notices of abandonment we still would be pleased to have you complete the work." The contractor then sued the owner; the owner took possession, completed the work and later sued the contractor and his surety.

Much evidence was submitted to the jury tending to sustain the respective contentions of the parties as to controverted issues of fact. It is unnecessary to discuss these in detail. It is admitted by all that the building as constructed was in many respects in a very defective condition. The contractor admits that these defects in part were due to defective workmanship. He claims that other defects were caused by the unfinished state of the building, some to defects in the plans and specifications, others to defects in the footings and foundations with which he had nothing to do, and still others because certain improper tests were required to be made by the owner, and further that the engineers and inspectors improperly passed certain work.

The appellee owner contends that all the defects were due to the fault of the contractor, that the issues as to these matters were submitted to the jury on conflicting evidence and

its verdict should be conclusive. The record, however, hardly sustains this contention especially as to claimed defects in the plans. Witnesses for the contractor testified to defects therein. It was shown that these were drawn by engineers of the owner and were approved by its architect, who, prior to that time, was without experience in planning or constructing this kind of building. In addition to the contractor's own testimony an architect of large experience testified, pointing out the particulars in which these plans were defective, and giving specific reasons why the defects in the plans would cause the defects complained of. He testified that the rods were not so designed as to terminate in the concrete girders, that the plans did not provide for the rods resting on anything, that the steel in every girder and every beam was overstressed and that the size of the steel and girders was improper. "There is insufficient steel in every slab, every beam and every girder carrying the main roof."

This evidence is not contradicted, but, on the contrary, is in some respects corroborated by the testimony of the owner's architect and one of its engineers. It is true, as appellee points out, that in all the controversies prior to the trial Wensch never mentioned that the plans and specifications and design were defective, but this has little weight in view of the proof that Wensch did not know about these defects at that time.

Nor is the fact (as appellee contends) that the contractor asked no instructions to the jury on this point, of weight in view of the stipulation to the effect that all defenses should be considered as pleaded. The evidence showed this defence was in the case and it was necessary for the owner to meet it. We think the contention of the Surety Company that the uncontradicted evidence proves the plans and specifications

were defective, and that these defects in part caused the defects in the building for which damages were allowed must be sustained.

The liability of a surety on a bond for the faithful performance of a building contract is in the nature of a liability on an insurance contract, and is to be liberally construed in favor of the insured. The strict rules which apply in favor of an accommodation surety, do not obtain. Lesher v. U. S. Fidelity & Casualty Co., 239 Ill. 502. But where a condition precedent to recovery on the bond clearly has not been complied with, the obligee may not recover. Lesher v. U. S. Fidelity & Casualty Co., supra; Western Tube Co. v. Aetna Indemnity Co., 181 Ill. App. 592; Brown v. Massachusetts Bonding Co., 176 Ill. App. 502; Rice v. Fidelity & Deposit Co., 103 Fed. 428; National Surety Co. v. Long, 125 Fed. 887.

The provision as to the plans and specifications was expressly made such a condition precedent. Other conditions precedent were also not performed by the obligee. It is not proved that notice of the alleged defaults of the contractor were served on the surety as required by the contract, and it is made to appear that material changes in the original contract were made by the agreement of February 25th, 1911, without notice to or consent of the surety. A material change in the contract of a surety or guarantor of a building contract to the prejudice of such surety or guarantor without his consent, releases him and prevents a recovery on the surety contract. Finney v. Condon, 86 Ill. 78; City of Chicago v. Agnew, 264 Ill. 283; McCartney v. Ridgway, 160 Ill. 129; Cunningham v. Trenn, 23 Ill. 62.

For the reasons indicated on the evidence in this record there can be no recovery against the surety on the bond sued on and

the judgment must be reversed. It may be added that the court by the instruction given as hereinbefore set forth, took from the jury every controverted question of fact so far as the special defenses of the surety were concerned, was therefore erroneous, and would, at any rate, make necessary a reversal of this judgment.

As to the judgment for defendant entered in the suit of Mensch v. Forsythe Bros. Company, we find no verdict of the jury responsive to the issues. In a suit at law tried before a jury, such a verdict is necessary to sustain a judgment, but even if such verdict had been returned, the instruction given by the court to the effect that under the letter of February 25th, Forsythe Bros. Company had the right, "As a matter of law" to withhold the sums of $10,000 and $3,000 from any amount due Mensch until the tests and repairs were made in accordance with said letter, expressed, in our opinion, an erroneous construction of that letter, which would require a reversal of that judgment also.

For the reasons indicated, the judgments will be reversed and the causes remanded.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

Barnes and Gridley, 12., concur.

24889

48 - 24889

(1072a)

JOSEPHINE MAROFSKE, administratrix of the estate of William Marofske, deceased,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CALUMET & SOUTH CHICAGO RAILWAY COMPANY, and THE SOUTHERN STREET RAILWAY COMPANY, operating under the name and style of CHICAGO SURFACE LINES, and JOHN F. MARTIN,
Defendants in Error.

217 I.A. 649

Error to Superior Court, Cook County.

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

The plaintiff sued as administratrix of the estate of her deceased husband to recover damages for his death alleged to have been caused through injuries sustained by him as a result of the negligence of the defendants on the 3rd day of November, 1916.

The declaration charged that the defendant railways company possessed and controlled a certain street railway, extending upon and along a certain public highway, known as North avenue, in the City of Chicago, County of Cook and State of Illinois, and that it, through its servants, was operating a car thereon in an easterly direction; that the defendant Martin was possessed of an automobile which he was driving in a westerly direction in said tracks of defendant's railway, and that the decedent was also driving an automobile in a westerly direction in said tracks and was in the exercise of due care etc., but that each of the defendants so carelessly, negligently etc., ran, drove, managed and controlled the said car and the said automobile, that thereby the street car collided with the automobile driven by the defendant Martin, thereby injuring

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plaintiff's decedent so that he died on the 9th day of November, 1916.

The defendants filed pleas of the general issue, and the defendant Martin filed a special plea, denying ownership and control of the automobile.

Upon the trial plaintiff offered proof tending to sustain the allegations of her declaration. At the close of her evidence the court denied a request of plaintiff that time be given her to produce the physician from the hospital to prove the cause of death, and then gave a peremptory instruction to find the issues for the defendant.

The principal errors assigned and argued are that the court excluded proper and competent evidence offered on behalf of the plaintiff; that it erred in directing a verdict in favor of the defendants, and that it abused its discretion in refusing to allow plaintiff an opportunity to produce the physician as a witness.

We shall first consider the evidence excluded. A witness was called by plaintiff, who stated that he saw defendant Martin on the day of the inquest and heard him testify. He was then asked whether he, Martin, said anything as to the ownership and operation of the automobile on the night in question. The court sustained the objection, stating, "The stenographic report is the best proof." The witness was then again asked what he, Martin, said about the automobile that night, if anything, about the big automobile. An objection to this question by the defendant was sustained. He was then asked, "Did Mr. Martin say who was running the automobile that night?" An objection by defendant was sustained to this question. He was further asked, "Did Mr. Martin say who drove the big machine that night?" An objection to this question by defendant was also sustained as

was an objection to the further question, "What did Mr. Martin say about the automobile, if anything?"

The theory, apparently, on which this evidence was excluded by the court was, that the official report of the proceedings before the coroner would be the best evidence. However, in the recent case of Spiegel's M. F. Co. v. Industrial Commission, 288 Ill. 422, it has been held by the Supreme Court, expressly overruling its former decisions, that neither the verdict of the coroner's jury nor the inquest of the coroner are admissible in evidence in civil suits to prove or disprove liability. We think, the rulings of the court were erroneous, and that statements made by the defendant, concerning which the witness was questioned, were admissible as declarations by him against his own interest. Defendant claims that the error, if any, was harmless, but we cannot so conclude from the record.

We think, too, the court in the exercise of a sound discretion should have permitted the plaintiff time to produce the attending physician to prove the circumstances and cause of decedent's death. The plaintiff attempted to establish this by means of the verdict of the coroner's jury and the record of the inquest, both of which were properly excluded by the court. When the request for time to produce the physician was made, the court intimated that the reason for denying it was, that having heard the testimony of Martin, who was called as a witness by plaintiff, the court was of the opinion that the deceased had not used ordinary care. The court said: "If the case was submitted now, without any proof by the defendant, I would have to set the verdict aside, if the jury returned a verdict of guilty." The court also expressed the opinion that there was nothing for the jury to base damages upon because there was no proof of the

life expectancy of the deceased. Apparently for these reasons the court denied the request for time to produce the coroner's physician. Clearly the court's ruling was based on an erroneous theory of the law applicable. It was not necessary that there should be any proof of the life expectancy of the deceased, the evidence having shown that he left a widow and minor children dependent on him for support. The tables, though admissible, were not indispensable. Calvert v. Springfield Light Co., 251 Ill. 290.

Moreover, under the facts, the question of the negligence of the defendants, as well as the decedent's care for his own safety were for the jury. The court had no right to take the case from the jury because he believed defendant Martin's testimony on that point as against other competent evidence tending to prove that the deceased was in the exercise of due care.

Appellee claims there is no proof that the injuries occurred in the State of Illinois or that death resulted from the injuries sustained. Proof of these facts was probably necessary. Walton v. Pryor, 276 Ill. 563; Carlin v. Springfield Light Co., 283 Ill. 142. For aught we can determine the excluded evidence might have supplied this proof.

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

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

(1073a)

126 - 24995

217 I.A. 649

CHARLES L. SHERLOCK,
Appellee,

vs.

JOHN GARALIUS et al.,

On Appeal of JOHN GARALIUS,
Appellant.

Appeal from
Municipal Court
of Chicago.

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

On the 19th day of June, 1917, the appellee, as plaintiff, confessed judgment against appellant in the Municipal Court of Chicago. This judgment was confessed by virtue of a power contained in a note for the sum of $500, payable to bearer on demand, and signed by appellant as maker thereof.

On October 19, 1918, an order was entered, vacating and setting aside this judgment and giving defendants leave to plead. On November first thereafter, on motion of plaintiff, entered October 23rd, the order of October 19, 1918, was set aside and the motion to vacate the judgment by confession on June 19, 1917, was denied. This appeal followed.

The motion to set aside the judgment was supported by the affidavit of defendant John Garalius, who states therein, in substance, that the note was delivered to John Rekosh, to be held by him in escrow for the faithful performance by defendants of a certain contract, made between defendants and one Polcyn, for the exchange of certain real estate; that Polcyn failed to carry out the contract, and that affiant thereupon demanded the return of the note, which was not done, and that thereafter, for the purpose of defrauding defendants, the said note was delivered to the plaintiff, Sherlock, who took it with notice

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of affiant's rights and for the purpose of defrauding him.

A copy of the contract is attached to the affidavit. It appears to have been executed January 22, 1917, and tends to corroborate the statements contained in defendant's affidavit. This affidavit of defendant by way of excusing his delay in making a motion to set aside the judgment, says that after an execution which issued upon the judgment was served upon affiant, he consulted an attorney, who informed him that the judgment was vacated, and that affiant had no notice that the judgment was unsatisfied until June 13, 1918; that on June 26th, he was informed by said attorney that he would have to pay the note, and that in the month of August thereafter, he employed another attorney in the matter.

Defendants also presented the affidavit of said other attorney which sets up that immediately after such employment, he filed a bill in the Circuit Court of Cook County, and obtained a preliminary injunction against the enforcement of the judgment, that this injunction was dissolved on the 28th day of September, 1918, and the bill of complaint dismissed on October 7, 1918. It also appears from the affidavits that the defendant is unable to read or write or converse "in the American language".

Counter affidavits were received by the court tending to show that on the 23rd day of August, 1917, the defendants filed their schedules claiming exemption against the judgment; that on the 16th day of August, 1917, in pursuance of notice by the defendants, the parties appeared in the Municipal Court and argued a motion to vacate and set it aside; that the court orally denied the motion, but before any order was entered, said motion was withdrawn; that on June 11, 1918, appellants having sold their property, agreed with their grantee that they would pay the judgment, and that the notice that defendant would appear and

ask to have the judgment set aside on the 21st of October, 1918, was served upon appellee at his home, contrary to the rules of the Municipal Court.

The appellee argues the defendants were guilty of such laches as to preclude the opening up of the judgment. He urges that the setting aside of a default is within the sound discretion of the court, and that where the affidavits of the parties are flatly contradictory, the court may give credence to one rather than to the other, and that when this is done, such action cannot be assigned as error, citing with other cases Hartford Life and Accident Ins. Co.,v. Rossiter, 196 Ill. 277.

This may be the rule as to defaults taken upon due service but we do not understand that it is the rule applicable where a motion is made to set aside a judgment entered by confession. In such case the general rule is that if a meritorious defense is shown by the affidavit of merits the judgment in the exercise of a sound discretion should be opened. Lake v. Cook, 15 Ill. 353; Rasmussen v. Smith, 88 Ill. App. 334; State Bank of Clifton v. Parkhurst, 155 Ill. App. 101; Halladay v. Underwood, 75 Ill. App. 97; Blake v. State Bank, 178 Ill. 182; Vennum v. Carr, 130 Ill. App. 311; Mastin v. Richardson, 134 Ill. App. 256. Upon such a motion, generally, we understand counter affidavits ought not to be received or considered. We think the affidavits in this case showed a meritorious defense and that the defendants were entitled to a trial of the issues.

For the reasons indicated, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

1044a

135 - 25004

LEWIS N. GILPIN,
Plaintiff in Error,

vs.

THE CHICAGO HOSPITAL COLLEGE OF MEDICINE, a corporation,
Defendant in Error.

217 I.A. 649[5]

Error to Municipal Court of Chicago.

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

In this case the plaintiff sued for the return of $100 paid by him to the defendant as part of his tuition fees for the year 1918. The statement of claim alleges that plaintiff hearing in what class the school was rated, decided not to take the course and so informed defendant, and asked defendant to return the $100, which defendant refused to do, and that plaintiff did not attend the school or any of its sessions.

No affidavit of merits was filed. The case was tried in what is known in the Municipal Court as "The Small Claims Court". In that court it seems that no pleadings by the defendant is required. The court found the defendant "Guilty, as charged in the statement of claim", and assessed plaintiff's damages at "$50 in tort". Motions for new trial and in arrest of judgment were made by plaintiff and overruled, whereupon judgment was entered.

By this writ of error plaintiff seeks to reverse this judgment, claiming that the court should have found for him in the sum of $100. No propositions of law were submitted to the trial court, and no errors are assigned and argued as to the rulings of the court on the admission or exclusion of evidence. The argument of plaintiff in error is to the effect

that the finding and judgment are against the preponderance of the evidence. But, we regret to say, the record of the trial court presented for our inspection precludes a consideration by us of this alleged error on the merits. The certificate of the trial judge is attached to what purports to be "A correct statement of all the facts * * * *". But it is apparent from an examination of it that this is not true. On the contrary, it appears to be in part a statement of contradictory testimony of the witnesses, and in part of contradictory claims made by the respective parties with respect to matters of fact, without any finding by the court as to which is true.

The judgment was entered November 6, 1918. On January 6, 1919, plaintiff in error presented "A statement of the proceedings for signature" of the trial judge, which the trial judge refused to sign. The supposed statement of facts was then made in the presence of counsel, the trial judge saying "My recollection as to the substance of the evidence as given before me is as follows:" It must be apparent that on such a record it is impossible for this court to weigh the evidence. Schumacher v. Claney, 152 Ill. App. 37; Seehausen Wehrs & Co. v. Interstate S. & I. Co., 150 Ill. App. 179.

The Municipal Court Act (Hurd's Revised Statutes 1917, Chap. 37, Sec. 23, p. 900) requires that the record presented for our review shall be either a correct statement of facts or a stenographic report of the trial and proceedings had. This record is neither. We will, however, add that we have examined the record that is before us, and that if we could regard the same as complying with the law we would be required to affirm the judgment on the merits.

AFFIRMED.

Barnes and Gridley, J. J., concur.

(1045a)

207 - 25083

SAMUEL NEIRMAN,
Appellee,

vs.

THE DREAMLAND RINK COMPANY,
a corporation,
Appellant.

Appeal from
Municipal Court
of Chicago.

217 I.A. 650

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

Plaintiff below, who is appellee here, sued the defendant in the Municipal Court of Chicago for the sum of $40, which his statement of claim alleged to be the fair value of a hat and an overcoat which plaintiff left with defendant as a bailee for hire, and which it negligently permitted to be lost. The case was tried by the court, which found for the plaintiff in the sum of $34.50, and entered judgment on the finding.

It is first urged that the evidence shows defendant was merely a gratuitious bailee, therefore liable only for gross negligence of which there was no proof. As to this point the evidence shows that at the time in question plaintiff went to the place of business of defendant at which a dance was conducted, that he paid an admission fee of fifty cents, then took his hat and coat to the check room and left them there, receiving a ticket reading "Dreamland Ward Robe Check, No. 583", that after dancing he presented his check, but the hat and coat could not be found.

He testified that he had danced there before, and that only one payment was made which included everything. A witness for defendant testified that a separate charge was made for

wardrobe. It does not appear, however, that any demand was made on plaintiff therefor. Possibly if such was the fact and the coat and hat had been found, the defendant would have demanded and received the usual charge. In either case we think the court was justified in finding defendant was a bailee for hire.

It is next urged that there is no proper proof in the record as to the damages. The plaintiff testified that he purchased the coat about a month prior to its loss from M. L. Rothschild, and that he paid therefor the sum of $35, that he purchased the hat in question from one Feilchenfeld, a hatter, on the day the armistice was signed and paid $5.00 for it, that he had worn the clothes only a few times.

It is generally true as appellant contends, that the measure of damages for the loss or conversion of goods, is the fair market value of the same at the time of the loss or conversion with interest thereon. But this rule is not strictly applied to clothing and household goods which have been worn and used for the reason that these will not usually sell as secondhand goods for what they are really worth. Head v. Becklenberg, 116 Ill. App. 580.

It appears from a part of the record which has not been abstracted that the plaintiff's evidence as to the price paid for these goods was corroborated by receipts taken at the time the purchases were made.

We think the evidence was admissible and justified the finding of the court.

The judgment will be affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

(1046a)

272 - 25149

MAGGIE SELENIS,
Appellee,

vs.

WILLIAM NAUGEDA,
Appellant.

Appeal from
Municipal Court
of Chicago.

217 I.A. 650

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

The plaintiff in this case sued defendant appellant for damages by reason of injuries sustained by her on the 23rd day of July, 1916, while riding in an automobile of defendant, which automobile was being driven by defendant's chauffeur.

The defendant set up as a special defense that he did not control the automobile at the time in question. The case was tried by the court without a jury. Defendant made a motion for a finding in his behalf which was denied and judgment was entered on the finding for plaintiff.

It is not disputed that plaintiff was riding in defendant's automobile at the time in question, nor that she was then injured by reason of the negligence of the driver. It is urged that the driver was not then acting within the scope of his employment, and that defendant, therefore, is not liable for his negligence.

The evidence shows defendant employed the chauffeur whose name was Adukis to drive the automobile and paid him for such services the sum of $35 per month, with board and lodging, and that Adukis had been so employed by defendant for about two months immediately preceding the accident. The defendant had occasionally, prior to this time, let the automobile for service

in conveying persons to and from funerals and Adukis at these times drove it. The evidence shows that on at least one occasion defendant accompanied Adukis upon a trip of this kind.

On the day in question plaintiff attended a funeral near Eighteenth and Union streets, in Chicago, and after the service at the church located near there decided to go to the cemetery, which was outside the city limits. She inquired of the undertaker about a conveyance, and he pointed out to her the automobile of defendant. With other friends she approached the driver Adukis, who agreed to carry the parties to and from the cemetery for the sum of $15, but no money was paid at that time.

The evidence for defendant tended to show that on the morning of the day in question, one Adolph Butkis, who was in the livery business, called up defendant and asked him to send over his machine, which defendant thereafter sent by Adukis. Butkis at that time told defendant he was going to a funeral with one Katoctis, who was the undertaker in charge. The automobile was late in arriving at the place of Butkis, and Butkis told the driver to take it home. Butkis says that he knew nothing more about it. Adukis, however, remained at the street corner, near the church about five or ten minutes, when Katoctis requested him to bring the car in front of the church. Katoctis then brought parties, including plaintiff, to the automobile, and plaintiff asked Adukis if he could drive. He replied that he could, but he says that nothing was said about money and no price agreed on. Adukis did not see or communicate with the defendant from the time he left defendant's place until after the accident.

It is, of course, elementary to say that in order to render the master liable for the tortious act of his servant it must be proved that the servant was at the time of the alleged

tortious act, acting within the scope of his employment. In Johansen v. The William Johnston Printing Co., 263 Ill. 236, the Supreme Court declared the law applicable as follows:

> "The general rule is that a party injured by the negligence of another, must seek his remedy against the person who caused the injury, since such person is alone liable. To this general rule the case of master and servant is an exception, and the negligence of the servant while acting within the scope of his employment, is imputable to the master, but to bring a case within this exception it is necessary to show that the relation of master and servant exists between the person at fault and the one sought to be charged for the result of the wrong, and the relation must exist at the time and in respect to the particular transaction out of which the injury arose."

The defendant argues that he is not liable under the facts of this case because he did not give express directions to Adukis to make the trip in question. We do not think this was necessary. If the chauffeur was acting within the general line of his employment without departure therefrom, defendant would be liable.

We think, under the evidence, that if the trial had been by jury, it would have been for the jury to say whether such direction might not reasonably be implied from the circumstances in evidence. The finding of the court is entitled to the same weight here as the verdict of a jury. The finding is not against the preponderance of the evidence, and the judgment will be affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

(1047a)

182 - 25437

NELLIE E., GLEASON,
Appellee,

vs.

ADOLPH COPELAND,
Appellant.

Appeal from
Municipal Court
of Chicago.

217 I.A. 650[3]

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

The stenographic report filed by appellant in this cause has been stricken by order of this court.

Appellee has made a motion that this order be set aside which must be denied.

The errors assigned on the record are all based on the stenographic report which has been stricken. No errors are assigned on the common law record. The judgment will therefore be affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

87 - 24945

PAUL J. SENGSTOCK and WALTER F. FARADAY, Administrators of the estate of WILHELMINA SENGSTOCK, deceased,
Plaintiffs in Error,

vs.

CHICAGO RAILWAYS COMPANY, a corporation, HENRY A. BLAIR, JOHN M. ROACH, CHAS. C. ADSIT, WALLACE HECKMAN, LEONARD A. BUSBY, HARRISON B. RILEY and F. O. WHITMORE,
Defendants in Error.

Error to Circuit Court, Cook County.

217 I.A. 650

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a case for compensatory damages for the death of Wilhelmina Sengstock. At the close of plaintiffs' evidence the court directed a verdict for defendants, thus presenting as the main question here whether there was any evidence tending to support any of the counts of the declaration.

She was a passenger on a car, controlled at least in part by the Chicago Railways Company, and shortly after leaving it was found lying in an unconscious state, partly on the track of the car, bleeding from a gash about two inches long over the occipetal region of the skull from left to right just below the upper part of the ear. From the injury thus received she died the next day.

All the counts of the declaration were predicated upon negligence in starting the car and causing it to move forward when the deceased was in the act of alighting therefrom whereby she was hurled against the car and upon the street, receiving injuries from which she died the next day, the first count alleging that the car was so started without knowing whether she had alighted from the car and before she had alighted, the second alleging that it was so started without giving her ample time to alight, and the third, that it was so started without giving

her a reasonable opportunity to alight.

While no witness saw the actual occurrence we do not think it can be justly said that the circumstances testified to had no tendency to support any count of the declaration.

The evidence showed that deceased left a south bound Western avenue car at 20th street at the usual stopping place just north of the latter street; that the witness Caroline Arndt had alighted at the same place from another south bound car and was standing at the northwest corner of the intersection waiting for her daughter when a car following the car she had left came along, stopped and passed on; that just as soon as the latter car passed on she saw deceased lying on her back about 50 feet north of 20th street with one arm on the car track; that she went to her and with the help of a man assisted or took her to the sidewalk; that when about 150 feet north of 20th street, walking south on the east side of Western avenue the witness Wiseman saw a woman near where deceased lay, looking at her as he thought, and when he got opposite them saw deceased lying in the street. He said a south bound car then stood motionless with its rear in 20th street. While these two witnesses varied in details, one claiming the deceased lay with her head to the north and the other that her head was to the south, and each apparently claiming to be the first to reach the body, and one claiming a car stood motionless at 20th street and the other that the car had passed on, yet the question on the motion to direct a verdict called merely for determination of whether any part of the testimony, whether contradictory or not, had a tendency to support any count of the declaration.

The testimony of both witnesses tended to show that deceased from her position with reference to the street car track, with one arm on it, could not have lain there before a south bound car had passed, else her arm would have been crushed; and the testimony of Caroline Arndt was that she saw deceased in that position immediately after the passing of a south bound car. It appeared that deceased left the rear door of a south bound car that had stopped at the regular place on the north side of 20th street and that her body was lying near where she left it. There was also testimony tending to show that there were no other vehicles near at that time nor persons, except one or two who may be accounted for as the persons who approached deceased immediately after the car from which she had alighted had passed, thus tending to eliminate the possibility of her having been thrown to the street otherwise than by some violence connected with her leaving the car. The nature of the injury, too, tended to show that it came from her being thrown violently to the ground rather than merely from slipping and falling to it after she was clear from the car. The evidence further tended to show that the conductor while waiting for deceased to alight and when giving the signal to start was standing back in the car some distance from its rear in a position unfavorable for determining with certainty whether the deceased had in fact completely alighted from the car before the car started again. Hence we think there was at least some evidence tending to support the charge of negligence in starting the car without knowing whether deceased had alighted therefrom and before she had in fact alighted, and that therefore the verdict was improperly directed as to the Chicago Railways Company.

As to the other defendants there was a special plea

denying their ownership, control or management of the car, as to which no proof was adduced, and plaintiff was not relieved from the burden of making such proof simply because there was no similiter filed to the replication. Adding a similiter is not only a mere matter of form (20 Ency. of Pl. & Pr. 263; Gillespie v. Smith, 29 Ill. 473; Nieman v. Hintker, 85 id. 468) but is waived by going to trial without it. (Hagen Paper Co. v. East St. Louis Pub. Co., 269 Ill. 535.) Hence the judgment that they go hence without day was proper.

So far as important for another trial it may be said that the coroner's verdict was properly excluded, (Spiegel's H. F. Co. v. Industrial Com., 288 Ill. 422) and also the testimony that the conductor was looking north at the time the car reached 22nd street. The conductor's position and conduct at that time were not a part of the res gestae.

The judgment will accordingly be reversed and the cause remanded as to the Chicago Railways Company with costs against the latter, and affirmed as to the other defendants in error.

REVERSED AND REMANDED AS TO CHICAGO RAILWAYS COMPANY, AND AFFIRMED AS TO THE OTHER DEFENDANTS IN ERROR.

Matchett, P. J., and Gridley, J. concur.

124 - 24988

(1049a)

ROSE REVESZ,
Plaintiff in Error,

vs.

PAUL T. WOLKOW,
Defendant in Error.

Error to
Municipal Court
of Chicago.

217 I.A. 651

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error obtained judgment by confession for $40 and costs, being one month's rent of $25 due under a lease containing power of attorney to enter such judgment, and $15 attorney's fees for entering up the same. Upon defendant's filing an affidavit stating that prior to institution of the suit he tendered the $25 due under the lease and that plaintiff in error refused to receive the same, and renewing the tender in court, he was given leave to defend, the judgment to stand as security, and the affidavit as an affidavit of merits.

The verdict was in the following form:

> "We, the jury, find that at the date of the rendition of the judgment by confession in this cause, there was due from the defendant, to the plaintiff, the sum of Twenty five Dollars ($25.00)."

The court overruled plaintiff in error's motion for a new trial and entered the following judgment:

> "This cause coming on for further proceedings herein, it is considered by the court that final judgment be entered on the verdict herein and that the judgment rendered herein against the defendant by confession be and the same is hereby reduced to the sum of $25, for which amount said judgment is confirmed and ordered to stand in full force and effect as the judgment of this court as of the date of rendition thereof, that the plaintiff take nothing by this suit and that no costs be taxed herein, it appearing to the court that no costs have accrued to either party to this cause."

Plaintiff in error asks that the judgment be reversed and the cause remanded with directions to correct the judgment by confirming the original judgment by confession, contending that the verdict was in substance one for the plaintiff.

Under the pleadings the only issuable fact was whether defendant in error made a proper tender of the $25 conceded to be due before institution of the suit. Though not in proper form the verdict indicates that the jury found that issue in favor of the defendant, and the judgment conforms to that construction. The tender being kept good plaintiff was not entitled to costs, (Monroe v. Chaldeck, 78 Ill. 429) and tender being made before suit there was no occasion for exercising the warrant of attorney, and consequently no right to recover fees therefor.

The expression used in various decisions, cited by plaintiff in error, that "if the defense is successful, the judgment falls, if otherwise the judgment is to be enforced," is applicable to an entirely different state of facts, where for instance the issues are such that the original judgment must either stand or fall in its entirety. That is not the case here where plaintiff in error was entitled to a part of the judgment, namely, for an amount admitted to be due, but to nothing more in view of the successful plea of tender. If defendant had failed on that issue then unquestionably the judgment should have been confirmed. But having succeeded it was clear that plaintiff was not entitled to the full judgment of $40 nor to costs in the case. As was said in Lyon v. Boilvin, 2 Gilm. 629, an authority frequently referred to in cases of this character, "the court may set aside the judgment wholly, or partially, and upon terms."

But as the judgment could not be more favorable to plaintiff in error it is useless to reverse it and remand the cause merely to correct informalities in the verdict and judgment that will in nowise change the result.

AFFIRMED.

Matchett, P. J., and Gridley, J. concur.

132 - 25001

1050a

IN THE MATTER OF THE PETITION OF MARY W. C. NELSON, ARRESTED AT SUIT OF CHRISTINA BENSON,

CHRISTINA BENSON,
Appellee,

vs.

MARY W. C. NELSON,
Appellant.

Appeal from
County Court,
Cook County.

217 I.A. 651[2]

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a denial of the petition of Mary Nelson for discharge under the Insolvent Debtors' Act. She was held in custody by virtue of a writ of ca. sa. issued on a judgment obtained against her in a suit for alienating the affections of the husband of Christina Benson.

It is first urged that the judgment was void because the declaration was not filed until the fifth term after the suit was instituted. But the court having jurisdiction of the defendant and the subject matter, its judgment did not become void from mere error in procedure. Nor can the judgment be attacked collaterally on the ground of error. A citation of authorities on these elementary propositions is unnecessary. Besides the record discloses that the irregularity was waived by defendant's appearing and joining in issue, and also stipulating to the reinstatement of the suit when three years later it was dismissed for want of prosecution.

The main question is whether malice was the gist of the action. The court held it was and denied defendant's motion to introduce extraneous evidence.

Petitioner's evidence consisted of the common law record of the suit showing the declaration in one count, the plea of general issue and the verdict of "guilty".

The declaration contained these allegations:

> "That defendant, contriving and wrongfully, wickedly, and maliciously intending to injure plaintiff and deprive her of the support, comfort, society and consortium of said Nils C. Benson, did wrongfully, wilfully and maliciously destroy and alienate from plaintiff the affections of her said husband, the said plaintiff in no wise consenting thereto, and has wrongfully, wickedly, wilfully and maliciously caused, induced and enticed said Nils C. Benson, the husband of plaintiff, to separate himself from her, whereby plaintiff has been deprived" etc.

Whether malice is the gist of a civil action may be determined alone from an inspection of the record of that action, (Jernberg v. Mix, 199 Ill. 254; Biebel v. Kuttnauer, 147 Ill. App. 627) particularly from the allegations of the declaration (People v. Healy, 128 Ill. 9), and the judgment is res judicata of that question and therefore not open to attack by the introduction of extraneous evidence. (Jernberg vv. Mix, supra.) Here the declaration alleged that defendant with wrongful, wilful and malicious intent to injure the plaintiff and deprive her of the support, comfort, society and consortium of her husband did wrongfully etc. alienate from her the affections of her husband etc. and on that issue the verdict was "guilty".

As the term "malice", as used in the Insolvent Debtors' Act, applies to that class of wrongs inflicted with an evil intent, design or purpose and implies that the guilty party was actuated by improper or dishonest motives involving the intentional perpetration of an injury or wrong upon another, (Jernberg v. Mix, supra; First National Bank of Flora v. Burkett, 101 Ill. 391; Kitson v. Farwell, 132 id. 327) we think there can be no doubt from such allegations and the nature of the cause of action that malice was the gist of it.

The Petitioner responds that Respondent:

> "does not dispute, materially, any statements, [illegible] or allegations, [illegible] Petitioner in Petitioner's Motion [illegible] Respondent has not filed any opposition [illegible] Petitioner's Motion, therefore, Petitioner's Motion should be granted."

Petitioner relies on the rule of [illegible] that he cannot be [illegible], (Citation) v. Bee, 345 U.S. 821; Tarpley v. Greenwood, 497 F.2d 1162, 1164 (5th Cir. 1974) [illegible] rule that "allegations of the petition [illegible] (Citation) v. Dowd, 318 F.2d 171, 173 [illegible] by [illegible] of mere assertions not [illegible] with [illegible] of the [illegible] of [illegible]." (Citation) v. Bee, supra, 345 U.S. 821; and the [illegible] rule that [illegible] not [illegible] [illegible] [illegible]

While in most of the cases decided in this state involving determination of this question the intent to defraud and deceive was the basis of the action, and none was a suit to recover for alienation of affections, yet in other jurisdictions it has been held that malice is an essential element of such an action, (Westlake v. Westlake, 34 Ohio St. 621; Sickler v. Mannix, 68 Nebr. 21; Geromini v. Brunella, 214 Mass. 492; Roland v. Stanley, 88 Ark. 562) and in 13 R. C. L. p. 1466, it is laid down as a general rule, where there is no element of seduction or adultery, "that a defendant in an action for alienation of affections is not liable unless he acted maliciously or from improper motives implying malice in law."

We do not think the court erred in holding that malice was the gist of the action, and in refusing to receive evidence extraneous to the record.

AFFIRMED.

Matchett, P. J., and Gridley, J. concur.

153 - 25025

JOHN GIANESIN,
Appellee,

vs.

CHARLES F. SCHLIESKE,
Appellant.

1051a

Appeal from Circuit Court
of Cook County.

217 I.A. 651[3]

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant for wages before a justice of the peace. From a judgment in his favor defendant appealed to the Circuit Court where the case was tried without a jury and judgment again rendered against defendant, which he seeks to reverse.

From plaintiff's own evidence it appears that they entered into a contract of partnership, and that it continued for several months, each drawing from the proceeds of the business on account, plaintiff the amount of $237.71, and defendant the amount of $57.25, the total exceeding the profits of the business. Plaintiff withdrew from the business, claiming defendant was in default in respect to the performance of certain terms of the partnership agreement and did not produce as much work as he did and did not do other things which he expected him to do as a partner, and brought suit on the theory that he could recover the value of his services as wages. It is plain from the very statement of these facts, that being admittedly partners, such a suit would not lie. That is elementary. If plaintiff has any remedy it is in equity. But it is not a case that can be sent back for a transfer on the theory that plaintiff misconceived his remedy, the suit having been begun in the justice's court. Accordingly the judgment will be reversed.

REVERSED.

Matchett, P. J., and Gridley, J. concur.

177 - 25053

(6052a)

AMERICAN TRUST & SECURITY COMPANY, a corporation,
Appellee,

vs.

MRS. S. KAUFMANN et al.,

On Appeal of RUSH B. COSPER and WILLIAM P. COSPER,
Appellants.

217 I.A. 651

Appeal from Municipal Court of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for plaintiff in a replevin suit for possession of an automobile mortgaged to plaintiff by defendant Rush B. Cosper to secure the latter's note for $967.37, which was past due and unpaid.

The evidence tends to show appellants' joint possession of the property, a proper demand on them therefor, and appellee's right to possession thereof under the terms of the mortgage and the circumstances in evidence, unless the note so secured was void for ultra vires, as urged by appellants. The evidence further discloses, and it was undisputed, that said note represents a loan by appellee to the Tyro Equipment Company, with which Rush B. Cosper appears to be in some way connected.

Appellee's charter authorized it to purchase and sell bonds and mortgages but prohibited its dealing in the business of loaning money. Possession of the mortgaged property was sought for the purpose of enforcing the mortgage. But as the transaction in making the loan was ultra vires and void, the mortgage could not, under the doctrine laid down in Calumet etc. Dock Co. v. Conkling, 273 Ill. 318, be enforced. "No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming

or enforcing the contract but in some other manner." (Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24; North Avenue Building & Loan Assn. v. Huber, 270 id. 75; Calumet, etc. Dock Co. v. Conkling, supra.) In the Conkling case it was held that as the corporation had no power to make a loan the trust deeds given to secure it were unenforcible. We think the decision in that case is applicable to the facts in this. Accordingly the judgment will be reversed.

REVERSED.

Matchett, P. J., and Gridley, J. concur.

195 - 25071

ABRAHAM TINSLEY,
Appellee,

vs.

INDEPENDENT WESTERN STAR ORDER, a corporation,
Appellant.

Appeal from
Municipal Court
of Chicago.

217 I.A. 651

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant is a fraternal beneficial society and was sued by appellee the beneficiary named in a benefit certificate issued by said society upon the life of appellee's wife as a member thereof. The only question is as to the extent of liability, appellant claiming that the beneficiary was entitled to only $100 and appellee that he was entitled to $500, less the amount to which assignees of the certificate were entitled. The finding and judgment of the court were in accordance with appellee's theory.

Stated chronologically the material undisputed facts are as follows: Deceased's undated application for membership in the local order was approved by the grand medical examiner August 16, 1916. She was initiated in the local lodge of the order September 10, 1916. Her certificate of membership was issued from the grand lodge September 13, 1916, and she was declared a beneficiary member in the local lodge by its president September 24, 1916. She died March 10, 1917.

Prior to August 22, 1916, the beneficiary certificates contained a provision in accordance with a previous law of the order that if the member died within one year from the date of approval of her application and medical certificate the beneficiary would be entitled to only $100. On that date a

Ministry Library,

Applicant,

AT.

Ministry Clerk

Defendant.

convention of the order repealed that law, and the resolution provided that such repeal should inure to the benefit of only those members "who will affiliate with the order after August 22, 1916." There had been written into and then erased from the certificate of membership issued to deceased the limitation prescribed by such law. Plaintiff and the secretary of the local lodge testified that the certificate bore such erasure when it was issued. Their testimony was not directly contradicted. The court's finding was in accordance with their evidence and we find nothing in the record that warrants changing it.

That the certificate was issued with such erasure is consistent with the fact that it was not issued until after August 22, 1916, and after deceased was initiated as a member. The grand secretary of the order, defendant's only witness, testified that he and the grand medical examiner acted together on applications and that when a certificate was approved he notified the secretary of the local lodge that the candidate was approved and might be initiated, and that it was not until he got a report from the lodge of the initiation that the policy or membership certificate was issued. With no other evidence relating to the subject of affiliation we think it cannot be said from the evidence in this record that a member is regarded as affiliated with the order until she is initiated into the local lodge; for until then she is not even entitled to a certificate of membership notwithstanding the approval of the application. The judgment will be affirmed.

AFFIRMED.

Matchett, P. J., and Gridley, J. concur.

(1054a)

204 - 25080

JOSEPHINE B. KILEY,
Appellee,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a corporation,
Appellant.

Appeal from
Municipal Court
of Chicago.

217 I.A. 652

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The question here is as to the liability of the appellant railroad company for the value of articles missing from a box that it received in Detroit and transported to Chicago, where on presentation of its check therefor it delivered the box to an expressman for delivery to plaintiff.

The evidence is undisputed that when the box was taken from defendant's baggage room in Chicago a board or boards on one side of it, though not broken through, were crushed or caved in and that the rest of the boards were nailed down. The evidence further shows that plaintiff sent the box to defendant's depot in Detroit by an expressman, and that she afterwards, the next day, saw it there, pointed it out to defendant's baggage man and received defendant's check therefor. She testified that at that time it stood on end and did not look any different than when it left the house. Defendant offered no evidence contradictory of these facts, but urges that in the absence of proof as to how long the box was in the possession of the Detroit expressman and the care taken of it in the meantime before delivery by him to the defendant, no presumption can be indulged that the loss

occurred after such delivery. It is true the burden of proof rested upon the plaintiff with respect to these matters, and while plaintiff's evidence as aforesaid as to the condition of the box after delivery to defendant was somewhat meager, yet uncontradicted we think it made a prima facie case that the box was delivered to defendant in the same condition in which it left her possession. In this respect it differs from the cases cited by defendant with respect to the burden of proof, the law of which is not questioned. The judgment will be affirmed.

AFFIRMED.

Matchett, P. J., and Gridley, J. concur.

1055a

213 - 25089

GUSTAVE DALLUF,
Appellee,

vs.

VINCENZO CHIARA et al.,
On Appeal of VINCENZO
CHIARA and JEROME H. BASSY,
Appellants.

Appeal from
Circuit Court,
Cook County.

217 I.A. 652

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is by two of several defendants against whom the judgment appealed from was rendered.

It is first contended that the motion for a new trial was erroneously overruled. But that question is not preserved for review, there being no assignment of error to that effect. (Drake Machine Works v. Brossman, 135 Ill. App. 209, 225.) We therefore cannot consider the specific contentions which call for determining the weight of the evidence, namely, those relating to the claim of plaintiff's contributory negligence, defendants' want of negligence, the ownership of the instrumentality causing the injury, and the agency of the person operating it.

Nor was there a special plea putting the fact of ownership in issue. No questions of fact argued, therefore, are preserved for review.

As to law points: As there was evidence tending to establish each material element of the cause of action, the court properly denied defendants' motion for an instructed verdict. It is urged that the court erred in refusing an instruction. But the abstract does not contain the instructions that were given, hence under our rules we will not go to the record to find what they were, as is necessary to determine the point. Consequently the judgment will be affirmed.

AFFIRMED.

Matchett, P. J., and Gridley, J., concur.

Dear Sir,

Yours faithfully,

Signature.

Address.

Occupation.

243 - 25120

(1056a)

AGNES SOUTH,
Appellant,

vs.

ANTON J. CERNAK, Bailiff of the Municipal Court of Chicago,
Appellee.

Appeal from
Circuit Court
of Cook County.

217 I.A. 652[3]

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Agnes South, appellant, claiming title by bill of sale from one H. F. Hartman to personal property levied on as his by the bailiff of the Municipal Court of Chicago under a judgment of that court against him, brought this replevin suit alleging that the property was unjustly detained from her. Issue was taken and the jury's verdict was for defendant.

The property covered by the bill of sale and so levied on consisted of pool tables and outfit, barber chairs, cash registers and all other furniture, goods and chattels at 3347 West Madison street, Chicago, the equipment of a pool room and barber shop conducted at that place by said Hartman, who at the time of said sale had various creditors including the execution creditor.

There being no question about the application of the Bulk Sales Act, passed in 1913, to such a sale (LaSalle Opera House Co. v. LaSalle Amusement Co., 289 Ill. 194) and the record disclosing no attempt on the part of the vendee to comply with its provisions with respect to demanding a list of the vendor's creditors and giving the required notice to them of the proposed purchase, such sale was void under the statute as to the vendor's creditors, and, though it refused so to do, the court for that reason might well have directed the verdict given by the jury. In this view of the case no discussion of other points is necessary.

AFFIRMED.

Matchett, P. J., and Gridley, J. concur.

(1057a)

244 - 25121

GEORGE E. FORD,
Appellee,

vs.

M. PIOWATY & SONS,
a corporation,
Appellant.

Appeal from
Municipal Court
of Chicago.

217 I.A. 652[4]

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Both parties to this action were engaged in the general commission business in Chicago. On August 6, 1915, plaintiff (appellee) sold defendant (appellant) a carload of peaches for delivery to C. H. Wiener Company, Akron, Ohio, and telegraphed the order to his agent C. E. Scott, Harrisen, Ark., who on that day loaded a car with fresh peaches, the car bearing initials and number FRL 1823. The next day Scott received a wire from plaintiff to deliver FRL car 366 to the Wiener Company and reported the latter car initials and number to defendant as those of the car en route. But as car 366 had already been sold Scott diverted car 1823, and later wired plaintiff of the fact. Wiener Company not having been notified of the change looked for car 366, and it not arriving, communicated the fact to defendant, and the latter in turn to plaintiff, who did not report the correct car number to defendant until about August 16 or 17. Being notified by the railroad company of the arrival of car 1823 at Akron, on August 16, Wiener Company on the same day inspected its contents and found the peaches to be over-ripe and partially decayed. In that condition Wiener Company contended that they could not be sold in Akron, and as Pittsburgh was the nearest place in which any disposition could be made of them, Wiener Company diverted the

Boston c. 1900.

Supplies.

Ex.

5. Kennard & Co.,
6 Lombard St.

Druggists.

Kidney Cure
Sheepskin Liners
Ad Circulars.

same to the Sales Service Company, a marketing agency of Pittsburgh, which sold them for $276.75, and after deducting freight, expressage, icing and charges amounting to $241.90 remitted the balance of $34.85 to the Wiener Company. After deducting $4.40 from said balance Wiener Company remitted the remainder, $30.45, to defendant, who in turn tendered that amount to plaintiff, which he refused to accept.

While the evidence tends to show that plaintiff did not inform defendant of the number of the substituted car until after it had been diverted to Pittsburgh yet we think that fact is immaterial if defendant nevertheless accepted the peaches in the condition they were when received at Akron, Ohio. While Wiener Company then inquired of the delivering carrier and did not learn from whom and where car 1833 came, it nevertheless exercised ownership and dominion over the car and dealt with the same for the account of defendant, and that action was not repudiated by the latter. Defendant seeks justification thereof on the testimony of its president that by custom it was the consignee's right so to do when he does not know where or from whom the peaches come. He did not pretend to know how universal or general was the custom and did not think it obtained in large places. Plaintiff introduced evidence that no such custom existed, and we do not think defendant's proof was sufficient to establish such a custom as the law recognizes. In the absence thereof and of any other proof to justify Wiener Company's appropriation of the peaches on any other theory than acceptance, we think the court was warranted in finding from the evidence that defendant through Wiener Company accepted the peaches.

But defendant paid freight to the amount of $213.40.

Plaintiff did not prove the exact amount of freight to Akron, as he should have done. We shall assume from the solitary proof of the amount paid that it was what plaintiff was required to pay for delivery. While plaintiff testified, and defendant's president denied, that the peaches were to be delivered f.o.b. Harrison, Ark., plaintiff's pleading is predicated on a different theory, alleging, as it does, delivery at Akron, Ohio. Defendant's evidence is in conformity with plaintiff's pleading on that subject. There is nothing in the nature of the transaction or the evidence that justifies any other inference than that plaintiff was to pay freight to the point of delivery, and that he did not confer title until such delivery and acceptance.

The amount of peaches delivered was 397 bushels. The price agreed upon was $1.25 per bushel. The amount due on the contract, therefore, was $496.25 less $218.40 paid by defendant for the transportation, leaving as due and payable to plaintiff August 16, 1913, $277.85, and at this time with statutory interest the sum of $368.20, for which judgment will be entered here.

No propositions of law were submitted to the court. We have no means, therefore, of knowing what specific rules of law the court applied to the evidence. We do not think that there was reversible error in the court's rulings except as to the amount of the judgment. Accordingly it will be reversed and judgment entered here for appellee in the sum of $368.20.

REVERSED AND JUDGMENT HERE.

Matchett, P. J., and Gridley, J., concur.

244 - 25121

FINDING OF FACT.

We find that appellee, George E. Ford, sold M. Piowaty & Sons, appellant, for delivery at Akron, Ohio, 397 bushels of peaches at $1.25 per bushel, and delivered the same at that point, pursuant to appellant's directions, to its consignee O. H. Wiener Company, and that appellant through its said consignee accepted said delivery and paid the freight thereon of $218.40, and that the balance of the purchase price less said freight was at the time of said acceptance due and payable to appellee and has not been tendered or paid, and that there is now due from appellant to appellee the sum of $368.20.

Mr. Hall

Mr. Hall

Certiorari allowed

(1058a)

276 - 25153

GORDON A. RAMSEY, Administrator of the estate of WILLIAM WALTER WOODS, deceased,

Appellee,

vs.

TUTHILL BUILDING MATERIAL COMPANY, a corporation,

Appellant.

Appeal from Superior Court of Cook County.

217 I.A. 652

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The principal assignment of error relied upon in this case is that the court erred in refusing to instruct the jury at the close of all the evidence in the case to find appellant not guilty. This raises the question whether or not the evidence tended to establish the cause of action to recover for the death of appellee's decedent, which happened under the following circumstances:

The deceased, a boy ten years old, together with a younger brother, climbed a ladder at the end of an elevated switch track maintained by defendant on its premises, walked along the same about 50 feet to, and jumped into, a bin constructed in the trestle-work which was nearly full of sand that had been dumped therein from a railroad car on the track above it. The top of the bin was about 20 to 25 feet and the bottom about 8 feet from the ground. In the bottom of the bin was a slide or door that was opened by a bar from the outside so as to let the sand run out. The undisputed evidence, - which seems reasonably probable, - is that the boy found the slide open, jumped into the bin, slid down the sand through the opening, and that a volume of sand, capable from its consistency of being thus disturbed from its repose, immediately flowed down upon XXX and smothered him. The grounds being unfenced were accessible from

the street, and the evidence discloses that the bins, the use to which they were put, and sand overflowing their top or running out from the bottom could be seen from an adjoining public street, and that the children of the neighborhood frequently entered the grounds from the street and played on sand they found underneath the structure or in the bins, and slid down the sand in the bins through the aperture as aforesaid. This aperture was about 18 inches square. The bins were divided into compartments, which held about 2 carloads each, and were so constructed as to form a sort of chute so that the sand would slide through the opening to the ground or into wagons, as the case might be. Neither said slide nor the bin was locked or otherwise guarded, so as to prevent the children from using the sand bins as aforesaid.

From the evidence thus recited there can be no question that the place was in fact attractive and enticing to children of tender years. That is demonstrated by the fact that they frequently went there to play, a fact known to defendant, for its agents undertook to chase the children away, but took no other precautions. Sand in any form is known to be attractive to children, probably on account of its mobility. They instinctively like to handle it, cover themselves with it, and otherwise set it in motion, and particularly to slide down slopes of sand. Defendant might anticipate that from their natural instinct such a situation would be most tempting to children even if defendant had no knowledge of the fact that the children were accustomed to go there and play in the sand.

This is not, as contended by defendant, a case where the attractive thing was discoverable only after the place was reached. Nor was the ladder the attractive thing in the case at bar. It was merely a means of rendering the attractive thing

accessible, and had such ready means of access to the dangerous or attractive thing not been left open for use, the case would present a different aspect.

Nor is this a case of getting into and playing in an empty bin. It was the combination of the sand in the bin, affording tempting facilities for gratifying their propensities and instincts, which they saw from the street, that allured the children. So seeing it they did not need to reach it before being influenced by its enticements. Had the ladder been removed or the door in the bottom of the bin kept closed or locked probably no injury from going to the bin could have been anticipated. But upon the facts as above stated, which in the main are undisputed, the court could not properly direct a verdict for defendant, and the jury was justified in finding that the deceased was attracted or allured from the public street, where he had a right to be, by the thing or instrumentality that caused his death, and that it was within the category of attractive nuisances; and whether or not such premises were attractive to children was a question for the jury. (Stollery v. Cicero Street Ry. Co., 243 Ill. 290.)

In Follett v. I. C. R. R. Co., 288 Ill. 506, the controverted question was whether the defendant was guilty of negligence in leaving a push-car standing unlocked at a place where children going to play with it would be liable to be struck by passing trains or drawn under them, defendant knowing or having reasonable opportunity to know that children were in the habit of going there to play and push the push-car. In that case the court held that the

> "charge of negligence against the defendant would rest on the fact that the childish instincts of children would naturally attract them to play

> with the push-car, which might bring them into contact with means of danger to which the defendant exposed them by not locking or fastening the push-car."

The court said:

> "Where the owner creates upon his premises a dangerous thing which from its nature has a tendency to attract children, who from childish instincts are drawn into danger, the law requires such reasonable precautions as the circumstances admit of to prevent them from playing with the thing or to protect them from injury while playing with it." (p. 511)

What was there said we think is applicable to the facts in this case. Whether the bin as constructed, together with the sand, constituted such an attractive and dangerous thing, and defendant took reasonable precautions to prevent children from playing in and around it, were questions for the jury, and we find no sufficient ground for disturbing their conclusion.

The contention that the only count on which the case went to the jury did not state a cause of action is, we think, without force. Its defects, such as they were, were cured by verdict.

Nor do we think the described conditions under which decedent came to his death inconsistent with the law of physics, as contended by appellant, the evidence showing that from dampness or other causes the material in the bin caked, so that at times it was not perfectly mobile.

Nor can we say that the evidence required the jury to find that the proximate cause of the injury was the movement of the deceased in the bin. If the attractive and dangerous thing was, as the evidence discloses, a combination of the sand with the structure in which it was placed and it was allowed to remain unguarded against the children's getting to it and playing in it, then this last contention falls of its own weight.

the court held:

> "Since the court charges were not incorrect a
> statement that no one testified to which the instruct
> applied that is, that there is nothing in which the instruct
> could be misunderstood, which might bring them to a
> conclusion other than that which the instruction
> directed."

> "Since the court charges were not incorrect a statement that no one testified to which the instruction applied, that is, that there is nothing in which the instruction could be misunderstood, which might bring them to a conclusion other than that which the instruction directed."

While reference is made in appellant's brief to the refusal of the court to give certain instructions the points are not argued, nor does the abstract contain the given instructions. Under such conditions, as has been frequently held, the points are not properly presented for consideration.

We think the judgment, therefore, must be affirmed.

AFFIRMED.

Matchett, P. J., and Gridley, J. concur.

Certiorari dismissed

1059a

141 - 25010

THE S. C. BECKWITH SPECIAL AGENCY, a corporation,
Appellant,

vs.

MANUEL MANDEL, LOUIS MANDEL and JACOB MANDEL,
Appellees.

Appeal from Municipal Court of Chicago.

217 I.A. 653

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Municipal Court of Chicago, entered January 18, 1919, against the plaintiff for costs. The cause was tried without a jury and at the conclusion of the hearing on said day the court found the issues in favor of said three defendants.

The cause was originally commenced by plaintiff on February 3, 1917, as one of the first class in assumpsit, against Frank Oppenheimer, doing business as the Oppenheimer Advertising Agency. In plaintiff's statement of claim, verified by affidavit, it is alleged in substance that the claim is for $1882.08, for advertising furnished Oppenheimer at his request and inserted by plaintiff in the Kansas City Journal, Louisville Courier Journal and St. Louis Post Dispatch newspapers in the month of November, 1916. On February 10, 1917, on plaintiff's motion, the court ordered that all records, papers and proceedings in the cause be amended by making the said three Mandels, the Mandel Manufacturing Co., a corporation; Chicago Ferrotype Co., a corporation, and the Mandel Corporation, a corporation, ~~xxxxxxxxxx~~ co-defendants; and on said day plaintiff filed an amended statement of claim, verified by affidavit, alleging that its claim was for said amount for said advertising furnished by plaintiff to all of the defendants at their request. On February 24, 1917, all of said new defendants entered a joint appearance

and filed an affidavit of merits, sworn to by Louis Mandel, in which each denied joint liability with any other defendant, and each and all denied that plaintiff had ever furnished any one of them with said advertising or that any of them had ever requested plaintiff so to do. On March 1, 1917, on plaintiff's motion, the suit was dismissed as to Frank Oppenheimer, and on November 15, 1918, on plaintiff's motion, the suit was dismissed as to all the other defendants, except the three Mandels.

The cause was tried upon an agreed statement of facts, supplemented by some oral testimony. From the lengthy agreed statement and from the oral testimony, we glean the following:

The defendants, Manuel Mandel and Louis Mandel (hereinafter referred to as the two Mandels), on October 20, 1916, were residents of Chicago and co-partners in business. They manufactured and sold cameras and photographic supplies under the partnership name of Chicago Ferrotype Co.; and they also manufactured and sold phonographs under the partnership name of Mandel Manufacturing Co. Extensive advertising in all kinds of publications had assisted in the development of their business, which advertising had been placed for them exclusively by Kastor & Sons Advertising Co. They had assets aggregating about $1,300,000, and were desirous of re-financing their business and securing additional capital. Kastor & Sons Co. offered a plan for incorporating their business and introduced them to Frank Oppenheimer as a broker who would undertake to sell stock in the proposed corporation, and represented him as an experienced broker and one fully able to carry out any contract he might make. Relying upon said representations, the two Mandels, on October 20, 1916, in good faith entered into a written contract with said Oppenheimer. At this time Oppenheimer had offices in the McCormick building, Chicago, employed many assistants, and was there engaged in

business as the Oppenheimer Advertising Agency, but the two Mandels did not then know that said Oppenheimer was engaged in the advertising agency business. By the terms of said contract the two Mandels agreed that they would organize within thirty days a corporation with a capital stock of $1,300,000, of which stock part should be preferred and part common stock; that after the organization of the corporation they would transfer to it the entire assets, including good will, of their photograph and phonograph businesses, theretofore conducted under said partnership names; that Oppenheimer should have the "sole and exclusive power and authority", for a period of five months from the date said corporation should be organized, "to sell all the preferred stock of the proposed corporation at par", and the two Mandels would transfer to the purchasers at par one share of common stock for every two shares of the preferred stock purchased; that they would pay Oppenheimer "fifteen per cent. of the selling price" of said preferred stock as soon as full payment for each share should be received by them; and that, in addition to said "15 per cent commissions" they would assign to Oppenheimer one share of common stock for every eight shares of preferred stock so sold by him. In consideration of the above promises of the two Mandels, Oppenheimer agreed that "before December 25, 1916 he will expend the sum of $35,000 in advertising in publications the sale of the preferred stock of said corporation", unless all of said preferred stock should be sold before December 15, 1916, at a less expenditure for advertising.

Within 30 days from the date of said contract the two Mandels, on November 8, 1916, caused to be organized under the laws of the State of Delaware the "Mandel Corporation", with a capital stock of $1,300,000, consisting of 130,000

shares, of which 40,000 shares were of preferred stock and 90,000 shares were of common stock. The two Mandels and Jacob Mandel were the incorporators and the first directors of this corporation, and the fact that the defendant, Jacob Mandel, became so associated with this corporation is apparently his sole connection with this cause. On November 11, 1916, the two Mandels caused to be fully organized under the laws of the State of Illinois the corporation, "Chicago Ferrotype Co.", and on the same date also caused to be fully organized under said laws of Illinois the corporation, "Mandel Manufacturing Co." And, afterwards, the two Mandels transferred the entire assets and business of their partnership, Chicago Ferrotype Co., to the new corporation of that name, and also transferred the entire assets and business of their partnership, Mandel Manufacturing Co., to the new corporation of that name. Subsequently all of the issued stock of these two Illinois Corporations was transferred to the Delaware Company, the "Mandel Corporation", and it became the "holding" company. The two new Illinois corporations continued to do the respective businesses formerly done by the partnership, and had their principal offices at the corner of Laflin and Congress streets, Chicago. The two Mandels were officers of both Illinois corporations and of the Delaware corporation. The principal office of the "Mandel Corporation" was in Delaware. It never had an office in Illinois, never was licensed to do business in Illinois, and never did any business in Illinois, except that solicitations were made in Illinois of persons and the public generally to buy shares of its capital stock.

Shortly after the contract of October 20, 1916, was executed, the two Mandels advised Oppenheimer in writing of the nature and value of their partnership business, and Oppenheimer with his assistants drafted all advertising matter

for the sale of stock in the proposed "Mandel Corporation." This work was done by persons employed and paid by Oppenheimer. The matter was then submitted to the two Mandels and, with some slight changes, approved by them. Oppenheimer then entered orders in numerous newspapers and publications throughout the United States, selected by him, for the insertion in said publications of the advertising matter, the two Mandels having nothing to do with the selections of the publications. On November 6, 1916, the plaintiff, S. C. Beckwith Special Agency, a New York Corporation, authorized to do business in Illinois, was engaged in the business of "purchasing advertising space from newspapers and periodicals, and reselling said space to such persons, firms or corporations as might desire same", and for a long time prior thereto had been doing business with Oppenheimer and "had extended credit to him from time to time." On said last mentioned date Oppenheimer gave plaintiff five orders, signed by him, on certain forms partly in printing and partly in typewriting, directing plaintiff to cause to be inserted, in the three newspapers mentioned in plaintiff's statement of claim, certain enclosed advertisements of the Mandel Corporation, which advertisements had been compiled by Oppenheimer and the compilations approved by the two Mandels as aforesaid. Thereafter, on November 8, 1916, plaintiff forwarded said advertisements to said newspapers, together with the written orders of plaintiff, directing said newspapers to insert in certain editions named the enclosed "matter of the Mandel Corporation", and to charge plaintiff therefor at certain named rates. Thereafter said newspapers inserted the advertisements in said editions and charged the price therefor to plaintiff, and thereafter plaintiff paid said newspapers the total sum of $1,882.08 therefor. The two Mandels had nothing to do with the placing of the orders by Oppenheimer with plaintiff or by plaintiff

with said newspapers; and they had no knowledge of the terms of Oppenheimer's contract with plaintiff, or of the fact that any orders for advertising were placed with plaintiff, until demand for payment therefor was made of them by plaintiff. On December 1, 1916, plaintiff demanded of Oppenheimer payment for said advertisements, which demand was refused, Oppenheimer stating he was unable to then pay same and requesting an extension of 90 days. This request for an extension plaintiff refused. On December 26, 1916, Oppenheimer called a meeting of his creditors, comprising various newspapers and agencies with whom he had placed advertising, and at said meeting Oppenheimer's said contract of October 20, 1916, with the two Mandels was presented. Until said meeting plaintiff had no knowledge of such contract or of the terms thereof. At this time Oppenheimer had not expended $35,000 in advertising, as he had agreed with the two Mandels to do by December 25, 1916. At this time, also, certain stock in the "Mandel Corporation" had been sold by the two Mandels, through the personal efforts of Oppenheimer, to various persons who had seen advertisements in newspapers and who had communicated with the two Mandels; and the two Mandels had paid Oppenheimer all commissions due him upon the sales of said stock, in accordance with the terms of said contract of October 20, 1916.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for appellant that the trial court erred in entering judgment in favor of the defendants. Counsel urge that Manuel Mandel and Louis Mandel, at least, are liable to plaintiff for the sum of $1852.08. The argument is, as we understand it, that, by virtue of the contract of October 20, 1916, Oppenheimer was simply an agent of said two Mandels and as such agent in the due course of his employment contracted with plaintiff for the publishing of said advertisements; that, while plaintiff extended credit to Oppenheimer for said advertisements under the impression that it was dealing with Oppenheimer as a principal, when plaintiff finally learned of the existence of said contract and of the acts done under said contract it had the right to treat Oppenheimer as agent, and the two Mandels as the undisclosed principals, and make the latter pay for the amount of said advertisements; and that, while by said contract of October 20, 1916, it is provided that Oppenheimer should himself expend $35,000 in advertising of which the advertisements in question were a part, still, this is a secret agreement between Oppenheimer and the two Mandels and plaintiff is not bound by the provision.

We cannot agree with the contention or the argument. Under the facts disclosed we do not think Oppenheimer was an agent of the two Mandels in contracting for the advertisements in question. He had an exclusive contract with them to sell stock in the Mandel Corporation on a commission basis, and evidently one of the moving considerations on the part of the two Mandels in giving him such exclusive contract was, that within a period of about two months Oppenheimer, himself, was to expend the sum of $35,000 in advertisements, of which the advertisements in question were a part. We think Oppenheimer is to be considered

as an independent contractor rather than an agent for the two Mandels in contracting for said advertisements. Furthermore, plaintiff gave credit solely to Oppenheimer for the same, and it was only after plaintiff ascertained that Oppenheimer would not or could not pay the amount he had contracted to pay it that it sought to hold the two Mandels therefor. Indeed, the evidence discloses that as early as December 26, 1916, plaintiff had knowledge of Oppenheimer being in embarrassed circumstances financially, and of the provisions of the contract of October 20, 1916, between Oppenheimer and the two Mandels, and yet, more than a month thereafter, plaintiff began the present action against Oppenheimer to recover the amount of the advertising, and made affidavit that Oppenheimer was the debtor.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Matchett, P. J., and Barnes, J. concur.

(Certiorari denied) 1060 a

159 - 25034

EDWARD C. WALLER, Appellee,

vs.

OSCAR J. FRIEDMAN, Appellant.

Appeal from Municipal Court of Chicago.

217 I.A. 653

STATEMENT OF THE CASE. This is an appeal from a judgment for $7,500 against Oscar J. Friedman, defendant, rendered September 10, 1918, in favor of Edward C. Waller, Sr., plaintiff, by the Municipal Court of Chicago, in a case tried before the court without a jury.

The action is one of the first class in assumpsit, commenced May 27, 1915. Plaintiff's second amended statement of claim, filed May 7, 1917, contained two claims or counts. In the first it is alleged in substance that plaintiff's claim is "for money had and received" by defendant for plaintiff's use in the sum of $10,000; that defendant received from one J. W. Cohn the quarterly rents of $2,500 each, due and payable by Cohn as a tenant of certain premises in the Pullman Building in Chicago, being the installments of rent due on August 1, 1914, November 1, 1914, February 1, 1914, and May 1, 1915; that prior to the collection of said rents the defendant and Edward C. Waller, Jr., (son of plaintiff), to whom said installments of rent were payable by said tenant, had agreed for a valuable consideration to turn over said rents as paid to the plaintiff, which when paid belonged to the plaintiff; that said installments of rents were paid by said Cohn to defendant on or about the respective dates that the same became due and the defendant received the same for the use of the plaintiff; and that by reason whereof on, to-wit; May 1, 1915, the defendant became indebted to the plaintiff in said sum of $10,000, and being so indebted promised to pay plaintiff said sum, etc. The second claim or count is in substance a count for money had and

received, and recites in detail certain agreements made by the parties. In his affidavit of merits the defendant did not deny that he had individually received the last three installments of rent, but it is alleged that the first installment of $2,500, due August 1, 1914, "was collected and paid to E. C. Waller, Jr., and this defendant jointly"; and it is further alleged, inter alia, that plaintiff in July, 1914, for a good consideration, orally agreed with defendant to release him from any liability on said installments of rent.

The following facts in substance were disclosed by the evidence: In September, 1913, plaintiff was the secretary and treasurer of the Rookery Building, Chicago. Plaintiff's son, Edward C. Waller, Jr., and defendant were jointly interested in various enterprises as partners. They jointly owned certain leases, among others the so-called "Pullman leases", and the "Sans Souci lease"; and they jointly owned a half interest in a fee known as the "Lake Michigan Building". About September 18, 1913, defendant and Waller, Jr. solicited of plaintiff a loan of $10,000, and offered to secure the loan by assigning to him certain rents coming due from J. W. Cohn, who was a tenant of defendant and Waller, Jr. in the Pullman Building, Chicago, under a lease which provided for the payment annually of $10,000, in quarterly installments of $2,500 each, payable on the first days of February, May, August and November in each year. Plaintiff told them that it was not convenient for him to loan to them $10,000 at the time, but said that he would extend to both of them his credit at the Corn Exchange Bank, Chicago, for $10,000, by guaranteeing his son's notes instead of the joint notes of defendant and said son. Plaintiff stated at the time that his reason for this was that he did not want to be put in the position of being considered as guaranteeing their different enterprises, some of which he thought "were bound to

go under". This arrangement was satisfactory to defendant and Waller, Jr., and it was further agreed that plaintiff "would extend his credit along until he got the money from Cohn for the notes". In accordance with said arrangement defendant and Waller, Jr. delivered to plaintiff a letter, signed by each of them, as follows:

"September 18, 1913.

Mr. Edward C. Waller. We have a tenant in the Pullman Building named J. W. Cohn, * * who pays us a rental of $2,500 every three months, nextbpayment being on November 1st, and we herewith agree to pay over to you Mr. Cohn's rent upon that date and each succeeding rent day until the credit you have advanced us of $10,000 is fully paid, and we hereby guarantee the prompt payment of said rent, said credit being in form of guarantee of two (2) notes of Edward C. Waller, Jr., to the Corn Exchange National Bank of five thousand dollars ($5,000) each."

Pursuant to the arrangement Waller,Jr. executed his two promissory notes each for $5,000, one dated September 18, 1913, and the other dated October 1, 1913, each falling due on February 2, 1914, and plaintiff wrote his name on the back of each of said notes below a printed form of guaranty, whereby he guaranteed the payment of the same at maturity or at any time thereafter, and the amount of the notes was received from said Corn Exchange Bank by defendant and Waller, Jr.

On September 27, 1913, defendant and Waller, Jr. each executed their joint note due in six months for $7,500, payable to the order of themselves and by them severally endorsed and delivered to the National Bank of the Republic at Chicago. This note was guaranteed by one A. G. Becker, a brother-in-law of defendant, and defendant and Waller, Jr. received the amount thereof. Becker's guaranty was in the form of a continuing guaranty whereby he held himself liable for all credits which said National Bank of the Republic might extend to defendant in an amount not to exceed $7,500. On said note there was subse-

quently paid the sum of $1,500, and on March 27, 1914, defendant and Waller, Jr. each executed a new 90 day note for $6000 to said bank. On June 25, 1914, this note was renewed for another 90 days and at its maturity, September 23, 1914, was protested for non-payment. Becker as guarantor afterwards paid the amount of said note to said bank about October 8, 1914.

On November 5, 1913, defendant and Waller, Jr., in accordance with the arrangement of September 18, 1913, paid to plaintiff the first installment of $2,500 received from said Cohn for rent due November 1, 1913, but upon their request plaintiff paid back to them said amount by two checks, one of $1,500, dated November 20, 1913, and the other of $1,000, dated January 14, 1914. At the respective times these checks were delivered the defendant and Waller, Jr. each signed and delivered to plaintiff the following letters:

"November 20, 1913.

Mr. Edward C. Waller.

On the 18th of September last we guaranteed to pay over to you the rent accruing under lease of J. W. Cohn, amounting to $10,000 a year, * * payable $2,500 every three (3) months, the first one becoming due on November 1st last. We gave you our check in conformity with that agreement on the 5th of this month. We hereby request that you return to us $1,500 of said amount, which we agree to repay on or before the 5th day of February next."

"January 14, 1914.

Mr. Edward C. Waller.

On the 20th day of November last you having given us your check for $1,500 as requested in the foregoing letter of like date, we now ask you to return to us the balance in your hands of the $2,500 received from us by check on the 5th day of November last. We hereby acknowledge receipt of said balance by your check to our order of this date for $1,000. For and in consideration of the above we hereby agree and bind ourselves to pay you on or before the first day of May next, the sum of $2,500 in addition to the $2,500 to be paid to you by us on that day due under the J. W. Cohn lease, the amount of said payment due you May 1st next being $5,000."

On February 2, 1914, the day of the maturity of the two notes signed by Waller, Jr. and aggregating $10,000, Waller, Jr. signed a new note for $10,000, due June 2, 1914, and plaintiff

extended his credit by endorsing his guaranty on the note similar to that on said two notes, and said new note was delivered to the Corn Exchange Bank. On May 6, 1914, defendant and Waller, Jr. each signed and delivered to plaintiff the following letter:

"May 6, 1914.

Mr. Edward C. Waller.

Referring to our letter to you of September 18th, 1913, in which we agreed to turn over to you the quarterly rents becoming due from J. W. Cohn, * * on November 1st, 1913, February 1st, 1914, May 1st, 1914, and August 1st, 1914, to secure you from loss in guaranteeing the notes of E. C. Waller, Jr., amounting to $10,000 discounted by him in the Corn Exchange National Bank, and whereas, said notes in said Corn Exchange National Bank have been renewed by your endorsement on the same and the said quarterly rents of November 1st, February 1st and May 1st aforesaid you have allowed us to use otherwise than in paying the Corn Exchange National Bank.

Now this is to certify that we hereby agree to turn over to you the quarterly rents of $2,500 each of August 1st, 1914, November 1st, 1914, February 1st, 1915, and May 1st, 1915, as they are paid by the said J. W. Cohn to secure you for your endorsement of said E. C. Waller's notes amounting to $10,000 on his renewal of the same in the Corn Exchange National Bank and we hereby guarantee to you the prompt payment of said J. W. Cohn of his rents becoming due as aforesaid."

When the $10,000 note matured on June 2, 1914, Waller, Jr. signed a new note for the same amount, due October 2, 1914, and plaintiff extended his credit by endorsing thereon a similar guaranty, and the new note was delivered to said Corn Exchange Bank.

During July, 1914, defendant and Waller, Jr. decided to dissolve their partnership relations. On July 24, 1914, they each signed a memorandum written in pencil wherein it was agreed, inter alia, that their partnership should be dissolved, that Waller, Jr. should assign his interest in the Pullman leases to Friedman, "the latter to collect the rents from August 1, 1914", and that Friedman should assign his interest in the Sans Souci lease to Waller, Jr. Prior to the signing of the memorandum the installment of rent of $2500, due from said Cohn on August 1, 1914, had been collected in advance by defendant, and credited to Cohn and charged to defendant on the partnership books. The memorandum agreement of dissolution

was not consummated at the time, and it was not until October 1, 1914, that the final and formal agreement of dissolution was executed by defendant and Waller, Jr., although said final agreement was dated July 31, 1914. In said final agreement it is recited, inter alia, that Waller, Jr. had assigned and transferred to defendant all his interest in the Pullman leases; that Waller, Jr. covenanted that none of the rents of said leases was subject to any pledge created by him, "excepting any pledge which may have been created prior to the date hereof by the parties hereto jointly"; and that the parties to the agreement "will remain jointly liable on account of any liabilities incurred on or before July 31, 1914", as regards said leases.

On October 2, 1914, the $10,000 note in the Corn Exchange bank matured, and on that day plaintiff paid the bank $2,500, and a new note for $7,500, due January 15, 1915, was executed by Waller, Jr., guaranteed by plaintiff in the same manner as the former note, and delivered to the bank. On January 15, 1915, a new note, due June 15, 1915, for the same amount, similarly executed and guaranteed, was delivered to the bank. This note was extended to October 14, 1915, by the execution of a new note by Waller, Jr., similarly guaranteed by plaintiff, and again extended by a new note, due April 14, 1916, similarly executed and guaranteed. Plaintiff paid this last note on April 15, 1916, by delivering his check for $7,500 to the bank.

On October 15, 1914, plaintiff by letter made a demand of defendant for the first $2500, due on the Cohn lease August 1, 1914; on November 18, 1914, he made another written demand of defendant for $5000, for the rents due August 1st and November 1st on said lease; on February 4, 1915, he made another written demand for the three installments of rent due; and on May 3, 1915,

another written demand for $10,000 for the four installments of rent due. Plaintiff received no money from defendant in response to these letters and on May 27, 1915, commenced the present suit. Defendant on the trial admitted that after the dissolution of his partnership with Waller, Jr., he (defendant) individually received the three installments of rent on the Cohn lease, aggregating $7,500, and due and payable respectively on November 1, 1914, and February 1, and May 1, 1915.

On the trial the defendant sought to establish the fact that in July, 1914, plaintiff verbally agreed to release defendant from his obligations as evidenced by the letters of September 18, 1913 and May 6, 1914. It appears that sometime during the month of July, 1914, and before the dissolution of the partnership existing between defendant and Waller, Jr., a conference was had in the office of plaintiff, at which plaintiff, Waller, Jr., defendant and Becker were present, for the purpose of determining whether or not it was advisable for defendant and Waller, Jr., to sell their interest in the building, known as the Lake Michigan Building, to a purchaser obtained through plaintiff's efforts. The testimony of defendant and his brother-in-law, Becker, was to the effect that at this conference plaintiff agreed to release defendant from his said obligations in consideration that Becker would release Waller, Jr. from his liability to him (Becker) by reason of the $6000 note, guaranteed by Becker, then in the National Bank of the Republic and falling due September 23, 1914. Both plaintiff and Waller, Jr. testified in substance that such a proposition was made but that plaintiff refused to accede to it, and for the reason stated by plaintiff at that time, as testified by him, that he "had security for the $10,000, * * and wouldn't think of giving it up." Waller, Jr. testified: "Mr. Becker asked my

father if he would pay the Corn Exchange note if Becker paid the note to the other bank. This Waller, Sr. refused to consider. * * He stated his indebtedness was a larger amount and he had security."

The evidence further disclosed that during the early part of 1916, Waller, Jr. went through bankruptcy. Plaintiff testified: "As soon as he went through bankruptcy, my bank called for that money and I went and paid the note." Plaintiff further testified that Waller, Jr. never paid him any sum on the note which he had guaranteed, that Waller, Jr. did not have any money, that plaintiff "just sued Oscar because he was getting what belonged to me", and that plaintiff "considered Friedman was the man that owed me because he was getting what was contracted to be delivered to me."

At the conclusion of the hearing, the trial court found that the first installment of rent on the Cohn lease for $2500, due August 1, 1914, had been paid to the defendant and Waller, Jr., as copartners, before the dissolution of the partnership, and that no recovery could be had for said installment in the present action, but as to the three installments of rent due respectively November 1, 1914, and February 1, and May 1, 1915, aggregating $7500, the court found the issues for the plaintiff. And the court made a finding of fact, at plaintiff's request, that plaintiff "never released his rights to the four quarterly rentals of $2,500 each * * in question herein."

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is first contended by counsel for defendant that the finding of the court that plaintiff did not release defendant is against the weight of the evidence. We have carefully considered the conflicting evidence bearing on this point but are unable to say that the finding is manifestly against the weight of the evidence.

It is next contended that the letter of May 6, 1914, constituted an equitable assignment which created an equitable lien or pledge, which is only enforceable in a court of equity, and that, therefore, the Municipal Court was without jurisdiction. We cannot agree with the conclusion. This is an action for money had and received. In Highway Commissioners v. Bloomington, 253 Ill. 164, 174, it is said: "The action of assumpsit, under the common counts for money had and received, is an appropriate remedy to enforce the equitable obligation arising from the receipt of money by one person which belongs to another and which in equity and justice should be returned. * * The right to recover is governed by principles of equity although the action is at law. The action is maintainable in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which ex aequo et bono belongs to another." (See, also, Allen v. Stenger, 74 Ill. 119, 121; First Nat. Bank v. Gatton, 172 Ill. 625, 627.) In Brauer v. Laughlin, 235 Ill. 265, 273, quoting from 16 Cyc. 45, it is said: "Where compensation in money will afford a party complete and efficient relief the law is usually adequate for that purpose, and plaintiff will be relegated thereto if the legal remedy is unimpeded. Thus, general assumpsit or the common counts having at an early date been adapted to the enforcement of equitable demands on equitable basis of compensation, must be resorted to where available. This is true even where

plaintiff claims a specific fund, or a part of a specific fund, which defendant has received, provided no further equity exists." In the present case, we think that the letter of May 6, 1914, and the letter of September 18, 1913, should be construed together, and both in the light of the surrounding circumstances and the objects which the parties had in view at the times of the transactions. Clearly it was agreed by both defendant and Waller, Jr. that the installments of rent in question should be turned over to plaintiff when paid by Cohn to secure plaintiff for loaning his credit to defendant and Waller, Jr., by guaranteeing the $10,000 note, which by the acquiescence of all parties was executed by Waller, Jr. alone. These installments of rent were definite and fixed sums of money and were specific funds due and payable at definite future dates. When these installments were paid by Cohn the money belonged in equity and good conscience to plaintiff. The first installment of $2500 was due August 1, 1914. That sum was paid by Cohn prior to that date and went into the partnership funds before defendant and Waller, Jr. had dissolved their partnership. We think the trial court was right in holding that this particular installment could not be recovered in the present action for money had and received against defendant alone. As to the other three installments, aggregating $7500, it appears that the same were paid about the respective dates that they were due, to the defendant alone, and after the partnership had been dissolved, and that by the dissolution agreement executed by defendant and Waller, jr. subsequent installments of rent due from Cohn were to be collected by defendant. We think that under the facts of this case plaintiff is entitled to recover of defendant in this action the aggregate amount of said three installments so paid defendant by Cohn, and that it was not necessary for plaintiff to join Waller, Jr. as a party defendant in the action as urged by defendant's counsel. The

money was received solely by defendant. In equity and good conscience it belonged to plaintiff and defendant ought not to retain it.

And we do not think that there is any merit in the further contention of counsel for defendant that the several renewals of the note in the Corn Exchange Bank, extending the time of the payment thereof, operated to release defendant from his liability to pay over to plaintiff the amount of said last three installments of rent received by defendant from Cohn. Nor do we think that the refusal of the trial court to admit in evidence, at defendant's request, the bankruptcy schedules of Waller, Jr. constituted reversible error, as urged.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Matchett, P. J., and Barnes, J. concur.

Matchett, I. J., and Barnes, J. concur.

166 - 25042

(1061a)

MC NEIL & HIGGINS COMPANY, a corporation,
Appellant,
vs.
ALEX FEUERREISEN,
Appellee.

Appeal from Municipal Court of Chicago.

217 I.A. 653[3]

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 29, 1918, plaintiff sued defendant in the Municipal Court of Chicago to recover the sum of $160 on a guaranty written by the defendant on April 11, 1918, on a paper showing that on April 5, 1918, there was a balance of $160, on a running account for groceries, due plaintiff from one M. Fisher. The guaranty is written immediately below the figures on said paper showing said balance and is as follows: "4/11/18. Chgo. Ill. I hereby guarantee above acct. to be paid by me, Fridsy, 4/12/18. Alex. Feuereisen." The defense was that said guaranty was without consideration. The case was tried before the court without a jury. At the conclusion of plaintiff's evidence defendant's attorney moved for a finding for the defendant, which motion was granted, and the court entered a finding and judgment against the plaintiff, and this appeal followed. No appearance has been entered here by the appellee (defendant) and we have not been favored with a brief and argument in his behalf.

Plaintiff's evidence disclosed in substance the following facts: Plaintiff had been selling groceries from time to time to M. Fisher who conducted a retail store. M. Fisher had been drafted into the United States Army and had left his store in charge of his mother and his brother, H. Fisher. After M. Fisher's departure his brother, H. Fisher, had made certain

payments to plaintiff, reducing said account to $160. On April 11, 1918, a salesman of plaintiff found the defendant in possession of the store, and the latter was about to conduct an auction sale of all chattels and fixtures therein. The salesman informed defendant that M. Fisher owed plaintiff said balance of $160 and that the amount must be paid before the sale took place. The defendant consulted his attorney and afterwards proposed to said salesman that he would pay $80 immediately and an additional $80 after the sale was made provided nothing was done by plaintiff to prevent the sale. The salesman then telephoned Mr. Ross, credit man of plaintiff, and Ross talked with defendant over the telephone, and refused defendant's offer. Shortly thereafter Mr. Beath, an attorney for plaintiff, had a conversation with defendant over the telephone and informed him that, even if he (defendant) had, as claimed, a bill of sale for the property, such sale was in violation of the "Bulk Sales law", and that if defendant did not pay plaintiff's claim of $160, or arrange for its settlement at a future time, plaintiff would immediately levy an attachment on the goods in the store. A few minutes later defendant wrote out the guaranty above mentioned and delivered it to said salesman and plaintiff's credit man and attorney were advised immediately of that fact. And the evidence tended to show that plaintiff, relying on said guaranty of the defendant, forebore bringing any proceedings by attachment or otherwise to collect said balance of $160 due it as aforesaid. The defendant did not pay to plaintiff said balance or any part thereof, on April 12, 1918, or on any subsequent day, and the same was not received by plaintiff from any one, and plaintiff commenced this action.

In Mulholland v. Bartlett, 74 Ill. 58, 63, it is

said: "To make forbearance a good consideration, there must be a well founded claim in law or equity forborne, or there must be a compromise of a doubtful right." In McKinley v. Watkins, 13 Ill. 140, 145, it is said: "In order to support the promise there must be such a claim as to lay a reasonable ground for the defendant's making the promise, and then it is immaterial on which side the right may ultimately prove to be."

Under the facts as disclosed from the evidence, and under the law, we think that the court erred in finding, on defendant's motion, at the close of plaintiff's evidence, the issues for the defendant. Plaintiff's evidence clearly tended to show that plaintiff had a well founded claim against M. Fisher in the sum of $160, which plaintiff could probably have collected by immediately taking appropriate proceedings; that defendant was desirous of not having the contemplated auction sale of the goods in the store interfered with by any legal proceedings; that, in consideration of plaintiff not commencing any immediate proceedings to enforce its claim against M. Fisher by attachment on said goods or otherwise, defendant signed the guaranty in question; and that, in consideration of said guaranty and in reliance thereon, plaintiff forebore bringing any proceedings immediately.

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Barnes, J. concur.

174 - 25050

(1062a)

WILLIAM D. JOHNSON,
Appellee,

vs.

FRANK C. PATTEN,
Appellant.

Appeal from
Circuit Court,
Cook County.

217 I.A. 653[4]

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $375 against Frank C. Patten, defendant, entered by the Circuit Court of Cook County, in an action of trover.

The suit was commenced on April 18, 1916. Plaintiff's declaration charged defendant with the conversion, on August 2, 1913 of 30 interest coupon notes of $12.50 each, ten of which were due October 10, 1913, ten due April 10, 1914, and ten due October 10, 1914, and all being part of ten mortgage bonds, secured by trust deed upon certain premises in St. Louis, Missouri, which said bonds were for the principal sum of $500 each of the Caxton Investment Company of St. Louis, and of which coupons plaintiff was on the day of the conversion thereof entitled to possession. The defendant filed a plea of not guilty.

After a full hearing, during which plaintiff and one J. J. Watson testified for plaintiff, and defendant and two witnesses testified on behalf of defendant, the jury returned a verdict, on October 23, 1918, finding the defendant guilty and assessing plaintiff's damages at $375, upon which verdict the judgment appealed from was entered.

The material facts as disclosed from plaintiff's evidence are in substance as follows: On July 12, 1913, defendant and said Watson, a loan broker, (through whom

defendant had previously negotiated several loans upon collateral) called on plaintiff for the purpose of obtaining a loan from him of $5000 upon their joint and several note secured by collateral. They each signed the note for $5000 and plaintiff paid at the time, on account of said loan, $3000 by two checks, one check payable to them jointly and the other smaller check payable to Watson alone at Patten's request. They presented as collateral ten $500 bonds of said Caxton Investment Company, represented to be first mortgage bonds. Each of said bonds had semi-annual interest coupons attached thereto, the first coupon being due October 10, 1913, and the other coupons being payable every six months thereafter until the maturity of the bond. Plaintiff at the time did not loan the full amount of said note, stating that he wanted an opportunity to investigate the strength of the collateral. Upon investigation he found that said bonds were only a second lien on the premises and he made no further advances on said note. During the month of August, 1913, Patten informed plaintiff he had an opportunity to sell said ten bonds for cash, whereby the loan could be liquidated, and requested that plaintiff return said bonds to him upon his trust receipt. After some negotiations with Patten and Watson, plaintiff received a trust receipt signed by Patten, and plaintiff delivered said bonds to Watson and Watson delivered them to Patten. Further negotiations followed but the loan was not paid or the bonds returned to plaintiff. In June, 1914, plaintiff commenced suit in the Superior Court of Cook County to recover the possession of said bonds. In March, 1915, this suit was about to be called for trial. Patten and his attorney, Abraham, met plaintiff in the court house and they had a conversation, the result of which was that Patten delivered to plaintiff ten bonds of said Caxton Investment Company and plaintiff dismissed said suit. After said dismissal, and while the parties were in the corridor adjoining

the court room, plaintiff examined the bonds more carefully, found that the three interest coupons on each of them, for the interest due October 10, 1913, April 10, 1914, and October 10, 1914, had been clipped off. Patten said that he had used the clipped coupons, had collected some interest (but not the face value) on some of them, and had disposed of the others "in a trade." Plaintiff then said that if the face value of the coupons was not immediately paid to him he would re-instate the case which had just been dismissed. Patten promised to pay plaintiff the amount of the coupons within a few days and plaintiff, relying on the promise, made no attempt to re-instate the case and the "term finally slipped by." Subsequently, foreclosure proceedings were commenced in St. Louis on the first mortgage and the bonds in question were found to be scant security for plaintiff's loan, and plaintiff had a further conversation with Patten. Plaintiff testified: "He told me at that time that he had dealt in some coupons after these three had become due, - that is, the coupons due in April, 1915, - and that these were being paid in full. I later found out that that was being done, and that the coupons, except the ones due in October, 1916, were paid in full." Plaintiff introduced no further evidence as to the market value of the coupons at the time of their conversion. Patten never paid plaintiff any money on the thirty coupons in question. Plaintiff did not at any time bring suit on the $5000 note, but on April 18, 1916, commenced the present action.

Patten's testimony was at variance with plaintiff's and Watson's testimony in many material particulars, but after a careful examination of all the evidence we cannot say that the verdict is manifestly against the weight of the evidence as here contended by counsel for Patten. And we cannot agree

with counsel's second contention that, under the facts in evidence, plaintiff had no right to maintain trover for the conversion of the coupons in question.

Counsel for Patten further contends that the verdict and judgment are excessive. We think there is merit in this contention. In Sturgis v. Keith, 57 Ill. 451, 463, it was decided that "the proper measure of damages in an action of trover is the current market value of the property at the time of the conversion, with interest from that time until the trial;" and the court in that case recognized no exception to the rule "where the property converted happens to be stocks." This rule has been followed in subsequent cases. (Janeway v. Burton, 201 Ill. 78, 80; Robinson v. Alexander, 141 Ill. App. 192, 194; Schwitters v. Springer, 236 Ill. 271, 275.) We see no good reason why the same rule should not apply where the property converted happens to be bond coupons. The evidence shows that the bonds in question were placed with plaintiff as collateral security for a debt in July, 1913; that in August, 1913, they were taken away by defendant under a trust receipt and were not returned until March, 1915; and that in the meantime defendant had used and converted to his own use 30 coupons each of the face value of $12.50, ten due in October, 1913, ten due in April, 1914, and ten due in October, 1914. Had these bonds not been taken away from plaintiff under said trust receipt but had remained in his hands he would have been entitled, as pledgee, to collect all of said coupons and apply whatever proceeds were realized thereon to the payment, pro tanto, of said debt. (Joliet Iron & Steel Co. v. Scioto Fire Brick Co., 82 Ill. 548; Peacock v. Phillips, 247 Ill. 467, 471.) And we think under the facts in evidence that the respective dates of the maturity of said coupons should be considered as the time of their conversion by

defendant. But the only testimony in the record before us as to the market value of said coupons at said dates was that given by the defendant, which was to the effect that they were worth in the market only about 50 cents on the dollar. While, as above shown, plaintiff testified that he had "found out" that certain coupons due in April, 1915, had been paid in full, he introduced no definite testimony to that effect, nor any testimony as to the market value of the coupons in question at their respective dates of maturity. We think, therefore, that the jury was not warranted in returning a verdict on the basis of the face value of said coupons, but that the verdict should have been for one-half of their face value, plus interest at the legal rate from the date of their respective maturities up to the time of the trial, October 23, 1918. Ten of the converted coupons matured on October 10, 1913, or subutantially five years prior to the trial; ten matured six months later and ten matured one year later. One-half of the face value of all of said coupons amounts to $187.50, and the interest from the respective dates of maturity of said coupons, at one-half of their face value, to the date of the trial, we have figured amounts to $42.20, or a total sum of $229.70. The judgment was for $375, and this should be reduced by the sum of $145.30. If plaintiff will file a remittitur in said sum of $145.30, the judgment will be affirmed for $229.70, otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

Matchett, P. J., and Barnes, J. concur.

201 - 25077

J. HAACK,
Appellee,

vs.

WILLIAM F. HANLON,
Appellant.

Appeal from
Municipal Court
of Chicago.

217 I.A. 653

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 6, 1916, plaintiff commenced an action of the 4th class, in contract, in the Municipal Court of Chicago against the defendant, William F. Hanlon. Plaintiff's claim, as alleged in his statement of claim, is "for a balance due on an account stated on or about November 1, 1916, for the sum of $421.75". Defendant in his affidavit of merits denied "that on November 1, 1916, he accounted with plaintiff and agreed to pay the sum of $421.75." The case was tried before the court without a jury, resulting in the court finding the issues against the defendant and assessing plaintiff's damages at said amount, and entering judgment on the finding against the defendant.

Plaintiff testified in substance that he had been in the painting business for many years; that in the year 1916, and for several years prior thereto, he had done work for defendant at the latter's request; that several times during the summer of 1916, he presented to defendant an itemized statement showing a balance due him from defendant of $496.75; that defendant did not dispute the statement but said it was "all right", and that he would pay it as soon as he could; that just prior to the beginning of this suit plaintiff told defendant that he would not wait longer for payment and suggested bringing this action, whereupon defendant said that

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[illegible]

[illegible]

if plaintiff sued he "would have to wait two years anyhow." Emil M. Wolf, a witness called by plaintiff, testified in substance that in September, 1916, plaintiff asked the witness to assist him in collecting said balance from defendant; that the witness wrote defendant, enclosing a statement showing said balance due; and that subsequently defendant telephoned the witness and said that the "account was all right and should have been paid long ago." Another witness for plaintiff, William J. Curtis, collection manager for a firm of attorneys, testified in substance that in the latter part of October, 1916, the claim against defendant was put in his hands for collection by Emil M. Wolf; that about the end of October 1916 the defendant called upon the witness in the latter's office; that the witness showed defendant a detailed statement of the account showing a balance due plaintiff of $496.75; that defendant said that the statement was correct, that he was sorry he had been unable to pay the account as yet, that he desired to be allowed to pay it in installments, that on November 1, 1916, defendant paid $75 on account, and that since said date no further payments had been made. The defendant was the only witness called in his behalf. He testified that at the time he called on the witness Curtis he told the latter that the work done by plaintiff was of inferior quality and that he disputed the correctness of the bill. He denied that Curtis showed him any statement at the time or that he promised to pay the account. He, however, admitted that he had received statements from plaintiff showing the balance of the account to be $496.75.

We think that by a clear preponderance of the evidence the plaintiff proved that he was entitled to a finding and judgment on the issue of an account stated in the sum of

$421.75, after allowing credit for the $75 paid by defendant. (2 Greenl. on Ev., part IV, Sec. 126; Neagle v. Herbert, 73 Ill. App. 17, 26; King v. Kahn, 157 Ill. App. 251, 252.)

Accordingly, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Matchett, P. J., and Barnes, J. concur.

25102

225 - 25102

(10674)

NEW YORK STAR COMPANY, a corporation,

Appellant,

v.

CHARLES OS-KO-MON,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

217 I.A. 654

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in attachment on the ground of non-residence, upon a judgment for $90 alleged to have been recovered against defendant on March 22, 1918, in the Municipal Court of the City of New York for the Borough of Manhattan, ninth district. Marie Berezniak was summoned as garnishee. The defendant entered his appearance by an attorney. The garnishee answered admitting owing the defendant the sum of $48.18, and she was ordered to pay this money to the clerk of the court. She did so and was discharged as garnishee. Harry Smits filed a petition or interpleader claiming he was entitled to the fund.

On November 29, 1918, the cause came on for trial before the court without a jury. Plaintiff offered in evidence what purported to be a transcript of the judgment sued upon. The document was not properly certified by the clerk of said Municipal Court of the City of New York, and plaintiff obtained leave to withdraw and did withdraw the document, and the further hearing of the cause was continued to December 13, 1918. On this date the hearing was resumed and plaintiff offered the same document which he had before offered. It appeared that said clerk's certificate had been altered by striking out certain words and writing in certain other words in lieu thereof. No new certificate had been made by said clerk nor had the same been newly attested. On objection being made the court refused to admit the document in evidence. No evidence was offered to prove that the alteration in the certificate had been made by said clerk. The court found the issues against the plaintiff, dissolved the attachment, ordered that the clerk of the

Municipal Court of Chicago pay over to the attorney for the defendant the sum of money deposited with said clerk by the garnishee, and entered judgment against the plaintiff for costs. Plaintiff appealed.

It is here contended by counsel for plaintiff that the court should have admitted the document in evidence for the reason that the court should have presumed that said alteration was made by the clerk of the Municipal Court of the City of New York. We cannot agree to this. The question when and by whom the alteration was made was one of fact. (Catlin Coal Co. v. Lloyd, 180 Ill. 398, 405; Gillett v. Sweet, 1 Gilm. 475, 489.) And the court, who saw the document both before and after the alteration, evidently decided this question of fact against the plaintiff and there is nothing in the record before us tending to show that his decision was erroneous.

And the order of the court that the clerk pay to defendant's attorney the money, which the garnishee had deposited with the clerk and which she admitted was due and owing from her to the defendant, is not one of which plaintiff, under the circumstances, has any right to complain.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Matchett, P. J., and Barnes, J., concur.

Certiorari denied

1065a

440 - 24793

HENRY LUSCH,

vs.

MASONIC FRATERNITY TEMPLE ASSOCIATION, et al

CHARLES S. THORNTON, JUSTUS CHANCELLOR and PHIL CHANCELLOR, doing business as Thornton & Chancellor,

Appellants,

vs.

EDWARD M. WILLOUGHBY, Receiver, etc.,

Appellee.

217 I.A. 654

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

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

The Masonic Fraternity Temple Association was organized in 1890 as an Illinois corporation for pecuniary profit. It constructed and maintained a large office building in the City of Chicago, known as the Masonic Temple. In 1902 the County Treasurer of Cook County, claiming that the general taxes of the Masonic Temple property for 1901, amounting to $26,770.17 had not been paid, threatened to sell the property at a tax sale unless they were paid. The general superintendent of the building, one Williams, claimed he had paid the taxes in question, and he produced a tax receipt purporting to be signed by the County Treasurer, and acknowledging receipt of the taxes. That official claimed the receipt was a forgery. There was much publicity given the matter in the public press. The board of directors of the Association made an investigation, passed a resolution

to the effect that the taxes had been paid and had copies of it published in the newspapers.

Thornton and Chancellor, whom we shall call the claimants, were tenants of the Association in the Masonic Temple and acted as its attorneys. At the direction of one of the officers of the Association, they filed a bill to restrain the County Treasurer from selling the property and obtained a temporary injunction. Williams and others were indicted, the charges being conspiracy to defraud the County, and forgery. After the taking of testimony in the injunction suit had been begun before the Master, the court directed that it be suspended, pending the disposition of the criminal cases. Williams was found guilty in the Criminal Court and the tax receipt in question was declared a forgery. A Dr. Rush, an officer and director of the Association, and one Mallon, a bookkeeper and assistant secretary of the Association, testified for the State in the Criminal Court, that the taxes had never been paid by the Association and the entries in the books of the Association to the contrary were fictitious and fraudulent. Upon this disclosure, which was the opposite of all previous representations which had been made to them, the claimants advised the Association to pay the taxes and dismiss the injunction proceedings.

The claimants acted as attorneys for the Association in the injunction suit and also represented Williams in the criminal proceedings. In this connection they employed other attorneys and incurred expenses, in payment of which they used their own money, all of which they allege was done at the request and direction of the Association. Not being able to secure payment for their services or reimbursement

for their cash outlays for expenses, the claimants began an action at law against the Association and certain of its officers and directors for that purpose. While that action was pending, one Leach, a stockholder of the Association, filed the bill in the proceedings at bar, seeking to wind up the Association's affairs. The claimants were not made parties to that suit. An answer was filed by those who were defendants, in which the subject-matter of the suit was not contested, and on July 14, 1914, a decree was entered, in which it was decreed that the attempted incorporation of the Association was without authority of law and void and by reason thereof the Association was, in contemplation of law, a partnership and was not then and never had been a corporation; "that until the appointment of the receiver herein, there was not any person in law entitled to enforce the payment of the rentals of said tenants, * * * and that there was no person authorized to manage said large building (the Masonic Temple) or to make leases of space therein." The decree declared the partnership which existed between the shareholders in the Association, terminated and ended and ordered that the proceeds of the partnership business and property be distributed according to the rules and practice in equity. The receiver was directed to convert all property of the Association into cash and make proper distribution among the shareholders, after paying the costs and expenses of the conversion and the receivership and the costs and charges incident to caring for, operating and administering the partnership property, "and all the lawful debts of said Association." By an order entered July 24, 1914, claimants were given leave to file their claim for $15,604.90 in this proceeding against the assets in the hands of the receiver. Said claim was accordingly filed. The order allowing it to be

filed provided that the receiver or any party might file objections. The receiver did so. The issues made up by the claim and the receiver's objections thereto, were referred to a Master. The assets of the Association were distributed except the sum of $20,000, which the receiver was directed to retain, pending the disposition of this claim. The Master recommended that a decree be entered in favor of the claimants for the sum of $6,341.69, made up of some of the items which we shall refer to as the expense items of the claimants and he recommended that the claim for the remaining expense items and also for $5,000 for the services rendered by the claimants be not allowed. A decree was entered in accord with the findings and recommendations of the Master from which the claimants have perfected this appeal. The receiver has filed cross-errors in this court, contending that certain of the expense items allowed should not have been allowed, and that, as to them, the decree is erroneous.

The space occupied by the claimants in the Masonic Temple, was covered by two leases, one of which contained what is referred to by the parties as a "rider" by the terms of which, the Association employed the claimants "as its counsellors and attorneys" for the term of the lease, which was ten years, agreeing to pay forsuch services at the rate of $400 per year and the claimants agreed to furnish the Association "legal advice and service in all matters in which said lessor (Association) is personally interested and needs legalcounsel." This lease described the lessor as the "Masonic Fraternity Association, a corporation, organized under and by virtue of the laws of the State of Illinois." The Master disallowed the claim of $5,000 for the legal services of the claimants on the ground that the provisions

of the rider referred to were broad enough to cover services in contested legal proceedings irrespective of their magnitude and importance, including such services as are involved here. The receiver contends that this ruling was correct, and further that it should be sustained on the ground that it was not within the scope of the authority of the Board of Directors of the Association to charge it with liability for attorney's fees or moneys expended for the defense of their manager Williams in the Criminal Court, or in other words that the special agreement which the claimants contend they had with the Association covering their fees for services in defending Williams was ultra vires and therefore void.

The decree of the Circuit Court in this suit, entered July 14, 1914, from which no appeal has been taken, is binding on all the parties to this subsequent proceeding involving the claim of Thornton and Chancellor. Reference has been made to the terms of that decree, by which it has been determined and declared that the Association is not and never was a legal corporation and all its leases, including those to which the claimants were parties were null and void and of no effect and it is clear that the same is true of the rider referred to. That being the case, the question of ultra vires has no application to the facts presented. In our opinion the officers of the Association, acting as the agents of the shareholders, (treating the Association as a partnership) were entirely within the scope of their authority, in providing for the legal services in connection with both the injunction suit which they instituted and with the defense of their manager Williams in the Criminal Court.

The record shows that on September 26, 1902, about a month after this tax matter arose, and after the claimants had done considerable work and had incurred some expense, both in the matter of the injunction suit and the criminal case, the so-called board of directors of the Association passed a resolution, apparently prepared by the claimants at the direction of some of the officers of the Association, in and by which the president and secretary were "authorized and directed to employ such means as they may deem necessary to maintain said injunction proceeding and to prevent a second payment of the said taxes, and to protect and defend the said Williams against said indictments, to employ counsel and any and all persons who may be necessary to defend or to assist in maintaining, prosecuting and defending the Masonic Fraternity Temple Association and the said Williams in all of said matters and to audit and pay all reasonable bills for expenses thus incurred." It is our opinion from all the evidence in the record that this resolution was passed by the duly authorized officers and agents of the Association constituting the so-called board of directors, for the purpose of confirming what had already been done with reference to the matters covered by the resolution as well as authorizing what might be done in the future. The evidence submitted by the claimants is to the effect that this resolution was prepared at the direction of Mr. Harris, vice-president of the Association, who was acting in the absence of the president Mr. Gormley, and that in the conversations had with him on this subject the employment of claimants was referred to. Harris denies this but we find his entire testimony so self-contradictory and so in conflict with his own admitted acts and written statements, as to be wholly

untrustworthy. Furthermore the claimants submitted testimony of conversations with Gormley subsequent to the adoption of the resolution referred to in which the fee to be paid claimants was discussed and also testimony to the effect that later when claimants were endeavoring to have their claim for services and expenses paid, the matter was the subject of further conversations with Gormley in which he stated that the charges of claimants for fees and expenses ought to be paid and he was surprised at the attitude of some of the members of the board who were opposing it. This testimony is not contradicted.

The record further shows that while the tax litigation including the criminal case, was pending and claimants were acting as directed, in representing the Association and Williams, they said they must have some money,- that they could not finance the litigation, whereupon Gormley gave claimants the check of the Association for $1500 which he said was all the money the Association could spare at that time and he also gave them two notes for $2500 each signed by Williams and himself which Gormley said the Association would take up at maturity. The claimants discounted these notes but they were not taken up at maturity, either by the makers or the Association and consequently claimants were obliged to pay them. Mr. Thornton testified that at the time Gormley gave him these notes he said he wanted to know if he was to understand that "this is collateral to the undertaking that the Association has entered into with us by that resolution" and he answered "all right". This is not denied in the record.

Even if we were to consider the so-called rider a valid and binding agreement, we are of the opinion that there was never any thought in the minds of any of the parties involved, that it was intended to or did cover such services as the claimants rendered in the cases growing out of this tax fraud. These services became necessary by reason of the criminal acts committed by individuals who were members of the Board of Directors and trusted employees of the Association itself and the advice given and services rendered by claimants were based upon representations made to them by officers of the Association which were wholly false, but were believed by claimants to be true. That the Directors of the Association, did not themselves consider the provisions of the rider as covering the services rendered by claimants in such an extraordinary situation, is proven conclusively, in our opinion, by the fact that at no time did any of them even mention the provisions of the rider, let alone advance the contention that the services and charges in question were covered by its terms. We are not impressed by the testimony of Bodman to the effect that he "understood there was a lease in force which covered the fees of Thornton and Chancellor." He admitted he never spoke to claimants about it and further that he had never seen the lease in question. "Actions speak louder than words." If the officers and directors of the Association understood that the provisions of the rider were suchas to include the services rendered by claimants involved here, it is hard to understand why they never mentioned that fact or discussed it with claimants, although at least some of the testimony of the latter to the effect that the question of their fees was discussed with certain officers of the Association, stands in the record

without contradiction, and further why they did not plead it in the action at law brought against them by claimants and why it was never mentioned even in this litigation until after the hearings were begun before the Master. It is in no way referred to in the objections filed by the receiver to the claim as filed by the claimants.

It is urged that claimants should not be allowed their fees as claimed because the directors passed the resolution authorizing the officers to employ counsel and "to employ such means as they may deem necessary*** to protect and defend the said Williams," in the criminal case, relying upon bad advice given them by claimants to the effect that in their opinion if Williams should be found guilty of forging the tax receipt in question, "it would practically put an end to every effort that might be made to sustain the injunction"; and further that they were not sure but that the decision in the criminal case might "in effect" be res adjudicata in the injunction proceedings. In our opinion that advice was entirely sound. The outcome of the litigation was precisely in accord with it. Of course legally, the decision in the criminal case could not be considered res adjudicata in the injunction suit. But without question, if Williams was found guilty in the criminal case upon convincing evidence, "in effect" the decision in that trial would dispose of the whole matter,- as it ultimately did do.

Turning now to the expense items which were not allowed. In supporting their claim Thornton and Chancellor submitted testimony to the effect that the former had told Harris early in the course of the litigation that in a

hotly contested case it is often necessary to incur expenses on the moment and asking whether he would be available for consultation and if not they wanted to know to whom they were to look, in answer to which he said, "Follow the directions of Captain Williams. The Captain knows all about this transaction and he is about the only one who actually took part in the payment of the money. Follow his directions, and whatever is essential to the trial of the case in the way of funds the Association will provide." Harris denies this conversation. We have previously referred to the weight to which his testimony is entitled. Among these expense items were sums paid to certain persons who did investigating and publicity work and some of them legal work,- Cleveland, Guinea, Baldwin and Baker. All these men were employed at the request and direction of Williams, who later appears to have approved of the work they were doing,- at least in the case of some of them. Another expense item, involved the payment of $50 to Lord & Thomas who were employed to get certain articles into the newspapers. As we have previously pointed out this tax scandal resulted in a great deal of newspaper publicity,- much of it reflecting unfavorably on the Association and its officers and in the view of the case entertained by claimants, as a result of the representations made by their clients, they endeavored to bring about the publication of what they believed to be the truth about the matter. Another expense item which was not allowed, involved the payment of $500 to Mr. Trude, a celebrated criminal lawyer of many years practice at the Chicago Bar. It appears from the record that he was employed entirely in an advisory capacity and was not expected to take an active part in the trial of the criminal case.

At this time he had retired from active practice. There is much discussion in the brief filed by the receiver in this court as to whether these expense items represented the reasonable and customary charges for the services alleged to have been rendered, and also as to the propriety of allowing items for the so-called publicity and investigating work and as to whether the work involved was of any real value. Some time in December 1902, the claimants submitted a list of their expense items to the Association. It appears from the testimony of Mr. Chancellor that this was done in response to a request from the Association for a statement of "the disbursements". This list or statement included all the expense items, not allowed, to which we have referred. All the items were checked over by the officers of the Association. At no time was any objection made by the Association or any of its officers to any of these items up to the time of the filing of the pleas in the action at law instituted by the claimants, which pleas were filed in October 1907. That being the situation the claimants made out a prima facie case as to all items included in the statement as submitted, when they put the statement in evidence. Jones v. University Research Extension, 157 Ill. App. 132; Popper v. Schoenfeld, 97 Ill. App. 477. In our opinion that prima facie case as to these expense items was not materially altered or weakened by the cross-examination of claimant's witnesses and the receiver put in no testimony at all to meet it and for that reason all the items referred to should have been allowed, aggregating $1,288.00. In contesting this claim the receiver is representing no one but the Association and its shareholders. The rights of creditors are not involved here in any way.

There is a further expense item claimed by Thornton and Chancellor, which is made up of another payment of $500 to Mr. Trude in December 1902, after the statement heretofore referred to was submitted to the Association by its claimants. It was, therefore, not included in that statement, nor was it included by the claimants in the bill of particulars filed by them in the action at law or in the claim filed by them in this suit. It is claimed that this was through some oversight. That Mr. Trude was being employed in connection with the criminal case, the Association through its officers, well knew. No evidence was offered by the receiver questioning its payment or the good faith of the claimants. We find no warrant in the record for the contention of the receiver that Mr. Trude was not employed to render such assistance as he might give in an advisory capacity in connection with the criminal case, but solely because he was the attorney for The Chicago Tribune and for the purpose of thus securing his influence with that newspaper in the matter of getting favorable publicity. In our opinion this item should also have been allowed. This is an equitable proceeding in which the Association and its shareholders are being given the right to wind up their business and go out of existence as an Association, it being provided in the decree that before this is done the Receiver pay all "lawful debts" of the Association. But this item should be allowed without interest, inasmuch as it was not included in the bill of particulars as filed by claimants in the action at law nor in their claim as originally filed in the suit at bar. Interest should be allowed on the other expense items aggregating $1,288 and also on the claim for fees amounting to $5,000, at the rate of 5 per cent per

annum from February 1, 1903, the date from which the Master allowed interest on such items as he recommended should be allowed.

For the reasons we have already discussed we are of the opinion that the expense items allowed by the Master and included in the decree of the trial court, were properly allowed.

The decree of the Circuit Court, entered on May 23, 1918, awarded the claimants the sum of $6,341.69 with interest at the rate of 5 per cent per annum from July 16, 1917, the date of the Master's report. It was erroneous in failing to award them, the further sums of $6,288 with interest at the rate of 5 per cent per annum from February 1, 1903 and$500 without interest. Instead of awarding a total sum of $6,612.49 to claimants, the decree of May 23, 1918 should have awarded them a total sum of $18,188.80. The decree of the Circuit Court is therefore modified to that extent and, as so modified, is affirmed.

DECREE MODIFIED AND AFFIRMED.

TAYLOR, J. and O'CONNOR, J. Concur.

448 - 24301

(10662)

NELLIE M. COX, Administratrix de bonis non of the Estate of Fred N. Cox, Deceased,

Appellant,

v.

CHICAGO RAILWAYS CO., et al.,

Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

217 I.A. 654

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

The plaintiff, administratrix, brought this action against the defendants to recover damages resulting through the death of her husband, alleged to have been caused by the negligence of defendants' servants in operating one of its cars, as a result of which it collided with an automobile in which the deceased was riding as a passenger, inflicting the injuries which caused the death. The plaintiff has perfected this appeal from a judgment recovered by the defendant in the trial court following the verdict of a jury finding the issues for them.

In support of the appeal the plaintiff contends, among other things, that the verdict "is contrary to the evidence". It must be more than that before this court would be warranted in disturbing it. Before a judgment can be reversed by this court, we must be of the opinion that it is contrary to the manifest weight of the evidence or clearly against the weight of the evidence. Kujawa v. Chicago & Alton Railroad Company, 175 Ill. App. 325; C. & A. R. R. Co. v. Heinrich, 157 Ill. 388;

Chicago City Ry. Co. v. Mead, 206 Ill. 174. While the record discloses sharp conflict in the testimony on some points, from a careful reading of it we are of the opinion that it cannot be said that the verdict of the jury, finding the defendants not guilty, is against the manifest weight of the evidence.

It would serve no useful purpose to take up the evidence in any detail but it will be sufficient for the purposes of this opinion to state that the evidence tended to show that the deceased Coe and one Johnson were riding in a seven passenger automobile, with a limousine body, as passengers, occupying the rear seat. In the front seat were two other men, Freed and Naugle. The latter was driving. The automobile was being driven south along Vincennes Road in the City of Chicago, about 9:30 o'clock on the evening of November 25, 1915. It was a dark, rainy night but without fog or mist, as some of the witnesses for the plaintiff testified, and automobile or street car lights could be seen for a distance of several blocks. When the automobile reached 95th street, which crossed Vincennes Road at right angles, a turn was made to the east. The roadway in Vincennes Road was paved to a width of about 25 feet.. To the east of this roadway were the two tracks of the street railway operated by the defendants. This right of way consisted of rails and ties without street pavement. Still further to the east of the street car tracks, was a railroad right of way containing four or five tracks of the Rock Island Railroad. The railroad crossing was planked and the street car right of way was paved with granite blocks opposite the 95th street intersection and for a few feet beyond the

north and south crosswalks of 95th street. Although the evidence is in direct conflict on this point, it is such as to warrant the jury in finding that in making the turn from Vincennes Road into 95th street the driver of the automobile did not keep to the right of the center of the intersection but cut across on a diagonal, in a southeasterly direction, from Vincennes Road into 95th street. Witnesses for the plaintiff testified that the automobile proceeded over the defendants' tracks at a speed of five or six miles an hour, while witnesses for the defendants gave the speed as fifteen or twenty miles an hour. Before the automobile cleared the northbound street car track, an interurban car coming north collided with it, with such force as to practically demolish the automobile and throw the wreckage to the north beyond the 95th street roadway and crosswalk and immediately east of the track, killing both Coe and Johnson. The motorman testified he had been running his car about fifteen miles an hour and as he approached this intersection he reduced the speedslightly, going over the crosswalk at 95th street at a speed of about twelve miles an hour. The evidence shows that the car was a large, heavy, interurban car, weighing 44 tons,- about double the weight of the ordinary street railway car,- which made considerable noise as it passed over the tracks. The motorman sounded whistle signals twice, the first being a regulation crossing signal a block or two south of 95th street, and the other being an emergency signal just before the collision. The 95th street crossing was the only one over defendant's tracks for several blocks either way. Witnesses for the plaintiff testified that the head-light

was not lighted. There is considerable testimony in the record to the contrary and there is further testimony by witnesses for the plaintiff as well as for the defendants, that the lights from within the car were visible for a distance of 400 feet, or more. The car continued north for about a block after the collision. One of the witnesses testified that just at the time of the collision or immediately after, he heard a sound like an explosion under the car. It appears from other testimony that this was caused by a breaking of the compressed air apparatus. After the accident the motorman discovered that the air was gone and he then had to bring the car to a stop by means of the reverse. This seems to account for the distance it traveled after the collision. Maugle and Freed testified that they lowered the windows of the car opposite the front seat, just before making the turn, and looked north and south but saw no lights or cars and heard no noise. Maugle, who was driving the automobile, had lived in the vicinity for some time and was very familiar with this crossing. The motorman testified that he first noticed the automobile when it was about two blocks away, the car being at about 96th street, and the automobile at 94th street. There was another automobile following behind. At about this point he "shut off the power and was giving a little air * * * to check up the speed." He further testified that the automobile was on the west side of Vincennes Road and when the front end of the street car was about at the board crosswalk at 95th street, "the automobile came right up to the point and made a kind of sharp turn right in the tracks in front of the car; that the automobile was coming 15 or 20 miles an hour and made this turn when the car was about 15 feet away."

It appeared from the evidence, over objection, that Naugle also had a suit pending against the defendants and the same was true of Freed, who was an employee of Naugle at the time of the accident, and that the attorney for the plaintiff in the case at bar also represented them in their cases. In his argument to the jury counsel for the defendants referred to these facts and commented upon them, in referring to the probable interest that these witnesses might have, and particularly Naugle, in having the plaintiff recover in this case, and he also pointed out that the plaintiff had never brought any suit against Naugle who would be liable if the accident was caused by his negligence and that the real issue involved in the trial of this case was the question whether the accident was caused by the negligence of the defendants or Naugle and that he was therefore probably interested in having it established that it was the former and not the latter. While objection was interposed to the introduction of the evidence referred to, we find no objection noted in the record to the argument of counsel now complained of. We are of the opinion, however, that the evidence in question was admissible and also that the argument was entirely legitimate. Commonwealth Edison Co. v. Hess, 214 Ill. 545.

It is also contended that the court erred in admitting defendants' Exhibit 1 in evidence and in sustaining the objection of the defendants to plaintiff's Exhibit 2. Defendants' Exhibit 1 was a photograph taken from a point in 95th street just east of the Rock Island tracks and showed the planking over the railroad crossing and the pavement over the street car tracks and the Vincennes Road pave-

ment beyond. The plaintiff contends that it gives a false impression of the conditions at the intersection but in what way is not pointed out. We have examined it with care and it has every appearance of being all that such an exhibit should be. Plaintiff's Exhibit 2, was a photograph of the wreckage of the automobile, offered, as counsel stated, for the purpose of fixing the location of the automobile after the accident. This photograph was properly excluded because it clearly appears from the evidence that it was taken after the wreckage had been moved several feet and therefore, it did not show the location of the wreckage immediately after the accident.

Over plaintiff's objection, the defendants introduced in evidence an ordinance of the City of Chicago, requiring the driver of any vehicle, in turning corners to the left, to pass to the right of the center of the intersection of the two streets. The court also gave the jury an instruction reciting the provisions of this ordinance, in which the jury were told that if they believed that the failure of the driver of the automobile to comply with the provisions of the ordinance (if they found from the evidence that he did so fail) was the sole proximate cause of the accident, then their verdict should be for the defendants. The court further told the jury, in the same instruction, that if the deceased, in the exercise of ordinary care could have prevented the driving of the automobile in violation of the ordinance, and he failed to exercise ordinary care in that behalf and such failure proximately contributed to cause the accident, then plaintiff could not recover even if the jury found that the defendants were negligent. The admission of the ordinance in evidence and the giving of this instruction are alleged

as errors. The ordinance was clearly admissible, not upon the theory that the negligence of Naugle, if any, could be imputed to the deceased, but upon the theory that it was evidence which the defendants had a right to have the jury consider in passing upon the question of whether the motorman was guilty of negligence. There is a presumption of law that every person will perform the duty enjoined upon him by law, and anticipation of his negligence in failing in that regard is not a duty which the law imposes upon others. While this presumption is not conclusive, it is proper to be considered on the question of whether the defendants have been guilty of negligence. Schlauder v. The Chicago & Southern Traction Co., 253 Ill. 154; Odette v. Chicago City Ry. Co., 166 Ill. App. 270. The instruction also was proper as it does not in any way violate the rule that the negligence of the driver of avehicle is not to be imputed to a passenger. The instruction has nothing whatever to do with the question of imputed negligence. It merely tells the jury that if the ordinance was violated and the jury is of the opinion that such violation was the sole proximate cause of the injury, then the plaintiff cannot recover, which is manifestly correct, for in that case the defendants could not have been guilty of any negligence proximately causing the injury. Chicago Union Traction Co. v. Leach, 215 Ill. 184; Phelan v. Chicago Rys. Co., 212 Ill. App./563. By the latter part of the instruction the jury was told that the plaintiff could not recover if the deceased was guilty of negligence proximately contributing to cause his injuries, which is also clearly correct. Flynn v. Chicago City Ry. Co., 250 Ill. 460; Pienta v. Chicago City Ry. Co., 284 Ill. 246. Complaint has also been

made of the giving of instruction No. 15, in which the jury was told that reasonable or ordinary care was required of both the motorman and the deceased as they approached the crossing in question and that if they believed from the evidence that both the deceased and the motorman failed to exercise such care and were guilty of negligence, then the plaintiff could not recover, for if the deceased himself failed to exercise due care, there could be no recovery even though the motorman was also negligent. This instruction in no way limited the jury to a consideration of the negligence of the motorman alone. Nothing was said in the instruction that would warrant the jury in believing that, of the various acts of negligence alleged, that of the motorman was the only one to be taken into consideration by them.

The only other point argued by the plaintiff in her brief is one to the effect that the trial court erred in permitting counsel for defendants to submit a statement, purporting to be signed by one Craig, to the court on the hearing of the motion for a new trial for the purpose of having the court compare Craig's signature on that statement with another alleged signature of his to an affidavit which the plaintiff had submitted in support of her motion for a new trial. In the affidavit Craig asserted that he had never made or signed such a statement as the defendants had in their possession. Craig had testified in another case, growing out of this accident, and the plaintiff expected him to testify in her behalf in this case, but he did not appear, whereupon counsel for defendants agreed that the evidence he gave in the other case might be read to the jury in the trial of this case and counsel for the plaintiffs, in apparent consider-

ation of this concession on the part of counsel for the defendants, stipulated that Craig had signed a statement to an investigator for the defendants, in which he said he heard the whistle of this car when it was near 98th street. This statement was also read to the jury. When the plaintiff on the hearing of the motion for a new trial, in support of such motion offered the affidavit of Craig that he had never made such a statement to an investigator for the defendants, it was entirely proper for counsel to submit the statement in question to the court for a comparison of the signatures. There can be no error in this as contended by the plaintiff, by reason of the fact that the statement had not been introduced in evidence or its execution proven, because upon the trial those matters became unnecessary by reason of the plaintiff's stipulation.

It appears that Johnson, who was also killed in this accident, brought suit against certain of the defendants in this suit in the Circuit Court of Kankakee County and recovered a judgment, which has been affirmed in the Appellate Court for the 2nd District, 209 Ill. App. 26. Plaintiff makes a point in her brief to the effect that the defendants in this suit are estopped by the verdict in the Johnson case, from contesting their liability. This question is not referred to in the argument of counsel and should therefore be deemed to have been waived. However, the point is not well taken. The plaintiff in the case at bar was not a party in the other case and the same is true of some of the defendants involved here. Furthermore it appears from the record that the motorman and two or three other witnesses, who t stified for the defendants in the case at bar, did not

testify in the Johnson case. The difference in plaintiffs in the two cases was important in the matter of possible contributory negligence, for in the Johnson case it was shown that the deceased resided in the country and was not in any way familiar with the scene of the accident, while in the case at bar it is shown that Coe did live in the vicinity of the crossing in question and was very familiar with its surroundings.

For the reasons given the judgment of the Superior Court is affirmed.

AFFIRMED.

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

(Certiorari denied) (1067a)

489 - 24843

ANDERSON & LIND MANUFACTURING COMPANY, a corporation,

vs.

WILLIAM LIEDLICH, et al

HENRY JOHNSON,

Appellee,

vs.

ANNA MALTZ,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

217 I.A. 654

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

This was a chancery suit by which the complainant sought to foreclose a mechanic's lien. The bill alleged that William Liedlich was the owner when the building contracts were made and that Anna Maltz had purchased the property from him and that Henry Johnson was the carpenter contractor. Johnson filed an answer and cross petition alleging that he was the carpenter contractor and had been employed as such by the then owner Liedlich to furnish labor and materials for, and to superintend the erection of, the buildings in question and that there was due him on his contract, the sum of $1322.06 for which he claimed a lien. In her answer Anna Maltz, denied that any sum was due Johnson. Settlement was made with the original complainant, Anderson & Lind Manufacturing Company and the cause proceeded to a hearing before a Master, on the cross petition of Johnson and the answer of Anna Maltz. The Master found the issues for Johnson and recommended that he be

given a lien for the amount of his claim with interest amounting in all to $1409.97 and a decree was entered accordingly from which Anna Maltz has perfected this appeal.

Appellee contends that the abstract filed by the appellant fails to comply with the rules of this court and that the decree of the Circuit Court should be affirmed for failure of appellant to make and file a proper abstract. The abstract is not all that it should be but we deem it sufficient for the purposes of this appeal.

It is also contended in behalf of appellee that the issues raised in the suit at bar were involved in an action formerly had in the Municipal Court of Chicago and that the decision of the court in that case, from which no appeal was taken, determined those issues against the contentions now being urged by appellant; that both parties here were parties to the Municipal Court action and that therefore appellant is estopped by the verdict in that action from again litigating those issues in this suit. As to this contention it is sufficient to say that the interests of the appellant and appellee in this suit, were not adverse in the Municipal Court case referred to. The question of estoppel by verdict can only be raised by one party against another where the issue in question has been involved and determined in a previous case in which those parties were adversaries. Gouwens v. Gouwens, 222 Ill. 223; Dempster v. Lansingh, 244 Ill. 402.

In seeking a reversal of the decree awarding Johnson the lien claimed by him, the main contention made by appellant is that the manifest weight of the evidence is that Johnson was not a contractor on the work in question

and that he therefore was not entitled to a mechanic's lien against it.

Johnson testified that he was a carpenter contractor and had known Liedlich about five years; that Liedlich was the owner of the premises in question consisting of three lots on each of which a two story flat building had been erected,- Johnson's claim being for work done on those buildings; that he had the plans for the buildings prepared for which the architect had charged him $60, which amount had not been paid; that Liedlich ordered him to make the plans; that the witness had the survey made for which he paid $28 and still owed $17; that he made all the contracts. The witness was asked whether there was any contract let for the carpenter work and he answered, "No, I did that." The witness further testified that he had charge of all the work done on the buildings from the time he set the frames in February, until August 4; that Liedlich saw the plans for the buildings; that he saw Liedlich two or three times a week during the progress of the work "mostly in the evening and after quitting time"; that he worked on the buildings every day from February to August; that he employed carpenters and painters on the buildings by the hour; that the witness put in 879 hours on these buildings himself, his charge being 75 cents per hour making the charge for his work $664.24; that he paid one Hagenson $402 for 575 hours work, one Peterson $83.20 for 416 hours, one Olson $44.40 for 63½ hours, one Carlson $22.40 for 32 hours, one Wenzel $103.60 for 148 hours, one Peterson $39.70 for 71 hours, one Nelson $97.20 for 139 hours, one Johnson $25.90 for 27 hours, one Nelson $48.80 for 70 hours, one Rackness $20.10for 28½ hours, one Burke $16.80 for 24 hours,

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one Laadgardt $17.50 for 24 hours, one Nelson $81.60 for 116½ hours, another Nelson $78.40 for 112 hours, making a total of $1082.30 which the witness had paid out for work done by carpenters and painters; that he paid one Fisher, another painter $40; that he furnished some lumber amounting to $10 and nails amounting to $14.50 and paint amounting to $2.25; that he procured the service pipes for two of these buildings from the Gas Company for which he was charged $15 each. The witness was asked how much he had received from Liedlich on account of his work and the money he had paid out and he answered "Not a penny". He testified that he had received $626.24 at different times from the proceeds of loans that were made on these lots by C. C. Mitchell & Co. and that there was a balance due him for his labor and materials furnished and money expended in the sum of $1322.06. It was agreed that Liedlich was the owner of record, of the property during the time Johnson worked on the buildings. On cross-examination Johnson testified that Liedlich purchased the lots from C. C. Mitchell & Co.; that no cash was paid for the lots but Liedlich gave a second mortgage on them; that Johnson arranged the deal; that he did not take Liedlich out to see the property; that he did not know whether Liedlich ever saw the property; that sometimes Liedlich's business was "playing piano and sometimes he said he was a painter and so forth,- his real business I don't know,- I knew he tended bar"; that Liedlich left the matter of letting the contracts with him; that he showed Liedlich the plans many times; that he first took up with Liedlich the matter of putting up these buildings for him, in January. He was asked where that took place

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and he said he could not remember, it was not at his home nor at the saloon,- "I think we met in town, you see, and we was together in the evening and so on, and took in shows and so on"; that he went to Mitchell & Co. and got the purchase price on the lots and Liedlich was not with him at that time; that he does not know whether Liedlich ever came out to the buildings to see how they were progressing; that Liedlich agreed to pay him by the hour (75 cents per hour) for all the work he did on the buildings. The witness was asked "And Mr. Liedlich was to pay you?" and he answered, "Well it was going to be paid." He was then asked, "Well who was going to pay you?" and he answered "Well, if the loan did not reach, you see, I had to get the money out of him or wait for it." The witness was asked further, "Will you state definitely how you expected to get paid for your carpenter work?" and he answered, "Well, you see, I was going to do the best, to run it the best way I know how and get along the best way I know how."

After the petitioner Johnson concluded his testimony, the defendant Maltz introduced the two applications for loans on the lots, one covering one lot and the other covering the other two lots, both applications being signed "William Liedlich by Henry Johnson", and also two contractor's statements to Mitchell & Co., who made the loans, both statements being signed and sworn to by Johnson. These latter statements read in part, "the following are the names of all parties having contracts or sub-contracts for specific portions of the work or for materials entered into the construction thereof and of the amount due and to become due each, and * * * the items mentioned include all labor and material required to complete said building according to

plans and specifications." Following this statement these documents contained a list of names of contractors, what their contracts were for and the amounts they called for and it read in part:

"* * * * *

Henry Johnson	Carpenter.

* * * * *

Henry Johnson	Painting.

* * * * *

Henry Johnson	Cement work crushed stone cement
William Liedlich	sand.

* * * * *"

Johnson admitted signing his name to all these documents but denied that he had signed Liedlich's name to the two applications for loans. The witness testified he had never asked Liedlich for any money. Johnson further testified that about August 4, he and Liedlich were arrested on a charge of obtaining money by false pretenses, at the instance of one Kahn, a lawyer through whom they had negotiated second mortgages on the property in question and that after that Liedlich would have nothing to do with him.

Liedlich testified for the defendant, that during the time in question he was a bartender; that in the saloon where he was working Johnson "told me he got some business for me to do * * * he says I should sign some papers, and I told him I don't want to get in any trouble because I never was in any trouble before * * * and he says there was no trouble at all and in case we got arrested I wouldn't be in there five minutes"; that he wanted the witness to sign the papers "so he could start on the buildings to work"; that he signed his name, and following

this he sometimes saw Johnson twice a week and sometimes not for a month; that he never saw the buildings in question; that the owner of the buildings was Johnson; that he signed some papers at the office of the lawyer Kahn; that Johnson promised to pay him $25 for signing the papers; that he never saw any building plans; that he received some bills and turned them over to Johnson; that Johnson did all the talking on the occasion of the several visits to Kahn's office; that he was never a painter or a mason and never told Johnson he was; that he tried to read the papers he signed but Johnson put his hand over them and told him it was nothing to him,- "it just means I can start on the buildings"; that Johnson never asked him to pay for the work he did; that he owned no real estate and never did so far as he knew; that Johnson never told him he was the owner of the property in question. On cross-examination Liedlich was shown some trust deeds which he admitted signing and testified that at the time he signed them he did not know the lots had been deeded to him and did not know that the documents he was signing were trust deeds and that is why he asked Johnson what they were and "he just told me that I shall sign my name so he could start on the buildings, so he can make money"; that he never was in Kahn's office except when Johnson was with him; that when he received a bill from the Ravenswood Stair Shop he called Johnson up and he came down the next day and he asked Johnson "What for he sent the bill over to me," and he said it must be a mistake that he had paid it; that he received a number of bills and turned them all over to Johnson; that he could read English a little but "not plain enough"; that he could have read the papers he signed if someone "explained it to me". The witness was asked whether

he had received a deed to these three lots and he answered, "What is that, a deed"? He testified further that he signed some papers in Kahn's office but that he does not know what they were and does not remember whether he was told what they were or whether they were explained to him; that after he was arrested and bailed out he signed a paper in Kahn's office in the presence of one Schaeffer, and received $300; that Johnson never paid him the $25 he promised to; that he would have nothing to do with Johnson and refused to talk to him after they had been arrested.

One Wolinsky testified that he was a building contractor; that he started to work on the three buildings in question July 18 and continued for about six weeks and that outside of himself and his men no others were working on the buildings during that time; that some time in May the witness was at the buildings and saw Johnson there and asked him what he was doing there and Johnson replied, "Why, I am the owner of these buildings." to which the witness remarked, "It is funny,- I was sent by Mr. Maltz to finish up the buildings," and that Johnson then said, "No, you are not going to finish these buildings while I am the owner." This witness said he saw these buildings several times a week between May and July and saw no men working on them; that he paid $106 to three men who were carpenters of Johnson; that he was employed to finish the buildings by Maltz who paid him $1200 for his work; that when he started to work on the buildings in July they were in the same condition they were in when he first saw them in May.

One Ritchie, a shorthand reporter, testified from his notes of the testimony taken at the trial of another case

involving these buildings, in which Johnson was a witness; that Johnson there testified that he was the general contractor on this work; that upon being asked who he had his contract with, he answered "I didn't have any contract * * * I took care of it * * * at the request of Liedlich,- we had the building together,- we owned it together"; that the witness was then asked, "So that you were not a contractor?" and he answered, "No".

There were introduced in evidence two orders signed by Liedlich directing Mitchell & Co. to pay out the proceeds of his loans with them on Johnson's orders.

Kahn testified that he first met Johnson in the latter part of May, who told him that he had three buildings under construction on which he wanted some second mortgage loans; that he looked up the property and told him he would make the loans; that when Johnson came to sign the application for the loans he wrote, "William Liedlich by M. Johnson"; that he asked Johnson who Liedlich was and he replied, "It is my building but Liedlich is my dummy * * * there are some judgments against me"; that Johnson brought Liedlich to execute the trust deed and notes; that no work was done on the buildings from the time the witness saw them during the first week in July until Wolinsky began his work on them; that one of the notes came due in July and was not paid and he asked Johnson about it and he said to wait a few days, that Liedlich was in Lockport doing some painting; that early in August he told Johnson he would take the buildings off his hands provided he would make a reasonable proposition; that Johnson said first he wanted $1500 to deliver title and later agreed to take $1,000 and said he would bring Liedlich in the next day and he asked the

witness to have a check ready drawn to his (Johnson's) order; that it would be all right to have it drawn to Liedlich and he could have the latter endorse it; that he had both Liedlich and Johnson arrested for obtaining money by false pretenses; that Johnson always spoke of the buildings as "my buildings" and said he needed money and so wanted to make the loans; that when Liedlich was brought in by Johnson he asked him if he was the Mr. Liedlich that Johnson had spoken to him about with reference to the buildings and Liedlich said he was; that he was in and out of the room when Liedlich was signing the papers and does not know whether he read them; that he took Liedlich's acknowledgment; that after he had Johnson and Liedlich arrested he was instrumental in getting the latter out on bail and then procured a deed of the three lots from Liedlich to the witness; that Liedlich put no prices on the buildings; that Liedlich was represented by ex-alderman Schaeffer; that he promised Liedlich he would keep him out of any trouble that might arise; that he told Liedlich he would give him a hundred dollars a deed for each one of the buildings and he said he would do so.

Johnson denied that he told Liedlich he would pay him $25 to sign the papers as testified by him; that he did anything to prevent Liedlich from reading the papers he had signed; that Wolinsky did any work on the buildings before August; that he told Wolinsky that he was the owner of the buildings; that he told Kahn he owned the buildings or that Liedlich was his dummy.

John testified that he did not know whether there were any judgments against him. One Hamill, a lawyer, testified he had represented Johnson in several suits brought against

him by material men and the record shows they went to judgments.

One Engral Nelson, a carpenter, and one Andrew Nelson, a painter, testified they did work on these buildings as employees of Johnson, during June and July and that during that time nobody else was working there except an old man and two or three boys who were working for Johnson.

We are of the opinion that the manifest weight of the evidence is such as to establish the fact that Johnson had no contract of any kind on the property involved and has no rights whatever under the Mechanic's Lien Statute as a "contractor". He himself testifies to no contract except an oral agreement under which Liedlich was to pay him 75 cents an hour for his time, but the testimony, in our opinion, clearly establishes that there was no such agreement. He does not testify that Liedlich promised to pay him any amounts he paid out on other contracts and yet he says he paid out over $1,000 in that way. It seems clear that Johnson had no contract whatever with Liedlich but that he wanted to buy and improve these lots as a business venture of his own; that there were judgments outstanding against him, so he picked out an ignorant bartender he knew and got him to take the title and execute mortgages by which he raised the money with which to erect the buildings; that the arrest of Johnson and his "dummy" at the instance of Kahn brought matters to a crisis and they fell out and the "dummy" who held the record title, signed a deed to the defendant Maltz. Whatever other rights Johnson may have in the premises, it seems clear he has none whatever as

"contractor" under the Mechanic's Lien Law. The clear preponderance of the evidence is that he did not bear the relation of contractor to Liedlich. In this action Johnson seeks to invoke an equitable right created by statute and to succeed he must bring himself clearly within its terms. In our opinion he utterly failed in this and his petition should have been dismissed.

The decree of the Circuit Court will, therefore, be reversed.

REVERSED.

TAYLOR, J. AND O'CONNOR CONCUR.

TAYLOR, J. AND O'CONNOR JOHNSON.

(1068a)

511 - 24865

NELS LARSON,

Appellee,

v.

CHICAGO STREET RAILWAY COMPANY and CHICAGO RAILWAYS COMPANY, operating and doing business as CHICAGO SURFACE LINES,

Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

217 I.A. 655

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

This is a suit for personal injuries which the plaintiff alleges he received as a result of the negligence of the employees of the defendants in operating one of their cars. The issues were submitted to a jury and a verdict was returned in favor of the plaintiff, following which a judgment was entered in his favor for the sum of $1,000, from which the defendants have perfected this appeal.

The occurrence in question happened on May 7, 1916 about five o'clock in the afternoon. It was broad daylight. The defendants operate a double track street car line, north and south on Cottage Grove avenue and another double track street car line, east and west on 79th street in the City of Chicago. A load of steel beams, 60 feet in length, broke down so as to block the southbound cars on Cottage Grove avenue and the westbound cars on 79th street and some time later the wreckage was pulled over into the west roadway on Cottage Grove avenue and far

enough north to clear the north crosswalk on 79th street. After it was thus removed, the north end of the steel beams rested on the ground close to the curb on the west side of Cottage Grove avenue and the south end of the beams rested on the rear truck of the wagon which had broken down. The plaintiff was injured while he and two helpers were engaged in raising the north end of the beams so as to permit the replacing of the front truck of the wagon under them. This was being done by means of jacks operated by the two helpers, one of whom was on the west side of the load and the other on the east side of the load. When they had raised the beams within an inch or so of the height required to permit sliding the front wagon truck under them, the plaintiff was holding the front wagon truck and wheels in position for that purpose. He did this by holding on to the wagon tongue, which was 6 or 8 feet long, about in the middle. He was standing on the east side of the tongue, facing west with his back to the southbound track on Cottage Grove avenue. A southbound car came along and the north end of the pole came in contact with the car a few inches in front of the rear dashboard, the pole projecting through into the platform space from 2 to 4 feet. The forward motion of the car swung the pole around, knocking the plaintiff down and inflicting the injuries complained of.

In our opinion the verdict for the plaintiff is against the manifest weight of the evidence.

The plaintiff testified that as he held the pole which was attached to the front wagon truck it was pointing

toward the northeast; that he did not see the car coming until it struck the pole; that he looked north to see if a car was coming, four or five minutes before the accident; that he didn't look after that because he had to pay attention to what he was doing; that he had been working there about half an hour and he did not know whether any cars had passed during that time; that he paid no attention whatever to the cars; that the pole came in contact with the side of the car and scraped along the side to the back and then went in the rear vestibule doors; that he heard no bell ring; that the car went about a car-length after it hit the pole; that there was enough room between the side of the wagon (the load he was working on) and the street car track for another wagon; that he was about to back the front of the truck in under the load and as he was doing so, the pole was turned northeast just a little. One Kroppi, the helper who was working on the east side of the load, testified that the pole of the wagon struck in the front end of the car and scraped all the way back to the back door; that he didn't see the car coming before the accident or hear any bell; that the first time he saw the car was when it hit the pole; that he was paying no attention to the car because he was paying attention to his work; that he was stooping over, as they all were, while they were at work; that the car ran about 10 feet after the pole went through the back door; that the car was about 5 feet away from him as it passed; that he had not been paying any attention to any of the cars as he was paying attention to his work. One Manes, the other helper who was working on the west side of the load, testified that the car came along without ringing any bell; that at the time of the accident he was standing

on his feet looking at the work he was doing; that the street car and the pole came together "when he (plaintiff) turned the front wheels around." The plaintiff's son, Emil Larson, was sitting on the seat of a single wagon, just north of the place where the plaintiff and his helpers were working. He was facing south and watching the work. He testified that the space between the east side of the load and the south-bound car track was nearly wide enough to permit another wagon to pass; that the pole was pointing in towards the car and came in contact with it just back of the front door, scraping along the side and catching in the rear end; that his father was stooping over the pole as he was backing the truck under; that he didn't notice the car before it struck the pole; that his father was in the act of pushing the pole and wheels of the front truck under the load at the time of the accident; that the pole didn't strike the front part of the car very hard, not hard enough for one to hear it; that his father was within about 6 feet of the car; that as his father stood beside the pole he could look north along the side of the wagon on which the witness was sitting and see the street car if it was coming.

For the defendants, one Elliott, a passenger on the car, testified that he was standing in the rear vestibule of the car on the east side, facing west; that the first thing he knew about the accident was when the pole struck the rear door of the car, coming into the platform space between the door and the jamb, about 2 feet; that the car was going very slow;- probably about five or six miles an hour, and stopped about 5 or 6 feet after the pole struck it; that the load of iron was 6 or 8 feet away from the side of the car and that

he heard no noise or any sound of scraping before the pole struck into the space he had described. One Graff, another passenger, was also standing on the rear platform. He testified that as the car neared the 79th street intersection he looked out and saw the plaintiff moving the pole "and he thought maybe he pull the pole over when the car pass by but he pulled it too soon, I guess, and the pole went right through the car in the rear end, and the car stopped about 2 feet from him"; that the car was going maybe four or five miles an hour, and very slow; that he saw the plaintiff pulling the pole towards the car and the pole came in contact with the rear end of the car first; that the witness was standing 2 or 3 feet from where the pole came through; that he heard no noise of the pole touching the car before it struck at the rear end and came through.

One Barker, a messenger boy about sixteen years of age, was standing in the parkway on the west side of Cottage Grove avenue watching the plaintiff and his helpers work as he was waiting for a southbound car. He testified that he saw the plaintiff working the tongue or pole attached to the two front wheels; that the motorman was ringing his bell as the car came up; that the plaintiff moved toward the car as it passed him and the tongue got caught in the rear door, which was the first part of the car the tongue hit; that as the front part of the car passed the plaintiff the tongue was 2 or 3 feet away from the car and was not moved over toward the car until the rear end came along, when the plaintiff pulled it over toward the car, which was moving slowly at that time, going about 3 feet after the pole struck; that he first noticed the car when it was about half a block away; that he could hear

the noise of it coming then and the motorman was ringing his bell. The motorman, Hathaway, testified that he began to slow up about 150 feet north of the 79th street crosswalk so as to stop his car at that street; that as he approached the place where the plaintiff was working the nearest part of the wagon was 4 or 5 feet away from the path of the car; that no part of the wagon was closer to the car than 4 feet at the time the front end passed by, the car then going about five miles an hour; that a moment later he heard the crash and brought his car to a stop in about 10 feet; that he heard no noise of any scraping of anything against the car and found no marks or scratches anywhere along the side of the car except at the rear doors. The conductor, Patterson, testified that as the car came to the 79th street intersection he was looking through the side windows to see if there were any passengers to get on; that he saw the plaintiff when he was 25 or 30 feet away and at that time he was working with the tongue of the wagon with the end of the tongue 4 or 5 feet away from the body of the car; that the car was then going slow, making a stop; that just as the back end came to the plaintiff he pulled the wagon tongue toward the car and hit the back of the vestibule by the grab handle which was the first part of the car to be struck; that the distance from the west side of the car to the nearest point of the load as it stood there was 7 or 8 feet.

It would seem from the evidence of the plaintiff's witnesses, alone, that he and his helpers were working at their task without paying any attention whatever to passing street cars and that, as his helpers got the load to a point where he could move the front wheels or truck, under the steel beams, the plaintiff began this operation and in doing

so, moved the wagon tongue over into the path of the street car without looking to see whether a car was approaching and as he did so, he poked the end of the pole directly into the car. In our opinion the manifest weight of the evidence is to the effect that the pole did not come in contact with the side of the car and then scrape along to the rear vestibule, as plaintiff's witnesses testified, but that it first came in contact with the car directly in front of the rear dashboard and at the point where it passed through into the platform space. A photograph of the car is in the record and it shows no marks indicating that the pole came in contact with the side of the car and scraped along, as the plaintiff contended. Plaintiff's counsel call our attention to a mark along the side of the car, plainly visible in the photograph, contending that this is the mark which was made by the pole as it scraped along the car. The mark in question is a perfectly straight line and one which could not possibly be made in such a manner.

The evidence in the record clearly establishes further, that as the car approached the scene of the accident there was 4 or 5 feet of clearance between the pole and all parts of the plaintiff's wagon, and the west side of the car and after the front of the car, moving slowly as it was coming to a stop at the intersection, had passed the plaintiff, he deliberately pulled the pole over into the car and thus caused the accident. Negligence cannot be imputed to the motorman in this case because he did not stop the car before reaching the plaintiff and his men, when, under all the circumstances appearing to him as he approached them, there was more than enough room to enable him to pass by without coming in con-

tact with the plaintiff or any part of the wagon. The peril of the plaintiff at no time became apparent to the motorman and did not arise until the motorman had passed beyond the point where the plaintiff was at work. The evidence fails to establish any negligence on the part of the motorman. Chicago Union Traction Co. v. Browdy, 206 Ill. 615; Coffey v. Campsell, 174 Ill. App. 576. It is equally clear that the sole cause of the accident was the negligence of the plaintiff in moving the pole over, without paying any attention whatever to his surroundings.

For the reasons stated, the judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as an ultimate fact that the defendant's servants were not guilty of any negligence in operating the street car in question, and that the injury of the plaintiff was brought about solely by his own negligence.

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

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allowed (1069a)

361 - 24713

UNITY I. McKENNA,

Appellee,

vs.

CHICAGO CITY RAILWAYS COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

217 I.A. 655 2

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

Plaintiff brought suit against defendant to recover damages for personal injuries. There was a verdict and judgment in her favor for $10,000, to reverse which defendant prosecutes this appeal.

The record discloses that about 8:45 o'clock on the evening of June 19, 1915, plaintiff, a woman about thirty-five years old, as she was about to cross the north or westbound street car track of defendant company in 79th street, at or near the intersection of Goldsmith avenue, in Chicago, was struck by a street car running east on the north track and severely and permanently injured. Defendant operates a double line of street cars in 79th street, which runs east and west. Plaintiff lived on Indiana avenue about a block south of 79th street. On the evening of the accident she left her home with her little girl, then about nine years old, intending to walk to a store on Halsted street near 79th street. Indiana avenue is three blocks east of State street and State street is a mile east of

No. 12013

Betty L. Robbins,

Appellee,

vs.

Appeal from

Municipal Court,

Cook County.

Defendant.

Halsted street. They walked north on Indiana avenue to 79th street and then walked west on the south side of that street to Normal avenue where they crossed over to the north side of 79th street, and then proceeded west about two blocks to Goldsmith avenue, which was a north and south street. Goldsmith avenue was not cut through on the south side of 79th street. On the north side it was filled with debris from excavations made in 79th street, which was being done in connection with the work of elevating the railroad tracks which crossed 79th street running north and south just west of Goldsmith avenue. At that time a double level railroad viaduct was being built across 79th street. One level was used by one railroad company, and the upper level by another railroad company. Seventy-ninth street was being excavated and extended under the viaduct in a subway. The depression of 79th street began about a block west of the railroad right of way which was from one hundred to two hundred feet wide, and extended under the railroad right of way to about one and one-half blocks east of the right of way. The surface of 79th street under the railroad tracks was depressed about six feet. The depression of the street included the roadway and sidewalk space as well. Supporting the railroad structure was a row of posts in the center of 79th street running east and west. The work of depressing 79th street had been under way some two or three months before the accident. At the time of the accident and for a week or two prior, the south or eastbound street car track was torn up from a point west of the subway, about Lowe avenue, to a point east of the subway, about Parnell avenue. During that time both east and westbound cars operated over that portion of the street on the north or westbound track.

When an eastbound car came to a point about Lowe avenue, it crossed over to the north or westbound track and proceeded on that track eastward until it reached the end of the single track, when it again crossed over to the south or eastbound track and continued on its way. Opposite Goldsmith avenue across the street car track planks or timbers were laid lengthwise making a crude crossing like the plank crossing of a country road over a railroad track. South of the track was a temporary structure somewhat like a cattle shoot leading southward across the road. About opposite this on the south side of the street was an arc light, and on the north side of 79th street near the west side of Goldsmith avenue was an ordinary street gas light. It had rained the afternoon of the accident and for sometime during the evening so that the ground was muddy. On account of obstructions one could not pass further west on the north sidewalk space than Goldsmith avenue. When the plaintiff and her daughter reached this obstruction they turned south to cross 79th street. Her daughter was a step or two in front of her, and as plaintiff was about to step on the north rail, she was struck by an eastbound car and severely injured. She was rendered unconscious for about three days and was confined to the Englewood Hospital for about three months. She sustained a fracture of the right femur which resulted in a shortening of the leg of about two and one-half inches. There were bruises and cuts on her right knee and both ankles, which resulted in loss of motion to the knee and ankles. Both ankles were severely injured. Several ribs were fractured and displaced. Three or four teeth were knocked out. At that time she was about thirty-five

years old and weighed about one hundred and thirty-five pounds; was in good health and the mother of two children, about nine and eleven years old respectively. About a year after leaving the hospital she was able to get around some with the aid of crutches, and at the time of the trial, which was about three years after the injuries, she was able to walk with the aid of one crutch and some other assistance.

Defendant does not argue that it was not negligent and makes no complaint to the giving or refusal of instructions, nor to the amount of the verdict. But it is strenuously insisted that the evidence shows that plaintiff was guilty of contributory negligence. The evidence tends to show that plaintiff was struck by the northeast corner of the street car; that the car was stopped as soon as possible; that plaintiff was lying near the rear trucks of the car and just north of the north rail; that the car was in front of a barber shop which was sixty-eight feet east of the east curb of Goldsmith avenue. It is defendant's theory that since the undisputed evidence shows the headlight of the car was lit and the interior of the car illuminated, plaintiff could have seen the car approaching if she had been paying attention more readily than the motorman could have seen her, and in these circumstances the finding of the jury that the motorman was not in the exercise of ordinary care, but that the plaintiff was, is not sustained by the evidence.

Plaintiff testified that she did not know that there was but one street car track at the place in question; that she had been over 79th street about a week prior to the accident; that as she turned to cross the street car

track she looked to the east and to the west two or three times, but more particularly to the east for the reason that she supposed that any car that would be on the north track would come from the east as was the custom; that she did not see the street car until it was but a few feet from her when it was too late. There is some evidence tending to show that the planks making the temporary crossing were not always at the same place; that they were occasionally shifted. Plaintiff introduced a photograph taken a day or so after the accident, that shows the plank crossing was barricaded by timbers extending east and west near the north curb line of the street and that the passage way along the north sidewalk space was also barricaded, so that one could not pass beyond Goldsmith avenue and could not cross the track. Witnesses were produced by plaintiff who testified that the east and west barricade which obstructed the way across the track was not there at the time of the accident. There is a dispute as to the speed at which the car was traveling. Witnesses for the plaintiff estimated it at from twenty to thirty miles per hour, while witnesses for defendant said the car was traveling six or seven miles per hour. Plaintiff also testified that just before the accident she heard a rumbling noise but thought it was a railroad train passing over the viaduct, and that she did not expect a street car to run east on the north track. There was also some conflict in the evidence as to whether the place was very dark at the time in question or whether it was fairly well lighted. The evidence also showed that south of 79th street, about

80th street, there was a railroad yard where considerable switching was done nearly all the time. The street car at the time was not carrying passengers but was being taken to the barn, as the men were through with their day's work. The conductor and the motorman were on the car at their accustomed places and standing by the motorman was another motorman who was off duty at that time. The two motormen testified that the car was traveling about six or seven miles per hour; that they did not see the plaintiff until she was about ten feet from the car, although they were looking ahead; that the motorman stopped the car as soon as it could be done.

We think it would serve no useful purpose to discuss in detail the evidence of the several occurrence witnesses who testified. We have carefully considered all the evidence in the record. The place of the accident was an extremely dangerous one when all of the attendant circumstances are considered. The ground was wet and muddy. It was more or less dark at the time. There is some evidence that tended to show that plaintiff's view to the west was obstructed by some posts or other material under the north side of the subway. The car was running on the wrong track which was known to the motorman but unknown to the plaintiff. The place was near railroad tracks and railroad yards where locomotives were frequently moving, and in these circumstances we cannot say that the finding of the jury that plaintiff was in the exercise of ordinary care for her own safety is against the manifest weight of the evidence.

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Use it the standard of judgment when its not only merely one that its simply just timeless, but is there intermediate or even better things to come. The elusive or rare timeless things are not necessarily good or bad, although the timeless is the ultimate goal; but the existence of timeless is the ultimate goal; that the existence of timeless the not be more to it could be just timeless.

It takes it until years to modify personal to attempt the existence of the ultimate goal. We must constantly experiment in the search. The first of timeless is the ultimate goal. The first of timeless are to particular goals. The first of timeless is the ultimate goal. The first of timeless is the ultimate goal. The first of timeless is the ultimate goal

It is contended that the court erred in the admission of evidence relating to the speed of the car; that the excessive speed of the car was the principal fact on which plaintiff claims the defendant was negligent; that there was a sharp dispute in the evidence on this subject and, therefore, the ruling of the court should have been accurate. On this point, the occurrence witness, Miss Covert, testified,"Q. How fast? A. It was running as fast - as far as I could see, faster than they are supposed to. Q. What? A. Faster than I ever seen them go. Mr. Kehoe. Object to that and move to strike out the answer. Objection overruled." The objection was that the witness had testified that she did not see the car until the accident happened, and therefore, she knew nothing about the speed. Her testimony is not clear. She was afterwards asked this question, "Q. Did you see the car passing? A. Yes." She further testified that she did not see the car until plaintiff was struck, when she heard her scream. There was some evidence that tended to show that plaintiff was dragged some distance after being struck. We think the evidence was competent, C. C. Ry. Co. v. Bundy, 210 Ill. 39. Nor do we think there was any error in the ruling made in reference to the testimony of the witnesses O'Donnell and Morene. O'Donnell testified that he was standing on the north side of 79th street just west of Goldsmith avenue; that he was thirty-three years old and had five years experience as a locomotive fireman but was acting as a watchman at the time. He had lived in Chicago about six years. He testified that he saw the car as it came from under the viaduct and that "it was running as

fast as it could run." This was stricken out and he said he was not able to judge the speed of the car. Afterwards he said his best judgment was that the car was running about twenty miles per hour. The witness Morena testified "cars came very fast". Counsel for defendant moved to strike this out on the ground that it referred to cars and not to the particular car in question. The motion was overruled and the witness continuing said that she heard the child scream and "the grinding of the cars - of the brake as they were trying to stop the car." Afterwards, near the close of plaintiff's case, counsel for defendant moved to strike out the testimony of this witness as to the speed of the car in view of the cross-examination as to where she first saw the car. This was agreed to and her testimony stricken. Counsel here say that this did not cure the error for the reason that the jurors would get the impression that cars customarily ran rapidly at that point. When the witness's testimony is considered in its entirety we think it clear the jury would understand the witness meant the car in question.

Complaint is also made that the court admitted improper evidence affecting the question of damages; that although this evidence was afterwards stricken out the error was not cured. As we understand counsel, his position is that although he makes no complaint that the damages assessed are greater than the injuries warranted, yet the jury might have fixed them at a less sum if improper evidence on this point had not been adduced. The evidence complained of is the testimony of Dr. Johnstone that plaintiff had a cataract on her eye and there was no

evidence that this resulted in any way from the injuries she received. Dr. Johnstone had examined plaintiff the day before the trial for the purpose of testifying. He was being interrogated by counsel for plaintiff as to what he found from his examination, and after detailing a number of injuries and what objective symptoms he found, counsel for plaintiff said, "Go ahead Doctor, what else? A. I think I have covered that. There was a cataract, by the way, of the left eye. Q. How much shortening, Doctor, was there, if any, in the right leg, etc." It appears that there was no question asked about the cataract, but the Doctor mentioned it casually. The examination immediately continued concerning injuries sustained as a result of the accident. No motion was made to strike it out until afterwards at the close of the plaintiff's case, then it was stricken out on motion of defendant by agreement of plaintiff. In these circumstances we cannot say that any serious error was committed.

Complaint is also made that the two doctors who testified on behalf of plaintiff as to what they found upon examination were permitted to improperly testify to many subjective symptoms, especially in reference to the stiffness of the knee and of the ankles, and that the movement of the knee and ankles was to a great extent under the control of plaintiff and, therefore, the evidence was improper. Dr. Mather took charge of plaintiff's case about a month after the accident. He testified that she had been practically under his care ever since; that he saw her daily at the hospital; that he called on her for a month or two after she left the hospital and saw her occasionally down

to the time of the trial. He testified that "the knee is practically ankylosed or stiffened. There is only about one-eighth or one-fourth of motion left in the knee"; that he attributed this to the accident, and that the voluntary muscles effecting the ankle are not under the control of the patient so as to render the symptoms subjective. Dr. Johnstone's testimony in reference to the limitation of motion in the knee and ankles was substantially the same. He had not, however, treated plaintiff but had made an examination only the day before the trial for the purpose of testifying. He testified that the right knee was so stiffened that it lost its functionment by seven-eighths; that he seized over the joint with one hand and the ankle with the other and by playing it forcibly found that he could not move it more than one-eighth of its normal mobility; that the patient could not resist the motion, that there was a thickening of the bone over the knee, and the bony structures were swollen. He also testified to certain pelvic disorders. This was afterwards stricken out by consent of the parties. In this connection plaintiff testified that she had no unusual difficulty in childbirth; that before the accident she had been regular in every way but since the accident she had ceased to menstruate and had more or less pain. We think the symptoms testified to by the two doctors were not subjective. Greinke v. C. C. Ry. Co., 234 Ill. 564. Nor do we think there was any error in the testimony of Dr. Johnstone in reference to the coccyx.

During the examination of plaintiff after she had described the difficulties in her knee and ankles,

her counsel called attention to the fact that as she sat in the witness chair the toes of one foot turned inward, and he took hold of her foot and attempted to show how far she could bend it, when plaintiff made an outcry. Counsel for defendant objected to the demonstration in the presence of the jury. The court said, "The objection made by counsel to the last demonstration is sustained, and the jury are to disregard it and the outcry made by the witness, and they are not in any manner to consider it. Consider that as not having been made at all. Disabuse your minds of it gentlemen. Do not consider it." Afterwards counsel for defendant moved to withdraw the jury and continue the case. It is said although the court sustained the objection and told the jury to disregard what had taken place, the error was not cured. Of course, striking out improper evidence after it is admitted does not always cure the error. But in the instant case after the admonition of the court we think the demonstration had but little weight with the jury, and since the argument is that the only prejudicial effect of it was the influence it might have on the jury in fixing the amount of the verdict, and since no complaint is made that the damages are excessive for the injuries sustained, the error, if any, would not warrant a reversal of the judgment. Complaint is also made of the action of the trial judge during the trial; that he showed by his attitude and his rulings on the evidence that he more or less favored the plaintiff's side of the case. Complaint is also made to the conduct of counsel for the plaintiff. We have carefully considered these matters and are clear that whatever error there was in this regard did not seriously effect the defendant.

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

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. CONCUR

1070a

397 - 24750

LAURA E. ASHLEMAN,

Appellee,

vs.

CHICAGO & WEST TOWNS RAILWAY COMPANY, a corporation,

Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

217 I.A. 655

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

Plaintiff brought suit against defendant to recover damages for personal injuries. There was a verdict and judgment in her favor for $1,000 to reverse which defendant prosecutes this appeal.

From the evidence it appears that defendant operated a double track street railway in Chicago and adjacent suburbs, the east terminus of which was in Lake street at Austin avenue. Eastbound cars ran on the south track to Austin avenue, and in making the return trip west crossed to the north track by means of a switch or cross-over; that about four o'clock in the afternoon of January 22, 1915, plaintiff who was a teacher of French in the Austin High School, boarded a street car at Austin avenue; that she stood on the back platform of the car, which was of the pay-as-you-enter type, waiting for the conductor; that the car then started up on its return trip, crossed over to the north or westbound track, and in doing so there was a violent swing or jerk of the rear end of the car which threw

plaintiff to the ground and the humerus of her right arm was fractured. She also received other injuries but as there is no complaint that the verdict is excessive, it will be unnecessary to further mention them.

Plaintiff's theory was thatwhile she was standing on the back platform, with all due care and caution for her own safety, the street car passed over the switch or cross-over with an unusual lurch or swing which threw her off the car. On the other hand, defendant's position is that the car passed over the switch in the customary manner without any undue jerk and that plaintiff was thrown off the car by reason of her own negligence. There had been considerable snow during the day and there is some evidence that it was snowing lightly at the time plaintiff boarded the car. Plaintiff and four other witnesses testified in substance that the car passed over the switch at a high rate of speed and with a violent lurch or jerk which threw plaintiff to the ground. The motorman, the conductor, and two other passengers testified for defendant that the car passed over the switch onto the westbound track in the usual manner and that there was no unusual or violent lurch or jerk.

We think it would serve no useful purpose to analyze the testimony of the witnesses in detail as to their several positions on the car, or other matters that might add to or detract from the weight to be given their testimony. This, of course, is primarily a question for the jury, but we have carefully considered all of the evidence in the record and are unable to say that the

finding of the jury that defendant was negligent in the operation of the car and that plaintiff was not guilty of contributory negligence but was in the exercise of due care and caution for her own safety, is against the manifest weight of the evidence. In these circumstances the judgment cannot be disturbed.

Defendant next urges that since the declaration on which the case went to trial consisted of three counts, and since the jury returned, by direction of the court, two verdicts of not guilty, one as to the first count and the other as to the third count, these verdicts operated as an acquittal on the second count, the only remaining one, because it was the same in substance as the first and third counts. Even if it be conceded that the three counts were in substance the same, we think the conclusion of defendant would not follow. The two directed verdicts were returned on motion of the defendant. The jury were given no opportunity to pass on the question whether either of these two counts were sustained by the evidence. The court should not have directed the two verdicts of not guilty. The proper practice was to instruct the jury to disregard these two counts if for any reason they were to be eliminated. Sec. 71, ch.110, R.S. The only question submitted to the jury for their consideration was whether the plaintiff had made out her case, as set up in the second count. On this point the jury found for the plaintiff. There was no judgment entered on the two verdicts of not guilty. The only judgment that was entered was on the verdict in favor of plaintiff. Of course in these circumstances, the two verdicts would not be <u>res judicata</u> of the matter in controversy.

Another point made seems to be that the declaration originally consisted of four counts and that none of the four counts contained any allegations of the injuries sustained by plaintiff except the fourth and since that count was stricken out before the trial there was no allegation of any injuries received and, therefore, the declaration is insufficient to support the judgment. This is a misapprehension. In neither of the counts were there such allegations, but following the fourth there are allegations of the nature of the injuries sustained by plaintiff and of the expenses incurred by reason thereof, together with the ad damnum and to which each of the counts refer. These allegations are common to all counts. L. S. & M. S. R. Co. v. Hessions, 150 Ill. 545; 1 Chitty on Pleading, 413.

It is further argued that the court erred in refusing defendants instructions Nos. 8, 10, 16 and 19. The eighth instruction sought to tell the jury that if they believed from the evidence there was a jar or jerk of the car due to the necessary swing in passing over the switch or to the condition of the tracks by reason of the presence of snow on the rails, which defendant could not avoid by the exercise of ordinary care, then the verdict should be for the defendant. We think that part of the instruction which referred to the jar or jerk was sufficiently covered by other instructions. There was not, however, any instruction given to the jury covering the question of snow on the rails. It had snowed considerably in the afternoon of the day the accident happened, and the motorman testified that there was a couple of inches of snow on the rails. "Q. When there is snow on the rails, from your experience as a

motorman, have you noticed whether that has any effect on the sliding of the wheels in going around a switch or over a cross-over as the wheels turned? A. Yes, it pulls a little harder than usual when there is snow on the rail. Q. They slip more? A. It slips more, yes." This is all the evidence on this point. It will be noticed that the witness was not asked and he did not testify that the snow on the rails effected the movement of the car in question. In fact the witness testified that thecar crossed over the switch in the usual manner and that there was no unusual jerk or lurch of the car. There being no evidence on which to base the instruction, it was properly refused. Instruction No. 10 was to the effect that if the jury found from the evidence that the rear platform was an unsafe place for a passenger to be when the car passed over the switch and if the plaintiff knew this, she was bound to use such care as would prevent such injury to her from the ordinary switching of the car, and if she failed to exercise such care and was injured by reason of her failure so to do, she could not recover. We think this instruction is not clear and might, therefore, mislead the jury. However, the substance of this instruction was covered by given instructions, Nos. 8, 10, 12 and 13. Refused instruction No. 16 covered the subject of snow on the track and what we have said in reference to refused instruction No. 8 is sufficient. Instruction No. 19 was an abstract proposition of law, and it has been held that it is not error to refuse such an instruction even if it correctly states the law. C. & A. R.R. Co. v. City of Pontiac, 169 Ill. 155. Upon a consideration of the entire record and of the instructions given we think

the defendant has had a fair trial. The issues were simple and clearly understood, and there was no substantial conflict in the evidence, except on one point, viz: whether the car gave an unusual lurch or jerk.

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

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. concur.

Certiorari denied

(1071a)

409 - 24762

BARBARA GRANT,

Appellee,

vs.

WARD BAKING COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

217 I.A. 655 4

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

Plaintiff brought suit against defendant to recover damages for personal injuries. There was a verdict and judgment in her favor for $2500. to reverse which defendant prosecutes this appeal.

It appears from the record that plaintiff, a woman about forty-seven years old, at the time of the accident, conducted a hotel and restaurant on Cottage Grove avenue near 39th street in Chicago. Defendant was engaged in the bakery business and used electric trucks with box bodies for the purpose of delivering goods to its customers. The truck involved in the instant case was of this type. The front part of it including the driver's seat was enclosed with doors and glass windows at the sides, and the front of such enclosure was likewise of glass extending from the roof of the truck to within about two feet of the floor. The entrance to plaintiff's restaurant was on the east side of Cottage Grove avenue between two east and west streets. On the day of the accident,

which occurred about nine o'clock in the morning, plaintiff was watching for a milk-wagon which was to deliver milk and cream to a store across the street from and slightly south of her restaurant. Alongside the west curb of Cottage Grove avenue was an electric truck belonging to defendant. It had been standing there about ten minutes when plaintiff started to walk across Cottage Grove avenue to purchase some cream at a store or market on the west side of Cottage Grove avenue and just south of where defendant's electric truck stood. As plaintiff was about to pass in front of the truck it started up without warning, struck plaintiff and threw her to the ground severely injuring her.

Plaintiff's theory of the case was that as she proceeded to the store on the west side of the street and was about a step or two from the truck, the driver of the truck suddenly and without warning started up, swung the front end of the truck out into the street and struck her. Defendant's contention is that plaintiff was walking across the street without giving any particular attention to where she was going andwalked into the middle or side of the truck just as it was starting. This is the only point of dispute in the case. The evidence shows that it was a bright morning and that there were no street cars or other vehicles in the street other than the one in question; that the electric truck had been standing about ten minutes before the accident happened. Some witnesses testified that the truck had been standing a longer time, but the driver testified that he had stopped there to deliver some bakery goods and that the truck had beenstanding ten minutes. The

undisputed evidence also is that the driver did not give any warning that he was about to start the truck; that upon starting he swung out into the street to get away from the curb intending to continue south; that just as he swung out and had gone a foot or two the collision occurred. Witnesses for plaintiff testified that when she was about a step or two from the truck it suddenly started up without any warning, swung out from the curb, and plaintiff was struck by the front wheel which passed over her. Witnesses for the defendant testified to substantially the same effect except that plaintiff walked into about the middle of the east side of the truck and that the hind wheel passed over her.

Defendant contends that the evidence fails to show any negligence on its part, but that it does clearly show that plaintiff was guilty of negligence which, contributed to the injuries sustained by her.

These questions are generally questions of fact for the jury and only become one of law when reasonable minds, upon a consideration of the evidence, would reach the conclusion that plaintiff was injured as a result in whole or in part of her own negligence. Under the facts in the instant case, we think it cannot be said that all reasonable minds would reach this conclusion. The truck had been standing at least ten minutes; the driver was not seen by plaintiff; she was walking on a direct line across the street which would bring her a short distance in front of the standing truck. The truck was started without any warning. It made no noise. It was swung out into the street from the curb. In these circumstances

we think it would be a dangerous rule to hold that the truck could be started in this manner without incurring liability for any injury occasioned as a result of such conduct. We think the question was a proper one for submission to the jury.

It is next contended that the court erred in refusing to give instructions Nos. 21, 22 and 24 requested by defendant. Instruction 21 sought to tell the jury that "contributory negligence as used in these instructions means negligence on the part of the plaintiff which contributed to the accident and the plaintiff's resulting injuries, if any. The failure to use one's senses to discover dangers which would be ascertained by such use of them as the exercise of ordinary care demands is negligence." We think this instruction was wrong. There is an implication that plaintiff was negligent, and it is misleading in this respect. Moreover, it is abstract in form and it has been held that it is never error to refuse such an instruction. C. & A. R. R. Co. v. Pontiac, 169 Ill. 155. Furthermore, we think the jury were fully instructed on the question of negligence. The defendant, by instruction 22, requested the court to instruct the jury that the driver of a vehicle is under no greater obligation to look out for and protect pedestrians in the street than pedestrians are to look out for and protect themselves; that it is the duty of pedestrians under such circumstances to keep a look-out for moving vehicles and to exercise care to avoid them, and that if the jury believed from the evidence that plaintiff failed in regard to either of these duties,

and such failure contributed to the accident no recovery could be had. We think this instruction was properly refused. The truck was an enclosed one. It had been standing at the street curb for some time and the driver of it knew he was going to start up and his chances of seeing the plaintiff were superior to the chances of plaintiff seeing him. Moreover, we think it would not be of any assistance to the jury in arriving at a proper decision of the case but that it would tend to confuse. Instruction 24 was as follows: "You are instructed that if you believe from the evidence that the driver of defendant's automobile did not know of the presence of plaintiff near his machine before the accident, there can be no recovery in this case, and you must find defendant not guilty." Of course, this instruction was wrong. The driver could not close his eyes and blindly start up. He must use due care. The instruction was properly refused.

The issues in this case were simple, easily understood, and there was no dispute in the evidence except as to the one point. We think the jury, as a whole, were fully instructed and understood the situation. The defendant has had a fair trial, and the judgment of the Circuit Court is, therefore, affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. concur.

1072a

418 - 24771

FANNIE EARLY,
Appellee,
vs.
MARSHALL FIELD & COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

217 I.A. 655

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

Plaintiff brought suit against defendant to recover damages for personal injuries sustained by her in falling on a stairway leading from the first floor into the basement of defendant's store. There was a finding and judgment in her favor for $1500.00 to reverse which defendant prosecutes this appeal.

The record discloses that on Saturday afternoon, December 11th, 1915, plaintiff went to defendant's retail store in Chicago to do some shopping. As she was walking down the stairway leading from the first or main floor into the basement, she fell and sustained an oblique fracture of the left tibia. She was given first aid at the store, and was afterwards taken to the Henrotin Hospital where she remained for a number of weeks. She necessarily suffered a great deal of pain and was incapacitated for several months, but since we have reached the conclusion that the judgment must be set aside because there is no liability, it will be unnecessary for us to consider further the nature of the injuries suffered.

The declaration which consisted of one count, averred that the defendant negligently permitted the stairway to be and remain in a dangerous condition in that the edges of the treads were covered with metal strips running horizontally; that several of these strips protruded upward from the tread, and that several of the treads were so weak that when a person stepped on them "they would sink or sag, thereby causing the said metal strips to protrude up higher than ever" causing shoppers and others to stumble and fall; that this condition was known, or by the exercise of ordinary care, should have been known to defendant; that plaintiff, while she was in the exercise of all due care and caution for her own safety, tripped on the metal strip and was injured. Both parties seem to agree that the gist of the action was that plaintiff tripped because one or more of the treads sunk or sagged when she stepped on them and thereby caused the metal strip or nosing "to protrude up higher than ever." In endeavoring to sustain the allegation of notice to defendant of the defective condition of the stairs, plaintiff produced Mrs. A. A. Carlson who testified that she had known plaintiff about seven years; that plaintiff worked for the witness's husband as bookkeeper and stenographer; that when the witness called at her husband's place of business she usually visited with plaintiff; that she had used the stairway in question thirty or forty times a year for a number of years; that about a week before the accident the witness in descending the same stairway noticed the brass nosings along the treads and that they extended upward about one-quarter to one-half an inch above the tread; that also she noticed when she stepped on one of the treads near the top of the stairway her weight "seemed to cause the step to

sink a little and the brass rods protruded then more where my weight was"; that she thought it protruded about one-quarter to one-half an inch; that there were five or six steps below the one she stepped on in the same condition; that the treads seemed to be loose and would give with her weight as she stepped on them and that seemed to cause the brass rod to protrude upward more than normally; that she had stumbled there a number of times before; that she had a habit of stumbling a great deal and that it had become rather a joke at her home; that she spoke to plaintiff about her experience after plaintiff's injury; that shortly after plaintiff was injured, in response to a telephone call, the witness came downtown and assisted plaintiff.

Plaintiff testified that when she got through with her work on Saturday afternoon, about one o'clock, she went to defendant's store to make some purchases and for that purpose was using the stairway to go to the basement; that about four or five steps from the top she caught her right heel on the brass rod or nosing; that this "threw my left leg back in under me, and then my right leg that had been caught sort of righted itself and went down a couple more steps and then held"; that her right leg was then perfectly straight and held on another brass nosing so that she could not get her left leg out and that it "just crushed right over one of the other steps." She then testified, "As I came down the step I felt a springiness - to one of the steps. It was the fourth or fifth step from the top. I know that I felt my heel catching on the brass rod, and that is what tripped me. The brass rod stuck up, I should imagine, from a quarter to a half an inch"; that she were a pair of shoes with Cuban heels; that they were not as high as French heels, but were just a

medium heel. She wore a tailored suit, and the skirt was not narrow, about two and one-half yards around the bottom; that she remained on the stairs a considerable time after the injury and some of defendant's employes took her upstairs to the medical room where she was given aid by a surgeon and others. On cross-examination she said that there was no one with her, and that there were no other persons on the stairs except a lady who was coming down the steps behind her; that she had a muff, in which she had a book, under her left arm, and that she might have had a little paper bag of nuts in her hand, but she did not remember; that she had used that stairway about a half-dozen or a dozen times prior to the accident; that she had never had any trouble before on this stairway, but that she had noticed the brass rods or nosings; that while she was on the stairway waiting for assistance, she noticed these brass nosings were extended up about one-half an inch above the treads, "I just looked around and saw that it was the brass rod, saw there was nothing but the brass rod there that I could have tripped on. * * * When I stepped on this particular tread I felt a springiness. The brass stuck up so that I caught my heel in it. The brass sprang up when I stepped on the tread. * * * There was a sensation of spring, the brass would go up higher."

Defendant produced six witnesses, Starr, Wakefield, Crawford, Pepper, Newpart, and Goettsch. Starr testified that he was purchasing agent and building superintendent for defendant; that he was familiar with the stairway; that he heard of the accident to plaintiff shortly after it occurred; that he knew the condition of the stairway at the time of the

trial, April 20, 1918, and that it was the same as on the day of the accident; that he had been employed in the same position since 1912. Wakefield also testified that he was a building superintendent for defendant, and that he learned of the accident to plaintiff within a day or two after it happened; that his duties were to see that this stairway was kept in repair and to make any necessary repairs if it was faulty; that he observed the condition of this stairway in December, 1912, and that since that time he had seen it on an average of once a day; that Mr. Starr or himself were the proper parties to authorize and direct any necessary repairs from and prior to the accident to the time of the trial, and that during that period he had given no directions for repairs on this stairway of any kind; that if any directions were given by either Mr. Starr or himself, they would be given to Mr. Pepper, the carpenter, or the latter's assistant, Mr. Corbett; that if any work was actually done , it would be done by Mr. Newpart or Mr. Pepper; that he knew there had been no repairs made on the stairway from December, 1915, the time of the accident, until the day of the trial; that he examined an inspected the stairway a day or two after the accident, and that the stairway was of steel construction,made of steel angle irons resting on iron stringers with a steel plate for the read and marble risers; that on the tread is laid interlocking hard rubber tile; that to protect the front of this tile is a brass nosing which is fastened to the angle iron frame itself; that the tread was eleven or twelve inches wide and that the nosing is screwed or bolted to the steel frame of the stairway to keep it from moving and that it is raised up high enough so that when the tile is laid on the tread the surface of it is even with the top of the nosing; that the stairway was four

feet eleven inches wide, and that the rubber comes up to the nosing but does not rest on top of it; that there are hand rails on each side of the stairway running from top to bottom; that he made some measurements of the stairway on the day he testified and that the greatest height to which the nosing extended above the tread was three-thirty-seconds of an inch; that the rubber tile on the tread was three eighths of an inch thick; that there were fifteen steps in the stairway. Crawford testified that he was connected with the "Special Service Detail" of defendant; that on the day of the accident he was notified of it and that he went to the stairway and found plaintiff sitting on the fifth or sixth step from the top; that he asked her how she came to be injured and she said that she tripped on the brass rod and fell; that she could not stand up and that he then sent for the medical chair and took her to the medical room, and then he examined the stairway; that he went from top to bottom, and tried the treads and nosings to see if there was anything sticking out; that he found none of the treads or nosings sticking up, and that Pepper and Newpart made the examination with him; that each of them examined the stairway in the presence of each other; that Pepper was the "boss carpenter", and Newpart the machinist; that this examination was made within three-quarters of an hour after the accident; that he walked up and down the stairs but did not make any measurements; that he started from the top and tried each tread going down, "putting my full weight, jumping a little to try to find if there was any spring, but I found none in any of the steps." He did not know positively whether any changes had been made in the stairway, but that he examined it the day he testified

and it seemed to be in the same condition as it was when the examination was made on the day of the accident. Pepper testified that he was the foreman carpenter of defendant at the time of the accident; that he remembered the accident and that he saw the stairway that afternoon about three-thirty o'clock with Newpart and Crawford; that he examined it from top to bottom, starting on the first step, feeling it with his hand; that there was nothing there that a person would trip on; that the nosing was three-thirty-seconds of an inch higher than the tread; that there was no change in the stairway from that day down to the day of the trial; that he again examined the stairway on the day he testified and that Newpart and Crawford were again with him; that they tried the treads and found them in the same condition as at the time of the accident; that the nosing protruded three-thirty-seconds of an inch above the rubber; that the top of the tread is hard rubber; that under the tread is a No. 10 steel plate; that it is impossible to move the plate without moving the nosing; that the steel plate could not be removed without first removing the nosing; that he examined the stairway as to the sinking, springing, or sagging sensation under his feet; that there was none either at the time of the accident or on the day he testified. On cross-examination he testified that the condition of the stairway was practically the same on the day of the trial as it was on the day of the accident; that the nosing was a piece of solid brass and that it was impossible for it to give under the weight of a heavy person; that the rubber was a hard matting glued on the steel plate. James Newpart testified that he was a machinist and iron worker for defendant and had held that position for about eight

years; that he heard of the accident on the day it happened; that he saw the stairway about three-quarters of an hour afterwards with Pepper and Crawford; that he walked up and down it from top to bottom more than once or twice and found nothing the matter with it; that the nosings were tight and that the rubber was tight; that on the day he testified he again examined it with Crawford and Pepper and found it in the same condition as in 1915; that he knew of his own knowledge there had been no work done on the stairway since the time of the accident; that he tested the treads to see if there was any spring, and that there was none; that he weighed one hundred and eighty pounds; that he walked up and down the steps and jumped on them and they would not give at all; that it was impossible to move the tread without moving the nosing as they were fastened together. Goettsch testified that he was an architect in the employ of a firm of architects that constructed this stairway and that he was in charge of such construction; that he looked over the stairway on the morning of the day he testified, but that he did not need to do so as he was already familiar with it; that the stairs were constructed of cast iron and steel and the so-called rubber tile and the brass or bronze nosing; that the rubber tile is three-eighths of an inch thick, interlocking, and cemented solidly into the steel plate; that the brass nosing, the steel plate, and the rubber tile make one solid mass; that the nosing and steel plate were rigidly bolted together; that motion in one would result in motion in the other; that the word "rubber-tile" as applied to the covering on the tread is really a misnomer as there is practically no rubber in it; that it has no elasticity and in

walking over it it will not give; that there is no elasticity, give, spring, or sag at all. He also testified in detail as to the method of construction of the entire stairway. On cross-examination he said that there was a slight variation in the elevation of the nosings above the rubber tile and that in most places it was practically flush; that on careful examination he found that the maximum was three-thirty-seconds of an inch; that the edge of this nosing was not sharp but was round or smooth; that he was familiar with various types of stairways in use in similar buildings; that this type was used a great deal and that he knew of none better; that in his opinion it was a first class stairway.

Counsel for defendant first contends that the court should have sustained its motion for a directed verdict at the close of all of the evidence. We cannot agree with this contention. The gist of plaintiff's case was that she was injured by reason of the fact that she tripped because one of the treads of the stairway sunk or sagged when she stepped on it and thereby caused one of the metal strips to protrude upward, and the evidence produced by her tended to sustain this charge. In passing on a motion for a directed verdict the question of the preponderance of the evidence does not arise at all, but the court must submit the case to the jury even if he is of the opinion that in case a verdict is returned for plaintiff it would have to be set aside as against the manifest weight of the evidence. Libby, McNeill & Libby v. Cook, 222 Ill. 206. While the court properly denied a motion for a directed verdict we think error was committed in refusing to grant a new trial for the reason that the verdict is against the manifest weight of the evidence. It is unfortunate that plaintiff was so severely injured and

suffered great pain, but we think the overwhelming weight of the evidence is that she was not injured by reason of the tread of the step or steps sinking or sagging when she stepped on it causing the metal nosing to protrude upward. No point is made that the stairway was defectively constructed. It appears from the evidence without contradiction that it was constructed in a substantial manner; that there was no swing or give to it which would cause the brass nosing to extend or protrude upward, for the steel plate, the rubber tile, and the nosing were all solidly fastened together. No repairs were made on the stairway from the time of the accident until the day of the trial, more than two years afterwards. An examination was made by three persons about forty-five minutes after the accident and nothing wrong was discovered with any of the steps. Counsel for plaintiff says that the witness Starr testified that if any work had actually been done it would have been by Pepper, Corbett, or Newpart, and that Corbett did not testify. It is true that Corbett did not testify but the testimony is that the work would actually be done by Pepper or Newpart, and not by Corbett. Counsel for plaintiff also contends that the evidence shows the bolts and screws that held the framework together were all on the underside of the stairway but that no one testified that an inspection had been made of the underside and it might be that some, and the inference is that some, repairs might have been made by someone underneath the stairway. We think the record will not warrant any such inference. Counsel also says that it appears from the record that "Mr. John G. Shedd is President of Marshall Field & Company and Kersey Coates Reed is Secretary, and neither of these gentlemen appeared to testify", etc.

Witnesses did name all of the persons who made anyrepairs, and we think the argument is entirely without merit.

We are constrained to hold that the verdict is against the manifest weight of the evidence, and the judgment will, therefore, be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT.

We find as an ultimate fact that defendant was not guilty of the negligence charged in the declaration.

THOMSON, P.J. and TAYLOR, J. Concur.

(1073a)

487 - 24841

WM. J. BENEKOS,

Appellee,

v.

JOHN ADINAMIS,

Appellant.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

217 I. A. 656

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

Plaintiff brought suit against defendant to recover $165.54. There was a finding and judgment in favor of plaintiff for the amount of his claim, to reverse which defendant prosecutes this appeal.

Plaintiff's claim was for candy, confectionery, and soda fountain supplies which he claimed to have sold and delivered to defendant. He further claimed that there was an account stated between him and defendant in February, 1913; that at that time it was mutually agreed that the amount due from defendant to plaintiff was $175.54; that afterwards, March 10, 1913, defendant paid $10.00, leaving the amount due for which suit was brought. It appears from the evidence that plaintiff, after he claimed to have delivered the goods to defendant, was adjudged a bankrupt, and among his assets scheduled a claim against "Adinamis Bros."; that this included the claim against defendant; that afterwards the trustee in bankruptcy sold this account to a party who in turn sold it to plaintiff. On cross-examination plaintiff testified that he had never sent

defendant any bill or statement; that plaintiff had sued defendant in the Municipal Court in March, 1913, for this same account. He further testified that he had two Adinamis accounts, one against John Adinamis and the other against Adinamis Brothers; that Adinamis Brothers, consisting of the defendant, John, and his brother Pete, were in business at 3150 W. North avenue, and that John, the defendant, was in business at 3218 W. North avenue; that he had received payment in full from the partnership and gave a written release April 30, 1912. John Lambros testified that he was working for plaintiff in 1913 at his store on Harrison street; that in March of that year defendant came to plaintiff's store and paid $10.00 and said that he would pay more in a few days. Charles Kapporth testified that defendant had rented a store from him at 3218 W. North avenue in 1909 and 1910 and that defendant signed the lease. Defendant testified that in 1909 he was in business with his brother Pete at 3150 W. North avenue, under the name of Adinamis Brothers; that they afterwards moved to 3218 W. North avenue, and that later he sold out to his brother and another; that he did not take an active part in the business; that his brother Pete ran the business; that he never bought goods from plaintiff; that the only goods plaintiff ever delivered was to Adinamis Brothers; that defendant had never been in business at either of the places mentioned as a member of the firm; that he had receipted for some goods that were delivered; that plaintiff did not ask him for any money and that he did not pay the $10.00.

There is a sharp conflict in the evidence, and at the close of the trial, the trial judge was moved to say that he thought both plaintiff and defendant were crooked and that he was compelled to decide between them.

He found for the plaintiff. While there are discrepancies in plaintiff's testimony, yet upon a consideration of all the evidence we cannot say that the trial judge's finding in favor of plaintiff was against the manifest weight of the evidence. He was in a much better position to understand and determine the facts of the case from the appearance of the witnesses on the stand than we are. No contention is made that plaintiff's claim has at any time been paid. Defendant, however, contends that the suit isbarred by the Statute of Limitations forthe reason that in the prior suit in March, 1913, brought to recover on the same account, the statement of claim there made and verified by plaintiff alleged that the last item making up the total of $165.54 was incurred May 2, 1910. If this were true, of course, it would be barred by the five-year Statute of Limitations, but in the instant case the testimony of plaintiff and another witness is that a payment of $10.00 was made in March, 1913. This, of course, is not in harmony with the prior statement of claim filed, but so far as the record shows, the witness was not asked to explain this matter. Moreover, at the close of the evidence, defendant asked a finding in his favor on three specified grounds, but did not mention the Statute of Limitations. While it might not have been necessary for him to have done do to save the point, yet we cannot say that the finding of the court that a payment of $10.00 was made in 1913 is against the manifest weight of the evidence.

It is next contended that the release given by defendant to the partnership is a release of plaintiff's claim. The release is as follows: "I, the undersigned W. J. Benekos, acknowledge that I received from Panagiotis

G. Adinamis all the debts due me of the partnership between himself and his brother, and I hereby release and satisfy all accounts between us, and by these presents all accounts between me and Panagiotis G. Adinamis are fully paid." This was signed by defendant. While it is true that the release of one joint-obligor releases all obligors, yet where the release is ambiguous evidence may be received and it should should be construed the same as every instrument, viz: to carry out the intention of the parties. We think it clear that the release, to say the least, is ambiguous, and the evidence was properly admitted that this release was of the partnership account, and not of the account of the defendant. Parmelee, et al v. Lawrence, 44 Ill. 405; Miller v. Lloyd, 181 Ill. App. 230.

In view of all these circumstances we feel that we would not be justified in disturbing the judgment of the Municipal Court, and it is, therefore, affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. concur.

1074a

493 - 24847

HOTEL SHERMAN COMPANY,
a corporation,
Appellee,

vs.

GUSTAV J. LANDECK,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

217 I.A. 656[2]

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

Plaintiff brought suit against defendant to recover $242.03 for hotel and restaurant accommodations furnished to defendant and one Johnson, at the special request of defendant. There was a finding and judgment in favor of plaintiff for the amount of its claim, to reverse which defendant prosecutes this appeal.

The evidence shows that defendant and one E. E. Johnson were guests of the plaintiff hotel company and that Johnson worked for defendant; that defendant had agreed to pay some of his hotel bills and had paid $111.14. The evidence is not clear as to how much of plaintiff's claim is for accommodations furnished to defendant and Johnson separately, but counsel for defendant says that $181.04 of the amount sued for was incurred by Johnson. This would leave $60.99 of the claim due from defendant for his personal accommodations if plaintiff's claim is sustained.

Plaintiff contends that the stenographic report should

should be stricken from the record for the reason that defendant was given leave to file a bill of exceptions, and that in place of doing so he filed a stenographic report. There is no merit in this point. The terms, statement, stenographic report, and bill of exceptions as mentioned in Sec. 81 of the Practice Act, seem to be used in the same sense, Wurlitzer Co. v. Dickinson, 247 Ill. 27.

On the trial of the cause plaintiff produced witnesses who testified that defendant told employees of plaintiff to charge Johnson's account to him; that he would pay it; that plaintiff had demanded payment a number of times and that statements had been regularly sent defendant every month showing the amount of plaintiff's claim. The employees who kept the books also testified. Plaintiff had installed a looseleaf ledger system and a witness testified that the entries in the ledger were correct; that they were made under his supervision. The abstract then is as follows: "Mr. Levinson, Now I offer this ledger account in evidence. Mr. Biossat, I object. The Court. Let it go in for what it is worth." The ledger leaf was then admitted in evidence. Counsel for defendant now say that the ledger leaf was inadmissible as not being a book of original entry. No such objection was made on the trial. If such objection had been there made, it could have been readily obviated by offering in evidence the books or original entry which the witness testified he had with him. The point now made was not brought to the attention of the trial judge and cannot be urged here for the first time. The purpose of making an objection is to bring to the mind of the court the point made so that he can pass

upon it intelligently. As was said in Coffeen, etc. v. Barry, 56 Ill. App. 587, "It is not permissible to so frame an objection that it will serve to save an exception for the action of a court of review, and yet conceal the real complaint from the trial court." See also First Natl. Bank of Hayward v. Gerry, et al, 195 Ill. App. 513. Defendant is not now in a position to urge that the ledger leaf was inadmissible because it was not a book of original entry.

Defendant further argues that the judgment is wrong for the reason that even if defendant did promise, as testified to by witnesses for plaintiff, that he would pay Johnson's hotel bills, this promise was within the Statute of Frauds as it was not in writing; that the promise of defendant to pay Johnson's billwas made after the bill was incurred and, therefore, it was not an original undertaking - that the credit for Johnson's bill was not extended to defendant. We have examined the abstract carefully and nowhere is the point made or even suggested, that the Statute of Frauds was interposed as a defense. No mention of the statute was made in the affidavit of merits. This is admitted by counselfor defendant, but he says that since plaintiff in its statement of claim alleged indebtedness due from defendant on account of accommodations furnished him and Johnson at defendant's request, which was denied in the affidavit of merits, that the defendant could not properly set up the defense of the Statute of Frauds because plaintiff's statement of claim alleged an original undertaking.

If plaintiff's statement of claim was upon the

theory of an original undertaking and if the evidence tended to show that it was not an original undertaking, butat most it was only a promise to pay the debt of Johnson which had been already incurred, objection should have been made on the trial, viz: that there was a variance between the statement of claim and the proof, but nothing of that kind was even suggested to the trial judge. We know of no practice that permits a defendant to take advantage of the Statute of Frauds unless such defense is set up in the trial court, and since such defense was not suggested, the point cannot be made here for the first time.

Upon a consideration of the entire record it appears that defendant and Johnson, who was in some manner employed by defendant, were given credit by the hotel; they were guests there. There is sufficient evidence to warrant the finding of the court that the bill was correct and unpaid. The judgmentof the Municipal Court will, therefore, be affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR,J. concur.

(1075a)

374 - 24727

AUGUST SALDUKAS,
Appellant,

v.

ANTON BRISZKO,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

217 I.A. 656 3

MR. JUSTICE TAYLOR delivered the opinion of the court.

On November 1, 1916, the plaintiff, August Saldukas, filed in the Circuit Court of Cook County a narr and cognovit together with an affidavit and a judgment note in the sum of $1453.00. Judgment was entered thereon for $1387.60, together with $25.00 attorney's fees.

On November 13, 1916, upon motion and petition of the defendant an order was entered giving the defendant the right to plead to the plaintiff's declaration and providing that the judgment by confession should stand as security.

On November 21, 1916, the defendant filed a plea of payment setting up that on November 9, 1914, $253.00, which was endorsed on the note, had been paid and that on December 15, 1914, the defendant had paid the plaintiff the sum of $1239.00 in full satisfaction of everything claimed in the declaration. On April 27, 1917, the defendant filed a Bill of Particulars. On May 8, 1917, there was a jury

trial and a verdict finding the issues for the plaintiff and assessing his damages at $1387.60. Subsequently, a motion for a new trial was granted, and on June 24, 1918, after a second jury trial, a verdict was rendered finding the issues for the defendant. Upon that judgment was entered, and this appeal taken.

A number of people living in a Lithuanian neighborhood in Chicago, being desirous, in the summer of 1913, of establishing a new parish church, undertook to obtain a piece of ground for that purpose. Accordingly, a certain 19 lots were bought and put in the name of the Catholic Bishop of Chicago. Part of the cost of the ground was obtained by collections from those who lived in the new parish. Prior to the purchase for church purposes, the plaintiff, Saldukas, and one Baros, had invested a certain amount in those particular lots, and, in order to make them whole, two promissory notes were made, one to the plaintiff for $1453.00, and another to Baros for the amount which he had invested. Those notes were both signed by the defendant. It is a fair inference from the evidence that the defendant signed the two notes with the understanding, at least as far as he and the people of the parish were concerned, that he was to be paid back out of the parish funds. It is the testimony of the defendant that at that time the title to the real estate was not in the church and as a result the notes had to be made by him instead of by the church. It is also the testimony of the defendant, that the note to the plaintiff, although made on September 6, 1914, was dated August 15, 1914, that being the date up to which interest had been figured. It is admitted that the defendant did

pay the plaintiff the sum of $253.00, which payment was endorsed on the note itself, and the balance now claimed by the plaintiff is the sum of $1200.00 and interest. The defendant claims that he subsequently paid the note in full.

The theory of the defendant, which his evidence tends to support, is that on or about February 9, 1915, the plaintiff called on him at his place of residence, stating that he needed some money in order to finish a building in which he was interested and asked for something on his note; that the defendant told him there was not sufficient parish funds on hand; that the plaintiff then suggested that the defendant pay him as much as he then had of parish funds and draw checks for different dates in the future for the balance, which checks the defendant should use as soon as there was sufficient parish funds to pay them; that accordingly seven blank checks of different dates and amounts were ultimately made out, all of which were endorsed on the back by the plaintiff; that he gave the plaintiff $380.00 in cash, for which he retained two of thechecks, that two of the other checks the plaintiff took with him and one of the checks, being for $500.00, the defendant retained as an offset to a note of $500.00 which the plaintiff owed him for that amount which he had loaned the plaintiff about the time the church property was bought; that the signature on the check of $500.00 was given as a receipt to the defendant for the payment of the note for $500.00, which note he turned over at that time to the plaintiff; that at the time of the settlement the plaintiff told him, the defendant,

that he had lost the $1453.00 note.

The evidence of the plaintiff is substantially to the following effect: That in March, 1914, when the church property was bought the defendant loaned him $500.00 to be used in the purchase of the property and that he gave the defendant his note for that amount; that subsequently in July, 1914, he sold certain property which he owned and paid the defendant the aforesaid $500.00 note; that afterwards, about November 7, 1914, he and the defendant bought a certain piece of real estate in partnership and shortly afterwards undertook the erection of a flat building on the premises; that about that time he loaned the defendant $300.00; that in order to complete the building on the real estate they jointly owned they, together, borrowed $2,000.00 from a bank and gave a mortgage on the real estate in question; that they needed $1,000.00 more in order to complete the building; that the defendant recommended borrowing the $1,000.00 from one Agatha Gailus; that accordingly she loaned them $1,000.00, but at that time no note was given her therefor although he did subsequently give her a judgment note for that amount; that shortly afterwards, in 1915, the defendant told him that he would have to dissolve his copartnership with the plaintiff; that the defendant told him he would pay the debt to Agatha Gailus; that at the time of the dissolution of thepartnership the defendant owed him $1400.00; that in settlement of the copartnership the defendant executed a quit claim deed of the property to the plaintiff; that about that time, February 9, 1915, they undertook to make a settlement; that the defendant stated that as he had promised to pay the $1,000.00 note to Agatha

Gailus he would consider that credited on the balance of $1200.00 of the $1453.00 note, leaving only $200.00 due; that he then requested the plaintiff to sign his name on the back of certain blank checks; that he, the plaintiff, at that time signed several blank checks on the back; that they contained no other writing; that the checks remained in the check book; that on that occasion the defendant delivered to him only two of the checks, one dated February 9, 1915, for $300.00, and the other dated February 10, 1915, for $59.00; that the $300.00 check given him was for a loan of $300.00 which he had made the defendant some time before and the $59.00 check was for interest on the principal note; that he, the plaintiff, paid the interest on the Agatha Gailus note for six months; that some time afterwards he asked the defendant if he was going to give him the money to pay Agatha Gailus and that the defendant said, "You signed the note I am not going to pay"; that the Agatha Gailus note for $1000.00 which was payable in two years from date was made out and given to the defendant on February 9, 1915. His explanation of signing his name on the backs of the checks is that the defendant told him to endorse them and then as money came in to the parish funds he, the defendant, would draw on it to pay the Agatha Gailus note. It is the testimony of the plaintiff that the defendant still owes Agatha Gailus the amount of the Gailus note and that there remains due a balance of $200.00.

The substantial question in the cause is whether the balance of $1200.00, being part of the original note for $1453.00 was paid by the defendant. The testimony of the plaintiff and that of the defendant is very much in conflict,

particularly as to what transpired at the meeting in February, 1915. The plaintiff claims that on that occasion he received a check for $300.00 which was for an old and separate loan of that amount, and a check for $59.00 for interest on the principal note, and the promise of the defendant that he would pay the Agatha Gailus note of $1000.00, leaving the sum of $200.00 still due the plaintiff. The defendant claims that at the time of the alleged settlement he gave the plaintiff $380.00 in cash and two checks, together with $500.00 the plaintiff owed him for a loan, all of which taken together settled in full the balance of $1200.00. The claim of the defendant that the note was paid in full is in part corroborated by the testimony of Rogicz, Zeubris, Skinder and Waslovas, all of whom testified that they had heard the plaintiff state that the note in question was paid. If the jury believed the testimony of the defendant and the witnesses just mentioned, there was ample evidence to support their verdict. There are some discrepancies in the testimony of the defendant but they are not such as necessarily to affect the truth of his story. On the other hand, in the plaintiff's testimony there are some obvious discrepancies which seem to be quite serious. We are not justified, however, in setting them forth here, the evidence involved being so voluminous. We have examined the evidence and the elaborate brief of counsel for the plaintiff with care - the defendant's brief being practically negligible - and have come to the conclusion that the judgment must stand.

It is contended by the plaintiff that a certain statement made by the trial judge in the cross-examination of the defendant was error. That statement,- "Do you mean to tell me he is trying to tell something that is not true?" - was improper and should not have been made. The record does not show, however, that any objection or motion was made, and under those circumstances, bearing in mind that there was ample evidence tending to prove payment, we are of the opinion that the error does not justify a reversal.

It is further contended that the fifth instruction which was given for the defendant was erroneous. That instruction referred to the endorsement upon the note and also tothe endorsement of the plaintiff's name upon the alleged checks, and intimated that they were"prima facie evidence that such sums as are shown by said endorsement and checks were applied as payment upon the note"; that, therefore, the burden was upon the plaintiff to show otherwise. That instruction was not entirely accurate but in view of the evidence which was actually introduced in support of the defendant's claim of payment, we do not feel justified in considering the instruction given as sufficient ground for a reversal. The same reason applies to the objection made by the plaintiff to the sixth instruction given for the defendant. Further, we are of the opinion that instruction number three, which was given for the plaintiff, sufficiently informed the jury that, as the evidence showed that the note was in the possession of the plaintiff at the time of the trial, the presumption was that it had not been paid, it, therefore, became the obligation of the defendant to put in evidence to overcome that presumption, and as a

result made it unnecessary for the court to give instruction number two for the defendant, which was refused.

A number of other contentions have been made on behalf of the plaintiff; we have examined them all and have concluded that they are insufficient to justify a reversal. The judgment is, therefore, affirmed.

AFFIRMED.

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

439 - 24792

(1076a)

JAMES F. BISHOP, Administrator of the estate of Marie Machacek,

Appellee,

vs.

JOHN CEPICAN, also known as JAN CEPICAN,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

217 I.A. 656 4

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, James F. Bishop, administrator of the estate of Mary Machacek, deceased, brought suit under the statute against the defendant, John Cepican, claiming that the latter owing to his negligence in driving an automobile ran into and killed Mary Machacek, the deceased. The cause was tried before a jury. There was a verdict and judgment for $700.00 and an appeal by the defendant.

On the evening of April 24, 1915, about 7:30 P.M. the defendant and five companions were traveling in a Rambler auotmobile, south on Blue Island avenue, between 18th and 19th streets in the City of Chicago. 18th and 19th streets run east and west, and Blue Island avenue northeasterly and southwesterly. At a point between 50 and 75 feet north of the northwest corner of 19th street and Blue Island avenue, the automobile, driven by the defendant struck Mary Machacek and killed her. It is the theory of the plaintiff that Mary Machacek - who at the time was nine years and two months old - was standing with

a playmate, Mary Kopta, on the sidewalk on the west side of Blue Island avenue in front of Rosenbaum's store, which was the third store north from the northwest corner of 19th street and Blue Island avenue, waiting for a southbound street car, which was standing there taking on passengers, to start up and go on so that they might cross over to the east side of Blue Island avenue; that as soon as the street car got out of the way, going south, Mary Machacek stepped into the street and was practically instantly run over and killed by defendant's automobile; that no horn was sounded or signal given; that the automobile did not have its lights on and was traveling from 25 to 30 miles an hour. On the other hand it is the theory of the defendant that the deceased ran, from the sidewalk on the east side of Blue Island avenue, towards Rosenbaum's store on the west side of Blue Island avenue; that she ran in a northwesterly direction, passing behind a northbound street car and then directly in front of the southbound automobile when it was not more than 2 to 15 feet from her; that the automobile was not going faster than from 8 to 10 miles an hour; that she was running after her companion, Mary Kopta, who was four feet ahead of her; that the defendant as soon as possible turned his machine to the east, applied the foot and emergency brakes, and stopped within four to six feet.

The witnesses, Fillipovitch, who at the time of the disaster was on the east side of the street; Vavra, who was in front of Rosenbaum's about ten feet from the two children; Antina Moracek, who was going towards Rosenbaum's, and who says she was about five feet away from the deceased, so near that she could reach out and touch her; Mary Kopta,

the companion of the deceased, who, however, was then only nine years of age; Marie Bilek, who was standing on the sidewalk about three steps back of the deceased; Mary Bilek who was standing just back of the deceased at the time in question; all testified that the deceased left the sidewalk from in front of Rosenbaum's; that she started east across the street and was at once, upon leaving the curb and getting into the street, struck by the defendant's automobile.

On the other hand the twelve witnesses, who were called by the defendant, which includes the occupants of the automobile, testified that the deceased undertook to cross the street from the east to the west; that she went behind a northbound street car and directly in front of the automobile. Counsel for the defendant argues that there are certain discrepancies in the testimony of the witnesses for the plaintiff; one discrepancy pertaining to the absence or presence of a policeman at the time of the accident, and another pertaining to what was done with the body of the child immediately after the disaster occurred, and that they cast doubt upon much of the evidence for the plaintiff.

In such a case as this, where there are so many witnesses and two opposing sets of fact are testified to we feel that the jury was in a far better position to judge the trustworthiness and credibility of the witnesses than we are. Of course, if the jury believed the witnesses for the plaintiff, and judging by their verdict it may be assumed they did, and, further, believed that the defendant's witnesses were unworthy of belief, their verdict was proper, and as we do not find, from the record, as it appears here, that it was against the manifest weight of

the evidence, we feel bound to let it stand.

As to the deceased being in the exercise of ordinary care: In Anglim v. Chicago Great Western R. R. Co. (Gen. No. 24655) we said: "A minor is charged with the exercise of such care as, reasonably considered, he should use, having in mind both his age and his mental and physical capacity, and the circumstances of the case." Citing, Heimann v. Kinnare, 190 Ill. 156; C. R. I. & P. R. R. Co. v. Eninger, 114 Ill. 79; C. C. Ry. Co. v. Wilcox, 138 Ill. 382.

Considering the immaturity of Mary Machacek, who, at the time she was killed, was but a little over 9 years of age; that, according to the evidence of the plaintiff, she stood and waited with her companion, on the sidewalk, until a street car going south had gotten out of the way and then stepped from the curb into the street to cross over and was almost instantly struck and run over by the defendant's automobile, which the evidence of the plaintiff tends to show was going from twenty-five to thirty miles an hour; we are of the opinion that the jury was justified in finding that she was not guilty of contributory negligence in undertaking to cross as she did, and, further, we are of the opinion that they were justified in finding the defendant was guilty of negligence.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

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

(1077a)

490 - 24844

JOHN GOLDSTEIN,

Appellee,

vs.

CHICAGO CITY RAILWAYS CO. and CHICAGO CITY RAILWAY CO., doing business as CHICAGO SURFACE LINES,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

217 I.A. 657

MR. JUSTICE TAYLOR delivered the opinion of the court.

Claiming that he had been forcibly ejected from one of the defendants' street cars, the plaintiff brought suit for personal injuries, and on May 25, 1918, recovered a judgment in the sum of $2500.00. From that judgment this appeal is taken. The declaration contains three counts: The first count avers that the plaintiff boarded the street car and became a passenger for hire; that it was the duty of the defendant to treat him as a passenger; that while he, with all due care, was riding upon the car, the defendant, through its servants, in violation of their duty, assaulted and violently struck him and with force and violence threw him off the car, seriously injuring him.

The second count is substantialy the same, save it avers that the plaintiff boarded a street car and that the defendant in disregard of its duty, through its servant, the conductor, assaulted and violently struck him and with great force threw him off, whereby he was injured.

The third count avers that he boarded a car of the defendants' and while in the exercise of care and riding upon said car, in disregard of his duty, the conductor upon the car abused him and wantonly and maliciously assaulted and violently struck and beat him and with great force and violence wantonly and maliciously threw the plaintiff off the car and injured him.

The defendant pleaded the general issue and also a special plea. The special plea set up that the plaintiff got upon the car and tendered to the conductor a transfer slip; that the conductor upon accepting it informed the plaintiff that it was not good for the payment of his fare; that his rights under the transfer had expired some two hours ago; that he then demanded of the plaintiff the usual cash fare; that the plaintiff refused to pay and insisted upon riding on the transfer slip; that after the conductor had requested the plaintiff to get off the car and the latter had refused, the conductor molliter manus imposuit, and using no more force than was necessary ejected the plaintiff from the car doing him no damage.

To the latter special plea, the plaintiff replied that the transfer slip which he tendered to the conductor had been given to him upon the payment of a cash fare to the defendant and that it purported on its face to be good for the payment of fare upon that car; that the transfer slip was not late and was not tendered two hours after the time it was given for. The plaintiff further replied denying that the conductor used no more force than was necessary to eject him from the car and averred that the conductor used more force than was necessary, and thereby did him

great damage.

The plaintiff, John Goldstein, whose home was in North Dakota near the Canadian border, but who was in Chicago on business, a man about 47 years of age, on August 18, 1914, in the afternoon, after transacting some business with Carson, Pirie & Scott's wholesale house, boarded one of the defendants' cars on Madison street, between Franklin and Market streets, going west. He paid his fare and got a transfer. His intention was to go to 1107 South Halsted street. The conductor of the Madison street car told him the transfer would entitle him to be transported on the Halsted street line from where it intersects Madison street. The conductor also told him where to stand to take the Halsted street car. He got off at Halsted street and went over to the northwest corner of Halsted and Madison streets preparatory to taking a car south on Halsted street. He waited about five or ten minutes until a car came and then got on and handed his transfer to the conductor. The transfer slip was submitted in evidence and, it is conceded, would entitle the plaintiff to be transported on that car. The defendant claims, however, that the transfer slip which was submitted in evidence was not the one which the plaintiff tendered to the conductor but was a different one and invalid because too late.

The attorney for the plaintiff testified that the plaintiff gave him the particular transfer slip, shortly after the occurrence and that he kept it in his vault. The plaintiff, also, testified that he gave the transfer slip to the attorney, and there is no evidence going to

show in what way the plaintiff might have secured that transfer other than in the manner stated.

The evidence of the plaintiff is that as soon as he had boarded the Halsted street car and given his transfer slip to the conductor the latter said, "Where didyou pick up that transfer; where did you pick it up;" that he told him he had just got it within ten or fifteen minutes from the Madison street car conductor;that he had paid that conductor a nickel and had received the transfer and been told to take that particular car on Halsted street; that the conductor on the Halsted street car then said: "We don't use such transfers". and gave it back to him and further said: "You will have to pay your fare if you want to go."; that he offered the conductor a Canadian five dollar bill and said he was willing to pay ten cents for its exchange, but that the conductor said it would cost him fifty cents exchange for changing the Canadian money; that they had some further dispute; that meanwhile the car was going on; that the conductor asked him if he was going to pay his fare; that he answered, "How can I pay my fare, I haven't got no small change"; that the conductor asked him to pay him fifty cents; that is for the exchange; that he said he would not pay that much but he said he would pay ten cents and five cents for the fare; that he had paid one fare already; that the conductor then took hold of him and threw him off the car; that when he boarded the car he was among the first; that when he threw him off he doesn't remember if he opened the rod that was between him and the conductor; that he believes he did.

The evidence of one Goldstein, a salesman, who was standing out in front of a store which was the second door north at the northwest corner of Halsted and Madison streets, is to the effect that between 4:00 and 4:20 P.M. August 18, 1914, he noticed the conductor grab the plaintiff with both hands and throw him off the car; that at the time the car was in motion; that as the man was lying there groaning the car went on and no effort was made to stop; that he took the number of the car and made a notation of it on a postal card; that he helped pick the plaintiff up, who at the time was in a semi-conscious condition; that Halsted street at that point was paved with granite blocks; that the rear end of the Halsted street car, when it came to a stop, was about ten or fifteen feet to the north of where he was standing; that after it had started and gone ten or fifteen feet he saw the conductor take the plaintiff with both hands and throw him off the car; that he could not say whether the conductor came out beyond the railing; that he is sure of everything with reference to the conductor getting hold of him and all that; that he did not see the conductor open the rail that surrounds him and pass out to where the passengers get on; that when he first saw the plaintiff he was standing in front of the rail, facing south, about 25 inches from the step, and that the conductor was facing him; that the conductor took him and threw him right out of the car while it was moving; that he threw him out with great force.

The evidence of Reilly, the conductor of the Halsted street car, is to the effect that when he stopped at Madison street the plaintiff boarded the car and handed him

a transfer; that he gave it back to him and told him that it was no good; that it was two hours too late; that he told him he would have to pay another fare and handed him back the transfer; that he then turned to collect fares from some people who were on the platform and when the car came to a stop at Monroe street, the next street south, passengers were getting on and off; that he then told him he would have to pay his fare and he said he wouldn't; that the plaintiff then called him a harsh name (unprintable) and said, "I won't pay you and you can't put me off"; that he then unlocked the bar of the railing, took the plaintiff by the arm and tried to lead him off the car; that he started resisting and that then he, the conductor, started pushing him; that when he started to push him, he, the plaintiff, got down off the platform onto the step and then slipped and fell; that as soon as he saw him slip and fall he immediately started the car; that he reached for the bell cord and rang the bell after the plaintiff was off the car. He further testified that the transfer which was offered in evidence is not the one that the plaintiff handed to him; that the transfer which was offered to him was punched at two o'clock in the afternoon, whereas the one in evidence is punched at five o'clock; that if the transfer - which was put in evidence - had been handed to him he would have accepted it.

The evidence of the plaintiff is that as a result of being thrown off the car he suffered a hernia and that his health was greatly impaired.

The cause was tried before a jury and a verdict rendered for the plaintiff in the sum of $2500.00, and

judgment entered thereon.

It is contended by the defendant that the verdict is contrary to the law and the evidence; that the plaintiff was not accepted as a passenger on the Halsted street car; that inasmuch as every count of the declaration was based upon the existence of the relationship of passenger and carrier it was necessary for the plaintiff, in order to recover, to prove the existence of that relationship. The following cases are cited: C. & E. I. R. R. Co. v. Jennings, 190 Ill. App. 478; Gemmill v. I.C. R. Co., 186 Ill. App. 124; Kulpinsky v. Sampsell, 145 Ill. App. 242. We are of the opinion, however, that the evidence is consistent with the declaration; that it proves that the plaintiff became a passenger on the Halsted street car and that it sufficiently supports the verdict. It is shown by the evidence of the plaintiff that he paid his fare on the Madison street car and had received a transfer slip, which was a printed memorandum announcing on the part of the defendant that it would carry him on one of its cars going south on Halsted street. From that, it follows, that when the plaintiff boarded the Halsted street car, a few minutes after he had left the Madison street car, he became at once - even if he were not a passenger during the short time he stood at the corner of Halsted and Madison streets - a passenger with the written evidence of his contract in his possession, and that he was entitled to be carried as a passenger according to the terms of the transfer slip which he tendered to the conductor. The refusal by the conductor of the transfer slip was too late; the defendant had already bound itself, when the plaintiff paid his full fare on the Madison street car. As far as the plaintiff was concerned, the contract was fully executed,

but there remained the unexecuted obligation of the defendant, that is, to carry him south on the Halsted street car. He was not trespassing when he boarded the Halsted street car; nor was it necessary for the conductor to perform any overt acts before the relationship of passenger and carrier could come into existence. xxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx

The foregoing statement of the law is not in conflict with Todd v. L. & N. R. R. Co., 274 Ill. 201, and the cases therein cited. It is an application of the well known principles of the law of contract that if, in making a journey, for which payment has been made in full, one gets off, as he is expected and entitled and instructed to do, and boards another car to which he is directed, all pursuant to the original undertaking and contract, he remains a passenger throughout. Feldman v. Chicago Rys. Co. 289 Ill. 25

It is further contended by the defendant that the damages are excessive. The testimony of the plaintiff is that prior to the alleged injury he had never been ill and that shortly after he was pushed or thrown off the car a hernia developed. Dr. Galbraith of North Dakota, an examiner for certain well known life insurance companies, testified that on August 14, 1914, prior to the injury in question, he made an examination of the plaintiff in connection with an application for a policy of insurance and that he did not find any evidence of hernia; that the plaintiff seemed to be in very good health; that subsequently, on August 26, 1914, after the injury in question he was consulted by the plaintiff who complained of symptoms peculiar to hernia; that he examined him and that he seemed to have a hernia and that he advised him to get a truss; that on September 2, 1914, he fitted him

with a truss. The defendant called Drs. McKenna and Tenney and undertook to show that if it was a hernia it was one that had been chronic and existed prior to the time of the alleged injury. We are of the opinion after a careful examination of the evidence that it sufficiently shows that the plaintiff was actually ruptured by reason of the fall, and, further, that, under the circumstances, the damages are not excessive. Ill. Steel Co. v. Koshinski, 135 Ill. App. 587; Atchison, etc. R. R. Co. v. Elder, 50 Ill. App. 276.

It is further contended by the defendant that an expert witness on behalf of the plaintiff was allowed in answer to a hypothetical question to testify that he had an opinion; inasmuch, however, as the witness did not state what that opinion was the contention is untenable. The decision cited by counsel, Kimbrough v. Chicago C.R. Co., 272 Ill. 71, is inapplicable because in that case the witness was allowed to express his opinion.

It is further contended that error was committed in the refusal of the defendant's instruction No. 1. Considering, however, as we do, that the plaintiff was a passenger, and that it was not proven that the plaintiff assaulted the conductor but, at most, that he applied a vile epithet to him - which it true might go in mitigation of damages - there was no justification for such and instruction, and it was properly refused.

FINDING NO ERROR IN THE RECORD THE JUDGMENT IS AFFIRMED.

AFFIRMED.

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

(1078)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: on DEC 1 1919 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6755.

Walter B. Stroud, appellee

vs Appeal from City Court Kewanee.

Maddra J. Hewlett, appellant.

Dibell, J.

Stroud is a machinist living in Kewanee. Hewlett also lived in Kewanee and was about seventy five years of age when the dealings began which are here involved. Hewlett was the husband of an aunt of Stroud. Hewlett was an inventor and was working on a water supply system, by which was meant the lifting of water in buildings by compressed air. Hewlett had a patent for said system and had installed the same is several places, but he was having ~~xxx~~ trouble with it and it was not yet a success. There was in Kewanee a building known as the Harris Machine Shop, which was known to be for sale. Stroud had a partner named Connery. Hewlett proposed to Stroud that he find out at what price the machine shop could be bought and that he, Hewlett would then buy and pay for it and sell it to Stroud and his partner on time, and payable at different intervals, and that they secure the debt by a chattel mortgage. A part of Hewlett's interest in the matter was that his patterns were in said shop and also various manufactured articles which went into the system. The price was ascertained and Hewlett bought the machine shop and sold it to Stroud and his partner and took notes for the purchase price, payable at different times and secured by a chattel mortgage on the personal property connected with the shop. This was in July 1915, and Stroud did some work for Hewlett in that shop up to December 1915. According to Stroud's testimony, Hewlett then proposed to Stroud that he get rid of Connery and go to work for Hewlett

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Dibell, J.

Stroud is a machinist living in Kewanee. Hewlett also lived in Kewanee and was about seventy five years of age when the dealings began which are here involved. Hewlett was the husband of an aunt of Stroud. Hewlett was an inventor and was working on a water supply system, by which was meant the lifting of water in buildings by compressed air. Hewlett had a patent for said system and had installed the same in several places, but he was having much trouble with it and it was not yet a success. There was in Kewanee a building known as the Harris Washing Shop, which was known to be for sale. Stroud had a partner named Connery. Hewlett proposed to Stroud that he find out at what price the machine shop could be bought and that he, Hewlett would then buy and pay for it and sell it to Stroud and his partner on time, and payable at different intervals, and that they secure the debt by a chattel mortgage. A part of Hewlett's interest in the matter was that his patterns were in said shop and also various manufactured articles which went into the system. The price was ascertained and Hewlett bought the machine shop and sold it to Stroud and his partner and took notes for the purchase price, payable at different times and secured by a chattel mortgage on the personal property connected with the shop. This was in July 1915, and Stroud did some work for Hewlett in that shop up to December 1915. According to Stroud's testimony, Hewlett then proceeded to Stroud that he get rid of Connery and go to work for Hewlett

in an effort toimprove and overcome the difficulties in his water supply system, and that Hewlett would pay Stroud for his time at the rate of eighty cents per hour, and that when the water supply system had been made a commercially practical proposition, Hewlett would give stroud a half interest therein. According to Stroud's testimony, he accepted the proposition and performed labor in perfecting said system for a long time. Thereafter Hewlett became paralyzed and his wife became insane. The wife was sent to an insane hospital. According to Stroumd's testimony, he, at Hewlett's request, gave up his work in part and devoted himself very largely to taking care of Hewlett, and Hewlett rented his house to Stroud, and Stroud charged him board and charged him for laundry and the like, and charged him for personal care and nursing. Hewlett had a settlement with the wife of Stroud about board and rent and laundry, etc., and Hewlett endorsed credits therefor so as to pay one note and partly to pay another, and the notes secured by the chattel mortgage have all been paid and satisfied. Hewlett improved in health and he and Stroud quarrelad and Hewlett left the home of Stroud. Thereafter Stroud brought this suit against Hewlett and filed a declaration, the first count of which declared upon the alleged contract by which Stroud was to experiment with and perfect the water supply syetem and keep a record of his time, and Hewlett was to pay Stroud eighty cents per hour therefor and also to transfer to him a one half interest in the patent when the system became commercially practical, and the count averred that Stroud did so work until the system became commercially practical and performed his part of said agreement, and there was a large sum of money due him under said agreement, and that Hewlett had refused to pay him therefor and to transfer the half interest in the system.

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The second count was for the services rendered by Stroud to Hewlett while he was ill, as aforesaid. To this the common counts were added. Hewlett filed the general issue and a plea of set off which latter was in effect the common counts. The cause was tried by a jury and plaintiff had a verdict for $1067.23 and a judgment therefor, from which Hewlett appeals.

On the trial Stroud testified to the various matters before stated and Hewlett testified denying many things and especially denying that he hired Stroud to perfect his water supply system and agreed to pay him eighty cents per hour therefor. Hewlett under his plea of set off introduced evidence of various pieces of manufactured articles which had passed into the control of Stroud, and of the value thereof. It is evident that as to the conflicting testimony on questions of fact, no ground appears from which we could say that the jury should have found the other way, and indeed, the whole evidence considered, we think the preponderance is with the plaintiff.

Stroud kept his account of the time he spent in endeavoring to perfect the water supply system in a little book which he carried in his pocket and which contained no other accounts. He offered that in evidence and it was admitted ~~xxxxxxxxxxxxxxx~~ against objection, and it is urged that this was erroneous, because this was not like a merchant's shop book wherein are kept the accounts of all customers and which are proved to be true and correct by someone who has settled with the merchant by said books. We deem it unnecessary to discuss the question whether this book standing alone would be admissible, for that is not the situation here presented. Stroud testified that it was agreed between him and Hewlett that he should keep an account of this time, and that he kept it pursuant to that agreement; that he had several times while it was being kept, submitted it to the inspection of Hewlett; that he made each entry therein

The second count was for the services rendered by Stroud to Hewlett while he was ill, as aforesaid. To this the common counts were added. Hewlett filed the general issue and a plea of set off which latter was in effect the common counts. The cause was tried by a jury and plaintiff had verdict for £1057.83 and a judgment therefor, from which Hewlett appeals.

On the trial Stroud testified to the various matters before stated and Hewlett testified denying many things and especially denying that he hired Stroud to perfect his water supply system and agreed to pay him eighty cents per hour therefor. Hewlett under his plea of set off introduced evidence of various pieces of manufactured articles which had passed into the control of Stroud, and of the value thereof. It is evident that as to the conflicting testimony on questions of fact, no ground appears from which we could say that the jury should have found the other way, nd indeed, the whole evidence considered, we think the preponderance is with the plaintiff.

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at the close of the day on which the work was done, and that the date and number of hours therein specified for each day was true and correct. After the book had been admitted he proceeded to testify at length as to the truth and correctness of each item, and he eliminated therefrom a few items which he said were not spent in perfecting this water supply system and should not have been entered in that book. He had a right to use this memorandum made by him to refresh his recollection as a witness, and all the evidence on that subject considered, it is clear that no error was committed in that respect.

Complaint is made of plaintiff's instruction No. 1, which told the jury that the burden was on the plaintiff to prove his case by the greater weight of the evidence, but that it was sufficient for plaintiff to recover if the evidence in his favor preponderated only slightly. This was awkwardly worded but it did not stand alone. By numerous instructions given for defendant the jury were told that plaintiff had to make out his case by a preponderance of the evidence, that if the evidnce was equally balanced they should find against the plaintiff, and if they were unable to say on which side the greater weight of the evidence was , they should find for the defendant, and it is clear that the jury could not have been misled by said instruction No. 1. Complaint is made of plaintiff's instructions Nos. 3 and 4, which told the jury that in order to make any settlement between defendant and plaintiff's wife binding, it must appear that the wife had authority from her husband to settle. It is contended that these instructions left out the proposition that even if the wife had no authority to settle at the time the settlement was made, yet if plaintiff afterwards ratified the act of his wife it would then become binding. There are several answers to this contention. Defendant presented and the Court

at the close of the day on which the work was done, and that the date and number of hours therein specified for each day was true and correct. After the book had been admitted be proceeded to testify at length as to the truth and correctness of each item, and he eliminated therefrom a few items which he said were not spent in performing this water supply system and should not have been entered in that book. He had a right to use this memorandum made by him to refresh his recollection as a witness, and all the evidence on that subject considered, it is clear that no error was committed in that respect.

Complaint is made of plaintiff's instruction No. 1, which told the jury that the burden was on the plaintiff to prove his case by the greater weight of the evidence, but that it was sufficient for plaintiff to recover if the evidence in his favor preponderated only slightly. This was awkwardly worded but it did not stand alone. By numerous instructions given for defendant the jury were told that plaintiff had to make out his case by a preponderance of the evidence, that if the evidence was equally balanced they should find against the plaintiff, and if they were unable to say on which side the greater weight of the evidence was , they should find for the defendant, and it is clear that the jury could not have been misled by said instruction No. 1. Complaint is made of plaintiff's instructions Nos. 3 and 4, which told the jury that in order to make any settlement between defendant and plaintiff's wife binding, it must appear that the wife had authority from her husband to settle. It is contended that these instructions left out the proposition that even if the wife had no authority to settle at the time the settlement was made, yet if plaintiff after-ards ratified the act of his wife it would then become binding. There are several answers to this contention. Defendant presented and the Court

gave at his request instruction No. 5 concerning such settlement and did not therein suggest that an unauthorized settlement might afterwards be ratified by the husband, and defendant can not be heard to complain that the court gave for plaintiff an instruction upon the same theory which defendant embodied in the instruction which he prepared and procured to be given. Again, if defendant conceived that the proof showed that an unauthorized settlement with the wife had afterwards been ratified by the husband, and he wished the effect of that ratification to be presented to the jury by an instruction, he should have prepared and tendered such an instruction. Again, we are unable to say that there is any evidence of such a ratification of such a character that the Court was required to submit the effect of such ratification to the jury. We think it entirely clear from the evidence that what was settled between defendant and Mrs. Stroud was the rent, board, laundry, and other like matters occurring at the home; that Mrs. Stroud tried to get Hewlett to wait till her husband got home before making the settlement but he insisted on goinf ahead and ascertaining the amount due from him on those matters and endorsing the same on the notes; and that the wife never attempted to discuss or settle with defendant anything pertaining to her husband's services upon the water supply system or any work in the shop. We think it clear there was no attempt to settle the shop matters with the wife and that the settlement between the wife and defendant was not intended to cover the shop work and should not be construed to bar Stroud from a recovery for those services. The court instructed the jury to allow plaintiff nothing for the alleged failure of defendant to transfer to plaintiff a half interest in said patent, for lack of evidence.

The judgment is therefore affirmed.

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prepared and tendered such an instruction. Again, we are

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STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6700

(077a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 657 3

BE IT REMEMBERED, that afterwards, to-wit: on

MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6700.

Cyclone Blow Pipe Company , Defendant in error; vs Empire Manufacturing Co., Plaintiff in error.	)	Writ of Error To Winnebago county.

O p i n i o n b y N I E H A U S, P. J.

This suit was instituted by the Cyclone Blow Pipe Company, defendant in error, to recover by subrogation under the provisions of Section 17 Paragraph B. of the Workmen's Compensation Act of 1911. The facts in this case are practically undisputed; the Cyclone Blow Pipe Company previous to the present controversy, had entered into an agreement with the Empire Manufacturing Company, plaintiff in error, to install a blow pipe system in the plant of the plaintiff in error, at Rockfore, Illinois. Both of the parties were working under the workmen's compensation act mentioned. George Lauruszka was one of the employes of the defendant in error, and in the course of his employment for the defendant in error, in installing this blow pipe system was fatally injured. A proceeding was commenced under the Workmen's Compensation Act, in the county court of Winnebago county, and in this proceeding it was held and determined, that the defendant in error was liable to pay the amount of compensation provided for in said act, which was $1200.00;

Cyclone Pipe Company,

Defendant in error,

vs.

Writ of Error To

Empire Manufacturing Co.,

Winnebago County.

Plaintiff in error.

Opinion by NIEDAUD, P. J.

This suit was instituted by the Cyclone Pipe Company, defendant in error, to recover by subrogation under the provisions of Section 17 Paragraph B. of the Workmen's Compensation Act of 1911. The facts in this case are practically undisputed, the Cyclone Pipe Company previous to the present controversy, had entered into an agreement with the Empire Manufacturing Company, plaintiff in error, to install a blow pipe system in the plant of the plaintiff in error, at Rockford, Illinois. Both of the parties were working under the workmen's compensation act mentioned. George Lagergren was one of the employes of the defendant in error, and in the course of his employment for the defendant in error, he sustained this blow pipe system was fatally injured. A proceeding was commenced under the Workmen's Compensation Act, in the county court of Winnebago county, and in this proceeding it was held and determined, that the defendant in error was liable to pay the amount of compensation provided for in said act, which was $1500.00;

and a judgment was entered against the defendant in error for that amount, in accordance with the provisions of the act. The defendant in error, thereafter commenced this suit in the circuit court of Winnebago county, under said Section 17 Paragraph B, which provides, that if compensation under the act has been recovered against the employer, the employer by whom the compensation has been paid, or the person who has been called upon to pay the indemnity under Sections 4 and 5 of the act, may be entitled to indemnity from the person other than the employer, and be subrogated to the rights of the employe, to recover damages, where the injury for which compensation is payable under the act, was caused under circumstances creating a legal liability in such person other than the employer, to pay damages; and the suit is based upon the alleged legal liability, that the plaintiff in error failed to exercise reasonable care to furnish said George Lauruska with a reasonably safe place to work, and to equip the exposed parts of the machinery in conformity with the act providing for the health safety and comfort of employes. There was a trial by jury which resulted in a verdict for $1292.60; whereupon a remittitur was entered for $92.60, and a judgment for $1200.00; from this judgment an appeal is now prosecuted.

It was admitted on the trial of the cause "that at the time of the injury and death of the said George Lauruska the said Cyclone Blow Pipe Company had a policy of insurance with the United States Casualty Company, a New York corporation, whereby the said United States Casualty Company

obligated itself to pay the loss, if any, that should be occasioned to the said Cuclone Blow Pipe Company by reason of the death of the said George Lauruszka; and that pursuant to its obligations, as contained in any by said policy or contract of insurance, the said United States Casualty Company paid said judgment on the 8th day of May, 1916."

The principal point made by the plaintiff in error for reversal of the judgment is, that the plaintiff in error is not liable because the judgment awarded against the defendant in error for the death of George Lauruszka, its employe, was paid by the insurance company; and was not paid by the defendant in error; that there ~~fore~~ bore the defendant in error did not suffer any injury or damage on account of said judgment; and therefore it had no interest in this suit, and no right to recover anything from the plaintiff in error.

The plaintiff in error also contends, that the defendant in error, carried the insurance in question under Section 20 of the workmen's compensation act referred to; and that such insurance was therefore taken out for its benefit, as well as the benefit of the defendant in error; and that when insurance is taken out by the employer under said Section 20, the right of subrogation under Section 17 of the act does not apply.

It is a sufficient answer to the latter contention to say, that the record does not show, that the insurance in question was taken out by the defendant in error under Section 20 referred to; moreover that there is nothing in the language, or the wording, or purpose, of Section 20, or in the insurance therein provided, which in any way conflicts with, or abridges or qualifies the subrogation provisions of Section 17.

But it clearly appears as a matter of fact, that the defendant

But it clearly appears as a matter of fact, that the defendant
abridges or qualifies the supposition provisions of Section 17,
therein provided, which in any way conflicts with, or
or the wording, or purpose, of Section 30, or in the insurance
to be referred to; moreover that there is nothing in the language,
question was taken out by the defendant in error under Section
that the record does not show, that the insurance is
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is taken out by the employer under said Section 30, the right
the benefit of the defendant in error, and that such insurance
insurance was therefore taken out for its benefit, as well as
the workmen's compensation act referred to; and that such

[illegible]

judgment; and therefore it had no interest in this suit,
had no right to recover anything from the plaintiff in error.
The plaintiff in error also contends, that the defendant in
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paid by the insurance company; and was not paid by the
defendant in error; that therefore the defendant in error
did not suffer any injury or damage or account of said
not liable because the judgment against the defendant
in error for the death of George Hamweke, its employe, was
versal of the judgment is, that the plaintiff in error is
The principal point made by the plaintiff in error for re-
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of the death of the said George Hamweke; and that pursu-
counseled to the said Cudone Bros Company by reason
obligated itself to pay the loss, if any, that should be

in error did not take such insurance under the provisions of Section 20; that it was taken for its own benefit, as a protection for the risk involved in the obligations which it assumed for payment of compensation under the compensation act. It is not disputed, that otherwise all the elements were present and proven which would entitle the defendant in error, to subrogation under Section 17, and to a recovery against the plaintiff in error. We are of opinion that taking out the insurance in question did not in any way deprive the defendant in error of its rights of subrogation under said Section 17. It is admitted that the insurance company paid the judgment and award which was made against the defendant in error; it was not a voluntary payment however; but one made in accordance with the terms of the contract it had with the defendant in error, and which was founded on a valuable consideration, that had been paid by the defendant in error. The insurance company was legally obligated to amke the payment, and to make it for the defendant in ~~error~~ error; and did make it for the defendant in error on that account. In legal effect it was the same, therefore, as if it had been made by the defendant in error. There is nothing in the statute, from which the reference could be reasonably drawn, that because a party is prudent enough to insure his risk under the compensation act, he shall be deprived of the rights of subrogation provided for in Section 17; nor lose the benefit of his prudence.

The judgment is affirmed.

Judgment affirmed.

The judgment is affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6218

(1080a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 6574

BE IT REMEMBERED, that afterwards, to-wit: on

MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6716.

David C. Pfoutz,
Appellee,
vs
Alvin F. Riley,
appellant.

Appeal from County Court
Winnebago County.

O p i n i o n by N I E H A U S, P. J.

David C. Pfoutz, the appellee commenced this suit in the courtn court of Winnebago county , against the appellant Alvin F. Riley, to recover commissions which he c claimed to be due him under an agreement with the appellant, to the effect that if the appellee got him a purchaser for his farm, appellant would pay him the sum of $400.00. There was a trial by jury, and at the close of all the evidence, the court on motion of the appellee, directed the jury to find for the appellee, and assess his damages at $400.00; and juigment was rendered upon the verdict; and from this judgment an appeal is prosecuted.

The appellant contends, that the judgment should be reversed for two reasons. First 'that the appellee practiced a fraud upon the appellant, which induced him to list his property for sale with the appellee; and that there was evidence offered by him, but excluded by the court, to prove that issue. Secondly, that even without the excluded evidence, there was enough evidence admitted to make it a question of fact for the jury, whether or not the appellee had practiced a fraud on appellant, in order

No. 3716.

David C. Pierce,

Appellee,

vs

Alvin F. Riley,

Appellant.

Appeal from County Court
Pinnepago County.

O p i n i o n by M I S S A U E R, P. J.

David C. Pierce, the appellee commenced this suit in the county court of Pinnepago county, against the appellant Alvin F. Riley, to recover compensation which he claimed to be due him under an agreement with the appellant, to the effect that if the appellee put in a furnace for his farm, appellant would pay him the sum of $400.00. There was a trial by jury, and at the close of all the evidence, the court on motion of the appellee, directed the jury to find for the appellee, and assess his damages at $400.00; and judgment was rendered upon the verdict; and from this judgment an appeal is prosecuted.

The appellant contends, that the judgment should be reversed for two reasons. First, that the appellee procured a trust upon the appellant, which induced him to list his property for sale with the appellee; and that that was evidence offered by him, but excluded by the court, to prove that issue. Secondly, that even without the excluded evidence, there was enough evidence submitted to make it a question of fact for the jury, whether or not the appellee had practiced a fraud on appellant, in order

to induce him to list the farm with him; and therefore the court should not have directed a verdict.'

It is probably sufficient answer to appellant's contention to say, that the evidence clearly shows, that appellant was not induced by appellee to list his farm with the appellee; and that he did not list his farm with the appellee, but positively refused to do so. It is not apparent how appellant could have been induced to do something which he never did.

The facts, which no doubt controlled the action of the court in directing a verdict, were established by the appellant's own testimony. He testified, that he had had a farm for sale, and had listed it with two different real estate men, namely Jilson and Horton; that he had a contract with Jilson by which he was to pay him $400.00 as a commission, in case he found a purchaser, who would buy the farm for $850.00 an acre. This was before the appellee, had appeared upon the scene. The appellee who was also in the real estate business, came out to see the appellant at his farm, and wanted him to list the farm with him. Appellant testified that the appellee said to him: "I have a buyer, and can bring him down here, and I think I can sell the eighty; I would like to have it for a week any way." To which appellant replied: "No I wont do that, because I have listed it with two real estate men now - Jilson and Horton." That, thereupon the appellee said: "I have got a buyer, and will bring him around the first part of the week." Whereupon the appellant inquired, "Who sent you here?" And the appellee replied, "I was

to induce him to list the farm with him; and therefore the

court should not have directed a verdict.'

It is probably sufficient answer to appellant's contention to say, that the evidence clearly shows, that appellant was not induced by appellee to list his farm with the appellee; and that he did not list his farm with the appellee, but positively refused to do so. It is not important how appellant could have been induced to do something which he never did.

The facts, which no doubt controlled the decision of the court in directing a verdict, were established by the appellant's own testimony. He testified, that he had a farm for sale, and had listed it with two different real estate men, namely Gibson and Norton, that he had a contract with Gibson by which he was to pay him $4500.00 as commission, in case he found a purchaser, who would buy the farm for $9000.00 or more. This was before the appellee, had appeared upon the scene. The appellee who was also in the real estate business, came out to see the appellant at his farm, and wanted him to list the farm with him. Appellant testified that the appellee said to him: "I have a buyer, and can bring him down here, and I think I can sell the widow; I would like to have it for a week or two." To which appellant replied: "No I want to deal, because I have listed it with two real estate men Gibson and Norton." That, thereupon the appellee said: "I have not a buyer, but will bring them around the first part of the week." Thereupon the appellant inquired, "Who want you have?" And the appellee replied, "I was

over to a neighbor's house;" and then the appellant said "Any real estate men send you here?" Whereupon the appellee said "No real estate men, but I was over to Charlie Johns, and he told me this farm was for sale." Thereupon the appellant stated, to the appellee: "I dont care to get mixed up with too many real estate men. If you can bring me a buyer here, I will sell it." Afterwards the appellee said to the appellant "How much are you going to give this other real estate man;" whereupon appellant told the appellee, "two per cent;" whereupon the appellee said: "If I get a buyer, will you give me the same;" and the appellant answered: "Yes, I will give you $400.00." It appears therefrom, to be established by appellant's own testimony, that he did not list the property with the appellee, but that he agreed to pay the appellee a commission of $400.00 if he got him a buyer for the farm. That the appellee did get a buyer who purchased the farm of the appellant is a fact not disputed. Under this state of the proof we are of opinion that the court property directed a verdict. We are also of opinion, that the court properly excluded the evidence of the witness Harry Jilson, by which the appellant sought to prove that the appelles had been at Jilson's office prior to the time he made his contract with the appellant; and that Jilson told him of appellant's farm; and that it was for sale; and that appellee had informed Jilson of the fact that he had a purchaser who would buy the farm; and that Jilson thereupon told him he would divide his

commission of $400.00 with appellee, if he bought the purchaser to him; and that the appellee said he would do so. This evidence could in no way effect the binding force of the contract which the appellant subsequently made with the appellee; nor could it in any way effect appellant's liability to the appellee under the contract; it was therefore properly ruled out. The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6730

(108/a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 6581

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6730.

Myrla Rowe, Defendant in error.

vs Error to Winnebago.

Eva Black, et al Plaintiffs in error.

Niehaus, P. J.

In this case the defendant in error, Myrla Rowe, as complainantx, filed a bill in equity in the circuit court of Winnebago county to bring about the partition of certain real estate situated in the city of Rockford. The bill alleges that the defendant in err r and Eva Black Strunk, Edith Clark and Norma Johnson, plaintiffs in error, are tenants in common each owning a one fourth interest in the premises sought to be partitioned; and that the father of said parties Frank Rowe, has a dower interest in a part of said premises. Plaintiffs in error as defendants filed their answer, admitting all the substantial facts alleged in the bill and the rights and interests of the parties as therein set forth, but did not admit, that the premises were correctly described. They also alleged ~~in~~ in the answer that the defendant in error, had made a proposition in writing to them since the filing of the bill, to sell her interest in the premises described in the bill, to them, and that they had accepted said proposition, and were ready and willing and able to pay to the defendant in error, the price so agreed upon whenever sufficient deeds of conveyance would be executed and delivered to them. The bill was afterwards amended, and the answers of the plaintiffs in error were allowed to stand as answers to the amended bill; a replication was then filed, and a hearing had before the court whereupon a decree was entered appointing commissioners to partition the premises. In this decree a slight error in the description of a part of the premises was also corrected. The commissioners reported, that the premises were not susceptible of division without manifest prejudice to the interests

Cen. No. 8730.

Myrla Rowe, Defendant in error.

vs Error to Winnebago.

Eva Black, et al Plaintiffs in error.

Mishens, P. J.

In this case the defendant in error, Myrla Rowe, as complainant, filed a bill in equity in the circuit court of Winnebago county to bring about the partition of certain real estate situated in the city of Rockford. The bill alleges that the defendant in err r and Eva Black Strunk, Edith Clark and Norma Johnson, plaintiffs in error, are tenants in common each owning a one fourth interest in the premises sought to be partitioned; and that the father of said parties Frank Rowe, has a lower interest in a part of said premises. Plaintiffs in error as defendants filed their answer, admitting all the substantial facts alleged in the bill and the rights and interests of the parties as ther in set forth, but did not admit, that the premises were correctly described. They also alleged ~~and~~ in the answer that the defendant in error, had made a proposition in writing to them since the filing of the bill, to sell her interest in the premises described in the bill, to them, and that they had accepted said proposition, and were ready and willing and able to pay to the defendant in error, the price so agreed upon whenever sufficient deeds of conveyance would be executed and delivered to them. The bill was afterwards amended, and the answers of the plaintiffs in error were allowed to stand as answers to the amended bill; a replication was then filed, and a hearing had before the court whereupon a decree was entered appointing commissioners to partition the premises. In this decree a slight error in the description of a part of the premises was also corrected. The commissioners reported, that the premises were not susceptible of division without manifest prejudice to the interests

of the parties, and appraised the value of the same for the purposes of a sale; and thereupon a decree for the sale of the premises was entered, and in accordance with this decree the premises were sold by the master at public sale for $7550.00 to the plaintiffs in error; they having made the highest bid and best bid therefor. The sale was confirmed by the court, and a solicitor's fee of $500.00, for the services of complainant's solicitors, was allowed and ordered to be taxed as costs in accordance with the statute; and it was also ordered that the net proceeds of the sale, be distributed among the parties in interest in accordance with such interests, as found by the decree in partition. From the latter decree, a writ of error is now prosecuted.

It is contended, that the court should have dismissed the bill, because the answer of the plaintiffs in error contained the allegation of the proposal to sell her interest to the plaintiffs in error, and that such proposal had been accepted by them; also that the court erred in the decree directing the distribution of the net proceeds in ordering the amount of defendant in error's share, as fixed by the decree in partition, to be paid to her, instead of the amount for which it is claimed she had agreed to sell her interest to the plaintiffs in error. It is also insisted that the decree for the sale of the premises was erroneous, because it failed to find that Frank Rowe had a dower interest in a part of the premises, and to direct that the sale be made subject thereto. The allowance of a solicitor's fee to be taxed as costs, is also assigned as error. Concerning the first and second contentions of the plaintiffs in error it may be said, that there is nothing in the record to show any agreement made by the defendant in error for a sale of her interest to the plaintiffs in error, and this court is therefore not in position to review

any of the questions raised in connection with such an agreement; and these matters are not before the court. Concerning the point made that the dower interest of Frank Rowe, should have been taken cognizance of, by the decree directing a sale of the premises, and the sale made subject thereto, it may be said that it is practically disposed of by the court proceedings, as shown in the amendment to the transcript of the record, which has been filed by leave of court. It conclusively appears from these proceedings, that the fact was brought to the attention of the court at the time of the entry of the decree for sale, that the dower interest of Rowe would be relinquished by him; and it was afterwards duly relinquished, and prior to the sale, so that at the time of the sale he had no dower interest in the property, and the sale was therefore properly made free of such interest. Moreover, all the parties in interest, including the plaintiffs in error, who purchased the premises, were fully aware, that at the time the premises were sold that such dower interest had been properly released, and the plaintiffs in error purchased with a full knowledge of the condition of the title in that regard. We find no error in this part of the partition proceedings. And there was no error in the allowance of the solicitor's fee to be taxed as costs. The rights and interests of the parties in the premises to be partitioned had been properly set forth in the bill; and the decree for partition finds, the interests of the parties exactly as they are alleged in the bill. The record does not show, that any good or substantial defense was interposed by any of the parties defendant in the bill. Under these circumstances a proper case was presented for the allowance of a solicitor's fee; Stollard v Nycum, 240 Ill. 472; Jesperson v Mech, 313 Ill. 488. The fact, that there was a slight error in the description of a part of the premises, does not bar the taxing of a solicitor's fee for the complainant's

error in the description of a part of the premises, does not per-
se vitiate the decree. Stollart v Wyoum, 3 O Ill. 475;
Stephenson v Mason, 113 Ill. 429. The fact, that there was a slight
allowance of a solicitor's fee; Stollart v Wyoum, 3 O Ill. 475;
Under these circumstances a proper case was presented for the
was interposed by any of the parties defendant in the bill.
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with a full knowledge of the condition of the title in that
been properly released, and the plaintiffs in error purchased
the time the premises were sold that such dower interest had
Moreover, all the parties in interest, including the plaintiffs
in error, who purchased the premises, were fully aware, that at
the sale was therefore properly made free of such interest.
time of the sale he had no dower interest in the property, and
ments duly relinquished, and prior to the sale, no part of the
interest of Rowe would be relinquished by him; and it was after-
at the time of the entry of the decree for sale, that the dower
filed by leave of court. It consequently a pears from these pro-
ceedings, that the fact was brought to the attention of the court
in the amendment to the transcript of the record, which has been
it is practically disposed of by the court proceedings, as shown
premises, and the sale made subject thereto, it may be said that
been taken cognizance of, by the decree directing a sale of the
point made that the dower interest of Frank Rowe, should have
and these matters are not before the court. Concerning the
any of the questions raised in connection with such an agreement;

solicitor; Fread v Hoag 132 Ill. App. 333; especially since the error was not pointed out in the answers of the plaintiffs in error, nor any defense made by them on that ground.

The decree is affirmed.

solicitor; Tread v Peag 132 Ill. App. 333; especially since the error was not pointed out in the answers of the plaintiffs in error, nor any defense made by them on that ground.

The decree is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6754

(1082a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: on

MAR 9 1920

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6754

Georgina S. Bingham, appellant.

vs Appeal from Winnebago.

Frank H. DeArment, appellee.

Niehaus, P. J.

In this case Frank H. DeArment, the appellee, obtained a judgment for the sum of $255.00 and costs of suit against the appellant, Georgina S. Bingham, before a justice of the peace in Winnebago County on April 15, 1918. On May 2nd. 1918 which was the last day for perfecting an appeal, the husband of appellant, acting as agent in her behalf, appeared before the justice of the peace, and presented an appeal bond in the sum of $615.00 with L. G. Krueter as surety, and properly executed for an appeal to the circuit court. He paid all the costs which had accrued to the justice of the peace; and the justice accepted the appeal bond but did not formally approve it, nor determine the question of the sufficiency of the surety at that time, but said to appellant's husband that there was nothing further for him to do in the matter, and from this the appellant inferred, that the bond was approved; however several days thereafter the justice advised appellant, that he would not approve the bond because he considered the surety insufficient; thereupon on the 13th. day of May 1918, an additional surety was added to the bond, who was satisfactory to the justice, and he then approved the bond. Thereafter the bond was filed in the office of the clerk of the circuit court, together with a transcript of the justice's docket, in accordance with the statutory requirements. At the following October Term 1918, of the circuit court, the appellee made a motion to dismiss the appeal on the ground that appeal had not been taken within the 20 days required by the statute. The motion was heard by the court at

Gen. No. 8724

Georgina S. Bingham, appellant.

vs Appeal from Tiverton.

Frank H. DeArment, appellee.

Nielsen, P. J.

In this case Frank H. DeArment, the appellee, obtained a judgment for the sum of $585.00 and costs of suit against the appellant, Georgina S. Bingham, before a justice of the peace in Whiteside County on April 16, 1918. On May 3rd, 1918, which was the last day for perfecting an appeal, the husband of appellant, acting as agent in her behalf, appeared before the justice of the peace, and presented an appeal bond in the sum of $1000.00 with L. G. Fowler as surety, and properly executed for an appeal to the circuit court. He paid all the costs which had accrued to the justice of the peace; and the justice accepted the appeal bond but did not formally approve it, nor determine the question of the sufficiency of the surety at that time, but said to appellant's husband that there was nothing further for him to do in the matter, and from this the appellant inferred, that the bond was approved; however several days thereafter the justice advised appellant, that he would not approve the bond because he considered the surety insufficient; whereupon on the 13th. day of May 1918, an additional surety was filed to the bond, who was satisfactory to the justice, and in turn approved the bond. Thereafter the bond was filed in the office of the clerk of the circuit court, together with a transcript of the justice's docket, in accordance with the statutory requirements. At the following October Term 1918, of the circuit court, the appellee made a motion to dismiss the appeal on the ground that appeal had not been taken within the 90 days required by the statute. The motion was denied by the court by

at the same term, namely, On October 17, 1918, and an order was entered dismissing the appeal. Thereafter a special July term was called and held; and a petition was filed by appellant at that term praying that the case be redocketed, and praying that the order dismissing said cause, be vacated because an error of fact had been committed by the court in entering the order of dismissal; also praying , that the execution which had been issued by the justice of the peace be stayed. The petition recites the facts about the recovery of the judgment before the justice against the appellant, and the presentation of the appeal bond, and what occurred at the time of its presentation to the justice; also alleges, that the appellant has a meritorious defense to offer to the claim of the appellee. The petition also alleges, that the counsel for appellant, who had charge of her case was not present in court, at the time the motion to dismiss was heard, and had had no previous notice to appear; and that his partner who was present, and participated in the hearing, had not had, at the time of the hearing sufficient time to obtain the facts, to present to the court on the motion; and that therefore the true facts were not presented to the court at the time of the hearing. The court heard the petition, and denied it; also vacated the temporary order which had previously been entered staying the execution. From the order denying the prayer of the petition, an appeal is now prosecuted.

It is contended by the appellant, that the petition in question was in legal effect, amotion which our statute (Section 89 of the Practice Act) authorizes as a substitute for the common law writ of error coram nobis, which issued to correct errors of fact; that this case is one in which the common law writ of coram nobis could properly have been issued; and that therefore it was proper to resort to the motion provided for by the statute. It is clear however as a matter of law, that the facts for cor-

at the same term, namely, On October 17, 1910, and in order
was entered dismissing the appeal. Thereafter a second July
term was called and held; and a petition was filed by appellant
at that term praying that the cause be reinstated, and praying
that the order dismissing said cause, be vacated and set aside
of fact had been committed by the court in entering the order
of dismissal; also praying , that the execution which had been
issued by the justice of the peace be stayed. The petition
recites the facts about the recovery of the judgment before the
justice against appellant, and the presentation of the
appeal bond, and what occurred at the time of its presentation
to the justice; also alleges, that the appellant has a meri-
torious defense to offer to the claim of the appellee. The pe-
tition also alleges, that the counsel for appellant, who had
charge of her case was not present in court, at the time the
motion to dismiss was heard, and had had no previous notice to
appear; and that his partner who was present, had participated
in the hearing, had not had, at the time of the hearing sufficient time to obtain the facts, to present to the court on the motion; and that therefore the true facts were not presented to the court at the time of the hearing. The court heard the petition, and denied it; also vacated the temporary order which had previously been entered staying the execution. From the order denying the prayer of the petition, an appeal is now prosecuted.

It is contended by the appellee, that the petition in question was in legal effect, motion which our statute (Section 59 of the Practice Act) authorizes as a substitute for the common law writ of error coram nobis, writing issued to correct errors of fact; that this case is one in which the common law writ of coram nobis could properly have been issued; and that therefore it was proper to resort to the motion provided for by the statute. It is clear however as a matter of law, that the facts for cor-

rection of which, the writ of coram nobis was issued at common law, were not facts which were directly involved in the issues tried and determined by the court; but a fact aliunde; such a fact as for instance the infancy of the defendant against whom a judgment was rendered. The common law writ of error coram nobis was never exercised concerning facts, which though not before the court, had bearing on the conclusion which the court reached in determining the issue presented for adjudication. Estate of Gold v Watson, 80 Ill. App. 445. In this case the issue which was determined by the court at the hearing of the motion to dismiss, was the date upon which the appeal bond was approved. And all that appellant's petition amounts to, is a showing, that she had evidence of facts, which were not presented to the court at the time of the hearing, which if presented might have caused the court to reach a different conclusion on that issue, namely, that the appeal bond was legally approved within the statutory time. The evidence of all the facts averred in the petition however, was within the knowledge of the petitioner, at the time of the hearing, and should have been presented to the court before the determination of the matter. The explanations made in the petition as an excuse for not presenting them to the court at that hearing are clearly insufficient. If the attorney, who was present, and acted in appellant's behalf, did not have sufficient knowledge of the facts concerning her side of the case, or did not have sufficient time to present the evidence at that time, he should have asked the court for further time so that her side might have been fully heard. No request for further time, or for a postponement of the hearing appear to have been made. Moreover, appellant had the legal right, after the hearing, and after the order dismissing the appeal had been entered, at any time during

the October Term, which apparently lasted for many weeks after the order of dismissal had been entered, to make a motion to set aside and vacate the order, and have the case xxxxxxxxx re-instated; and upon that motion she could have made a showing of all the facts, which she alleges in her petition. But appellant not only failed to avail himself of this right, but waited until after the October Term had expired, and for nine months after the dismissal of the appeal, and until another and special term convened, before she filed her petition to have the court's xxxxx order set aside and vacated.

We are of opinion that under these circumstances the prayer of the petition was properly denied, and judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6719

(1083a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 658 3

BE IT REMEMBERED, that afterwards, to-wit: on

MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6719

Tony Domenicantonio, Admr., etc., appellee, vs. Clarence E. Fort, appellant.	Appeal from Winnebago.

O p i n i o n by D I B E L L , J.

On September 8, 1917, Guerino Domenicantonio, six and one-half years old, while crossing a public highway outside the limits of the City of Rockford, was struck and killed by an automobile driven by Clarence E. Fort. Deceased left surviving him his father and mother, a brother and two sisters. His father became administrator of his estate and brought this suit against Fort to recover for loss to the means of support of said next of kin. Plaintiff filed a declaration, and defendant pleaded the general issue. There was a trial and a verdict for plaintiff for $300. A motion for a new trial was granted. Upon a second trial plaintiff had a verdict for $2,000. A motion by defendant for a new trial was denied, plaintiff had judgment thereon, and defendant appeals. Defendant argues (1) that the declaration is insufficient to support a judgment; (2) that the court erred in certain rulings upon the admission of evidence; (3) that the court erred in rulings upon instructions; (4) that the court erred in denying a motion made by defendant that the court investigate the conduct of the jury during the trial; and (5) that the evidence does not support a verdict for plaintiff.

No. 6713

Tony Domenicantonio, Adm.,)
)
etc., appellee,)
)
vs.)Appeal from Hinsdale.
)
Clarence E. Port,)
)
appellant.)

O p i n i o n by D I B E L L , J.

On September 8, 1917, Guerino Domenicantonio, six and one-half years old, while crossing a public highway outside the limits of the City of Goodfort, was struck and killed by an automobile driven by Clarence E. Port. Deceased left surviving him his father and mother, a brother and two sisters. His father, having administrator of his estate and brought this suit against Port to recover for loss to the means of support of said next of kin. Plaintiff filed a declaration, and defendant pleaded the general issue. There was a trial and a verdict for plaintiff for $300. A motion for a new trial was granted. Upon a second trial plaintiff had a verdict for $3,000. A motion for judgment for a new trial was denied, plaintiff had judgment thereon, and defendant appeals. Defendant argues (1) that the declaration is insufficient to support a judgment; (2) that the court erred in certain rulings upon the admission of evidence; (3) that the court erred in ruling upon instructions; (4) that the court erred in denying a motion to take judgment for the court; and (5) that the evidence does not support a verdict for plaintiff.

The declaration contained three counts. The second was for wilful and wanton conduct by defendant. The court instructed the jury that that count had been withdrawn and should not be considered by the jury, and that the word "declaration" in the instructions meant only the first and third counts. Those are the only counts to be considered by this court. The abstract does not show that defendant demurred to the declaration or moved in arrest of judgment. The sufficiency of the declaration was not raised in the court below, and it cannot be questioned for the first time on appeal. But if that question were before us we are not convinced by the criticisms made. The first count follows the form approved in Chicago City Ry. Co. v. Jennings, 157 Ill. 274, and in many later cases. The third count charges that the accident happened in a public highway outside the limits of the incorporated city of Rockford, and that said auto was being driven there by Fort at a speed exceeding twenty-five miles per hour, and stated facts which made this a violation of the provision in Section 10 of the Motor Vehicle Law.

At the place of the accident 15th Avenue runs east and west. On the south side is a sidewalk, north of that a parkway in which are trolley poles, next north of that a single track street car line, than a prepared way twenty-three or twenty-four feet side for vehicles, north of that three feet of a grass plat, and then eight feet to a fence. At the time of the accident the father of deceased was driving a motor truck east on said highway. His machine worked hard. He turned out on the north grass plat and stopped to see what was the

matter, and ~~xxitxx~~ spent perhaps ten minutes in trying to find what was the matter with the motor. We lived in a house on the south side of that street and near there. The boy came across the street to where his father was working at the motor. The father testified that when he got through he cranked up the engine and then looked each way to see if anything was approaching and saw nothing coming; and then got into his place in the seat at the wheel on the north side, with his face turned east. Mike Lungo, who lived near by on the south side of that street, was riding with plaintiff that morning, and testified that he then started to get in, and looked each way; that the boy had started to go home, and this took him across the highway to the south east; that the boy turned to the left and looked towards his father; that Lungo saw plaintiff's auto coming from the west, and made some effort to stop the boy, but in vain. According to the preponderance of the evidence the boy was struck by the fender and knocked down, and the north front wheel of the auto passed over the boy's head. His skull was fractured. He was unconscious when picked up, and was taken to a hospital where he died soon after.

Lungo was asked if, as the boy started to go home, he went across the road. Defendant objected to this, and the objection was overruled, and the witness answered, "Yes." It is claimed that the question was leading,

and the ruling reversible error. The objection was general only. The attention of the court was not drawn to the present claim that the question was leading. That point is not raised by a general objection. Ruddy v. McDonald, 244 Ill. 494; Dunn v. People, 172 Ill. 582; Hilton v. Santelman, 129 Ill. App. 109. It is clear from all the proof that the boy was going across the road when he was struck, so that the ruling did not injure defendant. Plaintiff was asked the speed of the auto, and an objection by defendant was overruled, and he answered "He was going good thirty-five miles an hour." It is argued that the question called for an ultimate fact and not for an opinion, and therefore the ruling was erroneous. That was not the objection made, nor does the abstract state correctly the objection or the ruling. The witness was first qualified to give an opinion as to the speed of an auto by proving the length of time he had driven an auto before the accident, and by obtaining from him the statement that at the time he was able to judge of the speed of autos, and the question then complained of was put. The only objection made was that the witness did not see the auto till after it struck the boy. In overruling the objection the court admonished the witness that he must answer as of the time when he first saw the auto and not before that time. We find no error in that ruling. We think it clear from all the proof of the speed of the auto that the

jury could not fail to understand that each witness for plaintiff on that subject was given an opinion merely. There is nothing to show that any witness for plaintiff professed to state the speed as a matter of fact. Several witnesses for plaintiff were cross examined at much length as to questions put to them and answers thereto made by them on the former trial. Objections were sustained to a few of these questions and complaint is made of these rulings. Some of these supposed answers were so framed that they confirmed instead of contradicting what the witness had sworn to on this trial, and therefore were not impeaching questions. Others were elsewhere answered. Still others were immaterial. Perhaps one or two might properly have been answered. But we find no material error in these rulings.

The chief defenses relied on are that defendant was not negligent; that the accident did not happen as plaintiff claims; and that plaintiff was guilty of contributory negligence in permitting his boy to cross the street, and therefore cannot recover. Four witnesses testified for plaintiff as to the speed of the car. One stated it as about thirty-five miles an hour, another about thirty or thirty-five miles an hour, a third said thirty-five miles an hour and more, and the fourth a good thirty-five miles an hour. Defendant sat at the wheel on the right side of his car, and a Mr. Bather, a friend of defendant, was riding with him and sitting on the north side, and at the side where the boy was

hurt. He testified to his familiarity with such cars, that he observed the speedometer on defendant's car as they rode along 15th Avenue, and that it fluctuated between ten and fifteen miles an hour within the last two or three hundred feet prior to the injury to the boy, and that the car was not working well. A garage keeper testified that defendant's car was in bad condition at that time, had little power, could not run fast, and that he did not believe it could run twenty-five miles an hour. This raised a question of fact for the jury. Bather also testified that the car did not run into or strike the boy, but that the boy ran into the north side of the car. His description of the situation on direct and cross examination was impossible and could not be true, unless the evidence of all the other witnesses was untrue as to where the boy law when he was picked up. That part of his testimony tended to discredit his opinion of the speed. We cannot say the jury should have believed him and discredited all the other witnesses, or that another jury would be likely to do so. The question whether plaintiff exercised due care for his child's safety was for the jury. He testified he looked both ways after he cranked his car and before he got into the seat, and saw no car coming either way. He would be likely to look, for he was on the wrong side of the road and was about to turn into the way traveled by vehicles. If defendant was driving at the speed of thirty or thirty-five miles per hour, that would help to explain why plaintiff did not see defendant's car. It has been often held in this State that parents who have

to labor to support their families are not required to keep that constant watch over their children which may be properly required of those whose means enable them to employ servants for that purpose. City of Chicago v. Major, 18 Ill. 349; P. F. W. & C. Ry. Co. v. Bumstead, 48 Ill. 221; C. & A. R. R. Co. v. Gregory , 58 Ill. 226; City of Chicago v. Hesing, 83 Ill. 204; Gavin v. City of Chicago, 97 Ill. 66; C. & A. R. R. Co. v. Logue, 158 Ill. 631; I. C. R. R. Co. v. Warriner 132 Ill. App. 301. On further appeal in the latter case, the Supreme Court held that the trial court properly submitted to the jury the question whether the parents exercised the degree of care required of them. I. C. R. R. Co. v. Waeriner, 229 Ill. 91. We cannot say that the jury should have found this father guilty of contributory negligence, or that another jury would be likely to so find.

The first and third counts of the declaration charged that deceased was six and one-half years old, and that he was in the exercise of due care. Instructions given for plaintiff did not require plaintiff to prove that deceased exercised due care. Defendant contends that as plaintiff made this allegation he was bound to prove it, and that the instructions which omitted that requirement were erroneous . A child aged six and one-half years is incapable of contributory negligence. McDonald v. City of Spring Valley , 285 Ill. 521; I. C. R. R. Co. v. Jernigan, 198 Ill. 297. This therefore was an immaterial allegation in view of the undisputed proof that the child was of that age when he was killed. It was not necessary to prove due care by the child. Plaintiff's

instructions only authorized a verdict for plaintiff upon proof of the material allegations in the declaration. They did not authorize a recovery upon proof of a case not pleaded, as defendant contends here.

The motion by defendant that the court investigate the conduct of the jury was based solely upon defendant's affidavit of a conversation he had with a juryman after the trial. A verdict cannot be impeached by statements by a juryman after he has rendered his verdict. Wyckoff v. Chicago City Ry. Co. 234 Ill. 613; Foley v. Everett, 143 Ill. App. 350. The matter was of slight importance, and that the facts stated by the juryman influenced the verdict rested only upon the opinion or rather guess of the defendant. The court properly denied that motion. We are of opinion that the verdict is supported by the evidence and that no prejudicial error was commited at the trial.

The judgment is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6720

(1084a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6720.

William J. Weeks, Admr., etc., Appellee.	)	
vs	)	Appeal from Kankakee.
Eugene J. La Marre, Executor, etc., Appellant.	)	

Opinion by DIBELL. J.

Hiram L. Richardson died at Kankakee, Illinois, September 28, 1916, aged seventy-three years, and his will was admitted to probate. Mrs. Anne F. Weeks brought this suit in the circuit court of Kankakee County against his executor to recover for services as house keeper and nurse for Richardson, and filed the common counts in assumpsit. Pursuant to a rule of court, plaintiff filed a bill of particulars which has been preserved in the bill of exceptions. Therein plaintiff claimed for services as housekeeper from October 16, 1899, to January 5, 1903 168 weeks, at $10.00 per week; for services as housekeeper and practical nurse from January 5, 1903, to September 25, 1916, 702 weeks at $15.00 per week; and also for a large amount of furniture itemized in the bill of particulars and valued at $458, the whole making a total of $13,668.00, against which credits were admitted to the amount of $1,094.00, making the net amount of the

No. 6750.

Tillie J. Wells, Admr., etc.,)
)
Appellee.)
)
vs)
)
Eugene J. De Haven, Executor,)
etc.,)
)
Appellant.)

Appeal from Tuscarawas.

Opinion by DILL, J.

Piram L. Fisherdick died in Dundee, Illinois, September 28, 1910, aged seventy-three years, and his will was admitted to probate. His son T. Wells Fouche this suit in the circuit court of Tuscarawas County against his executor to recover for services as house keeper and nurse for Fisherdick, and filed the common counts in assumpsit. Pursuant to a rule of court, plaintiff filed a bill of particulars which has been preserved in the bill of exceptions. Therein plaintiff claimed for services as housekeeper from October 15, 1899, to January 5, 1903 163 weeks, at $10.00 per week, for servi- ces as housekeeper and practical nurse from January 5, 1903, to September 28, 1910, 718 weeks at $10.00 per week, and also for a large amount of furniture itemized in the bill of particulars and valued at $800, the whole making a total of $12,880.00, and that after crediting the said estate with the amount of $1,000.00, making the net account of the

claim $11,574.00. The executor filed a plea of non assumpsit and a plea of the Statute of Limitations, and issues were joined thereon. There was a jury trial and a verdict and a judgment for plaintiff for $4,500. Defendant appeals therefrom.

Richardson was a lawyer and had a home not very far from his law office. He was a bachelor. Mrs. Weeks was widow, living in Canada. In October, 1899, Mrs Weeks moved to Kankakee to become housekeeper for Richardson. She brought with her about $1,100 in money and a large amount of furniture and a son, William J. Weeks, then some 20 years of age. What arrangement there was between her and Richardson at the beginning cannot be definitely known, as both parties are dead and no writing has been found to explain the arrangement. There are various circumstances in proof tending to show that in the early years of this arrangement Richardson was not well to do and frequently found it difficult to furnish the money for the household expenses, and tending to show that in the latter part of the stay of Mrs Weeks in his home he had money and lands and was worth much more than at the beginning. Mrs. Weeks did the housework all the rest of his life, including the weekly washings, except that about once in a month a colored woman came and did washing and other household work. There was a garden. Mrs. Weeks did the work in that garden, including spading the soil. Richardson had a barn and kept a cow and sometimes more than one .

Mrs. Weeks milked the cow or cows and cleaned out the stable at least a part of the time. Richardson was an invilid for a number of the last years of his life. He had a affection of the bladder. His bed clothing had often to be changed on that account. Sometimes the use of a catheter was necessary and she brought the instrument to his bed or couch for his use and took it away. He had a partial paralysis of the bowels, to relieve which he often found it necessary to take cathartics. He had so little control of his bowels that sometimes they were discharged while he was in his office, at other times while he was on his way home and often while he was lying on a couch or in bed. He had to be attended to like a child. Mrs. Weeks removed his clothing and furnished him with fresh clothing and also changed his bed clothing and washed his person and all those soiled garments and his bed clothing. These spells would last several days and occurred eight or ten times a year for several years. There was much proof of these details, a part of it coming from Dr. Brown, his attending physician. It is entirely clear that no serving woman would be willing or be expected to render such services for the ordinary wages of a housemaid or of a housekeeper. There was proof of the value of such services which would justify the verdict here rendered. There was some proof to the contrary and especially tending to show that when certain witnesses were in the home during the last years of the life of Richardson, Mrs. Weeks, who was a small, frail woman,

was in feeble health and physically unable to render such services as appellee's witnesses described. This presented a question of fact for the jury, and the preponderance of the evidence seems to be with the appellee, and we cannot disturb the verdict for appellee, approved by the trial judge, even though, if the verdict on the facts had been the other way, and the trial judge had approved it, it may be that such a verdict also could not be disturbed on appeal as unsupported by the evidence.

One witness for appellant testified that about January , 1900, Mrs. Weeks told her that Richardson was paying her $2.50 a week. Another witness testified for appellant that somewhere between 1907 and 1911 Mrs. Weeks told her that she was getting $5.00 per week. Appellant contends that this establishes that in 1900 Mrs. Weeks and Richardson had an express contract for $2.50 per week and that somewhere between 1907 and 1911 they had an express contract for $5.00 per week, and that, as no later express contract was proved, it must be assumed that an express contract to pay Mrs. Weeks $5.00 per week remained in force the rest of his life, and therefore there could be no implied contract and no evidence was admissible to show what her services were reasonably worth. The language so attributed to Mrs. Weeks might be construed to mean that she had contracts for the payment of those sums, but they might be with greater propriety construed to mean only that those sums were being paid her by Richardson, without meaning that any contract had been made between them. This position taken by appellant ignores other evidence.

A witness testified that Richardson told her he had never settled with Mrs. Weeks and there had never been any understanding what he was to pay her. Several witnesses testified that they were told by Richardson during the last years of his life that he was going to, or intended to or should, give Mrs Richardson his home and $5,000 in money and this was said in such a connection as to show that he meant that that property should be compensation to her for her services to him and especially for her services as his nurse. There is evidence by more than one witness that he expressly promised Mrs. Weeks that she should have the home and $5,000 in cash at his death. One of these promises was made during the last week of his life. There is other evidence of expressions by Richardson of his great obligation to Mrs. Weeks. We are of opinion that this justified the jury in believing that there was not an express contract for $5.00 per week in force for all the latter part of Richardson's life. The evidence just recited, coupled with the fact that Richardson did not convey to Mrs Weeks the home and $5,000 in cash, justified the admission of evidence as to the value of her services.

Appellant contends that there could be no recovery except for the last five years of Richardson's life and that it was error to permit proof of her services prior to that time; and it is contended that services on the one side and payment on the other do not make a running account such as prevents the Statute of Limitations being a bar. Appellee offered in evidence a paper

in the handwriting of Richardson, which stated his side of an account between them from 1906 to 1913, and in that he not only charged her with the moneys he paid her but also moneys paid for her to Dr. Brown and to a hospital, for money he furnished her to make four trips to Canada, for money he paid for groceries to her son, but he also charged her for boarding her son, William, four years at $3.00 per week. This seems to show the account between them was not solely for wages and for money paid for wages. When all the evidence is considered, we conclude that the entire financial dealings between the parties from 1899 to the death of Richardson were open to consideration, and also that Richardson's express promise to her to pay her $5,000 and to convey to, her the home, which was proven to be worth $10,000, justified the verdict and indeed, required as large a verdict even if all matters prior to five years before Richardson's death had been excluded. Appellant offered in evidence a receipt dated April 4, 1916, purporting to be signed by Mrs. Weeks, the body of which said: "Received of H. L. Richardson $2,340.00 for services as housekeeper to date." Appellant contends that because of this receipt the verdict for $4,500 cannot be sustained. This assumes that this receipt bears the genuine signature of Mrs. Weeks. When it was offered objections was made that the signature of Mrs. Weeks was not proven. A janitor was called by appellant, who testified that it was her signature, but afterwards he testified that portions of the signa-

ture looked like here and other portions did not. William J. Weeks was called by appellant and testified that he was familiar with his mother's signature and that he did not know whether this was her signature or not. Appellant put in evidence numerous other receipts purporting to be signed by Mrs. Weeks and which no doubt were genuine. The jury had a right to compare the signature of the receipts in question with the other admittedly genuine signatures in evidence. Those receipts have been certified to this court for our examination under our rule. We are of opinion that the signature to the receipt in question so far differs from the admittedly genuine signatures that the jury were warranted in believing that it was not the signature of Mrs. Weeks.

The will of Richardson first directed the payment of his funeral expenses and just debts. It then gave to "My housekeeper, Mrs. Ann Eliza Weeks, a certain note and mortgage of $1,800.00 and the interest due thereon, made by William J. Weeks and wife to me. I also give and devise to her $800.00, which is to be in full payment of any claim which she may claim she holds against me for services as such housekeeper." It also provided as follows: "It is my will that my housekeeper, Mrs. Ann E. Weeks, is to occupy my dwelling house free of rent until the same is sold as above and also to have my household furniture so long as she occupies said dwelling." A previous provision had directed the sale of all his real estate by his executor. Mrs. Weeks remained in possession

of that home the rest of her life. The $1,800.00 note and mortgage referred to was in fact a trust deed by William J. Weeks, purporting to secure two notes signed by Weeks and payable to Richardson, one for $1,800 and the other for $1,000, but the $1,000 note had never been signed by Weeks. Evidently the papers had been prepared for a $3,800 loan, and then only $1,800 had been loaned. This trust deed and these notes were not found by Richardson's executor and were not among Richardson's papers. Appellant called Weeks as a witness and at the request of appellant he produced the trust deed, the $1,800 note and the unsigned $1,000 note. Appellant assumes that Richardson had delivered these papers to Mrs. Weeks in her lifetime. There was no proof to that effect. Appellant could have asked Weeks whether he paid them to Richardson, or how they came into his possession. Appellant did not make that inquiry and appellee was not a competent witness in his own behalf on that subject. In this state of the proof we think the presumption must be that Weeks paid the $1,800 to Richardson. The fact that he did not obtain a release from the trustee till long after Richardson's death seems to us immaterial. There is no proof therefore that Richardson's death ~~xxxxx xx xx xxxxxxxxx~~ delivered these instruments to Mrs. Weeks. The $200 mentioned in the will was never paid to Mrs. Weeks, and was only tendered at the close of plaintiff's proofs on this trial. Appellant contends that because Mrs. Weeks remained in the home she thereby accepted a part of the provisions of the

will and is therefore bound by all its provisions for her and can only have the $300 which the will provided. We are of the opinion that under the proofs heretofore recited, her retention of the possession may well be attributed to her faith in Richardson's promises made to her to cause that home to be hers at his death.

On cross examination of a witness for appellee appellant sought to prove by her that William J. Weeks owed her a large sum of money and that he had not sufficient property to pay it and that if this claim was allowed he probably would be able to pay her and that therefore this was an interest which might affect the value of her testimony? . The court sustained an objection to this line of cross examination. We think its admission would have led to inquiries immaterial to this case. In order to ascertain whether the witness had such interest, it would be necessary to know how much property Mrs. Weeks left, what debts she owed and how many heirs at law she had to share in the avails of this claim. We approve the ruling.

Complaint is made of instruction No. 3, given for appellee, which said that evidence of payment of money or gifts to William J. Weeks should not be considered unless made at the request of Mrs. weeks and with the understanding that the same should apply upon her services to Richardson. Appellant concedes that there is no evidence of payment of money or gifts to William J. Weeks and that being so, we think it was not harmful to appellant.

Moreover we approve the instruction. Complaint is made of appellee's instruction No. 7, a part of which was that if they believe from a preponderance of the evidence that the signature of any of the receipts in evidence purporting to be signed by Mrs. Weeks was not her signature, they should not consider it as evidence of payment. It is argued that there was no evidence against the validity of any receipt, yet the evidence above recited shows that we find such evidence in this record. We approve the ruling of the court upon the other instructions, of which complaint is made, for reasons heretofore appearing.

The declaration charged Eugene J. La Marre as Executor. The judgment is against "Eugene J. La Marre, Executor," etc. Appellant contends that this is a personal judgment against La Marre and therefore it must be reversed. This could have been corrected by motion in the court below. The judgment will be so corrected in this court as to be against La Marre as Executor and to be paid in due course of administration. As so modified the judgment is affirmed.

Judgment modified and affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6735

(1085a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6735.

Earl R. Palmer, et al., Plaintiff in error. vs. The Bull Dog Auto Fire Insurance Association, Defendant in error.	Error to peoria.

O p i n i o n by D I B E L L , J.

Earl R. Palmer and George L. Limmer sued the Bull Dog Auto Fire Insurance Association for loss of an auto by theft, and filed and amended several declarations. The cause was tried on the last declaration as amended and a plea of the general issue and a stipulation that all defenses of law and fact might be proven under said plea. There was a jury trial and a verdict for plaintiff for $500. Each side moved for a new trial and a new trial was granted and the cause was tried by another judge, and at the close of all the evidence the court directed a verdict for defendant and such verdict was rendered. Plaintiffs moved for a new trial for the sole reason that the court erred in directing a verdict for defendant. This motion was denied and defendant had judgment in bar. Plaintiffs sued out this writ of error to review said judgment.

Defendant is a voluntary association of auto owners whom it insures against loss by fire, by collision and by theft. Each member is called a subscriber and

No. 6732.

Earl R. Palmer, et al.,

Plaintiff in error.

vs.

The Bull Dog Auto Tire

Insurance Association,

Defendant in error.

sign a very lengthy contract containing some 55 paragraps. Its affairs are conducted by an advisory committee of five and by a general managing officer who is called an Attorney in Fact. The applicant is required to give the name of his auto, the date when it was made, its horse power and style and perhaps other particulars. During the first year the association will insure 80% of the list price of the car; during the second year 66⅔ % ; the third year 50%; the fourth and fifth years 35%; and after the car is five years old the association will not insure it unless passed upon by an official inspector, and then only for not exceeding 20% of its list price. Not every auto owner will be accepted as a subscriber, but he must be of good moral character, must be acceptable to the Attorney in Fact and must be deemed by him to be a suitable person, and the Attorney in Fact may cancel a certificate when a subscriber becomes undesirable. The Attorney in Fact may inspect any car for which an application is made. Each subscriber pays a membership fee and an annual fee. The losses are paid by assessments made from time to time pro rata, according to the amount of insurance each subscriber carries. This assessment is made to pay losses already sustained. Each subscriber makes a mutual agreement with all other subscribers. Each subscriber withdrawing is liable for all losses accruing before his withdrawal becomes effective. If a subscriber sells his insured car and

buys another, he may have his insurance transferred to the new car and have an insurance on such new car ascertain in the same manner above described. But before such insurance of the new car, (which is by a rider attached to the original policy,) the new auto must be acceptable to the Attorney in Fact. Assessments were required to be paid within 30 days after notice, and if not paid by noon of the 45th day after notice the subscriber stands suspended, which of course also suspends his policy.

On December 18, 1916, plaintiffs obtained a policy insuring their Buick car for $650. They sold that car in June, 1917, and at some time thereafter, perhaps in that month, purchased a Chandler. An assessment of $5.87 was levied upon them in July 1, 1917, and they were notified thereof, Plaintiffs lived in Proeia and the Attorney in Fact lived in Washington, Illinois. At about three o'clock P. M. of August 7, 1917, plaintiffs claim they mailed a letter addressed to the Attorney in Fact at Washington, Illinois, in which they inclosed a check for $7.00 to pay their assessment and to pay the fee for transfer, and they therein asked that the insurance be changed to a six-cylinder Chandler, instead of the Buick. About seven P. M. that day one of the plaintiffs left said Chandler car in front of a bank building in Peoria and when he came to the place about 9 P. M. the car had been stolen and has never since been recovered. The Attorney in Fact received said application on August 8 and appeared

in Fact received said application on August 8 and released
stolen and has never since been recovered. The Attorney
Chandler out in front of a bank building in Peoria and
also be gone to the place about 4 P. M. the car had been
seven P. M. that day came to the plaintiff left said
a six-cylinder Chandler. Owners of the Union. About
Day their assessment and to pay the tax for transfer,
and came therein before this information be obliged to
Illinois, in which they refused a check for $7.00 to
addressed to the Attorney in Fact at Washington,
August 7, 1917, plaintiffs claim they mailed a letter
Washington, Illinois. At about three o'clock P. M. of
lived in Peoria and the Attorney in Fact lived in
1917, and they were notified thereof. Plaintiffs
perhaps in that month, purchased a Chandler. An
our in June, 1917, and at some time thereafter,
assessment of $6.87 was levied upon them in July 1,
insuring their motor car for $800. They paid said
On December 15, 1916, plaintiffs obtained a policy
suspends his policy.
be acceptable to the Attorney in Fact. Assessments
such insurance of the new car, (which is by a rider
the new car and have an insurance or such new car-
ried in the same manner above described. Put before
policy must, he may have his insurance transferred to

it and issued a rider, insuring said Chandler including loss by theft for $1116.80, and mailed the same to plaintiffs and they attached the rider to the policy. On August 8 plaintiffs mailed a notice to the Attorney in Fact of the theft of the car, and that notice was received by the Attorney in Fact on August 9. The association refused to pay for the loss and this suit is brought to recover therefor.

Counsel for each side argue the case as if the material question is whether the policy was in effect on August 7, when the Chandler was stolen. Defendant argues that this application for the transfer was in fact made out in the evening of August 7, after plaintiff knew the car was stolen. There are some suspicious circumstances connected with the application for the renewal. It seems strange that after having failed to pay their assessment and having allowed the policy to lapse by the terms of the contract, plaintiffs should happen to conclude to pay the assessment and have this transfer on the same day the new car was stolen and a few hours before it. The letter which they wrote asking for the transfer was dated: "Tuesday afternoon, August 7, 1917." The ordinary method of dating a letter written by business men, as these men were, would be simply to give the month, the day of the month and the year. That they should have written out "Tuesday afternoon " was unusual in ordinary business practice. But the plaintiff who wrote the letter and his office girl each

testified it was mailed about 3 P. M. , and that presented a question of fact which the trial judge was not at liberty to determine, and which should have been left to a jury if defendant desired the benefit of its claim that the letter was written that evening after plaintiffs knew the Chandler was stolen, and therefore we must disregard the suspicious circumstances referred to and must assume that the application was mailed about 3 P. M. that day. We are, however, of opinion that the policy was not in force on August 7. Plaintiffs had no absolute right to have the transfer made. The application for the transfer did not conform to the requirements of the contract for transfer, for it did not state the year when said Chandler was manufactured not the other details required, except to say that it has six cylinders. The Attorney in Fact had a right by the contract to determine whether the new auto was acceptable to him. Therefore the rider, which was dated August 8, insuring the Chandler, did not become effective until the plaintiffs had been reinstated and the Attorney in Fact had decided that the Chandler was acceptable to him and had determined the amount for which the company would insure the Chandler. Therefore the new contract could not become effective till he signed the rider and perhaps not until he mailed it to plainiffs, addressed to Peoria. There , therefore was no insurance on this car at the time it was stolen. But, if the old policy was in force on August 7, it insured a Buick car and that car was never stolen. If plaintiffs had brought suit that night on

this policy, it must have been to recover for the Buick car which they had long since sold, and to recover $650, whereas they here claim $1110.80 .

Plaintiffs claim that the policy was in force on the Chandler car because an adjuster of defendant named Robinson had left a card at the office of one of the plaintiffs, ~~duxxxg~~ dunning them for said assessment of $5.87, which said plaintiff found in his office at noon of August 3. This was heresay testimony as to the fact of such notice being left at plaintiff's office, except that said plaintiff testified that some part of said card was in the handwriting of Robison. It was not shown that Robinson had any power to bind the association. Plaintiffs in their brief quote from the alleged testimony of Robinson, but their abstract does not show that any such witness testified. Perhaps they are referring to testimony given at the former trial which is not before us. We decline to hunt through this record to see if we can find evidence not abstracted. But we fail to see that a demand for the payment of that past due assessment, if made by the association itself, would continue the policy in force. That assessment was made to pay losses which had been sustained prior to July 1, 1917. Plaintiffs were liable to pay that assessment even if they had permitted the policy to be suspended by the nonpayment thereof. They owed it to the association to pay losses incurred while they were members in good standing and which they contracted to

pay. They could not escape that liability by selling their car and dropping their insurance, which was what they ~~it~~ in fact did. The remittance was for thriteen cents more than said assessment and the fees for transfer. The Association did not return the thirteen cents. We are of opinion that its retention of that thirteen cents did not make defendant liable in this case, especially as the declaration was not framed to recover it. But further, their insurance remained good so far as the company knew for 45 days after defendants were notified of the assessment, and if they had kept the Buick it would have been protected by that insurance till noon of the 45th day. The proof showed that the aliquot part of the next assessment which they should have paid to extinguish their liability under their agreement would have been $3.66. That was not rebutted, and defendant might retain the thirteen cents to secure a part of that liability.

The judgment is therefore affirmed.

The judgment is therefore affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6750

(1082)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 659

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rehearing denied Apr 14/20

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6750.

Roy K. Farwell, Appellant,
vs
Pearl M. Farwell, Appellant.

Appeal from Stephenson.

Opinion by DIBELL, J.

On October 8, 1915, Pearl M. Farwell, obtained a divorce from Roy K. Farwell, in the circuit court of Stephenson County for extreme and repeated cruelty. The decree found that the names and ages of their children then were Knight d., 14 years; Nancy l., 11 years; Lalon J., 8 years; Betsy B., 7 years; Charles R., 4 years. The decree found that both parties were proper and fit persons to have the care, custody, control and education of said children. Their care, custody, control and education was given to Mrs. Farwell, subject to the right of Mr. Farwell to visit said children at all reasonable times, and to have them in his care and custody for three months each year without interference by Mrs. Farwell. Farwell was ordered to pay Mrs. Farwell $75.00 per month for the support of said minor children till Lalon J. became 20 years of age, but if $75.00 per month should exceed one-third of Farwell's annual income, that allowance was to be reduced to one-third of said income. For several years thereafter Farwell lived with his sister next door to

No. 1720.

Roy K. Farrell,

Appellant,

vs.

Appeal from Richardson.

Pearl M. Farrell,

Appellant.

Opinion by Gaines, J.

On October 8, 1918, Pearl M. Farrell, obtained a divorce from Roy K. Farrell, in the district court of Richardson County for extreme and cruel conduct. The decree found that the homes and ease of their children then were Kinney D., 14 years; Henry L., 11 years; Helen L., 9 years; Mary C., 7 years; Charles R., 4 years. The decree found that both parties were placed on 111 persons to have the care, custody, control and education of said children. Their care, custody, control and education was given to Pearl Farrell, subject to the right of Mr. Farrell to visit said children at all reasonable times, and to have them in his care and custody for three months each year without interference by Mrs. Farrell. Farrell was ordered to pay $10.00 per month for the support of said minor children till [illegible]. [illegible] to pay the sum of $70.00 per month which [illegible] by Farrell's annual income, that alimony was to be [illegible] to one-fifth of said income. The record shows that Farrell lived with his mother next door to

where Mrs. Farwell lived, and he saw the children dailey and frequently had some of them in to dinner with him. Afterwards Mrs. Farwell and the children removed to Chicago and since that time Farwell has not had the children three months in any one year, and has had difficulty in getting them as the decree provided. In January , 1919, Farwell married again. On June 25, 1919, he filed a petition in the circuit court of Stephenson County asking to have the custody of Charles and Lalon during July and August of 1919, and of betsy during August, 1919, which time the petition represented was a vacation period which would not interfere with the school work of the children. Mrs. Farwell answered denying Farwell's right to that relief, and also filed a cross petition in which she asked to have certain changes as to the sum to be paid for the care of the children and also asked that the decree be so modified that the custody of said children be awarded entirely to her, subject to the right of Farwell to visit them ~~xxx~~ at reasonable times. Afterwards Mrs. Farwell withdrew her cross petition, except so far as it asked a modification of the decree as to the custody of the children. Proofs were heard. The court found Farwell entitled to the relief he asked for and that Mrs. Farwell was not entitled to have the decree modified as to the custody of the children. The prayer of her cross petition was therefore denied, and an order was entered giving Farwell the custody of Charles and Lalon during July and August, 1919, and of

Betsy during August, 1919, and that Mrs Farwell turn over the custody of said children to him for that period of time. Mrs. Farwell asked an allowance for solicitor's fees and expenses in resisting Farwell's petition. That application was denied. Mrs. Farwell appeals.

The time within which the order was to be carried out has passed. The question which party should have had the children in July and August, 1919, is now a mere academic one. Courts usually do not review cases to decide such questions. People Ex Rel. Wilsonx.v. Rose, 81 Ill. App. 387 and Kendrick v. Wendel 157 Ill. App. 540 and cases there cited. Mrs Farwell, however, contends that she is entitled to a modification of the decree giving her the sole custody of the children and that she was entitled to an allowance for solicitor's fees and enpenses. Both sides have asked us to pass upon the merits , and the same controversy is liable to arise at any time hereafter, and we therefore conclude to pass on all the questions.

Farwell's petition alleged that he had requested the custody of said children for the summer of 1919 and that Mrs. Farwell had denied his request. It is contended that this allegation was not sustained by competent proof and therefore the court should have denied Farwell's petition. The original decree did not specify what time in the year he should have the custody of the children and he had a right to ask to have that modified and the time fixed, without previously making any request

of Mrs. Farwell. Again, the court inquired during the hearing if Mrs. Farwell was willing to comply with the provisions of the decree, and her solicitor answered in the negitive. It is entirely clear from the evidence of Mrs. Farwell and from the language of her solicitor in argument here, that Mrs. Farwell does not intend to give Farwell the custody of said children if she can avoid it. Therefore the petition was rightfully entertained without proof of a prior express refusal by Mrs. Farwell.

It is contended that the court admitted copies of letters and telegrams sent by Farwell, without giving Mrs Farwell notice to produce the original, and that this was error. These letters and telegrams related to previous efforts by Farwell to obtain temporary custody of some of the children pursuant to the decree, and are only important as they may tend to show the unwillingness of Mrs. Farwell to adide by the decree and that is sufficiently shown otherwise. This is a chancery case and the admission of incompetent evidence is not ground for reversal if the competent evidence supports the decree. It is also argued that the court erred in sustaining objections to questions put by Mrs. Farwell's solicitor to Farwell as to whether, before the divorce, Mrs. Farwell and he had quarrels concerning the woman who is now Farwell's wife, and whether prior to the divorce his wife accused him of paying considerable attention to said woman. This was on cross examination of Farwell and the questions were not proper cross examination on anything testified to to

by Farwell on direct examination. The question, if answered affirmatively, had no bearing on the question whether the present Mrs. Farwell was a fit person to have the custody of said children while Farwell was absent in his usual employment during the day. If the character of Farwell's present wife was such that it was not adviseable to allow these children to spend July and August in his home, that fact should have been proved directly and not by any inference from what Mrs. Farwell said before the divorce was obtained. The decree of divorce was not, based on any improper conduct on the part of Farwell with said woman.

It is contended that Mrs. Farwell proved without contradiction that the present wife of Farwell is a person unfit to have any care or custody of her children, and that therefore the court should have denied Farwell's petition. Mrs. Farwell did testify that in her opinion said woman was not a fit person, but that was a statement of an opinion and not of a fact, and to permit the decision to rest on her opinion is to make her the judge in her own case. She gave the reason why she had that opinion and it did not relate at all to the character of the woman, but was only that said woman had not been a mother herself and therefore would not be likely to know how to take care of children. It is a matter of common knowledge that many women who have never been mothers have excelled in wise care for the children of others. Farwell's employment occupies certain hours in the morning and in the afternoon of each week day. Obviously

the children, if in any home provided by him, must be under the care of some other person during those hours. That fact was obvious when the decree originally awarded him the custody of the children for three months in the year, yet no appeal was taken from that decree on that account. If Mrs. Farwell considered the part of the decree unwarranted which established that Farwell was a fit person to have the care and custody of the children and awarded him their care and custody for three months of each year, she should have appealed from that part of the decree. We must assume that that finding that Farwell was a fit person was duly proved in that case. Mrs. Farwell in obtaining the decree placed Farwell in a position where he could legally marry another woman, and if Mrs. Farwell was jealous of the woman in question she knew she was affording him an opportunity to marry that woman and that in that event the children would be in the family with that wom n for three months in the year. If that possibility was no objection to the decree then, the realization is not necessarily an objection now. The children would really be in the custody of their father, and there is no competent proof that the second wife is unfit to assist, and no other change of circumstances is shown which would justify depriving Farwell of the custody of his children a part of each year. We are of opinion that it was proper for the court below to fix the school vacation period as the time when Farwell should have the custody of his children, and that it is right that he should have them a part of the time, and that they should not become entire strangers to him. Mrs Farwell

they should not become entire strangers to him. Mrs. Farwell should have the custody of his children, and that it is right that he should have them a part of the time, and that to fix the school vacation period as the time when Farwell We are of opinion that it was proper for the court below Farwell of the custody of his children a part of each year. of circumstances is shown which would justify depriving that the second wife is unfit to associate, and no other objection now. The children would really be in the custody of their father, and there is no competent proof objection, the realization is not necessarily so dectee then, the realization is not necessarily so year. If that possibility was no objection to the be in the family with that one n for three months in the question, she knew she was affording him an opportunity to marry that woman and that in that event the children would woman, and if Mrs. Farwell was jealous of the woman in Farwell in a position where he could legally marry another in that case. Mrs. Farwell in obtaining the decree placed that that finding that Farwell was a fit person was only proved appealed from that part of the decree. We must assume and custody for three months of each year, she should have care and custody of the children and awarded him their care which established that Farwell was a fit person to have the If Mrs. Farwell considered the part of the decree unfavorable no appeal was taken from that decree on that account. the custody of the children for three months in the year, yet fact was obvious when the decree originally awarded Mrs the care of some other person during those hours. That the children, if in any home provided by him, must be under

testified that the children did not want to come to him, but they were not called as witnesses, so that the reason could be ascertained. That statement by Mrs. Farwell was mere hearsay, and it is not difficult for a mother under such circumstances to prejudice the children against their father.

We do not decide whether there can be circumstances where a wife, after obtaining a divorce from her husband, may obtain solicitor's fees and expenses in later legal proceedings between them about the custody of the children, but certainly where, as we hold here, the wife is resisting the decree of the court without just cause, she ought not to have solicitor's fees or expenses to aid her in her improper refusal to obey the decree.

The order is affirmed.

HEARD, J. took no part.

testified that the children did not want to come to him, but they were not called as witnesses, so that the reason could be ascertained. That statement by Mrs. Farrell was mere hearsay, and it is not difficult for a mother under such circumstances to prejudice the children against their father.

We do not decide whether there can be circumstances where a wife, after obtaining a divorce from her husband, may obtain solicitor's fees and expenses in later proceedings between them about the custody of the children. But certainly where, as we hold here, the wife is resisting the decree of the court without just cause, she ought not to have solicitor's fees or expenses to aid her in her improper refusal to obey the decree.

The order is affirmed.

HAND, J. took no part.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6712

(1087a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

Certiorari denied

217 I.A. 659

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6713

Dulcena B. Creps, Administratrix of the estate of S. F. Creps, deceased, Defendant in error.	)	
vs	)	Error to Iroquis.
Cleveland, Cincinnati, Chicago and StLouis Railroad Company, a Corporation, plaintiff in error.	)	

O p i n i o n b y H E A R D, J.

This is a suit by Dulcena B. Creps, administratrix of the estate of S. F. Creps, deceased, for the benefit of his widow and next of kin against the C.C.C. & St, L Ry Co. plaintiff in error, for pecuniary damages alleged to have been sustained by them by reason of the negligent killing of S. F. Creps by an engine of plaintiff in error at the Village of Donovan.

The amended declaration to which a plea of not guilty was filed consisted of four counts. The first count charged negligence generally. The second a violation of a speed ordinance. The third a failure to ring a bell or blow a whistle and the fourth count alleged a dangerous hole in the First street crossing and that deceased caught his foot there and was struck before it could be released. The suit was originally brought in the Superior court of Cook county, but the venue was changed to the circuit court of Iriquois county, where

No. 6713

Dulcena S. Crepa, Administratrix of the estate of S. F. Crepa, deceased,

Defendant in error.

vs

Cleveland, Cincinnati, Chicago and St. Louis Railroad Company, a Corporation,

Plaintiff in error.

Error to Vermilion.

O p i n i o n b y H E A R D, J.

This is a suit by Dulcena S. Crepa, administratrix of the estate of S. F. Crepa, deceased, for the benefit of his widow and next of kin against the C.C.C. & St. L. Ry. Co. plaintiff in error, for pecuniary damages alleged to have been sustained by them by reason of the negligent killing of S. F. Crepa by an engine of plaintiff in error at the Village of Donovan.

The amended declaration to which a demurrer of not guilty was filed consisted of four counts. The first count charged negligence generally. The second a violation of a speed ordinance. The third a failure to ring a bell or blow a whistle and the fourth counts alleged a dangerous hole in the floor at which crossing and that deceased caught his foot there and was struck before it could be released. The suit was originally brought in the Superior court of Cuyo county, but the venue was changed to the circuit court of Vermilion county, where

the case was tried resulting in a judgment for $3000 in favor of defendant in error, and the cause is before this court on writ of error to review that judgment.

Over the objection of plaintiff in error the court permittedproof of the number, ages, sex and names of the children of deceased. This evidence was later stricken out. The admission of this evidence is assigned as error and in his argument in this court attorney for plaintiff in error say: "The purpose of introducing this evidence was clearly for its effect on the Jury, and as the proof had been put in and gone to the jury, counsel for plaintiff below then asked the court to strike out part of it. You could not possibly cure the error. The effect on the mind of the jury could not be so easily eradicated, and having heard this proof it would be impossible for them not to consider it in arriving at their verdict. It should not have been admitted, and counsel for plaintiff below realizing the error sought to correct it by his motion. The case was close and no appeal to sympathy should have been permitted". The misleading character of this argument and the extreme triviality of the assignment is demonstrated by an inspection of the record which shows that the children (?) were four in number, Fanney Poney, aged 39, Raymond Creps, aged 32, Valera, aged 30, and Minnie, aged 28.

On the trial plaintiff in error offered evidence of declarations of deceased made at various times which were claimed to show a suicidal intent. The court rejected this offer. It was not shown that the declarations

were accompanied by any act tending to show an intent to commit suicide. Evidence of this character has uniformly been held incompetent by the Courts of this state. Siebert vs People 143 Ill. 571; Greenacre vs. Aurora Brewing Co., 200 Ill. App. 194; Greenacre vs Filby, 276 Ill. 294.

Deceased was struck by the train within the village limits of the Village of Donovan. Defendant in error introduced in evidence a copy of an ordinance passed by the Village Council in 1901, limiting the speed of freight trains witnin the village limits to six miles per hour. There was no newspaper published in Donovan in 1901. The Clerks certificate to the copy of the ordinance complied with the requirements of the statute and its admission in evidence was not error. Prairie du Rochu vs. Milling Co. 348 Ill. 57.

It is urged that the ordinance is unjust, oppressive, discriminating and a burden on interstate commerce and in violation of the federal constitution. S.A. Ry. Co. vs Blackwell 244 U. S. is relied upon to support this contention. The facts in that case are so different from the facts in this case that the decision is not at all in point here. It is within the undoubted province of the state legislature to amke regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precaution to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and generally, with regard to all operation in which the lives and health of people may be endangered, even though such regulations affect, to some

extent, the operation of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations on the same subject, are free from all constitutional objections and unquestionably valid.

In C & A R.R. Co. v City of Carlinville 300 Ill. 314 in discussing an ordinance limiting the speed of freight trains to six miles, the same limit as prescribed by the Donovan ordinance the Court says: "This ordinance, to be valid, must not, therefore, be unreasonable. The presumption, however, is in favor of its validity and that it is reasonable, and it is incumbent upon appellant to point out and show affirmatively wherein such unreasonableness consists. People v. Greiger, 138 Ill. 401.

Again on page 325 the court says: "The next question which presents itself for consideration is, does the ordinance in question impose an unreasonable restriction upon interstate commerce and the speedy transportation of the United States mail. We are of the opinion that it does not. The ordinance was passed as a police regulation for the preservation of the safety of the public and the protection of life and property, and was no more than a fair exercise of the police power vested in the city (Citing cases.) The ordinance does not undertake to regulate commerce between the states or interfere with the transportation of the mail, and amounts to but a reasonable regulation of the speed of trains within the corporate limits of the city, and such legislation has uniformly been held to be valid." There was no evidence tending

to show the unreasonableness of the Donovan ordinance and we must hold it to be a valid ordinance.

Plaintiff in error contends the deceased was not struck upon the street crossing. There was evidence tending to show that a shoe and heel of a shoe were found upon the crossing the night of the accident. Whether or not the accident occurred at the street crossing was a question of fact for the jury upon which they must have passed favorably to defendant in error and we see no reason to interfere with that finding.

At the close of all the evidence in the case plaintiff in error requested the court to instruct the jury to find the defendant not guilty. There was ample evidence upon which to submit the case to the jury and to have given the instruction would have been reversible error.

Complaint is made of the court's refusal to give other of the plaintiff in errors instructions. These instructions were properly refused as some of them were not based on the evidence while the substance of the others were contained in other instructions, which were given.

Plaintiff in error contends that the evidence does not show that it was guilty of negligence. The evidence shows that the train in question was going at a rate of speed greatly in excess of the speed limit of the ordinance. The jury found that there was negligence on the part of plaintiff in error and were justified by the evidence in so doing.

It is claimed that the evidence fails to show that deceased was in the exercise of ordinary care for his own safety, at the time of the accident.

There was no eye witness to the accident. Several witnesses testified that deceased was a sober man of careful habits. This evidence has been held when taken in connection with the circumstances of the case to warrant the jury in finding deceased was in the exercise of ordinary care at the time of the accident. I. C.R.R. v. Nowicki 148 Ill. 28; Follell vs I.C.R.R. , 209 Ill. App. 81; C.B.& Q. vs Sunderson 174 Ill. 495; I.C.R.R. vs Prickett, 210 Ill. 140.

It is finally insisted that the verdict is contrary to the evidence in that it is not shown that plaintiff in error's negligence was the proximate cause of the accident. The evidence showed that plaintiff in error was negligent in running its train at a high rate of speed in violation of the village ordinance. It is evident that if deceased and the train of plaintiff in error were both in motion the two would not have come together at the particular time, at the particular place of the accident if it had not been for the excessive speed of the train.

There was evidence tending to show that deceased was in the exercise of ordinary care for his own safety, and evidence tending to show negligence of plaintiff in error at the time of the accident and it was a question of fact for the jury to determine from all the facts and circumstances in evidence whether or not such negligence was the proximate cause of the accident and we are not disposed to interfere with their finding.

The judgment of the Circuit Court is affirmed.

The judgment of the Circuit Court is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6713

(1088)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 659 3

BE IT REMEMBERED, that afterwards, to-wit: on

MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6713

B. Manfield,
Appellant,
vs
B. Weinman and M. Werner,
co-partners, doing bueiness under
the firm name of Weinman & Werner,
Appellees.

Appeal from Dekalb.

O p i n i o n by H E A R D, J.

This was a suit by B. Manfield against B. Weinman and M. Werner to recover damages on account of an alleged breach of contract by the defendants as partners for the delivery of two hundred tons of cast scrap iron. The plaintiff originally filed the common counts and special counts counting on the contract, and later some additional counts, to which a plea of the general issue was filed and a special plea of the statute of frauds. Issues being joined, the case went to trial, and at the close of the evidence for the plaintiff the defendants obtained leave for and filed a plea, which was called in the record a plea in abatement denying the partnership. The plaintiff excepted to permitting the so-called plea in abatement to be filed.

The trial proceeded and after the arguments to the jury had been entered upon the Plaintiff dismissed the suit as to the defendant Werner and ~~that~~ the trial proceeded against the defendant Weinman alone, resulting in a verdict for the defendant. Motions for new trial and in arrest of judgment were overruled, judgment rendered on

No. 6713

B. Wentield,

Appellant,

vs

B. Weinman and H. Tanner,
co-partners, doing business under
the firm name of Weinman & Tanner,

Appellees.

Appeal from Duluth.

O p i n i o n by K E A R N E Y, J.

This was a suit by B. Wentield against B. Weinman and H. Tanner to recover damages on account of an alleged breach of contract by the defendants as partners for the delivery of two hundred tons of cast steel iron. The plaintiff originally filed the common counts and special counts counting on the contract, and later some additional counts, to which a plea of the general issue was filed and a special plea of the statute of frauds. Issues being joined, the case went to trial, and at the close of the evidence for the plaintiff the defendants obtained leave for and filed a plea, which was added to the record a plea in abatement denying the partnership. The plaintiff accepted to permitting the so-called plea in abatement to be filed.

The trial proceeded and after the arguments to the jury had been entered upon the Plaintiff dismissed the suit as to the defendant Tanner and the trial proceeded against the defendant Weinman alone, resulting in a verdict for the defendant. Motions for new trial and in arrest of judgment were overruled. Judgment rendered on

the verdict and plaintiff appealed to this court.

The only assignment of error argued by appellant in his brief is that the court erred in allowing the so-called plea in abatement to be filed. The plea is as follows: "The above named defendant B. Weinman, by James M. Cliffe, his attorney, comes and defends, etc., and says that the plaintiff ought not to have his said action against the above named defendants as copartners because, he says, that the above named defendants were not in partnership at the time alleged in plaintiff's declaration and thus defendant denies that any partnership existed as alleged in plaintiff's declaration at the time of the transactions complained of therein." It was subscribed and sworn to by the defendant B. Weinman. It has neither the beginning, nor the conclusion of a plea in abatement and is, if anything, a plea in bar under Sec. 54 of the practice act. Even if it were error (which we do not hold) to allow the filing of this plea at that stage of the case the plaintiff could not possibly have been harmed by it as he dismissed the suit as to the defendant Werner and upon the merits the jury found in favor of the defendant Weinman, with whom personally plaintiff testified the contract sued upon had been made.

The judgment of the Circuit Court is affirmed.

the verdict and plaintiff appealed to this court.

The only assignment of error argued by appellant in his brief is that the court erred in allowing the amendment in abatement to be filed. The plea is as follows: "The above named defendant T. Talmage, by James M. Little, his attorney, comes and defends, etc., and says that the plaintiff ought not to have his said action against the above named defendants as copartners because, he says, that the above named defendants were not in partnership at the time alleged in plaintiff's declaration and time defendant denies that any partnership existed as alleged in plaintiff's declaration at the time of the transactions complained of therein." It was subscribed and sworn to by the defendant B. Talmage. It has neither the beginning, nor the conclusion of a plea in abatement and is, it anything, a plea in bar under Sec. 54 of the practice act. Even if it were error (which we do not hold) to allow the filing of this plea at that stage of the case the plaintiff could not possibly have been harmed by it as he dismissed the suit as to the defendant Farmer and upon the merits the jury found in favor of the defendant Talmage, with whom personally plaintiff testified the contract was made and not with Farmer.

The judgment of the Circuit Court is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6717

(1089a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 659

BE IT REMEMBERED, that afterwards, to-wit: on

MAR 9 1920

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6717.

Charles W. Pease, Administrator of the Estate of Warren W. Pease, Deceased,
Plaintiff in error,
vs
Rockford City Traction Company and Rockford & Interurban Railway Company, corporations.
Defendant in error.

) Error to Winnebego.

O p i n i o n by H E A R D, J.

On December 31, 1914, Warren W. Pease began an action on the case against appellees for personal injuries received while in the employ of the defendants through their negligence, on July 21, 1914. On February 11, 1915, he died, and his death having been suggested to the court his administrator was substituted as plaintiff, and, on leave given, the praeipe and summons were amended so as to show Charles W. Pease, administrator of the estate of Warren W. Pease, deceased, as plaintiff. An amended decraration of four counts was filed on May 10, 1915, each count alleging the same negligence as was charged in the original declaration. The first and third counts charged that the deceased died from causes unknown to the plaintiff, the second and fourth that his death was the result of the injuries received. The second count, however, contained no allegation that the deceased left a widow or next of kin surviving him, which the fourth count did contain such an allegation.

The filing of the fourth count was an original effort then first begun to prosecute a new and distinct cause of

No. 5717.

Charles T. Pease, Administrator)
of the Estate of Warren W.)
Pease, Deceased,)
Plaintiff in error,)
vs) Error to Hennepin.
Rockford City Traction Company)
and Rockford & Interurban Rail-)
way Company, corporations,)
Defendant in error.)

O p i n i o n by B E A N, J.

On December 23, 1912, Warren T. Pease began an action on the case against appellees for personal injuries received while in the employ of the telephone through their negligence, on July 21, 1904. On February 11, 1908, he died, and his death having been suggested to the court, the administrator was substituted as plaintiff, and, on leave given, the pleadings were amended so as to show Charles T. Pease, administrator of the estate of Warren T. Pease, deceased, as plaintiff. In regular succession at four counts was filed by May 12, 1910, each count alleging the same negligence as was charged in the original declaration. The first and third counts charged that the deceased died from causes traceable to the plaintiff, the second and fourth that his death was the result of the injuries received. The second count, however, contained no allegation that the deceased left a widow or next of kin surviving him, which the fourth count did contain and an allegation.

The filing of the fourth count was an original effort then first began to prosecute a suit which finally came of

action. The defendants waived their right to object, chose to appear and joined issue. Further proceedings were had in the circuit court, appeals taken to the Appellate and Supreme courts (204 App. 130; 279 Ill. 513) and after remandment to the Circuit court the first three counts were dismissed and the cause tried upon the forth count and upon conclusion of plaintiff's testimony the Court instructed the jury to find the defendant not guilty and judgment was rendered against the plaintiff. The cause is brought to this court by writ of error.

Upon the trial of the cause Plaintiff in error read in evidence the deposition of deceased taken in the original case upon stipulation of the parties and it is claimed by defendants in error that this was error. The rule in this state is that when a witness in a former action has died his testimony in the former action is admissible in a subsequent action when both actions involve the same issue between the same parties or their privies. L. G. C. vs Cereal Co. 251 Ill. 123; Mo Interoff vs Ins. Co. 248 Ill. 93.

Upon the trial the witness Withers who was working with Pease at the time he received the alleged injury testified relative to what happened at that time and during his examination in response to the question: "Did you see Warren Pease after that?" answered, "I seen him sitting on the platform, yes, sir; he said he got a jolt, a shock." Defendants attorney moved to strike out the answer and the court said: "let it be stricken out what he said". This action of the court is alleged as error. The

portion of the stricken out answer was not responsive to the question asked and was properly stricken out.

The main question here presented is the alleged error of the court in directing a verdict. A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the testimony so demurrer to, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. Geiger vs Geiger 247 Ill. 629; Lloyd vs Rush, 273 Ill. 489; McCune vs Reynolds, 288 Ill. 188. The question presented on such motion is whether there is any evidence fairly tending to prove the issues involved. McCune vs Reynolds, supra; Vess vs Vess, 255 Ill. 414. Tested by this rule when we consider the evidence of deceased, his son, Withers and Dr. Zeit we find that there is some evidence fairly tending to prove the issues involved.

It is true that Dr Zeit testified that in basing an opinion upon the cause of a sarooma (the immediate cause of plaintiffs death) it was necessary to do some speculation, but he also testified that he had observed and treated sarcomas every day for the past twenty years and that he had made a study of it both as to its cause and effect and that ~~it~~ his opinion was based upon his study, experience and experiments made by him.

The judgment of the Circuit court will be reversed and the cause remanded for a new trial.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6721

1090a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 660

BE IT REMEMBERED, that afterwards, to-wit: on

MAR 9 1920

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 672 1.

People of the State of Illinois,)
Ex. Rel. A. J. Platt,)
Appellee)
vs) Appeal from Whiteside.
The City Council of the City)
of Sterling and Frank Hefle -)
bower and W. A. Weeks,)
Appellants.)

O p i n i o n by H E A R D, J.

Addison J. Platt, Mayor of the City of Sterling, filed in the circuit Court of Whiteside county a petition for mandamus in the name of the People against the City of Sterling and Frank Heflebower and W. A. Weeks, doing business as the Weeks Cola Company, alleging among other things "that it is by law the duty of the mayor and commissioners constituting the city council of the City of Sterling to keep the streets and avenues of said city free from all obstructions; that they have the power to do so and it is their duty to exercise said power for the public benefit* * * * that contiguous to the west line of First Avenue and also contiguous to and north of the northerly line of Wallace street is a small triangular piece of ground upon which exists a small building used for an office by the Weeks Coal Company; * * that Heflebower and Weeks proceeded to erect an addition to said building and enlarge the same so that it now extends

No. 672 I.

People of the State of Illinois,)
Ex. Rel. A. J. Platt,)
)
Appellee)
)
vs)
)
The City Council of the City)
of Sterling and Frank Hellebo -)
power and W. A. Weeks,)
)
Appellants.)

Appeal from Whiteside.

O p i n i o n by N E A R D, J.

Addison J. Platt, Mayor of the City of Sterling, filed in the circuit Court of Whiteside county a petition for mandamus in the name of the People against the City of Sterling and Frank Hellebower and W. A. Weeks, doing business as the Weeks Coca Company, alleging among other things "that it is by law the duty of the mayor and commissioners constituting the city council of the City of Sterling to keep the streets and avenues of said city free from all obstructions; that they have the power to do so and it is their duty to exercise said power for the public benefit* * * that continuous to the west line of First Avenue and also continuous to and north of the northerly line of Wallace street is a small triangular piece of ground upon which exists a small building used for an office by the Weeks Coca Company; * * that Hellebower and Weeks proceeded to erect an addition to said building and enlarge the same so that it now extends

in and exists in said First avenue at the southeast corner of said structure to the distance of seven and forty-five hundredths feet and the northeast corner of said building extends into said First avenue to a distance of four and nine hundredths feet * * * and the Mayor and Commissioners of the City of Sterling then and there neglected and refused and at all times since have neglected and refused and now do still neglect and refuse to perform their legal and statutory duty to remove said obstruction from said First avenue in the City of Sterling and the said Frank Heflebower and W. A. Weeks doing business as The Weeks Coal Company have neglected and refused to remove such obstruction to said First Avenue and now do neglect and refuse to remove said obstruction from said First Avenue. "

The prayer of the petition is that the writ of mandamus be ordered by this Honorable Court directed to the said Frank Heflebower and W. A. Weeks doing business under the name of Weeks Coal Company and to the City Council of the City of Sterling, consisting at present of Addison J. Platt, Mayor, James P. Overholder, Royce A. Kidder, Theodore Brought and John C. Meister, Commissioners of the City of Sterling, commanding them forthwith to proceed to remove that portion of said building or structure erected by said Frank Heflebower and W. A. Weeks under the name of the Weeks Coal Company ~~xxxxxxx~~ entirely from and off that portion of the public street called First Avenue in the City of Sterling in the County of Whiteside and State of Illinois, where the same now exists upon said Avenue,

The prayer of the petition is that the writ of mandamus be ordered by this Honorable Court directed to the said Frank Pellebower and W. A. Weeks doing business under the name of Weeks Coal Company and to the City Council of the City of Sterling, commanding and pressing on Addison J. Platt, Mayor, James F. Varholder, Morse A. Ridder, Theodore Wright and John D. Walker, Commissioners of the City of Sterling, commanding them forthwith to proceed to remove that portion of said building or structure erected by said Frank Pellebower and W. A. Weeks under the name of the Weeks Coal Company entirely from and off that portion of the public street called First Avenue in the City of Sterling in the County of Whiteside and State of Illinois, where the same now exists upon said Avenue.

Heflebower and Weeks and the Commissioners each filed their answers to the petition and relator demurred to the answer and specifically to certain portions of the answer. On May 14, 1919, the following was entered of record by the Court: "On this day come the parties hereto by their respective attorneys as heretofore and the demurrer to certain parts of the two answers designated in demurrers, heretofore heard and taken under advisement, is now after due deliberation by the Court sustained, to which ruling of the Court the defendants except, whereupon the plaintiff files herein his replications and the defendants elect to make no answer or reply to the replications and such replications are therefore taken and considered as admitted by the defendants. Therefore it is ordered by the Court that the respondents Frank Heflebower and W. A. Weeks doing business under the name of Weeks Coal Company be and they are hereby ousted, from the premises described in the petition, and that the petitioner do have and recover of and from the defendants his costs and charges in this behalf expended and have execution therefor, and writ of ouster is hereby awarded." From this purported judgment the defendants jointly appeal and although there is no pretense of judgment against the City or City Council, the City Council of Sterling has filed its brief in this Court. In the order of May 14, 1919, there is a recital of the filing of replications by "Plaintiff" after the sustaining of the demurrtr, but the record filed in this court does not contain any

the record filed in this court does not disclose any
"Plaintiff" after the overruling of the demurrer, but
there is a recital of the filing of replications by
brief in this Court. In the order of May 14, 1919
or City Council, the City Council or Wasting Gas filed its
although there is no recital of judgment against the City
purported judgment the defendants jointly appear in
for, and writ of ouster is hereby awarded." From this
charges in this behalf expended, and have remain time-
and recover of and from the defendants the costs and
described in the petition, and that the petitioner to have
T. A. Weeks dismissed under the name of Weeks Coal
Company be and they are hereby ousted, from the premises
by the Court that the respondents Frank Hellbower and
mitted by the defendants. Therefore it is ordered
enough replications are therefore taken and considered as
lect to make no answer or reply to the replications and
Plaintiff files herein his replications and the defendants
ruling of the Court the defendants except, whereupon the
now after due deliberation by the Court sustained, to which
demurrers, heretofore heard and taken under advisement, in
ter to certain parts of the two answers designated in
by their respective attorneys as heretofore and the demur-
record by the Court: "On this day come the parties hereto
answer. On May 14, 1919, the following was entered of
answer and specifically to certain portions of the
their answers to the petition and relator declared to the
Hellbower and Weeks and the Commissioners each filed

replications on that date. On May 9th, 1919, and prior to the ruling upon the demurrers relator filed what he calls pleas to the parts of the answer to which the demurrer was not specifically directed.

There are many things contained in the petition for mandamus which are unimportant and also many unimportant allegations of the answer being the portions to which the court sustained the demurrer. The matters in the answer to which demurrers were not sustained and to which relator filed his so called pleas were simply denials of allegations of the petition. Defendants in their answer say: "The defendants deny that said Frank Hwflebower and W. A. Weeks, proceeded to erect the addition to said building and enlarge the same so that it now extends in and exists in said First Avenue to the distance of seven and forty-five one-hundredths feet at one place and the distance of four and nine one-hundredths feet at another place.

These defendants deny that the land upon which said building or and part of the same stands, is a public Street," which is a direct denial of allegations of the petition above quoted. The so-called pleas repeated these statements and say that relator will prove the allegations of the petition.

Undoubtedly this pleading was largely informal, but when petitioner alleged that the building was in a public street (a very material allegation) and defendants answered denying that it was in the public street and relator reiterated his allegation and said he would prove it was in the public street it would seem as if an issue of fact had been formed without the necessity of any fourther pleading.

Upon these two questions whether the building was in a public street and whether the land upon which it stood was a part of a public street direct issues of fact were formed by the pleadings and not disposed of at the time of the entry of the order of May 14, 1919.

It has been frequently held that it is error to render judgment without a trial when issue has been joined.

The order of May 14, 1919, does not follow the prayer of the petition and contains none of the requisites of a judgment in mandamus. Appellant claims that where there are several defendants judgment cannot be rendered against part without disposing of the case of the others. As the case must be reversed and this question will probably not again arise we have refrained from discussing it.

The cause will be reversed and remanded.

Upon these two questions, whether the building was in a public street and whether the land upon which it stood was a part of a public street, first issue of fact were formed by the pleadings and not disposed of at the time of the entry of the order of May 14, 1919.

It has been frequently held that it is error to render judgment without a trial when issue has been joined.

The order of May 14, 1919, does not follow the prayer of the petition and contains none of the requisites of a judgment in mandamus. Appellant claims that where there are several defendants judgment cannot be rendered against part without disposing of the cause as the others. As the cause must be reversed and this question will probably not again arise we have refrained from discussing it.

The cause will be reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6724

(1911a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 660

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6724.

Emma L. Brown,)
)
Appellee,)
)
vs) Appeal from Henry.
Farmers State Bank)
)
of Alpha, Appellant.)

O p i n i o n by H E A R D, J.

Emma L. Brown, appellee, filed her bill in chancery in the Circuit Court of Henry County against the Farmers State Bank of Alpha, appellant, to set aside certain assignments of leases executed by her to the appellants for the rental of certain lands in Cass County, Iowa.

Appellee claims as the basis of her right to relief that the assignments were obtained by the appellant through intimidation, coercion and misrepresentations. The appellant answered denying the charges in the bill. The matter was referred to the Master in Chancery to take proofs and report his findings. Proofs were taken before the Master and on final hearing of exceptions to his report a decree was entered finding among other things, that about September 24th, 1914, complainant was induced to sign a purported assignment of all her right, title and interest to the three leases and the rents arising from the lands, until such time as all indebtedness of her husband, contracted prior to September 21st, 1914, should be paid: and that at the time this purported assignment was made, the defendant knew Mrs. Brown had no right to assign any of the

No. 2734.

Emma L. Brown,

Appellee,

vs

Farmers State Bank of Alpha,

Appellant.

Appeal from Henry.

Opinion by EWBANK, J.

Emma L. Brown, appellee, filed her bill in chancery in the Circuit Court of Henry County against the Farmers State Bank of Alpha, appellant, to set aside certain assignments of leases executed by her to the appellants for the rental of certain lands in Knox County, Iowa.

Appellee claims as the basis of her right to relief that the assignments were obtained by the appellant through intimidation, coercion and misrepresentations. The appellant answered denying the charges in the bill.

The matter was referred to the Master in Chancery to take proofs and report his findings. Proofs were taken before the Master and on final hearing of exceptions to his report a decree was entered finding among other things, that about September 26th, 1914, complainant was induced to sign a purported assignment of all her right, title and interest to the three leases and the rents arising from the lands, until such time as all indebtedness of her husband, contracted prior to September 21st, 1914, should be paid: and that at the time this purported assignment was made, the defendant knew Mrs. Brown had no right to assign any of the

rents from one-half of said land.

The decree further finds that at the time the assignment, dated September 24th, 1914, was executed, the defendant threatened to bring suit against complainant if she did not sign it; that she did not know of any notes to the defendant signed by her husband, except the $1,000 note dated August 1st, 1913, and did not understand the terms of said assignment, and believed she was signing her interest to secure the payment of that note; that she had little business experience and felt she was obliged to pay her husband's debts, and received that impression from the officers of the defendant who did not make a complete disclosure to her of all of the facts involved in the transaction, or show her any of the leases or any of the notes; that the equities of the case are with the complainant and that she is entitled to the relief sought, and from this decree appellant appeals.

The preponderance of the evidence shows that the assignment in question was not procured by intimidation or duress and that the only threat made was to bring suit on her husbands' indebtedness to the bank, for which she was security.

The appellee herself testified, "Mr. Johnson, said, I have a paper here that I want you to read and Mr. Linn said read it over carefully, and I said I wouldn't understand it anyway * * and I didn't read it over carefully" , "I read the paper over part of it and I told him I only received half of the rent, that it was an estate and my sister got half of the rent."

rents from one-half of said land.

The decree further finds that at the time the assignment, dated September 24th, 1914, was executed, the defendant threatened to bring suit against complainant if she did not sign it; that she did not know of any notes to the defendant signed by her husband, except the $1,000 note dated August 1st, 1913, and did not understand the terms of said assignment, and believed she was signing her interest to secure the payment of that note; that she had little business experience and felt she was obliged to pay her husband's debts, and received that impression from the officers of the defendant who did not make a complete disclosure to her of all of the facts involved in the transaction, or show her any of the leases or any of the notes; that the equities of the cases are with the complainant and that she is entitled to the relief sought, and from this decree appellant appeals.

The preponderance of the evidence shows that the assignment in question was not procured by intimidation or threat and that the only threat made was to bring suit on her husband's indebtedness to the bank, for which she is security.

The appellee Bernard testified, "Mr. Johnson said, I have a paper here that I want you to read and Mr. Dunn said read it over carefully, and I said I wouldn't understand it anyway," and I didn't read it over carefully," I read the paper over part of it and I told him I only received half of the rent, that it was an estate and my sister got half of the rent."

Vere Brown, daughter of appellee, who was present at the time the paper was signed, testified that her mother" read the first part of the paper and she said she had no right to sign away the other half of the rent, it didn't belong to her" and on cross examination she said Mr. Johnson gave appellee the paper to read and that she knew appellee read some of it.

Appellee knew at the time the paper was presented to her that it was an assignment of all the rents and the only objection she made to signing was that half the rent belonged to her sister. The terms of the assignment were plain. Appellee was advised to read it over carefully and had ample opportunity to do so if she so desired. The assignment was for a sufficient consideration and she cannot now repudiate it.

We are of the opinion that the decree of the Circuit Court should be reversed and the cause remanded to the Circuit Court, with directions to the circuit court to state an account between the parties showing which portion of the rents collected by virtue of the assignment belong to appellee and to decree that such portion of the rents be applied to the payment of the debts for which the rents were pledged to appellant by the assignment of September 24, 1914.

Reversed and Remanded with directions.

Reversed and remanded with directions.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6725

(1072a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

Certiorari denied
217 I.A. 660

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Emma L. Brown

No. 6725.

Mary A. Rickards,
Appellee,
vs
Farmers State Bank of Alpha,
appellant.

Appeal from Henry

Opinion by HEARD, J.

Appellee Mary A. Rickards, filed her bill in chancery in the Circuit Court of Henry County against the appellant, Farmers State Bank of Alpha, alleging that appellee and her sister, Emma L. Brown, each had a beneficial interest in a farm in Cass County, Iowa; that she constituted her sister's husband, J. H. Brown, her agent to rent the same for her; that without her knowledge or consent he had leases of these lands executed in the name of his wife as lessor; that without appellee's knowledge of consent Brown and his wife assigned all the right, title and interest of Emma L. Brown in these leases to appellant to secure indebtedness of the Browns to appellant, and that appellant, by virtue of this assignment, had collected the rents belonging to appellee for these lands. The bill prayed that appellant account to appellee for the portion of the rents belonging to appellee. Appellant answered claiming the rents by virtue of the assignment and denying appellee's right to an accounting.

The cause was referred to the Master in Chancery, who

No. 6735.

Mary A. Nickerde,

Appellee,

vs

Farmers State Bank of Alpha,

appellant.

Appeal from Perry

Opinion by HENRY, J.

Appellee Mary A. Nickerde, filed her bill in chancery in the District Court of Perry County against the Farmers State Bank of Alpha, alleging that appellee and her sister, Emma D. Green, each had a beneficial interest in a farm in Cass County, Iowa; that she constituted her sister's husband, J. D. Green, her agent to rent the same for her; that without her knowledge or consent he had leased of their lands standing in the name of his wife as lessor; that without appellee's knowledge or consent Brown and his wife executed all the right, title and interest of Mina L. Green in those leases to appellant to secure indebtedness of the Greens to appellant, and that appellant, by virtue of this assignment, had collected the rents belonging to appellee for those lands. The bill prayed that appellant account to appellee for the portion of the rents belonging to appellee. Appellant answered claiming the rents by virtue of the assignment and denying appellee's right to an accounting.

The cause was referred to the Master in Chancery, who

tooks proofs and reported to the Court his findings that neither J. H. Brown or his wife Emma L. Brown, had any right or authority to assign or dispose of Appellee's share of the rents and recommending the entry of a decree in favor of appellee and directing appellant to pay appellee $480, with interest and also that the sum of $600, which had been deposited in the bank at Cambridge pending the termination of the suit be paid appellee. Decree was entered in accordance with the Masters report and from this decree appellant appealed.

Appellant claims as the leases were made in the name of Mrs. Brown as lessor, that in the absence of notice to appellant of appellee's interest therein prior to the assignment appellee is not entitled to relief.

The assignment in question was merely an assignment of Mrs. Brown's interest in the leases and not an assignment of the leases. The evidence shows that the making of the lease in Mrs. Brown's name was without any authority from appellee and that the assignment was made without her knowledge or consent and without any authority whatever. There is no evidence in the case from which any inference to the contrary could be drawn and nothing in the record which would estop appellee from claiming the rents.

The decree was right and is affirmed.

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STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6726

1013A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 660

BE IT REMEMBERED, that afterwards, to-wit: on

MAR 9 1920

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6726.

Garret Pluym, Appellant,
vs
Illinois Central Railroad Company, Appellee.
Appeal from Jo Daviess Circuit Court.

Opinion by HEARD, J.

This is an action of trespass on the case brought by appellant against appellee in the Circuit Court of Jo Daviess County. The declaration consists of one count, alleging the killing of Plaintiff's cattle on the railroad tracks of appellee by appellee's engine, in June 1916 and that the cattle got upon appellees track on account of appellee failing to maintain a statutory fence. A jury trial was had and at the close of Plaintiff's evidence the court instructed the jury to find the defendant not guilty and a verdict of not guilty was returned. A motion for new trial was overruled and judgment rendered in favor of appellee, from which appellant appeals.

The right of way and tracts of the appellee run southeasterly from the City of East Dubuque in Jo Daviess County, Illinois. They are parallel with the Mississippi river which is on the west side of the right of way. The cattle in question were found dead on the right of way about a mile southeasterly of East Dubuque. The main channel of the Mississippi lies about one mile westerly

No. 6726.

Garret Pixley,

Appellant,

vs. Appeal from De Witt

Illinois Central Railroad Company, Appellee. Circuit Court.

Opinion by HEARD, J.

This is an action of trespass on the case brought by appellant against appellee in the Circuit Court of De Witt County. The declaration consists of one count, alleging the killing of plaintiff's cattle on the railroad tracks of appellee by appellee's engine, in June 1919 and that the cattle got upon appellees track on account of appellee failing to maintain a statutory fence. A jury trial was had and at the close of Plaintiff's evidence the court instructed the jury to find the defendant not guilty and a verdict of not guilty was returned. A motion for new trial was overruled and judgment rendered in favor of appellee, from which appellant appeals.

The right of way and tracks of the appellee run southwesterly from the City of East Dundee in De Witt County, Illinois. They are parallel with the Elgin-Aurora channel of the Milwaukee) line about one mile westerly from said city. The cattle in question were found dead on the right of way which is on the west side of the right of way.

from the tracks. Between the river and tracks there is low ground which was used by appellant as a pasture for the cattle. This pasture is bottom land and is much lower than the railroad tracks. When the Mississippi rises this pasture is partly submerged. There was high water in the Mississippi from April 8th, to June 13th, the date on which the cattle were killed and the high water backed up filling a pond or depression in appellant's pasture for a distance of about 800 feet from the right of way to about eight or ten feet inside the right of way where the ground was higher. A fence which was not described in the evidence ran along the line of the right of way through the water.

The evidence showed that a day or two before June 13th, appellant purchased some cattle that had been kept in a high pasture on the opposite side of the railroad track and turned them into his pasture; that shortly thereafter they went into this water; swam across to the railroad right of way and were struck by an engine and killed. At this time the water extended up to within fifteen inches from the top of the post, and about twelve inches from the top wire of the fence which was broken by the cattle when they swam through it. The top wire was freshly broken; and there was hair attached to it indicating that at this particular place the cattle forced their way over it. At this place there was hoof tracks on the bank leading towards the railroad track. The water extended in on the right of way eight or ten feet past the fence and up on the embankment. The action of the court in instructing the jury to find the defendant not guilty is assigned as

the jury to find the defendant not guilty is assigned as the embankment. The action of the court in instructing the right of way eight or ten feet back from the fence and up on towards the railroad track". This error intended in an at this particular place the cattle forced their way over it. At this place there was most trouble on the part leading cattle when they came through it. This fact, though proven; and there was fair attached to it indicating that fifteen inches from the top of the post, and about twelve inches from the top wire of the fence which was broken by the Killed. At this time the water extended up to within rectical right of way line should be on either end the water.

The evidence showed that a day or two before June 13th, appellant purchased some cattle that had been fed in a high pasture on the opposite side of the railroad track and turned them into the pasture; that shortly thereafter they went into the water; that access to the evidence ran along the line of the right of way through a distance of about 200 feet from the right of way to about eight or ten feet inside the right of way where the ground was higher. A fence which was not identical in the

filling a pond or depression in appellant's pasture for the cattle. This pasture is bottom land and is much lower than the railroad tracks. Then the Mississippi river in this pasture is partly submerged. There was high water in the Mississippi from April 8th, to June 12th, the date on which the cattle were killed and the high water backed up

error.

Sec. 62 of Chapter 114 of the Revised Statutes of Illinois provides: "That every railroad corporation, shall, within six months after any part of its line is open for use, erect and thereafter maintain fences on both sides of its road or so much thereof as is open for use, suitable and sufficient to prevent cattle, horses, sheep, hogs, or other stock from getting on such railroad, except at the crossings of public roads and Highways, etc".

The statute does not specify the kind of fence or the materials of which it shall be composed as does Section 3 of Chapter 54 of the Revised Statutes. It requires the erection of fences "suitable and sufficient to prevent cattle, horses, sheep, hogs or other stock from getting on such railroad".

Numerous authorities have been cited by both appellant and appellee, but a careful perusal of all these authorities demonstrates that in each case the question as to whether the fence in question in that case was or was not a suitable or sufficient fence was decided as a question of fact depending upon the facts of that particular case. Whether a given fence is or is not a suitable and sufficient fence is a question of fact for the jury and it is only where the evidence is such that all reasonable minds must agree on the question can the court hold as a matter of law that the given fence is a "suitable and sufficient fence". Upon a motion to instruct the jury to find the defendant not guilty the evidence with all its

error.

Sec. 88 of Chapter 114 of the Revised Statutes of Illinois provides: "That every railroad corporation, shall, within six months after any part of its line is open for use, erect and thereafter maintain fences on both sides of its road or so much thereof as is open for use, suitable and sufficient to prevent cattle, horses, sheep, hogs, or other stock from getting on such railroad, except at the crossings of public roads and highways, etc".

The statute does not specify the kind of fence or the material of which it shall be composed as does Section 2 of Chapter 54 of the Revised Statutes. It requires the erection of fences "suitable and sufficient to prevent cattle, horses, sheep, hogs or other stock from getting on such railroad".

Numerous authorities have been cited by both appellant and appellee, but a careful perusal of all these authorities demonstrates that in each case the question is to whether the fence in question is such a fence as was not a suitable or sufficient fence but resulted in a finding of fact depending upon the facts of that particular case, whether a given fence is or is not a suitable and sufficient fence is a question of fact for the jury and it is only where the evidence is such that all reasonable minds must agree on the question that the court [illegible] as a matter of law that the given fence is a "suitable and sufficient fence". Upon a motion to instruct the jury to find the defendant not guilty the evidence with all its

reasonable intendments must be construed most favorably to the plaintiff.

Mc Cune vs Reynolds 288 Ill. 188.

Without expressing any opinion upon the merits of the case or as to whether or not the fence in question was a "suitable and sufficient fence" we are of the opinion that the Court erred in not submitting the case to the jury. The judgment of the Circuit court will be reversed and the cause remanded.

reasonable intendments must be construed most favorably to the plaintiff.

Mc Cune va Reynolds 88 Ill. 188.

Without expressing any opinion upon the merits of the case or as to whether or not the fence in question was a "suitable and sufficient fence" we are of the opinion that the Court erred in not submitting the case to the jury. The judgment of the Circuit court will be reversed and the cause remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6731

(1094a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

217 I.A. 6605

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6751

Raymond S. Frost, Admr. appellee

vs Appeal from Winnebago.

Rockford & Interurban Railway Co.

appellant.

Heard, J.

This was an action commenced in the circuit court of Winnebago County by Ray Frost, Public Administrator of the County of Winnebago, to recover damages for death of plaintiff's intestate in consequence of a collision between an automobile in which she was riding in the city of Rockford traveling in a northerly direction, and an interurban car bound from Beloit Wis., to Rockford, Ill., traveling in a southerly direction. The case was tried upon the first and third counts of the declaration. The negligence charged in the first count was that the defendant by its servants so negligently, carelessly, and improperly ran, drove and managed, and controlled said interurban car that by and on account of the said negligence, carelessness, and improper conduct of the defendant by its servants, the car ran into, upon, and across the automobile in which the intestate was riding.

The third count was based upon an ordinance of the City of Rockford providing that no car shall be run at a greater rate of speed than fifteen miles an hour, and there was a general averment of negligence similar to the first count.

The trial resulted in a verdict in favor of appellee in the sum of $1,500.00. Motion for new trial was overruled, and there was a judgment on the verdict, and appeal from the judgment.

The plaintiff's intestate, with her husband, riding in the back seat of a Ford touring car in company with one Frank Gustafson, the owner and driver of the car, and another gentleman, was traveling in a northerly direction on North Second Street in the

Gen. No. 6731

Raymond S. Proet, Admr. appellee

vs Appeal from Winnebago.

Rockford & Interurban Railway Co.

appellant.

Heard, J.

This was an action commenced in the circuit court of Winnebago County by Ray Proet, Public Administrator of the County of Winnebago, to recover damages for death of plaintiff's intestate in consequence of a collision between an automobile in which she was riding in the city of Rockford traveling in a northerly direction, and an interurban car coming from Beloit Wis., to Rockford, Ill., traveling in a southerly direction. The case was tried upon the first and third counts of the declaration. The negligence charged in the first count was that the defendant by its servants so negligently, carelessly, and improperly ran, drove and managed, and controlled said interurban car that by and on account of the said negligence, carelessness, and improper conduct of the defendant by its servants, the car ran into, upon, and across the automobile in which the intestate was riding.

The third count was based upon an ordinance of the City of Rockford providing that no car shall be run at a greater rate of speed than fifteen miles an hour, and there was a general averment of negligence similar to the first count.

The trial resulted in a verdict in favor of appellee in the sum of $3,500.00. Motion for new trial was overruled, and there was a judgment on the verdict, and a appeal from the judgment.

The plaintiff's intestate, with her husband, riding in the back seat of a Ford touring car in company with one Frank Gustafson, the owner and driver of the car, and another gentleman, was

City of Rockford, about 7 o'clock on Sunday evening, November 11 1917. The Rockford & Interurban Railway Company, appellant, operate their cars over the line of the Rockford City Traction Company along this street from a point beyond the place of the accident to the business district of the City of Rockford. The interurban cars run hourly along this track, and the ~~interurban company~~ traction company city cars have a schedule of twelve and fifteen minutes over the same track. The street at this point is forty feet wide. Both companies use the same single track. The track is situated in about the center of the street. About one hundred feet south of the point where the accident occurred, the City of Rockford was engaged in putting in a sewer on the eastside of the track. The sewer ditch was about three feet wide and about nine feet deep on the east side of the track. A large part of the ditch had been filled up at the time of the accident. There was a barricade on the end of the ditch and red lanterns strung along as a warning of the danger. The edge of the ditch was about three feet from the east rail of the car track. and lanterns were set between the street car track and the ditch. The dirt was thrown on the east side of the ditch. There was no traveling space for automobiles between the street car track and the ditch. The barricade was also on the south end of the ditch. The auto had turned across the tracks to avoid the ditch and was recrossing the track to the proper side of the street at the time of the accident.

The automobile was struck by the left edge of the fender of the interurban car, about the center of the west side of the automobile. The interurban car was a large type, about sixty feet in length, and weighed about forty tons, and ran some twoor three car lengths after striking the automobile. All of the occupants of the automobile wereeither killed instantly or died

City of Pockford, about 7 o'clock on Sunday evening, November 11 1917. The Pockford & Interurban Railway Company, hereinafter operate their cars over the lines of the Pockford City Traction Company along this street from a point beyond the place of the accident to the business district of the City of Pockford. The interurban cars run northerly along this track, and the [illegible] traction company's cars have a schedule of twelve and fifteen minutes over the same track. The street at this point is forty feet wide. Both companies use the same single track. The track is situated in about the center of the street. About one hundred feet south of the point where the accident occurred, the City of Pockford was engaged in putting in a sewer on the westside of the track. The sewer ditch was about three feet wide and about nine feet deep on the east side of the track. A large part of the ditch had been filled up at the time of the accident. There was a barricade on the end of the ditch and red lanterns stung around as a warning of the danger. The edge of the ditch was about three feet from the east rail of the car track. Lanterns were set between the street car track and the ditch. The dirt was thrown on the west side of the ditch. There was no traveling space for automobiles between the street car track and the ditch. The derrick was used on the south end of the ditch. The automobiles turned across the tracks to avoid the ditch and was recrossing the track to the proper side of the street at the time of the accident.

The automobile was struck by the left edge of the fender of the interurban car, about the center of the west side of the automobile. The interurban car was a large type, about sixty feet in length, and weighed about forty tons, and ran more than three car lengths after striking the automobile. All of the occupants of the automobile were either killed instantly or died

within a short time of the accident. There was some evidence tending to show that Gustafson, the driver of the auto, was intoxicated and that deceased knew of his condition and it is claimed that deceased was guilty of contributory negligence in trusting herself to the care of an intoxicated driver. There was evidence on the part of appellee tending to show that Gustafson was not intoxicated. This controverted question of fact was submitted to the jury, their attention specifically called to it by instructions, and the jury evidently found in favor of appellee thereon,

It is claimed that the verdict is not supported by the evidence; that appellee has failed to prove that appellant was negligent and that deceased was in the exercise of ordinary care for her own safety. Deceased was a passenger sitting in the rear seat of the Ford auto. The rule as to the duty of a passenger in such case is laid down in Pienta vs Chicago City Railway 284 Ill. 246, and by this court in Chatelle v I. C. R. R. Co. 210 Ill. App. 475. The court plainly gave the rule to the jury in his instructions.

The preponderance of the evidence clearly showed that appellants car was running at a high rate of speed in violation of the city ordinance. From a consideration of all the evidence in the case we are of the opinion that the jury were justified in finding from the evidence that at and prior to the accident deceased was in the exercise of ordinary care for her own safety that appellant was guilty of negligence, as alleged in the 1st. and 3rd. counts of the declaration and that appellants negligence was the proximate cause of the death of deceased.

It is claimed that the court erred in the admission of evidence on the question of heirship of the deceased. The court admitted in evidence an order of the county court of Winnebago county

declaring the heirship of deceased and also admitted declarations of deceased as to her family.

Paragraph 140 of Chapter 3 Revised Statutes of Illinois, provides "that such orders of the court declaring such heirship, * * * * * shall be deemed and taken as prima facie evidence as such heirship: Provided, that any other legal mode of proving such heirship may be resorted to in place of court when the question may arise by any party interested therein". Follett v I. C. R. R. 209 Ill. App. 81; Prescott v Ayers, 276 Ill 246. Nolan v Barnes 266 Ill. 515; Ill. Steel Co. v I. C. 290 Ill 596. Even if the admission of the county court order were error, the cause cannot be reversed for that reason.

It has been repeatedly held in this state that pedigree or the facts of family history may be proven as they were in this case by the declarations of a person related by blood or marriage to the family to which the declaration refers, provided the declarant is dead and the declaration was made before a controversy arose. Demsey v Barnes 261 Ill. 646. In Champion v McCarthy 238 Ill. 87 will be found a full discussion of the authorities upon this question.

We find no error in the giving or refusal of instructions. The cause will be affirmed.

isolating the rights of ingress and egress limited restrictions of ingress to the premises.

Paragraph 150 of Chapter 3 Revised Statutes of Illinois, provides "that such orders of the court declaring such alleged, * * * * shall be deemed a nuisance and the premises wherein such nuisance may be found shall be taken as prima facie evidence that such nuisance exists: Provided, that any other legal mode of proving such nuisance may be resorted to in place of court when the question may arise by any party interested therein".

Follett v I. C. R. R. 309 Ill. App. 81; Peacock v Myers, 272 Ill 548. Nolan v Dumas 306 Ill. 515; Ill. Steel Co. v I. C. 320 Ill 559. Even if the admission of the county judge that error were the cause cannot be reversed for that reason.

It has been repeatedly held in this state that pedigree or the facts of family history may be proven as they were in this case by the declarations of a person related by blood or marriage to the family to which the declaration refers, provided the declarant is dead and the declaration was made before a controversy arose. Dempsey v Barnes 301 Ill. 566. In Champion v Doherty 258 Ill. 87 will be found a full discussion of the authorities upon this question.

We find no error in the ruling as refused or instructions. The cause will be affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6233

1075a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 661

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6733.

Leroy Smallenberger, appellee

vs Appeal from Co. Ct. Peoria.

Peoria Railway Company, appellant.

Heard J.

Leroy Smallenberger, appellee brought suit before a justice of the Peace against The Peoria Railway Co. appellant for damages to his automobile as the result of alleged negligence of appellant. The case was tried in the county court of Peoria County on appeal. Appellee obtained a verdict for $135. from which he remitted $30 and the court entered juigment against appellant for $105. damages and costs from which judgment this appeal is prosecuted.

The evidence shows that appellee was driving his auto on Pacific Avenue in Peoria and in attempting to turn around backed partly upon the street car track of appellant and killed his engine, leaving the machine standing at an angle of about 30 degrees with the track, the left hind wheel being between the rails. Bright electric headlights were burning on the auto as was also its tail light, but the tail light could not be seen by persons on a street car going toward town by reason of the position of the car. Appellant claims he could not start the auto, that he tried to lift it across the track, then attempted to crank it but could not and that he then ran up the track upon which he saw a street car approaching going towards town and waved his arms, but that the car passed him and ran into the auto, knocking off the back wheel and the fender on the left side and otherwise damaging the machine.

The accident occurred on a darm rainy night. The street car which ran into the auto had rounded a curve about thirty

Gen. No. 6733.

Leroy Smallenberger, appellee

vs Appeal from C. Ct. Peoria.

Peoria Railway Company, appellant.

Heard 1.

Leroy Smallenberger, appellee brought suit before a justice of the Peace against The Peoria Railway Co. appellant for damages to his automobile as the result of alleged negligence of appellant. The case was tried in the county court of Peoria County on appeal. Appellee obtained a verdict for $135. from which he remitted $30 and the court entered judgment against appellant for $105. damages and costs from which judgment this appeal is prosecuted.

The evidence shows that appellee was driving his auto on Pacific Avenue in Peoria and in attempting to turn around backed partly upon the street car track of appellant and killed his engine, leaving the machine standing at an angle of about 30 degrees with the track, the left hind wheel being between the rails. Bright electric headlights were burning on the auto as was also its tail light, but the tail light could not be seen by persons on a street car going toward them by reason of the position of the car. Appellant claims he could not start the auto, that he tried to lift it across the track, then attempted to crank it but could not and that he then ran up the track upon which he saw a street car approaching going towards them and heard his horn, but that the car passed him and ran into the auto, knocking off the back wheel and the fender on the left side and otherwise damaging the machine.

The accident occurred on a dark rainy night. The street car which ran into the auto had rounded a curve about thirty

feet more than a block from the place of the collision. The motorman testified that as the car rounded the curve and approavhed the place of collision it was running about twelve miles per hour; that he saw the auto before the collision; that the headlights of the street car were the usual and customary kind used on that line and were burning at the time; that all he could see of the auto was the headlights which looked as though the auto was coming up the street; that as he approached from the curve he was looking down the track; that he was about 30mfeet from the auto when he saw it; that he then reversed the power, but that the rails were slippery and he went about 20 feet after he struck the auto.

It is claimed by appellant that there is no evidence of negligence on the part of the appellant and that appellee was guilty of contributory negligence and that the court should have directed a verdict for appellant. Under the evidence in this case as disclosed by the record the question of negligence on the part of the appellant and of contributory negligence on the part of the appellee were questions of fact for the jury and the court did not err in refusing to direct a verdict.

Appellee, during the presentationof his case in chief, swore the court reporter as a witness and requested her to read a portion of the testimony of Thomas Vaughn, the motorman, taken at a former trial of this case. . Vaughn was present at this trial and testified in person, afterwards, when appellant was presenting its defense, Over objection of appellant, this was permitted, and part of the former testimony was read. A street car company cannot be bound by the admissions of its motorman made long after the happening of an accident and the admission of this evidence was clearly erroneous. Evidence was given of the value of the use of the auto during the time which

feet more than a block from the place of the collision. The motorman testified that as the car rounded the curve and approached the place of collision it was running about twelve miles per hour; that he saw the auto before the collision; that the headlights of the street car were the usual and customary kind used on that line and were burning at the time; that all he could see of the auto was the headlights which looked as though the auto was coming up the street; that as he approached from the curve he was looking down the track; that he was about 50 feet from the auto when he saw it; that he then reversed the power, but that the rails were slippery and he went about 50 feet after he struck the auto.

It is claimed by appellant that there is no evidence of negligence on the part of the appellant and that appellee was guilty of contributory negligence and that the court should have directed a verdict for appellant. Under the evidence in this case as disclosed by the record the question of negligence on the part of the appellant and of contributory negligence on the part of the appellee were questions of fact for the jury and the court did not err in refusing to direct a verdict.

Appellee, during the presentation of his case in chief, swore the court reporter as a witness and requested her to read a portion of the testimony of Thomas Vaughn, the motorman, taken at a former trial of this case. Vaughn was present at this trial and testified in person. Thereafter, when appellant was presenting its defense, over objection of appellant, this was permitted, and part of the former testimony was read. A street car company cannot be bound by the admissions of its motorman made long after the happening of an accident and the admission of this evidence was clearly erroneous. Evidence was given of the value of the use of the auto during the time which

it might have taken to reapir it. This was incompetent as the car was not repaired, but sold for junk.

The first instruction given for appellee was not based on the evidence. There is no evidence that the headlight on the street car was not a proper headlight. The only evidence on that subject was that it was the usual headlight used on that line and that it was burning. The second instruction given for appellee was erroneous. It assumed facts which were controverted. The third instruction was erroneous in including in the measure of damages the value of the loss of the use of the auto while it was being repaired, for the reason that the auto was not repaired. Appellants first refused instruction which was to the effect that rental value during the time of repair was not an element of damages in the case should have been given.

For the errors indicated the cause is reversed and remanded to the County Court of Peoria County.

it might have taken to repair it. This was incompetent as the car was not repaired, but sold for junk.

The first instruction given for supplies was not based on the evidence. There is no evidence that the headlight on the street car was not a proper headlight. The only evidence on that subject was that it was the usual headlight used on that line and that it was burning. The second instruction given for supplies was erroneous. It assumed facts which were controverted. The third instruction was erroneous in including in the measure of damages the value of the use of the auto while it was being repaired, for the reason that the auto was not repaired. Appellants first refused instruction which was to the effect that rental value during the time of repair was not an element of damages in the case should have been given.

For the errors indicated the cause is reversed and remanded to the County Court of Peoria County.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6734

1096a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 661

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Defendant

Gen. No. 6734

Lucas I. Butts, Sheriff, appellee

vs Appeal from Peoria.

Peoria Livery Co. et al appellants.

Heard, J.

In September 1916, the Peoria Livery Company delivered to the Alliance Manufacturing Company for repairs two automobiles. The first automobile finished was shipped to Peoria in January 1917 the bill of lading being accompanied by a draft for $480.35 which was paid by appellant and the automobile received by it. In February 1917, the second automobile was shipped by the Alliance Manufacturing Company to itself at Peoria, the bill of lading being accompanied by a draft for $300 a balance claimed by the Alliance Manufacturing Company to be due for work, labor and materials used and expended in the repair of the two automobiles. This draft the Peoria Livery Company refused to pay and brought replevin suit against the Peoria and Pekin Union Railway Company, the carrier, in the circuit court of Peoria County. This suit was dismissed by the plaintiff and a writ of returno habendo issued, but the property was not returned.

This suit is upon the replevin bond given to the sheriff in the replevin suit. A trial by jury resulted in a verdict for Plaintiff against the defendant for $1500.00 debt and $225.00 damages.

The main point in issue in the case is whether or not at the time the automobile was replevined from the carrier the Alliance Manufacturing Company had a lien upon it for labor and materials.

The evidence shows that in September 1916, James D. Jacobus secretary and manager of the Peoria Livery Company, visited the Streator factory of the Alliance Manufacturing Company to satisfy himself that they were able to do the work desired. A few days

Gen. No. 8734

Lucas I. Butts, Sheriff, appellee

vs. Appeal from Scott.

Peoria Livery Co. et al appellants.

Heard, J.

In September 1916, the Peoria Livery Company delivered to the Alliance Manufacturing Company for repairs two automobiles. The first automobile finished was shipped to Peoria in January 1917 the bill of lading being accompanied by a draft for $400.33 which was paid by appellant and the automobile received by it. In February 1917, the second automobile was shipped by the Alliance Manufacturing Company to itself at Peoria, the bill of lading being accompanied by a draft for $400 & balance claimed by the Alliance Manufacturing Company to be due for work, labor and materials used and expended in the repair of the two automobiles. This leads the Peoria Livery Company refused to pay and brought replevin suit against the Peoria and Pekin Union Railway Company, the carrier, in the circuit court of Peoria County. This suit was dismissed by the plaintiff and a writ of return habendo issued, but the property was not returned.

This suit is upon the replevin bond given to the sheriff in the replevin suit. A trial by jury resulted in a verdict for Plaintiff against the defendant for $1500.00 debt and $15.00 damages.

The main point in issue in the case is whether or not at the time the automobile was replevined from the carrier the Alliance Manufacturing Company had a lien upon it for labor and materials.

The evidence shows that in September 1916, James D. Jacobus secretary and manager of the Peoria Livery Company, visited the Streator factory of the Alliance Manufacturing Company to satisfy himself that they were able to do the work desired. A few days

thereafter Mr. Wenniger, President of the Alliance Company, went to Peoria, saw the automobiles and had some conversation with Mr. Jacobus concerning the subject matter in the Livery Company's office. As a result of this conversation the two automobiles were driven to the Streator factory shortly afterwards. On the trip the transmission onone of the cars was broken and it became necessary to have it restored at an expense of $30.35. This however was extra and in addition to what had been up to that time considered by either of the parties.

Plaintiff, appellee, proved that the labor, services and materials furnished in making the repairs originally contemplated were reasonably worth $650, but made no attempt to show what, if any, arrangement had been made between the parties prior to making the repairs. F. E. Doreman, Secretary and Treasurer of the Alliance Manufacturing Company, the only one of plaintiffs witnesses interrogated on this subject testified as follows: "Q. Didn't your factory send to Peoria a man or men to inspect these machines and to make a contract or bargain with reference to them, before delivered up there for repairs?

A. I don't know

Q. Do you know whether there was any contract made between your company and Peoria Livery Company, with reference to what was to be done upon these cars, and what was to be paid, and within what time the work was to be done?

A. No."

Mr. Jacobus, the secretary and manager, t stified positively that he made arrangements with Mr. Wenniger, the President of the Alliance Company at their interview in the livery office in Peoria County to make the repairs for the fixed price which he could not recollect to a cent, but stated more than once that $450 was his best recollection of the amount. Mr. Wenniger wa not called as a witness to deny the making of a contract for a

thereafter Mr. Wennlger, President of the Alliance Company, went to Peoria, saw the automobiles and had some conversation with Mr. Jacobus concerning the subject matter in the Livery Company's office. As a result of this conversation the two automobiles were driven to the Streator factory shortly afterwards. On the trip the transmission broke of the card was broken and it became necessary to have it repaired at an expense of $30.35. This however was extra and in addition to what had been up to that time considered by either of the parties.

Plaintiff, appellee, proved that the labor, services and materials furnished in making the repairs originally contemplated were reasonably worth $650. But there is no attempt to show what, if any, arrangement had been made between the parties prior to making the repairs. F. T. Dorsey, Secretary and Treasurer of the Alliance Manufacturing Company, the only one of plaintiffs witnesses interrogated on this subject testified as follows:

"Q. Didn't your factory send to Peoria a man or two to inspect these machines and to make a contract or bargain with reference to them, before delivered up there for repairs?

A. I don't know

Q. Do you know whether there was any contract made between your company and Peoria Livery Company, with reference to what was to be done upon these cars, and what was to be paid, and within what time the work was to be done?

A. No."

Mr. Jacobus, the secretary and manager, testified positively that he made arrangements with Mr. Wennlger, the President of the Alliance Company at their interview in the Livery office in Peoria County to make the repairs for the sums above which he could not recollect to a cent, but stated more than once that $450 was his best recollection of the amount. Mr. Wennlger, not called as a witness to deny the making of a contract for a

fixed price and while the Alliance Company at the time had a bookkeeper, a Miss. Weath, neither she, nor any of the firms books, bills or correspondence was produced on the trial. Mr. Jacobus is corroborated slightly by the fact that when the first car was shipped it was accompanied by a draft for $480.35 which was the amount Mr. Jacobus claims was due the Alliance Company altogether. He is also corroborated by the fact that Mr. Wenniger went to Peoria in inspect the cars. The only object there could be for so doing would be to figure on the price as Mr. Jacobus had satisfied himself as to the ability of the Alliance people to do the work.

In Larson v Glos, 335 Ill. on page 587, it was said: "It is true that a court or jury is not bound to believe a witness when from all the other evidence or from the inherent improbability or contradictions in the testimony, the court or jury is satisfied of its falsity."

In People v Davis 269 Ill. on page 270 it was said: "The general rule undoubtedly is that positive testimony of a witness uncontradicted and unimpeached, - either by positive testimony or by circumstantial evidence, either intrinsic or extrinsic,- cannot be disregarded, but must control the decision of a court or jury. (Quock Ting v United States. 140 U. S. 417.) It is true the rule admits of exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. (Podolski v Stone, 186 Ill. 540; Kennard v Curran 339 Id. 133.) But neither court nor jury can wilfully or through mere caprice disregard the testimony of an unimpeached

witness. (Larson v Glos, 235 Ill. 584.) To the same effect is Kelly v Jones 390 Ill. 375.

Mr. Jacobus' testimony was uncontradicted, and it was not inherently unreasonable and he was not impeached in any manner and the jury had no right to disregard his testimony and should have found that at the time the automobile was replevined the appellant was not indebted to the Alliance Manufacturing Company for such repairs.

It is true that Jacobus was not positive as to the cent of the contract price, but he was positive that a specific price had been fixed and if a price was so fixed then plaintiff could not recover on a quantum meruit.

The cause will therefore be reversed and remanded for a new trial.

Niehaus, P. J. took no part.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6736

(1097a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

Certiorari denied 3

217 I.A. 661

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6736

The County of Peoria ex rel

The People &c. appellee

vs Appeal from Peoria.

Christopher Harrigan, &c.

appellant.

Heard, J.

Michael Harrigan died testate in Peoria County on October 8, 1911. His will was probated in the probate court of Peoria County and letters testamentary were issued to Christopher Harrigan and Kate Harrigan on their personal bond without security on Feb. 16, 1912. Kate Harrigan died intestate and after her death Christopher Harrigan acted as sole executor of the estate

On Jan. 12, 1918, the States Attorney of Peoria County for and on behalf of the county and for and on behalf of the People of the State of Illinois filed a petition in the probate court of Peoria County, setting up among other things that although the executor had been acting for more than five years he had failed to file a report or make any accounting as executor; that he had been guilty of waste, mismanagement and fraud upon the court and creditors of the estate by refusing to file proper inventories and trying to conceal for the personal benefit of his sisters and himself assets belonging to the estate; that said Christopher Harrigan as executor had been guilty of negligence in not paying the costs of administration of said estate, and compelled the clerk to employ counsel to aid him in collecting costs due him; that said Christopher Harrigan as executor has sought to secure for himself and his sisters, Kate and Maggie Harrigan, property belonging to said estate of Michael Harrigan deceased, and by appeals and secreting of property has sought to hinder, delay and defraud creditors of said estate and used his appointment as executor throughout the administration of said

Gen. No. 5738

The County of Peoria ex rel

The People &c. appellee

vs Appeal from Peoria.

Christopher Herrigan, &c.

appellant.

Heard, J.

Michael Herrigan died intate in Peoria County on October 8, 1911. His will was probated in the probate court of Peoria County and letters testamentary were issued to Christopher Herrigan and Kate Herrigan on their personal bond without security on Feb. 16, 1912. Kate Herrigan died intestate and after her death Christopher Herrigan acted as sole executor of the estate

On Jan. 13, 1916, the State Attorney of Peoria County for and on behalf of the county and for and on behalf of the People of the State of Illinois filed a petition in the probate court of Peoria County, setting up among other things that although the executor had been acting for more than five years he had failed to file a report or make any accounting as executor; that he had been guilty of waste, mismanagement and fraud upon the court and creditors of the estate by refusing to file proper inventories and trying to conceal for the personal benefit of himself and sisters and himself assets belonging to the estate; that said Christopher Herrigan as executor had been guilty of negligence in not paying the costs of administration of said estate, and compelled the clerk to employ counsel to aid him in collecting costs due him; that said Christopher Herrigan as executor has sought to secure for himself and his sisters, Kate and Margie Herrigan, property belonging to said estate of Michael Herrigan deceased, and by a petition and accounting he has sought to hinder, delay and defraud creditors of said estate and upon his appointment as executor throughout the administration of said

estate for his own personal uses and not for the fulfillment of his duties as executor by false claims of ownership and has had no appointment made of an executor pro tem to defend for said estate against his personal claims to xxxx property in his hands as executor; the petition charged that said Christopher Harrigan had been guilty of fraud upon the courtx, of waste and mismanagement of said estate, of negligence and disobedience of law and the orders of this court, and should by reason thereof be removed and some fit and proper person appointed in his stead as executor of said estate.

A hearing was had upon the petition in the Probate Court and appellant ordered removed as executor and adjudged to pay the costs of the proceedings, from which order appellant appealed to the circuit court. Thereupon hearing an order was entered finding the charges to be sustained and ordering the removal of Christopher Harrigan as executor and appointing E. J. Galbraith Public Administrator of Peoria County, to be administrator de bonis non of said estate, and adjudging the costs of the proceedings against Christopher Harrigan, from which order he appeals.

It is claimed by appellant that appellee has not been shown to be a creditor of the estate and so has not such an interest in the estate as would entitle appellee to petition for the removal of the executor. Appellant is estopped from urging this claim for the reason that when appellee attempted to prove on the trial that a claim of appellee for back taxes in the sum of $4801.17 had been allowed by the Probate Court, against the estate, appellants attorney objected "on the ground that it has nothing to do with the issues in this case; it is incompetent, improper and immaterial," which objection was sustained by the court. It has been repeatedly held by the Supreme Court and this Court that counsel cannot lead the court into error and afterwards

take advantage of the error. Appellees interest in the estate however was not a controverted question. It was stated in both petition and answer that appellee had a claim against the estate for taxes.

Upon the trial in the Circuit Court, at the request of appellee the court called appellant as the Court's witness. It is urged that if appellee desired the testimony of appellant he should have called him as appellees witness and that it was error for the court to call him as the court's witness. Had appellee called him as a witness, appellee would have vouched for the truthfulness of his testimony and it was very evident from the character of the litigation that appellant was a witness hostile to appellee. In sit ations of this character the supreme court has held it permissible for the court to call and examine a witness as the court's witness. He was an officer of the court and the court had a right sua sponte to investigate. It is assigned as error that the court improperly allowed evidence as to the claim of Maggie Harrigan for the reason that this claim had been allowed by the probate court and that such final order could not be set aside by this court. This evidence was properly admitted not for the purpose of going behind the adjudication of the probate court, but as tending to show that appellant was mismanaging the estate and squandering the funds by consenting to the allowance of unjust claims and hence was not a proper person to act as executor. Other errors are assigned, which we do not think it necessary to discuss in detail.

The evidence shows that from the beginning of his executorship appellant has been continupusly attempting to refrain from accounting for property which belonged to the estate of the deceased, and that he has done all that he could to obstruct the proper settlement of the estate and the payment of claims and costs allowed against it.

The finding of the court was right and is affirmed.

take advantage of the error. Appellees interest in the estate however was not a controverted question. It was proved in both petition and answer that appellee had a claim against the estate for taxes.

Upon the trial in the District Court, at the request of appellee the court called appellant as the Court's witness. It is urged that if appellee wanted the testimony of appellant he should have called him as appellees witness and that it was error for the court to call him as the court's witness. Had appellee called him as a witness, appellee could have vouched for the truthfulness of his testimony and it was very evident from the character of the litigation that appellant was a witness hostile to appellee. In either of this character the supreme court has held it permissible for the court to call and examine a witness as the court's witness. He was an officer of the court and the court had a right <u>sua sponte</u> to investigate. It is assigned as error that the court improperly allowed evidence as to the claim of Maggie Bertram for the reason that this claim had been allowed by the probate court and that such was properly admitted not for the purpose of going behind the adjudication of the probate court, but as tending to show that appellant was discharging the estate and submitting to final order could not be set aside by this court. This without claims by consenting to the allowance of mutual claims and were not a proper person to act as executor. Other errors are assigned, which we do not think it necessary to discuss in detail.

The evidence does that from the beginning of his postmastership appellant has been continually receiving and retaining from accounting for property which belonged to the estate of the deceased, and that he has done all that he could to obstruct the proper settlement of the estate and the payment of claims and costs allowed against it.

The finding of the court are right and be affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6740

(1098a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 661

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6740.

Floyd D. Bromley, Appellee,	)	
vs.	)	Appeal from Peoria County
Peoria Railway Company, Appellant.	)	Circuit Court.

Opinion by HEARD, J.

Appellee filed a declaration charging that the defendant, appellant, negligently suffered and permitted the appellee, while a passenger on its car, to ride on the foot-board or step of said car; that the car was greatly over-crowded with passengers, and because of the crowded condition of said car appellee was unable to secure entrance therein; that the defendant collected the usual fare; that while the appellee was so riding and in the exercise of due care and caution for his own safety, the servants of defendant by reason of the sudden increase in speed, negligently caused the said car to jerk, and without any signal or warning from the defendant, the said car jerked and threw the appellee, against a certain obstruction or part of the bridge, etc., and in the second count, charged the negligence as follows: While the defendant had notice of the unsafe and dangerous position in which the appellee was riding as a passenger, which said dangerous and unsafe position was that furnished by the

No. 6740.

Floyd D. Bromley,

Appellee,

vs.

Peoria Railway Company,

Appellant.

Appeal from Peoria County Circuit Court.

Opinion by [illegible].

Appellee filed a declaration charging that the defendant, appellant, negligently suffered and permitted the appellee, while a passenger on the car, to ride on the foot-board or step of said car; that the car was greatly over-crowded with passengers, and because of the crowded condition of said car appellee was unable to secure entrance thereto; that the defendant collected the usual fare; that while the appellee was so riding and in the exercise of due care and caution for his own safety, the servants of defendant by reason of the sudden increase in speed, negligently caused the said car to jerk, and without any signal or warning from the defendant, the said car jerked and threw the appellee, against a certain obstruction or part of the bridge, etc., and in the second count, charged the negligence as follows: While the defendant had notice of the unsafe and dangerous position in which the appellee was riding on a passenger, which said dangerous and unsafe position was that furnished by the

defendant because of the over-crowded condition of said car, without warning or notice to the appellee, negligently, carelessly and recklessly increased the speed of said car, so as to cause the said car to jerk, etc.

The appellant filed the Plea of the General Issue. The evidence shows that appellee was working at a factory in East Peoria, Illinois, and on the morning of the accident boarded a train of three cars consisting of a motor passenger car and two trailers. This train was known as the "Holt Special" and ran from the City of Peoria to the Village of East Peoria, crossing a bridge referred to in the testimony as the "McKinley" bridge or the "Illinois traction" bridge on its way to East Peoria.

The accident is claimed by the appellee to have occurred while the train was crossing the bridge on its way from Peoria to East Peoria. The evidence shows that there is a grade or incline from the Peoria side of the bridge up onto it, which grade is one of 4%, or a raise of four feet in each hundred lineal feet. From the draw of the bridge easterly there is a slight down grade. The testimony on behalf of appellee was to the effect that when he reached the train on that morning it was already filled and men were standing on the platform of the several cars, and that appellee stood upon the bottom step on the left or north side at the front end of the third car. The train as it crossed the bridge was going in an easterly direction. That as appellee

was going in an westerly direction. That is appellee was
of the third car. The train as it crossed the bridge
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may from Peoria to East Peoria. The evidence shows that
there is a grade or incline from the Peoria side of the
occurred while the train was crossing the bridge on its
East Peoria.

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referred to in the testimony as the "McKinley" bridge
Peoria to the Village of East Peoria, crossing a bridge
known as the "Holt Special" duly run from the City of
motor passenger car and two trailers. Said train was
accident occurred a train of three cars consisting of a
in East Peoria, Illinois, and on the morning of the
The evidence shows that appellee was starting at a factory

Defendant because of the over-crowded condition of said
car, without warning or notice to the appellee, negligent-
ly and recklessly increased the speed of said car, so as
to cause the said car to jerk, who

The appellant filed the Plea of the General Issue.

stood on the step he faced south or toward the car, holding onto a hand rail with his left hand and holding his lunch in his right. Appellee says that the major portion of the step of which he was standing was inside the line of the body of the car. The testimony of appellee himself as to how the accident occurred was that when the car he was on reached the center of the draw of the bridge the car lurched sideways and his head struck the upright support of the side of the draw at the center. It appears from the evidence that the draw of the bridge is what is known as a jack-knife draw; that is, the draw is divided in the center and is opened by the two sides raising up, each side being, in effect, hinged at either end of the draw; that due to this construction there is necessarily a break in the rails at each end of the draw and at the center and a break in the trolley wire at the center.

There is testimony tending to show that after the motor, which was at the head of the train, passed over the draw so as to clear the trolley at the draw, the speed was increased by jerks; that there were four or five jerks, as additional power was applied, there was a sudden jerk, that jerk and swaying threw appellee against the upright on the bridge. This upright was a steel girder, and was only about one foot from the side of the car; that is, the car would clear these upright girders on the draw only about one foot. The cars were about 60 feet long. There were three steps on the car beside the vestibule floor. The bottom

steps on the car bearing the westbound floor. The bottom
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about one foot from the side of the car; that is, the car
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the step of which he was standing was inside the line of
onto a hand rail with his left hand and holding his hands
stood on the step he leaned south or toward the car, holding

step was three feet long and eight inches wide. When the car, upon which appellee was injured, started across the bridge, there were three men on the bottom step, two on the second, and two on the third, and eighteen or twenty men on the platform.

The evidence was conflicting as to the speed of the car and the lurching or jerking of the car. There is also testimony that there is necessarily some kerking or lurching as a car passes over the breaks in the rails both at the ends and in the cernter of the draw.

XXXX Appellee was in a hospital four days following his injury and then remained at home for three weeks. After that time he returned to the same work he was doing prior to the injury and continued in such work constantly up to the time of the trial, except during the time he was in the United States Army. His earnings at the time of the injury were $25.00 a week and at the time of the trial he was earning $31.00 a week. The injury occurred on December 21, 1917, and on May 23, 1918, appellee was drafted into the United States Army and sent to Jefferson Barracks, Missouri. He was in the Army until December 14, 1918, at which time he was discharged. His certificate of discharge showed his physical condition to be good at the time of such discharge. The only time appellee has ever lost from his work on account of the injury is the four days he was in the hospital immediately following the accident and the three weeks following when he was at home.

The case was tried before the Court and a jury and at

The case was tried before the Court and a jury and at

the close of all the evidence appellant moved the Court to direct a verdict in its favor and offered an instruction to that effect. That motion was overruled and the instruction refused. The case was then argued, the jury instructed and a verdict returned by the jury finding the appellant guilty and assessing appellee's damages at $7,000.00. Appellant moved for a new trial and such motion was argued before the trial Court. The trial Court held the verdict to be excessive but upon a remittitur by appellee to $4,000.00 the trial Court overruled the motion and entered judgment on the verdict against appellant for $4,000.00 and costs, from which judgment an appeal was perfected and the case comes here for review.

Prior to entering upon the trial appellant made a motion for a continuance of the case on account of the absence of the witnesses Dr. G. H. Raithel and M. A. Coffel and in support of such motion filed therewith sworn statements of what the witnesses would testify to if present in court, and appellee for the purpose of avoiding a continuance, admitted that if the witnesses were present in court in person they would testify as set-up in the statements, and upon the trial these statements were read in evidence.

One of the assignments of error is the refusal of the Court to give defendant's second and fourth refused instructions, which were with reference to the statements of the witnesses Dr G. H. Raithel and M. A. Coffel which had been read in evidence. As this case must be reversed upon another ground we do not deem it necessary to

pass upon this assignment of error.

Appellant contends that the remarks of appellee's counsel, during the course of the trial, his statements in argument and conduct towards the appellee's witnesses, were such as to influence and prejudice the jury and instances of such misconduct are called to our attention too numerous to detail here. He insulted witnesses and persisted in making prejudical remarks in his argument to the jury after objections thereto had been sustained by the Court. It is true that in most instances objection to the misconduct of counsel were sustained by the Court, and although trial judge did every thing in his power to prevent prejudice the appellant must have been prejudiced thereby is evidenced by the fact that the verdict of the jury was for $7,000.00 and that Appellee entered a remittiture of $3,000.00. Such misconduct of counsel cannot be tolorated in Courts of Justice and the quickest way of putting a stop to it is to grant a new trial whenever it occurs.

The language of the Supreme Court in Bishop v. Chicago Junction Ry. Co., 289 Ill. on page 68, is so exactly in point that we adopt it as our own. He says: "The rule concerning the effect of misconduct of ocunsel has been stated in numerous cases. In the case of Appel v. Chicago City Railway Co., 259 Ill. 561, 102 N. E. 1021, a judgment of the lower court was reversed for misconduct of ocunsel. In that case it was said:

"In a clear case, however, this court will reverse a

judgment because of the improper conduct of counsel, and had reversed judgments because of the prejudicial statements of counsel even though the trial court has sustained objections to such statements, rebuked counsel, and directed the jury to disregard the statements. Wabash Railroad Co. v. Billings, 212 Ill. 37 (73 N. E. 3); Chicago Union Traction Co. v. Lauth, 216 Ill. 176 (74 N. E. 738). The rule in this state must be regarded as settled that misconduct of counsel of the character mentioned is sufficient cause for reversing a judgment, unless it can be seen that it did not result in injury to the defeated party. The questions to be determined are therefore whether the improper argument was of such a character as was likely to prejudice the defendant, and if so, was the verdict so clearly right that a new trial ought not to be granted because of such prejudicial arguments ?"

"In Chicago & Alton Railroad Co. v. Scott, 232 Ill. 419, 83 N. E. 938, counsel for the plaintiff indulged in inflammatory language against the railroad company calculated to prejudice the jury. The trial court sustained the objections thereto. It was held there that the sustaining of the objections under the circumstantes in that case did not excuse the error. The court there said:

"A court owes a duty of protection to witnesses and parties, and especially to witnesses, and the court hearing an attorney, under the guise of argument, abusing his privilege, should, either upon objection or its own motion , check the

attorney, and not only do that, but preserve the dignity of the Court by compelling obedience to its order. 2 Ency. of Pl. & Pl & Pr. 750. It is the duty of a court to xx preserve its own dignity and the respect due to the courts and the administration of the law by not allowing an attorney, under the pretense of arguing the case, to indulge in abuse of parties or witnesses. City of Salem v. Webster, 193 Ill. 369 (61 N. E. 323). The xx power vested in the court should have been properly used in this case at the outset by stopping the line of argument upon which the attorney had entered and endeavoring to remove the prejudices excited by his language. The court failed in its duty, and the mere sustaining of objections was no adequate remedy for the evil done. As was said by the Supreme Court of Wisconsin in the case of Sullivan v. Collins, 107 Wis. 291 (83 N. W. 310); "The least that a self-respecting court can do under such circumstances is to stop such practice in the presence of the jury, and not allow it to proceed with simply a perfunctory sustaining of objections."

In Chicago Union Traction Co. v. Lauth, supra, it was said: "The rule is, that although the trial court may have done its full duty in its supervision of the trial and in sustaining objections, a new trial should be granted where it appears that the abuse of argument has worked an injustice to one of the parties."

While it is true that at times, in closely contested cases, counsel may inadvertently say that which is prejudicial,

objections."

In Chicago Union Traction Co. v. Lauth, supra, it was said: "The rule is, that although the trial court may have done its full duty in the enforcement of the rules of evidence by sustaining objections, a new trial should be granted where it appears that the abuse of discretion has worked an injustice to one of the parties."

While it is true that at times, in strictly contested cases, counsel may inadvertently say that which is prejudicial,

the influence of such a statement may generally be overcome by sustaining objections thereto and by retraction on the part of the offending counsel made in good faith, yet where it would appear, as it does here by frequent instances, that counsel has in the presence of the jury indulged in acts and statements prejudicial to the rights of the opposite party, and which tend to indicate that he was seeking what might be gained from such prejudice of the jury, such misconduct will amount to a mistrial of the cause, unless it can be seen that it did not result in injury to the plaintiff in error. We cannot so hold here. The evidence was conflicting and the verdict returned was for a large sum. While it is unfortunate that this case must be reversed for these reasons, yet it is a misfortune visited upon defendant in error by his own attorney. When intelligent counsel persists in conduct which he knows may result in setting aside the verdict of the jury if he secures one, he is thereby diliberately taking chances with his client's rights. As was said in Bale V. Chicago Junction Railway Co., 359 Ill. 476, N. E. 808, where prejudicial remarks were made, objected to, and objection sustained: "This kind of argument cannot be justified, and if willfully persisted in will justify the reversal of a judgment even though the court has sustained objections to it. It is, of itself, sufficient reason for granting a new trial.

While it is regrettable that this case must be reversed because of improper conduct of intelligent and

able counsel yet, if courts of law are to be sources of justice, the rule that parties litigant, regardless of who they may be, shall have secured to them the opportunity to have the issues of their case tried by a jury free from the prejudicial influence of improper conduct of counsel must be strictly enforced."

The judgment of the Circuit Court will be reversed and the cause remanded.

Niehaus, J., took no part.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6753

(1079a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 661

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6753

Christina Hoffman, appellee

vs Appeal from Lee.

Estate of Frank Abrogast, decd.

appellant.

Heard, J.

Christina Hoffman, the appellee, filed her claim in the County Court of Lee County against the estate of Frank Abrogast deceased, for nursing, washing, food and care furnished Minnie Abrogast wife of Frank Abrogast during her last illness and for board, food, labor and services furnished Frank Abrogast both before and after his wife's death.

The claim was disallowed in the County Court and an appeal taken by appellee to the Circuit Court, where a jury rendered a verdict for $832. in favor of appellee. A remittitur of $150 was made and judgment was entered against the estate for $682 and costs, from which judgment this appeal was taken.

Appellant assigns as error the giving of appellee's instruction to the jury. There were but two instructions given to the jury - one for appellee and one for appellant, and while the one given for appellee may be technically objectionable, yet when the two instructions are considered together as a series they are to say the least not unfavorable to appellant.

It is claimed that the judgment was not warranted by the evidence and that as appellee was a sister of Mrs. Abrogast the presumption is that the services were gratuitous.

The evidence in the case shows that Abrogast and his wife lived in a home which he owned in the City of Dixon; that they had no living children; that appellee lived almost directly across the street from the Abrogast family; that Mrs. Abrogast for some years before her death was afflicted with a cancer of her face which progressed until it became very painful, requiring

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It is claimed that the judgment was not warranted by the evidence and that as appellee was a sister of Mrs. Abrogast the presumption is that the services were gratuitous.

The evidence in the case shows that Abrogast and his wife lived in a home which he owned in the City of Dixon; that they had no living children; that appellee lived almost directly across the street from the Abrogast family; that Mrs. Abrogast for some years before her death was afflicted with a cancer of her face which progressed until it became very painful, requiring

frequent attention and dressing, and which gave forth very offensive odors; that appellee for some time before Mrs. Abrogast's death went to the Abrogast home daily to dress and care for Mrs. Abrogast and give her food and drink; that each week on Monday she did their washing. After his wife's death Frank Abrogast remained for several months at his home and while there appellee continued to cook, wash and mend for him. No payments were shown to have been made appellee. Some time prior to his death Frank Abrogast was elected tax collector for Dixon township. It was stipulated between the parties that Elmer Countryman, if present would testify that Frank Abrogast, ~~said~~ prior to the death of Minnie Abrogast, told said Countryman that "Christina helps take care of my wife in the daytime. I have'nt the money to pay for a nurse, and am going to make it all right with her when I get my tax money." That statement was made with reference to the claimant and was made between April 1914, and October 5, 1914. The evidence shows that to other persons he expressed his appreciation of appellee's services and said she would be paid therefor; that by his last will and testament he bequeathed $150. to appellee; that during all this time appellee kept up her own home and attended to her own household duties; that during a portion of the time before his wife's death Abrogast gave up his work and helped in the housework and care for his wife; that Abrogast was poor and unable to hire a trained or practical nurse. There was no direct evidence of an express contract. The law in this state in this class of cases is well settled.

In Heffron v Brown, 155 Ill. on page 336 it was said: "Where services are rendered by one admitted into the family as a relative, the presumption of law is that such services are gratuitous, and that the parties do not contemplate the payment of wages therefor. This presumption, however, may beovercome by

frequent attention and treating, [illegible] very cordially; that appellee for some time before Mrs. Bromley's death went to the Abrogast home daily to dress and care for her. Abrogast and give her food and drink; that each week on Monday [illegible] their washing. After his wife's death Frank Abrogast remained for several months at his home and while there supplied continued to cook, wash and mend for him. No requests were shown to have been made to appellee. Some time prior to his death Frank Abrogast was elected tax collector for Dixon township. It was stipulated between the parties that Tyler Countryman, if present would testify that Frank Abrogast, [illegible] prior to the death of Minnie Abrogast, told said Countryman that "Christine helps take care of my wife in every way. I have'nt the money to pay for a nurse, and am going to make it all right with her when I get my tax money." That statement was made with reference to the [illegible] and was made between April 1914, and October [illegible], 1914. The evidence shows that to other persons he expressed his appreciation of appellee's services. All said she would be paid therefor; that by his last will and testament he bequeathed $1500. to appellee; that during all this time appellee kept up her own home and attended to her own household duties; that during a portion of the time before his wife's death Abrogast gave up his work and helped in the housework and care for his wife; that Abrogast was poor and unable to hire a trained or practical nurse. There was no direct evidence of an express contract. The law in this state in this class of cases is well settled.

In Helfron v Brown, 144 Ill. on page 348 it was said: "Where services are rendered by one member of the family to a relative, the presumption of law is that such services are gratuitous, and that the parties in our understanding the [illegible] of [illegible] merges therefor. This presumption, however, may be overcome by

proof. The proof necessary to overcome the presumption may be wither of an express contract, or of a contract established by such facts and circumstances as show that both parties, at the time the services were rendered, contemplated or intended pecuniary recompense other than that which arises naturally out of the family relation. (Miller v Miller, 16 Ill. 296.)

A contract is express "where it consists of words written or spoken, expressing an actual agreement of the parties;" it is implied when it is evidenced by conduct manifesting an intention of agreement." (3 Am. & Eng. Enc. of Law, page 843.) Anderson, in his law dictionary, says that a contract is express "when the agreement is formal and stated either verbally or in writing, and is implied when the agreement is matter of inference and deduction." In Ex parte Ford, 16 Q. B. Div. 307, it was said that, "whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted." In Marzetti v Williams, 1 Barn. & Adol. 415, Lord Tenterden said: "The only difference between an express and an implied contract is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract by circumstances, and the general course of dealing between the parties;" In the same case Parke, J., said: "The only difference, however, between and express and an implied contract, is as to the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence;" and Patterson, J. said: "But the only distinction between the two species of contracts is as to the mode of proof. The one is proved by the express words used by the parties, the other by circumstances showing that the parties intended to con-

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tract. "An agreement may be said to be implied, when it is inferred from the acts or conduct of the parties, instead of their spoken words." The engagement is signified by conduct instrad of words. (Bixby v Moor, 51 N. H. 402.)

In Neish v Gannon, 198 Ill. 231, it is said: "It is well settled that where one person renders services to another with the assentand approval of the person for whom they are rendered the law raises an implied promise to pay for the services, but where the family relation exists such implication does not arise from the mere rendition of the services, and in that case it will be presumed that the services were rendered as a gratuity on account of the mutual obligations existing between the parties growing out of the family relation. Such presumption is, however, rebutted where the evidence establishes an express contract to pay for the servicesm, or where,from the facts proven, it appears that at the time the services were performed both parties understood and expected that the party performing the services was to be compensated therefor, although no express contract to pay for the service is proven, in which case a contract will be raised, by implication of law, to pay for such services. (Miller v Miller 16 Ill. 296; Collar v Patterson 137 id. 403; Switzer v Kee,146 id. 577; Heffron v Brown, 155 id 328; Sherman v Whiteside, 190 id. 576.) In Miller v Miller supra, on page 298 it is said: "Where one ramains with a parent or with a person standing in the relation of parent, after arriving at majority, and remains in the same apparent relation as when a minor, the presumption is that the parties do not contemplate payment of wages for services. This presumption may be overthrown and the reverse established by proof of an express or implied contract, and the implied contract may be proven by facts and circumstances which show that both parties, at the time

tract. "An agreement may be said to be implied, when it is inferred from the acts or conduct of the parties, instead of their spoken words." The expression is sometimes used instead of words. (Kirby v Wood, 32 E. R. 106.)

In Nelan v Gannon, 108 Ill. 481, it is said: "It is well settled that where one person renders services to another with the assent and a proval of the person for whom they are rendered the law raises an implied promise to pay for the services, but where the family relation exists such implication does not arise from the mere rendition of the services, and in that case it will be presumed that the services were rendered as a gratuity or account of the mutual obligations existing between the parties growing out of the family relation. Such presumption is, however, rebutted where the evidence establishes an express contract to pay for the services, or where, from the facts proven, it appears that at the time the services were performed both parties understood and expected that the party performing the services was to be compensated therefor, although no express contract to pay for the services be proven, in which case a contract will be raised, by implication of law, to pay for such services. (Miller v Miller 10 Ill. 338; Duffy v Patterson 137 id. 405; Smither v Kue, 146 id. 377; Hamilton v Brown, 165 id. 344; Burton v Burton, 180 id. 176.) In Miller v Miller supra, on page 338 it is said: "Where one remains with a parent or with a person standing in the relation of parent, after arriving at majority, and continues in the same apparent relation as when a minor, the presumption is that, the parties do not contemplate payment of wages for services. The presumption may be overthrown and the received rebutted by proof of an express or implied contract, and such contract may be proven by facts and circumstances other than that party services, at the time

the services were performed, contemplated or intended pecuniary recompense, other than such as naturally arises out of the relation of parent and child." And in Sherman v Whiteside, supra (p.579): "In the ordinary case of services rendered by one peeson to another with the assent and approval of the person for whom they are rendered the law raises an implied promise to pay but where the family relation exists the implication does not arise from the mere rendition of the service, and the law will rather infer that it was rendered on account of the mutual obligations between members of the same family. In such case, an agreement to pay for services must be established either by proof of an express contract, or of facts from which an inference of such an agreement will arise. Such facts must justify the conclusion that the parties were dealing on the footing of contract, and that both parties expected the services to be paid for."

In this present case the parties were not living together in the family relation and there was sufficient evidence to submit to the jury the question of whether or not at the time the services were performed both parties understood and expected that the party performing the services was to be recompensed therefor.

The jury found in favor of appellee on this question and we are not disposed to interfere with their finding.

The judgment of the circuit court is therefore affirmed.

the services were performed, contemplated or intended pecuniary recompense, other than such as ordinarily arises out of the relation of parent and child." And in Cheeves v Whitside, supra (p.579): "In the ordinary case of services rendered by one person to another with the assent and approval of the person for whom they are rendered the law raises an implied promise to pay but where the family relation exists the implication does not arise from the mere rendition of the service, and the law will rather infer that it was rendered on account of the mutual obligations between members of the same family. In such cases, an agreement to pay for services must be established either by proof of an express contract, or of facts from which an inference of such an agreement will arise. Such facts must justify the conclusion that the parties were dealing on the footing of contract, and that both parties expected the services to be paid for."

In this present case the parties were not living together in the family relation and there was sufficient evidence to submit to the jury the question of whether or not at the time the services were performed both parties understood and expected that the party performing the services was to be recompensed therefor.

The jury found in favor of appellee on this question and we are not disposed to interfere with their finding.

The judgment of the circuit court is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6756

(1100a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 662

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6756

Sherman W. Shafer, and Ray
C. Ferguson, appellees.

vs Appeal from Henry.

William Gradert and John
F. Tomlinson, appellants.

Heard, J.

December 2, 1913, appellants and appellees entered into a written contract according to the terms of which appellants agreed to convey to appellees 800 acres of land in Saskatchewan Canada in exchange for 558 acres of land in Dallas County Iowa and other considerations, both farms being subject to mortgage indebtedness. Appellants failed to carry out the provisions of the contract on their part to be performed and appellees brought suit to recover the difference between the fair cash market value of the Saskatchewan land and the contract price.

Defendants sought to set up their defense in four special pleas, setting forth that the appellees pointed out the wrong boundary lines of the Dallas County land, misrepresented the fertility and productivity of the lands, and a fifth special plea, setting forth the fact that appellees had accepted a recission of the contract. The appellees filed replications to those pleas but demurrers were finally sustained to the said pleas. Appellants again sought to file three additional pleas, setting up substantially the same matter. The court struck the pleas from the files because they were filed without leave of court and defendants sought a continuance of the case on the grounds that appellants were taken by surprise and were unprepared for trial under the state of the pleadings.

Appellants on the trial sought to introduce evidence of

Gen. No. 6778

Sherman W. Shafer, and Ray

C. Ferguson, appellees.

vs

Appeal from Henry.

William Gradert and John

F. Tomlinson, appellants.

Beard, J.

December 8, 1913, appellants and appellees entered into a written contract according to the terms of which appellants agreed to convey to appellees 800 acres of land in Saskatchewan Canada in exchange for 562 acres of land in Dallas County Iowa and other consideration, both farms being subject to mortgage indebtedness. Appellants failed to carry out the provisions of the contract on their part to be performed and appellees brought suit to recover the difference between the fair cash market value of the Saskatchewan land and the contract price.

Defendants sought to set up their defense in four special pleas, setting forth that the appellees pointed out the wrong boundary lines of the Dallas County land, misrepresented the fertility and productivity of the lands, and a fifth special plea, setting forth the fact that appellees had accepted a recission of the contract. The appellees filed replications to those pleas but demurrers were finally sustained to the said pleas. Appellants again sought to file three additional pleas, setting up substantially the same matter. The court struck the pleas from the files because they were filed without leave of court and defendants sought a continuance of the case on the grounds that appellants were taken by surprise and were unprepared for trial under the state of the pleadings.

Appellants on the trial sought to introduce evidence of

the fraudulent misrepresentations set forth in their pleas under the general issue for the purpose of recoupment, but the court held that the evidence was improper and appellees recovered a verdict of $750.00.

Appellants seek a reversal of the judgment of the trial court on these grounds:

1st. On the ruling of the court in striking the pleas of appellants and excluding evidence of fraud and misrepresentations offered for the purpose of recoupment under the general issue.

2nd. Because of the refusal of the court to allow a continuance after the striking of the pleas.

3rd. Because of instructions wrongfully given and others wrongfu ly refused.

4th. Because of other minor errors and the fact that the verdict was against the weight of the evidence.

Upon examination of the bill of exceptions in this case we find that the action of the court in striking the pleas from the files, refusing leave to file special pleas and refusing to grant a continuance does not appear in the bill of exceptions and therefore the rulings of the court in those respects are not before this court for review.

Appellants in this case contend that the refusal of the court to submit to the jury for the purpose of recoupment, certain claimed misrepresentations of fact with respect to the Dallas county lands which induced the appellants to enter into the contract in question was error. Appellants sought to have this issue submitted to the jury by evidence offered to the jury under the general issue by way of recoupment. Appellants rescinded the contract and notified appellees before the time for carrying out its provisions that they would not perform the contract or be

out its provisions that they would not provide the contract or be the contract and entitled appellee [illegible] for carrying under the general issue by way of recoupment. Appellants requested this issue submitted to the jury by evidence offered to the jury the contract in question was error. Appellants sought to have Dallas county Judge which instructed the appellants to enter into certain claimed misrepresentations of fact with respect to the court to submit to the jury for the purpose of recoupment, but the court before this court for review.

Appellants in this case contend that the refusal of the and therefore the rulings of the court in those respects are not to grant a continuance does not appear in the bill of exceptions the files, returning leave to file special plea and refusing find that the action of the court in striking the plea from

Upon examination of the bill of exceptions in this case we verdict was against the weight of the evidence.

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3rd. Because of instructions wrongfully given and others

2nd. Because of the refusal of the court to allow a continuance after the striking of the plea.

the general issue.

misrepresentations offered for the purpose of recoupment under appellants and exploiting evidence of fraud and [illegible]

1st. On the ruling of the court in striking the plea of court on these grounds:

Appellants seek a reversal of the judgment of the trial

verdict of $750.00.

held that the evidence was improper [illegible] recovered a

the general issue for the purpose of recoupment, but the court

the fraudulent misrepresentations set forth in their pleas under

bound thereby. Appellants did not accept the Dallas County lands concerning which the misrepresentations were alleged to have been made. The evidence was not admissible under the general issue for the reason that even if there had been fraudulent misrepresentations as to the land appellants were not injured thereby for they were not induced to take the lands by reason thereof. They did not take the land at all and for the purposes of this case it was immaterial whether or not the land was as represented.

Appellants' objections to appellees' instructions 2 and 3 are not well taken. They do not assume facts in controversy, but are merely statements of general principles of law.

There was no error in the refusal of instructions offered by appellants. The judgment of the circuit court is affirmed.

Appellants' objections to appellees' instructions 3 and 5 are not well taken. They do not assume facts in controversy, but are merely statements of general principles of law.

There was no error in the refusal of instructions offered by appellants. The judgment of the circuit court is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6759

(1012)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 662

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6759

Susan Mason, appellee

vs Appeal from LaSalle.

George Mason, appellant.

Heard, J.

Susan Mason, appellee filed a bill in the circuit court of LaSalle County against her husband, George Mason the appellant, for separate maintenance, alleging that she was living separate and apart from her husband by reason of his adultery and extreme and repeated cruelty. Appellant answered denying the charges and a trial in the Circuit Court resulted in a decree for appellee and an allowance by the court to appellee of $75. per month alimony from which decree this appeal is brought.

The only question raised by appellant in his brief and argument is that the allowance for alimony is excessive. In determining the amount of alimony to be allowed in a given case, the Court should consider the necessities of the wife, the ability of the husband to pay, the amount of their property and their respective incomes, and whether the accumulations of property if any, during their martial life were their joint production or were due solely to the efforts of the husband.

The parties were married in 1890 and at that time neither had any property. Most of their married life was spent upon farms at various places, appellee assisting in doing all kinds of farm work.

Appellee is forty one years of age, sickly and not able to do any thing to earn a livlihood and has no property and no home.

Appellant is a strong healthy man and at the time of the trial was a tenant on a 240 acre farm for which he pays $1940 cash rent. Of this land 13 acres was hay land, 90 acres under

Gen. No. 6758

Susan Mason, appellee

vs Appeal from LaSalle.

George Mason, appellant.

Heard, J.

Susan Mason, appellee filed a bill in the circuit court of LaSalle County against her husband, George Mason the appellant, for separate maintenance, alleging that she was living separate and apart from her husband by reason of his adultery and extreme and repeated cruelty. Appellant answered denying the charges and a trial in the Circuit Court resulted in a decree for appellee and an allowance by the court to appellee of $75. per month alimony from which decree this appeal is brought.

The only question raised by appellant in his brief and argument is that the allowance for alimony is excessive. In determining the amount of alimony to be allowed in a given case, the Court should consider the necessities of the wife, the ability of the husband to pay, the amount of their property and their respective incomes, and whether the accumulations of property if any, bring their mutual life were their joint production or were due solely to the efforts of the husband.

The parties were married in 1880 and at that time neither had any property. Most of their married life was spent upon farms at various places, appellee assisting in doing all kinds of farm work.

Appellee is forty one years of age, nearly old not able to do any thing to earn a living and has no property and no home.

A pellant is a strong healthy man and at the time of the trial was a tenant on a 240 acre farm for which he pays $1840 cash rent. Of this land 13 acres was hay land, 80 acres under

cultivation and the balance in pasture. He had 11 horses and about $1,500 worth of cattle and ordinary farm machinery.

Taking into consideration these facts together with the well known high cost of living and the high prices of all kinds of farm products we cannot say that an allowance of $75 per month is excessive, even though in time it might take some of the accumulations made possible by appellee's years of toil.

The decree of the circuit court is affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6763

(1102a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and nineteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 662

BE IT REMEMBERED, that afterwards, to-wit: on MAR 9 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6763

Wm. L. Belden, appellee

vs Appeal from Co. Ct. Knox.

Wesley Morse, Appellant.

Heard J.

This is a suit brought by Wm. L. Belden, appellee a landlord, against Wesley Morse, appellant his tenant, for a balance claimed to be due for rent. A jury trial resulted in a verdict for $161.10 in favor of appellee.

In his argument appellant says; The only questions material in this case are, as to what rent was to be paid by appellant to appellee for the rent of his farm from March 1, 1916, to March 1, 1917, and what credits appellant is entitled to for checks, cash, material and labor, performed by him for appellee on the farm during the time he, appellant, occupied it from March 1st. 1913, including the use of one room of the house on the premises for the four years.

Upon these controverted questions of fact there was a direct conflict of testimony. The jury found in favor of plaintiff and the Judge who heard and saw the witnesses approved the verdict and rendered judgment thereon and we find no ground to interfere with their decision.

The judgment of the County Court is affirmed.

Cir. No. 6783

We. L. Bolton, appellee

va Appeal from Co. Ct. Knox.

Wesley Morse, Appellant.

Held 1.

This is a suit brought by Wm. L. Bolton, appellee a landlord, against Wesley Morse, appellant his tenant, for a balance claimed to be due for rent. A jury trial resulted in a verdict for $181.10 in favor of appellee.

In his argument appellant says: The only question material in this case are, Is it the duty of the party to be sued by appellant to appellee for the rent of his farm from March 1, 1918, to March 1, 1917, and must certain evidence in writing to for checks, cash, material and labor, performed by him for appellee on the farm during the time in, appellant, concluded it from March 1st. 1915, including the use of one- fifth of the house on the premises for the four years.

Upon these controverted questions of fact there was a direct conflict of testimony. The jury found in favor of plaintiff and the Judge who heard and saw the witnesses approved the verdict and rendered judgment thereon and we find no ground to interfere with their decision.

The judgment of the County Court is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6211

(1103a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 662

BE IT REMEMBERED, that afterwards, to-wit: on APR 21 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No.6711

ELIAS MICHAEL Administrator of the Estate of FRANK MICHAEL, Deceased;
Appellant.

vs

PRAIRIE STATE CANNING COMPANY; a Corporation;
Appellee.

Appeal from Circuit Court Woodford County

Niehaus, P. J.

This is a suit which was brought by the appellant, Elias Michael as administrator of the Estate of Frank Michael, deceased, for the benefit of the next kin of said deceased, in the circuit court of Woodford county, to recover damages from the Prairie State Canning Company, William Jones, and the Bloomington Normal Railway & Light Co., who were made defendants therein, on account of the death of Frank Michael, whose death it is alleged, resulted from the negligence of said parties. There was a trial by jury; and at the close of the appellant's proofs, the appellant dismissed the case as to the defendants, William Jones and the Bloomington Normal Railway & Light Co. And the court thereupon on motion of appellee, directed a verdict of not guilty as to the appellee, the other defendant, and rendered a judgment on the verdict. And an appeal is no prosecuted from the judgment.

It appears from the evidence, that the Prairie State Canning Company appellee herein operates a canning factory at El Paso, in Woodford county; and that its business is canning sweet corn and other vegetables. In connection with this business it uses a silo, which is situated adjacent to the canning plant.

Gen. No. 6711

ELIAS MICHAEL, Administrator
of the Estate of ELIAS
MICHAEL, Deceased;

Appellant.

vs.

PHARIS STATE GAMING COMPANY;
a Corporation;

Appellee.

Pleadings, p. 1.

This is a suit which was brought by the appellant, Elias Michael as administrator of the Estate of Isaac Michael, deceased, for the benefit of the next kin of said decedent, in the circuit court of Buckley county, to recover damages from the Pueblo Pure Quality Company, Milton Jones, and the Stockingham Commel Mining & Light Co., the more well described therein, on account of the death of Isaac Michael, whose death it is alleged, resulted from the negligence of said [illegible]. There was a trial by jury; and at the close of the appellant's proofs, the appellee Company moved as to the defendants, Milton Jones and the Pleasantgrove Normal Mining & Light Co. And the court thereupon on motion of appellee, directed a verdict of not guilty as to the appellee, the other defendants [illegible] rendered a judgment on the verdict. And to reverse, entered from the judgment.

It appears from the evidence, that the Pueblo Pure Canning Company operates beside several a canning factory at El Paso, in Pueblo county; and that its business is canning sweet corn and other vegetables. In connection with this business it uses a silo, which is situated adjacent to the canning plant.

The silo is a round structure, about 50 feet high and 30 feet in diameter; and the refuse matter resulting from the canning operation is turned into the silo and thus converted into silage. The silo on its outer side, has a long slot, running up and down the structure, in which there are openings at different points to take out the silage; and a mechanical apparatus is used as a conveyor, to carry the silage which is put into it, through an opening and dump it into wagons which are used to haul it away. The conveyor is run by electric power; and the power is turned on, or off, by means of a switch, which is located on the inside of the silo. The negligence which is alleged in the declaration against the appellee is, that the electric switch was not properly safe guarded for the protection of the persons who had occasion to use it for the purpose of getting the silage. The silage was waste matter, which was given away by the appellee to farmers, who would agree to raise sweet corn; and the appellee before the day on which the deceased Michael met his death had extended a general invitation in an El Paso newspaper, to all such farmers, to come and help themselves to it. One of the farmers to whom the invitation applied was William Jones; and Jones had also received a personal invitation from one of the officers of the canning company, to take the silage and use it. The canning company by this method, was utilizing the waste product of its factory to induce farmers of the vicinity to grow the particular kind of corn which they were interested in having grown in the conduct of their business. William Jones had repeatedly during the year 1918 availed himself of the company's invitation to get silage; and on the day in question namely, the 13th day of

April of that year, accompanied by the deceased Frank Michael, and two sons, who were small boys, again came with a wagon to get more silage. Michael was a lad, sixteen years old, and for some time prior had been working for Jones during the morning hours of each day; and his employment up to that time had been to assist Jones in delivering milk about the town of El Paso; but arrangements had also been made for Michael, to do general work for Jones, after school was out and during the ensuing summer. When Jones, Michael and the two boys got to the silo, Michael took the pitch form, which Jones had brought along with him in the wagon, and climbed up the silo ladder, and entered the silo; he turned on the power at the switch, which started the conveyor; and when Jones got into the silo the conveyor was running. Jones took the fork, which he had brought with him, and pitched silage into the conveyor; Michael took another fork which was in the silo, and assisted Jones in his work. A little while thereafter, one of the Jones' boys shouted, that the "load was full," and thereupon, Jones climbed up the ladder to the lookout, to see whether the wagon was loaded; and having ascertained that fact, he said to Michael: "Frank, we have got a load." Michael, thereupon stopped pitching, and attempted to turn off the power at the switch; and in the act of turning the switch he received an electric shock which caused his instant death.

It is appellee's contention, that Michael was merely a trespassor in the silo, or at most a licensee, and that therefore, the appellee was not in duty bound to keep its silo in a reasonably safe condition so far as Michael was concerned. However it must be pointed out that the invitation to get silage from this silo, which was extended by the appellee to Jones, did not preclude the idea, that Jones might avail himself of assist-

ance in getting it; and if Michael was in the silo pursuant to Jones' desire to have him there, for the purpose of assisting him in getting silage, then Michael was in the silo in furtherance of the same object and purpose for which Jones was there; and hence he cannot be considered legally a trespasser, or merely a licensee; but his relation under these circumstances to the appellee, would be the same as that of Jones himself, who it is conceded was an invitee. The evidence adduced on the trial tended to show, that while Michael got into the silo, and performed work of assistance to Jones in getting silage, without any express solicitation from Jones, that he was working with Jones' assent and approbation, and that Jones apparently relied on him to perform the services which he did; and accepted them as if they were expected from Michael. It is not a necessary element for a recovery against the appellee, that the proof should show that the relation of master and servant existed between Jones and Michael; nor that Jones expressly requested Michael's assistance; nor that Michael was to get any pay for the services which he rendered; and it was a question of fact for the jury to determine, whether Michael was in the silo at the instance of Jones, and in accordance with his wish and desire for Michael's assistance, in the work which he was performing in getting silage. We are of opinion that the court therefore erred in taking this question of fact from the jury and directing a verdict. The judgment is therefore reversed and the cause remanded for, another trial.

Reversed and remanded.

another letter.

STATE OF ILLINOIS,)
SECOND DISTRICT.) ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6219

(1107a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

217 I.A. 663

BE IT REMEMBERED, that afterwards, to-wit: on APR 21 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Certiorari denied

Gen. No.6749

ABE J. DAVID, et al,
Appellants.
vs
L. ELMER HULSE, et al,
Appellees.

Appeal from Circuit Court; Lake County.

Niehaus, P. J.

In this case the appellants Abe J. David and Abraham P. Morris, as trustees, filed a bill in equity to foreclose a chattel mortgage, which had been executed by the appellees, L. Elmer Hulse and H. H. Richardson, to Leonard Sawvel, and the Gazette Publishing Company of Waukegan on July 1st, 1914. The mortgage was given for part of the purchase price of the newspaper property job printing plant, and the business of the Gazette Publishing Company, and covered the property of that company. The mortgage secured an indebtedness of $17000.00, represented by 17 promissory notes of $1000.00 each. These notes, and the mortgage, were afterwards assigned by Sawvel to the appellants, who brought this suit after the notes had become due, and remained unpaid. The mortgage provides for the appointment of a receiver, and for the payment of $500.00 solicitor's fees in case of foreclosure. After the filing of the bill, and at the term to which the case had been brought, the parties to the suit entered into a stipulation concerning some of the matters in controversy. The stipulation recites the fact, that $17515.67 which was the amount claimed by the appellants to be due them, had been brought into court and deposited by the Gazette Publishing Company, and placed in the hands of the clerk of the court; and that it had been agreed between the parties to the suit, that of the amount so

Can. No.6748

ANN J. DAVID, et al,

Appellants,

Vs

L. SIMON NOLAN, et al,

Appellees.

Appeal from Chancery Court, Lake County.

Mayhew, P. J.

Abraham P. Morris, in trusting, filed a bill to enjoin foreclose a mortgage, filed and been executed by the complainant, L. Elmer Nolan and R. H. Richards, to Security Bonds, and the Peoples Publishing Company, dated on July 1st, 1917. The mortgage was given for part of the purchase price of the newspaper property formerly job printing plant, but the business of the Peoples Publishing Company, and covered the property of that company. The mortgage secured the payment of $17500.00, payable by 17 promissory notes of $1000.00 each. These notes, and the mortgage, were alternately assigned by Reeves to the appellants, who brought this suit after the notes had become due, and received unpaid. The mortgage provides for the appointment of a receiver for the property at $500.00 additional fees in case of foreclosure. After the filing of the bill, and at the time by which the case had been brought, the parties to the suit entered into a stipulation concerning some of the matters in controversy. The stipulation recites the fact that $17500.00 was not amount obtained by the complainants to be due them, and went through into court and accounted by the Peoples Publishing Company, but stated in the bank at the close of the court. But that it had been agreed between the parties to the suit, that of the amount so

deposited and in the hands of the clerk of the court $14424.66 should be paid over to appellants' solicitor for the appellants, and be applied on their demand upon the surrender by them of fourteen of the notes secured by the chattel mortgage; and it was also agreed, that James Woodman be appointed receiver to take charge of the business and property of the Gazette Publishing Company. It was further agreed, that the remainder of the money in the hands of the clerk of the court, after payment of the amount above stated, to the appellants, abide the further order of the court. The parties also agreed in the stipulation, that the sole and only matters to be litigated and adjusted between them, were certain claims made by the defendants in the suit for credits against the amount of the indebtedness represented by the notes and chattel mortgage; and these claims for credits were attached to the stipulation, and are as follows: L. B. Grice account for $78.25; Earl Alden account for $376.41; The Lesan Advertising Agency account for $973.46; The Van Cleave Advertising Agency account for $648.93; and the Elmer V. Orvis account for $106.80. The court entered an order to carry into effect the stipulation; and appointed James Woodman receiver, who took charge of the property involved. Thereupon an amendment was filed to the bill; and thereafter, the cause was referred to a special master, to take the proofs in accordance with the stipulation and report the same to the court with his conclusions of law and fact. The special master heard the evidence which was offered under the reference, and made his report; and found that the appellees were entitled to some of the credits claimed by them, namely the accounts of L.B. Grice, Lesan Agency, and

the Van Cleave Agency; and the amount of the judgment of E.V. Orvis, making a total sum of $1806.44, as an offset against the indebtedness claimed by the appellants to be due them; thus leaving a balance of $251.40 to be paid them out of the money in the hands of the clerk. Objections and exceptions were filed by the appellants to the master's report; they also made a motion to re-refer the cause to the special master, which was denied. Upon the hearing of the exceptions to the master's report, the court overruled the exceptions, and entered a decree in conformity with the findings, except, that the court allowed $14.43 additional interest to the appellants. The court also allowed $500.00 solicitor's fees for the services of appellants' solicitor, to be paid by the appellees; also ordered that the appellees pay the costs of the suit; from this decree an appeal is prosecuted.

The points made for a reversal of the decree relate entirely to matters embraced in the master's report and the Exhibits offered, and evidence taken by the master on the hearings before him. A duly authenticated copy of the record of these proceedings however was not filed as required by the statute. But instead thereof, the original documents, exhibits and evidence were filed. This practice has been repeatedly condemned and the rule established that under these circumstances it is proper to affirm the decree Pinkerton v. Pinkerton 309 Ill. App. 393, Martin v. Todd 311 Ill. 105, Beth Hamwidrash v. Cemetery Assn. 300 Ill. 480, Bottigliero v. Cozzi 176 Ill. App. 311, Horwich Receiver v. Davis 291 Ill. 500 Lewis v. Lewis 150 Ill. App.354. The fact that the appellees agreed to the filing of

the original records of proceeding does not militate against the force of the rule; Trustees of Schools v. Welchey 19 Ill.64. After the briefs of the respective parties had been filed in this case, which raised the question of the affirmance of the decree under the decisions referred to, the appellants filed a motion, in which they ask this court to direct the clerk to detach the original report of the master, and the exhibits and evidence from the transcript of the record on file, and transmit the same to the clerk of the court below: and that appellants thereupon be given until the next term of the court to secure another transcript of the record withdrawn; and for leave to file such transcript at the next term, and to continue the cause until next term for that purpose; this motion we took to be considered with the case. We are of opinion, that the court would not be justified in granting a motion of this kind. It involves a delay of six months to enable appellants to supply something which which was necessary to be supplied for proper consideration of the case at the term at which the case was taken and which the appellants had sufficient time to supply before the case was taken on the regular call of the docket. Moreover to grant this motion would in effect destroy the force of the established rule which is emphasized by the decisions cited. This we do not feel at liberty to do; especially since a careful reading of appellants' brief does not convince us, than an injustice has been done appellants by the decree. The motion is therefore denied, and the decree affirmed.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6162

1105a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 663

BE IT REMEMBERED, that afterwards, to-wit: on APR 21 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6753

JOHN O. GYLLING,
Appellee.
vs
Appeal from Circuit court
Henry County.
THE CITY OF GALVA
Appellant.

Niehaus, P. J.

In this case, John O. Gylling, the appellee, brought suit in the circuit court of Henry county against the appellant, City of Galva, to recover damages to his property on Market street in the City of Galva by the construction of a local improvement made by the city. The declaration alleges, that the appellee was the owner of five lots abutting on Market street, upon which he had a blacksmith shop, a rooming house and a warehouse; and that by making the local improvement in question, which was the construction of a street pavement and sidewalks, the grade for the cement walks immediately in front of the premises mentioned was cut down to such an extent, that the ready means of ingress and egress to and from said premises which he had theretofore enjoyed, was permanently interferred with and destroyed; and that thereby the market value of his property was diminished.

Under the averments of his declaration, the appellee had a cause of action. Botsford v. City of Elgin 213 Ill. App. 598.

There was a trial by jury, which resulted in a verdict finding the appellant guilty, and assessing appellee's damages at $637.65; The appellant made a motion for a new trial, which was denied, and thereupon the court rendered judgment on the verdict; from which judgment this appeal is now prosecuted.

Several matters are urged by the appellant as constituting

Gen. No. 8752

JOHN O. GYLLING,

Appellee.

vs. Appeal from Circuit Court
Derry County.

THE CITY OF CALVA

Appellant.

Niebaum, P. J.

In this case, John O. Gylling, the appellee, brought suit in the circuit court of Derry county against the appellant, City of Calva, to recover damages to his property on Market street in the City of Calva by the construction of a local improvement made by the city. The declaration alleges, that the appellee was the owner of five lots abutting on Market street, upon which he had a dilapidated shed, a rooming house and a warehouse; and that by making the local improvement in question, which was the construction of a street pavement and sidewalks, the grade for the cement walks immediately in front of the premises mentioned was cut down to such an extent, that the yearly rents of lessees and agrees to and from said premises which he had theretofore enjoyed, was permanently interfered with and destroyed; and that thereby the market value of his property was diminished.

Under the averments of his declaration, the appellee had a cause of action. Botsford v. City of Elgin 211 Ill. App. 588.

There was a trial by jury, which resulted in a verdict finding the appellant guilty, and assessing appellee's damages at $837.65; The appellant made a motion for a new trial, which was denied, and thereupon the court rendered judgment on the verdict; from which judgment this appeal is now prosecuted.

Several matters are urged by the appellant as constituting

reversible error. Complaint is made, because the court refused to allow the appellant to prove by a witness that the grade of the finished roadway in fron of the premises in question was substantially the same as the old dirt street; and that the buildings and lots of the appellee had no greater elevation above the pavement than they had over grade of the old street. It is conceded however by the appellant that the appellee had disavowed any claim for damages by reason of a change of grade in the street proper, or road way, and confined his evidence to showing that the new grade of the side walk, which had been constructed as a part of the improvement, was lower on an average of about two feet in front of his entire property; in this state of the record the evidence offered could not in any way effect the real matter in controversy, and did not have any, bearing upon the lowering of the grade of the sidewalk; the objection to this offer was therefore properly sustained.

Appellant contends, that the court also erred in refusing to give to the jury instruction No.8, which is as follows: "You are instructed, that under the evidence in the case, there is nothing to warrant you in find that the city in constructing the improvement acted either negligently or oppressively." There was no claim made by the appellee in his declaration or otherwise, that in the improvement in question the city acted either negligently or oppressively; there is no evidence in the record offered or admitted in relation to that matter; there was no occasion therefore to instruct the jury on that point; and the instruction was properly refused.

The appellant also contends, that because, in the given instructions and the forms of the verdict of the jury, the jury

was advised, that the appellant should be found guilty or not guilty, the jury might from this have drawn the inference that the cutting down of the grade of the sidewalk constituted an unlawful act, and which subjected the appellant to a penalty. No such inferences could have been reasonably drawn by the jury; and it is not reasonable to assume, that the jury would have drawn such inferences. The instruction to find the appellant either guilty or not guilty was proper, because this was the issue in the case; and an issue which was raised by the appellant's plea of not guilty filed to the declaration.

Appellant also raises an objection to an instruction given to the jury by the court on its own motion with the consent of the parties, which instruction concerned the measure of damages; and the question of the amount of damages. It is sufficient to say in reference to this contention that all questions relating to the matter of damages and the amount of the same, are eliminated from consideration here, because the appellant did not specify among the reasons specified in the motion for a new trial, that the amount of damages fixed by the jury was not justified by the evidence, or excessive. Yarber v. C. & A. R'y. Co. 335 Ill. 569. All questions raised therefore which concern the amount of damages found by the jury are waived, and not properly before us for consideration.

The record does not disclose any reversible error, and judgment is therefore affirmed.

Judgment affirmed.

Judgment affirmed.

-4-

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

67-1

1106a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 663

BE IT REMEMBERED, that afterwards, to-wit: on MAY 7- 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

FIRST NATIONAL BANK OF
STERLING, ILLINOIS, et al

Appellant,

vs.

OTTO HEIDE,

Appellee.

Appeal from the Circuit Court of Whiteside County.

Heard,J.

Otto Heide, appellee filed a bill of complaint in chancery in the Whiteside county Circuit Court against Charles H. Corbett, Charles H. Corbett, Trustee, three National banks and one State bank and had a temporary injunction thereunder against all of the defendants. The First National Bank of Sterling and each of the other defendants moved to dissolve the injunction. The motions were denied. Three defendants prayed and were allowed an appeal. Afterwards the order granting an appeal was vacated, except as to the First National Bank of Sterling; and the latter prosecutes this appeal.

Appellee had brought an action in assumpsit against Corbett, filed a declaration and obtained a summons. Two days after beginning that suit, Appellee filed this bill against Corbett, Corbett Trustee, and said four banks, to enjoin Corbett and Corbett, Trustee, from drawing any money on deposit in any of said banks, and to enjoin said banks from paying any such money to Corbett or Corbett Trustee or on his order. The motion by the bank to dissolve the injunction was based on three points:- (1) that said injunction violates the Federal statute, which provides: "And no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county or municipal court;" (2) that the court did not have jurisdiction of the subject matter; (3) that the bill is without equity.

The assignments of error cover these three points.

FIRST NATIONAL BANK OF

STERLING, ILLINOIS, et al

Appellant,

Appeal from the Circuit Court of
Whiteside County.

vs.

OTTO HEIDE,

Appellee.

Heard J.

Otto Heide, appellee filed a bill of complaint in chancery in the Whiteside county Circuit Court against Charles Corbett, Charles W. Corbett, Trustee, three National Banks and the State bank and had a temporary injunction thereunder against all the defendants. The First National Bank of Sterling and each of the other defendants moved to dissolve the injunction. The motions were denied. Three defendants prayed and were allowed an appeal. Afterwards the order granting an appeal was vacated, except as to the First National Bank of Sterling; and the latter prosecutes this appeal.

Appellee had brought an action in assumpsit against Corbett, filed a declaration and obtained a summons. Two days after beginning that suit, Appellee filed this bill against Corbett, Corbett Trustee, and said four banks, to enjoin Corbett and Corbett, Trustee, from drawing any money on account of said suits, and to enjoin said banks from paying any such money to Corbett or Corbett Trustee or on his order. The motion by the court to dissolve the injunction was based on three points:- (1) that said injunction violates the Federal statute, which provides "And no attachment, injunction or execution shall be issued against such person or his property before final judgment in any suit, action or proceeding, in any state, county or municipal court;" (2) that the court did not have jurisdiction of the subject matter: (3) that the bill is without equity.

The assignments of error cover these three points.

The question chiefly argued is whether the Federal Statues referred to, prevent the state court from granting this injunction. The question, however, which naturally arises first is, does the bill on its face, state a case of which equity has jurisdiction. Appellee having just started an action at law against Corbett, immediately files a bill for an injunction against all the banks in which Corbett may have money on deposit, to prevent it being paid out to him, or on his order, until Appellee gets Corbett into court in the action at law, and obtains a trial and a judgment.

The only ground for equitable intervention attempted to be set up in the bill is that appellee fears he may not be able to obtain a satisfaction of such judgment, as he may get in his suit at law, unless all defendant's moneys are tied up, while he prosecutes this suit. No authorities are cited authorizing the granting of an injunction on such a showing and we do not believe that a court of equity should be made an adjunct to a collection agency for a plaintiff who has just begun suit. The consequences of such procedure would be exceedingly disastrous and would often force a defendant to an unjust settlement to prevent financial ruin before the case was tried.

There is no possible excuse shown by the bill for tying up the funds of Corbett, Trustee.

To affirm the action of the circuit court would be in effect to hold that whenever a creditor brought suit in assumpsit against his debtor, if the debtor had saved a few dollars and deposited them in a bank, whether such savings were exempt by law or not, or if the debtor as trustee for another had deposited the trust funds in a bank for safe keeping in carrying out his trust, the creditor whether he had a just cause of action or not, could by injunction from a court of chancery tie up such funds for months

The question entirely arises in whether the Federal Statutes referred to, prevent the writs issued from granting the injunction. The question, however, which naturally arises first is, does the bill on its face, state a case of which equity has jurisdiction. Appellee having just started an action at law against Corbett, immediately files a bill for an injunction against all the people in order Corbett may have money or property to prevent it being paid out to him, or on his order, until Appellee gets Corbett into court in the action at law, and obtains a trial and a judgment.

The only ground for equity's intervention otherwise is to be set up in the bill is that Appellee fears he may not be able to obtain a satisfaction of such judgment, as he may fail in his suit at law, unless all defendant's moneys are tied up, while he carries this suit. No authorities are cited but certainly for granting of an injunction on such a showing and we do not believe that a court of equity would be made to subject to a collection agency for a plaintiff who has just begun suit. The consequences of such procedure would be exceedingly disastrous and would often force a defendant to a unjust settlement to prevent financial ruin before the case was tried.

There is no possible escape either by the bill nor by the brief from the fact of Corbett, Trustee.

To affirm the action of the circuit court would be to effect by a ruling whereby a creditor could be restrained from enjoining the debtor, if the debtor had moved his residence and located then in a Bank, whether such action should or not, or if the debtor as trustee for another had deposited the trust funds in a bank for safe keeping at certain out the trust, the creditor whether he had a just cause of action or not, could by injunction from a court of chancery tie up such funds for months

and perhaps years before final adjudication of his assumpsit case. In our opinion, such a holding would be unconscionable.

But this bill is exceedingly defective in another respect. The affidavit states that the matters in the bill stated, to be on information and belief, he believes to be true. In the bill, appellee says he is informed and believes that Corbett has money on deposit in these banks. He does not state the source of his information, nor does he file an affidavit of anyone who knows that there are moneys so on deposit. He says he made investigation, and was unable to find any real estate owned by Corbett, or any other tangible asset, other than said moneys. He does not say what investigation he made, nor where he made it, nor where Corbett lives. If Corbett lives in Whiteside County, and does business there, he does not say that he examined the records, or that he had the ability to tell for himself whether he owns real-estate in that county. He does not state that he inquired of any abstract company, and does not have any affidavit made by any person in that business, that he has made such examination, and finds no real-estate standing in the name of Corbett. On all material matters, the bill and the affidavit are merely on information and belief, or on belief without the information.

An affidavit to a bill for an injunction which states that the matters and things related in the bill are true in substance and fact, except so far as they are stated on information and belief, but which fails to distinguish between matters stated on complainant's own knowledge and those stated on information and belief, is defective. Christian Hospital vs. The People, 333 Ill. 344. Neil vs. Oldach, 86 Ill.app354, Scroth vs. Seigfried 163 Ill. app.595. Knol vs. Knol 171 Ill. app.413, 2 High on Injunctions, Sec.1567.

We are clearly of the opinion that this bill does not state a case in equity, regardless of the question whether or not a

and perhaps years before final adjudication of his community dues.
In our opinion, such a holding would be unreasonable.

But this bill is exceedingly defective in several respects.
The affidavit states that the matters in the bill relied, to be on
information and belief, do believe to be true. In the bill, appel-
lee says he is informed and believes that Corbett has money on
deposit in these banks. He does not state the source of his infor-
mation, nor does he file an affidavit of anyone who knows that there
are moneys so on deposit. He says he made investigation, and was
unable to find any real estate owned by Corbett, or any other tangi-
ble asset, other than said moneys. He does not say what investi-
gation he made, nor where he made it, nor where Corbett lives. If
Corbett lives in Whitesit County, and does business there, he does
not say that he examined the records, or that he had the sheriff
tell for himself whether he owns real estate in that county. He
does not state that he inquired of any abstract company, and does
not have any affidavit made by any person in that behalf, that
he has made such examination, and finds no real estate standing in
the name of Corbett. On his material matters, the bill and the
affidavit are merely on information or belief, or on belief without
the information.

An affidavit to a bill for an injunction which states
that the matters and things related in the bill are true in sub-
stance and fact, except so far as they are stated on information
and belief, but which fails to distinguish between matters known
on complainant's own knowledge and those stated on information and
belief, is defective. Christian Counties vs. The People, 188 Ill.
544. Nail vs. Dixson, 88 Ill. App. 564, Forest vs. Seigrist, 188 Ill.
App. 585. Knol vs. Knol 171 Ill. App. 413, 3 Hinn on Injunctions.
Sec. 1867.

We are clearly of the opinion that this bill does not
state a case in equity, regardless of the question whether we pos-

National Bank can be enjoined by a state court before final judgment is obtained by appellee against Corbett in the action at law.

The order is reversed and remanded to the Circuit court of Whiteside county with directions to dissolve the injunction and as the bill is solely for an injunction to dismiss the bill for want of equity on its face.

National Bank can be enjoined by a state court before final judgment is obtained by a creditor against Cornett in the action at law.

The order is reversed and remanded to the Circuit court of Whitesside county with directions to dissolve the injunction and as the bill is solely for an injunction by plaintiff the bill for want of equity on its face.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6795

(107a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

217 I.A. 663 4

BE IT REMEMBERED, that afterwards, to-wit: on MAY 7- 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

F. V. Orvis, Appellee

vs. Appeal from Lake.

John D. Goehringer, Appellant.

Per Curiam.

This case was pending in the circuit court of Lake County, on an appeal by defendant, from a judgment for appellee, by a justice of the peace. The clerk's record, as abstracted, shows that either the suit or the appeal was dismissed for failure to pay a docket fee in compliance with some statute. The clerk could not preserve the reasons for the action of the court in the record kept by him. The abstract does not show that there is a bill of exceptions in the record. If there is a bill of exceptions, its contents are not revealed by the abstract. The abstract does not contain the showing made to the court, and upon which the court acted. It is a familiar rule, that while a reviewing court may examine the record to find grounds on which to affirm, it is not required to do so to find a reason for reversing. In the absence of a showing of the proof upon which the court acted, we must assume that the proof justified the dismissal. The abstract shows an affidavit was filed, but does not state its contents. We have turned to the record, and find that said affidavit does not appear to be included in the bill of exceptions. Appellee's brief called attention to the defects of the abstract, and was filed eleven days before the case was taken on call, so that appellant had ample time to file an amended abstract, if he desired.

The judgment is affirmed.

T. V. Davis, Appellee

vs.

John D. Goehringer, Appellant.

Per Curiam.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

Gen. No. 7061 Ag. No. 4

October Term, A. D. 1919

THE PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error

vs

EMMA BERRY, Plaintiff in Error
Error to the City Court of the City of Mattoon,
Coles County, Illinois.

GRAVES P. J.

Plaintiff in error was convicted of selling intoxicated liquor in anti-saloon territory and was sentenced to confinement in the county jail of Coles County for a period of 30 days and to pay a fine of $50.00 and the costs, and to stand committed until such fine and costs were paid. She contends the court erred in instructing the jury, and that there is no evidence of any sale by her within the period of eighteen months next before the indictment was returned. The instructions are not all abstracted. It is an inflexible rule which we here apply not to consider claimed errors in instructions unless all instructions given are abstracted.

There is the positive evidence of one witness that she bought of plaintiff in error a bottle of whiskey and paid her for it. At first the witness was uncertain as to the time when this purchase was made, but on being directed to go home and consult some data which she said would fix the time, she did so, and on resuming the witness stand testified that it was between certain definite dates within the statute of limitations. Plaintiff in error denied that she made the sale testified to by the witness. The jury heard the testimony and believed the story told by the witness and disbelieved the one told by plaintiff in error, and found her guilty.

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After reading the evidence carefully we are satisfied the verdict of the jury was correct. The judgment of the trial court is affirmed.

Judgment affirmed.

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General No. 7068 Agenda No. 10.

October Term, A. D. 1919

MABEL CASTEEL, Plaintiff in Error

vs

THE SPRINGFIELD CONSOLIDATED RY. CO., Defendant in Error.

Error to the Circuit Court of Sangamon County.

GRAVES P. J.

This is an action in tresspass on the case to recover for damages received by plaintiff in error while a passenger on a car of defendant in error. The negligence charged against defendant in error was in substance that on the floor of the car at the point where plaintiff in error was forced to pass in order to alight from it there was a certain unprotected oval metal shield that projected about four inches above the floor and had become so worn and smooth as to be dangerous to walk upon, and that plaintiff in error a passenger for hire on said car while preparing to alight from it with all due care and caution for her own safety, because of the said obstruction and the condition thereof slipped and fell and received injuries.

At the end of all the evidence the court sustained the motion of defendant in error for a peremptory instruction and instructed the jury to find the defendant not guilty. The jury returned the verdict directed and the Court after denying the motion of plaintiff in error for a new trial, entered judgment in bar of plaintiff's action and against her for costs. The testimony of plaintiff in error fairly tended to support the allegations of negligence of defendant in error and at the close of the testimony offered for her the court properly denied a motion by defendant in error for a peremptory instruction.

It was not until evidence had been offered on the part of defendant in error that the motion for a peremptory instruction was allowed. Apparently something in the evidence offered by defendant in error overcame in the mind of the court the prima facie case made by the evidence offered by and on behalf of plaintiff in error. In other words the court apparently weighed the testimony offered by defendant in error against that offered by plaintiff in error in determining that the

second motion should be allowed. It is improper on such a motion for the court to weigh the evidence, and must deny such motion if there is any evidence from which standing by itself the jury might, without doing violence in the eye of the law, find the issues for the plaintiff in error, even though on the whole evidence the court may be satisfied that a verdict for the plaintiff in error would have to be set aside as against the preponderance of the evidence. **Libby, McNeil & Libby v. Cook** 222 Ill. 206.

Defendant in error argues that even if sufficient evidence of its negligence can be found to require that issue to be submitted to the jury, still it was proper to give the instruction because plaintiff in error had not shown that she was in the exercise of due care for her own safety. The contention is without merit. Plaintiff in error had offered evidence showing the facts and circumstances surrounding the injury from her standpoint, and it was for the jury to say whether such facts showed that she was in the exercise of due care for her own safety or was guilty of contributory negligence.

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In giving the peremptory instruction the court erred. The judgment of the Circuit Court is reversed and the cause is remanded to that court.

Reversed and Remanded.

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General No. 7092. Agenda No. 34.

October Term, A. D. 1919

GEORGE J. GAY, Appellant,

vs

AMERICAN CASUALTY CO., Appellee.

Appeal from the Circuit Court of Vermilion County.

GRAVES P. J.

Appellant brought this suit on an insurance policy whereby appellee undertook to indemnify appellant against loss or expense or both arising from any claim upon appellant for damages on account of bodily injuries or death or both, accidently suffered or alleged to have been suffered by any one by reason of the ownership, maintenance or use of any of the automobiles enumerated in the policy, subject to certain conditions among which is the stipulation that none of the automobiles mentioned will be rented to other people than the assured or used to carry passengers for a consideration. A further condition of the policy provided that—

"F. If any legal proceedings, even though groundless, be instituted against the assured to enforce a claim for damages on account of injuries or death (or both) covered by this policy, the assured shall forward to the company every summoms or other process as soon as it shall have been served upon him, whereupon the company will, at its own cost, defend such legal proceedings in the name and on behalf of the assured."

In the declaration appellant set out the policy of insurance in full including the conditions above mentioned and averred that appellant had been sued for damages for accidental bodily injuries growing out of his ownership and operation of an automobile named in the policy, that judgment had been rendered against him for $700 which he had satisfied, and that his attorneys fees in that case amounted to $700, that the judgment, attorneys fees and costs in that case amounted to $2000. Pleas

were eventually filed to this narr. By one of them known as the second amended special plea appellee set out among other things the condition above mentioned whereby it was specified that the insurance policy should not cover any loss or damage resulting from the use of the automobile in question for carrying passengers for hire and that the damages sued for were sustained by the claimant when she was riding in the automobile as a passenger for hire and while appellant

was using the same as a taxi-cab as a common carrier, and concluded by the averment that by reason of the fact that the claimed damages were sustained while the automobile was being used for a purpose prohibited by the policy appellee was not liable and concluded with a verification. The plea contained other averments not necesasry to the determination of the case in the view we take of it.

To this plea a demurrer was interposed and was heard and overruled. Appellant elected to stand by his demurrer. Appellee withdrew all pleas except the said amended second special plea and thereupon judgment was entered against appellant in bar of his action and for costs.

Much has been said by counsel for the parties in relation to the question of estoppal by verdict raised by averments in both the declaration and plea, but it is not necessary to determine the question so raised.

The demurrer to the plea in question admitted that the condition exempting appellee from liability under the policy if injury resulted from the use of the automobile for hire and that the injury which resulted in the suit, judgment, attorneys fees and costs for which appellant now

seeks to be reimbursed occurred while the automobile in question was so being used for hire and as a common carrier. Those facts being admitted appellant has no right of action and the Circuit Court properly so held. It is no answer to say there are other averments in the plea that do not constitute a defense. All such averments can properly be disregarded as surplussage, but that would in no way militate against the sufficiency of that part of the plea that did set up a good defense and surplussage cannot be reached even by special demurrer. **Burnap v. White** 14 Ill. 301, **Jacobs v. Pierce** 132 Ill. App. 547, **Stover v. Millane** 89 Ill. App. 537.

Appellant has argued that there are several facts that might be set up by him in reply to the plea which if proven would entitle him to recover notwithstanding the facts averred in the plea. That may be true, but such facts in order to be availed of by him must be up in a replication, they cannot be presented by demurrer.

Appellant also argues that under the policy he is entitled to be reimbursed for the expenses he has been

put to in defending the case in which judgment was rendered against him and would have been entitled to such reimbursement even if the claim was groundless. That would be true providing the claim was one that was covered by the policy. The liability of the company to pay the expenses occasioned by groundless litigation is by stipulation in the policy limited to claims which if established would be covered by the policy.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

General No. 7109. Agenda No. 46.

October Term, A. D. 1919

MARIA WICKSTROM, Appellee

vs

ROBERT R. RODMAN, Appellant,

Appeal from the Circuit Court of Vermilion County.

GRAVES P. J.

Daniel Wickstrom died leaving a will by which he gave his entire estate to his widow, Maria Wickstrom, appellee in this case. She became administratrix with the will annexed of her husband's estate and procured the probate of the will on December 29, 1915. Sometime in 1917 she contracted to sell the real estate the title to which she had so acquired to the mother of appellant. In the meantime nothing had been done in and about the administration of the estate except securing the probate of the will. Appellant who is a lawyer, upon examination of the title to the real estate in question for his mother, concluded that in order to make the title good the administration of the estate should be completed, and so advised appellee. He afterwards rendered her some services in making the inventory of the personal property, giving notice to creditors and making her final report and in doing such other things as seemed necessary to make the title in appellee complete. The inventory showed one lot of household goods consisting of beds, bedding, dishes, cooking utensils, chairs, rugs, piano, bed-room furniture, etc., and $80 in money. It does not appear that the household goods were ever appraised. The inventory also showed the real estate in question. The final report showed under items received:—

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Household goods inventoried	
Cash on hand at time of death of deceased	$80.00
Received from sale of household goods	8.25
Total	$88.25

It also showed credits to exactly the same amount and concluded with the statement—"All claims have been paid except court costs and expenses of administration, these **costs** will be paid by administratrix upon hearing of this report."

There is nothing in this report, or on it, to show what the Court costs were, or that there were any other expenses of administration, or if there were any such other expenses what they were for or the amount of the

same.

The proof shows that before appellant rendered any services for appellee she asked him what his charges would be and that he replied "just what the court said should be his pay." When the final report was presented to the County Court for approval appellant told appellee his fee was $250 and filled out a check for that amount which she signed in her individual capacity and not as administratrix. This check she gave to him and he cashed it. Appellee testifies that before signing the check she protested against paying that amount telling him she had been informed that $50 or $60 would be all his fees should be. This appellant denies.

This suit was begun before a justice of the peace by appellee to recover of appellant the excess paid him under protest for fees over and above what his services were reasonably worth. It was tried in the Circuit Court of Vermilion County on appeal from the justice of the peace. The jury returned a verdict for appellee for $175.00.

Judgment was entered on the verdict.

That the charge made by appellant was excessive to the amount of the verdict is amply established by competent evidence and appellant offered no proof whatever to show that it was not excessive to that extent or to justify the charge made. He first insists that the matter is **res judicata.** That when the County Court approved the final report of appellee it amounted to an adjudication of the reasonableness of the fee then paid in the presence of the court, even though there is no mention of it in or on the report or in the order approving it. The position is clearly untenable. In the first place the services were rendered for the benefit of appellee personally to enable her to give a good title to property she was attempting to sell, and not for the benefit of the estate. The check with which the fee was paid was the personal check of appellee and was not the check of the administratrix of her husband's estate, nor has she ever attempted to charge the estate with the amount paid. The receipt given for the check was made out on a blank receipt made to be used by the administrators when paying out estate funds, but it is a significant fact that the blanks left to be filled were not in fact filled, so that the receipt of page 111 of the record reads:—"Reeceived of Maria Wickstrom, administra---------." which amounts to no more than a receipt to her individually. The abstract makes the receipt

read "Administra**trix**" but that is not a true abstract of the record. What appelleee should personally pay to appellant for the services he rendered for her was in no way brought officially

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before the County Court and was not passed upon by it nor had the County Court any business or jurisdiction to pass upon it until she should attempt to charge the fee up against the estate. Her liability to pay appellant for his services rendered in getting the title to the premises in question in such a shape as to make the same merchantable was as much a personal obligation on her part as if some third person had been executor or administrator with the will annexed. The fact that she paid him at the same time her final report was presented to the County Court for approval, is in no way suggestive that she was treating the charge for fees as an obligation of the estate. On the contrary in her final report she calls attention of the County Court to the fact that the court costs and the expenses of administration, which would include attorney's fees and her own commissions, were not paid, and she there promised the court to pay the **court costs,** but no promise was made to pay the expenses of administration.

The question of fact as to whether appellee paid the excessive fee under protest or not was submitted to the jury by proper instructions and was practically the only issue that was submitted to the jury, and we see no reason for disturbing its finding. The parties sustained the relation of attorney and client, appellant being clearly the dominant factor in the combination. He owed to her absolute fairness in all of his dealings with her in the matters involved, including his obligation to charge her no more than a reasonable fee for his services, and she had a right to rely on his performing his duty to her in that regard. In litigation involving the good faith of the attorney

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in such transations the burden is on him to show perfect fairness, adequacy and equity in the transaction. **Warner v. Flack** 217 Ill. 303. It is not necessary for an attorney to hold up a client with a gun and by that means extort from him an unconscionable fee, in order that the client may compel him to refund exhorbitant charges. It is sufficient if by means of his influence over the client acquired through confidential relations existing between them he is enable to still the client's objections and override his judgment and there-

by induce him to pay him money which he is not in equity and good conscience entitled to receive or retain.

The action of assumpset is the appropriate remedy to enforce the equitable obligation arising from the receipt of money by one person which belongs to another and which in equity, justice and good conscience should be returned. **Dd. of He'w. Com'rs. v. Bloomington** 253 Ill. 164. Justices of the peace have jurisdiction to try all cases where the action of assumpset will lie. The Circuit Court did not err in refusing to dismiss this case on the motion of appellant.

One of the grounds urged by appellant as grounds for a new trial was newly discovered evidence of the probate clerk, who was present at the time the money was paid to appellant and who says he will testify that appellee made no protest. The evidence suggested was cumulative only, and was not conclusive, neither was diligence shown by appellant to have the witness there at the last trial.

What has been said disposes of all the contentions made. The judgment of the Circuit Court is affirmed.

Judgment Affirmed.

Gen. No. 7115 Ag. No. 70

October Term, A. D. 1919

NOAH ATKINS, Administrator of the Estate of Carroll Atkins, deceased, Appellee

vs

CENTRAL ILLINOIS PUBLIC SERVICE CO. a corporation, Appellant

Appeal from the City Court of the City of Pana
County of Christian

GRAVES P. J.

Appellant is charged with negligently causing the death of appellee's decedent by coming in contact with an arc light wire belonging to appellant in the city of Pana, Illinois. A judgment for $2500 was obtained against appellant. In view of the fact that this judgment must be reversed for error in instructions and the cause remanded for another trial, we will refrain from discussing the facts.

Instructions numbered three in the series given at the request of appellee directs a verdict. In it the jury was told in substance that if appellant would in the exercise of ordinary care have turned off the electricity from that wire in time to have avoided killing the deceased but negligently failed to do so, then the plaintiff was entitled to recover. It wholly ignores the question of whether appellant had knowledge or notice of the fact that the wire was broken or down. Unless appellant had knowledge or notice of that fact in time to turn off the electricity or otherwise protect the public, it certainly would not be negligent in not doing those things. This instruction was defective, because it directs a verdict and does not contain all

the elements necessary to the plaintiff's right of recovery. **Money v. City of Chicago** 239, Ill. 414; **Montgomery Coal Co. v. Barringer** 218 Ill. 327-337; **I. C. R. R. Co. v. Smith** 208 Ill. 608-619; **Pardridge v. Cutler** 168 Ill. 504-512. Instructions that direct a verdict if erroneous are not cured by other correct instructions in the series given. **I. C. R. R. Co. v. Smith** 208 Ill. 608-619.

The fifth instruction given at the request of ap-

Trendinski v. Madison Coal Co. 282 Ill 32-37. Laughlin v. Hopkinson 292 Ill. 83-84-85

pellee leaves to the jury to determine what is averred in the declaration. That is also error. It is for the court in its instructions to tell the jury what is so averred. A juror is not supposed to be able to take a declaration and accurately determine unaided by the court what its averments amount to. That is a question often more or less difficult of determination even by the court.

The seventh instruction given at the instance of appellee directs a verdict and is bad because it tells the jury in effect that the only thing to be done in case a wire is broken, regardless of whether it is connected with an electric circuit or not, is to turn off the electric current from some where, and if that is not done the owner of the line is negligent. What is the most efficient and quickest way to protect the public in case a wire is down or broken depends on whether is is charged with a dangerous electric current or not and is a question of expert knowledge to be shown by evidence. It is also fatally defective because under it, if any wire is broken, whether it is charged with a dangerous current of electricity or not, and a person

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comes in contact with it and is injured the owner is liable whether the injury resulted by reason of the down wire or some other cause. Under that instruction if an uncharged wire was down and a child playing with it in the road was run over by an automobile and killed, its administrator could recover damages of the owner of the wire.

For errors in instructions the judgment of the trial court is reversed and the cause is remanded for another trial.

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Reversed and Remanded.

General No. 7075. Agenda No. 17.

October Term, A. D. 1919

Minnie Simcox, a minor, by George B. Simcox, her next friend, Appellee,

vs

William O'Connell, Appellant.

Appeal from Circuit Court, Vermilion County.

ELDREDGE J.

Minnie Simcox, appellee, a girl not quite fifteen years old, recovered a judgment against William O'Connell, appellant, for $2,500.00 in an action of trespass on the case.

On November 11, 1918, the citizens of the City of Danville, Illinois, were celebrating the event of the signing of the armistice during the late war. On the morning of that date a parade of automobiles and other vehicles took place. E. R. Pape participated in the parade driving a covered ambulance. Immediately prior to the time of the accident in controversy, this parade was proceeding south on Vermilion Street and appellee with three other girls, Helen Dallas, Beatrice Young and Sarah Darnell, were sitting on the left or east running board of the ambulance. William Bryant was standing on the right hand or west running board of the ambulance holding his two year old boy who was sitting on the hood. Harrison Street in

said city runs east and west and crosses Vermilion Street at right angles. The original declaration comprises one count and charges that appellant, who was also driving an automobile, so carelessly, recklessly and negligentely drove and guided his said automobile at said intersection of Vermilion and Harrison Streets and while appellee was riding upon said ambulance that appellant's automobile was driven against said ambulance and appellee was crushed between them. The first additional count is substantially the same as the original declaration. The second additional count sets out Section 18 of an ordinance of the City of Danville which provides that all vehicles going in a northerly or southerly direction shall have the right of way over vehicles going in an easterly or westerly direction except on Main Street where vehicles going in an easterly or westerly direction shall have the right of way. This count then avers that appellant, disregarding said ordinance, drove his automo-

bile westerly along Harrison Street and upon the intersection of Vermilion and Harrison Streets and carelessly and negligently failed to give the said ambulance upon which appellee was riding the right of way at said intersection and carelessly and negligently drove and guided said automobile against said ambulance and

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crushed appellee between them. The third additional count sets out Section 8 of the same ordinance which provides that a vehicle turning into another street to the left shall pass to the right of and beyond the center of the street intersection before turning. It is then averred that appellant failed to observe said ordinance and carelessly and negligently turned said automobile to the left before he had passed the center of said intersection and carelessly and negligently drove and guided said automobile against said ambulance on which appellee was riding and crushed her between them, etc. Appellant filed a plea of the general issue. The substance of the testimony of appellee, Beatrice Young and Sarah Darnell, three of the girls who were riding on the running board of the ambulance, E. R. Pape, who was driving the ambulance, William Bryant, E. M. Davis, R. G. Osborne and George B. Simcox, witnesses who saw the accident, is to the effect that the ambulance was proceeding in the procession at a rate of speed not to exceed six miles per hour and was traveling south on the west side of Vermilion Street within three or four feet of the west curb thereof; that appellant was driving his aautomobile in a westerly direction on Harrison Street and that when he reached the intersection of the two

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streets, instead of passing beyond the center thereof before he turned to the left or toward the south, guided his car in a southwesterly direction diagonally across the intersection and so close to the ambulance that the fenders or running board on his automobile struck appellee, Sarah Darnell and Beatrice Young whereby appellee and Sarah Darnell were scraped or pushed off the running board of the ambulance. Beatrice Young was not pushed off the ambulance and received no injury except a rip in her stocking. Helen Dallas was not hit by the automobile. Appellee received a fracture through the socket of the hip bone on the left side with an upward displacement of the lower fragment of the bone, a comminuted fracture of the

ramus of the pubis on the right side and also a transverse fracture of the lower bone of the pelvis. Appellee remained in the hospital until January 12th, 1919 and until January 7th, had to lay on her back in bed with sand bags packed about her to prevent her from moving, during which time she suffered pain. The testimony of Mrs. William Curran, who was riding with appellant in his automobile, is to the effect that she paid no attention to the way appellant turned his automobile at the intersection and that the ambulance running ten or twelve miles an hour came from behind appellant's automobile so close to the same that the fender

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of the latter brushed the girls off of the ambulance. Appellant, Lewis Ransom and Frank Towers testified to the effect that the girls were not brushed or scraped off the ambulance at all, but that Pape, when he saw appellant's automobile approaching so close, turned the ambulance suddenly to the right to avoid a collision and this sudden turning of the ambulance caused the girls to fall off the running board thereof. There is thus a clear and distinct conflict in the evidence and it was the province of the jury to determine what the facts were and the apparent weight of the evidence sustains its verdict.

The only error in regard to the instructions complained of is the giving of the sixth on behalf of appellee. This instruction permits the jury to assess damages for future suffering and loss of health. It is conceded that this instruction states a correct proposition of law ,but it is contended that there is no evidence tending to show that appellee will sustain any future suffering and loss of health. Appellee did not leave her bed until January 7th, 1919, and it was not until January 12th, that she was able to stand on her feet. The trial of this case commenced on February 10, 1919, and appellee testified that her back and head ached as a result of the injury, that she is stiff, that her left foot turns

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in and she cannot make it turn out and that she does not sleep as well as she did before she was injured. The physician who attended her testified that the kind of fracture she received causes pain and suffering and that there are adhesions that may heal later and may

not; that in his judgment, her foot will improve, but it will take time and persistent effort on her part, also that she is still sore, undoubtedly, from her injuries. At the time of the trial, appellee had not recovered from her injuries and the objection that there was no evidence of future damages cannot be sustained. Donk Brothers Coal and Coke Company vs Thill, 228 Ill. 233; C. & M. El. Co. vs Ullrick, 213 Ill. 170.

That the injury was severe there can be no question and what the result thereof may be in the future cannot now be determined from this record. We would hesitate to hold that the damages are excessive and substitute our judgment for that of the trial court and the jury.

The judgment of the Circuit Court is affirmed.

Gen. No. 7088 Ag. No. 30

October Term, A. D. 1919

Benjamin Eyre, Appellee

vs

George Worrick, Appellant

Appeal from Circuit Court, McLean County

ELDREDGE J.

In an action on the case to recover damages for personal injuries alleged to have been caused by the negligence of appellant, a verdict was returned awarding appellee $2,000.00 The trial court required a remittitur of $800.00 and a judgment was entered against appellant and in favor of appellee for the sum of $1,200.00

It is claimed by appellant that appellee is precluded from recovering damages in this action because he was guilty of contributory negligence. Appellee, at the time of the injury, was in the employ of one Jesse Barnes, one of a number of farmers who jointly owned an ensilage cutter by means of which they filled their silos helping each other in so doing by exchanging work. Appellant owned a gasoline tractor engine and was employed by this group of farmers to furnish the power to the ensilage cutter. On the day when appellee received his injuries, a number of these men, including appellee and his employer, Barnes, were helping to fill a

silo on the farm of James H. Button and appellant was furnishing the power to the ensilage cutter by means of his tractor engine. This power was transmitted from the engine to the cutter by means of a belt which extended from the belt wheel on the engine to one on the cutter. The belt wheel on the engine may be disengaged from the driving shaft thereon by means of a clutch which is operated by the foot. When the lever attached to the clutch is pushed down, the belt wheel on the engine is released from the driving gear and remains idle while the engine continues to run. This lever has a series of notches or teeth on one side, and, in disengaging the clutch from the driving shaft on the belt wheel, the lever is pushed down by the foot and may be locked in that position by pushing it to one side so that the notches or teeth therein may catch on the edge of the platform. The clutch may be again engaged with the driving shaft of the belt wheel by pushing it with the foot so that the teeth are released from the

edge of the platform. When this is done, the lever flies up again and the clutch becomes engaged with the driving shaft of the belt wheel which immediately begins to revolve transmitting the power from the engine through the belt to the other machine. The ensilage was prepared by feeding the material to the ensilage cutter where it

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was carried between a shear plate and a series of revolving knives. Appellee was assigned to the duty of feeding the material to the cutter, and, after the cutter had been in operation for some time, it was noticed that the knives were not cutting properly whereupon a signal was given to appellant to stop the power. Appellant pushed down the lever and the power was stopped though the engine continued to run. The old knives were removed from the wheel of the cutter and new ones attached thereto and when the machine was started again it was found that one or more of these knives were not properly adjusted, but were clicking against the shear plate. Thereupon, a signal was given again to appellant to disengage the power from the engine. He again pushed down the lever attached to the clutch with his foot and attempted to lock the same in the manner heretofore described. Appellee then sought to adjust the knives in the cutter by tightening several bolts which held them in position. After tightening these bolts, he was balancing or teetering the wheel of the cutter backward and forward to see if the knives would strike the shear plate. In doing this, he had one hand on one of the knives and the other on the wheel and while thus engaged the clutch lever on the engine suddenly became released and, as the engine was still running, power was immediately transmitted to

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the cutter and the knives began to revolve and cut off parts of three fingers of appellee's left hand. It is conceded that no signal was given to appellant to throw in the clutch and he testified that the clutch became engaged through no action of his. His testimony as abstracted in part is as follows:—"I attented to the tractor on the day in question. Nobody helped me. There is a seat on the tractor upon the platform. I was seated on my seat when the accident happened. I did nothing to set the clutch or start the belt. I could see over there most of the time. I did not do anything in any shape or form to start the belt or start the machine. It

had never started with me in any way at any time before that accident. I heard somebody holler. I sat there for a while and then went down. * * * * The reason I didn't stop the engine was because I had to crank it to start again. * * * * When you push the lever down, that releases the clutch. When you push it down, the clutch comes up again and then the engine runs again. There is a kind of lever that locks it. The only way the lever can disengage itself, is the vibration of the engine. The notches on the lever catch on the edge of the platform. * * * * It never got loose before that time. It held for the time being. All I know it held it down. I didn't look at it. I

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don't know whether it was completely locked or not. If it had been completely locked, the grooves would have locked it tight." It is conclusively established by the proofs that when the lever was pushed down to release the clutch, it was not securely locked and that either the vibration caused by the running of the engine or some other means caused the lever to be released and thus permitting the clutch to become engaged with the driving shaft of the belt wheel and the power transmitted from the belt to the cutter. Although appellant testified that he could not see the position of the hands of appellee, yet he knew that appellee was adjusting the knives of the cutter and it was his duty while the knives were being adjusted, to use reasonable care to prevent the starting of the power. We fail to see where appellee was guilty of any contributory negligence, and this was a question of fact for the jury to determine.

Appellee testified on cross examination that he saw where the three sharp knives came around where the shear plate was. He was asked this question; "You knew it was dangerous?" to which the Court sustained an objection. He was then asked; "Do you know that was dangerous?" to which an objection was also sustained. Then the following question was asked of appellee; "Could you see them approach

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so close to the plate that it would cut your fingers off if they were in there?" It is difficult to determine to what the first two questions above mentioned referred to, but these questions taken in connection with the last question would indicate that counsel for appellant was seeking to ascertain if appel-

lee knew that it was dangerous for him to adjust the knives. The danger was self evident provided the knives were in motion. There was no danger to appellee of having his fingers cut off between the knives and the shear plate unless the former were revolving. Appellee was not the servant of appellant and the latter had no interest whatever in the cutter. He was simply hired by the group of farmers who owned that machine to furnish power for its operation. It was not material whether appellee knew that the adjustment of the knives was a dangerous operation or not. The more dangerous the proceeding was, the more care appellant should have exercised to prevent any power from being transmitted while the adjustment was in progress.

Appellant sought to prove by the witness Barnes that the latter did not ask Button to permit appellee to work at feeding the cutter, but that he requested him to permit appellee to work inside the silo. The trial court refused to admit this testimony and properly so. Appellee was working at the cutter and feeding the same with the

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acquiesence of everybody and appellant knew what he was doing at the time of the accident and it was wholly immaterial so far as appellant's negligence was concerned, what the conversation was between Barnes and Button. Complaints are made of other rulings on the admission of evidence which are without substantial merit as are also the criticisms of the instructions. We can not say from the evidence as a matter of law that the amount of the judgment is excessive for the injuries sustained.

There is no reversible error in the record and the judgment of the Circuit Court is affirmed.

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General No. 7094. Agenda No. 36.

October Term, A. D. 1919

WILLIAM L. JORDAN, Appellee,

vs

JOHN M. GRIFFITH, Appellant.

Appeal from Circuit Court Vermilion County.

ELDREDGE J.

Appellee, William L. Jordan, procured a verdict and judgment for the sum of $15.00 against appellant, John M. Griffith, in an action on the case for malicious prosecution. The declaration charges that the defendant wilfully and maliciously and without any reasonable or probable cause represented to G. Ross Wertz verbally and in writing that the plaintiff had been guilty of larceny of certain lumber of the value of $15.00, belonging to said Wertz; that by reason of such representation, the said Wertz filed a complaint before a Justice of the Peace upon which a warrant was issued by virtue of which he was wrongfully and unjustly arrested and brought before said Justice of the Peace and compelled to give bond for his appearance, and that on February 14, 1919, the charge was dismissed and appellee was discharged and fully acquitted of said offense. The declaration is so defective that it is doubtful whether it would sustain a judgment, but as no question in regard to

the sufficiency of the pleadings are preserved or raised on this appeal, they are waived.

The evidence, briefly stated, shows that appellant was the tenant on a farm owned by Wertz and that appellee was employed by appellant as a farm hand. Appellee left the employ of appellant in September, 1918, and when he did so, took with him some chicken coops made out of some old boards on the place. Wertz discovered later that the boards were gone and procured the following affidavit to be executed by appellant:

"State of Illinois, Vermilion County, ss:

Personally appeared before me, a notary public, in and for the County and State aforesaid, John M. Griffith, who makes affidavit that he was renter of eighty acres of land from G. Ross Wertz, viz, W ½ of N. E. ¼ of Section 15-22-14 during the year 1918 and that one W. L. Jordan worked for him and lived in the house located on above mentioned farm.

Affiant further states that when W. L. Jordan

moved into above premises there was numerous boards of one foot width which had been used in making bottoms for corn cribs and that to his absolute knowledge above mentioned W. L. Jordan appropriated them to his own use and made 6 or 8 chicken coops of above 3½ by 3 feet on a side, a triangle in shape; and that on or about Sept. 20, 1918, he removed from said premises taking said coops.

Further affiant sayeth not."

There is not a scintilla of evidence that appellant aided, abetted or instigated Wertz to cause the arrest and prosecution of appellee on the charge of larceny. There is no evidence that appellant did any malicious act furthering the prosecution. The affi

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davit executed by appellant simply states facts which are not disputed. Under no construction of the same can it be held as accusing appellee of the crime of larceny.

The judgment is reversed without remanding and the Clerk is directed to enter in the judgment of this Court the following finding of facts:

"The Court finds from the evidence that appellant did not wilfully and maliciously and without reasonable or probable cause represent to G. Ross Wertz verbally and in writing that appellee had been guilty of larceny of certain lumber of the value of $15.00 belonging to said G. Ross Wertz."

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General No. 7101. Agenda No. 39.

October Term, A. D. 1919

JOHN HALL, Appellant,

vs

M. FEUER and JOHN SPEIGEL, Partners as Feuer & Speigel, Appellees.

Appeal from Circuit Court Sangamon County.

217 IA 665

ELDREDGE J.

Appellant brought an action before a Justice of the Peace to recover the cost of forty dozen empty soda water bottles and twelve dozen cases for the same. An appeal was taken to the Circuit Court of Sangamon County from the judgment of the Justice of the Peace and on the trial in the Circuit Court the cause was submitted to the Court, who tried the same without a jury and found the issues joined in favor of appellees and entered judgment accordingly. No instructions were asked by either party and no question of law is involved on this appeal. It is claimed the value of the bottles and cases amounts to $28.10. The trial court saw and heard the witnesses and was in a much better position to determine the weight of their testimony than this court is. There is evidence tending to support his finding and the judgment is affirmed.

Gen. No. 7105 Ag. No. 42

October Term, A. D. 1919

KESPOHL-MOHRENSTECHER Co., Appellee

vs

W. E. WILLIAMSON, Appellant

Appeal from Circuit Court, Adams County

ELDREDGE J.

Appellee recovered a judgment for $494.45 against appellant in an action on the case in the Circuit Court of Adams County. The case was tried on the issues presented by the third and fifth additional counts of the declaration and the plea of general issue. Appellant was the owner of a four story building situated on the northwest corner of Fourth and Main Streets in the City of Quincy, Illinois. Appellant, at the time of the matter in controversy, was his tenant occupying the first and second floors and part of the basement of said building and conducted therein a wholesale and retail dry goods business. The Standard Oil Company, of which appellant was the local manager, occupied the third floor and the firm of Meyer, Reighard & Higgins the fourth floor as tenants of appellant. By the terms of the lease from appellant to appellee, the former was required to furnish steam heat for the

premises occupied by the latter. The boiler for this purpose was located in the basement and was under the exclusive control of appellant. The steam was carried from this boiler in pipes to the raditors located in that portion of the building occupied by appellee and also to raditors located on the third and fourth floors of said building. Appellant employed a janitor or engineer who had charge of the heating apparatus. The boiler was connected with the city water mains by a pipe in which was located a valve and when it was necessary to put water into the boiler this valve was opened and the water from the city water mains allowed to flow into the boiler. When a sufficient quantity of water had flowed into the boiler, the valve could be closed. The raditors in the building were of the old style of construction by which it was necessary to open the pet-cocks thereon in

order to allow the cold air to escape and the steam to circulate through them. When the pet-cocks on the raditors were closed the steam could not go through the raditors and consequently the latter could radiate no heat. In very cold weather appellee had been accustomed to leave the pet-cocks on the radiators open at night so that when the steam was turned on in the morn-

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ing the premises would be suitably warm when the store was opened for business. This had been the custom for several years. If this was not done, it would take several hours in the morning after the store was opened to suitably warm the premises. On the evening of the 23d of December, 1917, the janitor who had charge of the boiler opened the valve on the pipe connecting it with the city water main in order to place some water in the boiler. He forgot to turn off the valve and went home. The water flowed from the city main into the boiler until the latter was full when it was forced through the steam pipes into the raditors and out through the pet-cocks onto the floor of the premises occupied by appellee and also came down through the ceiling of the second floor from the floors above. The following day was the day before Christmas and many goods had been displayed by appellee on its counters and otherwise anticipating the Christmas trade. The water thus forced into the rooms occupied by appellee damaged these goods to the extent of $494.45. There is substantially no dispute as to the facts. Appellant introduced some testimony tending to show that no water came through the ceiling from the third floor, but the clear weight of

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the evidence is to the contrary. The only defense is that appellee was guilty of contributory negligence in permitting the pet-cocks on the raditors located on the first two floors occupied by it to remain open and thus to permit the water to escape therefrom.

Many errors are alleged to have occured in the admission and exclusion of evidence. To discuss them all would make this opinion of unnecessary length. Many of the criticisms in this regard are without merit and

others pertain to alleged errors not of sufficient importance to cause a reversal of the judgment.

It is claimed that before appellee can recover it must be established by proof that appellant had knowledge that it was customary for appellee to permit the pet-cocks on the raditors to remian open at night. The witness Fortcamp testified that when the pet-cocks are open and the boiler had the usual amount of water in it the steam as it condensed in the raditors would run back into the boiler in the form of water and this water would not be forced through the pet-cocks and that in extremely cold weather is was necessary to have the pet-cocks open and have some steam escaping therefrom in order to allow circulation and get sufficient heat from the radiators. This testimony is uncontradicated and, if true, appellee was not

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negligent in leaving the pet-cocks open because no harm would result therefrom if the proper amount of water was maintained in the boiler. Appellant himself testified that he knew the raditors could not be warmed unless the pet-cocks were open.

It is also contended that no recovery could be had for the damage caused by water flowing from the third floor through the ceiling of the second floor because the only damages claimed in the declaration were those caused by water flowing through the raditors located on that portion of the premises occupied by appellee. The evidence in regard to the water flowing through the ceiling of the second floor was admitted without objection that there was any variance between the allegations and the proofs, but on the contrary appellant introduced evidence tending to show that no water escaped from the raditors on the third and fourth floors.

On the trial counsel for appellee in the presence of the jury asked that the jury might be allowed to view the ceiling and walls of the premises in question to aid them in determining whether any water did, in fact, flow through said ceiling. The Court denied the request, but it is insisted that it was reversible error to make it in the presence and hearng of the jury. If this re-

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quest was erroneously made in the presence of the jury, appellant was not materially harmed thereby because, as we have said before, the clear weight of the evidence is to the effect that the water did come through said ceiling.

There was no reversible error in the giving or the refusing of the instructions and the judgment of the Circuit Court is affirmed.

General No. 7111. Agenda No. 48.

October Term, A. D. 1919

WALTER D. STILABOWER, Appellee

vs

BENJAMIN F. FLETCHER, Appellant.

217 I.A. 665

Appeal from Circuit Court, Moultrie County.

ELDREDGE J.

The jury in this case returned a verdict awarding appellee damages to the amount of $1,000.00. A remititur of $200.00 having been entered, judgment was rendered against appellant for the sum of $800.00.

The declaration consists of four counts charging in substance that appellee was the owner of an automobile and he, together with his wife Lena, were, on November 10th, 1917, riding in the same driving west on a public highway west of the village of Dalton City and that while in the exercise of due care for his own safety and for the traffic on said highway, appellant, who was on the same public highway driving east in an automobile, negligently, carelessly and recklessly drove said automobile so that it violently collided with great force against appellee's automobile damaging the latter and that the wife of appellee was thrown against the wind shield thereof and one of her front teeth was broken off and her face injured whereby appellee sustained damages for

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money paid out in an effort to cure his wife of her hurt and bruises. To the declaration, appellant filed a plea of the general issue.

On the night of November 10th, 1917, appellee and his wife were riding west on the highway in question. It was raining at the time and the road was wet and slippery. Appellant was a farmer living in Moultrie County two or three miles northesat of Dalton City. He had been to the City of Decatur during the day and was returning to his home on that night in his automobile accompanied by his son-in-law and a neighboring farmer. Near to where the accident happened there was a culvert or small bridge across the highway. Appellee testified that he (appellee) was driving his automobile west on the north side of the highway which was about twenty-five feet wide; that when he saw the culvert ahead, he caused his automobile to slow up and,

at the time of the accident, it was standing still on the north side of the road; that appellant's automobile approached him from the west at a speed of from twenty to twentyfive miles an hour, crossed the culvert and struck appellee's automobile in a head on collision; that as a result of the collision, one of the front wheels of appelee's automobile was broken, a fender was crushed, the crank case was cracked and the side of the automobile was injured; that his wife was thrown against the wind shield and two or three of her

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teeth were injured and her lips were cut and bleeding. Appellant's wife, being an incompetent witness, did not testify. The substance of the testimony of appellant, and he is corroborated by that of the two men who were with him in his automobile, is that there was a deep ditch at the south edge of the road and that after he had crossed the culvert, he kept on the south side of the center of the road and within eighteen inches of the edge of the ditch; that within thirty or forty feet after he had passed over the culvert, appellee's automobile which was moving rapidly westward along the center, or south of the center of the highway, ran into appellant's automobile and badly injured the same. With the exception of appellee's wife, who did not testify, these four men were the only eye witnesses to the accident. Other witnesses testified on behalf of both parties in regard to the tracks made by the two cars in the highway and as to statements made by appellee after the accident. While the jurors were the judges of the credibility of the witnesses, yet it is apparent that the question of where lies the preponderance of evidence is very close, and it was very important that no substantial error should intervene in the trial which might prejudice the rights of either party.

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The first instruction given on behalf of appellee is very lengthy, extending over a page and a half of the abstract, and after instructing the jury that, if they believe, from a preponderance of the evidence, each particular fact averred in the declaration "then you should find for the plaintiff and assess the damages at such amount as you may find in the light of all the instructions given in this case." The latter part of this instruction might be misleading by not requiring the jury, in assessing the damages, to be restricted to such

as are shown by the evidence. The third instruction, while it states a correct proposition of law, carries the inference that the only issue in the case was the negligence of appellant. It instructs the jury that it was the duty of the defendant to use and exercise ordinary care in driving his automobile over the public highway having due regard for the safety of others and, if he did not do so, he was guilty of negligence. This duty applied equally to appellee and there was evidence strongly tending to show that the collision was caused by the negligence of appellee and not by that of appellant. The fourth instruction is based upon the statute and concludes by stating that if the rate of speed of any motor vehicle operated in any public highway outside the limits of an incorporated city, etc., exceeds twenty-five miles per hour, such rate of speed shall be **prima facie** evidence that the

person operating such motor vehicle is running at a rate of speed greater than is reasonable, etc. There was no evidence that the automobile driven by appellant exceeded a speed of twenty-five miles per hour. An instruction must be based upon the evidence and even if it attempts to set out the words of the statute, if the facts are not applicable thereto, it should not be given. The seventh instruction, when read in connection with the fifth and sixth instructions, would not be so misleading as to constitute reversible error. The ninth instruction is on the measure of damages and includes the following, "and in addition thereto whatever sum or sums may have been shown by the evidence to have been paid out by him for medical services, care and attention to his said wife." The only evidence upon this subject is found in the answer given by appellee to a question asked of him on his direct examination. Q. "You may state whether or not you have expended any money in the fixing of your wife's teeth?" A. "Yes, sir; I spent about $85.00." The rule has been many times announced that, to enable a plaintiff to recover for expenditures for medical services, it is necessary to prove that such services were made necessary because of the injury inflicted by the defendant and that the fees were reasonable for the services. Schmitt vs Kurrus, 234 Ill. 521; Amann vs Chicago Traction Co., 243 Ill. 266.

During the cross examination of appellant, counsel for appellee asked the following questions to which objections were sustained, "You are in the habit of driving at a pretty good speed?", "Are you not a pretty fast driver?", "How many automobile collisions have you had?", and again, "How many automobile collisions have you had?". In a case so close upon the facts, the repitition of those incompetent questions may have had a very prejudicial influence against appellant in the minds of the jury. The questions were improper and appellant was within his legal rights in objecting to them and although the Court sustained the objections, yet, in the minds of the jury, the inference might have been drawn that, had appellant been permitted to answer them, it would have been shown that he was a fast and reckless driver and had had other collisions ,and apparently the only object of repeatedly asking such questions was to create just such an impression in the minds of the jurors.

Other alleged errors have been argued which are unnecessary to discuss as they will probably not be repeated on another trial. The judgment of the Circuit Court is reversed and the cause remanded.

General No. 7116. Agenda No. 51.

October Term, A. D. 1919

C. B. GONES, Appellee,

vs

J. G. FISHER, Appellant.

Appeal from Circuit Court, Vermilion County.

ELDREDGE J.

This case has been tried three times. It was originally brought against appellant and two other defendants and on the first trial appellee recovered a judgment for the sum of $5,000.00. On appeal to this court that judgment was reversed and the cause remanded because no liability was shown to have existed against the other two defendants. Gones vs Illinois Printing Company, et al., 205 Ill. App. 5. The second trial resulted in a judgment in favor of appellant, the other two defendants having been dismissed out of the case. On an appeal directly to the Supreme Court that judgment was reversed and the cause remanded. Gones vs Fisher, 286, Ill. 606. The last trial resulted in a judgment against appellant in the sum of $2,000.00 to reverse which this appeal is prosecuted.

After this cause was remanded on the former appeal to this Court, appellee amended his declaration by omitting therefrom the acts of negligence charged against the two defendants who were dismissed

from the cause, otherwise, the present amended declaration is substantially the same as the original amended declaration, and consists of five counts. The negligence charged in the first count is in substance that appellant drove his automobile at a rate of speed of twenty miles an hour in the closely built up business district of the City of Danville, contrary to statute, and by reason thereof ran over and injured appellee. The second count charges that appellant drove his automobile at a greater speed than was reasonable and proper contrary to the statute. The third count charges that appellee was riding a bicycle upon one of the streets of said City and under an ordinance of said city had the right of way at the intersction with another street where he was injured and that appellant negligently failed to observe said ordinance. The fourth count charged that by reason of certain fences and buildings having been erected at said intersection, an extra hazardous condition was

created known to appellant and that the latter negligently drove an automobile against appellee and injured him. The fifth count charges the dangerous condition existing at the intersection of the streets in question and that appellant violated the ordinance of said City by driving his automobile at a high rate of speed.

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To the declaration appellant filed two pleas, one being the general issue and the other a plea of the Statute of Limitations. The Court sustained a demurrer to the plea of the Statute of Limitations and this action is assigned as error. When a declaration is amended simply by the omission of the names of some of the defendants who were originally charged as joint **tort feasors** with the remaining defendant and where the same acts of negligence are charged against the remaining defendant as were alleged in the original declaration, the action will not be barred by the two year Statute of Limitations. Ross vs Shanley, 185 Ill. 390.

It is urged by appellant that the manifest weight of the evidence shows that appellee was guilty of contributory negligence. North Street in the City of Danville runs east and west and Walnut Street runs north and south. At the time of the injury in January, 1915, there was being constructed a building on the southeast corner of the intersection of these two streets. For the protection of the people using the street during its construction, a fence about five or six feet high had been erected in North street ten or twelve feet north of the south curbing of said street. A similar fence had been erected east of the curb of Walnut Street and set about ten feet out in the street. These two

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fences did not join each other at right angles, but were connected by a short fence running diagonally across the south east corner of the intersection. The evidence offered on behalf of appellee tended to show that at the time in question, he was riding north on Walnut Street on his bicycle and as he attempted to cross its intersection with North Street, appellant, who was driving his automobile east on North Street at a rate of speed from fifteen to twenty-five miles an hour, ran into and injured him. The evidence introduced on behalf of appellant tended to show that he was not driving his automobile faster than ten or twelve miles an hour at the time of the accident; that appellee when he reached North

Street did not proceed directly north across the intersection, but turned east on Walnut Street and then turned northeast directly in front of his automobile; that appellant attempted to avoid the collision by turning his car to the left or north, but was unable to do so. The Statute then in force provided that if any motor vehicle was operated upon any public highway where the same passes through the closely built up business portion of an incorporated city at a speed exceeding ten miles an hour, such rate of speed should be **prima facie** evidence of negligence. The manifest weight of the evidence in this case is that

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appellant was driving his automobile at the time of the accident at a greater rate of speed than ten miles an hour. On the other facts, the evidence is conflicting. The questions of whether appellant was guilty of the negligence charged and whether appellee was guilty of contributory negligence, were for the jury to determine. Two juries to whom the facts have been submitted have found verdicts in favor of appellee and twice the presiding judge, who saw the witnesses and heard them testify, has approved of these verdicts. Under these circumstances we can not hold that the verdict is contrary to the evidence.

It is claimed that there is a variance between the allegations and the proofs in that it is alleged in the amended declaration that the collision occurred on Walnut Street as appellee was going north, while the proofs show that it occurred on North Street while appellee was going in a northeasterly direction. Just where appellee was injured was one of the points in controversy, but the question of variance has not been saved for review because it was not raised on the trial. I. C. R. R. Co. vs Thompson, 210 Ill. 226; Lindquist vs Hodges, 248 Ill. 491; Swift vs Rutkowski, 182 Ill. 18.

Dr. Poland, a witness for appellee, testified as to the extent of the injury to appellee's ear and to the extent to which his hear

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ing had been made defective by the injury. On this direct examination, no objection was made to any part of his testimony. He was fully cross-examined by counsel for appellant and his testimony on the cross examination was substantially the same as that given by him on his direct examination. At the conclusion of his testimony counsel for appellant

moved to exclude all his testimony on the ground that it was based upon subjective tests, which motion was overruled. The doctor, in his testimony, testified in regard to many objective symptons. He stated that he found the drum of the ear very red; that there was a severe inflamation of the middle ear; that he inflated the eustachion tube and heard the air whistle or escape through the perforation and several other facts which were all competent proof and which the Court would have had no right to exclude. Moreover, no objection was made at the time the testimony was given and the motion made at the conclusion of the testimony to exclude all of it should have been overruled for that reason. Chicago Union Traction Co., vs May, 221 Ill. 530.

The only error presented for our consideraation in regard to the instructions is the refusal of the Court to give the twenty-fifth instruction offered on behalf of appellant. This instruction states in substance that it is necessary for the plaintiff to establish by a

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preponderance of the evidence that at the time and immediately before the accident he was in the exercise of ordinary care for his own safety and if he fails to establish this fact, the jury should return a verdict finding the defendant not guilty. This same principle of law is announced in seven other instructions given on behalf of appellant.

It is also contended that the verdict is excessive. The injury occurred in January, 1915, as a result of which appellant has suffered practically a total loss of hearing in his right ear. He was receiving $15.00 a week at the time of his injury. There was evidence tending to show that he was not physicaally able to do any work for twenty-two months thereafter and that he had expended $200.00 in payment of bills for physician's services. He also suffered a great deal of pain. The damages are not excessive for the injuries received.

The judgment of the Circuit Court is affirmed.

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Gen. No. 7122 Ag. No. 57

October Term, A. D. 1919

JAMES M. MELONE, Appellant

vs

W. T. PAGE AND ANNA E. PAGE, Appellee

Appeal from Circuit Court Macoupin County

ELDREDGE J.

Appellant filed his amended bill in the court below to establish and foreclose a vendor's lien for the balance of the purchase price of Lots 7 and 8 in Block 1 of Behren's addition to the city of Gillespie, Macoupin County, Illinois. Upon a hearing in the court below the bill was dismissed for want of equity.

On February 29, 1916 appellant and appellee, W. T. Page, entered into a written contract wherein after reciting that appellant agrees to sell to Page for the sum of $3500.00 the property described, concludes with the following: "In consideration of the price mentioned for the property above described, the party of the first part further agrees to turn over all his stock of 25 shares in the Staunton Home Association of Staunton, Illinois, to the party of the second part, without any further charges cost or expense, when the party of the second part complies with the payment price named herein, and the party of the first

further agrees to do all in power to make any transfers required to close the deal, and will allow the party of the second part of the Agent, Geo. C. Ahrens, thirty days time if required to get the deal closed and the amount named herein fully paid." At the time the above was executed, the property was encumbered by a mortgage to secure a loan for the principal sum of $2500.00 from the Staunton Home Association, which was a building and loan association. In compliance with the rules governing loans from such an association appellant had taken out 25 shares of the stock thereof on which he had made payments for several years and which at the time in question had a cash or withdrawal value of $919.35. Pursuant to the contract of purchase appellant and his wife conveyed the said property to Anna E. Page, the wife of said W. T. Page (by direction of the latter) by warranty deed which provided that the property was conveyed subject to the mortgage held by the Staunton Home Association. At the time the deed was executed the 25 shares of stock were assigned

by appellant to either Anna E. Page or W. T. Page who paid to appellant $600.00 on the purchase price, took possession of the property and purchased from appellant furniture located therein of the value of $100.00. It

appears that the whole transaction was carried on between appellant's agent, Ahrens, and appellee Page. The contract was drawn up by Ahrens,acting as the agent of appellee, and the principals in the contract had little or no dealings with each other. As a final payment on the contract Page delivered to Ahrens his check for $400.00 as the balance due on the purchase price. Ahrens attempted to deliver the check to appellant who refused to receive the same on the ground that in addition to the $400.00 he should, under the contract, receive the cash value of the 25 shares of stock or a check for a total of $1319.35. Appellant thereupon filed this bill to foreclose his alleged vendor's lien for the said sum of $919.35 and Page tendered in court the said sum of $400.

The contract in regard to the assignment of the 25 shares of stock by appellant to Page is plain and unambiguous. The proofs clearly show that appellant's agent Ahren and Page clearly understood the contract to mean what it says, viz., that Page agreed to pay $3500.00 for the property and the stock. There is nothing in the proofs to suggest that Ahrens and Page contemplated any other agreement than that expressed in the contract. After Page discovered that

appellee's construction of the contract was that Page should pay to him the cash value of the shares of stock he offered to rescind the contract and reconvey the property to appellant upon the latter returning the money paid to him, which appellant refused to do. The contract was drawn up by Ahren, appellant's agent, in accordance with the terms which he understood appellant had agreed to. Appellant personally signed the contract which expressly provides that in consideration of the price mentioned for the property, appellant further agrees to turn over said stock to Page without any charge, cost or expense. The contract speaks for itself and in the absence of any charge and proof of fraud in regard to the transaction, its plain meaning must govern the rights of the parties thereto.

The decree of the Circuit Court is affirmed.

General No. 7132 . Agenda No. 63.

October Term, A. D. 1919.

Joseph Schingle, Jr., Appellee,

vs

M. S. and A .E. Plaut, Executors of the last will and testament of S. Plaut, Deceased, Appellants.

217 I.A. 666

Appeal from Circuit Court, Vermilion County.

ELDREDGE J.

On April 29, 1916, appellee and appellants entered into a written contract by which appelleee agreed to make certain alterations and additions to a store building known as No. 12 East Main Street, Danville, Illinois, for appellants. The alterations and additions were to be made in accordance with the plans, specifications and drawings prepared by Liese & Ludwick, architects, which were attached to the contract and made a part thereof. The contract provided that the work should be completed on or before August 10, 1916, time to be extended only in case of general strikes, alterations, fire or unusual action of the elements. The contract also provided that appellants could make such alterations deviating from the said plans, drawings and specifications as they might deem proper and that said architects should value or appraise such alterations and add to or deduct from the amount agreed to be paid the excess or deficiency caused by such alterations,

but should any dispute arise respecting the true value of any such additional work, the same should be arbitrated by the architects whose decision would be final and binding on all parties. The following provisions also appear in the contract: "It is further agreed that in case any difference in opinion should arise between said parties in relation to the contract, the work to be or that has been performed under it or in relation to the plans, drawings and specifications hereto annexed, the decision of Liese & Ludwick, the architects, shall be final and binding on all parties hereto. * * * * It is further agreed that should the contractor fail to finish the work at the time agreed upon he shall pay to or allow the owner, by way of liquidated damages, the sum of $10.00 per diem for each and every day thereafter the said works shall remain incomplete, subject to the right of arbitration above mentioned." The specification contained the fol-

lowing provision: "TERRA COTTA—All of the front as shown to be of fresh cream full terra cotta ,manufactured by Midland Terra Cotta Co., Chicago, Ill. Other similar designs by other firms may be used, if approved by the architects. This must be strictly a first-class job in every respect."

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The completion of the contract by appellee was delayed twenty-three days because, as appellee claims, the employees of the Midland Terra Cotta Company went on a strike and he was prevented from getting the terra cotta front in time to finish the work by August 10th, 1916. Appellee brought this suit to recover an alleged balance due of $294.50. This is the second appeal of this case, (Schingle vs Plaut, 212 Ill. App. 639) and we held on the former appeal that the words "general strike" did not include a local strike of the employees of a subcontractor. Notwithstanding this, the Court permitted appellee to introduce in evidence a number of letters written by the Midland Terra Cotta Company to appellee in an attempt to prove that there was at that time a strike of the employees of that company. These letters were wholly incompetent for any purpose. The architects and appellant insisted upon appellee complying with his agreement to furnish the particular terra cotta front mentioned in the specification and the architects assisted him in attempting to get such a front from other concerns, and because the architects attempted to assist appellee in fulfilling the terms of his contract in this regard, it is now contended by appellee that by so doing, appellants waived the time limit clause and released appellee from the payment of the penalty for the delay. This did not constitute

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a waiver on the part of appellants. When the final estimate of the balance due under the contract was to be made by the architects, the question in regard to the penalty for the delay and the cost of the additional alterations made and all other matters in dispute beteween the parties was submitted to the architects, who, after hearing both sides of the matters in controversy, executed a final estimate of the balance due on the contract fixing the sum at $1665.55, which amount appellants paid to appellee. No complaint is made of this estimate except as to the amount allowed therein of $230.00 deducted as the penalty for the delay of twenty-three days in the completion of the contract. This deduction appellants were entitled to un-

der the terms of their contract.

The judgment of the Circuit Court is reversed and the Clerk is directed to include in the judgment of this Court the following finding of fact: The Court finds as ultimate facts that, at the time of the completion of the contract in question, appellants owed to appellee the sum of $1665.55 and that appellants have paid that sum to appellee and that there was not at the time this suit was instituted, any sum owing from appellants to appellee on account of said contract.

General No. 7066. Agenda No. 8.

October Term, A. D. 1919

The People of the State of Illinois,
Defendant in Error,
vs.
Caroline Gedwill, Plaintiff in Error.

Error to the County Court of Sangamon County.

OPINION BY WAGGONER, J.

On November 12, 1917, an information was filed in the county court of Sangamon county, charging the plaintiff in error with having sold intoxicating liquor in the Town of Clear Lake while the said town was anti-saloon territory. Plaintiff in error was, by a jury, found guilty on one count of the information, and judgment was entered against her for $50.00 and cost.

A reversal of the judgment is sought on the grounds that the verdict of the jury is against the manifest weight of the evidence, and that the court erred in giving an instruction, for defendant in error, which ignored the statute of limitations as to the offense charged in the information. We can not concur in either of these propositions.

Plaintiff in error lived in the Village of Riverton, in Clear Lake Township. Three witnesses each testified to having

bought intoxicating liquor from her at her home in the months of October 1917 and the early part of November 1917. The President of the Village Board, three other members of the Board, and the Village Marshal each testified that on November 11, 1917, they went to her home, arrested her and seized fourteen hundred bottles of beer and four quarts of whiskey. Three of these witnesses, together with a justice of the peace in said village, testified that while at the police station, plaintiff in error said she was selling liquor; that she was afraid of the Government authorities; that if they (the village authorities) would make the fine right and return the liquor to her, she would plead guilty to the charge of selling intoxicating liquor in anti-saloon territory.

Plaintiff in error denied in the county court having sold intoxicating liquor and having made the statements attributed to her while at the police station. She testified that part of the beer belonged to a man boarding

Gen. No. 7084 Ag. No. 26

October Term, A. D. 1919

William P. Wheeler, a minor by James B. Wheeler, his next friend, Appellee

vs

City of LeRoy, Appellant

Appeal from Circuit Court of McLean County

OPINION BY WAGGONER, J.

This is an action on the case instituted by appellee a boy thirteen years of age, against appellant, to recover damages for a personal injury alleged to have been caused by the negligence of the appellant in permitting one of its streets to be out of repair and in an unsafe condition, in consequence of which appellee was thrown from the top of a wagon loaded with ear corn, upon which he was riding, onto a brick pavement, and after being dragged for some distance by the wagon, one of its wheels ran over his right knee completely crushing the bone and destroying the knee joint.

There is no dispute as to the extent of the injury sustained nor claim that the judgment would be excessive if appellee is entitled to recover.

The points relied upon for reversal are (1) that the court should have admitted in evidence the conversation between

appellee and his father in the presence of Dr. Tuthill, an attending physician, immediately after the injury; (2) that the court refused proper instructions offered by appellant particularly with reference to the negligence of appellee and his brother who was driving the team, and (3) that the verdict is against the manifest weight of the evidence with reference to the negligence of appellant and the exercise of ordinary care by appellee.

The evidence shows that, after the accident, appellee was taken into the house of Mrs. Thompson, and that within a short time his father and Dr. Tuthill were there. Appellant offered to show, by Dr. Tuthill, that the father said to appellee, "If you had not been standing up on the load of corn and cutting up, you would not have been injured," and that appellee said nothing in reply thereto.

Appellee interposed an objection to the admission

of this evidence, on the ground that it was incompetent, improper and prejudicial. The objection was sustained. Appellee had testified he was sitting on the corn with his feet on the side of the wagon bed at the time he was thrown off; that he had been throwing corn, as they came along the road, at pictures on telephone poles, and that at Mrs. Thompson's he had told his father what had happened. Appellant had offered some evidence that appellee was standing up

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and had just thrown corn at the time he fell. What appellee was doing at the time of the accident, and whether or not he was standing up on the corn was material in determing the question of ordinary care, and this statement would have been, by appellee's failure to deny it, in the nature of an admission, and should have been admitted for the consideration of the jury. Hatcher v. Quincy Horse Ry. Co., 181 Ill. App. 30 (34). ~~Appellee was asked, on cross examination, "After the docter came and you told your father about it, do you remember your father saying to you, 'If you had not been on the wagon making a fool of yourself and putting up, you would not have got hurt'?" Objection to this question should not have been sustained but the evidence should been admitted for the consideration of the jury.~~

The reason's assigned in support of appellant's motion for a new trial, that relate to instructions, are that the court improperly gave instructions offered by appellee; refused proper instructions and improperly modified others that were offered by appellant, without indicating any particular instructions complained of. We can not tell from this general assignment what instructions

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were objected to and the court asked to set aside the verdict on account of having given, refused or modified them.

No specific instructions are named in the assignments of errors except one to direct a verdict for appellant at the close if appellee's evidence and another at the close of all the evidence, neither of which appear in the record or abstract, nor was the refusal to give either of them assigned as a reason for a new trial. Appellant, in its brief, says, "The court in our opinion should have given two instructions with reference to the care to be exercised by appellee as he approached this corner," with no reference to their number ~~of~~ or where they may

be found.

The abstract, in this case, covers one hundred and twelve pages. The statement and argument of appellant contains thirty-four pages, with but ~~two~~ three references to any page in the abstract.

The instructions complained of and the facts shown by the evidence should be specifically pointed out and references made to the abstract where they may be found. This was not done and we would be justified in declining to consider the assignment of errors presented. Town of Western Mound v. Loper, 185 Ill. App. 60.

We have examined the abstract, however, and find that the court gave, on behalf of appellant, two instructions embodying

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the same principles that are contained in those that were refused. We found no testimony to the effect that appellee, after the accident, "got up and walked into the house," nor that he told his father "all about the injury," nor that as they approached the place of the accident the "brother who was driving had the horses going in a sweeping trot." Misstatements of this kind in appellant's brief may be the reason for the absence of references to the abstract.

The question of ordinary care and of negligence were both to be determined by the jury. In this case the jury were properly instructed, no evidence was admitted that should not have been, and no error that would justify a reversal was committed in the exclusion of evidence. The judgment is not against the manifest weight of the evidence, but is amply supported by it, and must be affirmed.

Judgment affirmed.

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General No. 7090. Agenda No. 32.

October Term, A. D. 1919

GEORGE BRECK, L. M. KAYS and EARL GILMORE, partners under the firm name of VITASLIDE COMPANY, Appellants.

vs

COMET AUTOMOBILE COMPANY, Appellee.

217 I.A. 667

Appeal from Circuit Court of Macon County.

OPINION BY WAGGONER, J.

This suit was instituted by appellants before a justice of the peace, and on a trial thereof, had in the circuit court on appeal, a judgment was rendered in their favor for one dollar as nominal damages. Appellants sued for and claim to be entitled to recover, from appellee, the purchase price of a Vitaslide Automatic Projector, $67.80, together with the further sum of $37.20 under a contract for slides to be used in such projector, making a total of $135.00.

On October 27, 1917, appellee signed and delivered to a salesman of appellants two orders, one being for a projector and the other for twenty-four slides to be used in it.

On January 14, 1918, appellee wrote appellant to cancel the orders. The two orders were executed at the same time, and have the same effect as though embodied in one. (Illinois Match Co. v. C. R. I. and P. Ry. Co. 250 Ill. 396.) The orders were furnished by the salesman and were signed by appellee only. No writing was executed by appellants. The only evidence of any

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undertaking on their part is contained in recitals of the orders, and the only evidence of an agreement to deliver the machine and slides was such as might be implied from an acceptance of the orders by the salesman. No time is specified for the delivery of the machine or slides. Where a contract is silent as to the time for delivery, the law places a construction thereon that delivery is to be made within a reasonable time. (McKinnie v. Lane, 230 Ill. 544; 23 R. C. L. Pg. 1369). The only competent evidence offered in reference to the delivery of the machine was a letter of appellee acknowledging its receipt on January 19, 1918, which was

eighty-two days after the date of the order that had been given therefor. There was a delay of one hundred and eight days in delivering the slides. Appellee immediately returned the machine by express and the slides were returned the day they were received by parcel post. No reason for the delay was offered by appellants, and we hold that, under the evidence, the same was unreasonable and sufficient to preclude a recovery in this case.

The judgment of the trial court is reversed, on the cross error assigned, and appellee awarded a judgment, against appellants, for cost.

Judgment Reversed.

Finding of facts: The order given appellants for a Vitaslide Automatic Projector did not specify a time in which it was to be delivered, neither did the order given for the slides specify a

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time for their delivery. Seventy-nine days after giving the orders appellee requested their cancellation. Appellants had a reasonable time in which to make such deliveries, and having failed so to do, are not entitled to recover.

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General No. 7093 Agenda No. 35

October Term, A. D. 1919

ELIZA J. KINNEY, Appellee

vs

JACOB DAVIS, Appellant 217 I.A. 667

Appeal from Circuit Court of Cass County

OPINION BY WAGGONER, J.

The error assigned on this record is that the court erred in overruling a motion for a new trial. Appellant assigned six reasons in support of such motion, but has argued only three of them. All errors assigned, which are not argued in the brief's filed in a case in this court, are deemed waived. (Harvester Co. v. Industrial Board 282 Ill .489 (492). The first error argued is that the verdict is against the evidence. The others relate to the giving of instructions on behalf of appellee and the modification of instructions submitted by appellant.

The basis of appellant's argument, so far as it relates to the instructions, is two of the reasons that were assigned for a new trial. Such reasons are that the court gave improper instructions on behalf of the plaintiff, and that the court improperly modified proper instructions asked by defendant. In Kehl v. Abram 210 Ill. 218, at page 221, it is said the "contentions argued by appellant are, that there was error in the second and fourth instructions of appellee. * * * But we are precluded

from considering them, for the reason that in appellant's written motion for a new trial in the circuit court no mention was made of these instructions as ground for said motion." The court then cite the case of Hintz v. Graupner, 138 Ill. 158 where the trial court refused to give any of the instructions offered by either party, and gave one instruction of its own, divided into sections. In this last mentioned case the court said: "The appellant cannot now before this court question the correctness of any section of the instruction so given, because, in his motion for a new trial in the court below, he did not allege the giving of any improper instruction as a reason for granting a new trial. The only grounds relating to instructions, upon which the mo-

tion for a new trial was based, (as it is in the case at bar) were, that the court refused 'proper instructions asked for by the defendant.' Nowhere, among the reasons urged in support of the motion, is it stated that the court erred in giving the instruction which it did give, or any section thereof."

The only error for our consideration is that the verdict is against the evidence. No complaints is made that evidence was admitted that should have been excluded, or excluded that should have been admitted. There is nothing in the record indicating that the jury were influenced by passion or prejudice. It is apparent that appellee was unfairly dealt with by appellant and his associates. It would be wrong to deprive her of the judgment

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that has been rendered in this case upon a verdict which we hold is supported by the evidence.

Judgment affirmed.

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General No. 7104. Agenda No. 41.

October Term, A. D. 1919

LIDA WELLS, Appellee,

vs

GEORGE W. PITTMAN, Appellant.

217 I.A. 667

Appeal from Circuit Court of Piatt County.

OPINION BY WAGGONER, J.

Appellee filed a petition in the county court of Piatt county, representing that appellant was a distracted person and by reason of unsoundness of mind incapable of managing or caring for his property, and asking that a conservator be appointed. A trial was had in the county court, which resulted in a verdict of a jury finding that appellant was a feeble minded person, not capable of caring for his property and that a conservator should be appointed. Afterwards an order was entered setting aside the verdict of the jury and the order appointing a conservator, and granting a new trial. There was incorporated in such order the following provision, "By agreement of all the parties to this cause and for the convenience of the trial judge, this cause is hereby certified to the circuit court of Piatt county, Illinois, for trial."

A transcript of the record made in the case in the county

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court was filed in the circuit court, where a trial was afterwards had, resulting in a verdict finding the issues for the appellant. The circuit court rendered judgment on this verdict against the conservator for all cost made in the county court and that each party pay their own cost in the circuit court.

Jurisdiction, in cases of this kind, is expressly conferred by statute upon county and probate courts, and the manner of proceeding specified by the various proisions of Chapter 86, Hurd's Revised Statutes. Section 40, of such chapter, provides for appeals to the circuit court from any order or judgment rendered in the county court, but a trial judge of a county court as a matter of convenience to himself, either with the consent of parties, (one of whom is alleged to be feeble minded,) or without such consent, has no power to certify the cause to the circuit court for trial, and a certificate of that character confers no jurisdiction of the subject matter upon the circuit court.

The judgment entered in the circuit court is a nullity and will be set aside.

Reversed.

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Gen. No. 7107 Ag. No. 44

October Term, A. D. 1919

ARVESTA F. DOWNS, Appellant

vs.

JOHN HENRY JANSEN, Appellee

Appeal from Circuit Cou t of Logan County

OPINION BY WAGGONER, J.

Appellant rented a farm, owned by her, to Joseph Stoll with whom she entered into a written lease expiring February 28, 1918. Under the terms of this lease Stoll was to pay, as a part of the rent, one-half of all corn raised on the farm delivered, free of charge, at either Beason or Chestnut Ill., as appellant directed. The lease prohibited the removal or sale of any of the corn until the rent was fully paid. Stoll moved from the farm to Florida about March 1, 1918. In January 1918, knowing that Stoll was going to move, A. C. Forbes, acting for appellant requested him to deliver the rent corn and was told that he did not intend to do so. Appellee was a grain buyer at Besaon, Illinois, and knew that Stoll was the tenant of appellant. On February 25, 1918, Forbes notified appellee in writing, that he was led to believe that Stoll did not intend to deliver the rent corn; that the lease provided for the payment of one-half of it,

and that in case of sale to appellee without the delivery of it to appellant, she would enforce her landlord's lien against him. Forbes suggested, in this notice, that appellee hold back enough for the expense of the delivery of one-half of the corn until he ascertained, from Forbes, that such delivery had been made. Stoll returned from Florida, and about June 24, 1918, began the delivery to appellee of about 1100 bushel of corn to be shipped for him. On the morning that Stoll began delivering the corn Forbes went to appelee's office and told him (appellee) that the notice served in February was still in force, and appellee replied that he had gotten the notice and would look out for it. On June 29, 1918, appellant caused a further notice to be served, by the sheriff, upon appellee that the corn was still undelivered; that she claimed a ilen upon it; that he (appellee) would impair such lien at his peril, and forbidding that he should ship, sell or dispose of said corn until delivery of the rent corn had been made. Appellee shipped the corn for Stoll, re-

ceived the proceeds of the sale thereof, retained and now has in his possession $271.00 for the purpose of paying for the delivery of the rent corn. Stoll put one-half of the corn in cribs on appellant's farm. Forbes testified, and appellee does not deny it, that about November 1,

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1918, he went to appellee's office and said to him, "I am ready to deliver that corn and I want you to get the teams to deliver it," to which appellee replied, "I will call the teams tomorrow or tonight." Forbes further testified that he told appellee that he (Forbes) would get the teams if appellee could not get them; would furnish feed for the horses and pay for feeding the men. Appellee was to pay for the hauling. He tried to get men and teams, and being unable to do so, Forbes got them; had the corn delivered; furnished feed for the horses; paid for feeding the men, and brings this action, in assumpsit, to recover on such agreement for the hauling of the corn to market.

Appellee claims his agreement with Forbes was to pay for the delivery of the corn to the market in the event that Stoll was legally bound to pay for it. If that was the agreement, then appellee should pay for the reason that under a plain provision of the lease Stoll was legally bound to make such delivery.

The court should have construed the provisions of the lease, and not have submitted the construction of it to the jury, as was done in the first instruction given at the request of appellant. McCormick Harvesting Machine Co. v. Laster 81 Ill. App. 316, 321.

Under the evidence in this case of the agreement made by appellant, through her agent Forbes, with appellee, as hereinbefore

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and in the bill of particulars indicated, and of the performance of the terms of such agreement by appellant, and a failure to perform on the part of appellee, appellant would be entitled to recover and the court should have set aside the verdict and granted a new trial. The judgment rendered in the trial court will be reversed, and this cause remanded.

Reversed and Cause Remanded.

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Gen. No. 7110 Ag. No. 47

October Term, A. D. 1919

Cleo Ray Hess, Appellee

vs.

William B. Dillion, Appellant

Appeal from the County Court of Pike County.

OPINION BY WAGGONER, J.

Appellee brought an action in trover against appellant and one Allen Johnson seeking to recover the value of wheat in the stack, and the straw thereunto belonging, consisting of an undivided one-half plus an undivided one-fifth of the other half of a crop of wheat lately harvested and stacked by him. The jury returned a verdict finding Allen Johnson not guilty, the appellant, William B. Dillion, guilty, and fixing appellee's damages at $280.42. Judgment was entered on the verdict.

The evidence shows that the parents of appellee were dead, and that for a number of years he had made his home with his grandfather, William Hess, who lived on a farm, and died April 8 ,1918. Appellee claims to have been in the employ of decedent during the whole of the five years immediately preceding April 1918. The last year, the one in which the wheat was sowed, at $30.00 and the four years prior thereto at $25.00 a month.

In the year 1917, William Kingery and Albert Lane were working for William Hess, and they, together with appellee, sowed

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in wheat about seventy acres of land on his home farm and in addition thereto twenty acres on a farm owned by him called the Colvin place. All the labor, in sowing the land in wheat, was performed by these three employees with teams, tools and seed furnished by the decedent. On the day of the funeral, while the remains were being taken to the cemetery, and not before as shown by the evidence, appellee claimed an interest in the twenty acres of wheat. We are not able to determine from appellee's argument the basis of such claim. In his argument he first says it should be emphasized that he claimed to own the undivided one-half of the wheat **as tenant** and an undivided one-fifth of the other half **as devisee** under his grandfather's will. He then says he is entitled to recover on

the ground that his grandfather gave him the wheat, the tenant's share ,irrespective of the existence or non-existence of the relation of landlord and tenant, and then that the uncontradicted statement of the grandfather, (who is dead and each statement attributed to him by appellee's witnesses is claimed to have been made with no one present but the witness and the decendent) that it was "Ray's wheat" should be regarded as a gift.

The evidence does not establish a gift. Appellee, in his testimony, makes no claim of that kind, but says that he asked his grandfather how he (the grandfather) wanted him (appellee) to put the wheat in; the grandfather said he would furnish teams

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and implements to put it in with, furnish the seed and appellee was to give him one-half of the wheat at the machine for rent. Appellee did not put the wheat in as a tenant would do. The part taken by him in putting it in was the same as that taken in putting in the seventy acres on the other farm, namely while working for his alleged landlord at $30.00 a month. According to appellee's version of the leasing, the only thing decedent did not agree to do was to pay for the threshing. If the judgment, in this case, is affirmed it can only be on the basis that appellee has established the remarkable leasing claimed by him, by a preponderance of the evidence.

Appellee is contradicted by other witnesses in referance to about all the material matters involved except the alleged conversation with the deceased grandfather when it is claimed the leasing was made. He said in cross-examination that he made no claim his grandfather was under contract to pay him $30.00 a month at the time the wheat was put in, notwithstanding that while this suit was pending ,in the county court, he filed a claim therein, under oath, against the estate of the decedent for five years services. Appellee called five witnesses to prove by them statements made by decedent. One of these witnesses testified to having said to the old gentleman, "If this weather does not warm up this wheat will not get up this fall," and he said, "this is Ray's wheat;" no further conversation about wheat was had, and

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the witness told no one of it other than his wife. Another witness testified that decedent tried to hire him to work; the witness said "Well, I can't;" dece-

dent then said, "Ray has twenty acres of wheat on the Colvin farm and will not do me much good this summer, I want to hire you." Another witness testified that he and decedent were talking about wheat, when the latter volunteered the statement that this is Ray's wheat, or that field of wheat is Ray's. Another witness testified that decedent told him Ray had the best looking wheat on the place. Another, that decedent said to him Ray is putting in, or sowing, twenty acres on the Colvin place. Neither of the statements, testified to by this last witness, indicated that appellee had any interest in the wheat.

William Kingery, called by appellant, testified that William Hess told him ,at the dinner table, when they had about finished plowing the seventy acres, to bring his tools in at night so he could begin plowing on the Colvin twenty the next morning; that appellee then asked his grandfather if he was not going to let him put in the twenty acres, and his grandfather replied, "No, Ray, it is too much * * * I will let you have ten acres here south of the road. Henry Boren testified to the same conversation, had at the dinner table, and that on other occasions he heard decedent tell appellee he could not have the ground. Homer Boren testified that appellee was going away to take lessons

concerning railroad affairs, and in January 1918, while engaged in hulling beans at the Hess barn with his father and appellee, appellee said he did not have any wheat; did not want any and did not expect to be there at harvest time. Amerson Deam testified that he was at the Hess place in January or February after the wheat was sowed, at a time when they were mending and greasing harness; that in the presence of this witness, Lane Ligon, Hal Williams and John Cloniger, appellee said he did not have any wheat and was not going to be there to harvest wheat, was going on the railroad. This witness was corroborated by two of the witnesses named by him as being present.

The verdict, rendered in this case, is not supported by the evidence, and should have been set aside. We find as facts, established by the evidence, that the claim of appellee to the wheat in controversy is fictitious; that he was not a tenant of William Hess; that no interest in the wheat was given him by William Hess; that at the time this suit was instituted he had no interest in

the wheat and cannot maintain it.

Each of the briefs filed in this case contain statements, as being facts for the consideration of the court, which nowhere appear in the record. Practice of this kind does not increase the confidence of courts in attorneys who resort to it and should not be indulged in.

Judgment Reversed.

General No. 7114. Agenda No. 50.

October Term, A. D. 1919

AUGUST GULBANAITIS, Appellee.

vs

SIMON LAPINSKY, Appellant.

Appeal from Circuit Court of Montgomery County.

OPINION BY WAGGONER, J.

Appellee was arrested upon a warrant issued by a justice of the peace upon a charge of an assault and battery, and by such justice of the peace required to give a bond for $200.00 for his (appellee's) appearance at the April term 1918 of the circuit court of Montgomery county. Appellant signed the required bond as surety. Appellee gave appellant a post-office order for $100.00, upon which appellant got that amount of money. It is the contention of appellee that the post-office order was given to indemnify appellant on account of having signed the bond, and that the money was to be returned to him at said term of circuit court. Appellant claims that he signed the bond without being secured in any way for so doing, and that two or three days after the bond was signed he cashed the post-office order at the request of appellee, and paid him $100.00 therefor. Each of the parties were corroborated in their respective contentions, and a question of fact was presented

to the jury for determination. The first instruction should not have been given, unless there is evidence in the record on which to base it, that is not shown by the defective abstract filed in this case. The abstract discloses no sufficient reason why the judgment of the trial court should be disturbed, and the same is affirmed.

Judgment Affirmed.

Gen. No. 7118 Ag. No. 53

October Term, A. D. 1919

WILLIAM H. H. WEST, Jr., Appellant

vs

IRA E. DAY, Appellee

Appeal from Circuit Court of Jersey County.

OPINION BY WAGGONER, J.

The parties to this suit were in partnership in the garage and automobile business. Their garage was called The White Way Garage. A question arose upon which they differed, the friendly relations between them terminated, and as a result a bill was filed, by appellant, for an accounting and settlement of the partnership affairs. Appellee answered and, among other things, alleged that prior to the filing of the bill an adjustment and full settlement of all matters relating to the partnership was made; that at the time of such settlement appellant executed and delivered to appellee the following writing and agreement: "Oct. 30, 1916. Know All Men by these presents that I, W .H. H. West, Jr., of Jerseyville, Jersey County, Ill., will turn all my right, title and good will and every claim in The White Way Garage, at Jerseyville, Ill., over to Ira C. Day and Ira C. Day is to pay all outstanding debts. W. H. H. West Jr."; that under and by virtue of this writing and agreement appellee became the sole owner of all the partnership business; took the exclusive possession thereof,

paid all outstanding debts due from the firm, and denies the right of the appellant to an accounting.

Evidence was heard for the purpose of enabling the court to determine whether or not a right to an accounting existed. The court found that the writing and agreement above quoted was executed by appellant and by him delivered to appellee; that it constituted a full and complete settlement of the partnership matters mentioned in the bill of complaint herein; that appellant was not entitled to an accounting, and dismissed the bill for want of equity.

The only question for consideration in this case is did appellant execute and deliver to appellee the written instrument in question. The evidence shows offers were made by the parties, one to the other, for the pur-

pose of terminating the partnership, and refused. Appellee testified that on October 30, 1916, appellant came from his house to the garage with a paper in his hand on which was set down the accounts due the partnership amounting to about two hundred dollars, and said that if I would give him the bills to collect he would call it square with me. I said I would not do it; that there was too much to pay out! that I was already ahead on the expense end of the game. West then said he would take the tools his father had made and turn the whole thing over to me if I would pay outstanding bills. We went into the office with the paper. I wrote the agreement and he signed it. Appellant denies that he had this conversation; denies having signed

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the paper, says he was in Granite City, Illinois, and not in Jerseyville, the morning of October 30, 1916, and in this last statement is corroborated by witnesses in a position to know the fact. Appellee is wrong as to the date. The agreement was written on the paper that appellee claims appellant brought to the garage, and appellee says the paper was made out by appellant or someone he had at his house. Appellant was in possession of the books of the firm, at the time in question, and while he denies being at the garage, he does not deny that the paper was prepared by or for him nor attempt to explain how it got into the possession of appellee. At the time the controversy arose between the parties, in reference to their business, William Bridges and Hansford Lockridge were in their employ, both of whom were called as witnesses. William Bridges testified he was in the garage the latter part of October 1916, one morning about 8:30 or 9 o'clock, when appellant came in with a paper in his hand, and said he had come for a settelement; that appellee said he would settle but not on the terms appellant had asked before; that appellant said if appellee would pay all outstanding bills and lett him have he tools his father had made, for relics, he (appellant) would turn it all over to appellee and call it square; that appellee asked if he would sign a statement to that effect; that appellant replied that he would, and that appellant and appellee went into the office; that he afterwards heard appellant say he had nothing more to do with the business,

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and to go to ap-

pellee for all bills; after that time appellee was the manager and the witness did not see appellant take any part in the affairs of the business. Hansford Lockridge testified he was working for the parties at the time they dissolved; that appellant told him they had dissolved; that he helped appellant gather up tools which appellant said he wanted to keep because his father had made them and they were old relics;; that appellant said he had settled everything and turned the garage over to appellee. Charles Corzine and Charles O. Spangler each testified to having presented bills due the Standard Oil Company to appellant for payment, and were told by him that he had sold out to appellee.

In September 1916, and prior thereto, appellant had a checking account at the Jerseyville National Bank. Appellee called as witnesses the cashier and assistant cashier of that bank, and Frank F. Loellke, general manager of the Jersey Mercantile Company, each of whom testified they knew appellant's signature, and that it was his signature to the agreement in question.

Appellant offered in evidence, for comparison of signatures in the trial court, two hundred and eighty-seven checks given by him on and paid by The State Bank of Jerseyville, bearing dates from February 2, 1916 to September 11, 1919. His brother, sister, and a witness who was not asked his occupation, testified that the signature in question was not that of appellant. It is significant that on one connected with The State Bank of Jerseyville, that had

cashed this large number of checks, was called, by appellant, to testify in reference to the genuineness of the signature.

The evidence shows that subsequent to the latter part of October 1916, appellee ran the business formerly conducted by himself and appellant; that appellant had nothing to do with it; that appellee paid the firm indebtedness, and that more than two years elapsed from the time the parties ceased doing business together until this suit was instituted.

If the appellant signed the written instrument in question, it constituted a full and complete settlement of the partnership matters between the parties to this suit, the appellant was not entitled to an accounting, and his bill was properly dismissed for want of equity. Taylor v. Coffing, 23 Ill. 207; Hamilton v. Wells, 182 Ill. 144

(151); Clark v. Carr, 45 Ill. App. 469 (478).

The decree entered by the chancellor is sustained by the evidence and must be affirmed.

Decree Affirmed.

General No. 7128. Agenda No. 59.

October Term, A. D. 1919

ELIZABETH SPENCER, executrix of the last will and testament of William S. Spencer, deceased, Appellee,

vs

JACKSONVILLE RAILWAY COMPANY, Appellant.

Appeal from the Circuit Court of Morgan County.

OPINION BY WAGGONER, J.

This was an action on the case brought by Elizabeth Spencer as executrix of the last will and testament of William S. Spencer, deceased, against the Jacksonville Railway Company claiming damages for the death of appellee's testate through the negligent operation of one of the street cars of appellant. The declaration charges that appellant was operating a street railroad on South Main Street in Jacksonville, Illinois, and that on May 5, 1918, one of its cars was driven by its servant south upon South Main Street near and over the crossing at the intersection of Anna Street and South Main Street; that while William S. Spencer, with due care and diligence, was crossing the track near said intersection appellant by its servant carelessly and improperly drove and managed its street car at an excessive and dangerous rate of speed; that through the negligent and improper conduct of appellant in that behalf the street car then and there struck the said William S. Spencer, and he was thrown to the ground and killed.

On a trial of the case, in the circuit court, a jury returned a verdict for appellee assessing her damages at $2000.00. The court overruled a motion for a new trial and rendered judgment on the verdict.

Among other errros assigned on the record, in this case, it is urged that the court erred in giving the first and second instructions asked by appellee. Such first instruction is long, involved and inartifically drawn. It allows appellee to recover on proof of negligence in failing to stop the car. The declaration does not charge negligence generally in the operation of the car, as would have been sufficient under the authority of Chicago City Ry. Co. v. Jennings, 157 Ill. 274, 279, but limits the charge of negligence to speed of the car. This in-

struction is therefore reversible error as it allows a recovery for negligence not charged in the declaration.

The second instruction given at the instance of appellee refers the jury to the declaration to determine the negligence there charged and should have been refused. A similar instruction was given in the case of Wendzinski v. Madison Coal Co., 282 Ill. 32 and in reference to such last mentioned instruction the Supreme Court said "counsel for plaintiffs, especially in this class of cases, persist in asking for an instruction of this kind although it has been criticised

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and condemned and more than one judgment has been reversed because of it. * * * The fact that the instruction did not direct a verdict does not relieve it of its objectionable character, and the court should not have left it to the jury to determine whether the plaintiff had proved his case as alleged in the declaration." Laughlin v. Hopkinson 292 Ill. 80. City of Chicago v. Sutton 136 Ill. App. 221, 229.

The judgment rendered in the circuit court is reversed and the cause remanded.

Reversed and remanded.

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