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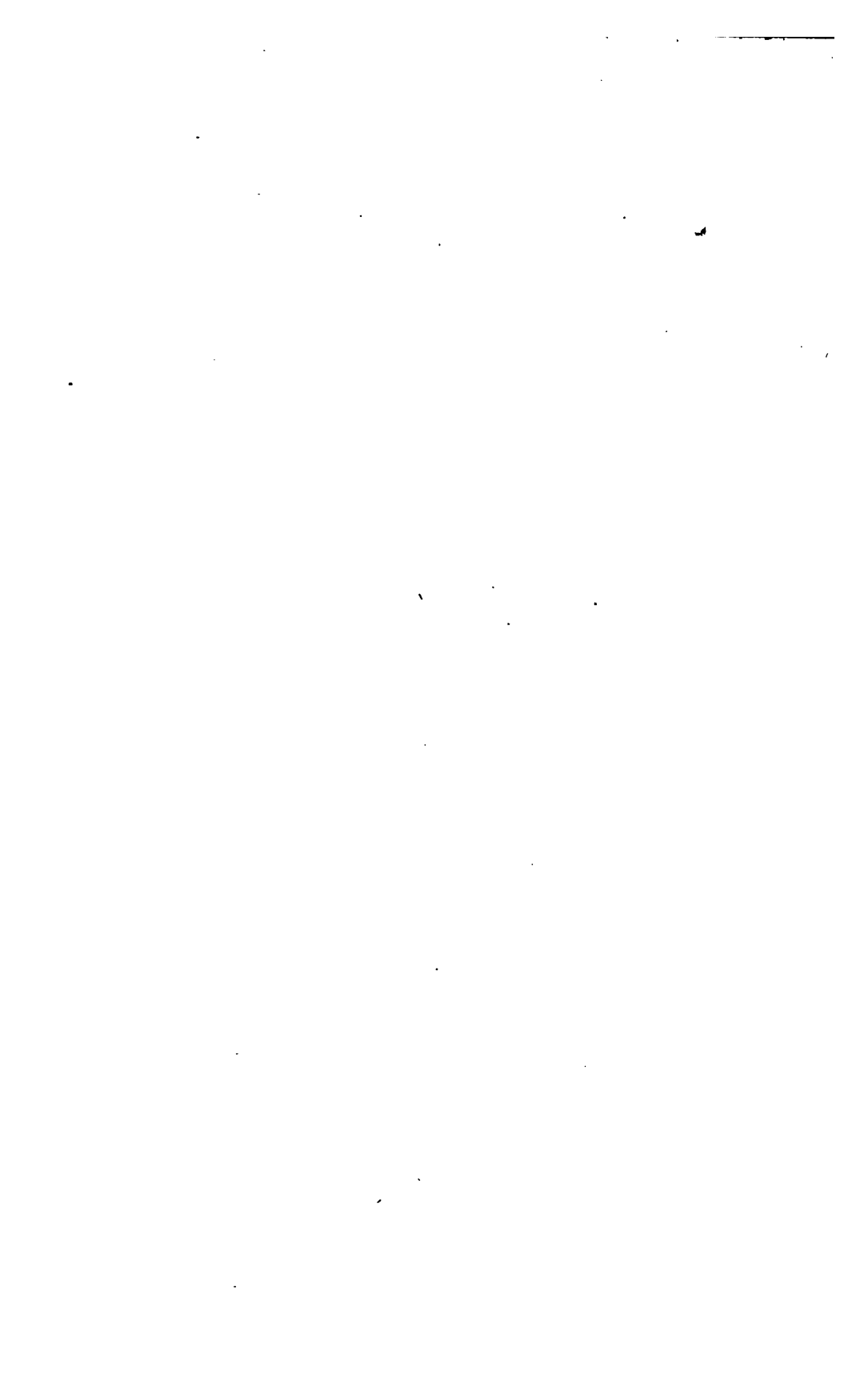
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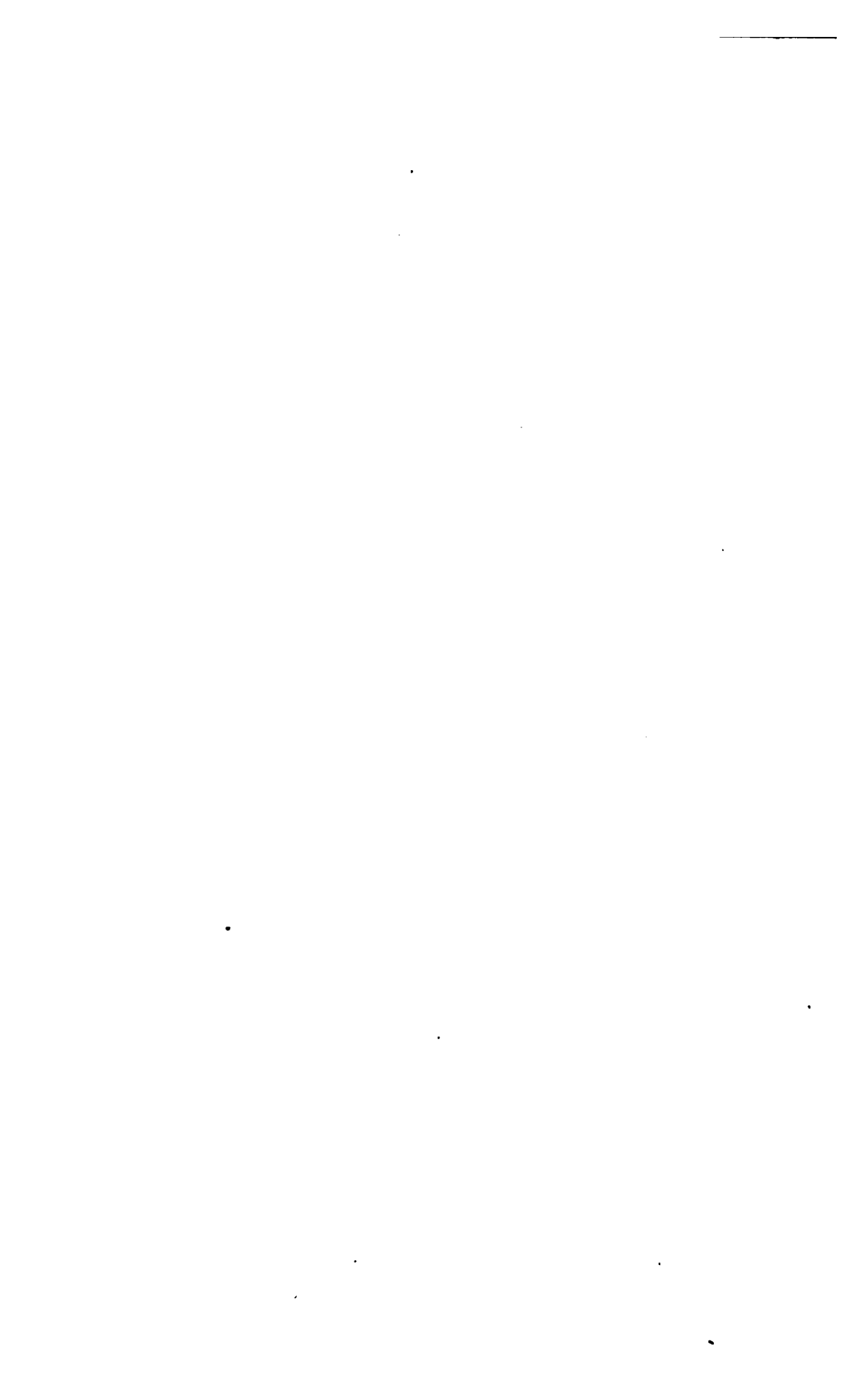


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REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS

OF ILLINOIS

**WITH A DIRECTORY OF THE JUDICIARY OF THE STATE
CORRECTED TO MARCH 1, 1917, AND ABSTRACTS OF
CASES AS DESIGNATED BY THE COURTS
UNDER ACT APPROVED JUNE 27, 1913,
IN EFFECT JULY 1, 1913.**

VOL. CCIII

A. D. 1917.

LAST FILING DATE OF REPORTED CASES:
FIRST DISTRICT, FEBRUARY 9, 1917.
SECOND DISTRICT, NOVEMBER 9, 1916.
FOURTH DISTRICT, JANUARY 8, 1917.

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THE PUBLISHERS' EDITORIAL STAFF

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1917

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DEC 19 1917

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO MARCH 1, 1917.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) Municipal Court of Chicago; (7) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mount Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

SAMUEL P. IRWIN.....Bloomington.

JUSTICES.

First District—WARREN W. DUNCAN.....Marion.
Second District—WILLIAM M. FARMER.....Vandalia.
Third District—FRANK K. DUNN.....Charleston.
Fourth District—GEORGE A. COOKE.....Aledo.
Fifth District—CHARLES C. CRAIG.....Galesburg.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Carter is the present Chief Justice.

CLERK.

CHARLES W. VAIL, Chicago.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by the Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One clerk is elected in each district.

REPORTERS.

Reported by the publishers' editorial staff.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—James S. McInerney, Michigan Blvd. Bldg., Chicago.

JESSE HOLDOM, Presiding Justice, Michigan Blvd. Bldg., Chicago.

WM. H. MCSURELY, Justice, Michigan Blvd. Bldg., Chicago.

WILLIAM E. DEVER, Justice, Michigan Blvd. Bldg., Chicago.

FIRST BRANCH*

ALBERT C. BARNES, Presiding Justice, Michigan Blvd. Bldg., Chicago.

DAVID F. MATCHETT, Justice, Michigan Blvd. Bldg., Chicago.

CHARLES A. McDONALD, Justice, Michigan Blvd. Bldg., Chicago.

SECOND BRANCH**

CLARENCE N. GOODWIN, Presiding Justice, Michigan Blvd. Bldg., Chicago.

JOHN M. O'CONNOR, Justice, Michigan Blvd. Bldg., Chicago.

THOMAS TAYLOR, Justice, Michigan Blvd. Bldg., Chicago.

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

JOHN M. NIEHAUS, Presiding Justice, Peoria.

DUANE J. CARNES, Justice, Sycamore.

DORRANCE DIBELL, Justice, Joliet.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Campaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Piatt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the first Tuesdays in April and October.

CLERK—George L. Tipton, Springfield.

GEORGE W. THOMPSON, Presiding Justice, Galesburg.

EMERY C. GRAVES, Justice, Geneseo.

EDGAR ELDRIDGE, Justice, Ottawa.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185, J. & A. § 2981.

** Established under act of June 6, 1911, J. & A. § 2989.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in March and October.

CLERK—Charles C. Johnson, Mount Vernon.

JAMES C. McBRIDE, Presiding Justice, Taylorville.

HARRY HIGBEE, Justice, Pittsfield.

FRANK H. BOGGS, Justice, Urbana.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into seventeen judicial circuits, as follows:*

FIRST CIRCUIT.

The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

Judges: A. W. LEWIS, Harrisburg.

DEWITT T. HARTWELL, Marion.

WILLIAM N. BUTLER, Cairo.

SECOND CIRCUIT.

The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

Judges: J. C. EAGLETON, Robinson.

JULIUS C. KERN, Carmi.

CHARLES H. MILLER, Benton.

THIRD CIRCUIT.

The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

Judges: LOUIS BERNREUTER, Nashville.

GEORGE A. CROW, East St. Louis.

J. F. GILLHAM, Edwardsville.

FOURTH CIRCUIT.

The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

Judges: WM. B. WRIGHT, Effingham.

JAMES C. McBRIDE, Taylorville.

THOMAS M. JETT, Hillsboro.

FIFTH CIRCUIT.

The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

Judges: JOHN H. MARSHALL, Charleston.

WALTER BREWER, Toledo.

AUGUSTUS A. PARTLOW, Danville.

* Laws 1897, 188, J. & A. § 2070.

SIXTH CIRCUIT.

The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Platt.

Judges: GEO. A. SENTEL, Sullivan.
WM. K. WHITFIELD, Decatur.
FRANKLIN H. BOGGS, Urbana.

SEVENTH CIRCUIT.

The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

Judges: FRANK W. BURTON, Carlinville.
NORMAN L. JONES, Carrollton.
ELBERT F. SMITH, Springfield.

EIGHTH CIRCUIT.

The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

Judges: HARRY HIGBEE, Pittsfield.
ALBERT AKEES, Quincy.
GUY R. WILLIAMS, Havana.

NINTH CIRCUIT.

The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

Judges: GEORGE W. THOMPSON, Galesburg.
HARRY M. WAGGONER, Macomb.
ROBERT J. GRIER, Monmouth.

TENTH CIRCUIT.

The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

Judges: JOHN M. NIEHAUS, Peoria.
THEODORE N. GREEN, Pekin.
CLYDE E. STONE, Peoria.

ELEVENTH CIRCUIT.

The counties of McLeah, Livingston, Logan, Ford and Woodford.

Judges: SAIN WELTY, Bloomington.
GEORGE W. PATTON, Pontiac.
THOMAS M. HARRIS, Lincoln.

TWELFTH CIRCUIT.

The counties of Will, Kankakee and Iroquois.

Judges: DORRANCE DIBELL, Joliet.
FRANK L. HOOPER, Watseka.
ARTHUR W. DESILM, Kankakee.

THIRTEENTH CIRCUIT.

The counties of Bureau, La Salle and Grundy.

Judges: SAMUEL C. STOUGH, Morris.
JOE A. DAVIS, Princeton.
EDGAR ELDREDGE, Ottawa.

FOURTEENTH CIRCUIT.

The counties of Rock Island, Mercer, Whiteside and Henry.

Judges: FRANK D. RAMSAY, Morrison.
EMERY C. GRAVES, Geneseo.
WILLIAM T. CHURCH, Aledo.

FIFTEENTH CIRCUIT.

The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

Judges: JAMES S. BAUME, Galena.
RICHARD S. FARRAND, Dixon.
OSCAR E. HEARD, Freeport.

SIXTEENTH CIRCUIT.

The counties of Kane, Du Page, De Kalb and Kendall.

Judges: CLINTON F. IRWIN, Elgin.
DUANE J. CARNES, Sycamore.
MAZZINI SLUSSER, Wheaton.

SEVENTEENTH CIRCUIT.

The counties of Winnebago, Boone, McHenry and Lake.

Judges: ARTHUR H. FROST, Rockford.
CHARLES H. DONNELLY, Woodstock.
CLARE C. EDWARDS, Waukegan.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, ex officio, of the Criminal Court.

CRIMINAL COURT.

CLERK—FRANK J. WALSH, Criminal Court Building, Chicago.

CIRCUIT COURT.

CLERK—AUGUST W. MILLER, County Building, Chicago.

JUDGES.

RICHARD S. TUTTILL,
JESSE A. BALDWIN,
ROBERT E. CROWE,
KICKHAM SCANLAN,
THOMAS G. WINDES,
MERRITT W. PINCKNEY,
JESSE HOLDOM,
VICTOR P. ARNOLD,
DAVID M. BROTHERS,
CHAS. M. THOMSON,

DAVID F. MATCHETT,
JOHN GIBBONS,*
LOCKWOOD HONORE,
GEORGE KERSTEN,
JOHN P. MCGOERTY,
FREDERICK A. SMITH,
CHARLES M. WALKER,
GEO. F. BARRETT,
THOMAS TAYLOR, JR.,
OSCAR M. TORRISON.

* Died February 11, 1917.

SUPERIOR COURT.

CLERK—JOHN KJELLANDER, County Building, Chicago.

JUDGES.

WILLIAM H. MCSURELY,
JOHN M. O'CONNOR,
THEODORE BRENTANO,
JOSEPH SABATH,
JOSEPH B. DAVID,
WILLIAM FENIMORE COOPER,
WILLIAM E. DEVER,
MARTIN M. GMDLEY,
CHARLES A. McDONALD,

MARCUS A. KAVANAGH,
JOSEPH H. FITCH,
JOHN J. SULLIVAN,
ALBERT C. BARNES,
HUGO PAM,
M. L. MCKINLEY,
CLARENCE N. GOODWIN,
CHARLES M. FOELL,
DENIS E. SULLIVAN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., J. & A. ¶ 3309, and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901, J. & A. ¶ 3289.

THE CITY COURT OF ALTON.

L. D. YAGER, Judge.

ALLAN G. MACDONALD, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge.

J. W. GREENAWAY, Clerk.

THE CITY COURT OF BEARDSTOWN.

J. J. COOKE, Judge.

JOHN LISTMANN, Clerk.

THE CITY COURT OF BENTON.

R. E. HICKMAN, Judge.

LORAN MORGAN, Clerk.

THE CITY COURT OF CANTON.

HARRY C. MORAN, Judge.

A. C. SHEPLEY, Clerk.

THE CITY COURT OF CARBONDALE.

HERBERT A. HAYS, Judge.

DALLAS MEISENHEIMER, Clerk.

THE CITY COURT OF CENTRALIA.

ALBERT D. RODENBERG, Judge.

GUY C. LIVESAY, Clerk.

THE CITY COURT OF CHARLESTON.

CHARLES A. QUACKENBUSH, Judge.

CORA DANIELS, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

CHARLES H. BOWLES, Judge.

EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF DE KALB.

HARRY W. McEWEN, Judge.

JOHN C. KILLIAN, Clerk.

THE CITY COURT OF DU QUOIN.

BENJAMIN W. POPE, Judge.

HARRY BARRETT, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

H. L. BROWNING,

W. M. VANDEVENTER, Judges.

WILLIAM J. VEACH, Clerk.

THE CITY COURT OF ELGIN.

FRANK E. SHOPEN, Judge.

CHARLES S. MOTE, Clerk.

THE CITY COURT OF GRANITE CITY.

M. R. SULLIVAN, Judge.

A. N. HOMAN, Clerk.

THE CITY COURT OF HARRISBURG.

W. W. DAMBON, Judge. HOMER WADE, Clerk.

THE CITY COURT OF HERRIN.

ROBERT T. COOK, Judge. ANNA REED, Clerk.

THE CITY COURT OF JOHNSTON CITY.

J. H. CLAYTON, Judge. J. E. SULLINS, Clerk.

THE CITY COURT OF KEWANEE.

H. STERLING POMEROY, Judge. CHARLES L. ROWLEY, Clerk.

THE CITY COURT OF LITCHFIELD.

DAN W. MADDOX, Judge. MRS. LAURETTA SALZMANN, Clerk.

THE CITY COURT OF MACOMB.

JOSEPH WESTFALL, Judge. WM. B. MARTIN, Clerk.

THE CITY COURT OF MARION.

W. O. POTTER, Judge. GEO. T. CARTER, Clerk.

THE CITY COURT OF MATTOON.

JOHN McNUTT, Judge. THOMAS M. LITTLE, Clerk.

THE CITY COURT OF MOLINE.

G. O. DIETZ, Judge. GEORGE A. SCHRADER, Clerk.

THE CITY COURT OF PANA.

J. H. FORNOFF, Judge. G. W. MARSLAND, Clerk.

THE CITY COURT OF SPRING VALLEY.

WILLIAM H. HAWTHORNE, Judge. PETER ROLANDE, Clerk.

THE CITY COURT OF STERLING.

CARL E. SHELDON, Judge. EARL L. HESS, Clerk.

THE CITY COURT OF WEST FRANKFORT.

H. R. DIAL, Judge. PEARL BEATTIE, Clerk.

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. O. L. SPRECHER, Clerk.

(6) MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 153), J. & A. § 3313 et seq.

FRANK P. DANISCH, Clerk.

CHIEF JUSTICE,
HARRY OLSON.

ASSOCIATE JUDGES.

HARRY M. FISHER
EDWARD T. WADE
JOHN K. PRINDIVILLE
JOSEPH P. RAFFERTY
JOHN COURTNEY
JOHN RICHARDSON
JOHN A. MAHONEY
WILLIAM N. GEMMILL
FRANK H. GRAHAM
WELLS M. COOK

HUGH J. KEARNS
JOSEPH S. LABUY
JOHN R. NEWCOMER
JOHN R. CAVERLY
JOHN A. SWANSON
HUGH R. STEWART
HARRY P. DOLAN
JOHN F. HAAS
HOWARD HAYES
ARNOLD HEAP

BERNARD P. BARASA
SAMUEL H. TRUDE
LEO DOYLE
EDMUND K. JARECKI
CHARLES N. GOODNOW
DENNIS W. SULLIVAN
SHERIDAN E. FREY
JOHN STELK
JOSEPH Z. UHLIR
HOSEA W. WELLS.

(7) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, LaSalle, Madison, Peoria, Rock Island, Sangamon, St. Clair, Vermillion and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72), J. & A. ¶ 3259.

JUDGES	COUNTIES	COUNTY SEATS
LYMAN MCCARL.....	Adams.....	Quincy.
MILES FREDERICK GILBERT.....	Alexander.....	Cairo.
WM. H. DAWDY.....	Bond.....	Greenville.
WM. C. DE WOLF.....	Boone.....	Belvidere.
WILLARD Y. BAKER.....	Brown.....	Mt. Sterling.
JAMES R. PRICHARD.....	Bureau.....	Princeton.
JOHN DAY, JR.....	Calhoun.....	Hardin.
ARTHUR J. GRAY.....	Carroll.....	Mt. Carroll.
CHARLES A. MARTIN.....	Cass.....	Virginia.
ROY C. FREEMAN.....	Champaign.....	Urbana.
CHARLES A. PRATER.....	Christian.....	Taylorville.
A. L. RUFFNER.....	Clark.....	Marshall.
JOHN L. BOYLES.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
JOHN P. HARRAH.....	Coles.....	Charleston.
THOMAS F. SCULLY.....	Cook.....	Chicago.
HENRY HORNER, PRO. J.....	Cook.....	Chicago.
DUANE GAINES.....	Crawford.....	Robinson.
STEPHEN B. RARIDEN.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FREDERICK C. HILL.....	DeWitt.....	Clinton.
D. H. WAMSLEY.....	Douglas.....	Tuscola.
S. L. RATHJE.....	DuPage.....	Wheaton.
DANIEL V. DAYTON.....	Edgar.....	Paris.
PETER C. WALTERS.....	Edwards.....	Albion.
BARNEY OVERBECK.....	Effingham.....	Effingham.
JEROME G. WILLS.....	Fayette.....	Vandalia.
MALCOLM L. MCQUISTON.....	Ford.....	Paxton.
NEALY I. GLENN.....	Franklin.....	Benton.
HOBART S. BOYD.....	Fulton.....	Lewistown.
GEORGE L. HOUSTON.....	Gallatin.....	Shawneetown.
THOMAS HENSHAW.....	Greene.....	Carrollton.
GEORGE BEDFORD.....	Grundy.....	Morris.
J. S. SNEED.....	Hamilton.....	McLeansboro.
E. W. DUNHAM.....	Hancock.....	Carthage.
ARTHUR A. MILES.....	Hardin.....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson.....	Oquawka.
LEONARD E. TELLEN.....	Henry.....	Cambridge.
JOHN H. GILLAN.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
HARRY C. DAVIDSON.....	Jasper.....	Newton.
ANDREW D. WEBB.....	Jefferson.....	Mt. Vernon.
HARRY W. POGUE*.....	Jersey.....	Jerseyville.
F. J. CAMPBELL.....	Jo Daviess.....	Galena.
J. F. HIGHT.....	Johnson.....	Vienna.
S. N. HOOVER.....	Kane.....	Geneva.
JOHN H. WILLIAMS, PRO. J.....	Kane.....	Geneva.
JAY H. MERRILL.....	Kankakee.....	Kankakee.
CLARENCE S. WILLIAMS.....	Kendall.....	Yorkville.
R. C. RICE.....	Knox.....	Galesburg.
PERRY L. PERSONS.....	Lake.....	Waukegan.
HENRY MAYO.....	La Salle.....	Ottawa.

* Died November 21, 1916.

COUNTY AND PROBATE COURTS.

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JUDGES	COUNTIES	COUNTY SEATS
ALBERT T. LARDIN, Pro. J....	La Salle.....	Ottawa.
O. W. LONGENECKER.....	Lawrence.....	Lawrenceville.
JOHN B. CRABTREE.....	Lee.....	Dixon.
B. R. THOMPSON.....	Livingston.....	Pontiac.
CHARLES J. GEHLBACH.....	Logan.....	Lincoln.
CHARLES I. IMES.....	McDonough.....	Macomb.
DAVID T. SMILEY.....	McHenry.....	Woodstock.
JAMES C. RILEY.....	McLean.....	Bloomington.
JOHN H. MCCOY.....	Macon.....	Decatur.
ANDREW J. DUGGAN.....	Macoupin.....	Carlinville.
H. B. EATON.....	Madison.....	Edwardsville.
GEO. W. CROSSMANN, Pro. J....	Madison.....	Edwardsville.
WILLIAM G. WILSON.....	Marion.....	Salem.
DANIEL H. GREGG.....	Marshall.....	Lacon.
JAMES A. MCCOMAS.....	Mason.....	Havana.
LANNES P. OAKES.....	Massac.....	Metropolis.
JESSE M. OTT.....	Menard.....	Petersburg.
FRIEND L. CHURCH.....	Mercer.....	Aledo.
HENRY SCHNEIDER.....	Monroe.....	Waterloo.
T. J. McDAVID.....	Montgomery.....	Hillsboro.
WM. E. THOMSON.....	Morgan.....	Jacksonville.
JOHN T. GRIDER.....	Moultrie.....	Sullivan.
FRANK E. REED.....	Ogle.....	Oregon.
CHESTER F. BARNETT.....	Peoria.....	Peoria.
WALTER A. CLINCH, Pro. J....	Peoria.....	Peoria.
LOUIS R. KELLY.....	Perry.....	Pinckneyville.
WM. A. DOSS.....	Platt.....	Monticello.
PAUL F. GROTE.....	Pike.....	Pittsfield.
B. F. ANDERSON.....	Pope.....	Golconda.
FRED HOOD.....	Pulaski.....	Mound City.
IRVING E. BROADBUSH.....	Putnam.....	Hennepin.
WM. M. SCHUWERK.....	Randolph.....	Chester.
ROBT. B. WITCHER.....	Richland.....	Olney.
NELS A. LARSON.....	Rock Island.....	Rock Island.
BENJ. S. BELL, Pro. J.....	Rock Island.....	Rock Island.
JOSEPH B. MESSICK.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
CHAS. D. STILWELL.....	Saline.....	Harrisburg.
JOHN B. WEAVER.....	Sangamon.....	Springfield.
C. H. JENKINS, Pro. J.....	Sangamon.....	Springfield.
JOHN C. WORE.....	Schuyler.....	Rushville.
F. C. FUNK.....	Scott.....	Winchester.
A. J. STEIDLEY.....	Shelby.....	Shelbyville.
FRANK THOMAS.....	Stark.....	Toulon.
ROSCOE J. CARNAHAN.....	Stephenson.....	Freeport.
JAMES M. RAHN.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union.....	Jonesboro.
LAWRENCE T. ALLEN.....	Vermilion.....	Danville.
W. J. BOOKWALTER, Pro. J....	Vermilion.....	Danville.
W. S. WILLHITE.....	Wabash.....	Mt. Carmel.
L. E. MURPHY.....	Warren.....	Monmouth.
W. P. GREEN.....	Washington.....	Nashville.
J. V. HEIDINGER.....	Wayne.....	Fairfield.
J. M. ENDICOTT.....	White.....	Carmi.
WM. A. BLODGETT.....	Whiteside.....	Morrison.
GEORGE J. COWING.....	Will.....	Joliet.
JOHN B. FITHIAN, Pro. J.....	Will.....	Joliet.
W. F. SLATER.....	Williamson.....	Marion.
LOUIS M. RECKHOW.....	Winnebago.....	Rockford.
ARTHUR C. FORT.....	Woodford.....	Eureka.

CASES IN THIS VOLUME IN WHICH CERTIORARI HAS BEEN DENIED.

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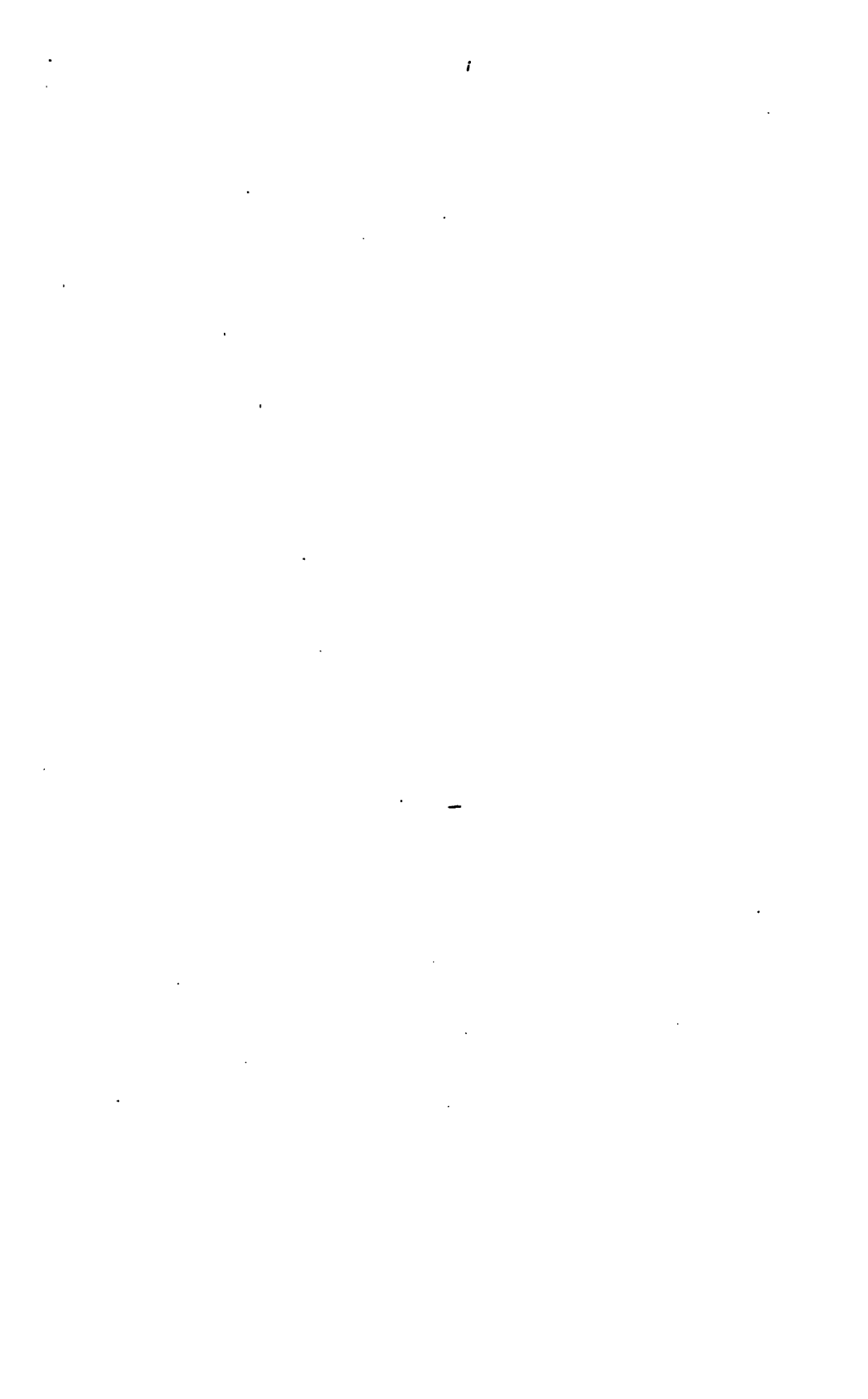


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CASES
DETERMINED IN THE
FOURTH DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEARS 1916 and 1917.

John Wendzenski, Appellee, v. Madison Coal Corporation and William Turton, Appellants.

1. **MINES AND MINERALS, § 125***—*when judgment for plaintiff in action on common-law counts by employee against mine manager for personal injuries is erroneous.* Where a miner, holding a certificate of competency from the State Board, brought action against his employer, who had rejected the Compensation Act, and his employer's mine manager for damages for injuries due to an explosion caused by said miner trying to ram a cartridge which he had prepared into a hole bored by him, the tamping rod striking against sulphur, known both by him and by defendants to be in the vein of coal, or some hard substance, *held* that a judgment for the plaintiff could not be sustained under common-law counts against the mine manager as he was entitled to the defenses of contributory negligence, assumed risk and fellow-servant, and the evidence showed that plaintiff was not in the exercise of ordinary care for his own safety.

2. **WORKMEN'S COMPENSATION ACT, § 2***—*what is effect of refusal of employer to come under as to mine manager.* While the election by an employer not to pay compensation under the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475(1) *et seq.*] would take away from such employer the defenses of contributory negligence, assumed risk and fellow-servant, such election would not

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wendzenski v. Madison Coal Corporation et al., 203 Ill. App. 1.

under that act have such effect as to the employer's mine manager joined as a codefendant.

3. MINES AND MINERALS, § 125*—*when assumed risk and contributory negligence are not available as defenses.* Where a count under the statute against an employer and his mine manager charged a wilful violation of the provisions of the mining statute with reference to the duties of such manager (J. & A. ¶ 7494), *held* that the defenses of contributory negligence or assumed risk would not be available either to said employer, who had elected not to pay compensation under the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475(1) *et seq.*], or to said mine manager.

4. MINES AND MINERALS, § 107*—*duty of mine manager to give special instructions with reference to placing and discharging of blasting shots.* Paragraph 14, subd. (a), sec. 20 (J. & A. ¶ 7494), of the Mining Statute, requiring a mine manager to give "special instructions concerning the storage and handling of explosives in the mine," should not be limited to other storage and handling than in charging and blasting, but should be held to be broad enough to cover special instructions with reference to the placing and discharging of the blasting shots.

5. MINES AND MINERALS, § 107*—*when mine manager is not relieved from duty to give special instructions concerning storage and handling of explosives.* The fact that a miner has a certificate of competency from the State Board does not relieve the mine manager from his duty under the mining statute to give to such miner special instructions concerning the storage and handling of explosives in the mine, where such manager has knowledge that such miner is inexperienced in the handling of explosives and placing and blasting of shots in the mine.

6. MINES AND MINERALS, § 173*—*when evidence sufficient to sustain verdict for plaintiff in action by miner against employer and manager for injuries.* Where, in an action by a miner against his employer and his employer's mine manager for damages under section 20 of the Mining Act (J. & A. ¶ 7494), because of injuries received while at work in the mine, the evidence tended to show that such miner, although holding a competency certificate from the State Board, was inexperienced in handling explosives and placing and firing of shots, and it was practically admitted by the defendants that said miner had received no instructions from them concerning such work, *held* that a verdict in favor of the plaintiff was not against the manifest weight of the evidence.

7. APPEAL AND ERROR, § 1666*—*when question of joinder of defendants cannot be raised on appeal.* After plea of the general issue and overruling of a demurrer raising the question of joinder of defendants, such question cannot be raised on appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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8. MINES AND MINERALS, § 138*—*when mine manager may be joined with master as defendant in action for personal injuries.* It is proper practice to join the servant with the master in an action by a miner against his employer and his employer's mine manager for damages for injuries while at work in the mine.

9. MINES AND MINERALS, § 45*—*when mine manager liable for violation of provisions of mining act.* The Mining Act, sec. 29 (J. & A. ¶ 7503), gives a right of action for violation of its provisions against the mine manager as well as against the mine operator.

10. INSTRUCTIONS, § 38*—*when giving in language of statute is not error.* Where an instruction was in the language of the statute and was applicable to the facts in the case, the giving of same was not error.

11. MINES AND MINERALS, § 191*—*when instruction in action by miner against owner and mine manager for personal injuries is not erroneous.* Where an instruction in an action for damages for personal injuries by a miner against his employer and his employer's mine manager was, in effect, that even though plaintiff had a certificate of competency from the State Board, such certificate would not relieve defendants from the duties imposed on them by law, *held* that said instruction laid down a correct principle of law and was applicable to the facts in the case, and the court did not err in giving same.

12. MINES AND MINERALS, § 188*—*when instruction in action by miner against owner and mine manager for personal injuries is not erroneous as directing a verdict.* Where, in an action for damages for personal injuries by a miner against his employer and his employer's mine manager, an instruction was given, in effect, that "if plaintiff had proven his case as alleged in the declaration that the mere fact of his having a miner's certificate of competency would not prevent him from recovering in his said suit," *held* that such instruction did not direct a verdict and the court did not err in giving same.

13. JUDGMENT, § 203*—*when judgment based on good count should be sustained.* A verdict and judgment should be sustained if there is one good count supported by the evidence, although other counts in the declaration may not be good or may not be supported by the evidence.

Appeal from the Circuit Court of Madison county; the Hon. LOUIS BERNREUTER, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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BURTON & BURTON, for appellants; JOHN G. DRENNAN, of counsel.

WILLIAM M. P. SMITH and TERRY, GUELTIK & POWELL, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

This is an appeal prosecuted from a judgment of \$15,000 rendered in the Circuit Court of Madison county, December 15, 1915, in favor of John Wendzenski, a coal miner, against the Madison Coal Corporation and William Turton, its mine manager. An amended declaration was filed by appellee consisting of three counts. The first count charged, in substance, that appellee was employed by appellant coal company as a coal miner; that part of his duties as such miner consisted of drilling and preparing holes to be charged with explosives and in handling explosives and placing such explosives in such holes preparatory to shooting down coal; that, contrary to the statute, said company, by its mine manager and assistant mine manager, wilfully failed to instruct appellee concerning the handling of explosives, which appellee was required to handle in blasting down the coal; that on account of the failure to so instruct appellee, appellee not realizing the danger, attempted to tamp a cartridge into place, and in doing so forced the tamping rod against a piece of sulphur or impurity in the coal, thereby causing an explosion which resulted in the loss of the sight of both eyes and otherwise caused appellee to be permanently scarred and disfigured.

The second count is a common-law count and charges that appellee was a foreigner unacquainted with the English language and inexperienced in the use of powder for blasting purposes, and that he was not properly instructed in the handling of powder as

an explosive and in placing explosives preparatory to shooting down coal, which facts were known to appellants, or by the exercise of due care could have been known, etc.

The third count is also a common-law count and charges the violation of duty to appellee in failing to instruct him regarding the danger of tamping powder cartridges or loose powder into a hole, the side of which was partly composed of sulphur or hard matter found in the coal seam in said mine. A general and special demurrer filed to said amended declaration was overruled and thereupon appellants entered a plea of not guilty.

Prior to pleading, appellants caused said proceeding to be removed to the United States District Court for the Southern District of Illinois. Said court held it had no jurisdiction of said cause for the reason that certain of the defendants thereto were residents of this State and remanded the same to the Circuit Court of Madison county. A trial was had in said Circuit Court, resulting in a verdict and judgment against appellants, as above set forth. Before the verdict was returned, said suit was dismissed as to defendant Anderson, assistant mine manager.

The evidence discloses that appellee was born in Poland; that he was some thirty-four years of age, and that his occupation had been that of a miner, and that he had worked for some two or three years in coal mines in Europe at the face, and had bored holes for firing shots, but had never fired such shots, as the evidence disclosed that in Europe, while the shots were prepared by coal miners, they were fired by regular shot firers.

The evidence further discloses that upon his arrival in the United States he came at once to Illinois where he obtained a certificate of competency as a practical miner from the State Examining Board. Shortly thereafter he was employed by appellant, the Madison

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Coal Corporation, and worked at the face of appellant's mine, doing the work of an ordinary coal miner until October 20, 1913, when he received his injury.

The evidence of appellee further tends to prove that he had no knowledge with reference to the handling of explosives or the preparing and firing of shots for the blasting down of coal as they were prepared and fired in appellant's mine; that he received no instructions from the mine manager or assistant mine manager of appellant coal company, with reference to the handling of explosives, or with reference to the placing and firing of shots to blast down the coal, and that while trying to ram a cartridge which he had prepared into a hole bored by him, an explosion was caused by the tamping rod striking against sulphur or some hard substance, and by reason of such explosion appellee lost the sight of both eyes and was otherwise disfigured.

Appellee's evidence is further to the effect that he did not know about said vein of coal containing sulphur, but that said fact was known to appellant coal company and William Turton, its mine manager. There is no serious dispute with reference to these matters and no great conflict in the evidence in regard thereto, the contention of appellants being, that inasmuch as appellee was a certified miner, that appellants were under no duty to instruct him with reference to the handling of explosives in connection with the placing and firing of shots, as not more than two pounds of powder were used for any one blast in appellant coal corporation's mine.

The evidence further discloses that the appellant, Madison Coal Corporation, had elected not to pay compensation under the Workmen's Compensation Act.

The principal ground relied on by appellants for a reversal of this case is that no right of recovery against them is disclosed by the record, and that the court erred in refusing to give appellants' peremptory instruction, directing the jury to find them not guilty.

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There were three counts in the declaration. Two common-law counts and one statutory count. We are inclined to hold that this judgment cannot be sustained as to either of the common-law counts, for the reason that, as to those counts, appellant William Turton is entitled to his common-law defenses of contributory negligence, assumed risk and fellow-servant, as the evidence shows that appellee was not in the exercise of ordinary care for his own safety prior to and at the time he received his injury, and that in part, at least, appellee's negligence contributed to his injury. That being true, a right of recovery is not shown against William Turton, the mine manager. While the election of the appellant, the Madison Coal Corporation, not to pay compensation under the Workmen's Compensation Act would take away from it the defenses of contributory negligence, assumed risk and fellow-servant, its said election would not have that effect as to William Turton, its mine manager. Section 3, subd. (a) of the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475 (3)], provides as follows: "In any action to recover damages against an employer, engaged in any of the occupations, enterprises or businesses enumerated in paragraph (b) of this section, who shall elect not to provide and pay compensation to any employee, according to the provisions of this act, it shall not be a defense that: First, the employee assumed the risks of the employment; second, the injury or death was caused in whole or in part by the negligence of a fellow-servant; or third, the injury or death was approximately caused by the contributory negligence of the employee."

"Subd. (b). The provisions of paragraph (a) of this section shall only apply to an employer engaged in any of the following occupations," etc.

The question to be determined then is whether or not, on the record in this case, the verdict and judg-

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ment can be sustained on the statutory count. A wilful violation of the provisions of the mining statute with reference to the duties of the mine manager being charged in said count, the defenses of contributory negligence or assumed risk would not be available either to appellant coal company, or to William Turton, its mine manager. *Kellyville Coal Co. v. Strine*, 217 Ill. 516; *Davis v. Illinois Collieries Co.*, 232 Ill. 284; *Peebles v. O'Gara Coal Co.*, 239 Ill. 370; *Waschow v. Kelly Coal Co.*, 245 Ill. 516; *Wilkerson v. Willis Coal & Mining Co.*, 158 Ill. App. 620.

The contention of appellants is that the provisions of the statute to the effect "that the mine manager shall give special attention to and instruction concerning the storage and handling of explosives in the mine" does not have reference to instructions to certified miners with reference to the time and manner of placing and discharging the blasting shots; that this provision with reference to instructions relative to the handling of explosives in the mine has to do with their storage and handling other than the handling by miners in charging and blasting the shots.

Subdivision (a) of section 20 of the Mining Statute, being section 20 of chapter 93, Hurd's Revised Statutes (J. & A. ¶7494), contains fifteen paragraphs specifying what shall be the duty of the mine manager. Among them is paragraph 14 above quoted. Subdivision (b) of section 20 contains three paragraphs under the heading: "The mine manager shall have power," paragraph 2 thereof being to the effect that the mine manager shall have power "To prescribe special rules concerning the proper storage and handling of explosives in the mine and concerning the time and manner of placing and discharging the blasting shots, and it shall be unlawful for any miner to fire shots except according to such rules." Appellants insist, in order to give meaning to the provisions of paragraph 2 of subdivision (b) of said section above referred to, that

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paragraph 14 of subdivision (a) should not be construed as having the effect of making it the duty of the mine manager to give special instructions to the miners with reference to the handling of explosives in connection with the placing and blasting of shots.

It will be observed that subdivision (a) provides what "shall be the duty of the mine manager." Paragraph (b) provides certain powers that the mine manager shall have, among them are "To prescribe special rules concerning the proper storage and handling of explosives in the mine and concerning the time and manner of placing and discharging the blasting shots," etc. In other words, paragraph 2 of subdivision (b) of said section 20 makes provision that the mine manager shall have power to prescribe certain rules with reference to the handling of explosives and blasting of shots, which rules when prescribed shall be followed, and making it unlawful for any miner to fire shots, except according to such rule. We are, therefore, of the opinion that paragraph 14 of subdivision (a) of said section 20 should not be given the limited construction contended for by appellants, but that it should be held to be broad enough to cover special instructions with reference to the placing and discharging of the blasting shots, and this construction, we think, is supported by the Supreme Court in the case of *Kulvie v. Bunsen Coal Co.*, 253 Ill. 386.

In the case cited, the declaration in said cause charged: "That Andrew Kulvie and his buddy, John Wuysik, were coal diggers in defendant's employment; that the defendant wilfully failed to instruct them concerning the manner of discharging blasting shots in said mine but ordered and directed them to discharge three certain shots at a place described, but, having wilfully failed to instruct said employees as to the manner of discharging said shots, they fired all three of them at the same time, as one blast, thereby causing an explosion of such force that a large quan-

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tity of coal was thrown to and upon Kulvie, instantly killing him." At page 390, the court says: "The Act of 1909 provides that certificates shall be issued to applicants found qualified upon examination, and such certificate shall entitle the holder 'to be employed as and do the work of miners.' The certificate is evidence that the holder possesses the qualifications 'to do the work of miners,' but does not necessarily show that he possesses the practical experience required of a shot firer. Notwithstanding Kulvie's certificate, there is proof in the record tending to show he did not possess such knowledge and experience." Again, at page 391, the court says: "The proof of defendant in error tended to establish the allegations of the declaration that Kulvie was a coal digger, not a shot firer. The trial court instructed the jury to find for plaintiff in error if they believed, from the evidence, deceased and Wuysik were shot firers at the time of the accident. Under the proof the court properly refused to direct a verdict, and rightly submitted to the jury the question whether defendant in error had proven, by a preponderance of the evidence, the allegations of her declaration that they were coal diggers."

While the facts in the case of *Kulvie v. Bunsen Coal Co.*, *supra*, are not the same as the facts in this case, at the same time the Supreme Court in construing the provisions of the mining statute relating to the duty of the mine manager with reference to giving instructions concerning the handling of explosives and the placing and blasting of shots is to the effect that unless a miner is a shot firer he is entitled to receive such instructions from the mine manager, where the evidence tends to show that he was not an experienced shot firer, and that the fact that the coal miner may have a certificate from the Mine Examining Board, does not relieve the mine manager from his duty to give instructions concerning the handling of explosives and the placing and blasting of shots in the mine, where the evidence

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tended to show said miner was inexperienced in reference thereto.

In the case of *Bagaini v. Donk Bros. Coal & Coke Co.*, 199 Ill. App. 76, decided by this court on April 17, 1916, in passing on the question of the duties of the mine manager to give instructions concerning the handling of explosives, etc., this court said: "We are inclined to hold that it is a question of fact to be determined by the jury whether an experienced miner, who holds a certificate as such, under the provisions of the statute, but whose business is not that of an expert shot firer as contemplated by the statute, should be instructed by the mine manager with reference to the handling of explosives, and whether his failure to so instruct said miner is negligence."

The evidence in this case tends to show that appellee was not experienced in the manner of handling explosives and the placing and firing of shots, and that this fact was brought to the knowledge of the mine manager. We therefore hold that the court did not err in refusing to direct a verdict in favor of appellants, as to the first count of appellee's declaration.

It is next insisted by appellants that the verdict is against the manifest weight of the evidence. As we have heretofore said, the evidence tended to show that appellee was inexperienced with reference to the handling of explosives and the placing and firing of shots, and that he received no instructions with reference thereto from appellant coal company, or William Turton, its mine manager. In fact, it was insisted throughout the trial by appellants that they were not required to give such instructions where a miner held a certificate from the State Examining Board, and the question as to whether or not the failure to so instruct appellee was wilful or not is not a controverted one, for appellants practically admit that if it was their duty to so instruct him, they have failed to perform the same and did so knowingly. We therefore hold that

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the verdict of the jury was not against the manifest weight of the evidence.

It is urged by appellants that it was error to join William Turton, the mine manager, with appellant coal corporation. Appellants, having filed a plea of general issue after demurrer raising the question of joinder had been overruled, cannot now raise that question. In *Peirce v. Walters*, 164 Ill. 560, the Supreme Court at page 565 of the opinion says: "The question as to whether the engineer was properly joined with the receiver cannot now be raised, issue having been taken on the declaration so joining him." This was a case where a railroad engineer was joined as party defendant with the receiver of said road.

That it is a proper practice to join the servant with the master in an action on the case of the character of this one is amply sustained by the Supreme Court of this State, especially where the servant is held to be a vice principal, as it is with the mine manager. *Republic Iron & Steel Co. v. Lee*, 227 Ill. 246.

It is also insisted by appellants that there can be no recovery against William Turton, the mine manager, for the reason that the statute giving a right of action for a violation of a provision of the mining statute applies only to the mine operator and not to the mine manager, and in support of this contention they cite the case of *Grannon v. Donk Bros. Coal & Coke Co.*, 259 Ill., page 350. We have examined this case and while the court, in effect, seems to hold that only the coal company operating the mine is liable under the provisions of said act, at the same time, that question was not before the court as the mine manager was not made a party defendant, and the final decision of the case was based on the common-law count of the declaration. The court made no holding with reference to the statutory count charging a wilful violation of the provisions of the statute, so the most that can be said with reference to the language in the opinion with ref-

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erence to the liability under the provisions of section 29 of said statute (J. & A. ¶ 7503) is that it was a mere *obiter dictum* opinion, and not controlling in this case.

This court in the case of *People v. Carter*, 186 Ill. App. 453, held Carter, the mine manager, liable to the penalties provided in subdivision (a) of said section 29 of the Mining Statute for a wilful violation of the provisions of said act relating to the duties of a mine manager. It would, therefore, seem to follow that if the mine manager is liable criminally under the provisions of subdivision (a) of section 29 of said statute, he should also be held liable in a civil action for damages under provisions of subdivision (c) of said section, giving a civil right for damages to any one injured by a wilful violation of the provisions of the mining statute, relating to the duties of the mine manager.

It is next contended by appellants that the court erred in giving the third and fifth instructions given on behalf of appellee "for the reason that it was calculated to and evidently did mislead the jury." The third instruction was in the language of the statute and was applicable to the facts in this case, and the court did not err in giving the same. The fifth instruction is to the effect that even though appellee had a certificate of competency issued to him by the miner's examining board, that said certificate would not relieve appellants from the duties imposed upon them by law. This instruction, we think, lays down a correct principle of law, and was applicable to the facts in this case and the court did not err in giving the same.

It is also insisted that the court erred in giving the sixth instruction given on behalf of appellee, said instruction being to the effect "that if appellee had proven his case as alleged in the declaration that the mere fact of his having a miner's certificate of competency would not prevent him from recovering in his said suit." It is insisted by appellants that this instruction is vitally defective for the reason it permits

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appellee to recover a verdict if he has proven his case as alleged in the declaration. We do not think the point well taken. This instruction does not direct a verdict and the court did not err in giving the same.

It is next insisted that the court erred in refusing five instructions tendered by appellants and which were refused by the court. The first refused instruction was, in effect, covered by the given instructions on behalf of appellants. No special criticism is made as to the court refusing to give the second, third and fourth of appellants' refused instructions. It is insisted, however, that the court erred in refusing to give appellants' fifth refused instruction. This instruction, after quoting parts of sections 19 and 20 of the mining statute, concludes as follows: "The court instructs the jury that the storage and handling mentioned in section 20 refers to the storage and handling of powder mentioned in section 19 (a) and (c)." We do not think the court erred in refusing this instruction for the reasons hereinbefore stated.

Twenty instructions were given on behalf of appellants, which, we think, presented their theory of the case to the jury in all its phases so far as warranted under the law.

It is not contended by appellants that the verdict is excessive. The injury suffered by appellee was a most serious one, being the loss of both eyes.

The evidence being sufficient to support the charge in the first count of appellee's amended declaration, and it being the settled law of this State that one good count supported by the evidence will sustain a verdict and judgment, although other counts in the declaration may not be good, or may not be supported by the evidence, the judgment should be sustained. *Eldorado Coal & Coke Co. v. Swan*, 227 Ill. 586; *Grannon v. Donk Bros. Coal & Coke Co.*, 259 Ill. 358.

Finding no reversible error in the record, the judgment will be affirmed.

Judgment affirmed.

**Bone Gap Banking Company, Assignee, Appellee, v.
George W. Porter et al. H. J. Strawn, Appellant.**

1. **BILLS AND NOTES, § 462***—*when instruction in action by holder on accommodation note is erroneous as assuming facts.* Where an action was brought upon an accommodation note given to a copartnership bank and by its cashier indorsed in blank but not negotiated, and which had been turned over, after the bank had ceased to do business, by a majority of said bank's stockholders and directors to an agent for collection, who delivered same to the plaintiff bank as collateral to a loan made by some of said stockholders and directors, and pleas putting in issue the consideration, assignment and delivery of said note were filed, *held* that an instruction given on behalf of the plaintiff to the effect that the fact that said note was indorsed by one agent of the payee bank and "afterwards delivered by another agent of the bank would not make void such delivery; but such a delivery would be legal," was erroneous, because delivery of the note was a disputed and litigated question in the case, and it was erroneous to assume that said agent for collection was an agent for the purpose of delivery of the note, and to instruct that such delivery would be legal.

2. **BILLS AND NOTES, § 462***—*when instruction in action by holder on accommodation note is erroneous as assuming facts.* Where an action was brought upon an accommodation note given to a copartnership bank and by its cashier indorsed in blank but not negotiated, and which had been turned over, after the bank had ceased to do business, by a majority of said bank's stockholders and directors to an agent for collection, who delivered same to the plaintiff bank as collateral to a loan made by some of said stockholders and directors, and pleas were filed putting in issue the consideration, assignment and delivery of such note, *held* that an instruction to the effect that if the jury believed from the evidence that said note was indorsed in blank by the payee, "then the title to said note passed to the plaintiff by the delivery of the note without further indorsement," was erroneous for the reason that said instruction assumed the title to the note passed to the plaintiff by delivery without reference to who delivered it or by whose authority it was delivered.

3. **BILLS AND NOTES, § 462***—*when instruction directing a verdict for plaintiff is erroneous.* Where an action was brought upon an accommodation note given to a copartnership bank and by its cashier indorsed in blank but not negotiated, and which

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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had been turned over, after the bank had ceased to do business, by a majority of said bank's stockholders and directors to an agent for collection, who delivered same to the plaintiff bank as collateral to a loan made by some of said stockholders and directors, and pleas were filed putting in issue the consideration, assignment and delivery of such note, *held* that an instruction directing a verdict for the plaintiff unless the makers of said note should prove by a preponderance of the evidence that it was given without consideration was erroneous.

4. INSTRUCTIONS, § 126*—*when should not be given.* An instruction which is abstract in form though correct in its proposition of law should not be given where its tendency would be to mislead the jury.

5. BANKS AND BANKING, § 42*—*what are powers of directors after bank ceases to do business.* When a bank ceases to do a banking business, its directors are not authorized to transact a banking business or to borrow money and issue notes securing same for such bank, or to involve the credit of the other stockholders.

6. BILLS AND NOTES, § 461*—*when refusal to direct verdict for defendant is not erroneous.* Where an action was brought upon an accommodation note given to a copartnership bank and by its cashier indorsed in blank but not negotiated, and which had been turned over, after the bank had ceased to do business, by a majority of its stockholders and directors to an agent for collection, who delivered same to the plaintiff bank as collateral to a loan made by some of said stockholders and directors, and pleas were filed putting in issue the consideration, assignment and delivery of such note, *held* that a peremptory instruction for the defendants should have been given but for the fact there was some evidence in the record tending to show a ratification by the makers of said note of its purported delivery to the plaintiff and of the plaintiff's right to enforce its collection, and hence a refusal of such instruction was not erroneous.

7. BANKS AND BANKING, § 42*—*when agent for collection of bank's assets has no power to pledge assets as collateral security.* An agent for collection of a bank's assets after it has ceased to do business has no authority to pledge such assets as collateral security to a loan made by third persons, even though they were stockholders of the bank.

8. BILLS AND NOTES—*when bank holding note as collateral security is not holder in due course for value.* A note payable to order is negotiable only by the indorsement of the holder completed by delivery, and where such a note so indorsed, given as accommo-

*See Illinois Notes Digest, Vols. XI to XV. and Cumulative Quarterly, same topic and section number.

tion paper, was held by the payee bank and turned over as part of its assets after it had ceased to do business to an agent for collection, who delivered same as collateral security for a loan to third persons by another bank having full knowledge of all the facts, held that such holder was not a holder in due course for value and could only recover on such note by showing that the makers thereof ratified the placing of the same as such collateral security, and had full knowledge of all the facts in connection therewith at the time said ratification took place.

Appeal from the Circuit Court of Edwards county; the Hon. JULIUS C. KERN, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded. Opinion filed November 13, 1916.

JULIUS C. KERN, for appellant.

ALLEN E. WALKER, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

The Bone Gap Banking Company recovered a judgment in the Circuit Court of Edwards county, Illinois, against George W. Porter, Flossie A. Porter, C. A. McClure, W. A. Morgan and H. J. Strawn, in the sum of \$1,000, from which judgment a joint and several appeal was prayed by said defendants, but which appeal was perfected by H. J. Strawn alone.

The declaration consists of the common counts and one special count. The special count charges that said above-named defendants executed and delivered to the Bone Gap Banking Company their promissory note in the sum of \$1,000, dated March 3, 1911, due six months after date, which said note was alleged to have been assigned for value to appellee by said payee and that the same had not been paid. To said declaration a plea of the general issue and several special pleas were filed.

The first special plea is sworn to and puts in issue the assignment of the said note to appellee by said

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Bone Gap Bank; the second alleges that said note was given without consideration and that it passed into the possession of appellee, if at all, long after maturity; the third alleges that said note was given without consideration and as accommodation paper only, and also alleges, in substance, that said note passed into the possession of appellee without consideration and not in the regular course of business. The fifth special plea alleges, in effect, that the note in question was held by the payee, the Bone Gap Bank, up to June 6, 1911, when it became insolvent; that at no time prior to its insolvency or since was said note negotiated by said Bone Gap Bank to appellee or to any one else. Replications were filed to said special pleas and issue joined, a trial was had resulting in a verdict and judgment in favor of appellee as above set forth.

The Bone Gap Bank, a copartnership composed of sixteen members, ceased doing business on June 6, 1911. It had been a financial failure and from time to time certain of its stockholders rendered it financial assistance by executing accommodation notes to be by it negotiated to raise funds to be used in its banking business. On the next day after the Bone Gap Bank ceased doing business, appellee, as the Bone Gap Banking Company, opened a bank in the same room and has since been operating a bank at said place.

On March 3, 1911, the note in question was executed by the above-named defendants and was delivered to E. A. Morgan, the then cashier of the Bone Gap Bank. Morgan, who was also a stockholder in said bank, resigned as its cashier on May 8, 1911, and one B. L. Mayne then became its cashier and so remained until it ceased doing business, on June 6, 1911. Mayne became the cashier of appellee bank when it opened on June 7, 1911.

About June 2, 1911, certain of the directors and stockholders of said Bone Gap Bank, nine in number, realizing its failing condition, entered into a contract

with one J. A. Turner for the closing up of said business. The substance of said contract is as follows:

"1st. That the said Bone Gap Bank shall turn over and deliver to said J. A. Turner all of its assets of every description, notes, bills and choses in action for the purpose of having the same collected and realized on as speedily as possible; that Turner was to have as compensation therefor, five per cent. of the amount collected or received by him.

"2nd. That as fast as said assets were collected the same should be used in paying the liabilities of said Bone Gap Bank.

"3rd. It was further provided that said business shall be closed up as speedily as practical and for said purpose of closing said business said Bone Gap Bank should retain its legal existence and when deemed expedient by Gould, Marriott and McClure, who were named as a committee for said purpose, the said Bone Gap Bank should institute suit for the collection of its notes, bills and claims. It was further provided that Turner might settle any of said notes, bills or claims by or without the consent of said committee."

This contract was signed by Gould, Harms, Drury, Porter, McClure, Marriott, Rude, Gould and Morgan.

The evidence further discloses that E. A. Morgan, while acting as cashier of said Bone Gap Bank, indorsed the note in question in blank but made no attempt to negotiate it either to appellee or to any one else, and that said note remained with said Bone Gap Bank until after it ceased to do business, and passed into the possession of said Turner. In May, 1912, Turner attempted to make a loan from appellee on behalf of said Bone Gap Bank, but appellee refused to make said loan. Thereafter during said month of May, 1912, Ansel Gould, Charles Marriott, Jacob Harms, J. T. Drury and H. E. Rude, certain of the directors and stockholders of the Bone Gap Bank, borrowed \$2,000 of appellee. This loan was negotiated

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by Turner for said parties, and in doing so Turner delivered to appellee, as collateral to said loan, the note in question. Thereafter, in December, 1912, these same parties borrowed of appellee \$1,000, and the note in question was again delivered by Turner as collateral to said note. Appellee sought to collect the note in question from said defendants, and on their failure to pay the same this suit was instituted resulting in a judgment as above set forth.

The principal grounds relied on by appellant for a reversal of this case are that the court erred in refusing to peremptorily instruct the jury to find the issues for appellant and the other of the defendants sued; second, that the court erred in its rulings on the giving and refusing of instructions; third, that the verdict of the jury is against the manifest weight of the evidence. The judgment in this case will have to be reversed by reason of the erroneous rulings of the trial court in the giving and refusing of instructions.

The fourth instruction given on behalf of appellee is as follows:

“The court instructs the jury that as a matter of law that the fact that the note in question in this case was indorsed by the Bone Gap Bank by one of its agents, and afterwards delivered by another agent of the bank would not make void such delivery; but such a delivery would be legal.”

This instruction is erroneous for the reason that it assumes that Turner, who was appointed by nine of the sixteen stockholders of the Bone Gap Bank after its dissolution to collect its assets, etc., was an agent of the bank for the delivery of said note. This was a disputed and litigated question in the case, and it was error for the court to assume Turner's agency for said purpose, and also to instruct the jury that the delivery of the note would be legal.

The fifth instruction is as follows:

“The jury are instructed that a note indorsed in

blank specifies no indorsee, and a note so indorsed may be negotiated by mere delivery from one person to another; and if you believe from the evidence in this case that the note in question was indorsed in blank by the payee, then the title to said note passed to the plaintiff by the delivery of the note without further indorsement."

This instruction was erroneous for the reason that it assumes that the title to the note in question passed to appellee by delivery without reference to who delivered it or by what authority it was delivered.

The sixth instruction is as follows:

"The jury are instructed that the law implies that every promissory note that is made and delivered, was given for a good and valuable consideration; and in this case, the burden is upon the defendant to prove by a preponderance of the evidence that the note in question was given without consideration, and unless they have done this the jury should find for the plaintiff."

This instruction is erroneous for the reason that it directs a verdict for appellee unless the makers of said note should prove by a preponderance of the evidence that the note was given without consideration, while the record in this case discloses that one of the material issues in the case was whether or not Turner, who was appointed by the nine stockholders to collect the assets of the bank, was authorized to deliver the note in question to appellee as collateral security for the notes given by Gould, Drury, Marriott, Harms and Rude, above mentioned.

The eighth instruction is abstract in form, and while it states a correct proposition of law it should not have been given in this case as its tendency would be to mislead the jury. The other instructions given on behalf of appellee, we think, are without serious objection.

The second refused instruction offered by appellant and the other defendants in said cause in the trial court was to the effect that, when the Bone Gap Bank

ceased to do a banking business, the directors of said bank were not authorized to transact a banking business, or to borrow money and issue notes securing the same for said bank. This instruction we think states a correct principle of law and one applicable to the facts in this case and should have been given. *Bank of Montreal v. Page*, 98 Ill. 109. The court did not err in refusing the other of appellant's refused instructions.

It is strenuously insisted by appellant that the trial court should have given the peremptory instruction offered by the defendants in the trial court directing the jury to find the issues in favor of said defendants. This assignment of error raises the question as to whether or not there was any evidence in the record fairly tending to warrant a recovery in favor of appellee in this case. Were it not for the fact that there is some evidence in the record tending to show a ratification by appellant and the other of the makers of the note in question, of the purported delivery of said note to appellee, and of its right to enforce collection thereon, this instruction should have been given, but, in the state of the record, we are unable to see that the failure of the court to give said peremptory instruction is error. In our view of this case, when the Bone Gap Bank ceased doing business as a bank on the evening of June 6, 1911, the authority of the bank officials to borrow money and to involve the credit of the other stockholders in said bank ceased, and there is no evidence in this record even tending to show that appellant and the other of the makers of said note authorized Turner to borrow any money from appellee or any one else for said Bone Gap Bank. Without such authority he could not bind them. *Bank of Montreal v. Page*, *supra*.

The contract entered into with Turner, even if it had been signed by all of the stockholders of said Bone Gap

Bank, is not broad enough in its terms to authorize Turner to borrow money for said bank.

The evidence in the record is to the effect that when Turner attempted to borrow money of appellee for the Bone Gap Bank, appellee, through its officers, refused to make any loan whatever to said bank, but did make two different loans to Gould and the other four persons above named, and attempted to deliver to appellee the note sued on in this case as collateral security for said notes. We know of no rule of law giving Turner that authority. The loan was not made to the bank but to individuals. That being true, Turner certainly would not have authority to pledge the assets of the Bone Gap Bank as collateral for the note of third parties, even though they were stockholders of the bank. It will be further observed that under the evidence in this case appellee was not a holder of the note sued on in due course, as this note never was negotiated by the payee. While the evidence is to the effect that Morgan indorsed the name of the bank on said note as its cashier, he never delivered said note while he remained cashier, neither did Mayne, his successor, deliver the same during his term as cashier, which term lasted until the bank ceased doing business. Under the Negotiable Instrument Statute, a note payable to order is only negotiated by the indorsement of the holder completed by delivery. Section 48, ch. 98, Hurd's Revised Statutes (J. & A. ¶ 7669).

Turner, who next came into possession of the assets of the Bone Gap Bank, had no authority to complete its negotiation by delivering the same as collateral security for the note of the above-named stockholders. We recognize the rule of law that holds liable the makers of accommodation paper in the hands of a holder in due course for value, even though said note passed into the hands of such holder after maturity, and with notice to the holder that it was accommoda-

Bone Gap Banking Co. v. Porter, 203 Ill. App. 15.

tion paper. *Diversy v. Loeb*, 22 Ill. 394; *Naef v. Potter*, 226 Ill. 628; *Peacock v. Phillips*, 247 Ill. 474.

We are of the opinion, however, that this rule of law does not apply in this case, as appellee is not a holder in due course for value in this case. Appellee had notice that the note in question was part of the assets of the Bone Gap Bank, or was held by said bank as accommodation paper at the time said note came into its possession through Turner. Appellee also had notice that said bank had ceased doing business as a bank at said time, for appellee's bank opened for business on the morning of June 7, 1911, in the same room occupied by the Bone Gap Bank when it ceased doing business on the evening of June 6, 1911, and Mayne, who was acting for the Bone Gap Bank as its cashier when it ceased doing business, became the cashier of appellee's bank when it opened for business on the next day.

We are therefore of the opinion that before appellee can show a right of recovery in this case, it must be able to show by the evidence that the makers of the note sued on ratified the placing of said note with appellee as collateral security for the note given by Anson Gould and the other four-named persons, having full knowledge of all the facts in connection therewith at the time said ratification took place.

For the errors referred to in this opinion the judgment of the trial court is reversed and the cause is remanded.

Reversed and remanded.

**H. L. Angerer and Robert Abeles, Jr., Appellees, v.
Southern Traction Company of Illinois et al.,
Appellants.**

**John D. Vogt, Appellee, v. Southern Traction Com-
pany of Illinois et al., Appellants.**

(Not to be reported in full.)

Appeal from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded with directions. Opinion filed November 13, 1916. Rehearing denied and opinion modified and refiled January 13, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Railroad lien proceeding by H. L. Angerer and Robert Abeles, Jr., complainants, against Southern Traction Company of Illinois, Lorimer & Gallagher Company and Union Trust & Savings Bank of East St. Louis, Illinois, as trustee, defendants, to establish a lien against said traction company for ties alleged to have been furnished said Lorimer & Gallagher Company as general contractors for the construction of a line of railroad for said traction company, and claiming as due the sum of \$26,485.84, and intervening petitions by John D. Vogt for a lien for work and labor performed by him in the construction of the right of way, and a lien as judgment creditor. From a decree of the Circuit Court confirming findings of a master to whom the case was referred and rendering a decree in accordance therewith, granting H. L. Angerer, for the use of Robert Abeles, Jr., a lien against said traction company for \$33,282.80, and the intervening petitioner, Vogt, a lien for \$9,487.99 for work and labor and as judgment creditor for \$4,252.83, defendants appeal.

Angerer et al. v. Southern Traction Co., 203 Ill. App. 25.

S. W. BAXTER, J. E. HAMLIN and J. L. FLANNIGEN,
for appellant Southern Traction Company of Illinois.

JOSEPH W. MOSES and JOHN C. SLADE, for appellant
Union Trust & Savings Bank of East St. Louis;
JOSEPH W. MOSES and HENRY JACKSON DARBY, of counsel.

GEORGE B. LOGAN and KRAMER, KRAMER & CAMPBELL,
for appellees H. L. Angerer and Robert Abeles, Jr.

TURNER & HOLDER, for appellee John D. Vogt.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. RAILROADS, § 397*—*who are subcontractors entitled to lien.* Where the owner of practically all of the stock and bonds of a railroad corporation, and who was acting as its general agent, entered into a contract with the company for the construction and equipment of its railroad whereby said company agreed to guarantee any contract entered into by him for the building of said road, and on the same day he entered into a contract with a construction company for the construction of a part of said road, and the railroad in an agreement with the latter guaranteed the faithful performance of the contract, which provided that the railroad company "makes itself directly liable" to the construction company and that the latter should "bear the relation and enjoy the rights of a contractor under and by virtue of the lien laws of the State of Illinois," held that the construction company was a contractor and not a subcontractor, and that those with whom such company contracted for materials were subcontractors and entitled as such to maintain a lien.

2. APPEAL AND ERROR, § 488*—*when findings of master may not be objected to on appeal.* A finding of fact made by a master in chancery, which is not objected to before the master or excepted to on the hearing before the court, cannot be objected to for the first time in the Appellate Court.

3. RAILROADS, § 397*—*when subcontractor entitled to a lien.*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Under the provisions of section 7 of the Railroad Lien Statute (Hurd's Rev. St. ch. 82, sec. 13 (J. & A. ¶ 7189)), a subcontractor has a right to a lien upon giving the proper notice and taking the necessary steps notwithstanding the original contractor has not completed his contract, or has abandoned the same.

4. ASSIGNMENTS, § 31*—*when lien of railroad subcontractor is enforceable by his assignee.* The lien of a subcontractor under the railroad lien statute is enforceable in equity by the assignee of such contractor suing in the name of the latter, distinguishing the case of *Cairo & V. R. Co. v. Fackney*, 78 Ill. 116.

5. LIMITATION OF ACTIONS, § 64*—*what constitutes statement of new cause of action in amended bill claiming railway subcontractor's lien.* Where an amended bill claiming a subcontractor's lien under the railroad lien statute was filed more than three months after the lien had accrued, including therein extra materials not included in the original bill filed within said three months, *held* that the claimant would not be entitled to a lien for such extras for the reason that, as to them, said amended bill set forth a new cause of action.

6. INTEREST, § 76*—*when not allowed.* Unless interest is asked in a bill claiming a lien under the railroad lien statute, the court would not be authorized to decree interest to such claimant.

7. RAILROADS, § 408*—*when party is not in position to insist upon determination of priority of lien.* Where a railroad company, against which and its general contractor, a railroad lien proceeding was instituted for the construction of its road, by a subcontractor, was shown to be in the hands of a receiver, and the general contractor in the bankruptcy court, and a bank, also made a defendant to the proceeding, appeared by its answer to hold certain bonds of said company as collateral security for a loan made by such bank to certain individuals, and appeared to be defendant in another suit in a federal court with reference to the same bonds and had been enjoined from turning them over to anybody, *held* that aside from the bankruptcy and receivership proceedings the bank was not in a position to insist on a decree giving it a prior lien on the property involved.

8. APPEAL AND ERROR, § 1666*—*when right to raise question as to nonjoinder of party defendant is waived.* Where, in a subcontractor's proceeding under the railroad lien statute, an amended bill was filed after the expiration of three months from the accrual of the lien claimed, making a new defendant a party to such proceeding, who neither by plea in abatement, demurrer nor plea of the statute of limitations raised the question in the trial court of the right to maintain such proceedings by reason of such de-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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fendant not having been made a party thereto within the three months specified in said statute, *held* that such defendant waived the right to raise such question and could not for the first time present the same in the Appellate Court.

9. RAILROADS—*when objection that defendant should have been made party to intervening petition in subcontractor's proceeding for lien is without merit.* Where, in a subcontractor's proceeding under the railroad lien statute, another subcontractor intervened, claiming also in part as a judgment creditor, an objection on the part of a defendant in the original proceeding, who claimed a lien as a bondholder, that it should have been made a party to the intervening petition, *held* to be without merit, since such petition amounted, in effect, to an answer and not to a cross-bill.

**Joseph Bisencon, Appellant, v. Wesley Walters,
Appellée.**

(Not to be reported in full.)

Appeal from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Action of forcible entry and detainer by Joseph Bisencon, plaintiff, against Wesley Walters, defendant. From a judgment for defendant, plaintiff appeals.

The land in controversy consisted of some 2.46 acres, sometimes described as Lots 15, 27 and 28 in the Village of Cahokia, Illinois. Plaintiff and defendant were both tenants, plaintiff being a tenant of August A. Busch, who claimed to own a tract of about 190 acres, which tract included the 2.46 acres above mentioned, and defendant being a tenant of the widow

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of Joseph LaValle, who claimed some interest in said above-described premises.

Some fifteen or sixteen years prior to the bringing of this suit, defendant went into possession of said premises under the LaValles, who gave him the right to occupy the same on his agreement to clear the land.

Defendant farmed a part of said premises and raised corn thereon which he sold at the vegetable market. After occupying said premises for a few years, defendant went to Kansas City and stayed there ten years. He afterwards returned, and about eighteen months before suit was brought moved on the premises in question. He erected a house thereon, or, as it is sometimes called by the witnesses, a shack, where the evidence discloses defendant was living at the time this suit was brought and at the time of the hearing. While plaintiff's lease covered the 2.46 acres in controversy, he never had farmed it, nor made any use of it. No one molested defendant while building said house or in his occupation of said premises until this suit was brought.

The LaValles, through whom plaintiff claims, have been in possession of said tract of land during all the time it was practical to have the possession of the same, being for more than sixty years prior to the bringing of this suit.

L. D. TURNER, JR. and TURNER & HOLDER, for appellant.

KERFE & SULLIVAN, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1173*—*what questions reviewed in absence of proposition of law.* Where trial was had by the court

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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without a jury, and no propositions of law were submitted to be held or refused by the trial court on the hearing, and no question was raised on the pleadings, the only matters to be determined on appeal under the assignment of errors are whether the court erred in its rulings on the evidence and whether the finding of the court was against the manifest weight of the evidence.

2. **FORCIBLE ENTRY AND DETAINER, § 73***—*when evidence as to survey of land is inadmissible.* Where, in an action of forcible entry and detainer between two tenants of different landlords, both claiming an interest in the land in dispute, the record showed that a witness was acting as the agent of one of said landlords and that any survey made by him of such land was at the instance of his principal without the presence of the other tenant or his landlord or notice to either, *held* that the court did not err in refusing to allow said witness to testify with reference to any such survey, especially as the witness was allowed to testify that he caused the tract occupied by his landlord's tenant, which included as a part of the same the premises in controversy, to be fenced and as agent had rented said tract to such tenant.

3. **FORCIBLE ENTRY AND DETAINER, § 67***—*what is only issue in action of.* In an action of forcible entry and detainer, the possession or the right of possession of the premises is the only matter in controversy, and the evidence should be confined to this issue.

4. **FORCIBLE ENTRY AND DETAINER, § 73***—*when tax receipts are inadmissible in evidence.* In an action of forcible entry and detainer heard by the court without a jury, the court did not err in refusing to consider certain tax receipts offered in evidence by one of the parties tending to show payment by him of taxes on the premises in controversy during certain years preceding the bringing of the suit, as such evidence was not material.

5. **TRIAL, § 77***—*when evidence offered in rebuttal may be refused.* Material evidence offered in rebuttal may properly be refused, as such evidence should be offered in chief.

6. **FORCIBLE ENTRY AND DETAINER, § 84***—*when evidence insufficient to show forcible entry or wrongful detention.* Evidence held to show that no forcible entry by defendant on the premises in controversy was shown and that he did not wrongfully detain same after obtaining peaceable possession thereof.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Margaret Watson, Appellee, v. Louis Kammeier et al.,
Appellants.**

1. JUDGMENT, § 463*—*when party is not bound by result of proceedings.* In order to be bound by the result of proceedings, a party must have been directly interested in the subject-matter thereof, with the right to make defense, to introduce testimony, to cross-examine the witnesses on the opposite side, to control in some degree the proceedings, and to have the right to appeal from the judgment, and a person not having these rights is a stranger to the cause.

2. INTOXICATING LIQUORS, § 207*—*when evidence of prosecution of intoxicated person killing intestate is inadmissible in action for death under Dramshop Act.* In an action under the Dramshop Act for the death of plaintiff's intestate, who was killed by a third person, alleged to have been intoxicated, where the defendant claimed that such third person was not at the time of the homicide intoxicated but insane, evidence of the criminal prosecution against such third person for the murder of another person at the time of the killing of plaintiff's intestate wherein the defense of insanity was interposed, such prosecution resulting in a judgment of conviction and a sentence to the penitentiary for life, held inadmissible.

3. INTOXICATING LIQUORS, § 249*—*when instruction in action for damages under Dramshop Act in language of statute is not erroneous.* An instruction in an action under the Dramshop Act for damages in the language of section 9 of that Act (J. & A. ¶ 4609), and purporting to be the law governing the right of recovery for violations of the act, while not the best practice, was not error.

4. INTOXICATING LIQUORS, § 249*—*when instruction in action for damages under Dramshop Act against saloon keeper and owner of building is not misleading.* An instruction in an action for damages under the Dramshop Act, where one of the defendants was not a dramshop keeper but was owner of the building occupied by a dramshop of another defendant, is erroneous which does not refer only to the defendants who were dramshop keepers in connection with the question of sales, but such error is not of a serious character and it could not have misled the jury.

5. INTOXICATING LIQUORS—*when peremptory instruction is properly denied in action under Dramshop Act for death of intestate by third person.* In an action under the Dramshop Act for the killing of plaintiff's intestate by a third person alleged by plain-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tiff to have been intoxicated, where the defense was that the homicide was caused by the insanity of such third person and not by the sale of intoxicants to him, a peremptory instruction for the defendants *held* properly denied.

6. INTOXICATING LIQUORS, § 202*—*when declaration in action under Dramshop Act for death of intestate by intoxicated third person is sufficient after verdict.* In an action under the Dramshop Act, where the declaration charged that defendants sold intoxicating liquors to a certain person which caused his intoxication, and that while so intoxicated he shot and killed plaintiff's husband, *held* that such declaration should state that the killing was in consequence of the intoxication rather than as charged, but the point not having been raised by demurrer, the declaration is sufficient after verdict to support a judgment against the defendants.

Appeal from the Circuit Court of Marion county; the Hon. WILLIAM B. WRIGHT, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded. Opinion filed November 13, 1916.

W. H. NELMS, F. P. DRENNAN, NOLEMAN & SMITH
and JOHN BUNDY, for appellants.

JONAS & HALEY and CHARLES H. HOLT, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

An action on the case was brought by appellee under the provisions of section 9 of the Dramshop Act (J. & A. ¶ 4609) against appellant and certain other defendants in the Circuit Court of Marion county, charging that appellee had been injured in her means of support by reason of the sale of intoxicating liquors by appellant and others to one Charles Woods, which caused his intoxication, and who on the 13th day of August, 1914, while so intoxicated shot and killed the husband of appellee. A trial was had resulting in a verdict against appellants in favor of appellee for \$2,750. A motion for a new trial was made by appellants, which on hearing was denied. Judgment was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

rendered on said verdict, from which judgment appellants prosecute this appeal.

The record discloses that while certain other parties were made defendants to said proceeding, all of said defendants, except appellants, were dismissed from said proceeding on the motion of appellee prior to the hearing before the jury.

The amended declaration filed in said cause alleged, in substance, that appellant, Louis E. Kammeier, Edward W. Mathias, August Gansauer, John Enrico and William Collinsworth, and each of them, did, on August 13, 1914, sell and give intoxicating liquor to one Charles Woods, and thereby caused the intoxication of said Charles Woods, and that said Charles Woods, being so intoxicated, on said 13th day of August, 1914, shot and mortally wounded Thomas Watson, the husband of appellee, and that from the effect of said gunshot wound, he then and there, on the day last aforesaid, died.

It is further alleged that by reason of the death of said Thomas Watson, appellee has been injured in her means of support, etc. A plea of the general issue was filed to said declaration.

The evidence discloses that appellant and certain other dramshop keepers had sold or given the said Charles Woods liquors a short time prior to the shooting and killing by him of appellee's husband, Thomas Watson. The said Thomas Watson was a man aged about fifty-one years and was at the time of the shooting the village marshal of Central City, which position he had held for some time.

The evidence further is that he had been called to the scene of the killing, in the line of his duty as such officer, to quell a disturbance claimed by appellee to have been caused by the said Charles Woods. The shooting occurred at about eleven o'clock on the evening of the said 13th day of August, 1914. The evi-

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dence is further to the effect that the said Charles Woods had procured from a butcher shop in the immediate vicinity a rifle with which he shot and killed not only the husband of appellee, but also a man by the name of Douglas Duncan, a deputy, who was at the time assisting appellee's intestate in his attempt to quiet said disturbance. The principal grounds assigned by appellants for a reversal of this cause are that the court erred in admitting in evidence the record of certain proceedings had in the case of the *People of the State of Illinois v. Charles Woods*, who had been tried for the murder of said Douglas Duncan; in giving on behalf of appellee instructions numbers one and three; and in the refusal to give the peremptory instruction requested by appellants at the close of appellee's evidence and at the close of all the evidence.

On the trial of said cause, appellants contended that the killing of appellee's husband by the said Charles Woods was not the result of intoxication caused in whole or in part by liquors sold or given to Woods by them, but was the result of insanity on the part of Woods at said time. Over the objection of appellee, the court permitted appellants to offer in evidence the record of the County Court of said county, dated March 12, 1913, showing the said Charles Woods to have been adjudged insane on that day and committing him to the insane asylum at Anna, Illinois. Woods remained in said hospital for some three or four months and was then discharged, but the record does not show whether he was discharged as cured or not. On rebuttal, appellee was allowed by the court, over the objection of appellants, to give in evidence the testimony of certain witnesses to the effect that one of the defenses made on the trial in the case of the *People of the State of Illinois v. Charles Woods*, charged with the murder of Douglas Duncan, that the said Woods at said time

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was insane. Mr. E. B. Vandervort, a practicing lawyer at Salem, Illinois, testified that the defense of insanity was made in said cause; that in the opening statement to the jury and all the way through the trial the defense of insanity was insisted upon. Following this testimony the court permitted appellee to offer in evidence the record of the judgment and proceedings of the *People of the State of Illinois v. Charles Woods*, charged with the murder of Douglas Duncan, which record among other things showed the return of the indictment and the final judgment, finding the defendant, Woods, guilty, and sentencing him to imprisonment in the penitentiary at Chester, Illinois, for the period of his natural life. Appellants insist that the admission of this testimony constituted reversible error.

On the other hand, appellee insists that this evidence comes within the exception which allows verdicts and judgments on subjects of a public nature and judgments, when used by way of inducement or to establish a collateral fact, to be admitted though the parties are not the same. We do not, however, believe that the record offered in this case comes within the exception. One of the principal defenses urged by appellants to defeat the action brought by appellee is that the killing of appellee's husband by Charles Woods was the result of insanity and not the result of intoxication caused in whole or in part by liquors sold by them to him.

It has been uniformly held as the law in this State that a party litigant shall not be affected by the result of proceedings to which he was a stranger. In order to be bound by such proceeding he must have been directly interested in the subject-matter of the proceeding with the right to make defense, to introduce testimony, to cross-examine the witnesses on the opposite side, to control in some degree at least the proceedings and to have the right to appeal from the judgment. Persons not having these rights are re-

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garded as strangers to the cause. *Corbley v. Wilson*, 71 Ill. 209; *Bollnow v. Roach*, 210 Ill. 364; *Whitaker v. Wheeler*, 44 Ill. 440; *People v. Newbold*, 260 Ill. 196.

In *People v. Newbold*, *supra*, being an appeal from a judgment of conviction on the charge that Newbold was violating section 57 of chapter 38, Revised Statutes (J. & A. ¶ 3591), by keeping a common ill-governed and disorderly house to the encouragement of idleness, drinking and fornication, the court on a trial in said cause permitted the People to offer in evidence the record showing convictions of certain persons charged with patronizing the house kept by Newbold in violation of a city ordinance. The court, in passing on the rulings of the trial court, at page 198 says: "The prosecutions under the ordinance were between different parties from those in the prosecution under the statute, and the records of the former were not admissible in the latter for the purpose of proving the character of the house or any other fact upon which the convictions were founded. No man can be affected by proceedings to which he is a stranger." Citing *Corbley v. Wilson*, *supra*; *Whitaker v. Wheeler*, *supra*. Again, at page 199 in said cause the court further says: "The admission of these judgments was seriously detrimental to the plaintiff in error, because from them it appeared that the court had in five different cases adjudged that the hotel kept by the plaintiff in error was a common, ill-governed and disorderly house, kept for the encouragement of idleness and fornication, and the jurors were not instructed that they might not accept and act upon such finding as conclusive." We are clearly of the opinion, in view of the holding of the Supreme Court made in the case cited, that the trial court erred in admitting the record in the case of the *People v. Woods*, above referred to, and the testimony of the witness Vandervort, in connection therewith, and that by reason of the probable effect of said evidence on the minds of the jury in this case that this error of itself is sufficient to require a reversal of this cause.

It is contended by appellants that the court erred in giving the first and third instructions given on behalf of appellee. The first instruction is in the language of section 9 of the Dramshop Act (J. & A. ¶4609) and purports to be the law governing the right of recovery for violations of said act, and while we are inclined to believe that the practice of giving instructions of this character is not the best and frequently has a tendency to mislead and confuse the jury rather than to enlighten them, still we would not be inclined to hold the giving of this instruction as error. In fact, both the Supreme and Appellate Courts have approved instructions of like character. *Johnson v. Bush*, 154 Ill. App. 494; *Reisch v. People*, 229 Ill. 574; *Eaton v. Marion County Coal Co.*, 173 Ill. App. 444.

The complaint made by appellants to the third instruction is that one of appellants is not a saloon keeper, but is the owner of the building occupied by one of the dramshop keepers; that the instruction was too general in its character and should have referred only to those of appellants who were dramshop keepers in connection with the question of sales. We think the point is well taken, but it is not of a serious character and could not have misled the jury to the hurt of any of appellants. It would be well, however, on the retrial of the cause to modify the instruction so as to make it comply with the facts.

It is next contended by appellants that the court erred in not peremptorily instructing the jury to find the defendants not guilty. Without going into a discussion of the evidence it is only necessary for us to say that in view of the record in this case we do not think the court erred in refusing said instructions, and that there was sufficient evidence in the record to warrant its submission to the jury.

Lastly, it is contended by appellants that the declaration is not sufficient to support the judgment. This

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contention is based on the failure of the declaration to allege that the killing of appellee's husband by the said Charles Woods was in consequence of intoxication caused in whole or in part by liquors sold by these appellants. The charge in the declaration being that appellants sold to the said Charles Woods intoxicating liquors, which said liquors caused the said Charles Woods to be and become intoxicated, and that while intoxicated he shot and killed appellee's husband. We hold that the declaration should state that the killing was in consequence of the intoxication, rather than as charged in the declaration, but were this the only error in the record we would be inclined to hold that after verdict, the point not having been raised by demurrer, the declaration would be sufficient to support the judgment.

For the reasons above set forth the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Frank Young by Andrew Bachman, Appellee, v. Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Appellant.

1. **WATERS AND WATER COURSES, § 10***—*when owner of dominant heritage has right to discharge collected waters on land of servient heritage.* The owner of the dominant heritage has the right to collect the waters falling on his land and throw them on the land of the servient heritage in increasing quantities and is not liable for damages caused thereby, providing the waters are thrown on the servient heritage at a point where in the course of nature they originally flow.

2. **ADJOINING LANDOWNERS, § 1***—*when doctrine of lateral support is inapplicable.* Where plaintiff's land adjoining defendant's railroad right of way was in part at a considerable elevation above said right of way and so hilly that at the time of heavy rainfall the water would flow with such velocity from plaintiff's land onto said right of way that it caused the soil to wash and flow off into a ditch excavated by defendant along the right of way and ten or twelve feet from plaintiff's land, and to cause ditches and gullies in plaintiff's land, *held* that while the doctrine of lateral support obtains, it is not applicable to the facts and it was error, in a suit for damages against the railroad, to refuse a peremptory instruction for the defendant.

3. **ADJOINING LANDOWNERS, § 2***—*when instruction is erroneous as not conforming to pleadings in action for damages resulting from excavation.* Where a declaration charged damages to plaintiff's land by reason of an excavation made by the defendant railroad on its adjoining land causing plaintiff's land to cave and fall into said excavation, and the evidence showed plaintiff's land was the dominant and defendant's the servient land, and that the water flowed from plaintiff's to defendant's land after as before such excavation, *held* that an instruction, to the effect that if the jury believe from the evidence that the defendant by such excavation negligently diverted the flow of surface water over plaintiff's land and thereby caused such water to erode the surface of said land and render it unfit for cultivation as charged in the declaration, did not follow the theory of said declaration and was not supported by the evidence, and the giving of same was erroneous.

4. **RAILROADS, § 943***—*when instruction on right of owner to recover damages for injury to land by fire is erroneous.* Where the owner of land sued a railroad company for damages for injuries

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to said land by fire from defendant's engine, and the evidence showed said land was rented and that the tenant had sued for and collected damages to the crop of hay growing on said land, *held* the giving of an instruction on the part of the plaintiff that if the jury believe from the evidence that the defendant negligently set fire to plaintiff's land as charged in the declaration and damaged the crops growing thereon, then they should find for plaintiff, was erroneous, and the only damage plaintiff would be entitled to recover would be the damage to the remainder.

5. RAILROADS, § 943*—*when defendant is estopped from insisting upon correct rule of damages in an action by owner for injury to land by fire.* The proper measure of damages in an action by the owner of land in possession of his tenant against a railroad company because of injury to said land caused by fire from defendant's engine is the value of the premises before and after the fire, but the defendant cannot insist on this measure of damages where he offered on the trial testimony as to the cost of resowing the land burned over and as to the loss of the succeeding crop of hay.

Appeal from the Circuit Court of White county; the Hon. JULIUS C. KEEN, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded. Opinion filed November 13, 1916.

P. J. KOLB and N. C. BAINUM, for appellant; L. J. HACKNEY and FRANK L. LITTLETON, of counsel.

FRANCIS M. PARISH and CONGER, PEARCE & CONGER, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Appellee, who was the owner of the Northeast Quarter of the Northeast Quarter of Section 22, and the Northwest Quarter of the Northwest Quarter of Section 23, Town 5 South, Range 9 East, except the right of way of appellant railway, instituted an action on the case against appellant in the Circuit Court of White county to recover for damages alleged to have been caused by reason of certain excavations made by appellant on its said right of way on said above de-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

scribed premises, and also for damages alleged to have been caused by reason of the failure on the part of appellant to keep its said right of way through appellee's lands free from combustible materials, by reason whereof, said materials on said right of way were ignited by a passing engine and the fire spread to the premises of appellee, thereby injuring the same, etc. Issue was joined and a trial was had resulting in a verdict and judgment for appellee for five hundred dollars, and from said judgment this appeal is prosecuted.

Appellant's first contention for a reversal of this judgment is that the court erred in refusing to direct a verdict in its favor on each of the three counts of appellee's declaration. The first and second counts are based on the theory that appellant, by virtue of the excavation made by it on its right of way adjoining appellee's land, removed the lateral support therefrom, thereby causing appellee's land to cave and fall into said excavation and to wash, and ditches or gullies to be formed running back from appellant's right of way, thereby injuring appellee's land and rendering it in a condition so it was impossible to cultivate the same. The evidence is to the effect that the excavation made by appellant on its right of way was some ten to twelve feet from the line of appellee's land adjoining said right of way, and so far as the evidence is concerned, it fails to show or tend to show that there was any caving in of the land of appellee by virtue of said excavation alone. The evidence being to the effect that by reason of the fact that appellee's land was extremely hilly (the highest point of which was some thirty-eight feet above the track of appellant's railroad), the water at the time of a heavy rainfall would flow with such velocity from the lands of appellee on the right of way of appellant, and into the excavation made by it, that it caused the soil, which is of a washy character, to wash and flow off into the

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ditch excavated by it along its right of way, thereby creating the ditches and gullies in appellee's land, some of which extended back some sixty feet.

The first and second counts of appellee's declaration present a question that so far as we have been able to ascertain is one that has never been passed upon by the Supreme or Appellate Courts in this State. The doctrine of lateral support obtains in this State and is recognized by the Supreme and Appellate Courts (*City of Quincy v. Jones*, 76 Ill. 232; *City of Joliet v. Schroeder*, 92 Ill. App. 68, affirmed in *Schroeder v. City of Joliet*, 189 Ill. 48), but has never been applied to a case of this character. That doctrine has only been held to apply to the extent that any one excavating on his own premises must not excavate so close to the land of an adjoining owner as to cause earth from the land of such adjoining owner to cave or fall into the excavation, for lack of lateral support, so far as its own weight is concerned. This doctrine, however, has not been carried to the extent that one must furnish lateral support for the additional weight that may be placed on the land of the adjoining owner. In other words, a person excavating would not be bound to furnish lateral support for a building that might be placed on the premises of an adjoining owner. In the case at bar there was some ten or twelve feet of unexcavated land between the cut made by appellant on its right of way and appellee's land. It cannot, therefore, be seriously contended that there was not sufficient lateral support for said lands of appellee, unaffected by any outside cause. The question then is, whether appellant in making the excavation on its right of way in the lawful pursuit of its business is responsible in damages by reason of the fact that heavy rains falling on appellee's land, on account of its hilly condition, would flow with such force and rapidity as to wash the banks of the ditch excavated by appellant, so as to create ditches and gullies ex-

tending back from said excavation onto the land of appellee.

We are of the opinion that appellant would not be so liable. It has been repeatedly held in this State that the owner of the dominant heritage has a right to collect the waters falling on his land and throw them on the land of the servient heritage in increasing quantities, and is not liable for damages caused thereby, providing the waters are thrown onto the servient heritage at a point where, in the course of nature, they originally flow. *Peck v. Herrington*, 109 Ill. 611; *Broadwell Spec. Drain. Dist. No. 1 v. Lawrence*, 231 Ill. 86; *Lambert v. Alcorn*, 144 Ill. 313.

The only case brought to our attention, which in its facts is similar to this case, is the case of *Pohlman v. Chicago, M. & St. P. R. Co.*, 131 Iowa 89. The opinion in that case, in arriving at the conclusion that there could be no recovery, among other things, says: "It is the theory of counsel for plaintiff that to all intents and purposes the situation presents a case of the removal by an adjoining proprietor of the lateral support to the soil of his neighbor. That such a right exists at common law in a proper case, all the books agree. The right is a natural one, and, like a surface-water servitude, is predicated upon necessity. As the term itself implies, it has relation to the support which in a state of nature the soil of one owner receives at the boundary line from the soil of his neighbor. * * *

But the doctrine cannot be extended to embrace cases of trespass generally. It goes no further than to inveigh against an interference within the zone of the natural support afforded by the soil conditions at the boundary line. Manifestly, then, we cannot concur in the view that the case before us is a proper one for the application of the doctrine. It is no part of the contention presented by the petition that the ditch constructed by defendant extended to or near the boundary line, or that plaintiff's soil at the boundary

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line in respect of its lateral support had been in any manner disturbed. The essence of the complaint is that by the accelerated flow of the surface water, more soil had been carried away from the general surface of plaintiff's land than otherwise would have occurred, and that this resulted in the formation of a ditch along the length of Poole Hollow, and of gullies back upon such portions of the land as drained into said hollow."

If the holding in the Iowa case is sound, and we think it is, then there can be no recovery by appellee on the first and second counts of his declaration, and the peremptory instructions directing a verdict for appellants on said counts should have been given and it was error to refuse the same.

The third count of appellee's declaration alleges damages to appellee's land caused by fire spreading from appellant's right of way onto the land of appellee, which burned and destroyed his meadow. We think the evidence tends to support this count of appellee's declaration, and there was no error in refusing to instruct the jury to find for appellant, as to said count. It is next insisted by appellant that the court erred in giving the three instructions given on behalf of appellee, and in refusing the tenth instruction presented on behalf of appellant. Appellee's first instruction is as follows: "That if you believe from the evidence that the defendant railway company reconstructed its road and excavated a cut, and in so doing negligently diverted the flow of surface water over the premises of the plaintiff, and thereby caused the surface water to erode the surface of such premises, and render it unfit for cultivation, as charged in the declaration, or some one of its counts; and if you believe that such premises were damaged by such acts of the defendant, then you should find for the plaintiff."

The declaration counts on damages by reason of the excavation made by appellant causing the land of ap-

pellee to cave and fall into said excavation, whereas, this instruction is based on the theory that there was a diversion of the flow of the surface water off appellee's premises. The evidence conclusively shows that there was no diversion of the flow of water off of appellee's land. In fact, the water flowed from appellee's land just as it had always flowed onto the right of way of appellant. This instruction does not follow the theory of appellee's declaration, nor is it supported by the evidence, and for that reason should not have been given.

Appellee's second instruction is based on practically the same theory, and for that reason should not have been given. Appellee's third instruction is as follows: "That if you believe from the evidence that the defendant negligently set fire to the premises of the plaintiff, as charged in the third count of the declaration, and damaged the crops growing thereon, then in such case you should find for the plaintiff as to such count." This instruction should not have been given for the reason that the evidence conclusively shows that appellee was not in possession of the premises owned by him but that the same were rented, and that the tenant had sued for and collected the damages occasioned to the crop of hay growing on said premises. The only damages that appellee would be entitled to recover for are the damages to the remainder.

It is next contended by appellant that the verdict is excessive. The evidence tends to show that some thirteen or fourteen acres of meadow were burned over by the fire set out by appellant's engine, and was thereby destroyed, and that it was necessary to resow the same.

The evidence further tends to show that the cost of resowing and the loss of the succeeding crop would amount to from six to ten dollars per acre. In other words, the maximum damages on account of the fire

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would not exceed one hundred forty dollars. It is also insisted by appellant that there was no evidence in the record tending to show the value of the premises of appellee before the fire and after the fire, and that therefore there was no basis on which to estimate appellee's damages. Appellant, however, is not in a position to insist on this measure of damages, as it offered on the trial testimony as to the cost of resowing the land burned over, and as to the loss of the succeeding crop of hay. We are inclined to hold that this is a correct basis for estimating the damages in this character of case.

As appellee is not entitled to recover on the first and second counts of his declaration, it is not necessary to consider the evidence with reference to the amount of damages suffered by him, by reason of the washing of his land.

For the reasons above set forth, the judgment of the trial court will be reversed and said cause remanded.

Reversed and remanded.

Ford Motor Company for use of John E. Keyser, Appellant, v. Charles Fry, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Wabash county; the Hon. J. C. EAGLETON, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Action by Ford Motor Company for the use of John E. Keyser, plaintiff, against Charles Fry, defendant, to recover damages for breach of a contract for the

purchase of an automobile from Keyser as agent and for loss of commissions. From a judgment for defendant, plaintiff appeals.

P. J. KOLB and M. J. WHITE, for appellant.

E. B. GREEN and THEODORE G. RISLEY, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 345*—*when seller exercising option to retain sum provided in contract as liquidated damages for breach is precluded from further recovery.* Where a contract of sale made between an automobile agent for his company and a purchaser for a machine provided that such purchaser should pay a certain sum on acceptance of the order, and that if he failed to accept the machine within forty-eight hours after being notified that same was ready for delivery such machine might be resold and the sum paid retained, at the seller's option, as liquidated damages for its expense and efforts in making such resale, *held* that under such contract the seller was foreclosed from any further recovery than the sum retained by it.

2. SALES, § 344*—*what is measure of damages for breach of contract of purchase where machine is resold by seller.* In the absence of a measure of damages fixed in a contract for the sale of an automobile for a breach thereof by refusing to accept the machine in accordance with the terms of such contract, where a resale of the machine is had the seller would not be entitled to recover any greater amount than the expense, if any, incurred in effecting such resale at the same price as to the first purchaser.

3. FACTORS, § 28*—*when agent is not entitled to commissions on unaccepted machine.* Where an automobile company sued for the use of its agent the purchaser of one of its machines under a contract of sale thereof, *held* no recovery can be had for the commissions or profits which such agent would have been entitled to had such purchaser accepted such machine under such contract.

4. CONTRACTS, § 256*—*what are merged in written contract.* All prior conversations and agreements are merged in a written contract.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hoehn v. East Side Levee & Sanitary District, 203 Ill. App. 48.

Leonard Hoehn, Appellee, v. East Side Levee & Sanitary District, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. LOUIS BERNREUTER, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Leonard Hoehn, a tenant farmer, complainant, against East Side Levee & Sanitary District, defendant, for damages alleged to have been caused by a levee constructed by defendant, which obstructed the flow of the water from the premises occupied by him, thereby damaging his crops. From a judgment for \$1,071 in plaintiff's favor, defendant appeals.

F. A. GARESCHE, J. B. HARRIS and D. H. MUDGE, for appellant; THOMAS E. GILLESPIE, of counsel.

BURTON & BURTON, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. SANITARY DISTRICTS, § 17*—*when evidence sufficient to show obstruction of flow of surface water by levee.* In an action against a sanitary district for damages claimed to have been caused by a levee constructed by the district obstructing the flow of surface water from plaintiff's land after a certain heavy rainfall, whereby plaintiff's crops were injured, the question was one of fact for the jury whether said levee so obstructed the flow of said water, and where the clear preponderance of the evidence was to the effect that prior to the construction of the levee the waters had flowed

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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in the direction of the levee and had never caused serious damage to plaintiff's crops or remained on his land at any great length of time, and that the levee did so obstruct the flow of water, a finding to that effect was not against the manifest weight of the evidence.

2. **WATERS AND WATER COURSES, § 12***—*what is rule as to obstruction of drainage by sanitary district as lower proprietor.* The courts of this State have adopted the rule of the civil law that the right of drainage is governed by the law of nature, and that the lower proprietor of land cannot do anything which prevents the natural flow of surface water and cast it back upon the land above, and no distinction is made as to water flowing in natural water courses or as to a sanitary district in its use of lands.

3. **APPEAL AND ERROR, § 1489***—*when error in admission of evidence may not be complained of.* Where, in a suit against a sanitary district for damages claimed to have been caused by a levee constructed by the district obstructing the flow of surface water from plaintiff's land after a certain heavy rainfall, whereby plaintiff's crops were injured, evidence was offered by plaintiff to the effect that defendant after said rainfall constructed a lateral ditch whereby such surface water was drained off the land, *held*, that whether or not the court erred in admitting such evidence cannot be raised by defendant, whose witness had testified on defendant's behalf on direct examination as to the construction by defendant of said ditch.

4. **SANITARY DISTRICTS, § 16b***—*what does not constitute variance between pleading and proof in an action for damages for overflow due to construction of levee.* Where, in an action for damages for overflowing of plaintiff's land caused by defendant's levee it was charged in the declaration that said levee was not properly constructed so as to provide for the escape of surface water from said land by openings in said levee along said land, the court admitted evidence on the part of the defendant that such openings were provided by defendant at other points, *held* such evidence was admissible under said averment in the declaration.

5. **SANITARY DISTRICTS—when tenant has right of action for construction of levee.** Where no lands in the possession of a tenant were taken for the construction of a permanent levee on adjoining land, such tenant would have no right of action because of the construction of such levee until damage to him occurred, and when it did occur he would have a right to recover therefor.

6. **APPEAL AND ERROR, § 1466***—*when erroneous admission of evidence is harmless error.* The erroneous admission of evidence which had no material effect on the finding of the jury, where the amount of damage found by the jury was supported by the evidence

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and was not complained of as excessive, would not require a reversal of the case.

7. INSTRUCTIONS, § 126*—*when giving of abstract instruction is not error.* There is no error in giving an instruction which is abstract in form and states the law correctly and is applicable to the facts in the case.

8. DAMAGES, § 244*—*when giving of inaccurate instructions on behalf of plaintiff is harmless error.* Where certain instructions given on behalf of plaintiff did not limit the damages to those charged in the declaration and were not as accurate as they should be, there would be no reversible error in giving same where the measure of damages which should govern appeared in the instructions given on behalf of the defendant.

**In the Matter of the Estate of Nelson A. Grote,
Deceased.**

**Loretta Lemen et al., Appellants, v. Estate of Nelson
A. Grote, Deceased, Appellee.**

1. JOINT TENANCY, § 6*—*when right of survivorship does not obtain in personalty.* Where a husband turned over to his wife out of his earnings a certain sum for a long term of years, from which she paid their living expenses and of the balance, with his consent, invested a part in real estate in their joint names and deposited a part in the bank, from which he checked and made loans in his own name, and at the time of his death there was on deposit in certain banks certain sums on deposit certificates stating he and she were joint owners of said sums and that said sums should be payable to either before or after the other's death three months after date, *held*, on petition for discovery of assets filed against said wife as administratrix of his estate, that said funds were held in equal shares, and that the deceased impliedly made a gift to his wife of one-half of the proceeds of said certificates, and that, notwithstanding it may have been their intention that said funds should be held jointly with right of survivorship, they would still be held, under the Act of 1821, in common and the right of survivorship would not obtain.

2. JOINT TENANCY, § 6*—*right of survivorship of joint estates.* The Act of 1821, abolishing the right of survivorship of joint

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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estates, is still in force, with unimportant changes, as to personal property, as the Act of July 1, 1872, restoring the right of survivorship when so expressly provided in a conveyance, has reference only to real estate and in no way affects personal property held in joint ownership.

Appeal from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded with directions. Opinion filed November 13, 1916.

W. E. KNOWLES and T. M. WEBB, for appellants.

JAMES G. RAFTER and DAN MCGLYNN, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

A petition was filed in the Probate Court of St. Clair county, by Loretta Lemen and May O'Neill, daughters of Nelson A. Grote, deceased, to compel Margaret E. Grote, widow of said deceased and mother of said petitioners, the administratrix of said estate, to make discovery of and inventory certain moneys which petitioners state on information and belief said administratrix had in her possession belonging to the estate of said deceased. No particular moneys or funds were designated, it being alleged in said petition that the knowledge with reference to said funds was particularly with said administratrix. The administratrix was the only witness testifying in the cause.

On the hearing in the Probate Court the prayer of said petition was denied and said petition was dismissed. On appeal to the Circuit Court said cause was heard at the September term, 1915, and an order was entered by the court dismissing said petition at the cost of said petitioners, and from said judgment this appeal is prosecuted.

The oral evidence consists alone of the testimony of said administratrix and is to the effect that Nelson A. Grote and his wife, Margaret E. Grote, lived for many

years in the City of East St. Louis; that during the time of his marriage, Nelson A. Grote was employed by an express company, which employment paid him a salary of \$125 per month; that for a period of something like twenty-two years preceding his death, said deceased from his monthly salary retained \$25 for his own use, the remaining \$100 he would deliver to his wife.

The evidence further discloses that Mrs. Grote was a frugal woman and saved whatever she could out of the money delivered to her by the deceased, and with his knowledge and consent she purchased certain real estate, paid taxes and life insurance, and the other necessary expenses about the house. The balance of the money, with the knowledge and consent of her husband, she would deposit in various banks in the City of East St. Louis to their joint account.

At the time of the death of said Nelson A. Grote, there was on deposit in the Southern Illinois National Bank the sum of \$5,037.50, and in the Illinois State Bank, the sum of \$1,000. The certificate of deposit for the \$5,037.50 issued by the Southern Illinois National Bank was as follows:

“N. A. and Margaret Grote, Joint owners, have deposited with The Southern Illinois National Bank, of East St. Louis, Five thousand, thirty-seven dollars and fifty cents, payable to the order of either, before or after the death of the other, on the return of This Certificate properly endorsed, three months after date, in current funds.

“This deposit bears no interest after maturity and will not be paid until this certificate is due.”

The certificate for the \$1,000 in the Illinois State Bank was of a similar character.

It is insisted by appellants that no gift was made by said deceased of the moneys delivered by him to his wife, Margaret E. Grote, and that whatever remained after the payment of the family expenses from the

funds so delivered by said deceased to his wife, remained his property and being traced to the certificates of deposit above referred to should have been inventoried as a part of his estate.

On the other hand, appellee contends that without reference to whether or not there was a gift of said funds to her by her husband at the time the same was delivered to her, that the fact that Nelson A. Grote allowed his said wife to retain said funds without making any account to him and allowed her to control the depositing of said funds, through the long period of years covering these matters, would have the effect of vesting the title to said funds in her.

There being no pleadings in this case from which the court can determine the theory of the parties to this proceeding, the only way that that theory is to be determined is from their briefs and arguments. Appellants insist that in order for appellee to hold the funds in question she must prove by a preponderance of the evidence that her husband, Nelson A. Grote, made an absolute gift of said funds to her in her lifetime, while appellee insists, quoting from the brief of her counsel: "We have refused from the commencement of this litigation to share the views of counsel for appellants in their insistence that the transactions between Nelson A. Grote and his wife were to be measured and determined by the law relating to gifts *causa mortis* or *inter vivos*." Again quoting from the brief of appellee: "Each semimonthly payment to her (appellee) was an executed transaction, and it is not altogether true to say that under the facts of this case these payments to her was a gift as the relation was contractual; she agreeing to pay, and the proof clearly showing that she did pay, all household and other expenses, and thereafter treating the residue as her own absolutely and without condition."

We do not agree in our conclusions with either contention but are inclined to hold that under the facts

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disclosed in this record, Nelson A. Grote and appellee, his wife, held the funds covered by the two certificates in equal shares. It is probable that it was the intention of appellee and her said husband that they would hold said fund as tenants in common with right of survivorship, and if the right of survivorship obtained with reference to personal property jointly held as it did at common law, appellee would probably be entitled to this whole fund.

In the case of *Hay v. Bennett*, 153 Ill. 271, the court at page 281, in discussing the question as to whether the Act of 1821, and which act with unimportant changes is still a part of the statute of this State, applied to personal property as well as real estate, says: "It seems reasonably clear that section 2 of this Act of 1821, being section 1 of the present chapter 76 (J. & A. ¶ 6744), is broad enough to include personal as well as real property, and that some of the phraseology, to wit, that referring to transmissibility to executors and administrators, is especially applicable to personal estate. Section 3 of the original act (section 2 of chapter 76, J. & A. ¶ 6745) manifestly includes a reference to personal property held in joint ownership, and has been so construed by our Supreme Court. (*Benjamin v. Strempfle*, 13 Ill. 466; *Boyle v. Levings*, 28 Ill. 314; *German National Bank v. Meadowcroft*, 95 Ill. 124.)" This same section applied to real estate held in joint tenancy and provided: "That if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivor or survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common." In construing this section the Supreme Court held that all estates in joint tenancy become tenancies in common and thereby cut off the right of survivorship.

The Legislature in order to obviate the sweeping effect of the Statute of 1821 abolishing joint estates, in the act concerning conveyances, in force July 1, 1872, re-enacted the provision in the Revised Statutes of 1845, provided in section 5, "that no estate of joint tenancy in any lands, tenements or hereditaments shall be held or claimed under any grant, devise or conveyance whatsoever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors and trustees (unless otherwise expressly declared as aforesaid) shall be deemed to be in tenancy in common." Section 5 of the Act on Conveyances (J. & A. ¶2236), however, has reference only to real estate and in no way affects personal property held in joint ownership, so that the Statute of 1821, abolishing the right of survivorship as to such personal property, still obtains.

It is insisted by appellee that whatever was left of the funds from time to time delivered by Nelson A. Grote to appellee were her funds and that she had complete control of the same, and that it was wholly with her as to how she deposited the same, and that by reason of the fact that the deceased never called on appellee to account for said funds or inquired of her what she was doing with the same necessarily shows that he had surrendered the entire dominion over said funds, and that they thereby became appellee's sole property. In other words, appellee argues that the construction placed on these transactions by appellee and her said husband must control.

It is our opinion, however, that if the question of the ownership of these funds is to be determined by that rule, our conclusion that the funds were owned in equal shares by appellee and her said husband must obtain, for the reason that the funds accumulated from time

to time from the funds delivered by the deceased to appellee were deposited in the name of both of them, and that this fact was known to the deceased and acquiesced in by him; that being true, at the time the deceased delivered these funds to his wife each month, he knew just what disposition was being made of them, and the conclusion would follow that one reason why he said nothing to her when he delivered the funds and why he made no inquiry of her as to how she was disposing of them is because he knew, according to her own testimony, just what disposition was being made of them, and that, that disposition of said funds was satisfactory to him.

There are other circumstances in the record that go to corroborate the correctness of this holding and that is, that certain real estate purchased by appellee from the accumulated funds saved from the amounts delivered by the deceased to her were invested in real estate, the title to which was taken to both of them. The record further discloses that the deceased did have access to these accumulated funds and that he checked from said funds and made loans therefrom, which loans he made in his own name, one of said notes now being in the hands of said appellee as such administratrix and which she concedes should be inventoried as a part of her husband's estate.

The construction we place on this transaction is as favorable, we think, as appellee can contend for, as she testified on the hearing that when these funds were delivered to her by her husband, nothing was said about there being a gift, in fact, she testified, that nothing was said when the funds were so delivered to her, but she says, "they were given to pay expenses. Sometimes it was over and above expenses; the balance, of course, went to me." The statement, however, that the balance went to appellee was a mere conclusion on her part, as she testified that her husband said nothing about what should be done with the

balance. Appellee's counsel insist in their brief that they do not have to claim this fund by gift, either *inter vivos* or *causa mortis*, but that the relation between the deceased and appellee when these funds were turned over to appellee was a contractual relation, that is, that appellee should pay the household expenses, taxes, etc., out of said funds and that the balance should be her property. Appellee further insists that while there is no direct proof of this contractual relation, that it is shown by implication from the acts of the parties and the way in which they treated the handling of these funds. This conclusion, however, as stated above, does not follow from the acts of the parties for the reason that according to appellee's own testimony she deposited these funds that were accumulated in the name of both of them, or when she purchased real estate from these funds she purchased it in the name of both of them, and that these acts of hers with reference to said funds were known to her husband, and were acquiesced in by him.

Our conclusion further is, that to the extent of one-half of the proceeds of the certificates in question, Nelson A. Grote impliedly made a gift to appellee, his wife, and that the same was an executed gift. The authorities we think fully bear out this construction. *Koch v. Sallee*, 176 Ill. App. 381; *Grondenberg v. Grondenberg*, 112 Ill. App. 615; *Morey v. Wiley*, 100 Ill. App. 76; *Mahan v. Schroeder*, 236 Ill. 392.

We might further observe with reference to the provisions in said certificates of deposit to the effect that the funds so deposited should be payable to the order of said deceased or appellee after the death of the other, that said provision at most would amount to a power of attorney to withdraw the entire fund, which power of attorney was revoked by death. It would have no effect on the construction to be given to these certificates, as our holding is that notwithstanding it may have been the intention of appellee and her intes-

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tate husband that said funds should be held jointly, with the right of survivorship, it would still, under the provisions of the Statute of 1821, be held in common and the right of survivorship would not obtain.

For the error in dismissing the petition and in not directing appellee to charge herself as administratrix of her husband's estate with one-half of the proceeds of the two certificates of deposit, as well as the note, said cause is reversed and remanded with directions to the trial court to enter an order directing said administratrix to charge herself as administratrix with one-half the proceeds of said certificates.

Reversed and remanded with directions.

H. T. Miller and Homer Miller, Appellees, v. George W. Mayberry et al., Appellants.

(Not to be reported in full.)

Appeal from the Circuit Court of Wayne county; the Hon. JULIUS C. KERN, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Action in assumpsit by H. T. Miller and Homer Miller, plaintiffs, against George W. Mayberry, J. B. Mayberry and J. K. Wright, defendants, to recover for the alleged breach of a contract for the exchange of certain real property, and personal property for real property. From a judgment for \$1,700 against them, defendants appeal.

CREIGHTON & THOMAS and WILLIAM T. BONHAM, for appellants.

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BOGGS, BOGGS & HEIDINGER, for appellees.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1173*—*what questions determined in absence of submission of propositions of law.* Where no proposition of law was submitted to the court trying a case without a jury, the only questions to be determined on assignment of errors are whether the court erred in its rulings on admission and refusal of evidence and whether the competent evidence in the record sustains the findings and judgment.

2. APPEAL AND ERROR, § 1301*—*when presumed court considered only competent evidence.* On trial by the court without a jury, it is presumed the court only considered the competent evidence, and if such evidence sustains the court's finding and judgment, it is sufficient notwithstanding the court received incompetent evidence.

3. EXCHANGE OF PROPERTY, § 10*—*when contract is not abrogated by subsequent contract of plaintiff with third person.* Where plaintiff and defendant entered into a contract for exchange of lands which was fully executed by plaintiff but defendant failed to furnish an abstract showing his title to be good, as required by the contract, and plaintiff thereafter entered into a second contract with a third party for an exchange of the same lands he was to receive from defendant, which contained a like provision that plaintiff should furnish an abstract showing the title to said lands to be good, *held*, in an action on the first contract, on trial by the court without a jury, that the court properly found the second contract did not abrogate the first contract, and defendant was not relieved from his obligation under the first contract to furnish an abstract showing good title merely by reason of the second contract.

4. APPEAL AND ERROR, § 1414*—*when findings of trial court on conflicting evidence not disturbed.* All the Appellate Court is required to determine on a contested question of evidence upon trial by the court without a jury is whether the findings of the court were against the manifest weight of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Powell v. Alton & Southern Railroad, 203 Ill. App. 60.

**Seth Powell, Appellee, v. Alton & Southern Railroad,
Appellant.**

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Action on the case by Seth Powell, plaintiff, against the Alton & Southern Railroad, defendant, to recover damages for injury to plaintiff's property due to the construction and operation of defendant's railroad. From a judgment for \$375 in favor of plaintiff, defendant appeals.

KRAMER, KRAMER & CAMPBELL, for appellant.

SILAS COOK, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1411*—*when verdict based upon conflicting evidence will not be disturbed.* Where the evidence upon a question of fact was sharply conflicting and the verdict of the jury was not against the manifest weight of the evidence, such verdict should not be disturbed, unless other errors in the record require it.

2. RAILROADS, § 443*—*when instruction on measure of damages in action for damages for construction and operation of road is erroneous.* The true measure of damages in an action against a railroad company for damages because of the construction and operation of its road near the plaintiff's property is the difference in the fair cash market value of the property before and after such

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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construction and operation, and an instruction which directs the jury to fix such damages as they may find them from the evidence, is erroneous and warrants reversal, unless it be supplemented and cured by other instructions.

3. INSTRUCTIONS, § 159*—*when considered as a series*. The instructions given by the court are to be read and considered together, and if when so considered they state the law applicable to the case with substantial correctness, it is sufficient, notwithstanding some one instruction is in itself erroneous.

4. INSTRUCTIONS, § 88*—*when instruction as to determination of preponderance of evidence is not reversibly erroneous*. An instruction as to determining the preponderance of the evidence should include the number of witnesses as one of the elements to be considered, but the omission of this element is not reversible error except where the element of the number of witnesses is shown to be important.

5. APPEAL AND ERROR, § 1491*—*when exclusion of evidence is harmless error*. It is not reversible error to refuse to admit in evidence exhibits consisting of certain records made by a witness with a machine invented by him where he is allowed to give the results of his tests to the jury.

S. R. Keasler, Appellee, v. Baltimore & Ohio Southwestern Railroad Company, Appellant.

1. CARRIERS, § 30*—*what law governs in action in State court involving interstate shipment*. An interstate shipment of freight is governed in an action in a State court for damages for loss of goods by the Interstate Commerce Act and its amendments.

2. CARRIERS, § 33*—*when question of unreasonableness of provision in a contract for interstate shipment as to notice of claim of damages may not be questioned in State court*. The reasonableness or unreasonableness of a provision in a contract for an interstate live stock shipment that no claim for damages in shipment shall be allowed or paid unless such claim is delivered to the general freight agent of the carrier at his office within five days from the time the stock is removed from the car is a question for the Interstate Commerce Commission and not for the State court in which action for such damages is brought, and so long as the filed tariff provides

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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for a notice of this character it is binding upon the shipper as well as the carrier and cannot be questioned in such suit.

3. CARRIERS, § 241*—*when shipper not having actual knowledge of provisions of contract for interstate shipment of live stock as to making claim for injuries is bound.* A shipper of an interstate car of live stock under a contract signed by his agent providing that a claim for damages for loss in shipment must be filed within five days after removal of the stock from the car is not in a position to raise the question that he had no notice of such provision of the contract, where the filed tariff provides for a notice of such character, as such provision of the contract is binding upon him, notwithstanding he may not have had actual knowledge of the stipulation in the contract.

4. CARRIERS, § 241*—*what is effect of failure of shipper of live stock to file claim for damages within required time.* Failure of a shipper of live stock to file his claim for damages for loss in shipment within five days after removal of the stock from the car, as required by his contract of shipment, is a bar to such shipper's right of action for such damages.

McBRIDE, J., dissenting.

Appeal from the Circuit Court of Gallatin county; the Hon. JULIUS C. KEHN, Judge, presiding. Heard in this court at the March term, 1916. Reversed. Opinion filed November 13, 1916.

KRAMER, KRAMER & CAMPBELL, ROEDEL & ROEDEL and W. H. HEBENSTREIT, for appellant; EDWARD BARTON, of counsel.

ROBERT H. DAVIS and M. E. LAMBERT, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Suit was brought by appellee before a justice of the peace of Gallatin county against appellant for the loss of certain hogs in a shipment made by appellee over appellant's railroad. Judgment was rendered in favor of appellee before a justice of the peace. An appeal was taken to the Circuit Court of said county, where a jury was waived and on a trial before the court, judg-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ment was rendered in favor of appellee for \$135, from which judgment this appeal is prosecuted.

The evidence discloses that on July 25, 1914, appellee loaded for shipment on appellant's railroad at Omaha, Illinois, a car of hogs billed to Cincinnati, Ohio. The hogs were loaded about 11:35 a. m. on July 25, 1914, and reached their destination at the stockyards at Cincinnati, Ohio, at about 9:35 p. m. on July 26th, and were unloaded at about 10:30 p. m. of said evening, when it was found eleven of said hogs were dead. Appellee insists that the cause of the death of the hogs was the failure of appellant to water them at proper times when requested so to do by Mr. Harrell, the man in charge of said shipment. At the close of the evidence, appellant requested the court to hold as a matter of law the following proposition: "That the plaintiff failed to file his claim with the defendant within five days, as required by the live stock contract in evidence, and that therefore plaintiff cannot recover in this case," which proposition of law was refused by the court and judgment was rendered in favor of appellee as above set forth.

The shipment in question was made under the provisions of what is known as the Uniform Limited Liability Live Stock contract, which contract provides among other things: "That said shipper is at his own risk and expense to load and take care of and feed and water said stock while it is being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same."

It is further provided in said contract: "That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper,

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unless a claim for such loss or damages shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the general freight agent of the said carrier, at his office in the City of Cincinnati, Ohio, within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs." Said contract contains this further provision: "And S. R. Keasler does hereby acknowledge that he had the option of shipping the above described live stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers, and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said live stock upon their respective roads and lines, but has voluntarily decided to ship same under this contract at the reduced rate of freight above mentioned."

On the trial of said cause the following stipulation was entered into between appellee and appellant:

"It is hereby agreed by and between the plaintiff and defendant in the above suit that a jury be waived in this court, and the case be tried by the court upon the following facts:

"That the plaintiff, on July 25, 1914, offered to the defendant at Omaha, Ill., 59 hogs for shipment to Talbert & McDonald & Co., Cincinnati, Ohio, and that the defendant accepted said shipment at 11:35 a. m. on said day as per contract, duly executed between the parties hereto attached hereto, and made a part of this stipulation; that said hogs arrived at destination July 26, 1914, at 9:35 p. m., and were unloaded at 10:03 p. m. same day; that when said hogs arrived it was found that 11 hogs were dead; that on August 3, 1914, plaintiff wrote a letter to Mr. C. V. Lewis, freight

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claim agent of the defendant at Baltimore, Md., as per letter attached hereto and made a part of this stipulation.

“Either party hereto may introduce such further competent and material evidence in this case not inconsistent to the above facts.”

The question, therefore, which is presented by this appeal and which is raised by the proposition of law submitted by appellant and which was refused by the trial court is whether or not appellee was bound by the provisions in said contract requiring him within five days to file his claim for damages, verified by his affidavit, or that of his agent, with the general freight agent of appellant at his office in the City of Cincinnati, Ohio. If appellee is to be bound by said provision in said contract, then the judgment of the trial court will have to be reversed without reference to any other question presented in this record.

Appellee makes no contention whatever that he complied with this provision of the contract of shipment entered into on his behalf by his agent, Harrell. In other words, he does not contend that the letter which he wrote to C. V. Lewis, freight claim agent of appellant at Baltimore, Maryland, on August 3, 1914, some eight days after said shipment was made, is a compliance with the provision of said contract of shipment above referred to, but the insistence of appellee is that the provisions of said contract are unreasonable and therefore are not binding upon him in this case.

This being an interstate shipment, the only question for us to determine is whether or not the courts of this State are bound by the provision of the Interstate Commerce Act with its amendments, and by the construction placed upon the same by the Federal courts as well as the courts of this State. In our view of the law, this is not now an open question as it has been definitely determined, not only by the Federal courts, but also by our Supreme Court, that interstate ship-

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ments are governed by the provision of the Interstate Commerce Act.

In the case of *Michelson v. Judson Freight Forwarding Co.*, 268 Ill. 546, at page 556, the court referring to the Carmack amendment to the Interstate Commerce Act says: "This statute has been held by the Supreme Court of the United States to be constitutional. (*Atlantic Coast Line Railway Co. v. Riverside Mills*, 219 U. S. 186.)" It has also been held in construing the act that almost every detail of the subject is covered, and there can be no doubt but that Congress intended by the act to take full possession of the subject of interstate shipments, and that the effect of the act was to supersede all State laws and regulations on the subject. *Adams Exp. Co. v. Croninger*, 226 U. S. 491; *Gamble-Robinson Commission Co. v. Union Pac. R. Co.*, 262 Ill. 400. In the case at bar, the shipment in question was an interstate shipment, and there can be no question but that it is governed by the provisions of the Interstate Commerce Act, including the Carmack amendment.

It is insisted by appellee that the provision in the contract entered into with appellant for the shipment of his stock requiring notice of his claim to be filed within five days is unreasonable. We take it that under the decisions of the United States Supreme Court construing the Interstate Commerce Act that this is not a question to be passed on by this court; that the reasonableness or unreasonableness of the provision with regard to the giving of notice is a question for the Interstate Commerce Commission, and that so long as the filed tariff provides for a notice of this character, it is binding upon the shipper as well as the carrier, and cannot be questioned in a suit for damages. We do not know whether or not this specific question in connection with the notice to be given of a claim for damages has been passed upon by the United

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States Supreme Court, but that court has frequently passed upon the question of the effect of the filed tariffs in connection with the limit to be placed on the amount of recovery for loss of goods shipped and in every such case has held the proviso with reference to the amount of recovery in case of loss to be binding on the shipper and the carrier. *Pierce Co. v. Wells Fargo & Co.*, 236 U. S. 278; *Missouri, K. & T. Ry. Co. v. Hariman Bros.*, 227 U. S. 657; *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508 [8 N. C. C. A. 53]; *Boston & M. R. R. v. Hooker*, 233 U. S. 97; *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184; *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639. We have no doubt but a like holding would be made by said court on the provision with reference to notice of claim for damages.

It is next contended by appellee that he had no notice of the provisions of said contract with reference to the five-day clause. We do not believe that appellee is in a position to raise this question as the provision of the contract signed by his agent is binding on him, notwithstanding he may not have had actual knowledge of the stipulations in his contract.

In the case of *Michelson v. Judson Freight Forwarding Co.*, *supra*, at page 558, the court quoting from the case of *Boston & M. R. R. v. Hooker*, 233 U. S. 97, says: "It was held that a regulation contained in the published tariffs of an interstate railway carrier on file with the Interstate Commerce Commission limiting baggage liability to \$100 unless a greater value is declared and stipulated by the owner, and the excess charges paid, is binding upon the passenger in case of loss of the baggage through the carrier's negligence." This is held to be the law regardless of the passenger's lack of knowledge of or assent to such regulation.

In *Boston & M. R. R. v. Hooker*, *supra*, quoting from *Adams Exp. Co. v. Croninger*, *supra*, it was said:

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"The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the commission." To the same effect is *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639.

Appellee being bound by the provision in the contract entered into with appellant, that notice of any claim for damages must be filed within five days, it will not be necessary for us to pass on the question as to whether or not appellant's alleged failure to water said hogs was the proximate cause of the injury complained of. For although appellee might have had a right of action for damages had he filed his claim in compliance with the provisions of his contract, his failure so to do would bar such right.

The whole theory of the Interstate Commerce Commission is that contracts for interstate shipments must be uniform and must be binding on all shippers and carriers alike, and so long as the tariffs filed with the Interstate Commerce Commission stand, they are not to be disregarded by either shipper or carrier, but are to be uniformly enforced. Not to do so in particular cases would amount to discrimination and would be a violation of the provisions of said act, and the courts are not warranted in countenancing any other than a uniform enforcement of its provisions until changed by the Interstate Commerce Commission under the provisions of said Interstate Commerce Act.

For the failure of the trial court to hold the proposition of law submitted, the judgment of said court is reversed.

Judgment reversed.

MR. JUSTICE McBRIDE dissents.

W. C. Goodall, Charles F. Merker and W. J. Miller, Appellants, v. Silas Cook, William P. Launtz, John J. Weis, J. A. Goodall and Bankers Accident Insurance Company, Appellees.

1. *INSURANCE—how transfer of risks may be made in mutual company.* Where a bill for injunction was filed by certain members of a mutual accident and sickness insurance company against the majority members of its board of directors, charging conspiracy to reinsure and transfer the risks held by the company in order to enable said majority members to convert the assets of said company to their own use, and a temporary injunction was issued thereon, *held* that the officers of such company did not possess the powers necessary to make such transfer of risks, as it could only be done under the statute (J. & A. ¶ 6564) by a two-thirds vote of the members and submission of the reinsurance contract to the meeting including all of the members, and such bill was without equity, and the court was without jurisdiction to issue the injunction.

2. *INSURANCE—provisions of statute relative to transfer of risks in mutual company as part of contract of transfer.* The provisions of the statute with reference to the transfer of members or risks in a mutual insurance association (J. & A. ¶ 6564) enter into and become a part of the contract of transfer just the same as though the provisions of the statute were written into the articles of transfer.

3. *EQUITY, § 23*—what court may not determine upon dismissing bill for want of equity.* Where in a suit for an injunction by certain members of a mutual accident and insurance company against the majority members of its board of directors, charging conspiracy to reinsure and transfer the risks held by the company, in order to enable such majority members to convert the assets of the company to their own use, the bill for injunction was dismissed for want of equity and a temporary injunction issued thereon dissolved, *held* that the court had no jurisdiction then to go on and undertake to determine who was president of the company or to enter an order undertaking to dispose of the company's personal property where the bill contained no basis for such an order.

Appeal from the City Court of East St. Louis; the Hon. W. M. VANDEVENTER, Judge, presiding. Heard in this court at the March term, 1916. Affirmed in part and reversed in part with directions. Opinion filed November 13, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Goodall et al. v. Cook et al., 203 Ill. App. 69.

JAMES O. MILLER, for appellants.

M. MILLARD and DAN MCGLYNN, for appellees.

MR. JUSTICE BOGGS delivered the opinion of the court.

At the January Term, 1916, of the City Court of East St. Louis, appellants, for themselves as members of the Bankers Accident Insurance Company, and for the benefit of all other members who might join, filed their bill of complaint asking for an injunction against appellees, setting up said company is a mutual association organized under the statutes of Illinois for insuring its members against disability due to accident and sickness; that it has members numbering about 3,700, and has assets of \$20,000; that it is managed by a board of seven directors, consisting of appellees and Albert Diehm, Edmund Goedde and appellant W. C. Goodall; that the appellant W. C. Goodall was president and had the active management of the affairs of said association until the acts of appellees hereinafter complained of; that appellees conspired to reinsure the members of the said company in another company with a secret commission to themselves; that appellees, in pursuance of the plan to reinsure, found it necessary to eliminate appellant W. C. Goodall from the management of the association; that appellees through said Albert Diehm represented to said W. C. Goodall that certain changes were desired in the by-laws which at that time required unanimous consent, and that because of the strained relations between appellee J. A. Goodall and appellant W. C. Goodall one or the other would object and prevent the desired changes in said by-laws; that upon this representation of appellees, the resignation of appellant W. C. Goodall as president was given on August 25, 1915; that the by-laws were amended as desired in October without objection from

appellant and that he continued the management thereafter with the consent of appellees, but that the resignation was not returned; that thereafter, on the 26th day of November, at a regular meeting of the board, appellees, being a majority of the board of directors, voted to accept the said resignation of appellant W. C. Goodall; that following the action of the board, appellees locked appellant out of the office of the association and notified the agents and others that said W. C. Goodall was no longer in charge of the business of said company; that an illegal meeting of the board of directors was held on November 29th, entirely without notice to the said W. C. Goodall, and that a pretended election was had of appellee Silas Cook as president; that said directors refused to rescind their pretended election of Cook or permit said Goodall to perform his customary duties of president.

The bill further charges that appellee J. A. Goodall negotiated with the Washington Life and Accident Company and the Clover Leaf Casualty Company for reinsuring the members of the Bankers, and that the interests of the members would be jeopardized by the reinsurance of the Bankers and by the elimination of appellant W. C. Goodall from the management of the association.

The bill concluded with a general prayer for summons and an injunction.

The chancellor ordered the issuance of a temporary writ of injunction as follows: "Therefore, by these presents, we command you and each of you to desist and you are hereby enjoined and restrained from making any contract for the reinsurance of the members of the Bankers Accident Insurance Company, providing for a commission or gratuity for themselves, or either of them, either directly or indirectly, and from interfering with W. C. Goodall in the discharge of his duties as president of the Bankers Accident Insur-

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ance Company, and that Silas Cook is hereby restrained and enjoined from presiding at members' or directors' meetings of said Bankers Accident Insurance Company until further order of the court in the premises."

Appellees filed an answer denying all of the material allegations of the bill and averred that about June, 1915, dissensions arose between the president, W. C. Goodall, and the secretary, J. A. Goodall, that threatened the destruction of the company's business; that the board on November 26th, accepted the resignation of W. C. Goodall theretofore tendered; that the resignation of said W. C. Goodall was not obtained by any misrepresentation, misstatement, promise or inducement, but that the resignation was obtained and demanded for the sole and only reason that the dissensions of the president and secretary threatened to destroy the business of the company, and that the interests of the company required such action. Formal replication was filed to the answer, and said cause was heard upon the merits.

At the conclusion of complainants' evidence, appellees moved to dissolve the injunction and dismiss the bill for want of equity. Thereupon the chancellor made the following findings: "That the resignation of W. C. Goodall as president was tendered and accepted by the board of directors on the 26th of November, 1915, and that thereafter he ceased to be president; that J. A. Goodall had not negotiated with the Washington Life and Accident Company for the reinsurance of the members of the Bankers without the knowledge and consent of the other defendants; that the resignation of W. C. Goodall was voluntarily given; that there was no equity in the bill and that the complainants wholly failed to establish the averments of the bill and that the injunction was improvidently issued without any grounds therefor, and entered an order dissolving

the injunction and dismissing the bill for want of equity."

Thereupon appellees filed a motion for an order of restitution of the effects and property of the Bankers Accident Insurance Company. Over the objection of appellants the chancellor heard testimony as to the property said to be in the possession of the appellants under the writ of injunction. After a hearing on said motion, the chancellor found that at the time of the service of the writ upon him that Silas Cook was in possession of the effects of the Bankers as president and that in obedience to the command of the writ he surrendered possession to W. C. Goodall, and it was ordered that said W. C. Goodall restore the possession of the effects of said company to Cook as president; that in event of his refusal to so turn over the effects that a writ of restitution issue to the sheriff to put said Cook in possession thereof, and that the bill be dismissed for want of equity.

It is first contended by appellants that the court erred in dissolving the temporary injunction issued in this case and in failing to make the same perpetual.

The theory of appellants being that J. A. Goodall, the secretary, and who was also one of the directors, and certain other of the directors were attempting to reinsure and transfer the risks held by the Bankers Accident Insurance Company in order to enable them to convert the assets of said association controlled by them as its officers to their own use. The evidence in the record in our judgment does not bear out this contention, and even if it did, under the statutes of this State governing the transfer of risks of the character held by the above named association, the officers of the association do not possess the power necessary to make said transfer. The transfer can only be made under the provisions of the statute by a two-thirds vote of the members holding certificates in said association.

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Section 245 of chapter 73, Hurd's Revised Statutes 1913 (J. & A. ¶ 6564), provides as follows: "No such corporation under the laws of this State shall transfer its risks to, or reinsure them in any other corporation, unless the contract of transfer or reinsurance is first submitted to and approved by a two-thirds vote of a meeting of the insured, called to consider the same, of which meeting a written or printed notice shall be mailed to each member, certificate or policy holder at least thirty days before the day fixed for such meeting. If such transfer or reinsurance shall be approved, every member, certificate or policy holder of the corporation, who shall file with the secretary thereof, within ten days after the meeting, a written notice of his preference to be transferred to some other corporation than that named in the contract shall be accorded all the rights and privileges, if any, in aid of such transfer as would have been accorded under the terms of such contract, had he been transferred to the corporation named therein."

It requires a two-thirds vote of all the members, after notice, to transfer the risks to some other company, and the reinsurance contract must be submitted to the meeting and include all of the members. *Bolles v. Mutual Reserve Fund Life Ass'n*, 220 Ill. 400; *Brown v. Mutual Reserve Fund Life Ass'n*, 224 Ill. 576.

The provisions of the statute with reference to the transfer of members or risks in an accident association of the character here involved enter into and become a part of the contract of transfer just the same as though the provisions of the statute were written into the articles of transfer. *Bolles v. Mutual Reserve Fund Life Ass'n*, *supra*; *Brown v. Mutual Reserve Fund Life Ass'n*, *supra*.

We are therefore of the opinion that appellees, as officers and directors of the Bankers Accident Insurance Company, had no power or authority to transfer

the risks covered by this association or to effect a reinsurance of the members of said association in any other organization. Such transfer could only be effected in the manner provided by statute, and the efforts of appellees to effect such transfer without submitting the same to a vote of the members of said association would be ineffectual. The temporary injunction sued out restraining appellees from making any contract for the reinsurance of the members of the Bankers Accident Insurance Company was therefore wholly unnecessary and the trial court was without jurisdiction to issue the same. Officers of an insurance corporation of the character here in question have the right to discuss questions of policy with regard to the management or control of the business of such association, even to the extent of the question of the advisability of consolidating it with another association of the same character or the advisability of reinsuring the risks held by the association represented by them in a different insurance association.* These are matters that usually precede submitting the question of consolidation or the transfer of risks to a vote of the members of the association. The acts of appellees in this case, we think, as shown by the record, would not warrant the conclusion that they were intending to violate the provisions of the statute or were attempting to transfer the risks of the Bankers Accident Insurance Company without first submitting that question to a vote of the members.

The next question which arises on the record in this case is as to the jurisdiction of the court to determine who were the officers of said Bankers Accident Insurance Company. The trial court after finding that the injunction should be dissolved finds that Silas Cook was the president of the Bankers Accident Insurance Company and that W. C. Goodall was not such president. When a bill is dismissed for want of equity, the

Goodall et al.¹ v. Cook et al., 203 Ill. App. 69.

court ordinarily makes no findings of fact other than to find the equities with the defendants. We are inclined to the opinion in this case that there was no occasion for departing from that rule, and that the court's finding with reference to who was or was not rightfully the president of the Bankers Accident Insurance Company was not a proper finding.

It might be further observed that the injunction in this case was not served until the 13th day of January, 1916, and on that day the members of the company held elections for the purpose of electing directors and officers of said association, and the question who was or was not the president of said association prior to that time is not a very vital question in this case.

The next question raised by the assignment of errors is whether the court in dissolving the injunction and dismissing the bill for want of equity should have entered an order requiring W. C. Goodall to return to Silas Cook the property of said association. It is contended by appellants that it is the duty of a court of equity, when it has jurisdiction of a cause, to make a complete decision upon all points before it. This proposition we concede to be correct, but the court in this cause, having dissolved the temporary injunction issued by it and dismissed the bill for want of equity, had no jurisdiction to then go on and undertake to determine who was the president of the board of directors of said association. Neither had it jurisdiction to enter an order undertaking to dispose of the possession of the personal property of said association.

It might be further observed that there is nothing in the bill on which to base an order of that character. The bill was solely a bill for injunction, and the temporary injunction which had been granted by said court did not undertake to dispose of the possession of the personal property in question. There was there-

Hummel et al. v. Freshwater. 203 Ill. App. 77.

fore no basis for the contention that the court, after having dissolved the injunction and dismissed the bill for want of equity, should then have a hearing in reference to the custody of the personal property and to enter an order disposing of the same. If appellants are wrongfully withholding any of the personal property of said association from the proper authorities, the law affords an ample remedy to regain possession thereof, and the remedy should be sought there.

The order, therefore, will be that the judgment of the City Court dismissing the bill for want of equity and dissolving the injunction be affirmed. The order designated an order of restitution will be reversed and cause will be remanded with directions to vacate said order of restitution.

The costs of the appeal in this case will be equally divided between appellants and appellees.

Affirmed in part and reversed in part with directions.

F. W. Hummel and E. S. Needs, trading as Hummel & Needs, Appellants, v. C. F. Freshwater et al., Appellees.

(Not to be reported in full.)

Appeal from the Circuit Court of Crawford county; the Hon. CHARLES H. MILLER, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Petition by F. W. Hummel and E. S. Needs, copartners, trading as Hummel & Needs, complainants, against C. F. Freshwater (J. L. Barnes, C. M. Schuder.

Hummel et al. v. Freshwater, 203 Ill. App. 77.

Henry Labowitz and Louie Lindenbaum, copartners, trading as the Lawrenceville Salvage Company), the Western Supply & Wrecking Company, a corporation, and the Independent Torpedo Company, a corporation, defendants, to enforce a mechanic's lien for drilling a well. From a judgment refusing to hold Barnes, Schuder and the Lawrenceville Salvage Company personally liable, the Western Supply & Wrecking Company, Independent Torpedo Company and complainants appeal.

McCARTY & ARNOLD and NEWLIN, PARKER & NEWLIN, for appellants.

GEORGE W. LACKEY and NOAH M. TOHILL, for appellees.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 8*—*what is insufficient evidence to prove agency.* The declarations of an alleged agent alone are not sufficient to prove his agency.

2. PRINCIPAL AND AGENT, § 8*—*what evidence is necessary to establish liability of persons as principals.* Where the owner of a certain oil lease contracted with three persons to sell to each a one-fourth interest in a well he proposed building when same was completed, and on completion of such well by him such interests were assigned to and paid for by said parties, and thereafter liens for supplies for the construction of the well furnished to the owner were filed and suit brought thereon and the materials sold to satisfy such liens, leaving a deficiency for which a personal decree was entered against such owner alone, *held* that in order to hold them to any personal liability it would be necessary to prove said owner was their agent either by positive evidence or by the facts and circumstances surrounding the transaction.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mary Newkirk, Administratrix of the Estate of Frank P. Newkirk, Deceased, Appellee, v. Albert F. Gross, Appellant.

1. **APPEAL AND ERROR**—*when giving unnecessary instruction is harmless error.* Giving an instruction which was unnecessary because it covered a question not raised in the case is not reversible error on that account.

2. **NEGLIGENCE, § 213***—*when instruction not misleading.* Where an instruction in an action for shooting plaintiff's intestate was to the effect that if the jury believed from the evidence that the deceased was shot by the discharge of a gun in the possession or control of the defendant "at or immediately before the time of its discharge," etc., *held* that the word "immediately" is generally understood as meaning "instantly, directly, without delay, forthwith," etc., and that its use could not have misled the jury.

3. **INSTRUCTIONS, § 120***—*when properly refused.* It is not error to refuse to give an instruction not based on the evidence.

4. **NEGLIGENCE, § 151***—*when burden of proof as to freedom from is on person holding exploding weapon.* A person in the sole control, possession and management of a dangerous weapon at the time it explodes and injures another person has the burden of showing that such explosion was not by any negligence or fault on his part.

5. **NEGLIGENCE, § 191***—*when freedom from contributory negligence is a question for the jury.* In an action for shooting plaintiff's intestate, *held* that it was a question of fact for the jury whether the defendant was without fault at the time of the injury, and their finding should not be disturbed unless against the manifest weight of the evidence.

Appeal from the Circuit Court of Clinton county; the Hon. JAMES C. McBRIDE, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916. *Certiorari* denied by Supreme Court (making opinion final).

FORD & JONES, for appellant.

NOLEMAN & SMITH and J. J. McGAFFIGAN, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE BOGGS delivered the opinion of the court.

The record in this case discloses that on December 3, 1914, while appellant and appellee's intestate were hunting near the home of appellee's intestate, the gun of appellant was discharged and its contents took effect in the right limb of appellee's intestate between the hip and the knee. The injury occurred about 2 p. m. in the afternoon, and at 8 p. m. in the evening death resulted therefrom.

An action in trespass was instituted by appellee as administratrix of her husband's estate in the Circuit Court of Clinton county against appellant resulting in a verdict and judgment of \$1,900 against appellant, from which judgment he prosecutes this appeal.

It is first contended by appellant that the court erred in refusing to exclude the evidence and peremptorily instruct the jury to find him not guilty. Without going into a detailed consideration of the evidence in the record, it will be sufficient to say that taking the evidence with the proper inferences to be drawn therefrom it was sufficient to go to the jury and there was no error in the trial court refusing to give appellant's peremptory instructions.

It is next insisted by appellant that the trial court erred in giving the second and third instructions given on behalf of appellee. Instruction No. 2 is as follows: "The court instructs the jury that if you believe from a preponderance of the evidence in this case that the deceased, Frank P. Newkirk, while he was using ordinary care for his own safety, was wounded as the result of the discharge of a gun which was in the control of the defendant, Albert F. Gross, at or immediately before the time of said shooting, then it is not essential for the plaintiff to prove in order to recover in this case that the shooting of her husband was done wilfully or intentionally by the said Albert F. Gross." The complaint made as to this instruction is that the

court erred in instructing the jury that it was not necessary for appellee to recover in this case to prove "that the shooting of her husband was done wilfully or intentionally by the said Albert F. Gross." We do not understand from the argument of appellant's counsel that this instruction does not state a correct principle of law, but it is argued that as no question was made that the shooting was intentional or wilful, an instruction in regard thereto would tend to mislead the jury as to the issues involved. While the giving of this instruction may have been unnecessary in this case, the giving of the same was certainly not such error as to require a reversal of the judgment on that account.

Appellee's third instruction is as follows: "The court instructs the jury that if you believe from a preponderance of the evidence in this case that the said Frank P. Newkirk, while in the exercise of ordinary care for his own safety, was shot by the discharge of a gun which was wholly in the possession or control of the defendant, Albert F. Gross, at or immediately before the time of its discharge, and that the said Frank P. Newkirk died as the result of said shooting, then, although you may further believe from the evidence that the said Gross did not intentionally discharge said gun at the said Newkirk, yet if you further believe from the evidence that said gun was discharged by the reason of the negligent or careless manner in which said gun was then and there handled or managed by said Gross, then you may find the defendant guilty." The complaint made to this instruction is the use of the words "at or immediately before the time of its discharge," it being contended that the statement in the instruction would tend to mislead the jury and that the instruction did not state a correct principle of law. The word "immediately" used in the instruction is a word of such common acceptation that we do not think the jury would have been misled thereby. As generally understood, the word has much the

Newkirk v. Gross, 203 Ill. App. 79.

same meaning as instantly, directly, without delay, forthwith, etc. "'Immediately' implies without any interposition of other occupation; instantly, or instantaneously; in an instant, or without any intervention of time; directly, without any division of attention." *Streeter v. Streeter*, 43 Ill. 165.

We do not believe there was any substantial error in the court giving this instruction and we fail to see how the jury could have been misled to the hurt of appellant thereby.

It is next insisted that the court erred in refusing the ninth, tenth and eleventh instructions presented on behalf of appellant. So far as instruction No. 9 presents a correct principle of law, it was covered by other instructions given on behalf of appellant. Instructions 10 and 11 assumed as facts matters not supported by the evidence. In other words, instructions 10 and 11 are not based on evidence in the record. Instead of it being error in the court refusing to give instructions 10 and 11, the court would have erred had it given said instructions. We think so far as the instructions in this case are concerned, the court liberally instructed the jury on behalf of appellant, giving some eight instructions, which we think covered appellant's theory of the case so far as his theory was supported by the law. Only three instructions were given on behalf of appellee.

It is also contended by appellant that the verdict is against the manifest weight of the evidence. Appellant's counsel concede in their argument, quoting from page 5 of their brief: "That one in the control, possession and management of a dangerous weapon, who, while so in possession and control of the same, permits it to explode and injure another, casts the burden upon him to show that it was not by any negligence or fault upon his part." This, we understand, to be a substantially correct statement of the law covering this character of case. *Atchison v. Dullam*, 16 Ill.

Newkirk v. Gross, 203 Ill. App. 79.

App. 42; *Zoeller v. Schmitz*, 172 Ill. App. 167; *Harrison v. Allen*, 179 Ill. App. 520.

In *Atchison v. Dullam*, *supra*, the court after discussing a line of cases involving injuries by firearms at page 46 says: "These adjudications which we admit as authorities, and give our unqualified approval to the conclusions therein reached, clearly show how strictly the law holds a party responsible for injuries inflicted upon another in the use or handling of firearms. They determine that if a person is injured by the discharge of a gun in the hands of another who has entire control of it, the burden is cast upon the latter to prove that the gun was not fired at him either intentionally or negligently, but the result was inevitable and without the least fault upon his part."

The court further says: "Firearms are not usually discharged without the intervention of some human agency. A presumption, therefore, almost conclusive in its character, is raised, that when such weapons are discharged while in the possession and control of another, the firing is caused either by design, carelessness or inadvertence upon his part."

In *Zoeller v. Schmitz*, *supra*, at page 169 the court says: "The rule is that if a person is injured by the discharge of a gun in the hands of one who has entire control of it, the burden is upon the latter to prove that the gun was not fired by him, either intentionally or negligently, but that the result was inevitable and without the least fault upon his part. *Atchison v. Dullam*, 16 Ill. App. 42; *Cole v. Fisher*, 11 Mass. 137; *Bahel v. Manning*, 112 Mich. 24; *Morgan v. Cox*, 22 Mo. 373. In the cases cited it would seem that the weapon was in the hands of the defendant, but we think the rule should be the same whether the gun was actually in the hands of the defendant or in his lap, as in the case before us."

In *Harrison v. Allen*, *supra*, being a case from this

district, this court cites and approves the language used in *Atchison v. Dullam, supra*.

It is contended by appellant that the shooting of appellee's intestate was purely accidental without any negligence on the part of appellant, and occurred while appellant and appellee's intestate were hunting; that appellant tripped and fell with his gun on his shoulder at the time and that when the gun struck the ground it exploded, the shot therefrom lodging in the right limb of appellee's intestate between the hip and the knee. It is conceded that appellant and appellee's intestate were only about thirty or thirty-five feet apart at the time the injury occurred; they were quail hunting and the shot which lodged in the limb of appellee's intestate were small bird shot. The testimony of appellee and her son Frazier Newkirk, a young man about eighteen years of age, is to the effect that appellant and appellee's intestate had been gone from the house some thirty minutes when appellant came running to the house of appellee's intestate hallooing, and upon the son inquiring of appellant, "What is the matter, Mr. Gross?" appellant replied, "I have shot your father's leg off from here on down and he fell right down in the water." On the other hand, appellant testified in his own behalf, in reference to this conversation, that after the injury occurred he went to the house, and that appellee's son asked him what had happened, and in answer he said: "I told him I had fallen and shot Frank Newkirk in the leg." Frazier Newkirk, son of appellee, testified that when he, appellant, and one or two of the neighbors went to the place where appellee's intestate was lying after his injury, appellant said to appellee's intestate, "Frank, you know I did not intend to do it," and that appellee's intestate replied, "Albert, I know you didn't." Also, that appellee's intestate stated to one of the neighbors, who was in the house of appellee's intestate the after-

noon of the injury, that the shooting was accidental.

An attempt was made to impeach Frazier Newkirk by showing that he made different statements with reference to what appellant had said at the home of appellee's intestate immediately after the injury, the effect of the testimony being that he had stated in the presence of these witnesses that appellant said that he had caught his foot in the grass and fell down and shot appellee's intestate in the leg. This evidence tended to impeach the testimony of appellee's son, but we are of the opinion that taking the whole testimony as shown by the record it was a question for the jury to determine as to whether or not the shooting of appellee's intestate was without the fault of appellant. It was conceded by appellant in his argument that immediately prior to the discharge of his gun he had the complete possession and control thereof. (Quoting from page 20 of appellant's brief), "We confess that Gross, immediately prior to the discharge of the gun, had the complete possession and control thereof, and did not lose control of the same until after he fell to the ground." The burden under the authorities above cited was on appellant to prove that the shooting of appellee's intestate was without fault on his (appellant's) part. There is no testimony in the record proving or tending to prove what degree of care appellant was using just at and immediately prior to the time his gun was discharged.

There was no serious error in the instructions and, as there is no complaint with reference to the rulings of the court on the admission and exclusion of evidence, it was a question of fact for the jury as to whether or not appellant was without fault at the time of the injury, and their finding on that question should not be disturbed unless against the manifest weight of the evidence. We are unable to say that the jury were not warranted in their findings.

Sternberger v. Anheuser-Busch Brewing Ass'n, 203 Ill. App. 86.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

MR. JUSTICE McBRIDE took no part on the hearing or decision of this case.

Morris Sternberger, trading as Empire Furniture Company, Appellee, v. Anheuser-Busch Brewing Association, Appellant.

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Action by Morris Sternberger, trading as Empire Furniture Company, plaintiff, against Anheuser-Busch Brewing Association, a corporation, defendant, to recover for certain saloon furnishings that plaintiff claimed to have sold to defendant. From a judgment in favor of plaintiff, defendant appeals.

DAN MCGLYNN, for appellant.

KEEFE & SULLIVAN, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1411*—*when finding of jury based on conflicting evidence will not be disturbed.* The finding of the jury upon

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Riggin v. Keck, 203 Ill. App. 87.

a disputed question of fact when amply supported by the evidence will not be disturbed.

2. CORPORATIONS, § 355*—*when evidence sufficient to show authority of agent to make contract.* Where the evidence tended to show that the manager of a beer company's office had authority to lease and rent out saloons, sell beer and collect money, and was a salesman and general man of said company, and claimed to have authority to buy certain saloon furnishings, and said company's vice president said the matter should be settled with said manager as local agent, *held* that the jury were warranted in finding said manager had authority to enter into a contract for the purchase of such furnishings.

3. CORPORATIONS, § 355*—*when evidence is sufficient to show agency of local manager of corporation to transact business.* Evidence *held* to show that the defendant beer company had in making a certain person manager of its local office in East St. Louis clothed him with apparent authority to transact all business of the character said company was transacting in that city, including the purchase of certain saloon furnishings.

4. CORPORATIONS, § 355*—*when bound by acts of agent.* A corporation is bound by the acts of its agent when it clothes such agent with apparent authority to transact certain business, even if, as a matter of fact, it has not so authorized him.

Dora M. Riggin, Appellee, v. Martin Keck, Appellant.

(Not to be reported in full.)

Appeal from the County Court of Madison county; the Hon. H. B. EATON, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916. Rehearing denied and opinion modified and refiled January 13, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Dora M. Riggin, plaintiff, against Martin Keck, defendant, to try the right to property taken by defendant under an attachment. From a judgment in favor of plaintiff, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same title and section number.

Riggin v. Keck, 203 Ill. App. 87.

J. L. SIMPSON, for appellant.

GEERS & GEERS, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. ACKNOWLEDGMENT, § 34*—*what does not constitute fatal omission in by justice of the peace.* The omission of the words "and entered by me" made by a justice of the peace in his certificate of acknowledgment to a bill of sale does not render such bill of sale void as to third parties.

2. ACKNOWLEDGMENT, § 44*—*when presumed that proper entry of certificate of is entered in record of justice of the peace.* It will be presumed, on appeal, in absence of evidence to the contrary, that an entry of a certificate of acknowledgment to a bill of sale was entered by a justice of the peace in his records.

3. FRAUDULENT CONVEYANCES, § 89*—*when bill of sale by husband to wife is valid.* Where a husband is indebted to his wife at the time he executes a bill of sale to her of certain personal property, and said bill of sale is made upon a sufficient consideration and is a fair transaction, it is valid and binding notwithstanding he may be at the time indebted to other parties.

4. FRAUDULENT CONVEYANCES, § 284*—*when good faith in making transfer is question for jury.* The question whether a husband's conveyance to his wife of certain personal property is for a bona fide debt to her and made in good faith and not in fraud of the rights of creditors is one of fact for the jury, and their finding should not be disturbed unless against the manifest weight of the evidence.

5. APPEAL AND ERROR, § 1562*—*when refusal of abstract instruction is harmless error.* The refusal of an instruction which is abstract in form though correct in announcing the principle of law is discretionary with the court and is not reversible error, particularly if such instruction is long and involved and would tend to confuse rather than enlighten the jury.

6. APPEAL AND ERROR, § 1525*—*when defective instructions are not reversibly erroneous.* Instructions are to be taken as a whole, and if when so taken the jury could not have been misled by the failure of some of the instructions to require the jury to find from a preponderance of the evidence, such failure is not reversible error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Holliday et al. v. O'Gara Coal Co., 203 Ill. App. 89.

7. APPEAL AND ERROR, § 1546*—*when giving of instruction assuming facts is harmless error.* An instruction which assumes a fact is erroneous, but where such instruction does not direct a verdict, and the error is not serious when the instruction is considered with other instructions, and the facts assumed arise only incidentally, the giving of such instruction is not reversible error.

John Holliday and Sarah Lounsberry, Defendants in Error, v. O'Gara Coal Company, Plaintiff in Error.

1. MINES AND MINERALS, § 182*—*when existence of dangerous condition in mine because of fallen electric wires is question for jury.* Where electric wires carrying current for motors and machines in a coal mine were fastened to pegs at the top of a narrow space eighteen inches wide and four feet high on the side of a car track but had become detached and had fallen to the ground a few inches from the outside rail for about thirty feet so that plaintiffs' son, a car driver, when he went to the rear of his car by direction of the mine boss to remove a sprag placed under the inside wheel to keep the car from backing came in contact with said fallen wires and was killed, *held* that whether a dangerous condition existed was a question of fact for the jury.

2. MINES AND MINERALS, § 194*—*when instruction is properly refused in action for death of miner.* An instruction in an action for the death of a miner which does not include all the elements to be considered in determining whether he was properly at the place in the mine where he was killed is properly refused.

3. DEATH, § 62*—*when presumed that pecuniary loss arises from death of child.* The law presumes pecuniary loss to a parent from the fact of his child's death, but a collateral relative must prove the deceased was in the habit of furnishing such relative pecuniary assistance or he can only recover nominal damages.

4. APPEAL AND ERROR, § 1535*—*when omission of word "preponderance" from instruction is harmless error.* The omission of the word "preponderance" from an instruction requiring the jury to find "from the evidence" is not reversible error where the instructions taken as a series showed the jury were fully informed on the questions of burden of proof and preponderance of evidence and could not have been misled.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Holliday et al. v. O'Gara Coal Co., 203 Ill. App. 89.

5. DEATH, § 67*—*when verdict is not excessive for death of child.* Where, in an action for damages for killing of plaintiffs' son, the deceased was shown to have been earning \$2.56 a day and was only eighteen years old, a verdict for \$1,000 was not unreasonable.

Error to the Circuit Court of Saline county; the Hon. ALBERT W. LEWIS, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

WHITLEY & COMBE, for plaintiff in error; MASTIN & SHERLOCK, of counsel.

GEORGE W. DOWELL and B. W. POPE, for defendants in error; PARRISH, PARRISH & STILWELL, of counsel.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Defendant in error recovered a judgment in the court below for \$1,000, to reverse which this writ of error is prosecuted.

It appears from the record in this case that Carl Holliday, a son of the defendant in error, hereinafter called defendants, was killed while engaged at work in the mine of plaintiff in error, hereinafter called plaintiff. The deceased was killed on March 1, 1910, by reason of having come in contact with an uninsulated electric wire that was used for carrying the current of electricity to the machines that were engaged in undercutting the coal. Deceased had been at work for plaintiff for about two weeks and was engaged as a driver, pulling coal from the rooms into what they call a parting, on the west side of the mine, and was located in the main west entry. This parting was from seventy-five to one hundred feet in length and was of the width of about thirty feet, and in it was constructed two switches, one on the north side of the parting and one on the south side thereof; both of which switches connected with a single track in the main entry leading out

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

into the works on the west and to the single track extending from the east end of the parting to the hoisting shaft. The empty cars were brought from the hoisting shaft with a motor and placed upon the north switch in this parting and were there taken by the drivers west into the several rooms, and when loaded they were returned by the drivers and collected upon the track located upon the south side of the parting, from whence they were hauled by the motor into the hoisting shaft. There was a down grade from the west to this parting and drivers in bringing in their coal were required to sprag their cars so as to keep them from running through the switch in the parting onto the main track. At the place where the spragging was done there was only a single track, and the driver could sprag either on the north side of his car or on the south side, but according to the testimony of the witness, Florence Rippy, who was boss driver, he had told the deceased: "I would sprag on the south side in order to get over this switch on the branch, and for him to be careful and not get hurt;" and the deceased was at the time working under the directions of Rippy. It further appears that the track on the south side was within about eighteen inches of the rib, opposite the rails, which had been cut up the distance of about four feet, which left an opening about eighteen inches wide and four feet high on the south side of the rail, and in this open place the electric wires were placed which carried the electric current for the motors, and also for the machines, and these wires had been fastened to the top of this open space by pegs that were insulated; that for some twenty-five or thirty feet the wires had in some manner become detached from the pegs and dropped down to the ground, which left the wires within a very few inches of the outside rail of the south switch, and when deceased ran his car of coal in on this switch it came opposite the place where the wires were down, and the sprag being in the south

wheel, he passed around behind the car and attempted to remove the sprag which placed him close to the wire carrying the current of electricity to the machines, and it was at this place and under these conditions that he was killed by this electric current.

It further appears from the record that the defendants were the father and mother of deceased, and that when he was about the age of seven or eight years they separated and afterwards the mother procured a divorce and the boy remained with her for a while and the mother was remarried, at which time the boy lived with his grandfather, and in later years worked with his father in the mine, and the father received the wages. It also appears that immediately prior to the time of the boy's death he had been receiving his own wages and had, in fact, assigned them to different persons to procure money and articles purchased in the store. He was receiving \$2.56 per day for his work.

It is insisted by counsel for plaintiff that the dangerous condition did not exist in the mine as charged in the declaration and for that reason there could be no recovery.

The evidence discloses that in this parting there were two tracks, one on the south side upon which the loaded cars were brought from the works and collected for the motor to haul to the hoisting shaft, and the track upon the north where the empty cars were collected for the drivers to haul out into the works. There was a space of about eighteen inches wide and four feet high between the south rail and the rib, in which the wires for carrying the electricity were located. They had been fastened to the top of this under cut but by some means the wire had become detached from the fastening for the distance of twenty-five or thirty feet and allowed to lie on or near the ground. There was a down grade from the west and the drivers were required to sprag their cars so as to keep them from running through the switch onto the track, and

the deceased had been instructed by the boss driver, under whose direction he was working, that it was better to sprag the south wheel of his car so that when the car reached the frog it would turn onto the proper switch, and this the deceased did, and when the car was stopped near the place where this wire was down, other cars being ahead of it, there was no occasion to leave the sprag in so he passed around behind the car and stooped in between the car and the wire to remove the sprag, and while doing so was killed. We think that the evidence tended to show that a dangerous condition did exist and it was certainly a question of fact for the jury to determine, and the jury having found that it was a dangerous condition, we can see no reason for disturbing the verdict upon that ground, and believe that the court did not err in refusing to direct a verdict for the defendant. In this connection complaint is made of the refusal of defendant's sixth instruction, which, in effect, states such physical facts would not necessarily constitute a dangerous condition, but did not include in this statement the necessity of spragging the car or the removal of the sprag, and other conditions that in fact existed, and concluded by saying that if deceased did not have to go in the place where he did in the discharge of his duty, that the jury should find the defendant not guilty. We think the court did right in refusing this instruction. It did not include all the elements to be considered in determining whether or not the deceased was properly at this place, and even if he did not perform the duty in the particular manner that the defendant would desire him to, he was actually in the performance of the duty, and even if negligently performed, could only be contributory negligence, which is no defense.

It is also insisted by counsel for plaintiff that there is no proof of actual pecuniary damages to the defendants and that they were not entitled to recover more

than nominal damages. It is said that the deceased did not in any manner contribute to the support of either of his parents and that he was allowed to care for himself and lived with his grandfather, or wherever he could secure a livelihood. While it is true that the record does not disclose that he ever contributed any great amount, yet the uncle of the boy states that he did contribute to their support, but it is insisted that actual dependence for support in some substantial measure at least upon the decedent is necessary to a recovery. It is true that it appears from the evidence that the parents were separated, the mother had remarried and that the boy lived a part of the time with his grandfather and a part of the time worked with his father, and that a part of the time the boy lived with his mother, but with all that this did not change the relation that the boy sustained to the defendants. He was their son and they were lineal heirs. It is said by our Supreme Court in the case of *Willis Coal & Mining Co. v. Grizzell*, 198 Ill. 317, which was a case where a father was suing for loss by reason of the death of a son: "The deceased left no child, children, descendants of children or adopted child or children, and no mother. Benton Grizzell, the father, was the only 'lineal heir' of said Thomas Lee Grizzell, the deceased, hence the right of action rested in the appellee Benton Grizzell alone." The defendants being lineal heirs of the deceased, we think that it is well settled by our courts that upon proof of the death, by reason of the negligence of the plaintiff, the law presumes pecuniary loss and substantial damages to such lineal heirs, and that an entirely different rule prevails where the next of kin are lineal and where they are collateral. If collateral, they must prove that they were in the habit of receiving pecuniary assistance from the deceased or they could only recover nominal damages. "If they were lineal, the law presumes pecu-

Holliday et al. v. O'Gara Coal Co., 203 Ill. App. 89.

niary loss from the fact of the death." *Dukeman v. Cleveland, C., C. & St. L. Ry. Co.*, 237 Ill. 109, citing *City of Chicago v. Scholten*, 75 Ill. 468, and *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197.

We have examined the authorities cited by counsel for plaintiff upon this subject, and while in the case of *Fowler v. Chicago & E. I. R. Co.*, 234 Ill. 625, the court condemned the instruction given, but in passing upon that instruction they say that the question of damages is exceedingly difficult of admeasurement and must therefore be left largely to the judgment of the jury, and state a number of things that may be proven in connection with the life and habits of the deceased, and conclude by saying: "And to prove whether he was of good habits, so that the jury could determine whether or not he would probably make proper use of such ability and money-earning capacity as he might possess. These and other matters of like character may be shown and are proper for the consideration of the jury, and the jury should upon such evidence, together with all the other evidence in the case, fix the damages, if any, at a sum equal to the actual pecuniary loss sustained by the next of kin." In this connection counsel criticise the action of the court in giving the defendant's fifth instruction upon the question of damages and refusing plaintiff's fifth instruction upon the same question. The refused instruction by its terms limited the amount of recovery to nominal damages, and the defendant's fifth given instruction would by its terms permit substantial damages, as they should determine from all of the circumstances that he would have been able to and would probably have given to the plaintiffs so far as appears from the evidence. We believe that the court did not err in refusing the fifth instruction offered by plaintiff, and that the instruction as given for the defendants was substantially correct.

Lastly, it is insisted by counsel that the giving of the first instruction on behalf of the defendants was the most serious error committed by the court, in that it did not require the plaintiff to prove that a dangerous condition existed, at the place complained of, by a preponderance of the evidence in the case, and that it allowed "A jury full sway to find a verdict by any kind of evidence under an instruction of this kind." It is true that the word "preponderance" is not used in this instruction, but it does require the jury to believe "From the evidence that there existed a dangerous condition," but we think the jury were well advised that the defendants were required to prove their case by a preponderance of the evidence by plaintiff's second, sixth and eighth instructions. By the sixth of these instructions the jury were told that "The burden of proof is upon the plaintiffs to prove the exact violation of the statute in manner and form as charged in the declaration." These instructions must be considered as a series, and the question of the burden of proof and preponderance of evidence was so often stated that we feel quite confident the jury could not have been misled about their duty in this respect.

It is also true that there was no dispute as to the facts in this case upon the question of the conditions that existed in the mine, so that plaintiffs have no right to complain in this regard. If the deceased was capable of earning \$2.56 per day and was only eighteen years of age, we are not able to say that the verdict of this jury was unreasonable in allowing these parents \$1,000.

We find no substantial error in the verdict of the jury, instructions, or order of the court in overruling the motion for a new trial, and the judgment of the lower court is affirmed.

Judgment affirmed.

LaSalle Extension University v. Stelle, 203 Ill. App. 97.

**LaSalle Extension University, Plaintiff in Error, v.
John H. Stelle, Defendant in Error.**

(Not to be reported in full.)

Error to the County Court of Hamilton county; the Hon. J. S. SNYDER, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded. Opinion filed November 13, 1916.

Statement of the Case.

Action by LaSalle Extension University, plaintiff, against John H. Stelle, defendant, on a contract for the sale of a set of law books and a course of instruction. From a judgment against plaintiff for costs, plaintiff brings error.

J. WILSON JONES, for plaintiff in error.

J. H. LANE, for defendant in error.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1787*—*when judgment reversed for failure to file brief.* The judgment of the lower court may be reversed *pro forma* under Rule 27 of the Appellate Court where the defendant in error fails to file a brief.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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Swigert v. Chicago, Burlington & Quincy R. Co., 203 Ill. App. 98.

Tobitha Swigert, Appellee, v. Chicago, Burlington & Quincy Railroad Company, Appellant.

1. RAILROADS, § 315*—*when not liable for construction of levee in public highway.* The construction by a railroad company under the direction and order of the county commissioners of a levee in a public highway over a river does not render such company liable in damages for an injury occasioned either by the construction or by the maintenance of such levee.

2. RAILROADS, § 315*—*when change of course of river by is not actionable.* The purchaser of river bottom land takes the risk of overflow, and a railroad company cannot be made to pay damages for such overflow simply because it makes a new channel for said river on its right of way, if such channel conveys the water into the old channel before it leaves such right of way and affords equal or better means for escape of the water and brings no more water on said lands than flowed there in a state of nature.

3. RAILROADS, § 315*—*when railroad has right to change or divert current of river on right of way.* A railroad company has a right to build its road through bottom lands and to change or divert the current of a river on its right of way by a new channel if equal or better means for escape of flood waters are provided and the water is returned to its old channel before leaving such right of way.

4. RAILROADS, § 328*—*what is duty of railroad in constructing road along or across streams.* A railroad company has authority under the statute [J. & A. ¶ 8754 (5)] to construct its road along or across streams but must construct necessary culverts and bridges or sluices as the natural drainage requires, and must restore a stream to its former state or to such state as not unnecessarily to have impaired its usefulness.

5. RAILROADS, § 330*—*what is duty of railroad electing to close a natural water course as to providing other channels.* It is the duty of a railroad company which elects to close a natural water course to make new channels of sufficient capacity to carry the water then carried by the natural stream and all that might thereafter lawfully come to or be turned in to flow through such natural channel, but not such flood waters as could not be carried by the natural channel and were accustomed to spread over the entire valley.

6. DAMAGES, § 244*—*when error in receiving evidence is harmless.* Error in receiving evidence to prove damages is harmless where there is no claim that damages awarded were excessive.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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7. DAMAGES, § 244*—*when error in giving instructions on is harmless.* Error in giving instructions as to the measure of damages is not ground for reversal where there is no claim that the damages awarded are excessive.

8. APPEAL AND ERROR, § 461*—*when assignment of error is not preserved for review.* Assignment of error that verdict is against the weight of the evidence, *held* not preserved for review.

Appeal from the Circuit Court of Johnson county; the Hon. WILLIAM W. CLEMENS, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed November 13, 1916.

SPANN & SPANN, for appellant; J. A. CONNELL, of counsel.

R. E. CHOISSE and LEWIS & LEWIS, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Appellee recovered a judgment against appellant for \$550 on account of the depreciation in value of certain farm lands owned by her, and occasioned, as she claims, by the improper construction of the grade or embankment upon which appellant's track is located, adjacent to her land.

A portion of appellee's lands lies in the Cache River Valley, and the gist of each count of the declaration is that said lands were formerly drained by the Cache River; that such drainage kept the lands of appellee free from all injurious and damaging excesses of water; that in constructing its grades and embankments appellant permanently stopped up and obstructed the channel and outlet of said river across its right of way; that by reason thereof, large quantities of water which usually flowed through the basis of said stream were obstructed and diverted over and upon the lands of appellee, and caused to stand and accumulate, rendering her land swampy and unfit for cultiva-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same title and section number.

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tion. Certain of the counts also charged that by the action of the water, great holes were washed in appellee's lands.

Appellant assigns as error certain rulings of the trial court in admitting evidence to prove damages, the giving of certain instructions, at the request of appellee, upon the measure of damages, the refusal of the court to give certain instructions submitted by appellant, and that the verdict is contrary to the law and the evidence.

In the present state of the record, we are not called upon to decide whether or not the trial court committed error in receiving the evidence complained of to prove damages, nor to determine whether or not the instructions complained of, upon the measure of damages, were improperly given. It is not claimed by appellant that the damages awarded are excessive, and even if there be error in either of the respects aforesaid, it would constitute harmless error, and would constitute no ground for the reversal of the judgment of the trial court. (*Carterville Coal Co. v. Abbott*, 81 Ill. App. 279.) We are also of the opinion that appellant has not preserved for review in this court its assignment of error that the verdict is against the weight of the evidence. (*Farrell v. Illinois Tunnel Co.*, 177 Ill. App. 425.)

In determining the remaining question presented by this record,—the action of the trial court in refusing instructions tendered by appellant,—it will be necessary to consider the chief facts disclosed by the evidence.

The evidence tends to show that the Cache River Valley where appellee's lands are located is approximately half a mile wide from bluff to bluff, the general course of the valley being slightly northeast and southwest. Adjacent to appellee's lands are two lines of railroad passing through the valley. The C. & E. I. R. R. right of way and track passes down the western

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side of the valley, adjacent to the bluff line, a part of its right of way passing through appellee's lands. The right of way and track of appellant's railroad passes down the eastern side of the valley, adjacent to the bluffs on that side of the river, and having a part of its right of way also over lands of appellee. The C. & E. I. R. R. was constructed through this valley about 1899,—appellant's road, during 1909.

Where these lines of railroad cross Cache River, near the north side of Section 3, Township 13, Johnson County, their grades are approximately 314 feet apart. The C. & E. I. R. R. has a bridge across the river at this point, extending from the south bank of the river northeasterly to the north side of a slough. The opening through this bridge for the passage of water is 514 feet wide.

Appellant's track through this valley is located upon an embankment, some 12 or 15 feet in height, and after entering Section 3 at the north, the right of way intersects and crosses the channel of Cache River at four different points in a distance of less than half a mile. In constructing the embankment for its roadbed, appellant completely filled up the channel of the river at these points. To take care of the situation thus created, appellant constructed two new channels entirely on its right of way. Each channel connects with the natural channel of the river at the north, proceeds south along and entirely upon the right of way, until the natural channel is again reached, and the waters of the stream restored to the natural channel of the river, at points located upon the right of way of appellant.

The northerly one of these artificial channels is located upon a part of the right of way passing through or adjacent to lands of appellee in the northeast quarter of the northwest quarter of Section 3. The other artificial channel is upon the right of way passing through the southeast quarter of the northwest quarter of said section, and adjacent to lands belonging to one

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Brown. Appellee owns the forty, or a part thereof, lying west of Brown's land. Appellant offered evidence tending to show that these artificial channels were of equal if not greater capacity than the natural channel of the river, and afforded equal or better facilities for the passage of water.

Slightly to the southeast of the point where appellant's right of way first reaches the river, near the north side of Section 3, a public road crosses said stream. Between the lines of railroad, said road runs almost directly east and west, and is but a very short distance south of the river bank. The point where this road formerly crossed the main channel of the river was east of appellant's line of right of way, and there was a steel bridge across the river at this point. The fills made by appellant in the river bed just north of the road, and the digging of the new channel, served to cut off that portion of the old channel lying east of the right of way at this point, and diverted the main channel of the river into the artificial channel constructed by appellant on the west side of its embankment. Appellant, then by arrangements made with the county commissioners, moved the steel wagon bridge from its location over the old channel east of the right of way and relocated it at a point west of its track, where the public road crosses the north end of the northerly one of the artificial channels made by it. It also appears from the evidence that as a part of this arrangement for the removal and relocation of this bridge, appellant was required to construct in the public road an embankment or grade some 4 feet in height, and approximately 15 feet in width, extending from the west end of this bridge, as relocated, to the C. & E. I. R. R. grade.

The lands involved in this suit lie south of this public road and between the lines of railroad, as above indicated.

It also appears from the evidence that appellant's

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embankment constructed and maintained, without openings for the passage of water, has served to cut off from this valley some 15 acres of low lands, lying east of the embankment, which were formerly subject to overflow.

It appears quite clear from the evidence that appellee's lands were always subject to overflow in times of floods and freshets; that such overflows frequently occurred from one to three times in each year, and often during crop periods. It is not pretended that on account of the embankment and artificial channels constructed by appellant that appellee's land is more subject to overflow now than before the road was built. Nor do we find any evidence fairly indicating that the cutting off of the 15-acre tract of low land east of the right of way has to any appreciable extent increased the burden of flood waters naturally and formerly cast upon the premises of appellee. Neither do we find any evidence fairly tending to show that flood waters naturally coming upon appellee's premises are obstructed and held thereon, or that a longer period is now required for the escape of flood waters, and the land thereby rendered wet and swampy. In fact, as we understand the evidence and the theory of counsel for appellee, the chief grievance now seems to be that appellant, by reason of the changes made by it in this valley, adjacent to appellee's lands, has so accelerated the flow of flood waters and has so changed the current of such flood waters as to wash away the soil from appellee's lands to her damage. There is evidence tending to show some washes upon her lands which were not there before appellant's road was constructed, but whether these washes were caused as a direct and proximate result of the construction of appellant's embankment, and the artificial channels, or from the clearing up and cutting away of the timber and underbrush in the valley and along the banks of

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the stream, thereby accelerating the flow of flood waters, or merely from the vagaries of the water itself, there is little to show outside of conjecture and speculation on the part of the witnesses.

The evidence discloses that one of the principal washes complained of was located just south of the public road, between the railroad grades, and just east of the right of way of the C. & E. I. R. R. Appellant contends that this wash was occasioned by the water breaking over the embankment in the public road at this point, and contends that it was not responsible for this embankment, or for any damages which may have been occasioned thereby. Appellant introduced evidence which tended to show that this wash was occasioned as claimed by it, and in this connection requested the court to give to the jury its refused instruction No. 3. This instruction advised the jury, in substance, that if they believed from the evidence that plaintiff's land had been washed and damaged by reason of water pouring over the levee built in the public highway, and that such levee was built by defendant under the direction and orders of the County Commissioners of Johnson county, that defendant would not be legally liable for any damages caused solely by such levee. This instruction was proper and should have been given, and we are of the opinion that its refusal constitutes reversible error.

This levee was no part of appellant's line of railroad, and was not located on its property. It was located on and became a part of the public highway, and was no doubt designed as and intended to be an improvement to that part of the highway extending from the wagon bridge to the C. & E. I. R. R. grade. Its effect was to raise the grade of the beaten path of the road above the natural surface of the adjacent land, and thus secure for the public a better road through these bottom lands. The control of this road and its

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repair and improvement was vested in the county commissioners (J. & A. St. vol. 5, p. 5164, ¶9810). The lawful character of this levee, or the lawful right of the commissioners to make and maintain it, would not be affected by the fact that its original construction or its future maintenance might or would occasion damages to an adjacent landowner. Nor would the fact that appellant constructed the levee in question, under arrangements made with the county commissioners, in connection with the removal and relocation of the wagon bridge, change the public character of this work. The acts done of appellant in this connection amounted to nothing more than a private donation of its services and material for what was undoubtedly regarded as a public benefit. The donation by appellant of its services for the purposes indicated was neither wrongful nor unlawful, and was not such as to render it liable in damages to one who may have sustained an injury occasioned either by the construction or from the maintenance of the levee. (*Culbertson & Blair Packing & Provision Co. v. City of Chicago*, 111 Ill. 651.)

We are of the opinion also that appellant's second and fifth refused instructions should have been given to the jury. Both of these instructions stated correct principles of law applicable to the facts in this case. The second refused instruction stated, in substance, that where one purchases land in a bottom where there is a river or creek, such land is purchased with the risk of overflow, and that a railroad company cannot be made to pay for such overflow and washing simply because such company may have made a new channel for such creek or river on its right of way, if such channel conveys the water into the old channel before it leaves the right of way of the company, and such new channel affords equal or better means for the escape of water than the old channel, and brings no more water over plaintiff's lands than would have flown thereon in a state of nature.

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The fifth refused instruction stated, in substance, that a railroad company had a right to build its road through bottom lands, and the right also to change or divert the current of a creek or river on its right of way by making a new channel, and that no one under the law has a right to complain because of such changes, provided the new channel affords equal or better means for the escape of flood waters than the old channel, and provided also that it runs the water again into the old channel before it leaves the right of way; that if the jury find from the evidence that defendant changed and straightened the channel of Cache River on its own right of way and diverted the water into a new channel which afforded equal or better means for the escape of water than the old channel, and that the new channel conveyed the water into the old channel before it left the right of way, then plaintiff would have no cause of action against defendant, on account of such change in the channel of the river.

Counsel for appellee concede that these instructions state correct principles of law, but contend that they are not applicable to the facts in this case. Under the statute, appellant had a right to construct its roadbed along or across any stream which it might intersect or touch. It was required to restore the stream to its former state,—“*or to such state as not unnecessarily to have impaired its usefulness.*” It had no right under the statute to build its roadbed, without first constructing the necessary culverts or “*sluices as the natural lay of the land requires for the drainage thereof.*” [J. & A. St. ch. 114, sec. 19, ¶ 8754 (5).] Under the statute, therefore, appellant was not required to restore the stream to its former state, but only to such state as not unnecessarily to impair its usefulness. In constructing its roadbed, it might either build culverts or bridges for streams or water courses or in lieu thereof might construct “*sluices.*” “*Sluices*” are de-

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fined to be artificial channels for carrying water. Appellant, therefore, did not violate the statute in constructing its roadbed in the manner it did, if the "sluices" or artificial channels constructed by it did restore said stream to such state as not unnecessarily to have impaired its usefulness. Having elected to close this natural water course for its own convenience, it was its duty to make the new channels of sufficient capacity to carry the water then carried by the natural stream, and also all waters that may thereafter lawfully come to or be turned in to flow through such natural channel. (*Atchison, T. & S. F. Ry. Co. v. Jones*, 110 Ill. App. 626; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288.) This rule of law, however, would not cast upon appellant the duty of constructing an artificial channel of such capacity that it would carry within such channel, flood waters, which formerly, and in a state of nature could not be carried by the natural channel of the river, and which flood waters were accustomed to spread over the entire valley. The weight of authority in this State is to the effect that "A proprietor of land may change the course of a natural water course within the limits of his own land, if he restores it to the original channel before the lands of another are reached, provided in changing the course of the stream he does not cast upon the lands of an adjoining proprietor water which would not in a course of nature flow upon such adjoining premises." (*Daum v. Cooper*, 208 Ill. 391; *Fenton & Thompson R. Co. v. Adams*, 221 Ill. 201; *Wills v. Babb*, 222 Ill. 95; 28 Am. & Eng. Encyc. of Law, 1st Ed. p. 982.)

The propositions of law announced in the second and fifth refused instructions were not covered by any of the given instructions in the case. It was a matter material to appellant's defense that the jury be advised as to its right under the law to divert the water of Cache River by means of these artificial channels, and

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to enable the jury to determine whether or not appellant was guilty of negligence in the construction and maintenance of its embankment adjacent to and through the bed of Cache River. The instructions referred to are in principle similar to the twelfth refused instruction, commented upon in the case of *Voudrie v. Southern Ry. Co.*, 155 Ill. App. 279.

For the errors indicated in refusing instructions, the judgment of the Circuit Court is reversed and the cause remanded:

Reversed and remanded.

MR. JUSTICE BOGGS took no part in the decision of this case.

**James M. McManus, Appellee, v. Fred D. Nellis,
Appellant.**

1. JUDGMENT, § 238*—*when judgment nunc pro tunc may be entered.* Before a judgment *nunc pro tunc* can be entered, it must appear that a judgment in fact has been rendered but not entered of record through some fault, neglect or oversight.

2. JUDGMENT, § 170*—*when is not rendered or directed to be entered.* Where a circuit judge in vacation directed the clerk of court to enter a certain judgment at the opening of the next session of the court, but before which time, however, such judge's term of office expired, and no judgment was entered at the opening of the next session, but later another judge entered a judgment *nunc pro tunc* as of the date of the opening of that session, held that no judgment was rendered or directed to be entered by said former judge, and that said entry *nunc pro tunc* was erroneous.

3. OFFICERS, § 70*—*when party entitled to office may recover fees and emoluments.* Where one is elected to office and another without his consent deprives him of the office and collects its fees and emoluments, the party entitled to the office may recover such fees and emoluments.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. OFFICERS, § 70*—*when coroner may not recover fees and emoluments received by person illegally appointed to fill vacancy in office of sheriff.* Where the coroner of a county assumed the duties of sheriff upon removal of the sheriff by the Governor, and later procured the appointment by the board of county commissioners, believing it was their province to make such appointment, of another man as sheriff for the unexpired term, which exceeded one year, of the former sheriff, and said appointee of the board qualified, acted and collected fees as sheriff until on quo warranto it was determined that his appointment was unlawful, *held* that an action of assumpsit would not lie by said coroner against said appointee for said fees and salary paid him.

Appeal from the Circuit Court of Alexander county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded. Opinion filed November 13, 1916.

LANSDEN & LANSDEN, for appellant.

REED GREEN, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Appellee recovered judgment in the Circuit Court of Alexander county against appellant in an action of assumpsit for money had and received for the amount of \$1,887.15, which it is sought to reverse by this appeal.

It appears from the record in this case that Frank E. Davis was elected sheriff of Alexander county, Illinois, for the term of four years ending December 5, 1910, and that on November 18, 1909, he was removed from office by the Governor of the State under a statute permitting such rule. It appears, however, that the Governor did not notify the Board of County Commissioners of Alexander county of such removal until December 14, 1909: That the appellee in 1908 was elected and qualified as coroner of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same title and section number.

Alexander county and upon the removal of Davis, appellee assumed the duties of sheriff, took possession of the office and otherwise discharged his duties as such sheriff, except that he gave no additional bond. It appears from the evidence that Alexander county was under county organization and its business was controlled by three judges. The appellee was a physician of quite an extensive practice in Cairo and did not have the time to attend to his practice and also the duties of sheriff of the county, and was apparently very anxious to be relieved of the burden of acting as sheriff. Upon the removal of Davis as sheriff, the county board conceded it to be its duty to appoint a successor and on December 22, 1909, appointed the appellant Nellis to the office of sheriff for the unexpired term of Davis. Nellis gave bond as sheriff and collector and on December 24, 1909, received from appellee, the coroner, the possession of the office, books, papers and records and all other property and things belonging to the sheriff's office. It further appears that at the time that Nellis was appointed sheriff there were two other applicants and that the appellee was exceedingly anxious to have some one selected as sheriff to relieve him from the duties and burdens of the office. He appeared before the board and requested that the appointment be made so as to relieve him. He requested Judge Butler, judge of the Circuit Court, to interview the county board and urge upon them the necessity of making an appointment. Nellis continued to act as sheriff from the time of his appointment until December 5, 1910, and that the fees collected by him amounted to \$1,887.15, and that the expenses of the office were covered by appropriations made by the county board. A quo warranto proceeding was instituted upon the relation of Davis against the appellant in the Circuit Court of Alexander county, and on July 22, 1910, it was determined by said court that appel-

lant was unlawfully appointed and judgment of ouster was entered. An appeal was taken to the Supreme Court where the judgment of the Circuit Court was affirmed [*People ex rel. Davis v. Nellis*, 249 Ill. 12], the Supreme Court holding that the vacancy in the office occurred on November 18, 1909, and that as it would be more than one year before the term of office expired, the county board would have no legal right to make the appointment of appellant as sheriff. On July 15, 1910, the appellee made a demand upon appellant for the office of sheriff then held by him and also notified him that he claimed the fees and salary of the office collected by appellant while acting as such sheriff. This case was heard by Judge Hadley, taken under advisement by him at the October term, 1914, of the Alexander County Circuit Court and nothing was done in the case at the February term, 1915. The May term of the court convened on May 10th and it was on that day adjourned until June 21st. On May 14th, Judge Hadley sent to the clerk of the Circuit Court the following communication:

“EDWARDSVILLE, ILL., May 14, 1915.

DEAR SIR:—On the first day that your Circuit Court is in session I wish you would enter for me in the case of *McManus vs. Nellis*, the following order: And now on this day the court being fully advised in the premises, finds the issues for the plaintiff in the sum of \$1,887.15, and judgment on the finding of the court for plaintiff vs. defendant for \$1,887.15 and costs. And the defendant excepts and prays an appeal to the Appellate Court of the Fourth District of Illinois, which is allowed upon filing appeal bond in the sum of \$2,500.00 within thirty days, to be approved by the clerk of this court, and bill of exceptions within forty days. I also inclose the propositions of law submitted by the defendant which you will mark filed as of the date you entered the order. Please advise the parties to this suit as to the decision of the court that they

may know of it and that they may take such further proceedings as either of them may elect.

With kindest regards, I am,

Very truly yours,

W. E. HADLEY,

Clerk of the Circuit Court,

Cairo."

No attempt was made to have any order entered on June 21st, but the court was again adjourned until June 29th when appellee presented an application for the entry of a judgment against appellant *nunc pro tunc*, as of June 21, 1915, upon the basis of the letter mailed by Judge Hadley to the clerk. The matter was continued until July 6th; at this date the application for a judgment *nunc pro tunc* as of June 21st was allowed. The term of office of Judge Hadley expired prior to June 21, 1915.

A reversal of this case is insisted upon principally upon two questions: 1st. That the court erred in rendering judgment *nunc pro tunc* as of June 21, 1915. The validity of this order depends upon whether or not a judgment had in fact been rendered by Judge Hadley during his term of office. If such judgment had been rendered and the clerk had failed to enter it as directed, then we think that the court would have been justified in requiring the clerk to carry out the order that was in fact entered; and such action is approved by the Supreme Court in the case of *Metzger v. Morley*, 197 Ill. 208, and this case is cited by counsel as being on parallel with the case at bar and decisive of the right of Judge Hartwell on July 6th to direct the entry of a judgment *nunc pro tunc* of June 21st.

Excepting the rendering of judgments by confession and agreement, there are two modes of rendering judgment recognized by our courts: One is to pronounce judgment in open court, which it then becomes the duty of the clerk to enter upon the records. An-

other mode is the one provided by statute where a judge takes a case under advisement, and his decision in vacation may be entered of record in vacation. And Judge Hadley had the right to send this order and direct that it be entered in vacation if he chose so to do, and it was certainly discretionary with him whether he would enter it in vacation or in term time, and, as we think, the real question is, when did he enter the judgment, and when did he intend that the clerk should make it a matter of record, in vacation or in open court? The language of the communication addressed by Judge Hadley to the clerk is: "On the first day that your Circuit Court is in session I wish you would enter for me in the case of *McManus v. Nellis* the following order." Of course, it was expected by Judge Hadley at that time that the court would be in session during his term of office, but, as it happened, his term of office expired before there was any session of court after the clerk received this communication. It is said by counsel that the mere fact of the judge having arrived at a conclusion and having placed that in the hands of the clerk would be sufficient to constitute a filing of the order, although no file mark had been placed upon it. This would probably be true if there had been a direction to enter it, but later on in the communication he states: "I also inclose the propositions of law submitted by the defendant which you will mark filed as of the date you entered the order." Which shows clearly that it was not in the mind of Judge Hadley to enter an order of judgment in vacation but that the judgment order should be entered in term time; and before the day arrived at which the clerk could in any manner make an entry of this order or judgment, Judge Hadley's term of office had expired, and we do not see how it could be said that any valid judgment was entered or directed to be entered by the judge, and if this is true then the Circuit Court erred in directing a judg-

ment *nunc pro tunc*. Before a judgment could be entered *nunc pro tunc* it must appear that one in fact had been rendered but not entered of record through some fault, neglect or oversight. *Chicago, B. & Q. R. Co. v. Winkler*, 165 Ill. 634.

It is also insisted that even if the judgment was properly rendered that the court erred in requiring appellant to pay the fees and the salary collected by him to appellee.

The declaration in this case consists of two counts: One is a special count charging that the appellant over the protests of appellee wrongfully and without legal authority took possession of the office of sheriff of Alexander county. The second is the consolidated common counts, including a count for money had and received. The appellee claims the right to recover under this declaration because appellant has money that in justice and equity belongs to the appellee. We agree with the contention of counsel for appellee that the doctrine is well settled in this State that where one is elected to an office and another without his consent deprives him of that office and collects the fees and emoluments of the office, that under such state of facts the party entitled to the office could sue the party depriving him thereof and recover the fees and salary collected, and this doctrine seems to be well sustained by the case of *Mayfield v. Moore*, 53 Ill. 428; *Waterman v. Chicago & I. R. Co.*, 139 Ill. 658. If the appellant had unlawfully without the consent of the appellee deprived appellee of this office, then we would not hesitate to say that he was entitled to the fees and emoluments thereof.

It appears from this record that the appellee was a physician of an extensive practice and did not have the time to attend to the business of the sheriff and his practice, and that he was exceedingly anxious to unload the burdens of the office of sheriff to some one who could discharge the duties so that he could have

the time to devote to his business as a physician. It also appears that it was the impression of the county board and of others interested that the county board had a right to appoint a sheriff to fill this vacancy, and it seems that appellee was of the same mind, as appellee appeared before the county board and said that he wanted to get rid of the sheriff's office so that he could give his attention to his professional business, that he was losing money fooling with the sheriff's office and wanted the county board to appoint a man in his place; and this is substantially the testimony of all three of the county judges. Appellee also called upon Judge Butler and requested him to urge upon the board the necessity of making an appointment soon, and that Judge Butler replied: "I have nothing to do with that but I understand they have offered the place to Charles Cunningham and Charles Carey and that they had declined and that Fred Nellis was the only applicant; that the Board had virtually agreed to give him the appointment and they were only awaiting the opinion of the Attorney General as to whether they could legally make the appointment." The doctor replied, "I wish they would hurry up about it. I didn't expect to be kept here this long. It is interfering with my business and I am losing money every day." He further said, "You would do me a favor if you would go to the Board and hurry up the appointment. I am losing money."

It is true, as contended by counsel, that if the money justly and equitably belongs to appellee that he should be entitled to recover under this action, but our courts have said: "In an action of assumpsit for money had and received, the main inquiry is, whether the defendant holds money which *ex aequo et bono* belongs to the plaintiff. It has been frequently called an equitable action, and, as is said in *Clafin v. Godfrey*, 21 Pick. [Mass.] 1, it approaches nearer to a bill in equity than any other common-law action." *Belden v. Perkins*, 78

McManus v. Nellis, 203 Ill. App. 108.

Ill. 449; *First Nat. Bank of Springfield v. Gatton*, 172 Ill. 627. "This being an action to recover for money had and received by the defendant to the plaintiff's use, it devolved on the plaintiff to prove that the defendant held money which *ex æquo et bono* he ought to pay to the plaintiff, the usual test being, does the money in justice belong to the plaintiff." *Richolson v. Moloney*, 195 Ill. 578.

Appellee was pleased when the appointment of appellant was made; he did all he could to bring about the appointment; he surrendered the office and the work and the emoluments to the appellant without any protest, and now, after appellant had performed the labor, can it be said that the earnings accruing from this labor equitably and justly belong to the appellee, who sought by every available means to get rid of this burden and was willing that appellant or any one else that the county board would sanction should take up and perform the work? It further appears that no complaint of any kind was made by appellee about appellant holding this office until July 15, 1910, and after an order had been entered by the court, in effect, holding that appellee was not entitled to hold the office; and the judgment rendered herein covers the fees earned during the period prior to as well as after this demand was made, but it is very clear to us that he was not entitled to the fees earned after he had surrendered the office willingly and without protest to appellee, and before the making of such demand.

For the reasons above indicated, we are of the opinion that the Circuit Court erred in rendering this judgment against appellant for the fees earned by him during the term that he held the office of sheriff under such appointment, and the judgment of the lower court is reversed and the cause remanded.

Reversed and remanded.

H. H. King, Appellee, v. Daniel W. Heilig and E. M. Rife, Appellants.

(Not to be reported in full.)

Appeal from the Circuit Court of Pulaski county; the Hon. BENJAMIN W. POPE, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded with directions. Opinion filed November 13, 1916.

Statement of the Case.

Action by H. H. King, plaintiff, against Daniel W. Heilig and E. M. Rife, defendants, on a promissory note of which defendants were makers and one Farrin the payee, and which was indorsed to plaintiff, before maturity as collateral security.

From a judgment for \$1,055.88 after trial had upon opening a judgment by confession for \$945.04 and costs, defendant Heilig appeals.

CHARLES L. RICE and FRED HOOD, for appellant Daniel W. Heilig.

C. S. MILLER and WALL & MARTIN, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 293***—*when payment to payee before maturity of note does not operate as discharge from liability.* Payment by the payor to the payee of a note which was then in the hands of another, who obtained same from the payee before its maturity as collateral security, does not operate as a discharge from liability as it was the duty of the payor to see that his payment was made to the proper holder of the note.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

King v. Heilig et al., 203 Ill. App. 117.

2. TRIAL, § 129*—*what constitutes improper remark by counsel in opening statement.* A remark by an attorney in his opening statement to the jury that when they had heard the evidence he was sure they could only arrive at the same verdict as a former jury was improper.

3. PLEADING, § 115*—*admissibility of affidavits and pleadings.* It is not error to admit in evidence a party's affidavits and pleadings, as they are but statements and declarations of the party, and if inconsistent with the evidence offered on the trial the jury were entitled to hear them and consider them with the other testimony.

4. BILLS AND NOTES, § 462*—*when failure of instruction to explain term is not error.* The term "bona fide holder" is so commonly used that the jury could not be misled by the failure of an instruction to explain its meaning.

5. BILLS AND NOTES, § 462*—*when instruction not setting out that holder acquired note for value before maturity is not erroneous.* Where neither the evidence nor the pleadings presented an issue that a note was held as security for the payment of an indebtedness after its maturity, there was no error in giving an instruction which did not set out that the holder acquired the note for value before maturity, but if such note was held to secure future advancements, it should cover same.

6. JUDGMENT, § 87*—*what is proper form of when verdict for plaintiff after trial upon opening up judgment of confession.* Where a judgment by confession is opened up, such judgment to stand as security, and trial is had resulting in verdict and judgment for plaintiff, the form of such judgment should be to confirm the judgment taken on confession, and a judgment rendered upon a verdict assessing a greater amount of damages is erroneous.

7. APPEAL AND ERROR, § 1807*—*when case reversed and remanded with directions.* Where, upon verdict being rendered for plaintiff after opening up of a judgment by confession and trial a judgment is erroneously entered for more than the amount of the judgment on confession, the case should be reversed and remanded with directions to correct the error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

F. E. Nulsen, Defendant in Error, v. Terre Haute Brewing Company, Plaintiff in Error.**(Not to be reported in full.)**

Error to the City Court of East St. Louis; the Hon. W. M. VANDEVENTER, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Action by F. E. Nulsen, plaintiff, against Terre Haute Brewing Company, defendant, for rent. From a judgment in favor of plaintiff for \$780, defendant brings error.

KEEFE & SULLIVAN, for plaintiff in error.

KRAMER, KRAMER & CAMPBELL, for defendant in error.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 102*—*when duty lies on third person to make inquiry and ascertain real authority of agent.* A person who has notice of such facts as to put him on inquiry as to the authority of an agent to make a lease acts at his peril in accepting a lease from such agent without making inquiry and ascertaining the agent's real authority, notwithstanding such agent may have apparent authority, and it is his right and duty to make such inquiry.

2. APPEAL AND ERROR, § 1241*—*when party may not complain of erroneous instruction.* A party may not complain of an instruction which sets forth a correct principle of law as misleading where he himself procures an instruction on the same subject.

3. INSTRUCTIONS, § 151*—*when refusal of is not error.* It is not error to refuse requested instructions which are covered by other given instructions.

4. INSTRUCTIONS, § 63*—*when instruction is not erroneous as assuming controverted facts.* An instruction is not erroneous as assuming controverted facts where, when considered with other instructions, such impression is not given.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same title and section number.

David E. Parker, Appellant, v. John Dietz, Appellee.

1. BAILMENT, § 10*—*what is duty of bailee as to insuring goods for owner's benefit.* There is no legal duty devolving on a bailee, even for accommodation, to insure the chattels for the owner's benefit unless there is a contract or custom requiring it.

2. BAILMENT—*when negligence of bailee is question for court.* The failure of a bailee to insure the chattels does not present a question of negligence for the determination of a jury, but one of law for the court.

3. BAILMENT, § 10*—*what diligence must be exercised by bailee for accommodation in caring for property.* A bailee for accommodation is bound to use extraordinary diligence in caring for the property, but is not liable for an accidental loss.

Appeal from the Circuit Court of White county; the Hon. JULIUS C. KERN, Judge, presiding. Heard in this court at the March term, 1916. Reversed. Opinion filed November 13, 1916.

NOAH C. BAINUM, for appellant.

FRANCIS M. PARISH, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Appellee recovered a judgment in the court below for \$325 and costs, which appellant seeks to reverse by this appeal.

It appears from the record in this case that the appellee was the owner of one Mercury Arc Rectifier, one glass globe with mercury, two lenses, one large lamp and two condensers, for a standard model picture machine, also one reel of pictures. That on or about the 3rd or 4th of April, 1915, the appellant was engaged in conducting a vaudeville and picture show and needed the apparatus owned by appellee for the purpose of conducting his show; that he offered to purchase the above-described articles from appellee but

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

appellee refused to sell them to him but told appellant he would loan them to him, and did make the loan, and on about the day last aforesaid, appellant took the apparatus from appellee's place of business to appellant's place of business and used it in connection with his vaudeville and picture show. It appears that on Thursday after he had borrowed it on Monday he had some trouble with the rectifier and appellee went up to appellant's building and worked upon it. It further appears from the evidence that shortly thereafter appellant had his building insured but did not take out insurance upon the apparatus borrowed from appellee. About the 10th of May, 1915, the building and contents, including the apparatus of appellee, was destroyed by fire. Prior to the commencement of this suit, appellee demanded payment of appellant, which was refused. The fire was not caused by any negligence of appellant but was unavoidable. The case was tried by a jury and verdict and judgment rendered for appellee for \$325.

The declaration in this case, after alleging that the appellant borrowed the aforesaid apparatus of appellee, then avers that it then and there became the duty of the defendant to procure insurance on said goods and chattels for the protection of the plaintiff, but that the defendant negligently failed and refused to procure such insurance, and that such goods and chattels were wholly destroyed by fire and that the plaintiff, owing to the negligence of the defendant, was thereby injured in his property. To this the defendant filed a plea of general issue.

There is no dispute as to the facts in this case. It appears from the evidence that the appellee loaned appellant the apparatus in question to be used by appellant in operating his picture show. That appellee knew where the apparatus was being kept and used; that there was no evidence of any contract for in-

surance, or of any custom with reference to insurance. The declaration charges that it was the duty of appellant to insure the property and that he neglected to do so and the loss resulted. The only claim of neglect, as shown by the evidence, was the failure upon the part of appellant to insure the property.

As we view the record in this case, its decision depends upon the determination of the question as to whether or not it was the duty of appellant under the law to insure the property, and we think this is purely a question of law. If such a duty devolved upon the appellant then he is liable. If he was not required by law to insure the property then no liability could attach. At the close of the evidence the appellant asked the court to give an instruction directing the jury to find a verdict for the defendant, which the court refused, and its refusal is assigned for error. As we view it, the whole case can be determined upon this assignment of error.

The relation sustained by appellant to appellee was that of a bailee for appellant's accommodation, and when he borrowed appellee's property he was bound to use extraordinary diligence in caring for the borrowed chattels. The question here submitted, however, is not one of care and diligence with reference to the preservation of the property borrowed but is one as to whether or not he should have taken the precaution to insure the property so that appellee could be reimbursed in case of loss, and we are of the opinion that this is a different proposition from that laid down in the textbooks requiring the greatest care and diligence as to the preservation of the particular property. It was his duty to use the utmost care and diligence to preserve the particular property that he had borrowed, and if he failed or neglected to do any act that he could have done for the preservation of the property, then he would be liable for such

neglect and the liability is based upon his negligence in this respect. We have not been able to find any authorities involving the exact question presented here nor has counsel cited us to any, and the case must be largely determined from the principles laid down in the elementary works. As we understand the law there is no duty devolving upon the borrower of a chattel even for accommodation to insure such chattel for the benefit of the owner, unless there is a contract so to do or a custom existing that required it, and no such has been proven in this case. So far as this record discloses, the fire was accidental and without the fault of appellant and we think the loss must be classed as an accidental loss. "In no case is the borrower obliged for any accident as death, naufrage, burning, unless he has undertaken that hazard either expressly or tacitly." Story on Bailments (8th Ed.), sec. 253 c. "Under a gratuitous loan for use, the benefit being all on one side, the borrower is bound to use extraordinary diligence in preserving the borrowed chattels. He is bound to exercise all the care and diligence which the most careful and vigilant men employ in their own affairs, and he is responsible for even slight negligence, whereby the property is lost or injured. The omission of the most exact and scrupulous caution, or any want of prudence, is regarded as a culpable neglect in the borrower. The borrower does not insure the safety of the goods and he is not liable for them where he keeps and uses them with due care and in the manner permitted by the terms of the loan; he is not liable where the chattel dies, or is stolen, or is destroyed by fire, without any negligence on his part. The risk of losses like these abides with the owner unless the bailee has failed in his duty to anticipate and guard against the danger." Edwards on Bailments, sec. 135.

The evidence in this case shows that appellee knew

the purpose for which the property was to be used, and where used, and in fact visited the property and worked upon it while in appellant's building, and if he did not care to assume the risk he should have required appellant by contract to have insured the property but this he failed to do. "Where the bailor knows the general character and habits of the bailee and the place where or manner in which the goods deposited are to be kept by him, the bailor * * * must be presumed to assent in advance that his goods shall be thus treated." Dobie on Bailments & Carriers, page 69. "And if a thing be injured or destroyed through inevitable accident or *vis major*, or by reason of fire, the fall of a building or other like casualty, * * * the loss will not fall upon the bailee unless he appears to have been to blame in the matter." Schouler on Bailments, sec. 74. And the same doctrine is laid down in Vanzile on Bailments, sec. 107. "If a person lend an article to another, the bailee is bound to take such care of it as a very careful and vigilant man would exercise in regard to his own property, and if it is injured without any negligence or fault on his account, he is not legally liable to the owner. 'Jones on Bailments, sec. 75;' Harringtons Reports, vol. 2, page 67 (Delaware).

We are satisfied from an examination of these authorities and others that we have examined that the law does not impose upon the bailee the duty of insuring property borrowed, unless there is a contract or custom existing to that effect. It is contended by counsel for appellee that there is a presumption of negligence, and for that reason the judgment should be affirmed. Where it appears, as it does in this case, that the only act of negligence charged or claimed by the evidence to exist is an act that the law does not impose upon the bailee, then no such presumption could arise. It is also contended by counsel for ap-

pellee that the question of negligence is a question of fact for the determination of the jury, and cites in support of this doctrine the case of *Gray v. Merriam*, 148 Ill. 179. The doctrine here invoked is not applicable in this case for the reason that the act complained of is not as to whether the appellant was negligent or not but the act upon which a recovery is sought was whether or not appellant was required to do a particular thing towards the property borrowed, to wit, to insure the same, and if he was not required in law to insure the property then it could not become a question of fact for the determination of the jury. We are of the opinion that the law did not impose upon the appellant the duty of having the property insured, and that as this was the only act of negligence complained of, there could be no liability for the accidental loss of the property.

The court erred in refusing to direct a verdict for the defendant, and the judgment of the lower court is reversed.

Judgment reversed.

Volin v. St. Louis & O'Fallon Coal Co., 203 Ill. App. 126.

Jim Volin, Appellee, v. St. Louis & O'Fallon Coal Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Jim Volin, plaintiff, against St. Louis & O'Fallon Coal Company, defendant, to recover damages for personal injuries received while working as a miner in defendant's coal mine. From a judgment for plaintiff for \$1,100 and costs, defendant appeals.

BARTHEL, FARMER & KLINGEL, for appellant.

SCHAEFER & KRUGER and T. R. MOULD, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1411*—*when verdict on conflicting evidence will not be disturbed.* In an action by a mine employee for damages for personal injuries, held that the finding of the jury that certain props required for the support of a roof in a mine were not furnished should not be disturbed, where the evidence was sharply conflicting, if not against the manifest weight of evidence.

2. DAMAGES, § 120*—*when verdict for personal injuries not excessive.* Where, in an action for damages for injuries to a workman, the evidence showed four fingers of his left hand were so fractured that he could only close that hand halfway and could not hold anything tight and that his left hip was permanently fractured, and that he lost two months from work, held a verdict for \$1,100 was not excessive.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

January v. Metropolitan Life Ins. Co., 203 Ill. App. 127.

3. **WORKMEN'S COMPENSATION ACT**—*when certificate as to filed notice of employer's election not to come under is sufficient.* A certificate by the secretary of the Industrial Board as to a notice filed with said board of an employer's election under the Workmen's Compensation Act, which describes said secretary as custodian and keeper of the files, records and documents of said board but does not specifically state he was custodian and keeper thereof, is a sufficient compliance with section 16, ch. 51 of the Statutes (J. & A. ¶ 5533), requiring a statement in any such certificate that the officer is the keeper of such files, etc.

4. **EVIDENCE, § 125***—*when witness may testify as to contents of posted notice.* A witness is not prohibited from testifying as to the contents of a notice that has been posted, especially where it has become dimmed and destroyed.

Clemeth January, Appellee, v. Metropolitan Life Insurance Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of St. Clair county; the Hon. GEORGE A. CAW, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded. Opinion filed November 13, 1916.

Statement of the Case.

Action by Clemeth January, plaintiff, against Metropolitan Life Insurance Company, defendant, to recover on a life insurance policy. From a judgment for plaintiff for \$179.31 and costs, defendant appeals.

W. P. LAUNTZ, for appellant.

ALEXANDER FLANNIGAN, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Anderson v. Chittick, 203 Ill. App. 128.

Abstract of the Decision.

APPEAL AND ERROR, § 1787*—*when judgment reversed pro forma.* A judgment will be reversed *pro forma* under Rule 27 of the Appellate Court where the appellee fails to file any brief.

Mattie Anderson, Administratrix, Appellee, v. Hiram Chittick, Appellant.**(Not to be reported in full.)**

Appeal from the Circuit Court of Pulaski county; the Hon. BENJAMIN W. POPE, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded. Opinion filed November 13, 1916.

Statement of the Case.

Suit by Mattie Anderson, administratrix of the estate of Martha Tapley, deceased, complainant, against Hiram Chittick, defendant, to foreclose a mortgage. From a decree for complainant, defendant appeals.

C. S. MILLER, for appellant.

FRED HOOD, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1105***—*what are not grounds for dismissal of appeal.* An appeal will not be dismissed because it was permitted by a different judge than the one who rendered the decree.

2. **MORTGAGES, § 263***—*what constitutes sufficient consideration for release of.* Where the purchaser of land under a warranty deed was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dallas v. East St. Louis & Suburban Ry. Co., 203 Ill. App. 129.

compelled to pay out money to perfect his title, *held* that such payments by him were sufficient consideration for a release of a mortgage given by him to secure part of the purchase money for said land.

3. MORTGAGES, § 270*—*what is effect of release on right of foreclosure.* Where a purchaser of land under a warranty deed gave a mortgage for part of the purchase money and was forced thereafter to pay out money to the extent of such mortgage in perfecting his title to the land, and obtained from the mortgagee a valid release of such mortgage, *held* such mortgagee was not warranted in obtaining a foreclosure and sale to satisfy such mortgage.

4. APPEAL AND ERROR, § 913*—*what is effect of certificate of reporter that record contains all the evidence.* The certificate of a court reporter that the record contains all the evidence in the case is not sufficient to make the testimony of witnesses a part of the record, but when same is followed by a regular certificate and signature of the judge, the fact of such reporter's certificate does not destroy the validity of the judge's certificate.

**Iva Dallas, Appellee, v. East St. Louis & Suburban
Railway Company, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. Louis BERNHETER, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded. Opinion filed November 13, 1916. Rehearing denied January 13, 1917.

Statement of the Case.

Action by Iva Dallas, plaintiff, against East St. Louis & Suburban Railway Company, defendant, to recover for personal injuries received by falling off one of defendant's cars. From a judgment for plaintiff for \$8,000, defendant appeals. For the case on a former appeal, see 188 Ill. App. 420.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Denison-Gholson Dry Goods Co. v. Inger, 203 Ill. App. 130.

WILLIAMSON, BURROUGHS & RYDER, for appellant.

GEERS & GEERS, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

CARRIERS, § 476*—*when evidence is insufficient to sustain recovery for injuries resulting from sudden jerk of car.* In an action against a street car company for damages for injuries sustained by plaintiff in leaving its car, where the plaintiff stood practically alone in her testimony that the car after slowing down started up suddenly and gave a jerk which threw her off, and the evidence for the defendant greatly preponderated in showing that the car did not stop with a sudden jerk and that plaintiff did not stop in the vestibule of the car but walked straight out and attempted to get off while the car was in motion, *held* that a verdict for the plaintiff was manifestly against the weight of the evidence.

**Denison-Gholson Dry Goods Company v. Max Inger
et al.**

**R. E. Hickman, Trustee, Appellant, v. R. F. Martin,
Interpleader Claimant, Appellee.**

(Not to be reported in full.)

Appeal from the Circuit Court of Franklin county; the Hon. J. C. EAGLETON, Judge; presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Action in attachment by Denison-Gholson Dry Goods Company, plaintiff, against Max Inger and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

others, defendants, R. F. Martin interpleading and claiming the property. From a judgment awarding the property to the interpleader claimant, R. E. Hickman, trustee in bankruptcy of Max Inger, who was allowed, upon petition, to appear as party defendant, appeals.

W. W. SKAGGS and JOSEPH H. BARNHART, for appellant.

WALTER W. WILLIAMS, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1303*—*when evidence presumed to warrant judgment.* A bill of exceptions must be signed by the trial judge and the certificate show that it contains all the evidence, otherwise the evidence is presumed to warrant the judgment.

Knights of Pythias N. A. S. A. E. A. A. & A., Grand Jurisdiction of Illinois, Appellant, v. Annie Davis, Appellee.

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. M. R. SULLIVAN, Judge, presiding. Heard in this court at the March term, 1916. Affirmed on remittitur; otherwise reversed and remanded. Opinion filed November 13, 1916.

Statement of the Case.

Action by Annie Davis, plaintiff, against Knights of Pythias N. A. S. A. E. A. A. & A., Grand Jurisdiction

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Knights of Pythias v. Davis, 203 Ill. App. 131.

of Illinois, defendant, to recover as beneficiary on a mutual benefit certificate on the life of her husband, Joseph Davis. From a judgment for plaintiff for three hundred dollars, the full amount recoverable under the policy, defendant appeals.

R. A. J. SHAW, for appellant; ALBERT B. GEORGE, of counsel.

SILAS COOK and W. R. HILL, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

INSURANCE, § 794*—*when acceptance of payment of arrearages does not constitute waiver of right to limit amount of benefits according to by-laws.* Where the by-laws of a fraternal beneficial association permitted a member who had become nonbeneficial to be reinstated before suspension by his local lodge by paying all arrearages, and provided also that if such reinstatement was after thirty days from default the amount of benefits to be paid under his certificate should be changed to a specified less amount, if death occurred within five years, *held* that such association did not by accepting such payment of arrearages waive its right to limit the amount of benefits according to its by-laws.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**George H. Pritchett, Appellant, v. George Griffin,
Appellee.**

(Not to be reported in full.)

Appeal from the County Court of Williamson county; the Hon. W. F. SLATER, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Action of replevin by George H. Pritchett, plaintiff, against George Griffin, defendant, to recover a stock of groceries. From a judgment for defendant, plaintiff appeals.

PILLOW & STONE, for appellant.

NEELY, GALLIMORE, COOK & POTTER, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. REPLEVIN, § 124*—*when evidence is sufficient to show that title to chattels had not passed.* Where plaintiff representing the agent of the owner of certain land contracted, subject to said owner's approval, to exchange said land for defendant's chattels, for which plaintiff took a bill of sale in the name of the agent and transmitted same to said agent with his own notes to the agent as in payment for said chattels on his own account, and before the owner of the land approved the contract defendant repudiated the same upon learning of the falsity of statements made by said agent, and guaranteed by plaintiff as true, as to the character of the lands, upon which defendant had relied in making the contract, *held* in an action of replevin for said chattels, plaintiff claiming to have effected a purchase thereof through defendant, that the jury were fully warranted in finding that title to said chattels had not passed from defendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. SALES, § 218*—*when agent is not innocent purchaser for value.* An agent who procures a contract for the exchange of his principal's land for certain chattels which is subject to said principal's approval, and who assumes to purchase said chattels prior to approval of the contract by his principal, is not an innocent purchaser for value, so as to prevent the owner of said chattels from repudiating the contract before its approval by the agent's principal, and no obligation rests upon such owner as to purchase money notes given by such agent on such purchase.

3. VENDOR AND PURCHASER, § 40*—*when knowledge of vendor's agent as to falsity of representations as to character of land is immaterial.* Where representations made by an agent in selling land as to the character of the land were false and were relied upon by the purchaser of the land, it is immaterial to such purchaser's right of redress whether the agent knew of such falsity.

**Granite City Lime & Cement Company, Appellee, v.
Board of Education of School District No. 126,
etc., J. R. Beale, H. S. Mettlen and Ellis Mettlen,
partners, trading as H. S. Mettlen & Company. J.
R. Beale, Appellant.**

1. FRAUDS, STATUTE OF, § 17*—*when undertaking of contractor to pay material man is original.* Where a contractor before delivery of materials for a school building promises the material man to pay for them, and upon such promise they are delivered to the subcontractor ordering the same, such undertaking of the contractor is original and not within the Statute of Frauds (J. & A. ¶ 5867).

2. MECHANICS' LIENS, § 79*—*who protected under lien statute as to public improvements.* The lien statute as to public improvements (J. & A. ¶ 7161) does not require that the materials should be furnished on the contract of the principal, but applies to any person who may furnish material or labor to any contractor for any public improvement.

3. MECHANICS' LIENS, § 79*—*when contractor is liable to material man on contract to pay for materials furnished to subcontractor.* Where a contractor promises a material man furnishing materials to a subcontractor for a school building to pay for the same, he is not

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to be deprived of a lien by the mere fact that the material man recognizes the subcontractor and charges the goods to him.

Appeal from the Circuit Court of Madison county; the Hon. J. F. GILLHAM, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

T. T. HINDE, for appellant.

TERRY, GUELTIK & POWELL, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

A decree was rendered in favor of the complainant against the defendants in the Circuit Court of Madison county, to reverse which the defendant J. R. Beale prosecutes this appeal.

It appears from the record in this case that on May 2, 1913, J. R. Beale entered into a contract with the Board of Education of School District No. 126 Union, Township 3, Ranges 9 and 10, for the erection and completion of a high school building. That thereafter J. R. Beale entered into a subcontract with the defendants H. S. Mettlen & Company to furnish the building material and do the brickwork upon said building for an expressed consideration of \$10,500, to be paid for as the work progressed, and payments were to be based upon the estimates of the architect and be made to the amount of eighty-five per cent. of such estimates. At the time that Mettlen & Company were endeavoring to secure this subcontract, they obtained prices of building material from the appellee upon which prices it appears that their bid was partly based. After Mettlen & Company had been awarded the subcontract for doing the brickwork, they then placed an order with the appellees for the necessary brick and other building materials, and in this order was included the prices theretofore quoted by appel-

lees to them. At the time of the making of the contract between Beale and Mettlen & Company, it was agreed that Mettlen & Company should give to Beale a bond, the exact nature and condition of this bond does not appear from the evidence, but Mettlen & Company were unable to give the bond and were unable to prosecute the work upon the payment of eighty-five per cent. of the estimated prices; that they would require more money than that per cent. would bring to them. Thereupon an arrangement was made between Beale and Mettlen & Company that Beale was to take care of all bills for material furnished and put in the building and would give a check upon Saturday for the amount of labor performed during that week. Beale denies that he undertook absolutely to pay all bills, but says that he had an understanding with Mettlen that he would pay the men for their labor and would pay for materials upon orders from Mettlen & Company out of what was due them. As the building progressed, payments were made by Beale to the men for their labor and sums were paid upon the building material furnished from time to time, upon the order of Mettlen & Company. When the building was completed there was a balance due appellee of \$1,212.05 for materials furnished and used in the erection of this building. It also appears from the testimony of appellees' witnesses that after Mettlen & Company had placed their order with appellees and before any of the building material had been delivered, that the appellees learned that Mettlen & Company had failed to give a bond, as they had agreed to do, and thereupon Mettlen & Company called upon Beale, and, as appellees claim, asked him what protection he would have if they would quit before the building was completed, or the material men would refuse to deliver the material, and he said he would see that the material used was paid for and that he was

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taking no chances. This is denied by Beale. It further appears that the McEwing & Thomas Clay Products Company furnished building material upon the promise of J. R. Beale to pay for them and that he did from time to time make payments by check upon orders given by Mettlen & Company, and that there is a balance due this corporation of \$225.79. Beale denies he made any such an agreement with the McEwing & Thomas Clay Products Company as contended for.

The bill alleges J. R. Beale entered into a contract with the board of education to erect said high school building and that he authorized and employed H. S. Mettlen & Company to do the brickwork and to order the material, and made payments thereon from time to time at the request of Mettlen & Company but that there was a balance due appellees of \$1,212.05, which remains unpaid. The bill also alleges that notices were given as required by the statute for the enforcement of liens.

It is contended by counsel for appellant that the appellee was a subcontractor and as such no right of lien existed in its favor under the statute, and maintains that appellee did not furnish materials to the contractor within the meaning of the statute, and that they could have no lien. The statute referred to (J. & A. ¶ 7161) is as follows: "Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor for a public improvement in this State shall have a lien on the money, bonds or warrants due or to become due such contractor for such improvement: *Provided*, such person shall, before payment or delivery thereof is made to such contractor, notify the officials of the State, county, township, city or municipality, whose duty it is to pay such contractor of his claim by a written notice."

The cause was referred to the master to take testi-

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mony and report conclusions, which was done, and the master recommended that a decree be entered in favor of the appellee and the McEwing & Thomas Clay Products Company for the amounts due them respectively. Exceptions were taken to this report and argued before the court, but the report was sustained and a decree rendered accordingly. It also appears from the evidence that the amount of \$1,212.05 remains unpaid and in the hands of the board of education.

The claim of appellee is based upon the fact that before he furnished the materials to Mettlen & Company that Beale agreed with them that he would pay for the materials furnished. This is denied by Beale, but it is testified to by the witnesses A. W. Eisenmeyer, Jr. and A. W. Eisenmeyer, Sr., Louis Buenger and E. C. Mettlen. It appears to us that the chancellor was warranted in finding that Beale did agree before the material was delivered to pay for it and that the material was thereafter furnished and used in the building upon the strength of the promises of Beale. It is insisted by counsel for appellant that even if Beale did promise to pay for the building materials furnished and placed in the building that such promise was within the Statute of Frauds and could not under any consideration be construed as an obligation of Beale's. If before the delivery of the materials the appellant promised the appellee to pay for such materials, and upon the strength of this promise the materials were delivered to Mettlen & Company, then the undertaking of the appellant was original and appellant was liable upon such original promise. *Lusk v. Throop*, 189 Ill. 127. "But, where the defendant promises the plaintiff to pay for goods, which the plaintiff may thereafter deliver to a third person, and which, at the time of the promise, have not been delivered, no debt exists from such third person to the plaintiff, and, hence, the promise of the defendant to pay is an origi-

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nal undertaking, and not merely a promise to pay the debt of another." *Lusk v. Throop, supra*. In a determination of a question similar to this one, the Supreme Court has said: "It is next claimed that the court erred in giving instructions for plaintiff. The first instruction merely directed the jury, if they believed from the evidence that plaintiff and defendant entered into an agreement under which plaintiff agreed to furnish lumber on the order of D. A. Tomb, to be used in erecting a building for the defendant, and defendant agreed with plaintiff to pay him for the lumber, and that in pursuance of such agreement plaintiff furnished lumber, then plaintiff would be entitled to recover. It is said this is erroneous, in view of the order introduced in evidence. We do not so regard the instruction. The instruction announced a simple and plain proposition of law, and it was authorized by the evidence." *Hartshorn v. Byrne*, 147 Ill. 418. If the appellant made the promise testified to by the witnesses for appellee which we think the court was justified in finding he did, then the promise of appellant to pay for the materials was not a collateral one but an original one and the Statute of Frauds would have no application. It is said by counsel for appellant that even conceding that the promise was made by appellant, as claimed by appellee, that this would not create a lien in favor of the appellee but would only make the appellant liable in an action of assumpsit, and calls attention to the fact that many of the authorities referred to by counsel for appellee are actions of assumpsit and can have no bearing in this case. It appears to us that the appellant was interested in having the building completed according to his terms of the contract with the board of education and that when Mettlen & Company were unable to proceed with their contract for the reason that they could not make the payments required upon eighty-five per cent. of the

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estimates, and were unable to give bond, and appellant at that point agreed to pay for the materials furnished, that it was to say the least of it, an implied request upon his part to furnish such materials as might be ordered by Mettlen & Company, and were needed in the carrying out of his contract. The section of the statute referred to does not require that the material shall be furnished upon the contract of the principal but applies to any person who may furnish material or labor to any contractor for any public improvement, and it seems to us that if we should say that before a person furnishing material should have an agreement with the contractor, that it would be a narrow construction of this statute. While it has been said by the Supreme Court that this statute in derogation of the common law and should be strictly construed, yet we do not believe that such a construction should be adopted as to deprive one of a remedy for the materials furnished and used in the erection of the building, if the proper notices have been given, as the statute itself by section 53 (J. & A. ¶ 7177) provides: "This act is and shall be liberally construed as a remedial act." The object and purpose of the lien law is to protect those who in good faith furnish materials for the construction of buildings, and such persons ought not by a strict construction to be deprived of this remedy. It does appear from the evidence in this case that after the contract was made between Beale and Mettlen & Company and after Beale had promised that he would pay for the materials furnished, that Mettlen & Company did give orders to appellees upon which they received payment, and that when appellees gave their first notice they referred to Mettlen & Company as subcontractors and did other things by which they recognized Mettlen & Company as subcontractors, but if they had a contract with appellant that he was to pay for the materials furnished,

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the mere fact of their having recognized Mettlen & Company as subcontractors afterwards and that the goods were charged to Mettlen & Company upon the books of appellee would not necessarily deprive them of their rights under the promise of Beale to pay for the materials. *Lusk v. Throop, supra*.

There was the same conflict of evidence with reference to the promise of Beale to pay for material furnished in the claim of McEwing & Thomas Clay Products Company, but the court arrived at the same conclusion with reference to his promise in this claim as in the other, and we can see no reason for disturbing the finding of the court in this matter.

After a careful consideration of all of the evidence, facts and circumstances in this case, we are of the opinion that the Circuit Court was warranted in finding that under the agreement and conduct of the appellant that there was an implied request upon his part to furnish the building material that was furnished and used in the construction of the building, and that the appellee and the said McEwing & Thomas Clay Products Company are entitled to their lien under this statute, and the decree of the lower court is affirmed.

Decree affirmed.

Halladay v. Murphysboro Supply Co., 203 Ill. App. 142.

John D. Halladay, Appellee, v. Murphysboro Supply Company et al., Appellants.

(Not to be reported in full.)

Appeal from the Circuit Court of Jackson county; the Hon. DEWITT T. HARTWELL, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Action under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), by John D. Halladay, plaintiff, against Murphysboro Supply Company, Rudolph Stecher Brewing Company, Thomas John and Daisy Mitchell, defendants, to recover for the death of plaintiff's son due to his falling from the top of a railroad car which he had boarded while in an intoxicated condition from liquor obtained of defendants. From a judgment for plaintiff for \$1,500, defendants appeal.

W. H. NELMS, F. P. DRENNAN and W. F. ELLIS, for appellants.

SCHWARTZ & HAYS and MARTIN & GLENN, for appellee; HAROLD F. LINDLEY, of counsel.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS—*when cross-examination proper in action for damages under Dramshop Act.* In an action for damages under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), a question on cross-examination whether the witness would say positively he did not sell intoxicating liquors or lager beer to a minor on a certain night, tes-

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timony in chief having been given that the instructions from the proprietor of the saloon were not to sell to minors, *held* proper if for no other purpose than to ascertain whether such instructions were given and were being carried out in good faith.

2. WITNESSES, § 253*—*when weight of is for jury*. The fact that a witness' testimony may not be of much weight because of remoteness does not destroy its competency, and its weight is for the jury.

3. INTOXICATING LIQUORS, § 249*—*when instruction in language of statute in action for death of minor is not erroneous*. Giving an instruction in the language of the statute, section 9 of the Dramshop Act (J. & A. ¶ 4609), in an action for the death of a minor due to intoxication and not directing a verdict, is not improper.

4. INTOXICATING LIQUORS, § 250*—*when instruction authorizing allowance of exemplary damages in action for death of minor is not erroneous*. Where in an action for death under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), the evidence warranted a finding that plaintiff sustained actual damages and that liquor was sold to the deceased, a minor, in violation of statute, *held* that the defendant could not complain even if an instruction was broad enough to include exemplary damages.

5. INTOXICATING LIQUORS, § 233*—*what damages are recoverable in action for death of minor due to intoxication*. The right of recovery under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), for the death of a minor is not limited to the value of the deceased's wages, but if he contributed to the parent's support, and if plaintiff is injured in his means of support by reason of the unlawful sale of liquor and consequent intoxication, he may recover whatever loss the jury determines he has sustained.

6. INTOXICATING LIQUORS, § 187*—*when right of action exists in favor of persons sustaining loss due to intoxication*. If a person by reason of intoxication is rendered reckless and careless of his own safety and unfit to care for himself, and is injured as a result of such intoxication, a right of action exists in the person who sustained loss from such injury.

7. NEGLIGENCE, § 196*—*when proximate cause is question for jury*. Where there is evidence tending to show any particular thing could be the proximate cause of an injury, the jury are the judges of what constitutes such proximate cause.

8. INTOXICATING LIQUORS, § 245*—*when verdict for damages for death of minor is not excessive*. Where the evidence tended to show that the deceased was a good worker, capable of earning \$2 a day, contributed much of his wages to the support of the father and the family dependent upon him, was seventeen years and six months old

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bier v. Weiler et al., 203 Ill. App. 144.

and of industrious habits, *held* a verdict for \$1,500 damages for his death was not excessive.

9. INTOXICATING LIQUORS, § 247*—*when proximate cause of death of intoxicated minor is question for jury.* Where a minor, while in an intoxicated condition, climbed on top of a railroad car and lost his balance while walking on the top thereof and fell between the cars and was killed, *held* that it was a question for the jury whether such intoxication was the proximate cause of his death.

Joseph Bier, Appellee, v. Abe Weiler, Jacob Keiner, Mary L. Hoppe and Washington West, Appellants, interpleaded with Warren E. Fleming, Cornelia E. Fleming, Homer Greer, Inez Greer, Nicholas Haffner, Henry J. Fink, Trustee, and C. P. Otwell Defendants to decree in this case.

1. MORTGAGES, § 269*—*when mortgagee selling notes secured by mortgage may discharge mortgage as to subsequent bona fide purchasers.* The holder of notes and mortgage securing the same who sells and assigns the notes but retains the mortgage, in which he is named as mortgagee or trustee, has the lawful right to discharge such mortgage as to subsequent bona fide purchasers, notwithstanding such notes have not been paid.

2. MORTGAGES, § 278*—*when presumed that release deed has been delivered.* The recording of a release made by persons appointed in a mortgage or trust deed to execute the release carries with it as to subsequent bona fide purchasers the legal inference that the release deed has been delivered.

3. MORTGAGES, § 269*—*when release of is binding.* As between the parties or as to third persons having notice of the equities of others, a release of a mortgage made without the notes secured by such mortgage having been paid and in fraud of the holders of such notes would not be binding, but subsequent purchasers or incumbrancers without notice who have acquired their interest in good faith would be protected by such release by the trustee.

4. NOTICE, § 3*—*when sufficient to charge person with knowledge.* To constitute notice sufficient to charge a person with knowledge there must be something more than bare suspicion; it must appear

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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that such facts were suggested as would cause a prudent mind to investigate, and to fail to do so would be gross negligence on his part, and that such negligence would be of a character that would imply a fraudulent intent.

5. MORTGAGES, § 277*—*what is effect of release of record.* In the absence of any notice or ground of suspicion, it is not the duty of a purchaser to obtain an admission of payment from the holder of a note secured by trust deed regularly released of record.

6. MORTGAGES, § 119*—*when purchasers of notes secured by new mortgage have priority under new mortgage over holders of notes under old mortgage.* Where the purchaser of land assumed a mortgage thereon then of record given to secure certain notes, on the maturity of which such mortgage was released of record by the person authorized therein to release same and a new mortgage to secure new notes was given and duly recorded, and said new notes sold to parties who, as well as said purchaser of the land, were ignorant of the fact that the notes secured by the old mortgage had not been paid, and no suspicious or other circumstances existed tending to put the purchasers of such new notes upon notice of such fact, *held* that such purchasers of such new notes were bona fide purchasers and entitled to priority under such new mortgage over the holders of the notes under the old mortgage.

Appeal from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded. Opinion filed November 13, 1916.

C. H. G. HEINFELDEN and P. C. OTWELL, for appellants.

WINKELMANN & OGLE, for appellee.

SCHAEFER & KRUGER, for Nicholas Haffner.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

The appellee recovered a decree in the Circuit Court of St. Clair county, to reverse which the appellants prosecute this appeal.

It appears from the record in this case that Warren

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

E. Fleming was the owner of Lot No. 19, and the south-east half of Lot 20, in Abend's First Addition to the City of Belleville, St. Clair county, Illinois, and that on the 7th day of July, 1910, he secured a loan of \$3,000 from Henry J. Fink, a loan broker of Belleville, and that to represent said loan he executed six promissory notes of \$500 each, payable to Henry J. Fink, trustee, or order, and due three years after date with interest coupons attached, and numbered from 1 to 6 inclusive. To secure the said notes the said Warren E. Fleming and his wife, Cornelia E. Fleming, executed to Henry J. Fink, trustee, a mortgage upon the above-described property. Fink sold and assigned the six notes as follows: No. 1, to Adolph A. Eggersman; No. 2, to Jacob H. Keiner; Nos. 3, 4 and 5, to Joseph Bier; and No. 6, to Nicholas Haffner, and the said notes were delivered to the respective purchasers and retained by them but the mortgage was left in the possession of Henry J. Fink. On November 25, 1910, Homer Greer purchased the above-described property from Fleming paying him \$500 in cash and assuming the Fleming mortgage for \$3,000 and from that date Greer continued to pay the interest as it became due to Henry J. Fink and received from Fink the interest coupons attached to the respective notes. The notes secured by the Fleming mortgage became due on July 7, 1913, and on that day, or a day or two previous thereto, Homer Greer told Fink that he could not pay the loan and wanted him to renew the loan, which Fink agreed to do, and on July 10, 1913, Fink and Greer went to the recorder's office in the courthouse at Belleville and there upon the margin of the recorded mortgage from Fleming to Fink, trustee, Fink, trustee satisfied the mortgage in full, in the presence of the deputy recorder. This original mortgage was marked "Satisfied in full on July 10, 1913, C. A. Summers, Recorder," and was delivered by Fink to Greer.

Thereupon Greer delivered to Fink six notes in the sum of \$500 each, payable to the order of Henry J. Fink, trustee, and signed by Homer Greer and Inez Greer, and also a mortgage duly executed by Homer Greer and wife and payable to Henry J. Fink, trustee. About a week after the maturity of the Fleming notes, Keiner, who was the owner of No. 2 note, presented it at Fink's office for payment. Fink advised Keiner that Greer had bought the property and had made a new mortgage for \$3,000 and that he would let Keiner have note No. 2 of the Greer series in exchange for the Fleming note owned by Keiner. The exchange was made. A little later Fink paid Eggersman the \$500 due him and took up note No. 1, of the Fleming series. On about July 15, 1913, Fink sold, assigned and delivered note No. 1 and No. 3 of the Greer series to Mary L. Hoppe for \$1,000 in cash, and during the first week in August he sold, assigned and delivered notes Nos. 4 and 5 of the Greer series to Washington West for \$1,000 in cash, and on August 13th he sold and assigned note No. 6 of the Greer series to Abe Weiler for \$500 in cash. The said notes of the Greer series were delivered to the respective purchasers and have been in their possession from that time. It appears that the purchasers of the Fleming series and also of the Greer series had confidence in Fink's ability and integrity and gave no particular attention to the records but relied upon Fink for their information. It further appears that appellee Bier called upon Fink at two or three different times for his money and advised Fink that he wanted to be present when the money was paid, and Fink agreed to advise him when he would be ready to pay the money so that he could be present but Fink never advised him that the money was about to be paid, and on about the 25th of August, 1913, Fink absconded and left Belleville but his absence was not generally known until about the 4th of September. Haffner, who held one of the Fleming notes, called at

Fink's office to collect the same and was told to come around in a few days and he would fix the matter up, but no payment was made to him. It further appears that the property in question is not of sufficient value to secure the payment of all of the unpaid notes above described, and that some of the purchasers of the notes will have to suffer a loss in consequence thereof. On the 2nd of January, 1914, the appellee filed a bill for a foreclosure of the Fleming mortgage and the setting aside of the satisfaction thereof made by Fink as trustee upon the records.

The bill filed by appellee was in the usual form of bills for foreclosure of mortgages and alleged that the three notes owned by Bier of the Fleming series had not been paid and that the release of the mortgage made by Fink was fraudulent, without authority of law and void as to appellee and others holding the unpaid Fleming notes, and asked that the release of the mortgage made by Fink be set aside and that Bier be decreed to have a prior lien upon the property in controversy. The bill also alleged that at the maturity of the Fleming notes Greer executed and delivered to Fink six other notes of \$500 each, and charges that they were delivered to Fink and that Fink was directed to indorse his name on each of said notes and distribute them among the respective owners of the Fleming notes, according to their several holdings. To this bill the appellee made Fleming, Greer and the purchasers of both series of notes parties. The several parties defendant answered the said bill, admitting the execution of the mortgages but denied that they had any knowledge that the Fleming notes had not been paid at the time of the purchase by them of the Greer notes, and alleged that the Greer notes were purchased by them after the Fleming mortgage had been satisfied of record. Each of the answers also deny any knowledge of fraudulent acts of the said Fink in the releasing of the Fleming mortgage, and

deny that they had any notice of the fact that the mortgage was released without authority or that the Fleming notes had not been paid.

The case was referred to the master to take testimony and to report conclusions, and thereafter the cause was heard before the chancellor upon exceptions, and a decree rendered finding that the appellee's lien and those of the unpaid Fleming notes were a prior lien to that of the appellants holding the Greer series of notes and directing a sale of the property.

The real question in controversy in this case is as to which series of notes the holders thereof have priority of lien. Many questions have been argued and citations presented as to what we regard as collateral matters herein which will not be commented upon except so far as they are connected with the principal questions involved. As we read this record there are two controlling questions, the determination of which will settle the rights of the parties to this suit. The first question is, Did Fink as trustee have a legal right to satisfy the mortgage that was given to secure the Fleming series of notes without the notes having first been paid? 2nd, Did the purchasers of the Greer series of notes have notice actual or constructive of the fraud practiced by Fink in the release of the Fleming mortgage or of the fact that the Fleming notes had not been paid? The first proposition has, as we think, been fully determined by the courts of this State. There was no assignment of the Fleming mortgage by Fink to any of the purchasers and Fink was named as the mortgagee or trustee therein and had the lawful right to discharge the Fleming mortgage, as to subsequent bona fide purchasers. The recording of a release made by persons appointed in a mortgage or trust deed to execute the release carries with it as to subsequent bona fide purchasers the legal inference that the released deed has been delivered. *Havighorst*

Bier v. Weller et al., 203 Ill. App. 144.

v. Bowen, 214 Ill. 90. "Whether the release was in fact delivered to Bowen would seem to be not controlling as between the parties. It was made by the person pointed out in the trust deed to make it. It was placed of record, and under our recording act the fact that it was of record carried with it, as to appellees and innocent third parties, the legal inference that it was delivered. There is quite as much delivery of this deed as there could be of an entry of satisfaction on the margin of the record, and, as we have said, one is given the same legal effect as the other." *Havighorst v. Bowen*, *supra*.

"The law is well settled in this State that the trustee in a trust deed of the character of the one in question has the power, as to third parties, to release the lien created thereby so as to revest the title in the grantor, even though he does so without the consent of the holder of the indebtedness which the trust deed was given to secure and in violation of the obligations of his trust (*Mann v. Jummel*, 183 Ill. 523); and such release may be made even though the indebtedness secured by the trust deed is not due at the time the release is executed. (*Ogle v. Turpin*, 102 Ill. 148.) In equity, however, a release unauthorized by the terms of the trust deed or by the consent of the *cestui que trust* will have no effect upon the trust deed as between the original parties or as to subsequent purchasers with notice." *Vogel v. Troy*, 232 Ill. 484. While it is true that as between the parties, or as to third persons having notice of the equities of others, a release made without the notes that were secured by said mortgage having been paid and in fraud of the holders of such notes would not be binding, yet as to subsequent purchasers or incumbrancers without notice who have acquired interest in good faith, a release of a previous mortgage by the trustee would protect such bona fide purchasers and incumbrancers.

This brings us to a discussion of the second proposition as to whether or not the appellants were purchasers without notice, actual or constructive, of the rights of the holders of the Fleming notes. There is no evidence in this record that the appellants, purchasers of the Greer notes, had any actual notice that the Fleming notes had not been paid and that the mortgage was released without the consent or direction of the owners of the notes, but it is insisted that there were such facts and circumstances surrounding the transaction as to put appellants upon notice. In order to constitute notice there must be something more than a bare suspicion; it must appear that such facts were suggested as would cause a prudent mind to investigate, and to fail to do so would be gross negligence upon his part, and that such neglect would be of a character that would imply a fraudulent intent. "If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply; then the purchaser will, in equity, be considered, as in fact he is, a bona fide purchaser without notice." *Grundies v. Reid*, 107 Ill. 312. "Enough must be shown to impute to the subsequent purchaser bad faith, so as to taint his purchase with fraud, in law. (*Doyle v. Teas*, 4 Scam. [5 Ill.] 202.) Mere want of caution, as distinguished from fraudulent and wilful blindness, is not sufficient to charge a subsequent purchaser with constructive notice of an unrecorded deed." *Anthony v. Wheeler*, 130 Ill. 128. The Supreme Court of the United States, in the case of *Williams v. Jackson*, 107 U. S. 478, says: "It was suggested in argument that as the first deed of trust showed that the notes secured

thereby were negotiable and were not yet payable, and that the land was not intended to be released from this trust deed until all the notes were paid, Williams was negligent in not making further inquiry into the fact whether they were still unpaid. But of whom should he have made inquiry? The trustees under the first deed and the original holder of the notes secured thereby, having expressly asserted under their own hands and seals that the notes had been paid, and Sweet and wife having apparently concurred in the assertion by accepting the deed of release and putting it on record, he certainly was not bound to inquire of any of them as to the truth of that fact; and there was no other person to whom he could apply for information, for he did not know that the notes had ever been negotiated, and had no reason to suppose that they had not been canceled and destroyed. To charge Williams with constructive notice of the fact that the notes had not been paid, in the absence of any proof of knowledge, fraud or gross or wilful negligence, on his part, would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business."

The language in the above-entitled cause, of *Williams v. Jackson*, is quoted approvingly by our Supreme Court in the case of *Havighorst v. Bowen*, *supra*. The recording laws are designed to afford protection to parties acting in good faith and relying upon them, and in the absence of any notice or ground of suspicion it is not the duty of a purchaser to obtain an admission of payment from the holder of a note secured by trust deed regularly released of record. *Lennartz v. Quilty*, 191 Ill. 174. It is said in the case of *Ogle v. Turpin*, 102 Ill. 153: "The assignment of the notes operated as an equitable assignment of the mortgage, and the assignment was an instrument that related to or affected the title to land, and to become

operative' as to creditors and purchasers the assignment of the mortgage should have been formally made and recorded, to charge notice to all persons dealing with the title, or at least the assignment on the note should have referred to the mortgage, and that assignment should have been recorded. As between the parties, the mere assignment, without recording, was all that was required to assign the mortgage, but as to strangers it was otherwise." In that same case Justice Dickey, in rendering a concurring opinion, says: "When a man buys notes secured by mortgage he becomes thereby the equitable assignee of the mortgage, and acquires an equitable interest in the mortgaged lands. If he wishes to protect that interest against subsequent purchasers, he may do so by taking a written assignment of the mortgage, and placing that assignment upon record. Possibly a record of the assignment of the note would be sufficient."

The evidence in this case discloses that at the time Greer renewed the note with Fink he supposed that Fink was the owner of the notes. He says: "I gave these (referring to the Greer notes) to Fink for the purpose of taking care of the three thousand dollars that the mortgage already stood for. I never knew that the notes had been transferred to anybody. I really thought the money was being furnished by Mr. Fink. The coupons were always ready for me when I paid the interest. * * * I supposed it was Fink's money and that he had the notes. I supposed the money was coming directly from Fink." So far as the record and circumstances disclose, these Greer notes came to Fink in a regular way of a renewal of the loan. The Greer notes and mortgage were given to Fink in apparently the usual manner of renewing or making a loan. The notes were made payable to him and he was named as mortgagee or trustee in the mortgage.

It is said by counsel for appellee: "That when Fink came to Dr. West and Mrs. Hoppe and offered to sell to them the Greer notes, as alleged in the bill, they knew: (a) That the Greer notes had not been substituted for the Fleming notes, because they were still in Fink's hands; (b) that the Greer notes had not been sold for money with which to pay the Fleming notes, as in such case they would not have been in Fink's hands; (c) that Fink was then insolvent and would not have paid the Fleming notes, for his insolvency from July 10, 1910, hitherto, is alleged in the bill and not denied by them, hence confessed and requires no further proof." We do not regard these suggestions as of sufficient importance to impute to appellants bad faith in the purchase of the Greer notes. As to the first suggestion, there is nothing in the record showing that appellants knew that the Greer notes were to be substituted for the Fleming notes. As to the second suggestion, there is nothing showing that the notes were to be sold to procure money to take up the Fleming notes, and even if that had been the arrangement between Fink and Greer there is nothing to show that appellants had any notice of it. As to the third suggestion, the insolvency of Fink could not have affected the question, for so far as appears from the record or from any facts developed therefrom, Fink had the Fleming notes and was the owner of them. Appellants had no knowledge that the Fleming notes had been sold to any one. While there is an allegation in the bill that Fink was insolvent from July 10, 1910, there is nothing in the record showing that these appellants knew of his insolvency. They all dealt with him as if he was perfectly solvent and reliable. We do not think that the facts, as disclosed by this record, bring this case within the rule announced in the case of *Blake v. Blake*, 260 Ill. 75, as contended for by appellee. There the property was sold by a guardian to his

brother, a deed made to him, and the brother then re-conveyed the property to the guardian within a few days and the two deeds were filed for record at the same time; which, under the circumstances, was held by the court to be sufficient to put the purchaser upon notice.

It seems to us from the reading of this record that the appellants and appellee all trusted Fink, all knew that he was a real estate man and understood the real estate business, and none of them had any suspicion, or real cause for suspicion, that Fink was endeavoring to defraud any one. We believe that appellants had a right to be governed by what appeared of record, and that they would be bound by what appeared thereon, and that if the appellee and other purchasers of the Fleming notes were unwilling to trust Fink, they could have in some manner placed upon the record some notice of the fact that the Fleming notes had been sold to them, and if they had done so their rights would have been fully protected and doubtless Fink would not have been enabled to have defrauded any one by procuring the Greer mortgage. It is true that this is a hardship upon appellee and the other purchasers of the unpaid Fleming notes, but we are of the opinion that under the law the equities of this case are with the appellants and that the Circuit Court erred in rendering a decree for the appellee, in giving the appellee and the holders of the unpaid Fleming notes a prior lien to that of appellants, and the decree of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

T. E. Gage, Appellee, v. City of Vienna, Appellant.**(Not to be reported in full.)**

Appeal from the Circuit Court of Johnson county; the Hon. ALBERT W. LEWIS, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded. Opinion filed November 13, 1916.

Statement of the Case.

Action by T. E. Gage, plaintiff, against the City of Vienna, defendant, to recover for damages for personal injuries sustained as the result of being thrown from a buggy while traveling on the streets due to his team running away and running into a wagon standing on the street. From a judgment for plaintiff for \$1,500, defendant appeals.

For a full statement of facts, see the opinion in the case on a former appeal, 196 Ill. App. 585.

The first instruction given for plaintiff was as follows: "The court instructs the jury that the defendant, City of Vienna, is bound by law to use reasonable care, caution and supervision to keep its streets and street crossings in a reasonably safe condition to travel in the ordinary modes of travel, and if it fails to so use reasonable care and caution to keep its streets and street crossings in a reasonably safe condition, it is liable for the injuries sustained in consequence of such failure, provided the party injured is himself exercising reasonable care and caution for his own safety before the accident occurred." Objection is made to this instruction that it, in effect, directed a verdict and omitted the element of notice.

The defendant, however, asked an instruction which was refused and contained the following language: "In this case, even though you might believe that the

plaintiff sustained his injuries complained of by reason of a wagon standing in a public street, still if you shall further find from the evidence that the said wagon was placed in said street by William Mathis, or by some other person in no way connected with the said city, and that said city had neither actual or constructive notice of such obstruction, as explained in other of these instructions, then in such case the defendant would not be liable in damages for such injuries and you should find the issues for defendant as to any damages so caused."

W. Y. SMITH and SPANN & SPANN, for appellant.

O. R. MORGAN and C. S. MILLER, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 195*—*when refusal to direct verdict in action for personal injuries is proper.* In an action against a city for damages for personal injuries, due to plaintiff's team running into an obstruction on the street, *held* that the court did not err in refusing to direct a verdict for defendant where there was evidence tending to show defendant was guilty of negligence and of permitting obstructions from time to time in the street at or near the place where plaintiff was injured.

2. MUNICIPAL CORPORATIONS, § 1100*—*what instruction directing verdict in action for injuries due to defective street must contain.* Notice of the condition of the street on the part of a city where an injury occurred and of the fact that it was obstructed or out of repair is one of the essential things to be proven in an action for damages because of such injury, and in directing a verdict the instruction must contain the element of notice, actual or constructive.

3. MUNICIPAL CORPORATIONS, § 1100*—*when instruction in action for personal injuries due to team running into obstruction on street is improperly refused.* In an action against a city for damages for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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personal injuries by reason of plaintiff's team running into an obstruction on a street, *held* that it was reversible error to refuse an instruction explaining what is actual and what is constructive notice to a city as to the condition of its streets, and advising the jury that if a wagon was left on a street by a third party and the city had no notice, actual or constructive, of it or was not in any manner permitting such obstruction, then there would be no liability.

George E. Nichols, Appellant, v. Rogers-Nichols Live Stock Commission Company, Appellee.

1. JUDGMENT, § 135*—*when motion to set aside default is not fatally defective.* Where there was enough in the beginning and signing of a motion to set aside a default to identify it as having been made on behalf of the defendant, the mere fact of an incorrect description given the defendant in the body of the motion ought not to deprive him of a right of hearing thereunder, or, where such motion was filed during the term at which judgment on such default was rendered, to deprive the court of jurisdiction to continue such motion to a subsequent term and then permit such amendments as were necessary to enable the parties to properly and fully submit their claims.

2. JUDGMENT, § 142*—*when failure to file record of former suit or copy with affidavit filed in support of motion to set aside default is immaterial.* Where an affidavit filed in support of a motion to set aside a default of defendant upon which judgment was rendered set up a former suit between the same parties and that it had been dismissed for want of equity, *held* that a failure to file with such affidavit the record of the former suit or a copy thereof was not important in disposing of such motion.

3. APPEAL AND ERROR, § 1380*—*when action of court on motion to set aside default will not be disturbed.* A motion to set aside a default is addressed to the sound legal discretion of the court, with the exercise of which a court of review will not interfere unless it appears to have been wrongful and oppressive.

4. COSTS, § 14*—*what costs plaintiff is liable for on dismissal of case upon setting aside judgment against defendant.* Where there was no order setting aside a judgment against defendant requiring

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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him to pay costs up to the date of setting aside such judgment, an order thereafter dismissing the case at plaintiff's cost could only cover such costs as defendant had not been adjudged to pay.

Appeal from the City Court of East St. Louis; the Hon. W. M. VANDEVENTER, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916. Rehearing denied January 13, 1917.

W. E. KNOWLES, for appellant.

KEEFE & SULLIVAN, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

It appears from the record in this case that at the May term, 1915, of the City Court of East St. Louis, George Nichols, appellant, obtained a judgment by default against Rogers-Nichols Live Stock Commission Company for \$367.71.

The declaration consisted of the common counts, to which an affidavit of merits was attached stating that the demand, "Is for balance due him on account from the defendant and that there is due to the plaintiff from the defendant, after allowing all just credits, deductions and set-offs, the sum of \$338.57, together with interest at the rate of five per cent. per annum from the 1st day of August, 1913, to April 21, 1915, making a total amount due the plaintiff from the defendant on last mentioned date the sum of \$367.71." On the 19th day of May, 1915, and during the May term of said court, the defendant describing itself as Nichols-Rogers Live Stock Commission Company filed a motion, with affidavits accompanying the same, asking the court to set aside the judgment theretofore rendered at said term. While the record was in this condition and on July 20, 1915, the May term of said court was adjourned and this cause, with other undisposed of matters, was continued under a general order of con-

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tinuance. At the September term of said court the appellant filed a motion to strike from the files the motion and affidavits purporting to be filed in said cause for the reason that they were not filed by any person, firm or corporation who was a party to the suit. On October 4th, and during the September term of said court, the defendant asked leave to amend the motion filed at the May term, by substituting for the name Nichols-Rogers Live Stock Commission Company the name of the real defendant, Rogers-Nichols Live Stock Commission Company. The appellant filed a motion to strike the motion of appellee from the files on the ground that it was not filed, at the term judgment was rendered. Upon a hearing the court denied the motions of appellant and granted the motion of appellee and gave appellee leave to plead by the 11th day of October on payment of costs to date. On October 15, 1915, the cause was regularly placed on trial and the appellant, choosing to stand by the record as made, refused to proceed further and the cause was dismissed by the court for want of prosecution at the cost of the plaintiff, and execution was issued therefor.

The principal contention of appellant is that no motion for a new trial was made at the May term of the City Court, at which judgment was rendered, by any person, firm or corporation who was a party to the suit, and that no motion having been made at the May term, the court was without jurisdiction at the September term to proceed further with the hearing of the cause. It appears from the record herein that the motion entered to set aside the judgment begins as follows: "And now comes the defendant, Nichols-Rogers Live Stock Commission Company by Keefe & Sullivan, its attorneys, and moves the court to set aside the judgment herein and for cause therefor assigns the following, together with the facts set up in

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said affidavits herewith filed;" which are made a part of the motion. The motion is signed as follows: "Keefe & Sullivan, attorneys for defendant." It will be observed that the motion was made by the defendant but misdescribed the person of the defendant which is styled, "Nichols-Rogers Live Stock Commission Company" instead of "Rogers-Nichols Live Stock Commission Company," as set forth in the declaration and judgment. It will also be observed that at the conclusion of the motion it is signed by Keefe & Sullivan, attorneys for defendant. There was certainly enough in the beginning of the motion, and in the signing of the motion, to identify the motion as having been made upon behalf of the defendant, and the mere fact of an incorrect description given to the defendant in the body of the motion ought not, in our judgment, to deprive the defendant of a right of hearing thereunder. Supposing that the description, "Nichols-Rogers Live Stock Commission Company" had been omitted entirely, then the motion would have been certain and definite as to the person in whose behalf the motion was entered, so that as we view it these words could well have been treated by the court as mere surplusage. It appears to us that the motion was really made by the defendant and that the court had a right to treat it as having been so made, and that the court acquired jurisdiction at the May term to hold on to the case and continue it and dispose of it at the September term, as it did, and as the court properly held on to its jurisdiction of the cause it then had a right to permit any amendments that were necessary to permit the parties to properly and fully submit their claims. The objection urged is technical and without merit and we believe that the lower court did not err in disposing of the motion at the September term.

It is also insisted by counsel for appellant that the motion to set aside the judgment is without merit and

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that it was an abuse of discretion of the court in setting aside a default on the grounds stated in the affidavits: First, because there was no diligence shown; second, because the affidavits do not show any merit but only state the conclusion that appellee did not owe appellant any money and that there was no record showing a former suit between the same parties upon this cause as having been dismissed for want of equity.

It appears from the evidence that the appellee had Mr. Keefe in its employ to represent it in any legal business, and that when summons was served he called over the telephone to Mr. Keefe's office, which was answered by Keefe's stenographer, and that appellant advised them of the service of the summons, but it was supposed by the stenographer that it was a paper in the old case that had been pending in chancery and disposed of, and nothing was said about it to Mr. Keefe, and the same was overlooked by the stenographer. It is also said that the affidavits attached to the motion did not show any merit in appellee's defense. The affidavit did state that appellee was not indebted to appellant and did not owe him anything, and the language of the affidavit of appellee was fully as broad as that filed by appellant with its declaration, as it only charged that a balance was due. The affidavit also showed that a former suit had been tried between these parties in chancery and the bill dismissed for want of equity, and while it does appear that the record of the former suit, or a copy thereof, was not attached to the affidavit, we would not deem that of importance in disposing of this motion. It doubtless would be important upon the trial of the case to show such proceeding by a certified copy of the record, but not so upon a mere motion.

It is well settled that a motion to set aside a default is addressed to the sound legal discretion of the trial court. It has the opportunity to view the surrounding conditions and determine properly more nearly what

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was necessary to be done to further the interests of justice in the particular case than the Appellate Court could. In the case of *Hartman v. Viera*, 113 Ill. App. 218, the court says: "It is well settled in this State that a motion to set aside a default is addressed to the sound, legal discretion of the court, and that unless it appears that such discretion has been wrongfully and oppressively exercised, a court of review will not interfere. *Culver v. Brinkerhoff*, 180 Ill. 548; *Eggles-ton v. Royal Trust Co.*, 205 Ill. 178." We are not able to see how the appellant was in any manner wronged or how the discretion exercised by the court was in any way oppressive to the appellee, and none has been pointed out to us by counsel in his argument. The appellant was not deprived of any right for if he had a just claim against the appellee the court gave him an opportunity to present it and he refused so to do.

It is also claimed that it was error to render judgment against the plaintiff for costs, as that the order made would include the costs that had heretofore been adjudged against the defendant. There was no order setting aside the judgment of the court requiring the defendant to pay the costs up to the date of the setting aside of the judgment, and the order rendered dismissing the suit at plaintiff's cost could only cover such costs as the defendant had not been adjudged to pay.

We are of the opinion that the court in this proceeding herein did not commit any reversible error and the judgment of the lower court is affirmed.

Judgment affirmed.

Daly v. New Staunton Coal Co., 203 Ill. App. 164.

William R. Daly, Appellee, v. New Staunton Coal Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. J. F. GILLHAM, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Action by William R. Daly, plaintiff, against New Staunton Coal Company, defendant, to recover damages for injuries received as the result of his being thrown from a train of empty cars, upon which he was riding down grade by gravity in defendant's mine, upon its colliding with another train of empty cars drawn by a motor. From a judgment for plaintiff for \$9,500, after requiring a remittitur of \$5,500, defendant appeals.

WILLIAM E. WHEELER, for appellant.

BURTON & BURTON and **CLARK & HUTTON**, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. **MINES AND MINERALS, § 114***—*who is not vice principal.* The bottom boss in a coal mine while performing duties in the mine not pertaining to his duties as such boss, *held* not to be a vice principal so as to exempt the owner of the mine from liability for negligence resulting in injuries to such boss while performing such duties.

2. **MINES AND MINERALS, § 182***—*what are questions for jury in*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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action by miner for injuries sustained by collision of train of cars with insufficiently lighted motor-drawn train. In an action by a miner for damages for personal injuries sustained as the result of the collision of a train of empty cars on which he was riding down grade by gravity in a coal mine colliding with a motor-drawn train of empty cars, *held* that whether a light on the motor was a conspicuous light such as was required by the statute (J. & A. ¶ 7489), and whether the plaintiff would have been able to have observed a light of sufficient brilliancy and have known of the approach of the motor in time to have escaped injury were questions for the jury.

3. NEGLIGENCE, § 196*—*what is question for jury.* The question of proximate cause of an injury is for the jury.

4. MINES AND MINERALS, § 189*—*when instruction quoting statute as to lights on cars is not erroneous.* Where the only contention in an action by a miner for personal injuries was whether there was a white light on the front of a motor in a coal mine which struck a train of cars on which he was riding and a verdict was directed upon a finding there was such a light, an instruction quoting the whole of the statute referring to a red light as well as a white one (J. & A. ¶ 7489), while there was no proof as to a red light, could not have misled the jury and was not objectionable.

5. WORKMEN'S COMPENSATION ACT, § 12*—*when instruction as to defenses employer electing not to operate under is deprived of its not erroneous.* There is no error in giving an instruction fully advising the jury as to the defenses which an employer is deprived of by its electing not to operate under the Workmen's Compensation Act, distinguishing the case of *Price v. Clover Leaf Coal & Mining Co.*, 188 Ill. App. 27.

6. INSTRUCTIONS, § 107*—*when instruction merely presenting plaintiff's view of case is not erroneous.* An instruction which does not direct a verdict but merely presents plaintiff's view of the case is not erroneous for not including the defense urged by the defendant, particularly where an instruction on behalf of the defendant fully advises the jury as to his rights.

7. NEGLIGENCE, § 237*—*when modification of instruction on proximate cause is correct.* In an action for negligent injuries, *held* that an instruction offered by the defendant, to the effect that if the jury found the plaintiff was negligent and that his negligence was the proximate cause of his injury they should find the defendant not guilty, was erroneous, and that the court properly inserted the word "sole" before the word "proximate."

8. DAMAGES, § 122*—*when verdict for personal injuries as remitted is not excessive.* In an action against an employer for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

damages for personal injuries, where the plaintiff was shown to have lost a leg and been sick and suffered severe pain for many months, had earned a salary of \$100 a month, and by the injury was wholly disabled from performing the work he was accustomed to or had prepared to perform, *held* that a verdict for \$15,000 as remitted to \$9,500, was not excessive.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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der of A. M. Young, one hundred dollars at seven per cent. from date. Value received.

S. F. Hart
J. Otis Hart
M. J. Hart
Martha Hart.

“(Indorsements on the back of note:)

“A. M. Young, W. J. Kirkpatrick

“Int. paid up to August 22, 1913.”

After a hearing before the justice of the peace the cause was appealed to the Circuit Court of Saline county, Illinois, and there tried. Upon the hearing in the Circuit Court the note was offered in evidence. The defendant objected to the introduction of the note because it appeared that an erasure or rubbing of the paper had been made at the place where the figures “42” were written. The original note was certified to this court for inspection and it has the appearance of having been rubbed. Upon the objection made by the defendant in error, the plaintiff in error then offered evidence showing that the note in question was the last of a series of seven notes of one hundred dollars each, all bearing date of February 22, 1910, and maturing one every six months, and again offered the note in evidence, but upon objections made by defendant the court refused to admit the note in evidence. The plaintiff then rested his case and the court directed the jury to return a verdict for the defendant, which was done and judgment rendered against plaintiff for costs, to reverse which judgment this writ of error is prosecuted.

The plaintiff in error contends that the court erred in refusing to admit the note in evidence and in directing a verdict for the defendant.

The defendant did not file an affidavit denying the execution of the note but insists that the erasure appears upon its face to be a material one and for that reason it was the duty of the court as a matter of law

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to exclude it from the consideration of the jury. Quite a number of authorities have been cited by counsel for plaintiff and defendant, the principal of which we have carefully examined and find that there is some conflict in the decisions of our court upon this question. In the case of *Reed v. Kemp*, 16 Ill. 445, in commenting upon alterations of an instrument offered in evidence, the court says: "There is no presumption of law arising upon the face of an instrument from bare inspection of its appearance, whether it has been, and if so, when, altered from the true contract; such appearance may throw suspicion and distrust upon the instrument, but it is a question of fact and not of law. *Gillett v. Sweat*, 1 Gilm. 489. In *Walters v. Short*, 5 Gilm. 256, the court expresses dissatisfaction with a rule of presumption in favor of the alteration being made at the time of the execution of the instrument; but while they seem to incline to a contrary presumption, they lay down no rule on the subject as to a presumption in law at all, but seem to put it, as we think it should be, upon the matter of fact. The party producing such an instrument is called upon for explanations, and if he fail to give them, suspicion may become the conviction of fact in the mind of the court or jury, that such alterations, or appearances of alteration, were subsequent to the execution and delivery. Such a conclusion seems strangely preponderant in the mind of the court in that case. Still these explanations may, themselves, be found on the face of the paper." In the case of *Hodge v. Gilman*, 20 Ill. 437, the court says: "It is, at least, the settled law of this court that such interlineations must be explained by the party claiming the benefit of the paper, the presumption of law being that the interlineations were made after the execution by the maker." Again, in the case of *Milliken v. Marlin*, 66 Ill. 13, the court in commenting upon the question of the alteration of an instrument says: "As to the eleventh instruction, it was claimed that the

power of attorney which was in evidence showed that the description of the land was in a different ink and handwriting from that in the body of the instrument, and showed an alteration. If this was true, then it was a fact to be found by the jury, and authorized such an instruction, properly limited. It has been held that on the production of such an instrument, apparently altered, the law raises no presumption as to when the change was made, or by whom, but these questions must be determined by the jury. *Reed v. Kemp*, 16 Ill. 445, and the authorities there cited. And the jury, in determining the question, will look to the instrument itself for an explanation, as well as to all of the circumstances in evidence. If there was an apparent alteration in the power of attorney, it was for the jury to determine whether the alteration was made before or after its execution, and with or without the consent of the maker." Again, in the case of *Gage v. City of Chicago*, 225 Ill. 218, the court says: "The law indulges no presumption as to when a change in a written instrument was made, but requires the party offering an altered instrument in evidence, if the alteration is material, to explain such alteration satisfactorily to the court before the instrument will be admitted in evidence. Such explanation may satisfactorily appear from the instrument itself or it may be made by extrinsic evidence." And refers to the case of *Reed v. Kemp*, *supra*, and other cases in support of this doctrine. In the case at bar, the plaintiff introduced evidence showing that this was the last of a series of seven notes given in the purchase of a drug store; that they all bore date of February 22, 1910, and that under the contract as made and the papers as they were to be executed the notes were to mature every six months from that date, and this note, under the evidence, and as it appears from its face, being No. 7, would mature in forty-two months and on August 22, 1913. So that the date of maturity of the note as it now appears

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thereon is in harmony with the contract of the parties and with the other notes that were given and with the date that this note No. 7 was to mature, so that this, of itself, would in our judgment be sufficient explanation of the apparent erasure, if material under the decision of the Supreme Court in the case of *Gage v. City of Chicago, supra*. When it is considered that the note as it now appears, making it due in forty-two months from the date, is in entire harmony with the contract of the parties, and the arrangement that was made for the maturity of the several notes, and this being the last of the series, and as it matures at the exact time that the parties understood it was to mature, we are of the opinion that the erasure complained of is not material as it does not in any manner change the time that the payment of the note was to be made.

We are of the opinion that after the explanations given by the testimony of the witnesses, in connection with the appearance of the note and of the transaction in which the note was executed, that the court erred in refusing to admit the note in evidence, and the judgment of the lower court is reversed and the cause remanded with directions to admit the note in question in evidence upon another trial of the case.

Reversed and remanded with directions.

Orlie Hill, Appellee, v. Terre Haute Brewing Company, Appellant.

1. LANDLORD AND TENANT, § 317*—*when plea in action for rent is insufficient.* Where, in an action for rent upon a lease of premises to be used for dramshop purposes, a plea was filed setting up that since the execution of said lease it had become unlawful to sell intoxicating liquors in that territory by reason of a vote of the people of the town making said territory "dry," held that such plea did not present any defense to such action or any question of eviction, as it did not allege a surrender or offer to surrender the premises.

2. LANDLORD AND TENANT, § 317*—*when plea in action for rent relying upon constructive eviction of defendant is insufficient.* A plea in an action for rent which relies upon a constructive eviction of defendant is bad if it fails to show a surrender of the premises.

Appeal from the Circuit Court of Franklin county; the Hon. JULIUS C. KEEN, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

DAVIS, BOGAERT & ROYSE and LAYMAN & JOHNSON, for appellant.

W. P. SEEBER, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

The appellant filed a plea to the declaration denying liability, to which plea a demurrer was interposed, demurrer sustained and the appellant elected to stand by its plea, whereupon judgment was rendered in favor of appellee in the amount of \$1,080 and costs of suit, to reverse which this appeal is prosecuted.

The declaration in this case alleges that on May 12, 1913, the appellee leased to the appellant the Doctor Summers property, located in Block 27, West Frankfort, Illinois, for a period of two years for a monthly rental of \$90 per month, payable on the first day of

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each month during said period, and alleges that the defendant by its said lease agreed to pay to the plaintiff the said monthly rental of \$90, and then alleges the sum of \$2,000, the rent agreed to be paid, became due and is still due and in arrears and that the defendant has refused to pay the same, to the damage of the plaintiff of \$2,000. Attached to this declaration is a copy of the lease, setting forth the rental of the property as aforesaid for saloon purposes, for the term of two years from June 1, 1913, to June 1, 1915, and the agreement upon the part of the lessee to pay as rent therefor \$90 per month. The lease also contains the following clause: "The lessee agrees to furnish lessor an indemnifying bond, which will secure the lessor from any and all loss or damage as a result of a dram-shop being conducted in said building." Also provides that the lessor shall keep the premises in good repair. To this declaration the defendant filed the following plea: "And the defendant, by Davis, Bogart and Royce, and Layman & Johnson, its attorneys, comes and defends the wrong and injury, etc., and says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that the property in said declaration mentioned, viz.: 'The Doctor Summers property, located on West Main street, in Block 27, in the original plat of West Frankfort, Franklin county, Illinois,' was and is located in the Town of Denning, in said Franklin county. That at the time of the execution of the lease in said declaration mentioned, it was lawful for persons to sell, in the said Town of Denning, intoxicating liquor when legally licensed so to do. That afterwards, at an election held on the first Tuesday in April, A. D. 1914, in said Town of Denning, there was submitted to the legal voters of said town the following proposition: 'Shall the Town of Denning become anti-saloon territory'? and the majority of the legal voters voting at said election voted

'Yes' on said proposition. That by virtue of the provisions of the statute of the State of Illinois, relative thereto, it became unlawful to sell intoxicating liquor in said Town of Denning the 30th day after said election so held on the first Tuesday in April, A. D. 1914. That, since the expiration of said thirty days after the aforesaid election, it has been impossible for defendant to use said premises for saloon purposes as provided in said lease. That the rent under and by virtue of the lease in said declaration mentioned has been paid to and including the thirtieth day after said election. And this the defendant is ready to verify. Therefore, it prays judgment if the plaintiff ought to have his aforesaid action against him." To this plea the appellee filed a demurrer which was sustained by the judgment of the court, and the appellant having elected to stand by its plea, judgment was rendered for the appellee for the balance of rent due upon said lease.

The appellant contends that the court erred in sustaining the demurrer to its plea for the reason that while it was lawful to sell intoxicating liquors in the Town of Denning at the time the lease was entered into, that before the lease had expired the Town of Denning had become local option territory and it became unlawful to sell liquors in said town or in said building, and that the purpose for which the building had been leased had failed by operation of law and by reason thereof the contract was terminated and no liability existed upon the part of appellant to pay the rent specified in the lease. There was some argument presented by counsel for appellant and for appellee as to the meaning of the word "saloon" specified in the lease, but we have no doubt that the purpose of the lease was to permit appellant to keep in said building a dramshop wherein intoxicating liquors could be sold.

Upon the proposition as to the effect that an election changing the territory from that in which a dramshop

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was permitted to be operated, to territory prohibiting the operation of a dramshop, many authorities have been cited by counsel for both sides. We have examined most of these authorities and find that quite a respectable number sustain the contention of appellant, holding that where there has been a constructive eviction by operation of law that such terminated the lease. Many authorities cited by appellee of equal weight and respectability hold that if a lessee desired to protect himself against such changes that he should have provided for such contingency in the lease, and having failed to do so he would not be relieved from the payment of rent. So far as we have been able to ascertain, this question has never been determined by any of the courts of Illinois; but conceding the view of appellant to be correct, we do not believe that the question sought to be made by the appellant is presented by this plea. The only matter that the plea sets up is that by reason of the vote it became unlawful to sell intoxicating liquors in said territory and building, and it had been impossible for the defendant to use said premises for saloon purposes as provided in said lease. This is not sufficient to relieve the appellant from the payment of rent. For aught that appears by this plea, the appellant continued in possession of the building until the expiration of the period for which it was leased. If the appellant relied upon an eviction, then it should have shown by its plea not only that it had become unlawful to sell liquor in the building but that it had surrendered or offered to surrender possession of the building to the appellee. This was appellant's plea and should have shown upon its face every fact necessary to constitute a complete eviction. The plea must be most strongly construed against the pleader. The facts set up by the plea do not pretend to show an eviction by force but such matters as constitute a constructive eviction, if anything.

What is necessary to constitute a constructive eviction? It is said in *Woods Landlord and Tenant*, page 798, in discussing the question of eviction by operation of law and otherwise: "But, in order to operate as an eviction, the act must not only be such as to warrant, but also such as was within a reasonable time followed by the tenant's giving up possession, and if he does not quit, but remains in possession, or does any act inconsistent with his right to abandon the premises, he will be treated as having waived the right, and the doctrine of constructive eviction will not apply, as such acts as create a constructive eviction amount to a right to abandon the premises rather than a bar to an action for rent, because the tenant may waive his rights arising from such acts; and by remaining in possession for an unreasonable time after their existence he is treated as having done so." It is said in the case of *Barrett v. Boddie*, 158 Ill. 484: "The eviction sought to be shown by appellant was constructive. The possession of the premises was retained by the tenant after the alleged acts of eviction. Possession retained after an alleged constructive eviction is a waiver of the right of abandonment. No constructive eviction exists without a surrender of possession. With retention of possession after constructive eviction, liability for rent exists, according to the terms of the lease, during occupancy thereunder." This plea fails to set forth a surrender of possession or offer to surrender the same to the appellee, and, having failed to do so, we are of the opinion that the plea failed to set up a defense to the action and is insufficient, and it would be unjust to allow the appellant to retain possession and avoid payment of the rent.

The court did not err in sustaining the demurrer to the plea, and the judgment of the lower court is affirmed.

Judgment affirmed.

Illinois State Bank v. Queen City Quarry Co. et al., 203 Ill. App. 176.

Illinois State Bank, Appellee, v. Queen City Quarry Company and W. H. Hill, Appellees. H. C. Barnard, Appellant.

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed November 13, 1916.

Statement of the Case.

Bill by Illinois State Bank, a creditor of Queen City Quarry Company, a corporation, complainant, against Queen City Quarry Company, W. H. Hill and H. C. Barnard, defendants, seeking to reach funds belonging to said Queen City Quarry Company, and to make defendants W. H. Hill and H. C. Barnard liable for the amount which they had knowingly permitted the debts of the corporation to exceed the amount of the capital stock, and cross-bill by H. C. Barnard against W. H. Hill for an accounting for money unpaid for stock and other money collected by him, and for an allowance of the sum of \$3,306.78 as salary as secretary of the corporation, and other relief. From a decree requiring Hill to pay to a receiver of the corporation appointed by the court the sum of \$468.02, and requiring Barnard to pay to the receiver the sum of \$3,306.78 received as salary and a further sum of \$100, and dismissing the cross-bill for want of equity, defendant Barnard appeals.

MARTIN D. BAKER and DAN MCGLYNN, for appellant.

KEEFE & SULLIVAN, for appellees; THOMAS E. GILLESPIE, of counsel.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. CORPORATIONS, § 288*—*when corporation is estopped to object to right of officer to salary.* Where the secretary of a corporation, whose duties were not prescribed by any statute or by-law, performed the duties of general manager and conductor of the business of the corporation, with the knowledge of and without objection by the stockholders and directors, and the corporation appropriated such services, *held* that such corporation was estopped to object to such officer's right to the salary which it had agreed to pay him as secretary.

2. CORPORATIONS, § 300*—*what is nature of liability of directors and officers assenting to creation of indebtedness in excess of capital stock.* The liability of directors and officers of a corporation under Hurd's Rev. St. ch. 32, sec. 16 (J. & A. § 2433), providing that such directors and officers who assent to an indebtedness of the corporation in excess of its capital stock shall be personally and individually liable to creditors for such excess, is that of a surety.

3. CORPORATIONS, § 301*—*what is insufficient to make director or officer liable for creation of indebtedness in excess of capital stock.* Mere recognition by a director or officer of a corporation of an indebtedness of the corporation in excess of its capital stock, on the fact he might have interposed to prevent such excess, is not sufficient to make him liable under Hurd's Rev. St. ch. 32, sec. 16 (J. & A. § 2433), providing that directors or officers of a corporation who assent to indebtedness in excess of its capital stock shall be personally and individually liable for such excess.

4. CORPORATIONS, § 299*—*when officer contracting indebtedness in excess of capital stock and assets may not compel stockholder to contribute to payment of his salary.* Where one of two directors and sole stockholders of a corporation was also secretary of such corporation and as such conducted the entire business of the corporation upon an agreed salary for such services, and contracted indebtedness of the corporation in excess of its capital stock and assets, *held* that such secretary could not compel such other stockholder to contribute to payment of such salary incurred under such circumstances.

5. APPEAL AND ERROR, § 1768*—*when decree will not be changed so as to increase liability.* A decree will not be so changed on appeal in favor of the appellee so as to increase the liability of the party against whom it was rendered where the appellee asks in argument that such decree be not reversed and the bill contained no proper basis for such change other than in its prayer for relief.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Halliday v. Board of County Comm'rs, 203 Ill. App. 178.

H. H. Halliday et al., Appellants, v. Board of County Commissioners of Pulaski County, Appellee.

1. COUNTIES, § 81*—*what is purpose of amendatory act of 1905 providing for levies for payment of judgments.* The amendatory statute of 1905, providing for county levies for payment of judgments (J. & A. ¶ 2781), was enacted for the purpose of enabling boards of county commissioners to take care of such claims, and is mandatory upon said boards to include such claims in determining the amount of taxes to be raised.

2. COUNTIES, § 81*—*necessity of tax levying power making provision for payment of all classes of claims.* A board of county commissioners cannot make provision for payment of one debt or class of claims and refuse to make any provision whatever for payment of others, even those reduced to judgment.

3. COUNTIES, § 81*—*non-necessity of demand upon board of commissioners to make levy to pay judgment.* Demand upon the board of county commissioners to make a levy to pay a judgment is not necessary, as the statute (J. & A. ¶ 2781) requires such levy.

4. COUNTIES, § 81*—*what answer in mandamus proceeding against board of county commissioners to compel making levy of taxes to pay judgments should contain.* The answer and proof in a mandamus proceeding against a board of county commissioners to compel them to make a levy for payment of judgments should show fully and definitely the necessities and items of expenses of the county and the facts as to levy and payment, so the court can see such board was acting in perfect good faith towards creditors.

Appeal from the Circuit Court of Pulaski county; the Hon ALBERT W. LEWIS, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded. Opinion filed November 13, 1916.

GEORGE E. MARTIN, C. L. RICE and FRED HOOD, for appellants.

C. S. MILLER, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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This is a petition presented by the appellants to the Circuit Court of Pulaski county, Illinois, for a mandamus against the appellee asking that it be required to levy a tax for the payment of certain judgments described in the petition. The application was denied and petitioners prosecute this appeal.

The petition filed herein alleges that appellants recovered judgments against the appellee in the Circuit Court of Pulaski county to the total amount of \$19,068.23. Said judgments were not recovered by the petitioners jointly but by them separately and for the amounts respectively due; one judgment for the amount of \$398.87 was recovered at the April term, 1914, and one for the amount of \$5,820.50 and another for \$588.30 were recovered at the October term, 1914; another for \$1,070 at the January term, 1915, and another for \$861.95, and another for \$2,469.65, and another for \$169.67, and another for \$238, and another for \$595.93 were recovered at the April term, 1915, of said court, and there was another for the amount of \$2,262.60, another for \$2,304.23, another for \$2,288.53 were recovered at the October term, 1915, of said court, and said petition sets forth in detail the names of the parties respectively in behalf of whom the several judgments were rendered. The petition further alleges that the Board of County Commissioners of Pulaski County held regular sessions of court in September, 1915, and that they met on September 28th and at that time the petitioners by their attorneys appeared before said board and demanded that said board should include among the purposes for which taxes should be raised a sum sufficient to pay said judgments, or portions thereof. That the said board adjourned until November 16, 1915, but refused to levy any tax for the payment of the said judgments, or any of them, or any part thereof. The petition then sets forth a list of the appropriations made and tax levied

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by said court, amounting to \$19,970, and then alleges that the amounts levied were at the rate of sixty-eight cents on the \$100 and would produce \$18,111.41; and avers that if the full rate of seventy-five cents on the \$100 had been levied it would have produced the sum of \$19,975.83; that the board finally adjourned without making any levy for the payment of said judgments or any part thereof. The petition concludes with a prayer for a writ of mandamus to be directed to the said board of county commissioners commanding it forthwith to meet and include among the purposes for which the taxes levied by said board are to be raised the payment of said judgments and to provide for the payment of said judgments and the interest thereon in equal annual instalments, not exceeding ten in number, and to include one of such instalments from the taxes to be raised for county purposes in the current year, and one each year thereafter, not exceeding ten, until all of said judgments are fully paid. Appellee filed an answer herein admitting that judgments were rendered against it in favor of the appellants respectively, as in said petition set forth, and then avers that county warrants were issued to all of said petitioners for their respective claims, and deny that any provision had been made for the payment of said judgments; also denying that there was no money in the treasury with which to pay said judgments; and deny that there was any demand made upon the county board to levy a tax for the payment of said judgments. Then avers that the appropriations as made and set out are wholly inadequate to pay the running expenses of the county, and avers that it has been unable to pay the expenses of the county and that such expenses will not decrease but will increase; that it will be necessary hereafter to levy the full seventy-five cents on the \$100 valuation for such expenses, and that if it is compelled by the order of this court to pay the full amount of said

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judgments that it would leave the County of Pulaski without any money with which to run the courts and pay the salaries of the officers and other expenses. The answer also avers that in the appropriation made the county board only appropriated \$600 for the State's Attorney salary when the actual amount of the State's Attorney salary is \$1,600, and that the board neglected to provide a fund to pay the pensions of the blind, as provided by statute; and then avers that there were many other items omitted from said appropriation and that if all of the necessary items had been included it would have exceeded seventy-five cents on the \$100.

It appears from the evidence in this case that after the judgments were rendered and at the September session of the court, the attorneys for appellants appeared before the board and requested that a levy be made to pay the said judgments, and while said court was in session assurances were given to the said attorneys that the judgments would be taken care of by the board. The board met on September 28, 1915, but adjourned to November 16, 1915. In the meantime the board consulted with an attorney with reference to the levying of this tax and was advised by the attorney that it was necessary for them to take some steps towards paying the judgments and that they had a right, if they desired so to do, to make payment of said judgments in ten equal payments and to make a levy each year for one-tenth part thereof. It also appears that the county was considerable in debt and that for the taxes levied in 1915 to be collected in 1916 the board was issuing warrants for debts that had been contracted and were due prior to that time, and were making efforts to make payment of certain claims that had been allowed without in fact making appropriation or specifying such in the levy. There is no definite testimony as to what the actual expenses of running

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It appears from the evidence in this case that after the judgments were rendered and at the September session of the court, the attorneys for appellants appeared before the board and requested that a levy be made to pay the said judgments, and while said court was in session assurances were given to the said attorneys that the judgments would be taken care of by the board. The board met on September 28, 1915, but adjourned to November 16, 1915. In the meantime the board consulted with an attorney with reference to the levying of this tax and was advised by the attorney that it was necessary for them to take some steps towards paying the judgments and that they had a right, if they desired so to do, to make payment of said judgments in ten equal payments and to make a levy each year for one-tenth part thereof. It also appears that the county was considerable in debt and that for the taxes levied in 1915 to be collected in 1916 the board was issuing warrants for debts that had been contracted and were due prior to that time, and were making efforts to make payment of certain claims that had been allowed without in fact making appropriation or specifying such in the levy. There is no definite testimony as to what the actual expenses of running

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the county would amount to. One of the members of the board testified in general terms that the expenses would amount to more than seventy-five cents on the \$100 but does not state with any definiteness or certainty what such expenses would consist of. It also appears that the board levied a tax of sixty-eight cents on the \$100 and then adjourned without making any levy to pay the said judgments, or any part thereof, and it also appears in the record: "On the day the amended levy was made the board said they would not consider anything of the kind at all, if the judgment creditors wanted money they could go ahead and get it by law."

It will be observed that the answer in this case was very general, and if taken as true would not be sufficient to warrant the board in refusing to comply with the plain requirement of the law. If they were seeking to justify their conduct upon the ground it would require all of the revenue that could be raised by taxation to pay the ordinary and current expenses of the county, then they should have shown definitely that such would be a necessity and it should have appeared from the testimony that they were not levying a tax for one purpose and using the money to pay other indebtedness that had no greater right to be paid than the judgments in the petition mentioned. They should have itemized the expenses of the county so the court could have seen that they were acting in perfect good faith towards these creditors. *City of Chicago v. People*, 215 Ill. 235.

It appears from the evidence that one of the items levied was for \$2,000: "For expense of aid in the construction of State aid roads," when there is nothing shown either by the evidence or the answer that any steps had been taken whereby it became necessary or proper to make such an appropriation; besides, the commissioner, Hosler, who testified in the case said:

“The State aid road would be in the neighborhood of \$1,000 or \$2,000;” and again he says that the State’s Attorney fund is \$1,600 and they made a levy of \$600, but the evidence shows that the State’s Attorney office for the last two years has been more than paying the salary of the State’s Attorney; and he also states in his testimony concerning the sheriff’s expense fund of \$500, but admits that this is paid out of the fees of the sheriff’s office, and his whole testimony shows an uncertain and indefiniteness that cannot be taken in the courts as a reason why they should not make a levy to pay off these judgments. The appropriation as made amounted to \$17,970, and it is conceded by counsel for appellee that if a levy of seventy-five cents on the \$100 had been made, it would have raised a fund of \$19,975.83, but the levy amounted, as he says, to \$18,111.41, and if you would deduct from this the \$1,000 or \$2,000 State aid fund, that the commissioner is uncertain about as to the amount required, and the \$600 appropriated for the State’s Attorney salary, together with the amounts appropriated where the fees were earned by the sheriff to cover expenses, it would more than pay a one-tenth of these judgments and the interest. The judgments totaled \$19,068.26, to which would have to be added about \$500 or \$600 interest, and the one-tenth part of this would be less than the extra amount that could have been raised by the board, had it so desired. It is the duty of the board to show that it was actuated by an honest purpose to pay its legal obligations, and the statute of 1905 was enacted to enable the board to take care of such claims as had been reduced to judgments. *Board of Supervisors v. People*, 226 Ill. 579. Prior to the passage of the statute of 1905 it was much more difficult for judgment creditors to obtain a levy for the payment of their claims than it has been since the statute of 1905 was enacted. The statute that existed prior to 1905 pro-

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vided: "Execution shall not, in any case, issue against the lands or other property of the county; but when judgment is rendered against a county, the county board shall direct an order to be drawn on the county treasurer for the amount of the judgment and costs, which order shall be paid as other county debts." In 1905 there was an amendment to this statute which provided: (a) "Whenever the county board in any county shall in any year determine the amount of all taxes to be raised for county purposes, such board shall include among the purposes for which such taxes are to be raised the payment of any outstanding judgment or judgments against such county for the payment of which no other provisions have been made. (b) The county board may provide for the payment of any such judgment or judgments and the interest thereon in equal annual installments, not exceeding, however, ten (10) in number, and may include one of such installments in the amount of taxes to be raised for county purposes each year, but the aggregate amount of all taxes to be raised for county purposes shall not in any year exceed the rate of seventy-five (75) cents on the one hundred dollars (\$100) valuation of property unless authorized by a vote of the People of the county." Hurd's Rev. St. ch. 34, sec. 34 (J. & A. ¶ 2781).

While it is true as contended by counsel for appellee that the issuing of the writ of mandamus is not a writ of right but can only be issued in the discretion of the court, yet this is and must be a judicial discretion exercised when the interests of the parties involved require it, and we are of the opinion that this statute is mandatory and requires the board, when it comes to the question of determining the amount of taxes to be raised for county purposes, to include judgments that have been obtained against the county. "The amendment of section 34 in 1905 was unquestionably

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intended to impose a positive duty upon the board of supervisors to include among the purposes for which taxes are to be raised the payment of any outstanding judgments against the county for the payment of which no other provisions have been made. Such is its plain and unequivocal language." *Board of Supervisors v. People, supra.*

It is argued by counsel for appellee that if it be required to levy the taxes to pay these judgments that it would then be deprived of any funds with which to pay the current expenses of the county, and in its answer it says that if it were required to pay these judgments that the effect would be to deprive them of any funds for current expenses. It is not sought by this petition to require the county to pay the judgments all at one time, but the petition is presented in such a manner as to give them the right to divide this up into ten equal payments. The testimony of the county clerk shows that out of the levy made in 1915, and from the taxes to be collected in 1916, that something like \$12,000 in warrants had been drawn against this tax for debts that were due prior to its levy but none of them for the judgments, and the board has no right to pursue a course in the transaction of its business that will permit the payment of one debt and neglect the payment of another. A tax levying power cannot make provision for the payment of one debt or one class of claims and refuse to make any provision whatever for the payment of others, even those reduced to judgment. *Board of Supervisors v. People, supra.*

It is also contended by counsel for appellee that there was no demand made upon the board of commissioners to make this levy. We think the evidence fairly shows that a demand was made. It is testified to by two attorneys who appeared before the board, and also by one of the members of the board, that a request was made, and a promise upon the part of the

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board to take care of the judgments but it was not done. It is clear that the existence of the judgments was brought to the attention of the board at its September meeting, and if nothing else was done then it was the plain duty of the board to proceed to make a levy for the payment of such judgments, even without any demand. The statute required it and they should have performed their duty under this statute. *City of Cairo v. Campbell*, 116 Ill. 309.

It is further insisted that if this levy is required to be made that the county will thereby be deprived of revenue sufficient to pay its current expenses. We do not believe that that question arises in this case, or that it is necessary to determine whether or not that might be the effect, for under the evidence in this case we are of the opinion that if all of the creditors were required to participate alike in the funds that the board was authorized to levy, that all could be properly taken care of and the expenses of the county paid. We are therefore of the opinion that it was not necessary for a determination of the rights of the parties herein to hold the proposition of law submitted.

It appears to us from the reading of this record that the board of commissioners were not disposed to treat these judgment creditors the same as they were treating other creditors and were unjustly discriminating against them in the levying of the tax, and that under the law they had no right to undertake to prefer one creditor over another, and the judgment of the lower court is reversed and the cause remanded.

Reversed and remanded.

James A. Woods and Edward Boyd, trading as Woods & Boyd, Appellants, v. Edwin Gamper and A. F. Cook, Appellees.

(Not to be reported in full.)

Appeal from the Circuit Court of Edwards county; the Hon. JULIUS C. KERN, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded with directions. Opinion filed November 13, 1916.

Statement of the Case.

Action by James A. Woods and Edward Boyd, partners, trading as Woods & Boyd, plaintiffs, against Edwin Gamper and A. F. Cook, defendants, to recover upon a written agreement for the drilling of an oil well by plaintiffs for defendants. From a judgment against plaintiffs for costs, plaintiffs appeal.

MCGAUGHEY & TOHILL and ALLEN WALKER, for appellants.

JOHN A. MACNEIL and S. J. GEE, for appellees.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. RELEASE, § 23*—*what plea of should contain.* A plea setting up an agreement relied upon as releasing a defendant from the obligation sued on should set out such agreement definitely and certainly and not in a mere argument.

2. RELEASE, § 23*—*when plea of is insufficient.* In an action upon a contract wherein defendants agreed to pay plaintiffs for the construction of a well upon premises which one of the defendants had leased, where plea was filed claiming under the con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Park v. Penn, 203 Ill. App. 188.

tract a release from such obligation by reason of one of the defendants having turned over said lease to a certain corporation as contemplated in said contract, under whose direction and employment plaintiffs continued the construction of the well as set up in the plea, *held* that defendants were not released from such obligation, and the statement in said plea that defendants were released was simply a conclusion of the pleader.

Artemissa Park, Appellee, v. Caroline Penn, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1916. Reversed with statement of facts. Opinion filed December 12, 1916.

Statement of the Case.

Action by Artemissa Park, plaintiff, against Caroline Penn, defendant, to recover damages on account of injuries received by falling down a defective stairway in a house owned by defendant and rented by plaintiff's husband and occupied by him and the family. From a judgment for plaintiff for \$1,500, defendant appeals.

SCHAUMLEFFEL & JOHNSON, for appellant.

T. M. WEBB and W. E. KNOWLES, for appellee.

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

The People v. Goodall, 203 Ill. App. 189.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 257*—*what constitutes variance between declaration and proof in action by lessee's wife against landlord for injuries due to defective stairway.* Where, in an action by a lessee's wife against the lessor for damages for injuries sustained on the demised premises, the declaration alleging the lessor's promise to repair said premises was amended after verdict for plaintiff by striking out such allegation, *held* plaintiff must rely upon such amended declaration to support the judgment, and that evidence in support of such allegation offered by plaintiff was incompetent under such amended declaration.

2. LANDLORD AND TENANT, § 226*—*when tenant may not recover against landlord for injuries due to defective condition of premises.* A tenant cannot recover against his lessor for injuries sustained by reason of a defective condition of the premises in the absence of a contract by the lessor to repair.

3. LANDLORD AND TENANT, § 242*—*what are rights of wife of lessee as to recovery against landlord for injuries due to defective condition of the premises.* The wife of a lessee has no different right of recovery against the lessor for injuries sustained by her on the demised premises than the lessee for injuries sustained to himself.

The People of the State of Illinois ex rel. Silas Cook et al., Defendants in Error, v. W. C. Goodall et al., Plaintiffs in Error.

(Not to be reported in full.)

Error to the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 8, 1917.

Statement of the Case.

Information in the nature of quo warranto by the People of the State of Illinois *ex rel.* Silas Cook, Edmund Goedde, Albert Diehm, J. A. Goodall, John

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Goodall, 203 Ill. App. 189.

J. Wies and William P. Launtz, petitioners, against W. C. Goodall, Clyde D. Miller, Charles F. Merker, Alexander S. Vien, F. L. Schroeder and W. J. Miller, respondents, charging them with unlawfully exercising the offices of directors of the Bankers Accident Insurance Company and demanding that they show by what right they claim to exercise such offices. From a judgment of ouster, respondents bring error.

JAMES O. MILLER, for plaintiffs in error.

DAN MCGLYNN, for defendants in error.

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

Abstract of the Decision.

1. QUO WARRANTO, § 56*—*when judgment of ouster is proper.* The respondents to quo warranto proceedings are bound to state in their pleas and show by proof good authority for acting as officers, otherwise the relators are entitled to a judgment of ouster.

2. ASSOCIATIONS—*when meeting is not legally organized.* Where the by-laws of an association provided that the president, and in his absence the vice president, should preside at all meetings of members, and that the officers should be elected by ballot, *held* in quo warranto proceedings upon proof showing that neither the president nor the vice president presided over the meeting at which the respondents were elected as officers, although the vice president was present, and that such meeting was organized by a *viva voce* vote for a presiding officer and a secretary, that said meeting was not legally organized, and such officers elected thereat had no title to the offices claimed by them.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1917.

The People of the State of Illinois ex rel. Martin J. Qualey, Appellee, v. City of Chicago et al., Appellants.

Gen. No. 21,989. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded with directions. Opinion filed January 8, 1917.

Statement of the Case.

Petition for a writ of mandamus by the People of the State of Illinois *ex rel.* Martin J. Qualey, petitioner, against the City of Chicago and others, respondents, to compel the restoration of relator to the position of detective sergeant of the police force of Chicago. From a judgment ordering that a writ issue as prayed for, respondents appeal.

Petitioner did not set forth any ordinance creating the position of detective sergeant. The petition alleged that on August 11, 1913, charges were made against petitioner and delivered to him; that he was charged with having been guilty of conduct unbecoming a police officer, and also wilful maltreatment of a

The People v. City of Chicago, 203 Ill. App. 191.

citizen; that the trial before the Civil Service Commission was set for August 20, 1913, and that he attended upon that day, but that the commission did not hold a session, and that on September 3, 1913, in the absence of the petitioner, the trial board met and he was found guilty upon the charges made, and an order was entered that he be discharged from the police department.

SAMUEL A. ETTTELSON, for appellants; ROY S. GASKILL and JOHN A. COOKE, of counsel.

No appearance for appellee.

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

Abstract of the Decision.

1. MANDAMUS, § 138*—*when petition for mandamus must set forth ordinance creating position of officer.* Where a petition for a writ of mandamus for restoration of a police officer to the position of detective sergeant of the police force of Chicago does not clearly show the ordinance creating the position, the petitioner is not entitled to a writ of mandamus.

2. CIVIL SERVICE, § 25*—*when presumed that police officer had opportunity to appear in defense at hearing of charges and that proceedings were properly conducted.* In the absence of any averment to the contrary, in a writ of mandamus by which a detective sergeant of the police force of Chicago seeks restoration to such position, it will be presumed that the hearing of the charges was continued from the day first set until the day of actual trial, that the petitioner had opportunity to appear in defense and that the proceedings were properly conducted.

3. CIVIL SERVICE, § 24*—*what findings of Civil Service Commission will not be reviewed.* The findings of the Civil Service Commission upon the questions of the innocence or guilt of a petitioner seeking by writ of mandamus to be restored to a position on the police force of the City of Chicago will not be reviewed.

4. CIVIL SERVICE, § 28*—*what constitutes laches in filing petition of mandamus for restoration of petitioner to office.* A delay of more than six months in filing a petition of mandamus by an officer of the police force of the City of Chicago constitutes laches, and is a sufficient defense thereto.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Richard F. Lillis, Defendant in Error, v. City of Chicago, Plaintiff in Error.

Gen. No. 22,502. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term. 1916. Affirmed. Opinion filed January 8, 1917. Rehearing denied January 22, 1917.

Statement of the Case.

Action by Richard F. Lillis, plaintiff, against the City of Chicago, defendant, to recover damages for injuries received through a defective sidewalk. From a judgment for eight hundred dollars in favor of plaintiff upon trial by jury, defendant brings error.

SAMUEL A. ETTELSON and CHARLES R. FRANCIS, for plaintiff in error; MAXWELL R. HERMAN and KAPLAN & KAPLAN, of counsel.

EARL J. WALKER, for defendant in error.

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

Abstract of the Decision.

1. APPEAL AND ERROR, § 788*—*when action of trial court upon motions will not be reviewed.* The action of the trial court upon motions will not be reviewed where neither the evidence nor proceedings have been preserved for review by bill of exceptions, or otherwise.

2. APPEAL AND ERROR, § 1303*—*when presumed that evidence is sufficient to support verdict.* Where neither the evidence nor the proceedings in a personal injury action have been preserved for review by the bill of exceptions, or otherwise, it must be presumed, under the pleadings, that the evidence is sufficient to support the verdict.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

F. Mayer Boot & Shoe Co. v. Grygierczyk et al., 203 Ill. App. 194.

3. LIMITATION OF ACTIONS, § 68*—*when statement of claim does not state new cause of action.* The filing of a second statement of claim in an action for personal injuries, which simply states the same actionable cause with more particularity than the first statement of claim, which was stricken from the files, does not state a new cause of action so as to bar a right of recovery because of the expiration of the one-year period for the commencement of actions in such cases.

**F. Mayer Boot & Shoe Company, Plaintiff in Error, v.
F. Grygierczyk and F. Luba, copartners, trading
as Grygierczyk & Luba Company, Defendants in
Error.**

Gen. No. 22,507. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the October term, 1916. Reversed and judgment here. Opinion filed January 8, 1917.

Statement of the Case.

Action by F. Mayer Boot & Shoe Company, plaintiff, against F. Grygierczyk and F. Luba, copartners, trading as Grygierczyk & Luba Company, defendants, to recover on two promissory notes executed by defendants to the order of plaintiff, dated October 1, 1914, the first note being for \$54.03, due November 20, 1914, and the second note being for \$54, due December 20, 1914, and both drawing interest at the rate of seven per cent. per annum from date until paid. From a judgment for plaintiff for \$29.90, plaintiff brings error.

J. J. MOSER, for plaintiff in error.

EDWARD A. BIGGS, for defendants in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

F. Mayer Boot & Shoe Co. v. Grygierczyk et al., 203 Ill. App. 194.

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

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1078***—*when cross errors must be assigned.* The action of the trial court in an action on a promissory note in finding against the defenses of lack of consideration and release from all liability cannot be considered on review where the defendants have not assigned cross errors.

2. **BILLS AND NOTES, § 451***—*when evidence insufficient to establish defense of payment.* In an action by a seller of goods against the buyers on promissory notes given for purchases made, where it appeared that plaintiff, while the indebtedness was still in the form of an account, had notified defendants not to pay money to any agent or representative of the company, except on written authority, and defendants, in spite of such notices, made payments to an agent of the seller, and subsequently an agreement was made under which the notes sued on were executed and defendants undertook to recover from the agent the money improperly paid to him, evidence held insufficient to establish the defense of payment.

3. **BILLS AND NOTES, § 51***—*what constitutes good consideration for notes.* Where purchasers of goods, ignoring notices by the seller not to make payment to an agent of the seller, make payment on an account, and, upon the seller's ascertaining that payment had been made to the agent contrary to its instructions, an agreement is made under which the notes are executed and the purchasers undertake to recover from the agent the money improperly paid to him, the postponement of payment constitutes a good consideration to support the notes.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Jackson v. Burns, 203 Ill. App. 196.

Andrew Jackson, Defendant in Error, v. William A. Burns et al., Defendants. William A. Burns, Plaintiff in Error.

Gen. No. 22,512. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 8, 1917.

Statement of the Case.

Action by Andrew Jackson, plaintiff, against William A. Burns and W. Tudor ApMadoc, defendants, to recover for damages to plaintiff's automobile received in a collision alleged to have been caused through the carelessness and improper management of defendants' respective automobiles. From a judgment on trial by the court finding defendant ApMadoc not guilty and defendant Burns guilty and assessing plaintiff's damages at \$285, defendant Burns brings error.

Plaintiff's statement of claim alleged that Burns so negligently, recklessly and improperly ran his automobile that as a direct result thereof the automobile of ApMadoc and the automobile of plaintiff were brought into violent collision. Defendant Burns by his affidavit of defense denied that he so operated his automobile that, either directly or indirectly, he caused any other automobile to come in contact with or be the proximate cause of any collision between plaintiff's automobile and any other automobile. Defendant did not ask for a more particular statement of claim, but joined issue upon the essential fact of his negligence causing the damage to plaintiff's automobile.

ADAMS, CREWS, BOBB & WESCOTT, for plaintiff in error; ASA G. ADAMS and E. C. TOURJE, of counsel,

WILLIAM SCOTT STEWART, for defendant in error.

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

Abstract of the Decision.

1. PLEADING, § 466*—*when defect in plea is cured by verdict.* Where there is defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*what statement of claim in action for negligence need not specify.* In an action to recover damages for injury to an automobile due to a collision with other automobiles, it is unnecessary to specify the acts which constituted negligence in a statement of claim.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*when defendant is precluded from complaining of insufficiency of statement of claim.* Where a statement of claim in an action for damages to plaintiff's automobile alleges that one of the defendants negligently, recklessly and improperly ran an automobile, and as a direct result thereof the automobile of the other defendant and the automobile of plaintiff were brought into violent collision, which was denied by an affidavit of defense, and a more particular statement of claim is not asked, but issue is joined upon the essential fact of the negligence causing an injury to plaintiff's automobile, the defendant whose action is alleged to have caused the injury is precluded from complaining of insufficiency of the statement of claim.

4. AUTOMOBILES AND GARAGES, § 3*—*when evidence is sufficient to show that negligent operation of automobile of defendant found guilty was proximate cause of damage to plaintiff's car.* In an action to recover damages for injury to an automobile received in a collision, and alleged to have been caused through the carelessness and improper management of defendants' respective automobiles, where there was evidence tending to show that the defendant found guilty, came into the street on which the accident occurred from a cross street at a high rate of speed, and the other

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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defendant's automobile, in veering away to avoid such incoming automobile, collided with plaintiff's car, evidence *held* sufficient to sustain a finding that the negligent operation of the automobile of the defendant found guilty was the proximate cause of the damage to plaintiff's car.

**Adrian F. Sherman and R. E. Ellis, Appellants, v.
Charles M. Hayes, H. A. Redding, Jr. and Chicago
Motor Club, Appellees.**

Gen. No. 22,516.

CORPORATIONS, § 124*—*when contract for turning in personal property at face value in payment of capital of proposed corporation is invalid.* A contract, pursuant to which the property and good-will of an insurance exchange for the insurance of automobiles among its members, upon a sufficient number of contracts of insurance being issued so as to produce a specified premium income, is to be turned in on the basis of such premium income at its face value in payment of the capital stock of a proposed corporation, is invalid under Hurd's Rev. St. ch. 32, sec. 4 (J. & A. ¶ 2421), providing, with reference to capital paid, that if any proportion of the capital has been paid in property the claim should be appraised by the commissioners and the fair cash value thereof reported.

Appeal from the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 8, 1917.

**LEWIS A. STEBBINS and A. A. MCKINLEY, for ap-
pellants.**

MILLER, GORHAM & WALES, for appellees.

**MR. PRESIDING JUSTICE MCSURELY delivered the opin-
ion of the court.**

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

By their bill (technically an amended and supplemental bill) complainants sought by injunction to restrain the defendants from acting contrary to the terms of a certain contract. Demurrers interposed were sustained and the bill ordered dismissed for want of equity. Complainants, appealing, ask that this order be reversed.

The bill avers a contract between the Chicago Motor Club and Hayes, its president, permitting him to organize an interinsurance exchange for the insurance of automobiles among its members; also a contract between complainants and Hayes that he should devote all his time, not occupied with his duties as president of the motor club, to the organization of this insurance exchange; that when contracts of insurance covering three hundred automobiles, producing a premium income of \$30,000, should be acquired, the good-will and going business should be deemed worth \$30,000 and a corporation should be organized with capital stock of \$30,000, of which \$10,000 should be in the name of Hayes, \$10,000 in the name of Sherman and \$10,000 in the name of Ellis, or, to put it briefly, that the property of the insurance exchange should be turned in at a value of \$30,000 in payment of the capital of the proposed corporation. Complainants assert the violation of these contracts and seek relief.

We hold that the contract between Hayes and complainants is repugnant to the statute and void. The statute on corporations (chapter 32, Hurd, sec. 4, J. & A. ¶ 2421), in ordering the process of incorporation says, with reference to the capital paid in: "If any proportion of the capital has been paid in property, the same shall be appraised by said commissioners and they shall report the fair cash value thereof." The contract in question ignores this statutory requirement and attempts by the dictum of the parties to fix this "fair cash value" of the "good-will and going

Rosetti et al. v. Chicago, R. I. & P. Ry. Co., 203 Ill. App. 200.

business'' of an organization as yet without either. It provides for the payment of the entire capital of the proposed corporation by an arbitrary determination of the cash value of that which from its very nature, under the circumstances, could have only an uncertain and speculative value, if any. Intangible property or property with no ascertainable market value can be valued only at such a price as could be realized by selling it to others. In so holding we are in harmony with what was said in *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373.

In this view of the matter it is unnecessary to note other considerations presented and argued.

For the reason that the contract in question is non-enforceable, complainants are not entitled to the relief sought. The demurrers were properly sustained, and the order dismissing complainants' amended and supplemental bill is affirmed.

Affirmed.

Tony Rosetti and Vincent Manno, copartners, trading as Tony Rosetti & Company Labor Agency, Defendants in Error, v. Chicago, Rock Island & Pacific Railway Company et al., Plaintiffs in Error.

Gen. No. 22,528. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 8, 1917. Rehearing denied January 22, 1917.

Statement of the Case.

Action by Tony Rosetti and Vincent Manno, copartners, trading as Tony Rosetti & Company Labor

Rosetti et al. v. Chicago, R. I. & P. Ry. Co., 203 Ill. App. 200.

Agency, plaintiffs, against the Chicago, Rock Island & Pacific Railway Company, a corporation, Rock Island Lines and the Chicago, Rock Island & Pacific Railroad Company, a corporation, defendants, to recover for breach of a contract under which plaintiffs agreed to furnish laborers, whom the defendants agreed to employ and furnish transportation to. From a judgment for plaintiffs for eighty-six dollars, defendants bring error.

CHARLES T. SCHWARZ, for plaintiffs in error.

CYRUS J. WOOD, for defendants in error.

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

Abstract of the Decision.

1. CONTRACTS, § 385*—*when evidence is insufficient to show contract with employment agency for the employment of laborers and the furnishing of transportation therefor.* In an action by an employment agency against a railroad company, evidence consisting of letters written by officers of the defendant to plaintiff stating that they could use a certain number of men and that transportation would be furnished, *held* sufficient to show a contract for the employment of laborers and for the furnishing of transportation therefor.

2. MASTER AND SERVANT, § 19*—*what names of employees must be placed upon register of employment agency.* Under J. & A. ¶ 5322 *et seq.*, relating to private employment agencies, only the names of those employees whose applications for employment have been accepted must be registered on the books of the employment agencies.

3. MASTER AND SERVANT, § 19*—*when person contracting for service of laborers is estopped to claim that names of rejected laborers have not been formally registered.* A railroad company, defendant in an action by an employment agency to recover for breach of a contract for the furnishing of laborers, resulting in plaintiff being compelled to return registration fees to such em-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Smith, 203 Ill. App. 202.

ployees, cannot avail itself of the defense that the names of such rejected employees were not placed upon the register of the employment agency so as to entitle the agency to a registration fee, where the names of such employees were not and could not legally be placed upon the register owing to the fact that defendant failed to comply with its agreement to take such laborers.

**City of Chicago, Defendant in Error, v. Fred Smith,
Plaintiff in Error.**

Gen. No. 22,532. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 8, 1917. Rehearing denied January 22, 1917.

Statement of the Case.

Prosecution by the City of Chicago, plaintiff, against Fred Smith, defendant, for keeping a common gaming house in the City of Chicago. From a judgment of guilty and assessing a fine of fifty dollars, the defendant brings error.

HENRY M. SELIGMAN, for plaintiff in error.

SAMUEL A. ETTELSON and HARRY B. MILLER, for defendant in error; DANIEL WEBSTER, of counsel.

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

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 26*—*how evidence in prosecution for keeping a common gaming house may be preserved.*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Jones, 203 Ill. App. 203.

Under section 23 of the Municipal Court Act (J. & A. ¶ 3335), prescribing how evidence in cases of the fifth class may be preserved, the evidence in a prosecution for keeping a common gaming house may be preserved by a correct statement of the facts.

2. MUNICIPAL COURT OF CHICAGO, § 29*—*when presumed that evidence was sufficient to justify finding of court as to keeping of common gaming house.* Where an ordinance upon which a prosecution for keeping a common gaming house was not preserved in the record, it must be presumed on appeal that the evidence was sufficient to justify a finding of the trial court that defendant was guilty of keeping a common gaming house.

**City of Chicago, Defendant in Error, v. Tom Jones,
Plaintiff in Error.**

Gen. No. 22,533. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 8, 1917. Rehearing denied January 22, 1917.

Statement of the Case.

Prosecution by the City of Chicago, plaintiff, against Tom Jones, defendant, for gambling in violation of a city ordinance of Chicago. From a judgment finding him guilty, defendant brings error.

HENRY M. SELIGMAN, for plaintiff in error.

H. B. MILLER, for defendant in error.

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

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rutkowski v. Marcowska, 203 Ill. App. 204.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 29*—*what Appellate Court may not take judicial notice of.* The Appellate Court cannot take judicial notice of a city ordinance upon which a prosecution by the city is based where such ordinance is not preserved in the record.

2. MUNICIPAL COURT OF CHICAGO, § 29*—*when presumed that trial court is justified in finding defendant guilty for violation of city ordinance.* Where a city ordinance upon which a prosecution for gambling is based is not preserved in the record, it must be presumed on appeal that the trial court was justified in its finding that the defendant was guilty of engaging in gambling in violation of such ordinance.

Walter Rutkowski by Mary Landowski, Defendant in Error, v. Carl Marcowska, Plaintiff in Error.

Gen. No. 22,542. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in this court at the October term, 1916. Reversed and judgment here. Opinion filed January 8, 1917.

Statement of the Case.

Action by Walter Rutkowski, by Mary Landowski, next friend, plaintiff, against Carl Marcowska, defendant, to recover damages for malicious prosecution and false imprisonment. From a judgment for plaintiff for five hundred dollars, defendant brings error.

WINSTON & LOWY, for plaintiff in error; FRANK A. LASLEY, of counsel.

G. RAYMOND COLLINS, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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

Abstract of the Decision.

1. MALICIOUS PROSECUTION, § 51*—*what must be alleged*. In an action to recover damages for malicious prosecution, it is essential to allege, among other things, the absence of probable cause and determination of the original proceedings in favor of the plaintiff.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*when defendant is not bound to answer statement of claim*. A defendant is not bound to answer a statement of claim which does not show any liability against him, and hence cannot be in default.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim is fatally defective*. A statement of claim in an action to recover damages for malicious prosecution which fails to allege the absence of probable cause and determination of the original proceedings in favor of plaintiff is fatally defective.

4. MUNICIPAL COURT OF CHICAGO, § 13*—*when insufficiency of statement of claim is not waived*. Insufficiency of a statement of claim in an action to recover damages for malicious prosecution, in that it fails to allege the absence of probable cause and determination of the original proceedings in favor of plaintiff, is not waived by the failure of the defendant to move for a more specific statement.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

DeLong et al. v. Hruby, 203 Ill. App. 206.

**Ray F. DeLong and James F. Collins, Appellees, v.
Thomas J. Hruby, Appellant.**

Gen. No. 22,563. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 8, 1917.

Statement of the Case.

Action by Ray F. DeLong and James F. Collins, plaintiffs, against Thomas J. Hruby, defendant, to recover a balance of \$500 of a deposit of \$1,500 made by plaintiffs with defendant under an agreement for the lease of a building to be erected by the defendant. From a judgment for plaintiffs for \$500, defendant appeals.

The declaration was merely described as "Narr. Filed by and in name of Ray F. DeLong alone. Common counts, unverified." Then follows: "Pleas of defendant, 1st, General issue; second, On July 2, 1914, plaintiff by his deed bearing date of that day, released defendant. Affidavit of meritorious defense." There were also other deficiencies in the abstract.

OTTO L. KOLAR, for appellant.

CHARLES W. STIEFEL and JOHN B. HEINEMANN, for appellees.

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

Abstract of the Decision.

1. APPEAL AND ERROR, § 866*—*what does not constitute an abstract.* A purported abstract held to be a mere index.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kelly v. Great Lakes Dredge & Dock Co., 203 Ill. App. 207.

2. APPEAL AND ERROR, § 1752*—*when judgment must be affirmed.* In the absence of a sufficient abstract of record, a judgment must be affirmed.

3. APPEAL AND ERROR, § 1303*—*when presumed that verdict of jury is justified from evidence.* In the absence of a complete bill of exceptions showing all the testimony and evidence submitted to the jury, it must be presumed on appeal that the jury were justified from the evidence in finding that plaintiff had established his claim.

**Owen Kelly, Defendant in Error, v. Great Lakes
Dredge & Dock Company, Plaintiff in Error.**

Gen. No. 22,262. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH Z. UHLIR, Judge, presiding. Heard in this court at the March term, 1916. Reversed and judgment of *nil capiat* and for costs entered here. Opinion filed January 8, 1917.

Statement of the Case.

Action by Owen Kelly, plaintiff, against Great Lakes Dredge & Dock Company, a corporation, defendant, to recover for breach of a contract of employment. From a judgment for plaintiff for \$488.20, defendant brings error.

MONTGOMERY, HART, SMITH & STEERE, for plaintiff in error.

JOHN J. LUPE, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Newport et al v. McPherson et al., 203 Ill. App. 208.

Abstract of the Decision.

MASTER AND SERVANT, § 3*—*when contract of employment is unilateral and unenforceable.* A contract of employment under which the employer is bound to use the services of the employee for a specified term but the employee has the right to quit work at any time he sees fit is unilateral, lacking in mutuality, and is consequently unenforceable.

J. R. Newport and Earl L. Cook, copartners, trading as J. R. Newport Lumber Company, for use of Newport Lumber Company, Defendants in Error, v. John J. McPherson and Ralph T. McPherson, copartners, trading as McPherson Brothers. J. O. Nesson Lumber Company, Plaintiff in Error.

Gen. No. 22,482.

1. ATTACHMENT, § 2*—*how proceedings for must be complied with.* Attachment proceedings are purely statutory, and the statutory provisions must be at least substantially complied with in order that such remedy may be availed of.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim must be filed.* A statement of claim in an attachment action must be filed within three days after the commencement of the action in order that the court may have jurisdiction to further proceed.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*when time for filing statement of claim may not be extended.* The time for filing a statement of claim in an attachment action may not be extended after the lapse of a three-day period from the commencement of the action.

4. GARNISHMENT, § 13*—*what proceedings may be attacked and reviewed.* While mere irregularities in garnishment proceedings are not open to attack where the jurisdiction of the court to enter judgment against the defendant and the garnishee is involved, antecedent proceedings may be attacked and reviewed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Error to the Municipal Court of Chicago; the Hon. JOHN STELKE, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded with directions. Opinion filed January 8, 1917.

ADAMS, CREWS, BOBB & WESCOTT, for plaintiff in error.

SOBOROFF & NEWMAN, for defendants in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The judgment in this record against the garnishee is sought to be reversed on a writ of error sued out by the garnishee.

Many errors are both assigned and argued, but in the conclusion to which we have come it will be unnecessary to notice any error except the one challenging the jurisdiction of the court to enter the judgment against the garnishee.

The judgment, it is contended, is invulnerable to attack as the trial court had jurisdiction of the defendants and the garnishee, the provisions of the attachment statute regulating the time when declarations shall be filed being operative in the Municipal Court. In this contention we are unable to accord our assent for reasons hereinafter to be stated.

We will briefly state the order of events in this case chronologically.

The suit is attachment, the grounds for which are stated to be the nonresidence of defendants. The affidavit setting forth the facts relied upon to maintain the attachment was filed December 31, 1913. On the same day a writ of attachment was issued and returned by the sheriff that the defendants were not found in his county and that appellant had been served as garnishee.

On January 20, 1914, an order was entered allowing

plaintiff to file its statement of claim and interrogatories to garnishee instant and they were filed in pursuance of that order.

On March 13, 1914, defendants in the attachment suit were defaulted for failure to appear, and a judgment entered against them for \$1,831.71. On June 16, 1914, the garnishee filed its answer denying any indebtedness to defendants.

On December 17, 1914, trial was entered upon before the trial judge and on January 18, 1915, judgment was entered against the garnishee for the same amount as the judgment theretofore entered against defendants. February 10, 1915, garnishee entered a motion to vacate the judgment, which on February 16, 1915, was overruled. The order so overruling the motion was entered *nunc pro tunc* as of January 18, 1915, and an appeal prayed and allowed to this court.

Attachment proceedings are purely statutory and are in their nature drastic. To take advantage of such an extraordinary remedy the statutory provisions must be in their essence at least substantially complied with. Such compliance must appear from the record; no presumptions not deducible from matters appearing of record can be indulged. A case of affirmative compliance with the statute must appear from the record; less will not suffice.

In the present condition of the Municipal Court Act and the rules of the Municipal Court made in pursuance of that act, the provisions of the attachment statute regulating the time in which a declaration must be filed have no application.

This case is of the first class in the Municipal Court. But for the rules of the Municipal Court hereinafter referred to, which are properly before us for interpretation, the attachment statute would be applicable in that court so far as the time for filing a declaration is concerned. But the rule abolishes the

necessity of a declaration and provides that in its stead a statement of claim shall be filed. Section 28 of the Municipal Court Act (J. & A. ¶ 3340) reads:

"That, until otherwise provided by the rules of the Municipal Court, cases of the first class mentioned in section two (2) of this act shall be commenced and prosecuted in said Municipal Court in the same manner in which similar suits and proceedings are required to be commenced and prosecuted in the circuit courts, except as is herein otherwise prescribed, and excepting also in the following particulars: * * *."

The seventh clause of said section 28 reads:

"The plaintiff shall file his declaration within three days after the commencement of the suit, in default whereof the suit shall be dismissed unless the court by an order entered in said suit shall extend the time for filing such declaration."

By rule of the Municipal Court it is provided that "In all cases of the first class instituted in this court on and after April 1, 1910, the pleadings shall be the same as in cases of the fourth class, and they may be amended in the same manner. In first-class cases the plaintiff shall file, in lieu of the declaration now provided for in the act and within the time allowed for the filing of such declaration, a statement of claim which shall consist * * *," etc.

Plaintiff filed a statement of claim and not a declaration. This was in accord with the directions of the Municipal Court Act and the rule of the Municipal Court above recited. In so doing, plaintiff recognized the fact that they were not proceeding under the attachment statute but under the Municipal Court Act and the rules of that court. We think that the time of the filing of the statement of the claim is jurisdictional, and, if filed within the three days prescribed by the Municipal Court Act and its rules, vests that court with jurisdiction to further proceed, and that a failure to so file the statement of claim robs the court of

Newport et al v. McPherson et al., 203 Ill. App. 208.

further jurisdiction except to dismiss the suit. The order granting leave to file statement of claim, entered twenty days after the attachment suit was commenced and seventeen days after the time for filing had expired, was a void order, entered without jurisdiction, and of no binding force or effect. The court had no power, by implication or otherwise, to extend the time after the lapse of three days. By analogy, the decisions that in the extension of time to file bonds on appeal and bills of exception, to be effective, such orders must be entered within the time prescribed by statute, are equally persuasive and binding as to the extension of the time in which to file statements of claim. *Hill v. City of Chicago*, 218 Ill. 178; *Lassers v. North German Lloyd Steamship Co.*, 150 Ill. App. 273, affirmed in 244 Ill. 570. It follows that the court being without jurisdiction to order the declaration filed when it did, all proceedings subsequently had, including the judgment against defendants and the garnishee, were nullities and void.

It is contended that the garnishee is impotent to attack any of the proceedings anterior to the judgment against it or the judgment against defendants. In a limited sense, this may be true. Mere irregularities in the proceedings against the defendants are not open to attack, but where the jurisdiction of the court to enter the order appealed from is involved, antecedent proceedings may be attacked and reviewed. The foundation upon which a judgment against a garnishee rests must be sufficiently secure to support it, otherwise it will fall.

In *Kirk v. Elmer H. Dearth Agency*, 171 Ill. 207, it is held that in order to pronounce judgment against the garnishee in an attachment suit, the court must have jurisdiction to render judgment against the attachment defendant, as the judgment against the defendant is the basis of the one against the garnishee,

Sprengel v. Schroeder, 203 Ill. App. 213.

and also that a garnishee may inquire into the validity of all the antecedent proceedings claimed to vest the court with jurisdiction to enter judgment against the attachment defendant. To a similar effect is *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582.

The judgments against the attachment debtor and the garnishee are void for want of jurisdiction in the Municipal Court to pronounce either of them.

The judgment against the garnishee in this writ of error is reversed and the Municipal Court is directed to enter an order discharging plaintiff in error as garnishee.

Reversed and remanded with directions.

Minna Sprengel, Defendant in Error, v. Arthur Schroeder, Administrator, Plaintiff in Error.

Gen. No. 22,505. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. WILLIAM FENIMORE COOPER, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 8, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Minna Sprengel, plaintiff, against Arthur Schroeder, administrator *de bonis non* with the will annexed of the estate of Henry Hochbaum, deceased, defendant, to recover damages for personal injuries sustained as the result of falling through a trapdoor left open by defendant's testator on premises rented of him by plaintiff's husband. From a judgment for plaintiff for \$4,000, defendant brings error.

The accident to plaintiff, damages for which are sought to be recovered in this action, happened by her

Sprengel v. Schroeder, 203 Ill. App. 213.

falling through a trapdoor left open by defendant's testator. The declaration consisted of two counts, in the first of which Henry Hochbaum was alleged to be in "possession and control" of the building of which the trapdoor was a part; that plaintiff's husband was a tenant in said building, where plaintiff and her family resided; that Hochbaum negligently caused a certain trapdoor in the sidewalk in front of said premises to be and remain open, rendering said sidewalk not reasonably safe for plaintiff and others going to and from the tenements in said building, and that plaintiff while exercising ordinary care and caution on her part stepped into said trapdoor, left open by reason of Hochbaum's negligence, and fell, receiving severe bodily injuries, internal, external, permanent and otherwise, etc. The second count was similar to the first, but alleged that plaintiff was a tenant of Hochbaum. To this declaration three pleas were filed, one the general issue, the second denying that Hochbaum owned or controlled the premises of which the trapdoor was a part, and the third denying that Hochbaum left open the trapdoor, etc.

AUGUST MARX and AUGUST R. MARX, for plaintiff in error.

OTTO W. JURGENS, for defendant in error; GEORGE H. MASON, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 824*—*what must be preserved in bill of exceptions.* An exception to a trial court's action in striking

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

special pleas from file cannot be availed of where such exception is not preserved in the bill of exceptions.

2. APPEAL AND ERROR, § 824*—*when exceptions to ruling of court must be preserved in bill of exceptions.* Exceptions to the ruling of the trial court in overruling the motion for new trial and in arrest of judgment and in entering judgment upon the verdict which are contained in the record but are not in the bill of exceptions are unavailable upon review.

3. LANDLORD AND TENANT, § 10*—*when relation exists.* The relation of landlord and tenant exists between the occupant of premises and another person where the occupant pays to such person rent and such person receives the money as rent and such person is in possession and control of the premises.

4. LANDLORD AND TENANT, § 226*—*what is duty of landlord as to keeping trapdoor in common sidewalk in repair.* It is the duty of the landlord to keep a trapdoor in a sidewalk used in common by the tenants of a building in a reasonably safe condition, and failure to do so involves the landlord in a liability for resulting injuries where the injured person is in the exercise of ordinary care for his or her own safety.

5. APPEAL AND ERROR, § 1456*—*when striking of special pleas is harmless error.* The striking of special pleas from the files is harmless error where the matters contained therein are covered by a plea of general issue.

6. PLEADING, § 100*—*what is admitted by plea of general issue.* The plea of general issue in an action by a tenant against his landlord for damages for personal injuries sustained by the tenant due to the negligence of the landlord in allowing the premises to be in an unsafe condition, where the declaration avers that the defendant owns and controls the premises, admits such ownership and control.

7. LANDLORD AND TENANT, § 258*—*when evidence is sufficient to show exercise of due care by tenant using common sidewalk.* In an action by a tenant against a landlord for damages for personal injuries sustained as the result of falling through a trapdoor on the premises left open by the landlord, where it appeared that the trapdoor was located in a common sidewalk used by all the tenants of the building, evidence held sufficient to show that plaintiff was in the exercise of due care for her own safety at the time of the accident.

8. LANDLORD AND TENANT, § 234*—*what care is required of tenant using common sidewalk.* A tenant using a sidewalk on premises used in common by other tenants of the building is not required

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sprengel v. Schroeder, 203 Ill. App. 213.

to be on the lookout for open trapdoors, although she may have known of the existence of such a trapdoor.

9. LANDLORD AND TENANT, § 259*—*when contributory negligence tenant falling in open trapdoor in common sidewalk is question for jury.* In an action by a tenant against a landlord for damages for personal injuries sustained as the result of falling through a trapdoor, which had been negligently left open by the landlord, and which was used in common by the tenants of the building, *held* that it was a question for the jury whether the plaintiff was guilty of contributory negligence in not observing that the trapdoor was open.

10. LANDLORD AND TENANT, § 257*—*when counts in declaration for damages for personal injuries are not inconsistent.* In an action by a tenant against a landlord for damages for personal injuries sustained as the result of a defective condition of the premises, *held* that a count alleging that the plaintiff was the tenant of the defendant was not inconsistent with another count alleging that plaintiff's husband was a tenant of defendant.

11. DAMAGES, § 106*—*when averment of declaration is sufficient to admit proof of fracture of the femur.* In an action for damages for personal injuries, *held* that under an averment of the declaration that plaintiff had received severe bodily injuries, internal, external, permanent and otherwise, which had from the time of the injury and would for the rest of her life disable her from attending to her affairs and business, evidence that plaintiff as the result of the injury suffered an impacted fracture of the femur, with resultant permanent shortening of the leg and consequent disability, was admissible.

12. APPEAL AND ERROR, § 1236*—*when defendant is estopped to complain that a hypothetical question is improper.* Where, in an action for personal injuries, a hypothetical question is put to plaintiff's attending physician and no omission is pointed out by the defendant when an objection to the question is made, but he simply makes objection to the question on the ground of omitted facts, and when asked to specify any omitted fact fails to do so or to specify any fact omitted or any statement in such question which was not justified, he is estopped on appeal to complain that the hypothetical question was improper.

13. EVIDENCE, § 435*—*when hypothetical questions are proper.* The party seeking the opinion of an expert must put his case as he claims it is proven and take the opinion of the witness thereon, leaving the jury to determine whether the case, as put, is the one proven.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

14. APPEAL AND ERROR, § 1540*—*when reference to declaration in instruction is harmless error.* It is not reversible error in a personal injury action to instruct the jury that the plaintiff is entitled to recover if they find defendant guilty of the negligence charged in the declaration, where the jury are also told that as a condition precedent to a finding against the defendant they must find that the plaintiff was at and prior to the time of the accident in the exercise of due care for her own safety.

15. ABATEMENT AND REVIVAL—*when action for personal injuries does not abate.* An action for personal injuries against a deceased person does not abate upon the death of the executrix of his estate, but such suit may be prosecuted against an administrator *de bonis non* with the will annexed who is substituted in place of the deceased executrix.

16. DAMAGES, § 241*—*when verdict of jury will not be disturbed on ground of excessiveness.* The amount of damages recoverable in a personal injury action is largely a matter for the jury, and when the jury are not affected by prejudice or passion in rendering the verdict it will not be disturbed on appeal.

17. DAMAGES, § 124*—*when verdict for personal injuries is not excessive.* A verdict for \$4,000 in favor of a woman who suffered an impacted fracture of the femur with resultant permanent shortening of the leg and consequent disability, *held* not excessive.

Good Products Company, Defendant in Error, v. James J. Dwyer, Plaintiff in Error.

Gen. No. 22,511. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ROSEA W. WELLS, Judge, presiding. Heard in this court at the October term, 1916. Reversed and judgment of *nil capiat* and for costs. Opinion filed January 8, 1917.

Statement of the Case.

Action by Good Products Company, a corporation, plaintiff, against James J. Dwyer and Gustav Hochstadter, defendants, to recover on a contract with

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Good Products Co. v. Dwyer, 203 Ill. App. 217.

Dwyer whereby plaintiff agreed to perform certain work on a building owned by Hochstadter, which was being constructed by Dwyer as contractor, and against Dwyer and Hochstadter upon an award of arbitrators. From a judgment in favor of plaintiff against defendant Dwyer, after dismissal of the case against defendant Hochstadter, defendant Dwyer brings error.

ALFRED E. BARR and FRANK W. BIGELOW, for plaintiff in error.

WALTER S. HOLDEN and G. FRED RUSH, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. ACCORD AND SATISFACTION, § 1*—*what is subject of*. A claim for an unliquidated amount is a proper subject of accord and satisfaction.

2. ACCORD AND SATISFACTION, § 6*—*when third person is bound by settlement*. A settlement of a disputed claim for labor performed in the construction of a building by a subcontractor between such subcontractor and the owner constitutes an accord and satisfaction as to the contractor.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Donovan v. National Life Ins. Co., of the U. S. A., 203 Ill. App. 219.

James Donovan, Appellee, v. National Life Insurance Company of the United States of America et al., Appellants.

Gen. No. 22,515. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in this court at the October term, 1916. Reversed. Opinion filed January 8, 1917.

Statement of the Case.

Action by James Donovan, plaintiff, against National Life Insurance Company of the United States of America, Werner Brothers Express & Storage Company, Albert M. Johnson, Lewis A. Stebbins, Henry M. Windsor and Oliver L. Watson, defendants. From an order vacating an order of dismissal of the suit for failure of plaintiff to file a bond for costs, defendants appeal.

GEORGE A. TRUDE and BURTON P. SEARS, for appellants.

No appearance for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. COURTS, § 63*—*when jurisdiction of not affected.* Noncompliance by a court with its rules of practice does not affect its jurisdiction of the persons of the parties and the subject-matter.

2. JUDGMENT, § 298*—*when order of dismissal of case may not be vacated at subsequent term.* The fact that a trial court did not know when it made an order dismissing a suit for failure of plaintiff to file a bond for costs that the motion made to dismiss was not in writing as required by its rules, and, if it had possessed such knowledge, would not have entered the order, does not render its action in so doing one of fact and not of law so as to warrant the vacation of such judgment after the term at which it was entered.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Marshall v. Delaware, L. & W. R. Co., 203 Ill. App. 220.

Arthur C. Marshall, Plaintiff in Error, v. Delaware, Lackawanna & Western Railroad Company, Defendant in Error.

Gen. No. 22,525. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ROSEA W. WELLS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 8, 1917. Rehearing denied January 22, 1917.

Statement of the Case.

Action by Arthur C. Marshall, plaintiff, against Delaware, Lackawanna & Western Railroad Company, a corporation, defendant, to recover damages for the negligent shipment of fruit. From a judgment for \$99.20, being only a part of the claim, plaintiff brings error.

STEWART REED BROWN, for plaintiff in error.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

MUNICIPAL COURT OF CHICAGO, § 13*—*when affidavit of defense is sufficient.* In an action by a shipper against the carrier to recover damages for the negligent shipment of fruit, an affidavit of defense in which defendant denied that the fruit was delivered to the initial carrier in sound condition, that it was damaged while in its possession by any act on its part or that any damage resulted to the fruit while in its possession, and averred that the fruit was sold by defendant in a damaged condition after notice to plaintiff, and at its request, that the net amount realized from the sale, being the amount of judgment, was tendered to plaintiff and refused, that defendant acted in good faith, and that no notice of plaintiff's claim was made within four months, as required by the terms of the contract to carry, *held* sufficient.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Florence E. Schaefer, Defendant in Error, v. Washington Safety Deposit Company, Plaintiff in Error.

Gen. No. 22,531.

1. SAFE DEPOSIT COMPANIES, § 1*—*when not presumed to be liable for loss of contents of rented box.* Where money is deposited in a rented safe deposit box under a contract providing that the liability of the depositary is expressly limited to the exercise of ordinary diligence to prevent the opening of the box during the term or any extension or renewal thereof by any person other than the renter or his duly authorized representative, and such opening shall not be inferable from the loss of its contents, the depositary is not presumptively liable from the mere fact that the money was placed in the box and six months afterwards, when the box was opened by the depositor, was not found to be there.

2. SAFE DEPOSIT COMPANIES, § 1*—*when instruction on liability of is erroneous.* In an action against a depositary for the loss of money placed in a rented safe deposit box where it appeared that plaintiff's statement of claim was defective, *held* that it was error for the court to instruct the jury that if they found plaintiff had by preponderance of the evidence made out her case, as alleged in her statement of claim, and if they also found that plaintiff had used ordinary care and diligence in the premises but had failed to meet and overcome such proofs, then their verdict should be for plaintiff.

Error to the Municipal Court of Chicago; the Hon. SAMUEL H. TRUDE, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed January 8, 1917.

CHARLES V. BARRETT, for plaintiff in error; JOHN F. HAAS and RAYMOND M. WHITE, of counsel.

M. D. DOLAN, for defendant in error; FREEMAN K. BLAKE, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Schaefer v. Washington Safety Deposit Co., 203 Ill. App. 221.

The judgment in this case is for \$1,250, rendered by the court upon the verdict of a jury after overruling motions for a new trial and in arrest of judgment.

Plaintiff rented a safety deposit box from defendant, in which she alleges she placed in current money \$1,250; that the box was under the care, control and management of defendant; that the money was extracted or removed from her box some time between January 2nd and July 11, 1914, without the consent or knowledge of plaintiff and in violation of defendant's contract to safely keep said sum.

By order of court plaintiff filed a copy of her renting contract. Among the rules and conditions appearing as a part of said contract is the following:

"The liability of the company is expressly limited to the exercise of ordinary diligence to prevent the opening of the within mentioned safe during the within mentioned term, or any extension or renewal thereof, by any person other than the renter or his duly authorized representative, and such opening shall not be inferable from the loss of any of its contents."

In defendant's affidavit of defense it denied that plaintiff deposited \$1,250 in its safety deposit box as alleged in the statement of claim and denied that that sum or any other sum was extracted or removed from the box without the consent or knowledge of plaintiff, and averred that it had lived up to and carried out all the terms of its contract with plaintiff, and that at all times during the existence of the lease it used all ordinary diligence and care to prevent the opening of plaintiff's box by any person other than plaintiff.

Plaintiff was allowed to file a verified reply to the affidavit of merits of defendant, in which she denied that defendant lived up to or carried out the terms of the contract or that it had used at all times all ordinary diligence and care to prevent the opening of the box during the term of the lease by any person other than plaintiff.

On the pleadings as thus stated, the cause proceeded to trial, with the result above recited.

The cause of action proceeds upon the theory of plaintiff, as outlined in her statement of claim, that defendant is presumptively liable because the money alleged by plaintiff to have been deposited in her box in January was not there in July when she again opened the box. Such is not the presumption of law which obtains in this class of cases; but, if it were, the presumption has been effectively rebutted by defendant's proof. The contract of defendant is to use ordinary diligence to prevent the opening of the box by any person other than plaintiff, and it is further stipulated that such opening shall not be inferable from the loss of any of the contents of the box. This being the contract of the parties, their rights, duties and responsibilities must be admeasured within its terms.

The statement of claim fails to state any cause of action, as defendant's liability must be predicated upon acts on its part which in law would amount to negligence. No negligence of defendant is averred as the primary cause of the alleged loss of plaintiff's alleged money. No act of negligence is alleged against defendant; neither is any act of negligence proven against it. Plaintiff's testimony that she deposited \$1,250 in her box in defendant's vault is not only, in our opinion, highly unsatisfactory, but is in some of its aspects open to grave suspicion upon the vital question as to whether the money was in fact ever deposited in the box of plaintiff. In the first place, plaintiff asserts that she received only one key to the box. A preponderance of the evidence demonstrates that she received two keys. Plaintiff's statement that she put \$1,250 into the box lacks corroboration. That she had such an amount of money and the source from which she received it are not satisfactorily proven. Plaintiff claims she received \$1,500 from her husband and at-

Schaefer v. Washington Safety Deposit Co., 203 Ill. App. 221.

tempts to support such contention by the testimony of her husband, who endeavored to account not only for his possession of the money but the source from which he received it. He testified that the one hundred dollar bills which plaintiff claims she deposited in her box were obtained by him from the Washington Park National Bank in exchange for smaller bills. While plaintiff's husband was known at the bank, the tellers repudiated his statement and denied that he ever had any such transaction with the bank or that he received one hundred dollar bills from either teller in exchange for small bills at the time he claims he did, or at any other time.

The case of *Shoeman v. Temple Safety Deposit Vaults*, 189 Ill. App. 316, is pertinent to the instant case both in law and fact. In the *Shoeman* case a thousand dollar bill was involved, and the proof there was, as here, that the money was placed in the box by Shoeman, but when the box was next visited by him it was not there to be found. While the statement of claim in that case alleged negligence, the negligence was not proven. This court, through Mr. Justice McSurely, held that the relation between the parties was that of bailor and bailee, and that as such bailee defendant was bound to exercise ordinary care for the preservation of the property intrusted to it, that such ordinary care was the care a prudent man would take of his own property, and then lays down the following principle of law:

"The defendant was not obliged to prove a condition of perfect safety in the management of the vault, and certainly not a condition beyond any possible speculative theory of insecurity. The case should not have gone to the jury upon the theory that unless the defendant proved its deposit boxes to be absolutely impregnable it would be held negligent. As we have said, the defendant was bound to use only ordinary care, and the evidence shows beyond any question that such a degree of care was exercised."

While it is true that changes were made in the vaults of defendant between January and July, 1914, in the making of which the boxes were removed from one part of the vault to another, yet there is no evidence of any negligent act committed or suffered in the making of such changes and the moving of the boxes. The whole evidence considered, the case rests upon an averment that the money was placed in the box and that six months thereafter, when the box was opened by plaintiff, it was not found to be there, that therefore a case in the nature of *res ipsa loquitur* is made out, fixing liability on defendant without further proof, and thereby placing the burden upon defendant to exculpate itself by proof from the presumption of negligence thus said to obtain. Such, however, is not the law. On this theory the court submitted the cause to the jury, which theory is substantially embodied in instruction number 4.

For the additional reason that no fact is stated in plaintiff's statement of claim entitling her to maintain an action against defendant, it was error for the court to instruct the jury that if they found plaintiff had, by a preponderance of the evidence, made out her case as alleged in her statement of claim, and if they also found that defendant had used ordinary care and diligence in the premises, but had failed to meet and overcome such proof, then their verdict should be for the plaintiff.

As plaintiff has neither stated nor proven a case entitling her to recover in this action, the judgment of the Municipal Court is reversed with a finding of fact.

Reversed with finding of fact.

Finding of fact. The court finds from the evidence that plaintiff has not proven defendant to be liable in the manner and form charged in her statement of claim, and, further, that plaintiff has failed to prove any actionable negligence against defendant in the matters set forth in her statement of claim.

Rosenbluth v. Heintz Food Co., 203 Ill. App. 226.

**Louis Rosenbluth, trading as Anchor Mills, Appellant,
v. Heintz Food Company of Illinois, Appellee.**

Gen. No. 22,545. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 8, 1917. Re-hearing denied January 22, 1917.

Statement of the Case.

Action by Louis Rosenbluth, trading as the Anchor Mills, plaintiff, against Heintz Food Company of Illinois, a corporation, defendant, to recover for flour sold and delivered at various times to defendant. From a judgment for defendant for \$66.44 on a claim of set-off, plaintiff appeals.

RICHARD T. MUNZER, for appellant.

No appearance for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **SALES, § 401***—*when evidence is sufficient to sustain claim of set-off.* In an action to recover for the value of flour sold where defendant interposed a set-off claiming damages suffered by it by reason of the fact that plaintiff failed to deliver winter wheat flour as required by the contract, and in its stead had delivered corn flour, causing loss of two batches of biscuits, in the making of which the corn flour was used, evidence held sufficient to sustain the claim of set-off.

2. **APPEAL AND ERROR, § 1414***—*when finding of trial court upon conflicting evidence will not be disturbed.* The finding of a trial court upon conflicting evidence will not be disturbed on appeal where such finding is not contrary to the probative force of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

W. B. Fuller, for use of Nell E. Jordan, Appellee, v. Bridgeport Wood Finishing Company, Appellant.

Gen. No. 22,565. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN STELKE, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded with directions. Opinion filed January 8, 1917.

Statement of the Case.

Action of garnishment by W. B. Fuller, for the use of Nell E. Jordan, plaintiff, against the Bridgeport Wood Finishing Company, a corporation, defendant. From a judgment against defendant for \$560 as garnishee and ordering that \$167.10 thereof be recovered for the use of the beneficial plaintiff, defendant appeals.

ELBERT C. FERGUSON, for appellant.

No appearance for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. GARNISHMENT, § 93*—*when answer must be taken as true.* Where no issue is joined upon an answer in a garnishment action the averment of facts therein stand admitted and must be taken as true.

2. GARNISHMENT—*when right of exemption is preserved by garnishee.* The assertion of the right of exemption of a debtor in an answer by the garnishee is sufficient to preserve such right to the debtor.

3. GARNISHMENT, § 35*—*what wages employer is required to answer for.* Under section 14 of the Garnishment Act as amended

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Weingarden v. Weinberg et al., 203 Ill. App. 228.

in 1901 (J. & A. ¶ 5949), the employer is not required to answer for the wages earned by a wage earner after the service of the writ.

4. EXEMPTIONS, § 5*—*when wages of nonresident are exempt from garnishment.* A nonresident debtor whose wages are earned in a foreign State is entitled to the exemption of the State of his residence.

I. M. Weingarden, Plaintiff in Error, v. Louis Weinberg and Isadore Weinberg, Defendants in Error.

Gen. No. 22,728. (Not to be reported in full.)

-Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 15, 1917.

Statement of the Case.

Action by I. M. Weingarden, plaintiff, against Louis Weinberg and Isadore Weinberg, defendants, to recover for breach of a contract whereby defendants agreed to receive plaintiff's show for a certain period at a stipulated price. From a judgment finding the issues for the defendants, on a trial before the court without a jury, plaintiff brings error.

S. L. and FRED LOWENTHAL, for plaintiff in error.

ADOLPH MARKS, for defendants in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 854*—*what does not constitute a certificate of evidence.* A document purporting to be a certificate of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bushnell et al. v. Chester, 203 Ill. App. 229.

evidence is insufficient to constitute a certificate of evidence where it is not stated anywhere in it or in the certificate of the trial judge thereto that it contains all the evidence in the case.

2. MUNICIPAL COURT OF CHICAGO, § 26*—*how facts in a case of first class may be preserved for review.* The Practice Act, sec. 81 (J. & A. ¶ 8618), providing for preserving of facts in a cause for review by a bill of exceptions, stenographic report and certificate of evidence, governs first-class cases in the Municipal Court.

3. MUNICIPAL COURT OF CHICAGO § 29*—*when presumed that judgment is sustained by evidence.* Without a bill of exceptions, certificate of evidence or stenographic report certifying that it contains all of the evidence heard upon the trial of a first-class case in the Municipal Court, unless such record is a *præcipe* record, a court of review will presume that the judgment is sustained by the evidence heard upon the trial, and such judgment will not be disturbed upon review for errors of fact.

D. I. Bushnell and R. W. Pommer, partners, trading as
D. I. Bushnell & Company, Plaintiffs in Error, v.
Henry H. Chester, trading as H. H. Chester &
Company, Defendant in Error.

Gen. No. 21,573. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed January 17, 1917. Rehearing denied January 29, 1917.

Statement of the Case.

Action by D. I. Bushnell and R. W. Pommer, partners, trading as D. I. Bushnell & Company, plaintiffs, against Henry H. Chester, trading as H. H. Chester & Company, defendant, to recover the sum of \$566.50 as damages alleged to have been sustained by reason of defendant's failure to carry out a written contract for the sale of onion sets. From a judgment for costs in favor of defendant, plaintiffs bring error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bushnell et al. v. Chester, 203 Ill. App. 229.

ASHCRAFT & ASHCRAFT, for plaintiffs in error;
CHARLES F. RATHBUN, of counsel.

EBEN F. RUNYAN, for defendant in error.

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

Abstract of the Decision.

1. SALES, § 366*—*when fact that onion sets are not actually screened through sieve of required dimension does not bar recovery for breach of contract.* Where a contract for the sale of a specified quantity of onion sets of specified varieties provides that the sets shall be screened through a sieve with a mesh of a specified dimension, the mere fact that the sets are not actually screened through a sieve with a mesh of such required dimension does not bar a recovery if the sets are of the size called for by the contract.

2. SALES—*when contract may not be rescinded.* A slight or partial neglect on the part of one of the parties to a contract of sale to observe some of the terms or conditions thereof will not justify the other party in at once abandoning the agreement.

3. SALES, § 373*—*when evidence is sufficient to show that contract is substantially performed.* In an action by the purchaser of onion sets against the seller for breach of contract where it appeared that defendant agreed to sell a specified quantity of onion sets of a specified variety which were to be screened through a one-inch mesh sieve and plaintiff refused to accept the first shipment merely on the ground that a few were too large, whereupon defendant refused to ship any more, evidence held sufficient to show that the contract was substantially complied with.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Barney Nelson and Axel LeMoon, copartners, trading as Nelson & LeMoon, Defendants in Error, v. A. F. McKeown, Plaintiff in Error.

Gen. No. 21,600. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed January 17, 1917.

Statement of the Case.

Action by Barney Nelson and Axel LeMoon, copartners, trading as Nelson & LeMoon, plaintiffs, against A. F. McKeown, defendant, to recover for repairs and storage of defendant's automobile and supplies furnished. From a judgment for plaintiffs for \$134.68, defendant brings error.

EDWARD A. MECHLING, for plaintiff in error.

S. T. SLAWITSKY, for defendants in error.

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

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1414***—*when finding of trial court will not be disturbed.* The findings of the trial court upon conflicting evidence will not be disturbed on appeal especially where the trial court has had opportunity to see and hear the witnesses.

2. **BAILMENT**—*what compensation bailee is entitled to for storage of property.* A garage proprietor with whom an automobile had originally been left for repairs and afterwards for storage, held entitled to a reasonable charge for storage of the car up to the time that the owner demanded possession of it.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Chicago B. S. Co. v. Koehring Mach. Co., 203 Ill. App. 232.

Chicago Builders' Specialties Company, Defendant in Error, v. Koehring Machine Company, Plaintiff in Error.

Gen. No. 21,645. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed January 17, 1917.

Statement of the Case.

Action by the Chicago Builders' Specialties Company, a corporation, plaintiff, against the Koehring Machine Company, a corporation, defendant, to recover for breach of contract for the sale of certain machinery. From a judgment in favor of plaintiff for the amount of its claim, \$144, defendant brings error.

The plaintiff on December 23, 1909, wrote the defendant concerning the purchase of certain machinery. To this defendant replied giving the cost of the several items and stating that the defendant could fill the order immediately. Nothing further appeared to have been done until March 19, 1910, when the parties communicated by telephone. A witness for the plaintiff testified that on that date he talked over the telephone with a representative of the defendant and told him that they were ready to close the Horrabin deal, and asked the defendant how soon the order could be filled, and that the defendant replied by Wednesday of the following week. Immediately afterwards plaintiff wrote a letter confirming the telephone communication and instructed the defendant to ship the goods to plaintiff's customer, Horrabin, at Iowa City, Iowa. There were further communications between the parties in reference to the method of payment, the defendant insisting that it would not ship the goods except upon

the receipt of a certified check for the amount, \$411. The plaintiff sent a certified check March 28th through a bank, and on March 31st the defendant wrote a letter to the plaintiff as follows: "Owing to your late reply to our request for certified check with your order No. 5190, we cannot now accept this order, and have requested the bank to return your check." It further appeared that the defendant filled the Horrabin order direct on March 25th. A witness for the defendant testified that in the telephone conversation March 19th, he told the plaintiff he would not accept the order; that the plaintiff would have to take it up direct with the defendant's Chicago agent. The evidence further showed that plaintiff had contracted to sell the machinery to Horrabin for \$555, and his profit would be \$144.

MONTGOMERY, HART, SMITH & STEERE, for plaintiff in error.

CULVER, ANDREWS, KING & COOK, for defendant in error.

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

Abstract of the Decision.

1. SALES, § 373*—*when evidence is sufficient to show making of contract.* In an action to recover damages for the breach of a contract for the sale of certain machinery, evidence held sufficient to show that a contract was made between the parties.

2. SALES, § 93*—*when evidence is sufficient to show that contract was not abandoned.* In an action to recover damages for the breach of a contract for the sale of certain machinery, evidence held sufficient to show that the contract between the parties was not abandoned.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Peter Schoenhofen Brewing Co. v. Newbold, 203 Ill. App. 234.

Peter Schoenhofen Brewing Company, Defendant in Error, v. Mrs. H. M. Newbold, Plaintiff in Error.

Gen. No. 21,702. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed January 17, 1917.

Statement of the Case.

Action by the Peter Schoenhofen Brewing Company, a corporation, plaintiff, against Mrs. H. M. Newbold, defendant, to recover for goods sold and delivered. From a judgment for plaintiff for the amount of its claim, \$558, defendant brings error.

TIMOTHY J. FELL, for plaintiff in error; HERMANN P. HAASE, of counsel.

JAMES J. KELLY, for defendant in error; JOHN A. BURKE, of counsel.

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

Abstract of the Decision.

SALES, § 325*—*when burden of proof is on seller to prove price at which goods are sold.* While the burden of proving payment is on the defendant where he admits the receipt of goods and the price claimed by plaintiff and interposes a defense that payment has been made, yet where the price to be paid for the goods is in dispute, the burden of proving the price at which the goods were sold is upon the plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**S. D. Childs & Company, Appellant, v. City of Chicago
and William R. Moorhouse, Commissioner of Public
Works, Appellees.**

Gen. No. 22,991.

1. EMINENT DOMAIN, § 42*—*when watchman's house for use with municipal bridge is not an additional burden upon fee of street.* A watchman's house which is constructed on a street in order that the watchman may, upon the operation of a municipal "jack-knife" bridge over a navigable river, lower the gates across the roadway and warn the public is not an additional burden upon the fee of the street, but is an essential part of the bridge.

2. EMINENT DOMAIN—*what does not constitute taking of street for navigation and for private purposes without compensation.* There is no taking of a street for the purpose of navigation and for private purposes without compensation, where, in order that the premises on one side of a navigable river may be used for railroad purposes and that the river may be open for the necessary width for the purpose of navigation, it is necessary that the abutments on the side used by railroads be constructed in the river and that the bridge be moved a certain distance in the other direction so that not only the river but a certain portion of the street on the side of the river opposite the railroad premises be bridged.

3. EMINENT DOMAIN, § 40*—*when remedy of owner of damaged property is at law.* The remedy of one whose property is damaged by the method of construction of a lawful public improvement is at law.

4. DEDICATION, § 5*—*how question of intention to make is determined.* The question of intention to dedicate a street across a navigable river is the controlling element and must be gathered from the plat and all the attendant circumstances.

5. DEDICATION, § 5*—*when evidence sufficient to show dedication of street across navigable river.* Evidence, including an examined plat, held to show the intention of the dedication of a street to connect both portions of the street by extending it across a navigable river.

6. RAILROADS—*when lessee may authorize construction of viaduct.* The lessee, under a 999-year lease of property for railway purposes, held to have the right to authorize the construction of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

S. D. Childs & Co. v. City of Chicago, 203 Ill. App. 235.

a viaduct from a navigable river over the railroad property to connect a municipal bridge with a city street.

Appeal from the Superior Court of Cook county; the Hon. JOSEPH H. FITCH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1916. Affirmed. Opinion filed January 17, 1917.

EDMUND S. CUMMINGS and LEE D. MATHIAS, for appellant.

SAMUEL A. ETTELSON, C. E. CLEVELAND and M. S. CRESSY, for appellees.

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

S. D. Childs & Company, a corporation, filed a bill in equity against the City of Chicago and certain of its officials to restrain the defendants from constructing a bridge in Monroe street across the Chicago River, until damages occasioned to complainant's property by reason of the construction of the bridge should be first ascertained and paid. A temporary writ of injunction was ordered, from which the defendants prosecuted an appeal to this court, where the order of the trial court was modified and the cause reversed and remanded. The city, to conform with the opinion of this court, changed its plans so that the entire bridge would be constructed within Monroe street. The facts are stated in the former opinion of this court (198 Ill. App. 590) and need not be repeated. After the decision on the former appeal, complainant filed an amended and supplemental bill, and, after issue joined, the cause was tried upon the merits, and a decree entered dismissing the amended and supplemental bill for want of equity.

The appeal was taken directly to the Supreme Court, but on motion of the defendants it was transferred here by that court. On that account a number

of points are argued in the briefs that it will be unnecessary for us to pass upon. The only contentions of complainant not covered in our former opinion are: (1) that the proposed construction of the watchman's house in the street is an additional burden upon the fee of the street, and that the city has not acquired the right to construct the same by condemnation, contract or otherwise; (2) that the construction of the bridge as proposed is designed for the purpose of aiding navigation, and not to facilitate travel on the street; (3) that the city has not the right to construct the bridge across the river, for the reason that Monroe street when dedicated stopped at the banks of the river and did not extend across it; (4) that the city has not acquired the right to construct that portion of the bridge or viaduct between the west bank of the river and Canal street, and particularly the twenty-seven and one-half feet immediately west of the river.

First. The plans and specifications of the bridge provide for the construction of the watchman's house at the east end of the pit. The house when completed will extend over the street from curb to curb and rest on two pillars, the floor being sixteen feet above the roadway. There are fourteen feet of sidewalk space between the curb and the lot line on each side. When the bridge is being operated, the watchman lowers the gates across the roadway and warns the public. We are clearly of the opinion that this house is an essential part of the bridge and therefore not an additional burden upon the fee of the street.

Second. The abutments on the west side of the river are to be built in the river, in order not to obstruct any part of the premises on the west side of the river for railroad purposes, and to provide a channel of one hundred and sixty-five feet in width for purposes of navigation. To accomplish these purposes it was necessary that the bridge be moved to the east so that not

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only the river, but approximately fifty feet of the street is to be bridged. Complainant contends that this constitutes the taking of the street for the purpose of navigation and for private purposes without compensation, and is therefore unlawful. The Chicago River is a navigable stream, under the control of the Federal Government, and the bridge must be constructed under the supervision and approval of Federal authority. The chief engineer of the city, under whose supervision the plans were prepared, testified that the bridge could be constructed in no other feasible manner. We are therefore of the opinion that the contention of the complainant is untenable. Of course if complainant is damaged by reason of the method of construction adopted, such damages may be recovered in an action at law. *Rigney v. City of Chicago*, 102 Ill. 64.

Third. Complainant contends that the title to the bed of the Chicago River is in the riparian owners to the thread of the stream, subject to the rights of the public for the purposes of navigation; that Monroe street was not dedicated across the river, but stopped at the river's banks and that the city has not acquired the right by condemnation or otherwise to construct the bridge over the river. In support of this contention, it is argued that the plat of school section 16 addition to Chicago, "indicates the Chicago river by two boundary lines and Monroe street coming up to the banks of the river on each side thereof. There is no mark on the plat indicating or denoting that it was the intention of the dedicator that Monroe street should be dedicated across the Chicago River." The question of intention is the controlling element and must be gathered from the plat and all the attendant circumstances in evidence. In passing on a similar question, Mr. Justice Scholfeld, in delivering the opinion of the court in *Piper v. Connelly*, 108 Ill. 646, said

(p. 651): "The question of intention must be settled by the language of the deed and all the attendant circumstances in evidence, and not merely by the letter in the descriptive part of the deed." The plat of section 16 in the record shows Monroe street extends from east to west across the entire section; that the Chicago River divided the section about the middle in a northerly and southerly direction. The river is indicated by two lines representing the easterly and westerly banks. The boundary lines of Monroe street stop at the lines indicating the banks of the river. The plat also shows at least seven other streets extending from east to west across the section, indicated in the same manner as Monroe street. There are also at least four streets east and the same number west of the river extending across the section from north to south and indicated in a like manner, so that the entire section is divided into blocks, and on each side of Monroe street the blocks are divided into lots. From an examination of the entire plat we are clearly of the opinion that it was the intention of the dedicator that Monroe street should extend across the river.

Fourth. The complainant contends that the city has not the right to construct the viaduct from the west bank of the river to Canal street, and that unless such viaduct is constructed the bridge cannot be used. Of course the law will not permit the city to construct a bridge which cannot be utilized. It is conceded that the bridge cannot be used without the viaduct. The question therefore is whether the city has the right to construct the viaduct. Monroe street between the river and Canal street was vacated in 1861, and conveyed to the Chicago, Pittsburgh and Ft. Wayne Railway Company for railway purposes. The railway company and its successors have continued to and are now occupying the property for such purposes. The evidence tends to show that the railway company, its

S. D. Childs & Co. v. City of Chicago, 203 Ill. App. 235.

lessees and successors, have conveyed to the Union Station Company the westerly one hundred and thirty-two feet of that portion of Monroe street, but have not conveyed the twenty-seven and one-half feet immediately west of the river; that the Pittsburgh, Ft. Wayne and Chicago Railway Company, the owner of the premises, executed a lease for a period of 999 years to the premises, which lease is now the property of the Pennsylvania Company. The Union Station Company is a corporation organized for the purpose of constructing a union station in Chicago. It was authorized to make use of certain streets by the city council, and, as a consideration for such rights, it agreed to construct a bridge across the river at Monroe street, connect it with Canal street by means of a viaduct, and procure a grant to the city of the right to extend Monroe street upon the viaduct from the bridge to Canal street. The Union Station Company has changed its name to Chicago Union Station Company, and in accordance with the provisions of the ordinance agreed to build the viaduct, and has given bond to secure the performance of its agreement in this regard. The ordinance further provides that if the viaduct is not constructed by the station company, the city may do so, and the Pennsylvania Company, the lessee under the 999-year lease, is required to accept the provisions of this ordinance, which it has done. July 11, 1916, the Chicago Union Station Company granted to the city, in accordance with the ordinance, a perpetual easement to construct and use a viaduct from the bridge to Canal street, and under the provisions of the ordinance it has also agreed to secure a similar grant from the owner of the fee and the lessees of the twenty-seven and one-half foot strip. The evidence also shows that complainant's leasehold interest in the premises which it occupies will expire April 30, 1919. The Pennsylvania Company, under its lease, which has

about 950 years yet to run, must use this property in the same manner and for the same purposes as the Pittsburgh, Ft. Wayne and Chicago Railway Company are required to use it, namely, for railway purposes. Building a union station is certainly using the premises for railway purposes. One of the conditions under which this station must be constructed is that a viaduct be built connecting the bridge with Canal street as provided by the city ordinance, which provisions have been accepted by the lessee Pennsylvania Company. From the foregoing it appears that the objection urged by complainant is that the city has not obtained the right to construct and maintain the viaduct from the owner of the fee of the twenty-seven and one-half feet immediately west of the river. We are, however, of the opinion that the Pennsylvania Company, under the provisions of its lease, has the right to authorize the construction of the viaduct. *Chicago West Division Ry. Co. v. Metropolitan West Side El. R. Co.*, 152 Ill. 519.

Finding no reversible error in the record, the decree of the Superior Court of Cook county is affirmed.

Affirmed.

Gustafson et al. v. Peterson et al., 203 Ill. App. 242.

**Emily Gustafson and Vernon Gustafson, minor, by
Emily Gustafson, Appellees, v. Robert Peterson
and William Schaefer, Appellants.**

Gen. No. 21,431. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. J. H. FORNOFF, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed January 17, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Emily Gustafson and Vernon Gustafson, a minor, suing by Emily Gustafson, his mother and next friend, plaintiffs, against Robert Peterson and William Schaefer, defendants, under the Dramshop Act, sec. 9 (J. & A. ¶4609), for damage to their means of support. From a judgment for plaintiffs for \$2,500, defendants appeal.

The first instruction given on behalf of defendants was as follows:

“The court instructs the jury, as a matter of law, that it is unlawful to sell or give intoxicating liquors to an habitual drunkard or to a person when intoxicated, and you are further instructed that a sale to such person is a sale wantonly and wilfully made; so if you believe from the evidence that intoxicating liquors were sold or given to Carl Gustafson by the defendants at the time when they knew, or ought to have known, that the said Carl Gustafson was intoxicated or had become an habitual drunkard, then such sales or gifts, if any, were unlawful.”

ROBERT J. NORDHOLD and ROSE & SYMMES, for appellants.

RANKIN, HOWARD & DONNELLY, for appellees.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 233*—*when evidence as to loss of support subsequent to wrongful acts complained of is admissible.* In an action by a wife and child against saloon keepers under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), to recover damages for loss of support due to the intoxication of the husband and father, evidence tending to show loss of support subsequent to the wrongful acts complained of, *held* to be admissible.

2. INTOXICATING LIQUORS, § 233*—*what damages may be recovered for loss of support.* The damages recoverable in an action under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), by a wife and child for damage to their means of support are not confined to damages which they suffered up to the time suit was brought, but include loss of support subsequent to the time of commencing the action, since the wrongful acts complained of give rise to but one cause of action.

3. INTOXICATING LIQUORS, § 216*—*when evidence as to attitude of husband when drunk towards wife and child is admissible.* In an action against saloon keepers under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), for damage to their means of support, evidence as to the attitude of the husband when drunk towards the plaintiffs, *held* admissible for the purpose of showing the nature and extent of the husband's intoxication, when introduced in connection with a description of his conduct when drunk.

4. INTOXICATING LIQUORS, § 249*—*when instruction on unlawfulness of sale of intoxicating liquor to an habitual drunkard is not erroneous.* In an action by a wife and child against saloon keepers under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), for damage to their means of support, an instruction that it is unlawful to sell or give intoxicating liquors to an habitual drunkard or to a person when intoxicated and that a sale to such a person is a sale wantonly and wilfully made, and that if the jury believed from the evidence that intoxicating liquors were sold or given to the husband by the defendants at a time when they knew, or ought to have known, that the husband was intoxicated or had become an habitual drunkard, then such sales or gifts, if any, were unlawful, *held* not erroneous.

5. INTOXICATING LIQUORS, § 253*—*when instruction is not erroneous as not conforming with pleadings.* In an action by a wife and child against saloon keepers under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), for damage to their means of support due to the intoxication of the husband, an objection to an instruction that it did not limit the time when the defendants gave or sold intoxicating

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same title and section number.

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liquors to the husband to the time alleged in the declaration, *held* untenable where there was no evidence of sale by either defendant other than those set out in the declaration and the instruction expressly limited the jury to the sales shown by the evidence.

6. INTOXICATING LIQUORS, § 225*—*when evidence is sufficient to sustain verdict in action for loss of support.* The Dramshop Act, sec. 9 (J. & A. ¶ 4609), gives an action to a wife and child against saloon keepers selling intoxicating liquor to the husband for damage to loss of support resulting from intoxication from liquor or otherwise, and evidence which establishes intoxication will sustain a verdict for the plaintiffs even though it is not shown to be habitual.

7. PLEADING, § 447*—*when objection that more is declared upon than is proved is unavailable.* Where enough is proved to establish a right of action it is no objection that more is declared upon, as the matter not proved may be treated as surplusage.

8. INTOXICATING LIQUORS, § 253*—*when instruction in action by wife and child for loss of means of support is not erroneous as allowing recovery greater than declared on in declaration.* In an action under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), by a wife and child against saloon keepers for damage to their means of support due to intoxication of the husband and father, *held* that an instruction allowing recovery for injury to property as well as means of support was not erroneous, although the declaration counted only on injury to the latter, the jury having been confined to what they believed from the evidence, and there being nothing in the record tending to show injury to property.

9. INTOXICATING LIQUORS, § 250*—*when instruction on right to recover exemplary damages in action for loss of support is not erroneous.* An action under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), by a wife and child against saloon keepers for damage to their support due to the intoxication of husband and father, an instruction that if the jury believed from all the circumstances that plaintiffs ought to recover exemplary damages, they might, if they saw fit, in addition to the actual damages, assess such further sum as exemplary damages as they believed from all the circumstances in evidence in the case that plaintiffs were entitled to, *held* not erroneous because not explaining to the jury in what circumstances exemplary damages were allowable, such objection being met by another instruction.

10. INSTRUCTIONS, § 10*—*what instruction must contain.* It is not necessary to state all the principles of law relative to one subject in one instruction.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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11. INTOXICATING LIQUORS, § 250*—*when instruction on liability of saloon keepers for act of servant in action for loss of support is not erroneous.* In an action under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), by a wife and child against saloon keepers for loss of support due to the intoxication of the husband and father an instruction that the defendants were liable for the acts of their servants *held* not objectionable as tending to mislead the jury into allowing exemplary damages, even though the defendants had forbidden the sales where, in the only instruction on exemplary damages, the court instructed the jury that the right to such damages depended upon the finding that the conduct of defendants was wanton and in wilful disregard of the plaintiffs' rights.

12. INTOXICATING LIQUORS, § 254*—*when requested instruction on liability of codefendant for exemplary damages is properly refused as misleading.* In an action by a wife and child under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), against saloon keepers to recover for loss of support due to intoxication of the husband and father, a requested instruction that if one defendant was guilty of conduct which would permit exemplary damages and the other not, then the jury could only assess "such damages as you find the defendant least at fault is liable for," *held* properly refused as being ambiguous and misleading.

13. INTOXICATING LIQUORS, § 254*—*when requested instruction on period of intoxication that can be considered is properly refused.* In an action by a wife and child under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), to recover damages for the loss of support due to intoxication of the husband, a requested instruction that the jury should not consider habitual intoxication of the husband at any time or period other than the time or period during which it was proven by the evidence that the defendants or either of them sold or gave intoxicating liquors to him, *held* properly refused.

14. INTOXICATING LIQUORS, § 254*—*when requested instruction that no recovery may be had unless habitual intoxication is shown is properly refused.* In an action under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), to recover damages for loss of support due to the intoxication of the husband and father, a requested instruction that no recovery could be had unless habitual intoxication was shown, *held* properly refused, as recovery might be had for damages caused by intoxication, even though it had been shown to be habitual.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Weiss v. Clamitz et al., 203 Ill. App. 246.

**Louis Weiss, Plaintiff in Error, v. Max Clamitz and
Amelia Clamitz, Defendants in Error.**

Gen. No. 21,461. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and judgment here. Opinion filed January 17, 1917.

Statement of the Case.

Action by Louis Weiss, plaintiff, against Max Clamitz and Amelia Clamitz, defendants, to recover earnest money paid under a contract for a sale of certain real property. From a judgment against him for costs, plaintiff brings error.

The contract provided, among other things, that the land should be subject to an incumbrance of \$3,500, of which \$500 was to be payable in July, 1913, and the balance in 1917. Upon an examination, it appeared that the property was subject to an incumbrance of \$3,500, of which \$500 was payable August 7, 1914, \$500 August 7, 1915, and the balance in 1917. Plaintiff gave notice to the defendants that he elected to stand on his contract, and must have a conveyance subject only to the incumbrance therein provided for. No such conveyance was tendered.

FLECK, KAVENEY & BURKE, for plaintiff in error;
WILLIAM REEDA, of counsel.

No appearance for defendants in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. **VENDOR AND PURCHASER, § 81***—*what does not constitute waiver of condition in contract.* Where a contract for the sale of land provides that the land shall be subject to a specified incumbrance, an agreement to change the terms of the contract so as to permit an incumbrance materially different from the one originally provided for does not constitute a waiver of the condition.

2. **EVIDENCE, § 322***—*when parol evidence inadmissible to vary terms of contract.* Where a contract for the sale of real property provides that the land shall be subject to a specified incumbrance, payable at specified periods, evidence that an agreement to change the terms of the contract so as to permit an incumbrance materially different from the one originally provided for is inadmissible as an attempt to vary the terms of a written document by parol evidence.

3. **VENDOR AND PURCHASER, § 325***—*when purchaser is entitled to repayment of earnest money.* Where a contract for the sale of real estate provides that the land shall be subject to a specified incumbrance payable at specified periods, and the vendor is unable to furnish a conveyance subject only to such incumbrance within the time stipulated by the contract, the purchaser is not in default and is entitled to recover earnest money deposited under the contract.

4. **APPEAL AND ERROR, § 1810***—*when final judgment will be entered in Appellate Court upon reversal.* Where, in an action by the purchaser of real estate against a vendor to recover earnest money paid under the contract, there is no dispute in regard to the amount, the Appellate Court upon reversing a judgment for defendant will enter final judgment for the amount claimed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same title and section number.

**G. E. Clinton, Defendant in Error, v. Rhoda Royal,
Plaintiff in Error.**

Gen. No. 21,474. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed January 17, 1917. Rehearing denied January 29, 1917.

Statement of the Case.

Action by G. E. Clinton, plaintiff, against Rhoda Royal, defendant, on two judgment notes for \$250 each, drawn by defendant and made payable to one Seaver, and by him indorsed in blank. From a judgment against him on a directed verdict, defendant brings error.

The notes in question were judgment notes signed by the defendant, and on the back of each appeared the following order:

“Chicago, Ill. March 14th, 1914.

“Treasurer,

Young Buffalo Wild West Co.

“Please pay to the order of Vernon C. Seaver Two Hundred and Fifty (\$250.00) Dollars, and charge same to my 1913 account.

Rhoda Royal.”

The date and the amount named in those orders were identical with the date and the amount named in the promissory notes.

The defendant testified that the Young Buffalo Wild West Company owed him \$1,700 for services during the year 1913; that he considered Seaver as the owner of the show; that he had done all his business with him; that at the time the notes were made, Seaver gave him \$500 on account, and expressly agreed to look to the show for reimbursement, and that defend-

ant would not have to pay the notes; that he (Seaver) would get the \$500 from the show; that the defendant was about to attach the show for the amount due him, and that Seaver advanced the \$500 with the tacit understanding that the attachment would not be made, and that it was not made, and that he credited the account of the show with the \$500 which he had received. All of this testimony was stricken out. Counsel for defendant also made the following offer:

“Your Honor, I want to show the schedules filed and sworn to on behalf of the Wild West Company, a corporation in bankruptcy, that they scheduled their indebtedness to this defendant at \$1,200, showing the payment less the \$500 which appears upon these notes.”

This offer was objected to, and the evidence excluded as immaterial.

ADOLPH MARKS, for plaintiff in error.

WHEELLOCK, NEWAY & MACKENZIE, for defendant in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 251***—*when purchaser after maturity without consideration is charged with notice of defenses pleadable against payee.* A purchaser of judgment notes after maturity and without consideration is charged with notice of any defenses pleadable against the payee, unless title is procured from a person standing in the position of a bona fide purchaser without notice.

2. **BILLS AND NOTES, § 18***—*when designation of particular account to be debited with amount of judgment notes does not render them conditional.* Under the Negotiable Instruments Law, sec. 2 (J. & A. § 7642), notations on the backs of judgment notes designating a particular fund to be debited with the amounts of the notes do not render the notes conditional.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Corrigan v. North American Union, 203 Ill. App. 250.

3. **BILLS AND NOTES, § 431***—*when parol evidence is inadmissible.* Evidence as to a conversation had at the time notes are executed is inadmissible for the purpose of varying the terms of the notes themselves, or for the purpose of showing an agreement that defendant would not be liable according to their terms.

4. **BILLS AND NOTES, § 426***—*when bankruptcy schedules are erroneously excluded in action on judgment notes.* In an action on two judgment notes given by an employee of a circus to the manager thereof, on the backs of which were notations directing the treasurer of the company to pay to the manager the amounts thereof and charge to the maker's account, and there was evidence that the manager had expressly agreed to look to the circus for reimbursement and that defendant would not have to pay the note, *held* that schedules filed in bankruptcy by the circus company showing that the indebtedness to the defendant had been reduced by the amount of such notes were admissible in evidence, especially in view of the fact that the payee had the entire control and management of all the affairs of the bankrupt company.

Bridget Corrigan, Defendant in Error, v. North American Union, Plaintiff in Error.

Gen. No. 21,490. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. J. J. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed January 17, 1917.

Statement of the Case.

Action by Bridget Corrigan, plaintiff, against North American Union, defendant, to recover on a benefit policy issued to one George Whelan. From a judgment in favor of plaintiff, defendant brings error.

C. V. DONOVAN, for plaintiff in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

TIMOTHY J. FELL, for defendant in error; HERMANN P. HAASE, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 789*—*when evidence is insufficient to show that insured was engaged in prohibited occupation of bartender.* In an action on a mutual benefit insurance policy, evidence held insufficient to show that insured, who had been in the habit of frequenting his brother's saloon, had been engaged in the prohibited occupation of bartender.

2. INSURANCE, § 789*—*when person occasionally selling liquor is not engaged in prohibited occupation of bartender.* Casual sales of liquor made from time to time in a brother's saloon by one not employed for the purpose and receiving no compensation therefor do not, as a matter of law, constitute him a person engaged in the occupation of bartender in violation of a provision of a mutual benefit insurance policy.

Edward Hudson, Defendant in Error, v. Ben Marks et al., Plaintiffs in Error,

Gen. No. 21,553. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed January 17, 1917. Rehearing denied January 29, 1917.

Statement of the Case.

Action by Edward Hudson, plaintiff, against Ben Marks, D. S. Marks, Emanuel Mendelson and I. Lipse, defendants, to recover rent under a lease. From

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hudson v. Marks, 203 Ill. App. 251.

the denial of the motion to vacate a judgment against defendants entered by confession under a power of attorney, reserved to plaintiff in the lease, defendants bring error.

LEVY & LEVY, for plaintiffs in error.

FREDERICK A. BROWN and RAYMOND S. PRUITT, for defendant in error; JOHN G. McDONALD, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 310*—*when receipt of rent with knowledge of illegal use of premises does not constitute defense to action on lease.* It is not a defense to an action by a landlord against lessees on a lease for rent that the lessor received rent with the knowledge that the premises had been used for immoral purposes where it is not shown that he acquiesced in such use or permitted the occupants to continue the use of the premises for such a purpose.

2. JUDGMENT, § 82*—*when judgment by confession will not be vacated.* A judgment by confession will not be vacated unless the affidavit on which it is based sets out facts which, if true, would in themselves constitute a defense.

3. JUDGMENT, § 82*—*how affidavits filed in support of motion to vacate judgment by confession must be construed.* Affidavits filed in support of a motion to vacate a judgment by confession must be construed most strongly against the party making the application.

4. JUDGMENT, § 82*—*when affidavit in support of motion to vacate judgment by confession is insufficient.* An affidavit filed in support of a motion to vacate a judgment by confession on a lease which stated that the assignees of the lease used the premises as a house of ill fame, that the use of such premises by the assignees for such purpose was with full knowledge and notice thereof on the part of the plaintiff, and that the plaintiff accepted certain payments of rent knowing the money paid to him was the proceeds of the unlawful and immoral uses to which said premises were devoted, held insufficient.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

W. B. Crane and O. F. Crane, trading as W. B. Crane & Company, Defendants in Error, v. James M. Taft, Plaintiff in Error.

Gen. No. 21,580.

1. **CARRIERS, § 74***—*what is duty of carrier as to forwarding of goods when route is specified.* A carrier who undertakes to carry the goods of a shipper to a point named and then forward them by given route to the destination is bound to forward them over the route named unless unforeseen circumstances justify a change in the route.

2. **CARRIERS—what is duty of connecting carrier as to acceptance and carriage of goods contrary to specified route.** Where goods are tendered to a carrier by another carrier in lawful possession, it is its duty to accept and carry them even though a different route be named.

3. **CARRIERS, § 209***—*when connecting carrier is entitled to lien upon goods.* Where goods are delivered to an initial carrier by the shipper with directions that they be shipped by specified route and, in violation of such instructions, are turned over to a connecting carrier and taken by a different route thereon to the destination, such connecting carrier is entitled to a lien upon the goods for its freight charges.

Error to the Municipal Court of Chicago; the Hon. JOHN STELK, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed January 17, 1917.

WORTH E. CAYLOR, for plaintiff in error.

W. TUDOR APMADOC, for defendants in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

In this case, the defendants in error, who will be referred to hereafter as plaintiffs, recovered a judgment against the plaintiff in error, hereafter referred to as defendant, in a replevin suit brought to recover two

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Crane et al. v. Taft, 203 Ill. App. 253.

carloads of lumber. The judgment was for the return of the property and nominal damages. It is to reverse this judgment that the writ of error is sued out. The facts were stipulated to be that the plaintiffs had shipped the lumber in question from Salt Lick, Kentucky, under a uniform bill of lading by which the property was consigned to themselves at Chicago, and the route expressly stated. After the initial carrier had taken the cars over its line to Cincinnati, Ohio, it disregarded the route specified and turned them over to a railroad not named in the bill of lading, which carried them to their destination in Chicago. The plaintiffs, as consignees, refused the freight when tendered, and thereupon the final carrier deposited the contents with the defendant, who placed them in his warehouse. When the plaintiffs demanded the lumber of him, and he refused to surrender it without a payment of charges, they brought this replevin suit. The plaintiffs did not offer to pay or tender payment to any person or corporation of any amount whatever for the transportation of this lumber or the warehouse charges. No question has been made of the right of the defendant to retain the lumber if the final carrier had a lien for its charges, nor as to the right of the plaintiffs to recover possession of the lumber without the payment of such warehouse charges if the final carrier had no lien; the sole question is, as to whether the final carrier had a lien for the transportation charges.

While cases have been cited, none appears to be in point, and it would, therefore, seem to be a matter of first impression, which must be governed by the general principles applicable to carriers.

A carrier who undertakes to carry the goods of a shipper to a point named, and then forward them by a given route to their destination, is bound to forward them over the route named, unless there are unforeseen circumstances which justify a change in the route.

The question, then, is, what is the duty of an intermediate or final carrier where goods are tendered it by a carrier when the bill of lading shows that the consignor has routed them over another line? Is it its duty to refuse the shipment until the tendering carrier has produced evidence which satisfies it that the facts and circumstances are such as to authorize a diversion from the route named? It is, of course, the duty of a common carrier at common law and, in interstate shipments, under the acts passed to regulate interstate commerce, to receive and carry goods when tendered by those having them in their lawful possession and under their control. While an initial carrier intrusted and charged with the duty of forwarding goods to their destination has express authority to forward them over the route named in the bill of lading, it is also within the scope of its implied authority to make changes in that route if the facts and circumstances are such as to make it necessary, and the question of whether the original route shall be followed or another selected is one between the shipper and the original carrier. When, therefore, goods are tendered to a connecting carrier by a carrier in possession, we think it is clearly its duty to accept them and carry them to their destination, and that it is not justified in refusing so to do until express authority to make the change in the route is shown, or until evidence is heard on the question of the initial carrier's right to change the route. In other words, we think that where goods are tendered to a carrier by another carrier in lawful possession, it has a duty to accept and carry them, even though a different route be named. To hold otherwise would be to cause endless confusion and delay. We are, therefore, of the opinion that the final carrier in the case at bar, in accepting and carrying the goods to their destination, did only what the law required of it, and that it was entitled to a lien upon the goods for its

Alford v. Lambert, 203 Ill. App. 256.

lawful charges. If the initial carrier, who acted as the agent for the shipper in the matter of forwarding the goods, violated his contract by making an unauthorized diversion, it is responsible to the plaintiffs for the damages resulting therefrom, and liable to such penalties as it may have incurred. As the trial court allowed a recovery of the property without any tender of the lawful warehouse charges or of the charges due the final carrier, we are of the opinion that the judgment is erroneous. The judgment is, therefore, reversed and the cause will be remanded to the Municipal Court.

Reversed and remanded.

Frank Alford, Defendant in Error, v. Antonia Lambert, Plaintiff in Error.

Gen. No. 21,592. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES N. GOODNOW, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed January 17, 1917.

Statement of the Case.

Action by Frank Alford, plaintiff, against Antonia Lambert, defendant, to recover the sum of \$836 alleged to be due plaintiff for work as janitor for twenty months at \$35 a month, and other items, including \$21 for borrowed money. From a judgment for plaintiff for \$836, defendant brings error.

EMIL A. MEYER and EDWARD H. MORRIS, for plaintiff in error.

Forler v. Butts, 203 Ill. App. 257.

COMBERFORD & COHEN, for defendant in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 41*—*when husband is competent witness for wife.* In an action concerning the separate estate of a wife, her husband is a competent witness for her.

2. MASTER AND SERVANT, § 82*—*when evidence as to amount of work done by servant is admissible.* In an action by a janitor of an apartment building, consisting of fifteen flats, to recover, among other things, for his services for twenty months at \$35 per month, where the defense was that defendant had not agreed to pay plaintiff anything and that he simply worked for his board and lodging, and it appeared that defendant's husband also worked in the building, held that evidence as to the amount of work which plaintiff did during the term he was with defendant was admissible for consideration in determining whether a contract had been entered into for the payment of the sum claimed per month.

John Forler, Plaintiff in Error, v. E. R. Butts, Defendant in Error.

Gen. No. 21,622. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed January 17, 1917.

Statement of the Case.

Action by John Forler, plaintiff, against E. R. Butts, defendant, on two promissory notes aggregating \$590. From a judgment in favor of defendant, plaintiff brings error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Forler v. Butts, 203 Ill. App. 257.

These checks were given on a Monday, and plaintiff failed to deposit them in the bank in Chicago until Wednesday or Thursday, and this resulted in a failure to present them to the bank in Niles, Michigan, on which they were drawn, until Saturday, the day the bank closed its doors. The defendant had on deposit with the bank at the time of its failure an amount in excess of the amount of the checks. The evidence further disclosed that it takes about two and a half hours to travel by rail from Chicago, where the transaction took place, to Niles, Michigan.

Plaintiff, however, contended that as the defendant wrote him on the day of the bank's failure, saying that he hoped the checks had been paid, and, if not, he (defendant) was out that amount, and also in a conversation with plaintiff agreed to give a note for the amount of the checks, that these promises revived defendant's obligation without any further consideration, and that it was immaterial whether defendant knew that by the rules of law the negligence of plaintiff to deposit the checks promptly would discharge him.

EDWARD A. MECHLING, for plaintiff in error.

JAMES NICHOLAS LORENZ, for defendant in error;
JOHN W. LYDDICK, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 283***—*when debt is extinguished by unreasonable delay in presentation of checks.* A delay of five days in presentation of checks for payment, held to be unreasonable and to constitute a payment or extinguishment of debt for which the checks were drawn, where the bank on which they were drawn failed before the checks were presented for payment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Moser, 203 Ill. App. 259.

2. **BILLS AND NOTES, § 291***—*when new promise by drawer does not constitute waiver of discharge by failure to present checks for payment within reasonable time.* A new promise by a maker of checks who is discharged from liability because of the unreasonable delay of the payee thereof in presenting the checks to the bank on which they were drawn for payment, which is made without a full knowledge of the facts out of which the discharge arose, does not constitute a waiver of the defense of delay in presentation of the checks for payment.

**City of Chicago, Defendant in Error, v. J. J. Moser,
Plaintiff in Error.**

Gen. No. 21,707. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed. Opinion filed January 17, 1917.

Statement of the Case.

Action by the City of Chicago, plaintiff, against J. J. Moser, defendant, to recover for alleged violation of section 2012 of the Municipal Code relative to breach of the peace. From a judgment for the plaintiff for one dollar and costs, defendant brings error.

J. J. MOSER, for plaintiff in error.

SAMUEL A. ETTELSON and HARRY B. MILLER, for defendant in error; DANIEL WEBSTER, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Moser, 203 Ill. App. 259.

Abstract of the Decision.

1. EVIDENCE, § 221*—*when hearsay inadmissible.* A refusal by the court upon motion to strike out hearsay evidence, *held* reversible error.

2. TRIAL, § 45*—*when remarks by trial judge constitute reversible error.* Obviously improper and prejudicial remarks by the presiding judge at a trial before a jury constitute reversible error.

3. BREACH OF THE PEACE, § 1*—*what does not constitute breach of peace.* Where a person in possession of a ticket which entitled him to become a passenger on a certain railroad passed through its entrance gates without force but refused to have his ticket punched in the honest belief that the railroad company had no right to insist upon cancellation of a fare until it was apparent that transportation would be furnished, *held* that, although a trespass, this was not a violation of section 2012 of the Municipal Code of the City of Chicago, providing, in effect, that all persons who shall make, aid, countenance or assist in making any form of noise, riot, disturbance, breach of the peace, or a diversion tending to a breach of the peace, within the limits of said city, shall be subject to a fine of not less than one dollar nor more than two hundred dollars.

4. CARRIERS—*when may eject trespasser from station.* A railroad has the right to make reasonable rules and regulations for the conduct of its business, and a person entering its station in contravention of such a rule or regulation is a trespasser and may rightfully be ejected by the railroad, using no more force than necessary, notwithstanding the fact such person may have acted upon a claim of right made in good faith.

5. APPEAL AND ERROR—*when bill of exceptions is sufficient.* A bill of exceptions filed in an action based upon a municipal ordinance is sufficient although it contains no copy of the ordinance where its substance was stated in an instruction given to the jury to which no exception was made or preserved, and particularly where the offense for which the defendant was tried was fully disclosed by the sworn complaint filed in the trial court and by the statement of counsel for the city preserved in the bill.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Henry Weiss and Samuel S. Schwartz, Defendants in Error, v. S. A. Corn, Plaintiff in Error.

Gen. No. 21,275. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and judgment. Opinion filed January 17, 1917.

Statement of the Case.

Action by Henry Weiss and Samuel S. Schwartz, plaintiffs, against S. A. Corn, defendant, to recover the sum of \$942.85 for goods sold and delivered. From a judgment for defendant for costs upon a nonsuit, plaintiffs bring error.

MARTIN L. WILBORN, for plaintiff in error.

BERNARD J. BROWN, for defendants in error.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Abstract of the Decision.

1. DISMISSAL, NONSUIT AND DISCONTINUANCE, § 43*—*when motion for nonsuit is too late.* Where motion for a nonsuit was not made until after the trial judge had stated that he did not see how the plaintiffs could recover or what he could do but allow the defendant's motion for a finding in his favor, *held* that such motion for a nonsuit was an admission that the plaintiffs had been informed of the court's conclusion, and was too late.

2. MUNICIPAL COURT OF CHICAGO, § 29*—*how fourth-class case must be decided on review.* Under section 23 of the Municipal Court Act (J. & A. ¶ 3335), it is the duty of the Appellate Court in a fourth-class case to decide the case upon its merits as appearing from the statement or stenographic report signed by the trial judge.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. MUNICIPAL COURT OF CHICAGO, § 29*—*when finding of trial court will not be disturbed.* Where, in a fourth-class case under the Municipal Court Act, the evidence was conflicting and the trial judge at the conclusion of the evidence made a résumé and analysis of the effect thereof and conclusion that the defendant had established his defense, *held* that the plaintiffs had failed to make out their alleged case by a preponderance of the evidence.

**Daniel P. Brian and J. Thurston Brian, copartners,
trading as D. P. Brian & Son, Defendants in Error,
v. H. A. Born Packers' Supply Company, Plaintiff
in Error.**

Gen. No. 21,538.

1. SALES, § 388*—*what are remedies of buyer for breach of warranty.* Where goods are sold with warranty the buyer has, on breach of the warranty, an option of returning the goods or of retaining them and suing on the warranty.

2. SALES, § 105*—*when right to rescind sale and return goods is waived by buyer.* Where the buyer of goods received and executed a written acceptance of same as entirely satisfactory, he thereby waived the right to rescind the sale and return the goods.

3. SALES, § 427*—*when seller of goods under conditional sale contract cannot prevent obtaining of perfect title by buyer.* Where a party purchased goods upon condition that title should remain in the seller until the goods were paid for, *held* that the seller could do nothing to prevent the buyer from getting perfect title upon retaining the goods and paying the purchase price.

4. SALES, § 388*—*when action is based on breach of warranty and not on rescission of contract.* Where the statement of claim in an action of the fourth class in the Municipal Court of Chicago set up a sale of a refrigerating plant and warranty of same by the defendant to the plaintiffs, a breach of such warranty, damages by reason thereof, and payment of part of the purchase price, under which evidence of such breach and payment was presented and instructions given that the action was one for breach of warranty, *held* that such action was one based upon breach of warranty and not one based upon rescission of contract, notwithstanding

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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there was no evidence of damages for such breach and a verdict was rendered for an amount equal to the payment shown on account of the purchase price.

5. SALES, § 404*—*what is measure of damages for breach of warranty.* The measure of damages for breach of a warranty is the difference between the value of the goods as warranted and their actual value in their defective condition.

6. SALES, § 404*—*what evidence is insufficient as basis for determination of damages for breach of warranty.* Evidence of payment of the purchase price of goods sold with warranty does not constitute of itself a sufficient basis for determination by a jury of damages for a breach of the warranty.

7. SALES, § 402*—*when refusal of court to instruct jury as to measure of damages for breach of warranty is error.* In an action for damages for breach of warranty it was error for the court not to instruct the jury, when requested so to do, as to measure of damages in case they found a breach.

8. MUNICIPAL COURT OF CHICAGO, § 31*—*when case reversed.* The statement of a claim, the evidence, the instructions, and the verdict should be reasonably consistent and all tend to support the judgment, and where the evidence, the instructions and the verdict are irreconcilable, the judgment should be reversed.

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed January 17, 1917. Rehearing denied January 29, 1917.

BAKER & HOLDER, for plaintiff in error.

PAUL WEMPLE, C. M. CAVENEE and WALTER F. OLDS, for defendants in error; PAUL WEMPLE, of counsel.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This was a suit of the fourth class begun in the Municipal Court by Daniel P. Brian and J. Thurston Brian, copartners, doing business as D. P. Brian & Son, defendants in error (hereinafter referred to as plaintiffs), against the H. A. Born Packers' Supply

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Company, a corporation, plaintiff in error (hereinafter referred to as defendant), to recover damages in the sum of \$1,000, for an alleged breach of warranty in the sale of a refrigerating plant.

The plaintiffs' statement of claim alleges, among other things, that on or about September 12, 1911, the plaintiffs and defendant entered into a written contract by which the defendant sold and the plaintiffs purchased a refrigerating machine and equipment, including a 4½-horsepower gasoline engine, for \$935; that the defendant guaranteed the said machine to do its work to perfection; that "the engine furnished by the defendant had failed to operate said refrigerating plant and has been and is of no value to the plaintiffs, and there has been a total breach of the defendant's warranty as to said refrigerating plant"; that the plaintiffs have paid under said contract the sum of \$810.50 to the defendant and have suffered damage by the loss of the use of one of their own refrigerators which was connected with the said refrigerating plant, to the damage of the plaintiffs in the sum of \$1,000.

On January 8, 1914, the plaintiffs filed a more specific statement of claim to which was attached a copy of the written contract. The new statement of claim alleges, among other things, that the engine would not operate the plant; that the plaintiffs lost the use of their refrigerators from May to October, both inclusive, in the years 1912 and 1913; that they paid the sum of \$57.65 for repairs in an attempt to make said plant operate satisfactorily; that they have paid to the defendant, under said contract, the sum of \$810.50; "to the damage of the plaintiffs in the sum of \$1,000." On January 16, 1914, the defendant filed an affidavit of merits in which the defendant admits the sale and delivery to the plaintiffs of the refrigerating machine pursuant to the above-mentioned written contract, but denies that it was unsatisfactory and not

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in accordance with the contract, and that the plaintiffs lost the use of said refrigerator during the months of May to October in the years 1912 and 1913, and denies that the plaintiffs were damaged in the sum of \$1,000 or in any amount, but alleges that the plaintiffs are entitled to a set-off in the sum of \$167, being the balance of the purchase price remaining unpaid.

On January 16, 1914, the defendant filed a statement of claim setting up four certain promissory notes (part of the purchase price) signed by the plaintiffs, payable to the order of the defendant, three being for the sum of \$50 each, payable respectively in seven, eight and nine months after date, the fourth being for \$17.50 and payable ten months after date.

The plaintiffs filed an affidavit of merits to defendant's set-off upon the four promissory notes, claiming that the notes were given as part of the purchase price of the machine and that there had been a total want and failure of consideration for said notes in that the machine was warranted to operate satisfactorily, and that it has not so operated and has been and is of no value to the plaintiffs. The case was tried before a jury.

The evidence, substantially, was as follows: The plaintiffs, butchers in Waverly, Illinois, on September 12, 1911, bought, by written contract, from the defendant a refrigerating plant to be used in place of ice, for cooling meat in their ice boxes. H. A. Born, president of the defendant company, in the fall of 1911 visited the plaintiffs' place and looked over the situation and told them what they needed. The result was the sale above mentioned. The contract provided for building and furnishing a refrigerating and power plant, with a 4½-horsepower gasoline engine, together with certain specified equipment for \$935. It contained the following, "and further guarantee said machine to do its work to perfection"; also "and pur-

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chaser claims no title to said property until all payments have been made as above stated." On October 23, 1911, defendant sent two workmen, Furman and Barry, to Waverly and by November 6, 1911, the plant was installed. The first engine was found to be insufficient and the defendant sent a larger engine for which the plaintiffs paid \$43 extra. The plant was then operated for one afternoon before Furman and Barry left. On November 6, 1911, the plaintiffs gave the defendant a receipt which stated the plant had "been properly installed and worked entirely satisfactorily," etc. Meanwhile, according to the suggestions of the defendant, the plaintiffs had sealed the ice boxes so as to bring about more perfect insulation. In order to get familiar with the machinery, the plaintiffs operated the plant about two hours a day for a week after November 6, 1911, although at that time the weather was cold and artificial refrigeration was unnecessary. The plant was idle until April 1, 1912, when the weather grew warm. It was then started but failed to furnish sufficient refrigeration. Beginning with May 9, 1912, the defendant sent a number of letters to the plaintiffs; and on June 29, 1912, it wrote: "Our Mr. Maher returned this morning and we have his report on the condition of the engine that you have. We have taken this matter up with the factory again and we will see that an engine is rushed to you with all possible haste. Of course we are indeed sorry that this engine fell down," etc. The third gas engine arrived July 23, 1912, and was refused by the plaintiffs. Brian testified that it was never set up and that he notified Born the engine was there subject to his disposal. Whereupon defendant wired "accept or stand suit." The plaintiffs stopped operating the machine in June, 1912, and took the coils out of one box and began using ice. The coils remained in the other ice box until March 1, 1914; the rest of the apparatus was

left in, where it was erected in the building, until the machine was torn down on March 1, 1914, when it was taken out by the plaintiffs and put in storage on the premises belonging to the plaintiffs where it was at the time of the trial. The evidence also shows that the refrigerating plant, as erected, had no market value; and that defendant was notified by plaintiffs some time in June, 1912, that they refused any more responsibility in regard to it; that it was of no use to them. There was no return, however, or offer to return the refrigerating plant. On October 24, 1911, the plaintiffs paid, as part of the purchase price, \$467.50 and gave their notes for the balance; six of which latter notes, each for \$50, were paid (the last one being paid May 6, 1912) and the remaining four, three being for \$50 each and one of \$17.50 being still unpaid and constituting the basis of the defendant's set-off. The plaintiffs had paid altogether on the purchase price \$823.

After being instructed orally by the trial judge, the jury brought in a verdict against the defendant for \$823.50 and costs of suit. The defendant made a motion for a new trial and also in arrest of judgment, both of which were overruled.

It is contended by the defendant: First, that as the judgment is for a breach of warranty, it cannot stand because there is no evidence in the record of damages for a breach of warranty; second, that as a judgment based on a rescission of the contract, it cannot stand, as that is inconsistent with the statement of claim, and also the jury were instructed only on the theory of a breach of warranty. The plaintiffs claim that the cause of action is rescission and also that the court did not err in refusing the defendant's proffered instructions.

An examination of the record discloses: First, a statement of claim obviously based on a breach of war-

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ranty; second, evidence of a breach of warranty; third, evidence showing just what part of the purchase price had been paid; fourth, no evidence of damages for a breach of warranty; fifth, instructions only on the theory of a breach of warranty; sixth, a verdict for an amount equal to that part of the purchase price that had already been paid by the plaintiffs.

Of the foregoing six subjects, three, the statement of claim, the evidence of a breach of warranty, and the instructions, are consistent only with a trial on the theory of an alleged breach of warranty. The other three, the evidence of the purchase price that was paid, the absence of evidence of damages for a breach of warranty and the verdict of the jury, are consistent only with the trial on the theory of an alleged rescission of the contract. We cannot agree with the plaintiffs' contention that the suit in the case at bar is not a suit for a breach of warranty, but is a suit to recover that portion of the purchase price for the refrigerating plant which the plaintiffs have paid.

The plaintiffs had the option to return the refrigerating plant or to retain it and sue for a breach of warranty. *Kemp v. Freeman*, 42 Ill. App. 500. The evidence shows that the defendant retained the refrigerating plant in its possession and had it in its possession at the time of the trial. The coils in one of the ice boxes remained there from the fall of 1911, when they were put in by the defendant, until March 1, 1914; in fact, the machine as a refrigerating plant, was not torn down until March 1, 1914. Also the plaintiffs on November 6, 1911, accepted in writing, the plant as satisfactory; and had it not been for the condition in the contract, the title would have passed on November 6, 1911, to the plaintiffs. It is difficult to discover any right on the part of the plaintiffs to rescind the contract after the refrigerating plant was put in, and it was admitted by the plaintiffs that it

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had "been properly installed and working entirely satisfactorily." As to the sale being conditional, and the title remaining in the defendant, the latter could do nothing to prevent plaintiffs from getting a perfect title upon the retention of the property and the payment of the purchase price. *Fleury & Co. v. Tufts*, 25 Ill. App. 101. According to the law, it cannot be said that in such a case an action for breach of warranty would not lie. As far as the defendant was concerned, it was an executed contract. The plaintiffs having received and had installed the complete refrigerating plant, in November, 1911, and having executed a written acceptance of the property at that time, must be considered as having waived the right to rescind and return it.

We, therefore, proceed to a consideration of the case as one for a breach of warranty. The measure of damages for a breach of warranty is the difference between the value of the refrigerating machine and attachments as warranted and the actual value in their defective condition. *Woodford Distilling Co. v. Remington Typewriter Co.*, 174 Ill. App. 244. As said above, however, the record fails to disclose any evidence of such damages arising by reason of a breach of warranty. There is no evidence in the record which the jury could consider when it undertook to ascertain and assess damages for a breach of warranty. It is true the evidence discloses what part of the purchase price had been paid, but that, of itself, constituted no sufficient basis for the determination of damages for a breach of warranty. If the law would allow us to consider the suit as one for rescission of the contract, then the evidence as to what part of the purchase price had been paid might have justified such a verdict as was rendered in this case. But it is our opinion that the litigation, as evidenced by the record, is for damages for a breach of warranty. The trial judge instructed

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the jury that the plaintiffs were seeking to recover against the defendant for a breach of warranty and "that the burden of proof is upon the plaintiffs to establish by a preponderance of the evidence that the defendant permitted a breach of warranty and plaintiffs suffered damages therefrom." Such an instruction, if the suit were for a rescission of the contract, would be very misleading to the jury and vitiate the verdict which was rendered.

The defendant requested the trial judge to instruct the jury as follows:

"That the amounts paid by plaintiffs to defendant on account of the purchase price cannot be recovered back by plaintiffs as a part of its damages, if any, in this case.

"That if you find from the evidence that defendant permitted a breach of the warranty expressed in the written contract, still plaintiffs were not entitled in law to reject the machinery and recover back the purchase price paid.

"That the contract made by the plaintiffs with the defendant in this case is inseparable, and if you find from the evidence that any material portion of the machinery called for by said contract furnished by defendant to the plaintiffs failed to conform to the warranty, then the measure of the plaintiffs' damage is the difference between the value of the thing, of the entire machine and attachments as warranted, and their value there in their defective condition, if you find from the evidence that their condition was defective.

"If you find from the evidence that the refrigerating plant furnished by the defendant under the contract would not operate satisfactorily, then the measure of the plaintiffs' damage is the difference between the value of the entire machinery and attachments as warranted and their actual value in their defective condition, if you find from the evidence that their condition was defective."

We are of the opinion that the defendant's request should have been granted. A case such as this, whether involving a breach of warranty or a question of rescission, is one in which it is particularly necessary that the jury be properly instructed in the rules of law applicable to the facts. The defendant was entitled to have the jury clearly and accurately instructed as to the law of the case. The *ad damnum* of plaintiffs' statement of claim is \$1,000, yet nowhere in the instructions which were given was the jury informed how to measure the damages in case they found there was a breach of warranty. They were instructed as to what would constitute a breach, but were not given any rule of law applicable to such facts by which damages might be ascertained and assessed. They were left entirely in the dark on that subject and the result was they brought in a verdict such as might have been expected (as soon as they found there was a breach of warranty), that is, the amount of the purchase price which the plaintiffs had paid.

On the theory that it was a suit for a breach of warranty, it should have been taken from the jury at the close of all the evidence, and on the theory that it was for a rescission of the contract, the jury were improperly instructed. Where, as in this case, a trial has taken place in which a jury have found there was a breach of warranty and therefore that the plaintiffs might be entitled to damages, it is with reluctance that we set aside the judgment; but the law, which the courts are created to apply, requires that the statement of claim, the evidence, the instructions and the verdict shall be at least reasonably consistent, and shall all tend to support the judgment, whereas in the instant case, the evidence, the instructions and the verdict are completely irreconcilable.

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

Reversed and remanded.

Herhold v. Herhold et al., 203 Ill. App. 272.

William H. Herhold, Appellant, v. Frederick H. Herhold and Herhold Chair Company, Appellees.

Gen. No. 22,451. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. **FREDERICK A. SMITH**, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed January 22, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by William H. Herhold, complainant, against Frederick H. Herhold and Herhold Chair Company, a corporation, defendants, charging misappropriation of funds of the company by Frederick H. Herhold and praying for an accounting, restitution and appointment of a receiver of the company. From an order by the court on its own motion dismissing the bill for want of equity, the complainant appeals.

Complainant was a brother of the defendant Frederick H. Herhold, and they, with other brothers and sisters, were the sole stockholders of the defendant company, and complainant was at one time secretary of the company, but in consequence of complainant's refusal to join in a certain disposition of the estate of their parents desired by the others, complainant was deposed at the next directors' meeting from his office as secretary of the company and from his employment as superintendent of the business.

WORTH ALLEN, for appellant.

MAYER, MEYER, AUSTRIAN & PLATT, for appellees;
CARL MEYER, of counsel.

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

Abstract of the Decision.

1. CORPORATIONS, § 267*—*when evidence is insufficient to support bill in suit for accounting against officer.* Evidence held insufficient to support the allegations of the bill or to warrant appointment of a receiver in a suit against an officer of a corporation for alleged misappropriation of funds.

2. CORPORATIONS, § 554*—*when appointment of receiver proper for going corporation.* So long as a concern is a prosperous going corporation there is no necessity for a receiver, and before one is appointed it must clearly appear that such appointment is an imperative necessity to preserve the property of the concern.

3. CORPORATIONS, § 554*—*when appointment of receiver proper because of apprehensions as to future of corporation.* Apprehensions of the future of a corporation, to entitle the appointment of a receiver thereof, must be founded on facts clearly proven by evidence and not merely on hostile expressions, especially such as naturally arise out of a family quarrel.

4. CORPORATIONS, § 553*—*when depriving stockholder of office is not ground for appointment of receiver.* Merely depriving a stockholder, by vote of directors representing a majority of the stock, of his employment as secretary of a corporation is not such evidence as warrants appointment of a receiver of the company, in the absence of facts showing loss to the stockholder as such.

5. CORPORATIONS, § 267*—*when opinion in another case in which officer was party is inadmissible in suit against him for accounting.* Evidence under a bill for accounting, charging a misappropriation of funds by an officer of a corporation consisting of an opinion of the Appellate Court in another case in which the defendant was a party, offered as tending to show his improper conduct in that case and a habit on his part, held properly excluded.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**George J. Williams, Appellant, v. J. C. Veeder,
Appellee.**

Gen. No. 22,571. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1916. Reversed and judgment here. Opinion filed January 22, 1917.

Statement of the Case.

Action by George J. Williams, plaintiff, against J. C. Veeder, defendant, to recover \$56.25, being one and one-half months' unpaid rent on a lease. From a judgment for defendant, plaintiff appeals.

The former opinion of the Appellate Court in the same case, 195 Ill. App. 413, held that the defendant was obligated on the lease for rent to April 30, 1915. He vacated May 1, 1914, and the plaintiff re-rented the premises one and one-half months later. The defendant claimed a surrender of the lease April 30, 1914.

CHARLES S. WILLISTON, for appellant.

BALCOMB, LANE & McGRATH, for appellee.

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

Abstract of the Decision.

1. LANDLORD AND TENANT, § 449*—*when evidence insufficient to show surrender of lease.* Evidence held to show that there was no surrender of a lease, in an action thereon for rent.

2. LANDLORD AND TENANT, § 326*—*when refusal to direct verdict in action for rent is erroneous.* Where a lessee of an apartment executed a lease from the same lessor of another apartment, and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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was notified he would be held answerable under the old lease until a new tenant was secured, *held*, upon evidence so showing in an action by the lessor for unpaid rent under the old lease, that the court erred in refusing to direct a verdict for the plaintiff for the amount of the rent for the period until a new tenant was secured.

George E. Ford, Plaintiff in Error, v. American Express Company and Illinois Central Railroad Company, Defendants in Error.

Gen. No. 22,581. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917. Rehearing denied February 5, 1917.

Statement of the Case.

Action of the fourth class in the Municipal Court of Chicago by George E. Ford, plaintiff, against the American Express Company and Illinois Central Railroad Company, defendants, to recover damages for alleged failure by the defendants to deliver promptly a carload of strawberries, shipped from Louisiana to Chicago. From a judgment for defendants, plaintiff brings error.

STEWART REED BROWN, for plaintiff in error.

WILLIAM A. PURCELL, for defendants in error.

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

Waldes v. Hanes, 203 Ill. App. 276.

Abstract of the Decision.

1. CARRIERS, § 4*—*when railroad is not common carrier.* A railroad company is not a common carrier of the traffic of an express company, but acts simply as its agent.

2. CARRIERS, § 82*—*what constitutes delivery to consignee by express company.* Where a carload of strawberries shipped by an express company as a common carrier was placed by the railroad company on its team tracks at destination which were used by the express company for its deliveries, and the consignee there opened the car, inspected the contents, and receipted and paid the charges for the shipment, held that there was a delivery to the consignee, notwithstanding when he went to unload the next day he found the car had been taken away by some one's mistake.

3. CARRIERS, § 96*—*when not liable for delay in delivery.* There can be no recovery against a railroad company for failure to perform a contract to deliver goods promptly where no goods are actually received by the company, but are received by an express company whose cars are carried by the railroad company.

Heinrich Waldes et al., trading as Waldes & Company,
Appellants, v. W. R. Hanes, Appellee.

Gen. No. 22,593. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. J. J. Cooke, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917.

Statement of the Case.

Action by Heinrich Waldes, Siegmund Waldes, Ignatz Puc and Edward Meszenger, copartners, trading as Waldes & Company, plaintiffs, against W. R. Hanes, defendant, to recover for goods sold, to which the defendant claimed a set-off under a warranty of fitness of the goods for a special purpose. From a judgment

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

for defendant for \$275, upon trial by a jury, plaintiffs appeal.

NORMAN K. ANDERSON, for appellants.

CARNAHAN, ELSDON & SLUSSER, for appellee.

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

Abstract of the Decision.

1. APPEAL AND ERROR, § 1526*—*when instructions are not reverstibly erroneous*. Instructions which were so confusing, misleading and prejudicial as to compel reversal in a close case will not do so where under the undisputed evidence the jury returned the only verdict they could properly return.

2. INSTRUCTIONS, § 135*—*when failure to give instruction cannot be complained of*. Failure to give an instruction, in an action for damages, as to measure of damages cannot be complained of on appeal where neither party requested such an instruction.

3. SALES, § 404*—*what is measure of damages for breach of warranty of fitness for special purpose*. In an action for damages for breach of warranty of fitness for a special purpose of goods purchased, held that proper elements of damage were the difference between their agreed price and the price the purchaser was obliged to pay for goods that answered the purpose, also that the use of the unfit goods made worthless other goods on which they were used and also payment of freight and duty on the unfit goods.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Elia v. Societa Mutuo Soccorso di Plane Crati, 203 Ill. App. 278.

Giuseppe Elia, Defendant in Error, v. Societa Mutuo Soccorso di Plane Crati, Plaintiff in Error.

Gen. No. 22,599.

1. **APPEAL AND ERROR, § 866***—*what are requisites of abstract.* An abstract is the pleading of the parties and must inform the court of review as to the character of the case and the issue involved.

2. **APPEAL AND ERROR, § 1752***—*when judgment will be affirmed.* In the absence of an abstract informing the court as to the character of the case and the issue involved, the judgment will be affirmed.

Error to the Municipal Court of Chicago; the Hon. SHERIDAN E. FRY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917.

Rocco DE STEFANO, for plaintiff in error.

No appearance for defendant in error.

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

We must affirm the judgment in this case for the reason that the plaintiff in error has furnished this court with no proper abstract of record. What purports to be an abstract commences as follows:

"1. Placita.

Present: Honorable Sheridan Fry, judge of the Municipal Court of Chicago.

"2. Premise.

"3. Plaintiff's statement of claim.

"5. Summons.

"6. Appearance of defendant.

"7. Order.

"8. Order.

"9. Affidavit of merits.

"10. Judgment for thirty-five (\$35) dollars."

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

As has been said many times, the abstract is the pleading of the parties and must inform the court of review as to what the case is about. The abstract before us utterly fails in this respect. See classic opinion by Judge Gary in *Bishop v. Loewus*, 63 Ill. App. 351. See also, *Deane v. Michigan Stove Co.*, 69 Ill. App. 106.

In the absence of an abstract informing the court as to the character of the case and the issue involved, the judgment will be affirmed.

Affirmed.

City of Chicago, Defendant in Error, v. Emma Simonetti, Plaintiff in Error.

Gen. No. 22,600. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917.

Statement of the Case.

Prosecution by the City of Chicago, plaintiff, against Emma Simonetti, defendant, for keeping and maintaining a disorderly house in violation of an ordinance of the City of Chicago. From a judgment upon a verdict of guilty and fine of one hundred dollars, defendant brings error.

WILLIAM L. MARTIN, for plaintiff in error.

SAMUEL A. ETTelson and HARRY B. MILLER, for defendant in error; DANIEL WEBSTER, of counsel.

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

City of Chicago v. Simonetti, 203 Ill. App. 279.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 27*—*how action of trial court in refusing change of venue should be preserved for review.* Under section 23 of the Municipal Court Act (J. & A. § 3335), in order to secure a review of the trial court's action in refusing a change of venue, the plaintiff in error should make a correct statement of such action, as required by the statute, and not present it by a bill of exceptions, for which the statute makes no provision in such matter.

2. VENUE, § 34*—*when error in refusing motion for change of is waived.* Participating in the trial of a case after refusal of a motion for a change of venue waives any error of the court in such refusal.

3. ATTORNEY AND CLIENT, § 11*—*when attorney may not take acknowledgment.* An affidavit for a change of venue sworn to before an attorney in the case should not be received or considered.

4. MUNICIPAL CORPORATIONS, § 867*—*when presumed that findings of trial court are correct.* In the absence from the record of a municipal ordinance upon which a prosecution is based, and of which the court cannot take judicial notice, the findings of the trial court will be presumed correct.

5. APPEAL AND ERROR, § 966*—*binding effect of record.* The Appellate Court is bound by the record as to the proceedings before the trial court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**City of Chicago, Defendant in Error, v. Gussie Boller,
Plaintiff in Error.**

Gen. No. 22,601. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917.

Statement of the Case.

Prosecution by the City of Chicago, plaintiff, against Gussie Boller, defendant, for keeping a place where liquor was sold in less quantities than one gallon without a license, in violation of an ordinance of the city. From a judgment upon a verdict of guilty and fine of fifty dollars, defendant brings error.

The defendant appeared by the same counsel who made substantially the same points of error as in the case of *City of Chicago v. Simonetti*, ante, p. 279.

WILLIAM L. MARTIN, for plaintiff in error.

SAMUEL A. ETTTELSON and HARRY B. MILLER, for defendant in error; DANIEL WEBSTER, of counsel.

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

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 27*—*how action of trial court in refusing change of venue should be preserved for review.* Under section 23 of the Municipal Court Act (J. & A. § 3335), in order to secure a review of the trial court's action in refusing a change of venue, the plaintiff in error should make a correct statement of such action, as required by the statute, and not present it by a bill of exceptions, for which the statute makes no provision in such matter.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Boller, 203 Ill. App. 282.

2. VENUE, § 34*—*when error in refusing motion for change of is waived.* Participating in the trial of a case after refusal of a motion for a change of venue waives any error of the court in such refusal.

3. ATTORNEY AND CLIENT, § 11*—*when attorney may not take acknowledgment.* An affidavit for a change of venue sworn to before an attorney in the case should not be received or considered.

4. MUNICIPAL CORPORATIONS, § 867*—*when presumed that findings of trial court are correct.* In the absence from the record of a municipal ordinance upon which the action is based, and of which the court cannot take judicial notice, the findings of the trial court will be presumed correct.

5. APPEAL AND ERROR, § 966*—*binding effect of record.* The Appellate Court is bound by the record as to the proceedings before the trial court.

**City of Chicago, Defendant in Error, v. Gussie Boller,
Plaintiff in Error.**

Gen. No. 22,602. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917.

Statement of the Case.

Prosecution by the City of Chicago, plaintiff, against Gussie Boller, defendant, for keeping and maintaining a house of ill fame for the practice of prostitution in violation of a city ordinance. From a judgment upon a verdict of guilty and fine of seventy-five dollars, defendant brings error.

WILLIAM L. MARTIN, for plaintiff in error.

SAMUEL A. ETTELSON and HARRY B. MILLER, for defendant in error; DANIEL WEBSTER, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 25*—*when application for extension of time for filing correct stenographic report is too late.* An application for an extension of time for filing a "correct stenographic report" under section 23 of the Municipal Court Act (J. & A. ¶ 3335) made more than thirty days after rendition of the judgment is too late, and the court had no jurisdiction after said thirty days to allow further time for filing such report.

2. MUNICIPAL COURT OF CHICAGO, § 26*—*when question of sufficiency of evidence will not be considered.* Where a stenographic report on writ of error in the Appellate Court under section 23 of the Municipal Court Act (J. & A. ¶ 3335), is stricken from the record because not filed in time, no assignment of error based on the sufficiency of the evidence will be considered.

3. MUNICIPAL COURT OF CHICAGO, § 31*—*when judgment will be affirmed.* Where a stenographic report is stricken from the record and no errors arising from the statutory record are presented, the judgment should be affirmed.

John and William Hallissey, trading as Hallissey Brothers, Appellees, v. Rothschild & Company, Appellant.

Gen. No. 22,606. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917.

Statement of the Case.

Action by John and William Hallissey, trading as Hallissey Brothers, plaintiffs, against Rothschild & Company, defendant, to recover damages to plaintiffs'

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hallisey et al. v. Rothschild & Co., 203 Ill. App. 283.

horse occasioned by the negligent operation of defendant's automobile. From a judgment for plaintiffs for \$225, defendant appeals.

JOHN A. BLOOMINGSTON, for appellant.

RYAN, CONDON & LIVINGSTON, for appellees; DONALD A. CALLAHAN, of counsel.

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

Abstract of the Decision.

1. APPEAL AND ERROR, § 1512*—*when improper remarks by trial court are harmless error.* Where the verdict of the jury was the only one under the evidence they could properly have reached, the judgment should not be reversed merely because of improper remarks by the trial judge in refusing a request for a continuance of the case.

2. AUTOMOBILES AND GARAGES, § 3*—*when question whether collision of automobile with horse is due to sole negligence of driver of automobile is for jury.* Where plaintiffs' horse while turning into a cross street, after its driver had looked behind and seen defendant's automobile one-fourth of a block away and going at eighteen or twenty miles an hour, was struck by the automobile which had attempted to pass on the side towards which the horse was turning, *held* that it was a question of fact for the jury whether the accident was caused by defendant's sole negligence.

3. DAMAGES, § 190*—*when verdict for injury to horse is not excessive.* Where the evidence showed plaintiffs' horse was worth \$250 before it was injured by defendant's automobile, and thereafter was lame, unfit for any but farm work, and worth about \$50, and that its board following the injury was \$46, *held* that a verdict for \$225 was not excessive.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mrs. Joseph H. Lawler, Plaintiff in Error, v. Robert McNamara, Defendant in Error.

Gen. No. 22,612.

LANDLORD AND TENANT, § 264*—*what constitutes constructive eviction.* Failure of a lessor to furnish heat in an apartment in accordance with the terms of the lease amounts to a constructive eviction, which justifies the lessee in abandoning the premises.

Error to the Municipal Court of Chicago; the Hon. JOSEPH SABATH, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917.

JOSEPH H. LAWLER, for plaintiff in error.

WILLIAM F. PROPPER, for defendant in error.

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

This is a suit in which the plaintiff is attempting to recover rent of an apartment leased by her under a written instrument to the defendant. The defense is failure of the lessor to comply with her contract to heat the apartment. Upon trial by a jury, verdict was returned favorable to the defendant. Upon this, judgment was entered which plaintiff seeks to have reversed.

The evidence shows that on September 4, 1915, the parties entered into a written lease whereby plaintiff leased to defendant a certain apartment of five rooms in an apartment building in Chicago, to be occupied by the lessee as his residence for a term fixed at two years from October 1, 1915, at a rental of forty dollars per month payable in advance on the first day of each month. The lease required the lessor among other things to furnish heat "at all reasonable hours during

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lawler v. McNamara, 203 Ill. App. 285.

each day and evening, from October 1 to May 1 of each winter term." The defendant moved into the premises and occupied the same from about the 1st day of October, 1915, until late in January, 1916, paying the rent for this period.

From the evidence the jury could properly find that during the months of December, 1915, and January, 1916, the lessor failed to furnish sufficient heat to keep the apartment habitable; often a temperature of between 40 and 50 degrees was maintained. Numerous complaints were made to the lessor's agent but the conditions were not remedied. As a consequence the tenant vacated the apartment late in January, 1916. Plaintiff brought this suit to recover rent for the months of February and March.

It is now the well-settled law that failure of a landlord to furnish heat in an apartment in accordance with the terms of the lease amounts to a constructive eviction, which justifies the tenant in abandoning the premises. Among the many cases so holding are *Harmony Co. v. Rauch*, 64 Ill. App. 386; *Filkins v. Steele*, 124 Iowa 742; *Minneapolis Co-operative Co. v. Williamson*, 51 Minn. 53; *Tallman v. Murphy*, 120 N. Y. 345. We approve and adopt the expression of the court in the opinion in *Barnard Realty Co. v. Bonwit*, 155 N. Y. App. Div. 182, 139 N. Y. Supp. 1050:

"Very large numbers of people live in tenement houses, apartment houses and apartment hotels * * *. Such tenants have, and can have, control only of the inside of their own limited demised premises. Conditions unknown to the ancient common law are thus created. This requires elasticity in the application of the principles thereof. An intolerable condition, which the tenant neither causes nor can remedy, seems to me warrants the application of the doctrine of constructive eviction."

Errors in rulings on evidence and instructions to the jury, if any, are not of sufficient importance to re-

Giesecke v. Cullerton et al., 203 Ill. App. 287.

quire a reversal. The uncontradicted evidence in the record is sufficient to support the verdict and judgment. The judgment is affirmed.

Affirmed.

William H. Giesecke, Appellee, v. Edward F. Cullerton
and The Bankers Surety Company, Appellants.

Gen. No. 22,627.

DAMAGES, § 83*—*when provision in bond is for liquidated damages and not penalty.* Where a lessee covenanted in the lease, in addition to his covenant to pay rent, that he would expend a certain sum within a certain time in remodeling and improving the leased premises, and executed a bond stated to be "in the penal sum" of the amount named in the lease to be so expended for the performance of such covenant, *held*, in an action on the bond, that the words "penal sum" used therein had no determinative effect, and the amount named in the bond was liquidated damages and not a penalty, distinguishing the case of *Westfall v. Albert*, 212 Ill. 68.

Appeal from the Superior Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917.

GUSTAV E. BEERLY, for appellants.

CASTLE, WILLIAMS, LONG & CASTLE, for appellee.

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

Defendant Cullerton, as lessee, entered into a lease for ninety-nine years, with plaintiff as lessor, wherein the lessee agreed to expend at least \$5,000 in remodeling and improving the building on the leased premises. To secure the performance of this covenant a bond for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Giesecke v. Cullerton et al., 203 Ill. App. 287.

\$5,000 was given, executed by Cullerton as principal and the defendant Bankers Surety Company as surety. Plaintiff brought suit on the bond alleging a breach of this covenant, and upon trial by the court had judgment for \$5,000, the full amount of the bond. Defendants, appealing, seek a reversal.

The covenant of Cullerton referred to is as follows :

"Fourth. As a further consideration for the leasing and demising aforesaid, said lessee further covenants and agrees to remodel and improve the said building now upon the said demised premises within six months from and after the date of this lease, and to expend in good faith for materials used and labor furnished in and about remodeling and improving said building the sum of at least five thousand (\$5,000) dollars.

"And the lessee further agrees to furnish the said lessor upon the execution of this lease a bond in the sum of five thousand (\$5,000) dollars, issued by a surety company satisfactory to said lessor, said bond to be conditioned upon the faithful performance by said lessee, of his said covenant last above made."

The bond recites that the defendants are bound "in the penal sum of five thousand (\$5,000) dollars," and contains the following:

"Whereas, it was also stipulated and agreed by the said Edward F. Cullerton, as lessee, in the said lease, that he, the said Edward F. Cullerton, as such lessee, should and he would within the period of six (6) months from the said 1st day of July, A. D. 1910, make or cause to be made upon the hereinbefore described premises, improvements to the value of five thousand (\$5,000) dollars;

"Now, if the said Edward F. Cullerton, as lessee, shall within the period of six months beginning the first day of July, A. D. 1910, and ending on the 2nd day of December, A. D. 1910, go ahead in keeping with the terms of the said lease and make or cause to be made upon the premises hereinbefore described improvements to the value of five thousand (\$5,000) dol-

lars, then this obligation to, be void; but otherwise it shall remain in full force and effect."

The evidence shows that Cullerton went into possession of the premises, paid the first quarterly rent, and did some preparatory work towards remodeling the building, but at the end of six months abandoned the premises, leaving them very much dismantled. The lease was afterwards forfeited for failure of the lessee to pay rent.

That there was a breach by defendant is not seriously in dispute, and upon the evidence the trial court was justified in so concluding, as well as that there was an ensuing liability of the defendants under the bond.

Shall the amount named in the bond be held to be a penalty only or liquidated damages? The trial court held it to be liquidated damages, and we are in accord with this decision. The words of the bond designating the obligation as a "penal sum" have no absolutely determinative effect. The rule is correctly stated in Sutherland on Damages (4th Ed.), vol. 1, page 864:

"It is apparent from this consideration of the cases that in determining whether the sum named in a contract is to be taken as a penalty or liquidated damages courts are influenced largely by the reasonableness of the transaction, and are not restrained by the form of the agreement, nor by the terms used by the parties, nor even by their manifest intent. Where the sum named has been expressly designated as stipulated damages it has been held to be a penalty; and, conversely, where the sum has been denominated a penalty, it has been declared to be stipulated damages."

The same author also correctly says, after considering a large number of cases, that "the decision of this question is often intrinsically difficult, for judicial opinions, in the numerous cases on the subject, are very inharmonious; they furnish no universal test or guide"; and quotes with approval from the opinion *Jaquith v. Hudson*, 5 Mich. 123, as follows: "While

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no one can fail to discover a very great amount of apparent conflict, still it will be found, on examination, that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case." Both of these statements are in harmony with the well-considered and persuasive brief of counsel for the defendants. As good a statement as any of the general principle appears in the decision in *Sun Prtg. & Pub. Ass'n v. Moore*, 183 U. S. 642, where the court said:

"The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not, bona fide, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

The lease before us provides as a consideration of the leasing to defendant, not only the payment by him of a stipulated sum of money as rent, but the expenditure upon the premises of the sum of \$5,000. The lessor was entitled to this added value to his premises as part of the consideration for the leasing, and we can see no reason why the parties might not agree that the amount of damages in the event of a breach should be the full amount of \$5,000. Judgments for the entire amount of rent reserved in leases have been sustained under a covenant that this should be considered as the damages upon breach of the lessee to pay any instalment of rent. *Central Investment Co. v. Melick*,

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267 Ill. 564; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634. By analogous reasoning this judgment could properly be sustained.

This view of the matter would render ineffectual any argument based upon an alleged part performance by the lessee, although in the instant case the court could properly be of the opinion that the expenditure in dismantling the premises should not properly be considered as part performance for the reason that this left the premises in a worse condition than they were before.

We are not persuaded of the unsoundness of the reasoning of the late Mr. Justice Adams which appears in his opinion in *McCullough v. Moore*, 111 Ill. App. 545, in accord with which this judgment could be affirmed on the theory that the undertaking to remodel and improve the premises was for the purpose of furnishing the lessor with security for the rent and the other obligations of the lessee. The failure of this security would reasonably result in damages uncertain and difficult of determination. This is especially apparent in the case before us, where the premises were abandoned by the lessee and left in a chaotic condition and the lease forfeited for failure of the rent. We do not understand *Westfall v. Albert*, 212 Ill. 68, to be in opposition. In this latter case a controlling factor, as stated by the court, was that the damages were capable of easy ascertainment.

In our opinion the trial court was right in treating the sum mentioned in the bond as liquidated damages, and the judgment is affirmed.

Affirmed.

The People v. Shapiro et al., 203 Ill. App. 292.

The People of the State of Illinois, Defendant in Error, v. Abe Shapiro and Jake La Bow, Plaintiffs in Error.

Gen. No. 22,631. (Not to be reported in full.)

Error to the Criminal Court of Cook county; the Hon. CHARLES M. THOMPSON, Judge, presiding. Heard in this court at the October term, 1916. Writ of error dismissed. Opinion filed January 22, 1917.

Statement of the Case.

Prosecution by the People of the State of Illinois, plaintiff, against Abe Shapiro and Jake La Bow, defendants, charged with conspiracy. After a trial and verdict of guilty, defendants bring error.

McEWEN, WEISSENBACH & SHRIMSKI and MICHAEL E. MAHER, for plaintiffs in error.

MACLAY HOYNE, for defendant in error; ALEXANDER E. ARKIN, of counsel.

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

Abstract of the Decision.

1. APPEAL AND ERROR, § 868*—*how abstract will be construed.* An abstract is the pleading of the parties in the Appellate Court, and must be construed against the appellant.

2. APPEAL AND ERROR, § 892*—*what is effect of failure to file proper abstract.* Where the abstract fails to show any judgment was entered by the trial court, there is nothing to review and a writ of error must be dismissed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Anna Pico, by Nicalo Accomondo, Plaintiff in Error, v.
Chicago Railways Company, Defendant in Error.**

Gen. No. 22,640. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917. Rehearing denied February 5, 1917.

Statement of the Case.

Action by Anna Pico, a minor, by Nicalo Accomondo, her next friend, plaintiff, against Chicago Railways Company, defendant, to recover damages for personal injuries. From a judgment and verdict presumably for the defendant, plaintiff brings error.

RANKIN, HOWARD & DONNELLY, for plaintiff in error.

JOSEPH D. RYAN and FRANK L. KRIETE, for defendant in error; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

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

Abstract of the Decision.

1. **APPEAL AND ERROR, § 892***—*what is effect of failure to file proper abstract.* An abstract is the pleading of the parties, and where it fails to show the nature of the verdict or what the judgment was, affirmance is warranted, but *held* that from the nature of the case consideration would be given to the merits involved.

2. **STREET RAILROADS, § 69***—*when motorman running over child is not guilty of negligence.* Where a child five years old who was standing on a street curb at a crossing suddenly ran from the curb on the approach of a street car when the car was a short distance away, and stumbled and fell alongside the car with one

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Beamesderfer v. Cermak, 203 Ill. App. 294.

hand on a rail in front of the car, and the motorman, as soon as he saw the child leave the curb, struck his gong and applied the brake but was unable to stop the car, and the child's hand was injured, *held* that the motorman was not chargeable with negligence.

3. APPEAL AND ERROR, § 1303*—*when presumed that evidence disclosed by photograph not incorporated in bill of exceptions was sufficient to satisfy jury.* Where a photograph was introduced in evidence and considered by the jury but was not incorporated in the bill of exceptions, the evidence is assumed to have been sufficient to satisfy the jury as to the matters shown thereby.

4. TRIAL, § 54*—*when denial of motion to withdraw juror and continue case because of alleged improper conduct of juror is not error.* Where a juror was accused of improper conduct but denied same under oath unequivocally and the court, after considering affidavits by the parties concerned, denied a motion to withdraw a juror and continue the case, *held* that there was no error in such denial.

Mary R. Beamesderfer, Defendant in Error, v. Anton J. Cermak, Bailiff, Plaintiff in Error.

Gen. No. 22,648. (Not to be reported in full.)

Error to the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded with directions. Opinion filed January 22, 1917.

Statement of the Case.

Action by Mary R. Beamesderfer, plaintiff, against Anton J. Cermak, bailiff of the Municipal Court of Chicago, defendant, to replevy certain personal property. From a judgment for the plaintiff on default, defendant brings error.

The replevin writ was made returnable to the April term beginning April 12, 1915. The defendant entered

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

appearance March 30, 1915. Plaintiff's declaration was filed May 13, 1915. The May term began May 10, 1915. Defendant did not plead. The case was called for trial February 28, 1916, and, defendant not appearing, he was defaulted and judgment entered.

GURDON WILLIAMS and M. J. O'DONOGHUE, for plaintiff in error.

J. MARION MILLER, for defendant in error.

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

Abstract of the Decision.

1. DISMISSAL, NONSUIT AND DISCONTINUANCE, § 37*—*when nonsuit proper*. Under section 32 of the Practice Act (J. & A. ¶ 8569), where a declaration is not filed ten days before the term of court next after the term to which a summons is made returnable, the defendant is entitled to a judgment as in case of nonsuit.

2. TRIAL, § 7*—*when case may be called for trial*. It is error to call a case for trial before it is at issue.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error, v. James Y. Thompson, Plaintiff in Error.

Gen. No. 22,610. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed January 22, 1917.

Statement of the Case.

Information by the People of the State of Illinois, plaintiff, against James Y. Thompson, defendant, charging that he did unlawfully, wrongfully and unjustly, for his own gain and to prevent the owner again possessing his property, buy, receive and aid in concealing fourteen bags of Lehigh cement to the value of \$7.13, the property of Gustaf A. Johnson, knowing that the cement had been stolen. From a finding by the trial judge, a jury being waived, that defendant was guilty and sentence of a fine of \$300 and \$6 costs, defendant to stand committed until fine and costs were paid, defendant brings error.

ROBERT F. MUNSELL, for plaintiff in error; L. J. HAIGLER, of counsel.

MACLAY HOYNE, for defendant in error; IRWIN N. WALKER, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. INDICTMENT AND INFORMATION, § 62*—*when amendment of information is proper*. An information stands on different grounds, as to amendment, from an indictment, and may be amended to any

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Meisel v. Kalms, 203 Ill. App. 297.

extent which the judge admits to be consistent with the ordinary conduct of judicial business, with the public interest and with private rights.

2. INDICTMENT AND INFORMATION, § 62*—*when allowance of amendment to information is proper.* Where an information was amended by striking out the name of one party as defendant, whose name had been inserted by a clerical error on the part of the person who transcribed the information, and inserting the name of another and the proper party, *held* that there was no error in allowing such amendment.

3. RECEIVING STOLEN GOODS, § 11*—*when jury must make finding as to value of property.* In a prosecution by information, charging the defendant with unlawfully concealing or aiding to conceal the property of another of a certain value, knowing same to be stolen property, it is indispensable to a judgment that there be a finding as to the value of the property, as same is required under the statute in fixing the punishment.

**Edward Meisel, Defendant in Error, v. William Kalms,
Plaintiff in Error.**

Gen. No. 22,617. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917.

Statement of the Case.

Action by Edward Meisel, plaintiff, against William Kalms, defendant, based upon an architect's certificate for \$350 for balance due under a building contract between plaintiff, contractor and defendant, owner of the building upon which the work under the contract was done. From a judgment, upon trial before the court, for the plaintiff for the amount of the certificate, defendant brings error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Meyers, 203 Ill. App. 298.

SAMUELS & SAMUELS, for plaintiff in error.

EMIL A. MEYER, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

BUILDING AND CONSTRUCTION CONTRACTS, § 40*—*when owner may not retain money under contract to pay liens.* Where a building contract provided that the owner might retain out of any money due the contractor an amount sufficient to indemnify him against any lien or claim chargeable to the contractor for which, if established, the owner might be liable, and there was a subcontractor's lien filed but no suit was brought thereon, *held* in an action by the contractor against the owner for the balance due under the contract brought more than four months after the time final payment was due the subcontractor, and within which period a petition to enforce such lien should have been filed, that the subcontractor's lien filed constituted no defense to such action.

The People of the State of Illinois, Defendant in Error, v. Arthur Meyers, Plaintiff in Error.

Gen. No. 22,625. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in this court at the October term, 1916. *Affirmed.* Opinion filed January 22, 1917.

Statement of the Case.

Information by the People of the State of Illinois, plaintiff, against Arthur Meyers, defendant, for violation by defendant of Rev. St. ch. 38, sec. 57a1 [Cal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ill. St. Supp. 1916, ¶ 3591(1)], providing for a penalty for being an inmate of a house of prostitution. From a judgment of conviction, upon trial by the court, and sentence of six months, defendant brings error.

ARTHUR H. SIMMS, for plaintiff in error.

MACLAY HOYNE, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. DISORDERLY HOUSE, § 6*—*when evidence sufficient to sustain conviction for being inmate of house of prostitution.* Evidence held sufficient to sustain a finding, beyond all reasonable doubt, of defendant's guilt as charged in an information, under Rev. St. ch. 38, sec. 57a1 [Cal. Ill. St. Supp. 1916, ¶ 3591 (1)], providing for a penalty for being an inmate of a house of prostitution.

2. CRIMINAL LAW, § 150*—*when particeps criminis is competent.* A *particeps criminis* is a competent witness under an information for violation of Rev. St. ch. 38, sec. 57a1 [Cal. Ill. St. Supp. 1916, ¶ 3591(1)], providing for a penalty for being an inmate of a house of prostitution.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Meyer et al. v. I. Lurya Lumber Co., 203 Ill. App. 300.

**Jacob Meyer, Complainant, and Angelo Paoella et al.,
Defendants, Defendants in Error, v. I. Lurya
Lumber Company et al., Interveners, Plaintiffs in
Error.**

Gen. No. 22,629. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. **FREDERICK A. SMITH**, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917.

Statement of the Case.

Bill by Jacob Meyer, complainant, against Angelo Paoella and others, defendants, I. Lurya Lumber Company and others, interveners, involving questions affecting mechanics' liens. From the denial of a motion by the interveners to set aside an order dismissing the suit at complainant's cost for want of prosecution, the interveners bring error.

The cause was referred July 1, 1913, to a master in chancery, who was later appointed a special commissioner. September 24, 1915, the court ordered the special commissioner to file his report by October 6, 1915, and set the cause for hearing on that date. October 13, 1915, the suit was dismissed, and on February 14, 1916, the interveners filed motion to set aside the order of dismissal.

SAMUEL W. NEWMAN, for plaintiffs in error.

JOHN S. REYNOLDS and **I. B. PERLMAN**, for defendants in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1268*—*when presumed that proceedings in suit in equity were regular.* No certificate of evidence being filed, *held* that the regularity of all proceedings, the giving of proper notices, and that the parties were in court when an order was entered requiring a special commissioner to file his report and when a cause was set for hearing, will be presumed in a suit in equity.

2. EQUITY, § 341*—*when chancery suit may be dismissed for want of prosecution while still before special commissioner.* Where, in a suit in chancery, an order was entered requiring a special commissioner to file his report by a certain date, *held* that it devolved upon the parties to close their proof within the time limited by the order, or so much earlier as to enable the commissioner to comply with the order to file his report, and upon the parties' failure so to close their proof and of the commissioner to file his report, that the cause might properly be dismissed for want of prosecution.

3. EQUITY, § 362*—*when court may not vacate order of dismissal of suit.* A court has no jurisdiction to entertain a motion to vacate an order of dismissal of a suit after the lapse of the term at which such order was entered.

4. APPEAL AND ERROR, § 274*—*what is a final order.* An order dismissing a bill for want of prosecution is a final order.

5. EQUITY, § 341*—*when chancery suit properly dismissed for want of prosecution.* When proper notices are given and the parties are in court at the time an order is entered upon a special commissioner in a chancery suit to file his report, and the cause is set for hearing, the court, if the parties do not appear at the time the case is called for trial, may dismiss it for want of prosecution.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mundstock v. Mundstock, 203 Ill. App. 302.

**Emelie Mundstock, Appellee, v. Herman Mundstock,
Appellant.**

Gen. No. 22,647. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed January 22, 1917.

Statement of the Case.

Bill for divorce by Emelie Mundstock, complainant, against Herman Mundstock, defendant, charging adultery. From a decree in favor of complainant and awarding alimony, defendant appeals.

There was introduced in evidence a postnuptial contract between complainant and defendant which recited that differences had arisen between them in relation to the ownership of certain property, one piece being held in joint tenancy and the other in the name of complainant alone, and, both being desirous of settling such differences, the pieces of property were conveyed to complainant, she paying defendant \$2,500 in money and assuming an incumbrance thereon of \$1,400, evidenced by the notes of both parties, which complainant agreed to pay and to hold defendant indemnified from any liability therefor. As a further consideration of the contract, conveyance, the payment of the \$2,500, and the assumption of the \$1,400 of indebtedness, each released all claim in or to the real or personal property of the other then owned or afterwards to be acquired by either, and also agreed that the survivor waived and released all claims of dower, homestead rights, widow's award, or other rights or interest in and to the property of which the one first dying should be seized at the time of his or her death.

CHARLES WERNO, for appellant.

RATHJE & WESEMANN, for appellee; W. ARNOLD AMBERG, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. DIVORCE, § 14*—*when evidence sufficient to show adultery. Evidence held sufficient to establish defendant's adultery, in an action for divorce on that ground.*

2. DIVORCE, § 105*—*when postnuptial agreement is not bar to allowance of alimony in suit for divorce. A postnuptial contract between husband and wife made when in settlement of differences between them as to the ownership of property owned by them jointly and for the purpose of settling such differences, held no bar to the wife's right to alimony under a suit for divorce brought by her subsequent to such contract, and not anticipated by or in the contemplation of the parties at the time they entered into the contract.*

3. DIVORCE—*when duty rests on chancellor to award alimony and solicitor's fees. It is the duty of the chancellor, under Rev. St. ch. 40, sec. 18 (J. & A. ¶ 4233), on granting a wife a decree of divorce for the fault of her husband, to award alimony as well as solicitor's fees in favor of complainant.*

4. DIVORCE, § 102*—*when amount of alimony and solicitor's fees is reasonable. The amount of alimony and solicitor's fees awarded by the decree, held to be reasonable and just when measured by the financial ability of defendant to pay and the necessity of complainant for financial aid in her support, and conformable to well-settled practice.*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**A. L. St. George, Appellant, v. James A. Printy,
Appellee.**

Gen. No. 22,530. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed February 5, 1917.

Statement of the Case.

Action by A. L. St. George, plaintiff, against James A. Printy, defendant, plaintiff claiming false and fraudulent representations in the sale by defendant to her of a violin. From a judgment for defendant, on trial by the court, plaintiff appeals.

M. J. ST. GEORGE, for appellant.

CHARLES DANIELS and MICHAEL P. MORRISSEY, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 41*—*when husband is competent witness in action by wife.* The husband of a party to an action is a competent witness for the wife in such action where the separate property of the wife is involved or where he acted as her agent.

2. HUSBAND AND WIFE, § 135*—*when evidence sufficient to show agency of husband for wife.* In an action by a wife against a third person to recover damages for the fraudulent sale of a violin to plaintiff, evidence held sufficient to sustain a finding that the husband acted as agent for the wife in making the purchase although she was present at the time of the sale and took some part in the conversation relating to such sale.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**L. S. Dickey, Appellee, v. Mary Wells et al., Trustees,
Appellants.**

Gen. No. 22,537. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 5, 1917.

Statement of the Case.

Action by L. S. Dickey, plaintiff, against Mary Wells, Thomas E. Wells, John E. Wells and Preston A. Wells, trustees under the will of Thomas Edmund Wells, deceased, defendants, for damages for injuries to plaintiff's property in his apartment in defendants' steam-heated apartment building, caused by steam escaping from an unprotected pipe in the dining room. From a judgment for plaintiff for the sum of \$110.90, defendants appeal.

SONNENSCHN, BERKSON & FISHELL, for appellants.

WINSTON, PAYNE, STRAWN & SHAW, for appellee;
WALTER H. JACOBS and GEORGE A. KELLY, of counsel.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. *APPEAL AND ERROR, § 1752*—when judgment affirmed for insufficiency of abstract.* An abstract which is a mere index to the record and does not comply with Rule 18 of the Appellate Court warrants affirmance of the judgment.

2. *LANDLORD AND TENANT—when landlord liable for damages due to escape of steam from pipe left in unprotected condition.* Where the owners of a steam-heated apartment building failed to place a cap upon the open end of a radiator pipe in an apartment after

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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removing the radiator therefrom in the spring, although the attention of the owners' foreman and of the janitor of the building was called to the matter, and in consequence thereof when steam was turned on in the building in the fall, seven months later, during the absence of the lessee of the apartment, the lessee's property was damaged by steam which escaped from the unprotected pipe, *held* that the unprotected condition of the pipe was the result of a positive wrongful act on the part of the owners' employees, the provisions of the lease exempting the owners from liability for any damage occasioned by steam and water pipes, "except from the positive wrongful act of the lessor herein or his employees."

3. LANDLORD AND TENANT, § 197*—*when evidence sufficient to sustain verdict in action for damages for leaving steam pipe in unprotected condition.* Evidence *held* sufficient to warrant the verdict of the jury in an action by a lessee for damages for leaving the end of a radiator pipe in a steam-heated apartment building unprotected.

**Crane Company, Appellant, v. Charles E. Ummach,
Appellee.**

Gen. No. 22,544.

1. FRAUD, § 24*—*when verdict for defendant improperly directed in action for damages against officer of corporation for making false statements as to its financial standing for purpose of obtaining credit.* In an action for fraud and deceit, where the plaintiff showed that the defendant had, for the purpose of securing a continuing line of credit for a corporation of which he was president, made a statement as to its resources and liabilities, upon which credit was given to the corporation and later to a corporation of another name in which the defendant was a stockholder but not an officer, and plaintiff offered to prove that said statement was materially false and misleading and that the two corporations, though differing in name, were one in corporate entity, *held* that the evidence properly offered or submitted tended to prove that material false representations were made by defendant upon which plaintiff relied in extending credit to the last-mentioned corporation, and that the court erred in directing a verdict for defendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Crane Company v. Ummach, 203 Ill. App. 306.

2. FRAUD, § 127*—*when negligence of seller in delivering goods in reliance upon financial statement is question for jury.* Where goods were delivered to a buyer corporation two and one-half years after, and in reliance upon, a certain statement made by its president as to its financial condition with request for a continuing line of credit, which statement contained false and fraudulent representations, *held* that the seller was not negligent as a matter of law in so delivering the goods.

3. FRAUD, § 24*—*what is effect of change of name of corporation on liability of officer for making false financial statements for purpose of obtaining credit.* Where the president of a corporation made false and fraudulent representations as to its financial condition for the purpose of securing a continuing line of credit for the corporation, *held* that the fact that the name of the corporation was thereafter changed while its corporate entity was otherwise retained did not change the liability of such officer because of such representations for credit given such corporation in reliance thereon after such change of name.

4. FRAUD, § 92*—*when exclusion of evidence in action for making false statement as to financial condition of corporation for purpose of obtaining credit is erroneous.* In an action for fraud and deceit in making false and fraudulent representations as to financial condition of a corporation for the purpose of securing continuing credit for the corporation, *held* that it was error for the court to refuse to admit evidence that such corporation and one of another name to which credit was given on such representations were one and the same corporation under different names.

Appeal from the County Court of Cook county; the Hon. ARTHUR J. GRAY, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed February 5, 1917.

ALDEN, LATHAM & YOUNG, for appellant; T. A. SHEEHAN, of counsel.

CULVER, ANDREWS, KING & COOK, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

This is an action on the case for fraud and deceit, begun by plaintiff against the defendant in the County Court of Cook county. The declaration, consisting of two counts, avers that on January 10, 1912, the defend-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ant made an application to the plaintiff for a line of credit, and that to induce such credit and to procure the goods and merchandise of the plaintiff the defendant made certain false representations, upon which the plaintiff relied and upon which it delivered its goods to the defendant. Defendant filed a plea of the general issue. Trial was had in the County Court, and at the close of the plaintiff's case the court directed a verdict in favor of the defendant for costs. Plaintiff brings the case here for review.

The evidence submitted on behalf of plaintiff tends to prove that the W. S. Edwards Manufacturing Company was organized in the State of Illinois; that some time during the year 1911 the defendant became interested in that company and was made president thereof; that on December 21, 1911, the name of this corporation was changed to that of Ummach Manufacturing Company; that in the latter part of the year 1911 and prior to such change in the name of the corporation, Ummach called upon Mr. Stiles of the plaintiff company and requested a line of credit with plaintiff. Stiles requested Ummach to mail to him a statement of the financial condition of his company. Ummach complied with this request of Stiles and mailed him a letter a copy of which follows:

"Chicago, January 10, 1912.

"Mr. Stiles,
c/o Crane Company,
Dear Sir:—

As per our recent conversation, we herewith submit a statement of our financial standing at the close of business December 31, 1911:

RESOURCES.

Accounts receivable	\$37,826.72
Cash in bank and on hand.....	1,416.20
Merchandise, inventory, Dec.	
31, 1911	76,351.85
Machinery, tools, etc.....	25,500.00
(This item taken at 50 per	
cent. less than formerly) —————	\$141,094.77

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LIABILITIES.

Capital stock	\$50,000.00	
Accounts payable	32,783.16	
Surplus	58,311.61	\$141,094.77

Respectfully,

CHARLES E. UMMACH."

On receipt of this letter Stiles gave instructions to the proper officers of his company to extend credit to the Ummach Manufacturing Company in an amount not to exceed \$1,000 or \$1,200. Thereafter the plaintiff continued to sell goods to the Ummach Manufacturing Company and its successor, the W. S. Edwards Manufacturing Company, until the time they went into bankruptcy in the year 1914, and within a few weeks of the delivery to the Edwards Company of the last bill of goods sold to it by the plaintiff.

It also appears from the evidence that the name of Ummach Manufacturing Company was in turn changed back to that of W. S. Edwards Manufacturing Company on May 22, 1913; that a short time before this second change of name took place, Ummach had severed his official connection with the Ummach Manufacturing Company, although he retained a stock interest therein; that Stiles had a conversation with Ummach after this last change in name, in which conversation nothing was said one way or another about the financial condition of either the Ummach Company or the Edwards Company.

During the months of May, June and July, 1914, the plaintiff delivered goods to the W. S. Edwards Manufacturing Company of the cash value of \$272.80. A short time thereafter the Edwards Company went into bankruptcy, and the plaintiff insists that there is now due it, after allowing certain credits, the sum of \$129.63. It is sought to recover this amount from the defendant.

We are of the opinion that the court erred in directing the jury to return a verdict for the defendant,

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as we believe that the evidence properly offered or submitted by the plaintiff fairly tends to prove that material false representations were made by Ummach upon which the plaintiff relied and because of which it extended credit to the corporation in which Ummach was interested as a stockholder or officer. The plaintiff offered to prove that the statements contained in the letter of January 10, 1912, were materially false and misleading, and that the then liabilities of the Ummach Manufacturing Company were in fact \$119,411.68 instead of \$32,783.16, as represented in the letter of Ummach to the plaintiff; that the corporation's name had been changed twice but that there had been no change in the corporate entity itself.

The trial judge seemed to be under the impression that the changes in the name of this corporation indicated that more than one corporation were involved in the transactions here referred to. Whether this be so or not, counsel for plaintiff offered to prove that as a matter of fact there was but one person or one corporation involved in the representations out of which this suit grew. We think counsel should have been permitted to make this proof. If the changes referred to here were in name only, if the same corporation had continued to do business under different names, then it cannot be held that the representations which were made by the defendant were made on behalf of one company and the credit given to another.

We are also of the opinion that the court erred in holding that the plaintiff was guilty of negligence as a matter of law. It is true that the goods for the value of which suit was brought were delivered two and one-half years after the representations were made, but these representations were made in pursuance of a request for a continuing line of credit. That the representations made by defendant were grossly fraudulent is not denied upon this record, and it cannot be said that the plaintiff was negligent as a matter of law in

relying upon them, coming as they did from one who was authorized to make them on behalf of his corporation.

There is no merit at all in the contention that a mere change in the name of a corporation could permit it to escape liability for its acts. Ummach was the agent of and had the right to speak for the corporation, whatever name or names it may have used in the transaction of its business, and under the law he is personally liable for such fraudulent conduct, if any, which may have resulted in damage and injury to the plaintiff. Whether the changes in the corporate entity were merely nominal, whether the representations were in fact made, and, if so, whether the plaintiff relied upon them, were questions of fact which should have been submitted to the jury.

In *Lowdon v. Fisk* (Tex. Civ. App.), 27 S. W. Rep. 180, the court said:

"It is well understood that such representations are made as a basis for continuing credit, and it is not necessary that they should be made exactly at the time of the sale. Such a requirement would be unreasonable. The length of time that has elapsed since the making of the statement, within reasonable limits, is for the consideration of the court and jury in passing on the question as to the extent that the sale was actually influenced thereby." See also, *Brown v. Lobdell, Farwell & Co.*, 51 Ill. App. 574.

For the error in directing a verdict in this case the judgment of the County Court will be reversed and the cause remanded.

Reversed and remanded.

Trembacz v. Dvorakova, 203 Ill. App. 312.

**In the Matter of Petition of Frantiska Dvorakova, arrested at the suit of Mary Trembacz.
On appeal of Mary Trembacz, Appellant, v. Frantiska Dvorakova, Appellee.**

Gen. No. 22,553. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. JOHN H. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 5, 1917. Rehearing denied February 19, 1917.

Statement of the Case.

Petition by Frantiska Dvorakova, petitioner, against Mary Trembacz, respondent, for release of petitioner from arrest under the Insolvent Debtors' Act (J. & A. ¶ 6198 *et seq.*). From a judgment for the petitioner, respondent appeals.

FRANK PESKA, for appellant.

No appearance for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

EXECUTION, § 295*—*when evidence is insufficient to show that malice was the gist of action.* Where the evidence on a petition for release under the Insolvent Debtors' Act (J. & A. ¶ 6198 *et seq.*) showed only the fact and the amount of the judgment in the action under which the petitioner was in arrest, and did not show the nature of the claim, evidence or verdict upon which such judgment was based, *held* that there was no evidence tending to show that malice was the gist of such action, notwithstanding a statement was introduced in evidence, but not identified as a pleading in said action, that the plaintiff therein complained that petitioner had maliciously caused her arrest for disorderly conduct.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Douglas State Bank for use of William Hardy, Plaintiff in Error, v. Chicago Bonding & Surety Company, Defendant in Error.

Gen. No. 22,576.

1. CORPORATIONS—*who may make affidavit of merits denying genuineness of signature of person as attorney in fact for corporation.* Under Rule 23 of the Municipal Court of Chicago, adopting section 52 of the Practice Act (J. & A. ¶ 8589), an affidavit of merits, denying on behalf of a corporation that the purported signature of a certain party as attorney in fact for the corporation was not his genuine signature and that he did not sign the instrument, may be made by any agent of the corporation duly authorized to make such affidavit, and same need not be made by such party whose signature is denied therein.

2. BONDS, § 37*—*when admission of evidence is harmless error.* In an action on a stay of execution bond against a corporation as surety, wherein the genuineness of the signature of a certain person as attorney in fact for the defendant was denied, *held* that the admission of evidence tending to prove that a certain person had forged the signature of the attorney in fact, and that after the execution of such bond such forger was a fugitive from justice and had left the city, was harmless error.

3. BONDS, § 38*—*when genuineness of signature is question for jury.* In an action against a corporate surety on a stay of execution bond, *held* that the question of the forgery of the signature of an attorney in fact for the corporation was a question for the jury.

Error to the Municipal Court of Chicago; the Hon. HARRY C. MORAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 5, 1917.

CLYDE C. FISHER, for plaintiff in error.

SABATH, STAFFORD & SABATH, for defendant in error.

MR. JUSTICE DEVER delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Douglas State Bank v. Chicago Bonding & Sur. Co., 203 Ill. App. 313.

This case comes to this court on a writ of error to the Municipal Court of Chicago, wherein a judgment was entered in favor of the defendant. Suit was brought on a "Stay of Execution" bond which it was alleged the defendant had executed as surety in case No. 390,027 in the Municipal Court. An affidavit of merits was filed by the defendant in which Albert N. Jacobs, as its duly authorized agent, stated "that defendant never executed the bond set forth in plaintiff's statement of claim; that the purported signature of Chester Strail, attorney in fact, is not the genuine signature of the said Chester Strail; that he never signed same; and that it is not indebted to the plaintiff on said purported bond."

Plaintiff contends that the affidavit of merits which was signed by Jacobs as agent of the defendant, under Rule 23 of the Municipal Court of Chicago and under section 52 of the Illinois Practice Act (J. & A. ¶ 8589) should have been sworn to by Strail, the person whose signature it is claimed was forged in the bond in question.

Rule 23 of the Municipal Court, as it appears in the record here, adopts section 52 of the Practice Act, which provides that where a defendant is sued upon any instrument in writing he may not deny the execution of such instrument unless such denial is verified by his affidavit; as a proviso it is stated that "if the party making such denial be not the party alleged to have executed or assigned such instrument, the denial may be made on the information and belief of such party." The defendant is a corporation. The theory of plaintiff is that the bond sued on is the bond of defendant, and not that of Strail. The defendant being a corporation, all of its acts are performed for it by agents; it is incapable of binding itself by any instrument or contract except through the acts and with the aid of such agents. The affidavit purports to have

been made by Jacobs as the duly authorized agent of the defendant, and we are at a loss to understand how the defendant could have executed the affidavit in question in any other manner. There is nothing in the law which requires that an affidavit such as the one filed in this case should be executed by any particular officer of a corporation. From the language of the proviso of section 52 above quoted, it may reasonably be inferred that the Legislature intended that it would be necessary in cases such as the one at bar that the affidavit required of the defendant should be executed by a properly authorized agent. Strail, the person whose signature it is alleged was forged to the bond in question, testified as a witness in the case and denied that he executed such bond. It might be inferred from this that it was possible for the defendant to have denied the execution of the bond by the affidavit of Strail himself; yet we find nothing in the statute referred to or in the decisions that leads us to the belief that the denial could not be made by any other authorized agent of the defendant.

It is further insisted by the plaintiff that the court erred in admitting certain testimony over the objection of the plaintiff. The evidence taken at the trial tended to prove that one Lewinsohn had forged Strail's signature in the bond, and certain evidence was admitted which tended to prove that after the execution of the bond Lewinsohn, being a fugitive from justice, had left the City of Chicago. We are inclined to the view that some of this evidence was erroneously admitted, but we do not think that the error of the court in this regard was so serious as to warrant us in reversing the judgment for that reason.

It is contended also that the verdict and judgment are against the weight of the evidence. There are in the record photographic copies of two instruments which contain the genuine signature of Strail, as also

Stein et al. v. Emerman, 203 Ill. App. 316.

the bond in which appears the alleged forged signature. An examination of these papers will disclose that there is a very marked similarity between these signatures; yet, notwithstanding this fact, the question of the genuineness of the signature in question became a question of fact for the jury, and we are unable to say that the finding of the jury is unsupported by the evidence.

The judgment of the Municipal Court is affirmed.

Affirmed.

**Sidney L. Stein and Edward J. Ehrhardt, copartners,
trading as Stein & Ehrhardt, Defendants in Error,
v. Herman Emerman, trading as H. Emerman
& Company, Plaintiff in Error.**

Gen. No. 22,583. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1916. Reversed and judgment of *nisi capiat*. Opinion filed February 5, 1917.

Statement of the Case.

Action by Sidney L. Stein and Edward J. Ehrhardt, copartners, trading as Stein & Ehrhardt, plaintiffs, against Herman Emerman, trading as H. Emerman & Company, defendant, to recover on a contract between real estate brokers to pay plaintiffs four hundred dollars as their part of a commission in making a loan. From a judgment for plaintiffs for four hundred dollars, defendant brings error.

WILLIAM FRIEDMAN, for plaintiff in error.

Thompson Bros. Feed Co. v. Neiman Bros. Co., 203 Ill. App. 317.

ISADORE S. BLUMENTHAL, for defendants in error.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

CONTRACTS, § 294*—*when performance is condition precedent to maintenance of action for breach.* Under a contract between real estate brokers whereby defendant agreed to pay plaintiffs a part of a commission in making a second mortgage loan and providing that the amount specified should be paid plaintiffs when the money on the mortgage was paid, *held* that the right of the plaintiffs was dependent on the making of the loan as a condition precedent, and that they could not recover under such contract without first showing that the loan was in fact made.

Thompson Brothers Feed Company, Appellee, v. Neiman Brothers Company, Appellant.

Gen. No. 22,596. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 5, 1917. Rehearing denied February 16, 1917.

Statement of the Case.

Action by Thompson Brothers Feed Company, a corporation, plaintiff, against Neiman Brothers Company, a corporation, defendant, to recover \$828.39 on account stated for balance due on merchandise sold. From a judgment for plaintiff, defendant appeals.

T. O. Thompson, an officer of the plaintiff, testified that he had had conversations with the defendant's

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Thompson Bros. Feed Co. v. Neiman Bros. Co., 203 Ill. App. 317.

officers in reference to the account, and that Louis J. Neiman, treasurer of the defendant company, said that if plaintiff would allow a disputed item of \$105 the balance of the account, \$828.39, would be paid; that Alexander Neiman, president of the defendant company and a brother of Louis, also said "that he would take care of us, he would give a chattel mortgage and that everything would be all right"; that a statement of the account was mailed to the defendant every month, and that the Neimans had never questioned its correctness except as to the matter of the \$105 item which plaintiff allowed to defendant.

WILLIAM FRIEDMAN, for appellant.

LEVISOHN & LEVISOHN, for appellee; ALVIN E. STEIN, of counsel.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. ACCOUNT STATED, § 25*—*when evidence sufficient to show.* Evidence held to support the finding of the court that the plaintiff's claim arose on an account stated, in an action to recover for balance due after allowance of a disputed item.

2. CORPORATIONS, § 354*—*when bound by action of officers.* A corporation is bound by the action of its president and treasurer in accepting an account as an account stated.

3. PLEADING, § 153*—*what defenses must be set up in affidavit of merits in action on account stated against a corporation.* The defenses to an action against a corporation on an account stated, that the debt was due to an individual and that the agreement to pay the debt was voidable under the Statute of Frauds and was *ultra vires* as to the corporation, come too late when first made after the filing of an affidavit of merits; they should be specifically set up in such affidavit.

4. PLEADING, § 153*—*when affidavit of merits is insufficient.* In an action on an account stated, an affidavit of merits held insuffi-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cronstedt et al. v. McCormick, 203 Ill. App. 319.

cient to show that the indebtedness sued on was that of an individual and not the defendant corporation or that the defendant had entered into a voidable agreement to pay such indebtedness.

5. TRIAL, § 295*—*when propositions of law should be tendered.* Propositions of law should be tendered before announcement of final judgment.

A. D. Cronstedt; A. D. Cronstedt and Ralph Berg, trading as Ralph Berg & Company, Appellees, v. Thomas T. McCormick, Appellant.

Gen. No. 22,608.

BROKERS, § 28*—*when evidence is sufficient to support judgment for plaintiff in action for commission for exchange of real estate.* Where the plaintiff, an unlicensed real estate broker, on behalf of the defendant initiated and was the procuring cause of an exchange of defendant's property for other property which was effected after plaintiff had become a member of a firm which was duly licensed to conduct a real estate brokerage business, *held* that the evidence supported a finding and judgment for the plaintiff, in an action to recover a commission for effecting such exchange.

Appeal from the Municipal Court of Chicago; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 5, 1917.

ARTHUR A. BASSE, for appellant.

GURDON WILLIAMS, for appellees.

MR. JUSTICE DEVER delivered the opinion of the court.

This is an appeal from a judgment of the Municipal Court of Chicago for the sum of \$175.

In November, 1914, the defendant, Thomas T. McCormick, listed for exchange a farm which he owned

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

in Reno county, Kansas, with the plaintiff, A. D. Cronstedt, a real estate agent. The evidence taken on the trial tends to prove that Cronstedt, at the time the property was listed with him, was not duly licensed to conduct a real estate business in Chicago; that in March, 1915, he became a member of the real estate firm of Ralph Berg & Company, and that on March 4, 1915, there was issued to this firm by the City of Chicago a broker's license expiring January 1, 1916; that on June 23, 1915, Cronstedt procured a broker's license to deal in real estate in his own name. This latter license it appears was taken out for the reason that Berg, a member of the firm, had on May 17, 1915, unexpectedly gone to Arizona; he returned to Chicago in July, 1915, and resumed his partnership relations with Cronstedt.

In the latter part of February, 1915, Cronstedt submitted to the defendant a building owned by Robert F. Schenck and located at 66th street and Ingleside avenue in Chicago. Cronstedt and McCormick together went to the Schenck building, and McCormick authorized Cronstedt to say to Schenck that he, McCormick, would trade his Kansas farm for the Schenck property subject to the incumbrance of \$20,000. Schenck, through his agent, one Hanson, refused this offer but said he would trade if McCormick would take the Chicago building subject to an incumbrance of \$22,000. McCormick refused to accept this offer. On April 13, 1915, McCormick gave to Cronstedt a written proposition for a trade of the properties which Cronstedt mailed to Schenck.

Cronstedt testified that he saw McCormick again in June, 1915, when the latter stated that he would not consider Schenck's proposition, and that he had in prospect a trade for another building; that he, Cronstedt, had had several conversations with McCormick with reference to the proposed exchange of the proper-

ties in August and October, 1915, and in January and February, 1916.

The evidence discloses that on May 11, 1915, McCormick and Schenck entered into a contract for the exchange of the properties in question, and mutual transfers thereof were made in July, 1915.

It is urged by the defendant that Cronstedt is not entitled to any commissions by reason of the exchange of these properties because he was not a duly-licensed real estate broker in Chicago at the time the transfer was made. There is not much merit in this contention. Cronstedt became a member of the Ralph Berg & Company firm in March, 1915, and at that time his firm was licensed to conduct a real estate brokerage business. The contract for the exchange of the property was entered into in May, 1915; the actual transfer took place in July of the same year. The evidence submitted on the trial by the plaintiff fairly tended to prove that he was the procuring cause of the exchange of the defendant's farm for Schenck's Chicago property. He and McCormick together examined the Schenck property, and it appears from the evidence that Cronstedt had exercised reasonable industry to bring about the exchange which was ultimately made by the parties themselves, during a period of several months.

The defendant denied that he had concealed from plaintiff the fact that he had entered into the contract with Schenck; he stated that he had informed plaintiff on several occasions of the fact of his relations with Schenck. On this subject there was a direct contradiction as between these parties, and the matter was one of fact for the determination of the trial court. There can be little doubt from this evidence that Cronstedt had in good faith given of his time and energy to bring about the exchange of the properties which was afterwards made, and we believe there is sufficient evidence in the record to sustain the findings and judgment of the trial court.

Gillett v. Bryant, 203 Ill. App. 322.

Complaint is made of the rulings of the trial court with reference to the admission of certain evidence. As to this complaint we do not think that any error was committed which would authorize a reversal of the judgment.

The judgment is affirmed.

Affirmed.

Charles W. Gillett, Plaintiff in Error, v. Elizabeth Parker Bryant, formerly Elizabeth Parker Gillett, Defendant in Error.

Gen. No. 22,228. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed February 5, 1917.

Statement of the Case.

Bill for divorce by Elizabeth Parker Gillett, now Elizabeth Parker Bryant, complainant, against Charles W. Gillett, defendant, charging defendant with habitual drunkenness. From an order, upon defendant's petition, awarding defendant the custody of the children for a limited time, after a decree rendered divorcing the parties and awarding the custody of their children to complainant and forbidding defendant to interfere until further order of the court, defendant brings error.

The decree found the defendant to be an unfit person to have the care, custody, control and education of the children, a boy then seven and a girl then four years of age. They resided with their mother for about a year, when she married one Bryant, a British subject, since which time they lived with her and Bryant at

their home in Lake Forest, Illinois. About two years and seven months later, the defendant filed a petition praying that the care and custody of the children be changed to himself. After extended hearing the prayer was denied, but the decree was modified so as to give the defendant the right to visit and talk with the children and be with them on Saturday of each week from twelve o'clock noon to six o'clock in the evening free from interference or espionage of their mother or her agents, servants or others in her behalf, to be delivered to petitioner and returned by him at a specified place, with special provisions as to sickness, vacations, failure of petitioner to meet the children, etc. The order expressed the court's intent eventually upon proper showing to give the petitioner the right to have charge and control of the children at night as well as during the day, and also directed that they should be known by their father's name. The order found petitioner had become a sober, temperate man.

FRANCIS W. WALKER and DONALD C. MUHLEMAN, for plaintiff in error; FRANCIS W. WALKER, of counsel.

WINSTON, PAYNE, STRAWN & SHAW, for defendant in error; EDWARD W. EVERETT, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. DIVORCE, § 153*—*when children of tender years will not be taken from custody of their mother.* As a general rule, children of tender years will not be taken from the custody of their mother where she is physically, morally and by general environment a proper person for them to live with and be controlled by.

2. DIVORCE, § 159*—*when retention of custody of children properly not denied to their mother.* On a petition by a party divorced

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gillett v. Bryant, 203 Ill. App. 323.

from his wife, praying that the divorce decree awarding the custody of their children to her be changed and their custody be awarded to him, *held* that, looking to the best interests of the children, who were of tender years, and their care and nurture the chancellor, under the circumstances, did not exceed the exercise of sound, humane, judicial discretion in allowing the mother to retain their custody.

3. DIVORCE, § 153*—*when mother preferred over paternal grandmother as to custody of children.* All things being equal as between the mother and the paternal grandmother of children of tender years, the mother has the preference in law in the matter of the custody and nurture of the children.

4. DIVORCE—*what is effect of marriage of divorced mother to alien on right to custody of children.* The fact that a woman's husband is a British subject, and that by her marriage with him her political status follows his, will not, while they live together within the jurisdiction of a domestic court, affect her right to the custody of her children by a former marriage who are American citizens.

5. DIVORCE, § 150*—*when jurisdiction of domestic court over children of divorced parents is not divested.* Children of divorced parents, who are American citizens, remain such notwithstanding their mother's subsequent marriage to the subject of a foreign power, and are subject to the jurisdiction of a domestic court and its orders concerning their custody as their welfare may demand.

6. DIVORCE, § 150*—*when evidence is insufficient to show that children were estranged from the father.* Evidence *held* not to show that the children of divorced parents were being estranged from their father, on a petition by the father for their custody, they having been in the custody of their mother by decree of court.

7. DIVORCE, § 150*—*what is extent of jurisdiction of court over children after divorce.* The jurisdiction of the court over the children of parties to a suit for divorce continues after the divorce decree, and such children are wards of the court subject to its future orders and directions as to their care and custody.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois ex rel. Emma L. Parker, Plaintiff in Error, v. Mrs. William Bryson, Defendant in Error.

Gen. No. 22,540. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. WILLIAM FENTIMORE COOPER, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded with directions. Opinion filed February 5, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Habeas corpus proceedings by the People of the State of Illinois *ex rel.* Emma L. Parker, petitioner, against Mrs. William Bryson, respondent, for the custody of a female child. From a judgment for respondent, relatrix brings error. For the decision on a former appeal, see 198 Ill. App. 171.

SHEPARD, MCCORMICK, THOMASON, KIRKLAND & PATTERSON, for plaintiff in error; PERRY S. PATTERSON, of counsel.

BENJAMIN E. BURR and EMOBY SMITH, for defendant in error; BENJAMIN E. BURR, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. INFANTS, § 4*—*what does not constitute abandonment of child by mother.* Where a mother, before her pains of maternity had scarcely ceased, allowed her baby to be taken from her under a secret arrangement between her husband and a physician at a hospital where her husband had placed her for confinement, of which arrangement she was ignorant but passively assented thereto,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Bryson, 203 Ill. App. 325.

and the physician refused her any information when asked as to the child's whereabouts, and she was unable to ascertain its whereabouts until after her husband's death, when, upon learning where it was, she instituted habeas corpus proceedings to secure its custody, *held* that there was no abandonment in fact or in law by her of her child.

2. PARENT AND CHILD, § 3*—*when right of mother of child to its custody will not be curtailed.* The mother of a child, its father being dead, is its natural guardian and custodian, and her right will not be infringed or curtailed unless there is something in her life and conduct which makes her an undesirable character to be intrusted with its care and nurture.

3. INFANTS, § 4*—*when mother is proper person to have custody of child.* Where the mother of a child was shown to be a woman of education, refinement and exemplary conduct, and the only criticism upon her life or character possible to be indulged was her indiscretion in yielding under promise of marriage to the father of the child, *held* that she was a fit person to have its care, custody and nurture.

4. INFANTS, § 4*—*when for best interests of child that its mother have custody of it.* All other things being equal, it is for the best interests of a child that it be brought up by its own mother rather than by a foster mother.

5. INFANTS, § 4*—*when for best interests of child that mother be preferred as to custody over foster mother.* In a habeas corpus proceeding between the natural mother and the foster mother of a child for its custody, where the foster mother appeared to be husbandless and was employed away from her home from 5:30 to 9:30 each evening, leaving the baby in the care of others in a store, and the natural mother was shown to have a home on her father's farm where she could give the child her maternal and undivided care and attention and rear it in the atmosphere of a healthy country environment, with the protection of her father, *held* that it would be to the best interests and welfare of the child that it be brought up and cared for by its natural mother.

6. APPEAL AND ERROR, § 1725*—*when opinion of Appellate Court is law of case.* The opinion of the Appellate Court on appeal in a former habeas corpus proceedings by a mother against the foster mother of her child is binding as the law of the case in similar proceedings between the same parties.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Reuben B. Edmunds, Appellant, v. City of Chicago,
Appellee.****Gen. No. 22,578.**

1. MUNICIPAL CORPORATIONS, § 1233*—*what is necessary averment in declaration against city for personal injuries.* A cause of action against a city in a personal injury case is not well stated unless the declaration affirmatively shows that the notice required by Hurd's Rev. St. ch. 70, sec. 7 (J. & A. ¶ 6190), was served upon the city, except in a statement of claim in a fourth-class action under the Municipal Court Act.

2. PLEADING, § 34*—*when averment of giving notice in declaration by reference to exhibit is not permissible.* Where service of a notice upon the defendant is required in the statement of a cause of action at law against him, an averment of the giving of the notice by reference in the declaration to an exhibit attached thereto is not permissible either under common-law pleadings or by virtue of any statute of the State of Illinois, and is without any force or effect.

3. PLEADING, § 34*—*how service of notice on defendant should be set out.* Where service of notice upon the defendant is required in the statement of a cause of action at law against him, such notice should be set out either in its terms or in its tenor and legal effect.

4. LIMITATION OF ACTION, § 64*—*what constitutes statement of new cause of action.* A declaration in an action against a city in a personal injury case which omits an averment of service of the statutory notice within the statutory time states no cause of action, and an amendment after the statutory period of limitation of actions setting up such notice constitutes a statement of a new cause of action.

5. PLEADING, § 223*—*what is effect of abiding by demurrer.* Where the defendant was granted leave to withdraw a plea of general issue and to file a demurrer, which was sustained, and plaintiff was granted leave to amend his declaration, to which amended declaration the defendant filed a plea of the statute of limitations, and, upon the overruling of the plaintiff's demurrer to such plea, the plaintiff elected to stand by his demurrer, *held* that plaintiff waived the right to challenge whatever erroneous exercise of judicial discretion there may have been in allowing the defend-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Edmunds v. City of Chicago, 203 Ill. App. 327.

ant to withdraw his plea of the general issue and to file demurrer to the original declaration.

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 5, 1917.

JAMES C. McSHANE, for appellant.

SAMUEL A. ETTELSON and CHARLES R. FRANCOIS, for appellee; ROBERT H. FARRELL and HENRY T. CHACE, JR., of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action for personal injury. The merits of the case are not involved. The questions in dispute relate to the pleadings only.

The action was originally commenced against the City and two others, but at the time of the entry of the judgment appealed from the City was the only defendant. The action was commenced February 25, 1914. The original declaration was filed April 24, 1914. On May 5, 1914, the City filed its plea of the general issue. On March 21, 1916, when the case was called for trial, leave was granted defendant to withdraw its plea and to file a demurrer in its place, which it did, and the demurrer being sustained, plaintiff then, by leave of court, filed an amended declaration, to which defendant filed a plea of the general issue and also a plea of the statute of limitations. To the plea of the statute of limitations plaintiff filed a demurrer, which the court overruled and, plaintiff electing to stand by his demurrer, judgment upon the limitation plea was entered in favor of defendant and against plaintiff for costs.

In actions of this nature against municipalities, section 7, ch. 70, Hurd's Rev. St. 1915-16 edition is material (J. & A. ¶6190). It reads:

"Any person who is about to bring any action or suit at law in any court against any incorporated city * * * for damages on account of any personal injury shall, within six months from the date of injury, or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney * * * and also in the office of the city clerk a statement in writing signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident, the place or location where such accident occurred and the name and address of the attending physician (if any)."

In the original declaration the following averment was made:

"And plaintiff further alleges that after he sustained his said injuries as aforesaid, that is to say on January 27, A. D. 1914, he, through his attorney, served upon the city attorney and city clerk of the City of Chicago and filed in the office of the said city attorney and said city clerk a notice or statement, copy of which is hereto attached and marked Exhibit A and is hereby made a part of this declaration."

In the amended declaration the notice is set forth by proper averment *in haec verba*. It is contended, and the learned trial judge acted upon the theory in overruling the demurrer to the defendant's plea of the statute of limitations, that the original declaration did not state a cause of action and that the amended declaration, which sufficiently set forth the giving of the statutory notice, stated a new cause of action, which is barred by the statute of limitations.

It is settled in *Walters v. City of Ottawa*, 240 Ill. 259, that a cause of action is not well stated against a city in a personal injury case unless the declaration affirmatively shows that the notice required by the statute was served upon the city; and in *Erford v. City of Peoria*, 229 *ibid.* 546, in passing upon this precise question, the court said:

Edmunds v. City of Chicago, 203 Ill. App. 327.

"Statutes of this character are mandatory, and the giving of the notice is a condition precedent to the right to bring such suit, and the giving of the notice must be averred and proved by the plaintiff to avoid a dismissal of his suit."

Did the original declaration show that the statutory notice was served upon the City? This is the crucial and determining factor.

The method adopted by the pleader in averring the giving of notice by reference to an exhibit attached to the declaration was abortive for that purpose. While such practice is common in equity, it is not permissible under common-law pleadings or in virtue of any statute of this State. *Jones v. City of Chicago*, 167 Ill. App. 175.

We appreciate the point ably argued by plaintiff that to sustain the judgment of the trial court we must, logically, hold to the ruling in *Walters v. City of Ottawa*, *supra*, that the original declaration did not state a cause of action. The attempt to set forth the alleged notice to the city by reference to an exhibit attached to the declaration was meaningless and without any force or effect in a common-law pleading. It must be treated as surplusage and as serving no purpose as a pleading. Were we able to extract from the words used an averment of the giving of the statutory notice, another question might arise. The document claimed to have been served is referred to as "a notice or statement." A notice or statement of what? The words used give no indication of what the statement or notice in fact was. We are not permitted to surmise or guess what it was. If the fact cannot be ascertained from the language used, then it is of no import. To be of service the notice should be set out either in its terms or in its tenor and legal effect.

The rule that a pleading must be taken most strongly against the pleader is the canon of interpretation in the instant case. This rule applied to the aver-

ment of notice renders that averment unintelligible and of no meaning. It is not even equivocal or susceptible of a dual meaning. Standing alone as it must, and without reference to the exhibit referred to, which we are not allowed to inspect, the words are without import. The original declaration, lacking an averment of service of the statutory notice within the statutory time, states no cause of action—not a cause of action imperfectly stated as argued by plaintiff, but states no cause of action. If a cause of action had been imperfectly stated, then the amended declaration would have been a sufficient curative. Failing this, it follows that the amended declaration states a new cause of action, which is barred by the statute of limitations. As defendant invoked the limitation statute as a defense in bar, it was entitled to the judgment of the court in its favor.

The question of the propriety of the court's action in allowing defendant to withdraw its plea of the general issue and interpose a demurrer to the original declaration is not preserved for review. The demurrer to the original declaration was sustained, and plaintiff asked and obtained leave to file an amended declaration. It is the amended declaration, filed by leave so obtained by plaintiff, to which defendant filed its plea of the statute of limitations, the demurrer of plaintiff to which was overruled and, plaintiff electing to stand by his demurrer, the judgment now being reviewed was entered. In this state of the pleadings, plaintiff waived the right to challenge whatever erroneous exercise of judicial discretion there may have been in allowing defendant to withdraw its plea of the general issue and substitute its demurrer to the original declaration.

The Supreme Court in its wisdom has seen fit in *Enberg v. City of Chicago*, 271 Ill. 404, to lay down a different rule concerning the necessity of setting forth

Slater v. Ball, 203 Ill. App. 332.

the statutory notice in a statement of claim for personal injuries against a city in a fourth-class action in the Municipal Court. The distinction is clearly based upon a construction of the Municipal Court Act, and the holding by the court that the statement of claim in a tort action in the Municipal Court does not arise to the dignity of a common-law declaration, requiring all the material or ultimate facts of a case to be stated or pleaded. The doctrine of *Walters v. City of Ottawa*, *supra*, is not only not departed from but confirmed, although it is distinguished as not being pertinent to the Municipal Court practice nor analogous to pleadings in that court which are founded and controlled by different principles and legislative acts than those of the common-law courts of the State.

The judgment of the Superior Court is supported by the record, and is affirmed.

Affirmed.

J. E. Slater, Plaintiff in Error, v. Elbert D. Ball, Defendant in Error.

Gen. No. 22,597. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in this court at the October term, 1916. **Affirmed.** Opinion filed February 5, 1917.

Statement of the Case.

Action by J. E. Slater, plaintiff, against Elbert D. Ball, defendant, to recover \$451.50 upon a note given by defendant. From a judgment for defendant, plaintiff brings error.

Freeman v. Counsell, 203 Ill. App. 333.

JOSEPH M. CONNERY, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

BILLS AND NOTES, § 451*—*when evidence is sufficient to show payment of note.* Evidence held sufficient to show that the note sued on and given by the defendant was paid by the conveyance to the plaintiff of a farm.

H. M. Freeman, Appellee, v. **J. T. Counsell**, Appellant.

Gen. No. 22,605. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. **DENNIS W. SULLIVAN**, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 5, 1917.

Statement of the Case.

Judgment by confession taken by **H. M. Freeman**, plaintiff, against **J. T. Counsell**, defendant, upon a promissory note, with power of attorney to confess judgment, in the sum of \$448.04. From a reinstatement of the judgment, after same had been opened and a hearing had, the defendant appeals.

The payee of this note became a bankrupt and the plaintiff purchased it through the bankruptcy proceedings prior to maturity of the note. Judgment was entered July 16, 1915. The defendant, with knowledge of the entry of the judgment from that date, took no steps

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

to open it until September 30, 1915. His petition then filed was denied, but on a further petition the judgment was opened October 28, 1915.

The payee of the note, the defendant, and one other owned the stock of the Minden Edison Light & Power Company, which owed the Madison Street Bank, an unincorporated bank owned by the payee, \$1,225. The bank being involved in the failure of the La Salle Street Trust & Savings Bank, the defendant gave to the payee his check for \$800 and the note in question to pay said indebtedness to the Madison Street Bank, the payee assigning to him twenty-four shares of stock in said company and delivering to him the notes evidencing such indebtedness, with the following agreement:

"I agree to pay to P. A. Hines Four Hundred Forty-eight Dollars and Four Cents (\$448.04), subject to the following conditions:

"1. That all matters relating to the Minden Edison Light & Power Company, now handled by P. A. Hines, or relatives, be brought up to date and all collections made and forwarded to me.

"2. That no claim for services shall be rendered against the Minden Edison Light & Power Company or me personally by P. A. Hines or relatives, except that of Clara M. Hines already agreed on.

P. A. Hines."

SHEPARD, McCORMICK, THOMASON & KIRKLAND, for appellant.

C. H. SIPPEL, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 80*—*when denial of motion to open judgment by confession on ground of laches is proper.* Where a defendant having knowledge that a judgment by confession had been entered against him took no steps to open the judgment until about two months and a half after it was entered, *held* that the court might well have denied the motion to open the judgment on the ground of laches.

2. JUDGMENT, § 86*—*when opening of judgment by confession does not affect stipulations in power of attorney waiving errors of procedure.* The opening of a judgment by confession for the purpose of allowing the defendant to present a defense does not abrogate the effect of the stipulations in the power of attorney under which the confession of judgment was taken waiving errors of procedure.

3. CONTRACTS, § 86*—*when agreement is nudum pactum.* An agreement between the payee of a note and the maker made at the time of the giving of the note and relating to the transaction of business in a corporation the shares of stock in which held by the payee were turned over to the maker, who was also a stockholder, and who gave the payee the note sued on and a check to pay indebtedness to a bank to which the corporation owed money, and in which the payee, who alone signed it, promised to pay to himself the amount of the note upon the performance of certain conditions relating to the transaction of the business of the corporation, *held* to be *nudum pactum*.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lockwood & Strickland Co. v. City of Chicago, 203 Ill. App. 336.

Lockwood & Strickland Company, Appellant, v. City of Chicago, Appellee.

Gen. No. 22,614. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. WILLIAM FENIMORE COOPER, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 5, 1917.

Statement of the Case.

Action of assumpsit by Lockwood & Strickland Company, a corporation, plaintiff, against the City of Chicago, a municipal corporation, defendant, to recover \$2,694 paid to defendant under the terms of an ordinance vacating an alley, with consolidated common counts and a special count declaring upon the ordinance and setting it out *in haec verba*. From a judgment dismissing the action upon sustaining a general demurrer to the special count, plaintiff appeals.

This action was based upon that portion of the ordinance which reads:

“The vacation herein provided for is made upon the express condition that Lockwood & Strickland Company, a corporation, shall, within sixty (60) days after the passage of this ordinance, pay to the City of Chicago the sum of twenty-six hundred ninety-four (\$2,694) dollars toward a fund for the payment of any and all damages which may arise from the vacation of said alley.”

WINTERS, PRICE & STEVENS, GEORGE W. UNDERWOOD and J. C. RISK, for appellant; GEORGE M. STEVENS, of counsel.

SAMUEL A. ETTELSON, for appellee; CHESTER E. CLEVELAND and DONALD P. VAIL, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL CORPORATIONS, § 83*—*when construction of ordinance is question for court.* In an action against a city to recover money paid under a city ordinance, upon demurrer to a special count declaring upon and setting out *in haec verba* such ordinance, held that the right to maintain the action rested in the legal interpretation of the liability of the city to refund the sum paid under the terms of the ordinance, and the question was one of law for the court, regardless of the erroneous conclusion of the pleader.

2. LIMITATION OF ACTIONS, § 103*—*necessity of pleading arresting of statute.* If the running of the statute of limitations has been arrested in any manner, that is matter of defense and need not be anticipated in the initial pleading.

3. LIMITATION OF ACTIONS, § 104*—*how defect in count setting up running of statute may be availed of.* That a count setting up the running of the statute of limitations is bad because not negating the exceptions, if any exist, which arrest the running of the statute, cannot be reached by demurrer but must be availed of by plea.

4. MUNICIPAL CORPORATIONS, § 926*—*when person procuring vacation of alley under ordinance is estopped to question right of city to collect compensation therefor.* Where a city ordinance provided that the vacation of an alley made therein should be upon the express condition that a certain party paid a certain amount within a certain time, and the party paid the amount within the time, such party is estopped from questioning the power of the city to exact such payment from him.

5. MUNICIPAL CORPORATIONS, § 926*—*when party paying money in consideration of vacation of alley may not recover it.* The terms of a city ordinance vacating a certain alley upon the express condition that a certain party pay a certain amount within a certain time are regulative of the rights of the parties, and in the absence of a provision therein for the return of the money paid by such party he cannot maintain an action at law for its recovery.

6. ASSUMPSIT, ACTION OF, § 49*—*when money paid may not be recovered.* Money voluntarily paid cannot be recovered in an action at law.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

General Cement Gun Co. v. Temple E. & P. Co., 203 Ill. App. 338.

**General Cement Gun Company, Defendant in Error, v.
Temple Engine & Pump Company, Plaintiff in
Error.**

Gen. No. 21,616. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 7, 1917. Rehearing denied February 20, 1917.

Statement of the Case.

Action by General Cement Gun Company, a corporation, plaintiff, against the Temple Engine & Pump Company, a corporation, defendant, to recover the purchase price of a gasoline engine. From a verdict and judgment for plaintiff for \$850, defendant brings error.

After considerable correspondence, in which defendant offered to sell to plaintiff the engine for \$850, a pump for \$39, a tank for \$6, and a clutch and pulley for \$25, making a total of \$920, with a guaranty of the engine in certain respects and that it might be returned within a certain time and the purchase price would be refunded if it should prove not as represented, the plaintiff purchased the articles at the aggregate price given. Shortly after the engine was put in operation certain parts broke, whereupon plaintiff returned it, demanded return of the purchase price, and on refusal brought this action. There was some evidence on the part of defendant of an oral change in the contract at the time of delivering the order, which was denied by plaintiff. Defendant contended that its letter accepting the order constituted the contract irrespective of prior negotiations.

General Cement Gun Co. v. Temple E. & P. Co., 203 Ill. App. 338.

ARCHIBALD CATTELL and CARL A. WALDRON, for plaintiff in error.

WORTH E. CAYLOB, for defendant in error.

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

Abstract of the Decision.

1. **SALES, § 52***—*when question of what constitutes contract is for jury.* In an action to recover the purchase price paid for an engine under a contract made by correspondence and in part oral, *held* that it was a question for the jury to determine, under the instructions of the court, what constituted the contract between the parties.

2. **SALES, § 59***—*when question of severableness of contract is for jury.* Where several articles upon which separate prices were quoted the buyer were finally sold altogether to him for the aggregate price given, with a guaranty of one of the articles and an agreement that it might be returned if it should prove not as represented and the purchase price therefor would be returned to the buyer, *held* that it was a question for the jury to determine whether the contract was severable, in an action for the return of the purchase price of such article after the article had been returned to the seller under such guaranty and agreement.

3. **SALES, § 356***—*when evidence is sufficient to sustain finding that buyer has option of returning goods.* Where a buyer in his order for goods stated that he should have the option of returning them if found to be not as represented, and the seller in his acceptance of the order stated that he would make any imperfections right or take back the goods and return the money, *held* that the finding of the jury that the buyer had the option of returning the goods was conclusive as to the contract of the parties in that regard.

4. **SALES, § 357***—*when instruction as to value of article sold is not erroneous.* Where the evidence showed a number of articles were sold at the aggregate of the separate prices quoted to the buyer shown in the evidence, *held* that there was no error in the court instructing the jury as to the price of one of such articles according to the amount shown in the evidence, in an action to recover such amount upon return of the article under the contract of sale.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lincoln Electric Heating Appliances v. Schultz, 208 Ill. App. 340.

5. APPEAL AND ERROR, § 479*—*when objection as to insufficiency of instructions is made too late.* An objection that instructions are contradictory not made at the time the instructions were given cannot be made for the first time in the Appellate Court.

**Lincoln Electric Heating Appliances, Incorporated,
Defendant in Error, v. Richard A. Schultz, Plain-
tiff in Error.**

Gen. No. 21,683. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ARTHUR J. GRAY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and judgment here. Opinion filed February 7, 1917.

Statement of the Case.

Action by Lincoln Electric Heating Appliances, incorporated, a corporation, plaintiff, against Richard A. Schultz, defendant, to recover \$1,000 damages because of materials furnished to defendant with which to construct certain parts of electric lanterns for plaintiff. From a judgment for plaintiff for the amount claimed, defendant brings error.

VINCENT D. WYMAN, OTTO W. JURGENS and CHARLES E. CARPENTER, for plaintiff in error.

HOWARD AMES, for defendant in error.

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

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Abstract of the Decision.

1. **CONTRACTS, § 329***—*when party accepting and paying for work is estopped to recover damages for defects.* Where a party experienced in a particular line of business accepted and paid for work done in that line, *held* that such party was estopped from recovering damages because of such work.

2. **PAYMENT, § 48***—*when money paid is recoverable.* Money paid upon false bills or upon bills already paid is recoverable.

3. **DAMAGES, § 61***—*when judgment for loss of profits on contract is erroneous.* Where a judgment for claimed loss of profits on a contract was not based upon any evidence of how much profit, if any, the plaintiff would have made on such contract or that the loss of such contract was by reason of the defendant's failure, *held* that such judgment was erroneous.

4. **DAMAGES, § 190***—*when evidence is insufficient to authorize recovery for depreciation in value of returned materials furnished manufacturer.* Where materials belonging to the plaintiff were furnished to the defendant, a manufacturer, with which he was to manufacture certain articles for the plaintiff, and were returned to the plaintiff five or six days later in large part in the same condition as when delivered to the defendant, and no reason for depreciation in value or evidence thereof appeared in an action against the defendant for damages, *held* that a judgment for the plaintiff for damages was erroneous.

5. **DAMAGES, §. 190***—*when evidence is insufficient to justify recovery for expenditures due to failure of manufacturer to return demanded materials.* Evidence *held* insufficient to justify recovery for certain expenditures by plaintiff claimed as damages while its factory was idle, in an action to recover damages for failure to return materials furnished defendant with which to construct for plaintiff parts of certain lanterns.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Max Nickol, Plaintiff in Error, v. Dwight M. Clark and John E. Traeger, Sheriff, Defendants in Error.

Gen. No. 21,722. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 7, 1917.

Statement of the Case.

Action by Max Nickol, plaintiff, against Dwight M. Clark and John E. Traeger, sheriff of Cook county, Illinois, defendants, for trial of the right of property in an automobile taken by the sheriff on an execution issued upon a judgment in favor of the codefendant. From a judgment for defendants, plaintiff brings error.

AARON and HIRSCH E. SABLE, for plaintiff in error.

FULTON, GAREY & DEUTSCHMAN, for defendants in error.

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

Abstract of the Decision.

1. SALES, § 179*—*when title does not pass from mortgagee to creditor.* Where the plaintiff sold and delivered an automobile, and the purchaser, being unable to pay a chattel mortgage given for the balance due on the machine, at its maturity, returned the machine with a bill of sale thereof by him to the plaintiff, who thereupon canceled the mortgage, which had been unrecorded, and the indebtedness, and turned back the machine to such purchaser with a written agreement between them loaning the machine to the purchaser for eight months, when he was to pay either a cer-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tain amount and retain the machine or a certain other amount as damages and return it, *held* that the transaction at the maturity of the mortgage was a mere subterfuge and no title passed from such purchaser to the plaintiff.

2. EXECUTION, § 121*—*when proceedings for trial of right of property may not be maintained.* In proceedings for trial of the right of property in an automobile taken on execution upon a judgment against the party in whose possession it was at the time of levy, where it was shown such party held it under an agreement with the plaintiff to pay a certain amount at a certain time, subsequent to the levy and to retain the machine, or to return it to the plaintiff at that time and pay a certain other amount as damages, *held* that the plaintiff could not maintain such proceedings against the execution creditor and the officer making the levy.

Ravenswood Hospital, Appellant, v. Maryland Casualty Company, Appellee.

Gen. No. 21,736.

1. INDEMNITY—*when part payment of judgment against insured is made by casualty company under contract of indemnity.* In an action against a casualty company upon its policy of indemnity agreeing to indemnify the insured to the extent of a certain sum on a single liability for damages on account of injury or death, where judgment was recovered against the insured in a certain case for more than the face of the policy in which appeal was taken, and the surety company on the appeal bond required the insured to give collateral security covering the excess over the face of the policy of the recovery in the case and the casualty company to give indemnity to it to the extent of the face of the policy, and upon such judgment becoming final and the surety company paying the same and taking an assignment thereof the casualty company paid the amount of the policy and the insured the excess over that amount to the surety company, *held* that the insured's contention that the payment by the insurer of the amount of the policy was not made under its policy of indemnity to the insured but under its independent contract with the surety company was without merit.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same title and section number.

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2. INDEMNITY, § 26*—*how much interest insured may recover from casualty company where judgment is rendered for more than face of policy.* Under a policy of indemnity issued by a casualty company agreeing to indemnify the plaintiff, in an action on the policy, to a certain amount on a single liability for damages on account of injury or death, and to defend at its own cost any action for the recovery of such damages, such company is liable for interest on a judgment recovered against the plaintiff to that amount from the date of the judgment, and the plaintiff who has paid the same may recover it from the defendant, but not interest paid by plaintiff on an excess of the judgment over the face of the policy.

3. INDEMNITY, § 25*—*when casualty company is not liable for money paid to husband of injured patient of insured.* Under a policy of indemnity issued by a casualty company agreeing to indemnify a hospital against loss from liability on account of injuries or death suffered by its patients under treatment in consequence of alleged error, mistake or malpractice in such treatment, such company is not liable for money paid to the husband of a patient for damages suffered by him in consequence of injuries or death of such patient.

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and judgment here. Opinion filed February 7, 1917.

CHARLES C. SPENCER, for appellant.

J. F. DAMMANN, JR., for appellee.

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

The Ravenswood Hospital brought suit against the Maryland Casualty Company to recover \$4,095.19 upon a policy of insurance issued by the defendant. The case was tried before the court without a jury, and judgment was entered in favor of the plaintiff for \$92.25. Plaintiff prosecutes this appeal, and defendant has assigned cross error.

The facts in the case were stipulated, and so far as

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

material are as follows: Plaintiff was conducting a hospital in Chicago, and on July 9, 1907, the defendant issued a policy of insurance to the plaintiff in and by which it agreed to indemnify the plaintiff for a period of one year "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any patient or patients under treatment by the assured, * * * in consequence of any alleged error or mistake or malpractice occurring in the course of said treatment." The policy further provided that the defendant company "will defend, at its own cost, in the name and on behalf of the assured, any civil suit or suits for the recovery of damages for such alleged error or mistake or malpractice, subject to the following conditions:" (a) The defendant's liability for such damages on account of injury or death to one person is limited to \$5,000, and the total liability on account of injuries to or death of any number of persons is limited to \$10,000; (c) the assured shall give immediate written notice to the defendant of any claim for damages; (d) that if suit is brought to enforce a claim for damages against the assured, it shall immediately notify the defendant, and the defendant will at its own cost defend the suit, in the name and on behalf of the assured, unless it shall elect to pay the claim; (e) the assured shall not without the written consent of the defendant incur any expense or settle any claim, except at its own cost, nor interfere in any negotiations for settlement, nor in any legal proceedings, without the written consent of the defendant.

It further appears that while the policy was in force, a patient was injured while in plaintiff's hospital, for which suit was brought. There was a verdict in the case for \$10,000 in favor of the patient. The court required a remittitur of \$2,500, and judgment was entered for \$7,500. An appeal was prosecuted to this

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court, where the judgment was affirmed (*Appell v. Ravenswood Hospital*, 167 Ill. App. 187), and a writ of certiorari was later denied by the Supreme Court. In that case, the Circuit Court, in allowing the appeal, fixed the bond at \$9,000. After the judgment had become final, July 29, 1912, the surety on the appeal bond paid the same and took an assignment of the judgment, the amount paid being \$8,642.25. This amount was made up of \$7,500 principal, \$1,125 interest and \$17.25 court costs. The surety company, before signing the bond, required the plaintiff to deposit with it collateral security for \$3,000, and required the defendant to indemnify the surety company to the extent of \$5,000. Upon assignment of the judgment to it, the surety company threatened to issue execution, and demanded that the defendant pay it \$5,000 and the plaintiff \$3,642.25, which payments were made. The plaintiff paid \$2,500 of the judgment, \$1,125 interest on the entire judgment pending the appeal, and \$17.25 court costs. These are the items plaintiff seeks to recover in this suit, and in addition \$75 which it paid the husband of the patient to settle his claim for damages on account of injuries to his wife. The court allowed the plaintiff this \$75 and \$17.25 court costs, making \$92.25 for which judgment was entered, but disallowed the balance of plaintiff's claim.

Plaintiff first contends that it is entitled to recover the entire amount it paid the surety company, \$3,642.24, together with interest thereon from the time of such payment, for the reason that this was the loss sustained by the plaintiff, and was covered by the contract of insurance; that the payment of the \$5,000 by the defendant to the surety company was not paid under the policy, but under the provisions of an independent contract between defendant and the surety company while the policy provided that payment should be made to the hospital. It appears that both

parties desired to prosecute the appeal, and it was therefore necessary to secure a surety. When the judgment was assigned to the surety company, it could then have enforced it in its entirety against the hospital. Under these circumstances, the defendant paid the \$5,000 under the policy, and thereby relieved the hospital to that extent. The contention of the plaintiff is clearly without merit.

Plaintiff next contends that the defendant is liable for interest on the whole of the judgment against the plaintiff from the date of the entry thereof, or at least for the interest paid by the plaintiff on the \$5,000, the portion of the judgment paid by the defendant.

In support of this contention it is argued that, by the terms of the policy, the defendant agreed to indemnify the plaintiff against loss from the liability imposed by law on account of bodily injuries to patients, and agreed to defend any litigation arising out of any matters covered by the policy at its own costs, and that the interest which accumulated on the judgment pending the appeal is a part of such costs. To sustain its position in this regard plaintiff cites *Aetna Life Ins. Co. v. Bowling Green Gas Light Co.*, 150 Ky. 732, and *Century Realty Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 179 Mo. App. 123, 161 S. W. 624. In these cases it was held that interest which accumulated on judgments pending appeal could be recovered under policies similar to the one before us, as being part of the costs of the suit.

On the other side, defendant contends that it is not liable under the policy for such interest; that the policy insures "*against loss from liability as contradistinguished to insurance against liability*"; that under such a policy nothing is due until the loss has been paid, and that at or about the time the plaintiff paid its portion of the judgment the defendant paid \$5,000 of such judgment and therefore nothing can be recovered in this case. In support of this contention

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many authorities are cited, among them being the following: *Davison v. Maryland Casualty Co.*, 197 Mass. 167, 83 N. E. 407; *Coast Lumber Co. v. Aetna Life Ins. Co.*, 22 Idaho 264, 125 Pac. 185; *Puget Sound Imp. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 52 Wash. 124, 100 Pac. 190; *Munro v. Maryland Casualty Co.*, 48 N. Y. Misc. 183, 96 N. Y. Supp. 705; *Maryland Casualty Co. v. Omaha Electric Light & Power Co.*, 157 Fed. 514; *Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co.*, 152 Mo. App. 332; *United States Fidelity & Guaranty Co. v. Maryland Casualty Co.*, 182 Ill. App. 438; *Campbell v. Maryland Casualty Co.*, 52 Ind. App. 228; *Connolly v. Bolster*, 187 Mass. 266; *Cushman v. Carbondale Fuel Co.*, 122 Iowa 656; *Carter v. Aetna Life Ins. Co.*, 76 Kan. 275, 91 Pac. 178; *Frye v. Bath Gas & Electric Co.*, 97 Me. 241. In each of these cases the policy contained a provision similar to the provision in the policy in this case, and, in addition, a condition that no action should lie against the company for any loss, unless brought to reimburse the assured "for loss actually sustained and paid by him in satisfaction of a judgment, after trial of the issues." The *Davison* case, *supra*, is typical of all the authorities cited by the defendant. In that case it was held that the casualty company was not liable for interest which had accrued on the judgment pending the appeal, in addition to the face of the policy of \$5,000. The court there said: "The contract here sued on is one to 'indemnify' the plaintiff 'against loss from common-law or statutory liability for damages on account of bodily injuries * * * caused through the negligence of the assured,'" etc. What is meant by the words 'against loss' is described in article 8 of the conditions precedent to which the insurance is stated to be subject. Article 8 provides that no action shall lie for 'any loss,' unless brought 'to reimburse' the

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assured 'for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.'

* * * The result of these provisions is that the plaintiff was to be reimbursed for sums paid by him, not exceeding \$5,000, on judgments recovered after a trial founded on accidents described in the policy. See *Connolly v. Bolster*, 187 Mass. 266, and cases there cited."

It will be noted that the defendant in that case is the same as the defendant here, and, further, that the policy in the case at bar contains no provision such as that mentioned in article 8 above quoted. The distinction between a policy such as the one before us and one containing the two provisions as in the *Davison* case, *supra*, is clearly pointed out by the Missouri Court of Appeals in the *Century Realty Co.* case, *supra*. In that case the Realty Company was insured in the Frankfort Company and Travelers Liability Company, a policy being issued by each company. An employee of the Realty Company recovered a judgment against it on account of injuries sustained in the sum of \$5,000, which judgment was to draw six per cent. interest. The Frankfort Company by the terms of its policy agreed to indemnify the Century Company against loss arising from legal liability for damages on account of bodily injuries, etc. The liability on account of injury or death of any one person was limited to \$5,000, and for any one accident resulting in the death of several persons, to \$10,000. It also contained provisions with reference to notice, and that the company should defend any suit at its own cost, and that it should have charge of all suits growing out of any accident covered by the policy. Similar provisions were contained in the policy issued by the Travelers Company, and in addition the following: "No action shall lie against the company as respects any loss under this policy, unless it shall be brought

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by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment, after trial of the issue." The court held that the Travelers Company was not liable for interest which had accrued on the judgment pending an appeal on account of the provision in the policy just quoted. The court, however, held that the Frankfort Company was liable for such interest, in addition to the face of its policy, under the provisions with reference to costs. The court there analyzed most of the cases cited by counsel here. In the case at bar, the provisions in the policy were substantially the same as those contained in the policy of the Frankfort Company. We, however, are of the opinion that in and by the terms of the policy, the defendant agreed that it would indemnify the plaintiff for damages sustained on account of any patient being injured by reasons of mistake or malpractice while in the plaintiff's hospital to the extent of \$5,000. Therefore the damages to the extent of that amount must be taken care of by the defendant, and when that item is increased by the postponement of payment, the interest is merely an accumulation to the principal sum, which the company has agreed to take care of, and in so doing the defendant pays no more than it agreed to, for it has had the use of the \$5,000 from the time the judgment was entered in the trial court until it was paid. Moreover, under the terms of the policy, the defendant had entire charge of the litigation, and as it did not see fit to pay the judgment when it was rendered, nor permit the plaintiff to do so, it cannot be heard to say that its liability has been increased by the accumulation of interest. The conclusion reached not only gives effect to the terms of the contract but is in accord with every principle of justice, since by the postponement of the day of payment each party retains the use of the amount upon which it is obliged to pay interest. If defendant were

not liable for its share of the interest, it could by the postponement of the day of payment reduce the amount of its burden and increase that of the assured. We, however, are of the opinion that this is the extent of defendant's liability, and that it should not be required to pay interest on the entire judgment.

Plaintiff next contends that the defendant is liable for the \$75 which it paid to the husband of the patient who obtained the judgment against it, on account of injuries sustained by such husband by reason of the injuries to his wife. In support of this contention, it is argued that the injury to the husband arose out of the same accident as did the injury to his wife, but that it was a separate injury to him; that the defendant agreed to indemnify it against loss from liability for damages on account of bodily injuries suffered. The policy provides that the Casualty Company agrees to indemnify the hospital against loss from liability "on account of bodily injuries or death suffered by any patient or patients under treatment by the assured or at the assured's hospital, in consequence of any alleged error or mistake or malpractice occurring in the course of said treatment." We think it clear from this provision that defendant's liability was limited to claims made by the patient for bodily injuries and did not cover a claim made by the patient's husband, who may have suffered damages as a consequence of such injuries.

For the reasons stated, the plaintiff is entitled to the interest on \$5,000 from the date judgment in favor of the patient was entered, July 20, 1909, until it was paid, July 29, 1912, at five per cent., \$756.25, plus \$17.25 court costs which is conceded, making a total of \$773.50, less the \$75 claimed in defendant's set-off which it paid on account of the claim made by the husband of the patient, leaving a balance due the plaintiff in this case of \$698.50.

Marino v. Parisi et al., 203 Ill. App. 352.

The judgment of the Municipal Court of Chicago is therefore reversed and judgment will be entered in this court in favor of the plaintiff and against the defendant for \$698.50.

Judgment reversed and judgment here.

James L. Marino for use of Frank Surianello, Plaintiff in Error, v. Antonio Parisi and Nicola Monaco, Defendants in Error.

Gen. No. 21,748. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and judgment here. Opinion filed February 7, 1917.

Statement of the Case.

Garnishment proceedings by James L. Marino for use of Frank Surianello, plaintiff, against Antonio Parisi and Nicola Monaco, defendants, based upon a judgment in favor of Surianello against Marino for \$97.10 and \$3 costs. From a judgment for defendants, plaintiff brings error.

ERNEST SAUNDERS and FRANK A. RAMSEY, for plaintiff in error.

No appearance for defendants in error.

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

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Abstract of the Decision.

1. GARNISHMENT, § 15*—*when cogarnishee furnishing funds to contractor may not be garnisheed.* In garnishment proceedings, where it was shown that one of the defendants had a contract with the other to furnish him the funds for constructing a certain building which the nominal plaintiff had contracted with the latter to construct for an agreed price, *held* that there was no claim or demand by the nominal plaintiff against the cogarnishee furnishing the funds so as to authorize garnishment.

2. MECHANICS' LIENS, § 62*—*when right of subcontractor to lien is waived by contractor.* Where a building contractor by his contract expressly waives any and all liens for himself and all subcontractors, the subcontractors have no enforceable lien.

3. GARNISHMENT, § 69*—*when garnishee paying debt after garnishment is wrongfully discharged.* Where the evidence showed that a garnishee had a building contract with the nominal plaintiff in the garnishment proceedings at the time of service of process and was indebted to such plaintiff and thereafter paid him a certain sum under such contract, *held* that it was error for the court to discharge such garnishee.

**American Hard Rubber Company, Defendant in Error,
v. Thad H. Howe, Plaintiff in Error.**

Gen. No. 21,776. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 7, 1917.

Statement of the Case.

Action on a contract of guaranty by American Hard Rubber Company, a corporation, plaintiff, against Thad H. Howe, defendant, to recover \$2,000 and interest thereon and \$10.50 court costs. From a judgment for plaintiff for \$2,000, defendant brings error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

American Hard Rubber Co. v. Howe, 203 Ill. App. 353.

The statement of claim alleged a debt due to plaintiff from the Swiss American Vaporator Company of \$2,000 balance for merchandise sold and delivered "to the defendant"; that the defendant guaranteed payment for such merchandise, that an action for that amount was brought against that company and, on admission of \$1,040 due, judgment was entered for such amount, on which execution issued and was returned "no part satisfied"; that that company was insolvent and delay in reducing the balance of the \$2,000 claimed to be due to plaintiff from that company which was disputed would endanger plaintiff's claim against the defendant. Defendant's affidavit of merits was as follows:

"That said plaintiff did not furnish and deliver the goods, wares and merchandise mentioned in said order and guarantees; that there was no balance of \$2,000 due on December 3, 1914; that Swiss American Vaporator Company has paid \$100 on account of said judgment of \$1,040 mentioned in said statement of claim; that defendant is not liable for costs and interest on said claim; that plaintiff on, to wit, March, 1915, in consideration of A. H. Preeman agreeing to pay \$100 on said judgment and \$100 each and every week thereafter until same was paid, agreed to extend the time of payment of plaintiff's claim so that same should be paid \$100 cash on, to wit, March 1, 1915, and \$100 each and every week thereafter, and that A. H. Preeman paid said plaintiff \$100 on account of said agreement and agreed to pay plaintiff \$100 each and every week thereafter."

This affidavit of merits was stricken from the files, and defendant ordered to file an amended affidavit in five days. He elected to stand by this affidavit, and was defaulted and judgment entered.

HARRY A. BLOSSAT, for plaintiff in error.

ELBERT C. FERGUSON, for defendant in error; EDWARD L. ENGLAND, of counsel.

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

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*what constitutes a clerical error in a statement of claim.* Where a statement of claim against a guarantor of payment for goods sold to a corporation set up that the goods were delivered "to the defendant" and that suit had been brought against the corporation for the debt, *held* that the words "to the defendant" were a clerical error and were shown by the entire statement to have referred to the corporation.

2. PLEADING, § 267*—*when clerical error may be corrected.* Where the context in a pleading affords the means of correction of a clerical error, the proper word will be deemed substituted.

3. GUARANTY, § 21*—*when guarantor is discharged.* Where an extension of time is given the principal for the payment of money due by him by a valid and binding agreement without his guarantor's consent, the latter is discharged.

4. PLEADING, § 153*—*when affidavit of merits filed by guarantor in action on guaranty is fatally defective.* An affidavit of merits filed by the guarantor of a debt when sued upon his guaranty which seeks to set up an extension of the time of payment as a defense is fatally defective in not alleging that such extension was without his consent.

5. PLEADING, § 153*—*when affidavit of merits may be declared insufficient in its entirety.* A court is not called upon to point out the particular parts of an affidavit of merits which are insufficient, and is warranted in holding it insufficient in its entirety.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

O'Brien v. Salerno, 203 Ill. App. 356.

Bridget O'Brien, Defendant in Error, v. Peter P. Salerno, Plaintiff in Error.

Gen. No. 21,066. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 7, 1917.

Statement of the Case.

Action by Bridget O'Brien, plaintiff, against Peter P. Salerno, defendant, to recover damages for personal injuries caused by defendant carelessly and negligently leaving a horse hitched to a wagon untied in the street. From a judgment for plaintiff for six hundred dollars, on trial by the court without a jury, defendant brings error.

CANTWELL & SMITH, for plaintiff in error.

FARBELL & THOMPSON, for defendant in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1303*—*when presumed that there was evidence sufficient to sustain finding of court.* Where a bill of exceptions recited that it contained "as much evidence as recollected by counsel and court and introduced on the trial," held that as the bill did not purport to contain all the evidence the law conclusively presumed that there was evidence sufficient to sustain the finding of the court.

2. APPEAL AND ERROR, § 1488*—*when judgment on trial by court will not be reversed for improper admission of evidence.* A judgment on trial by the court without a jury will not be reversed on account of the court's improper admission of evidence where there is sufficient competent evidence to sustain the judgment, as the court is presumed to have disregarded evidence improperly admitted.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Julia Farrell, Defendant in Error, v. James W. Stafford, Plaintiff in Error.

Gen. No. 21,204. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 7, 1917. Rehearing denied February 26, 1917.

Statement of the Case.

Action by Julia Farrell, plaintiff, against James W. Stafford, defendant, to recover damages for conversion of certain goods belonging to plaintiff. From a judgment for plaintiff for \$153.50, defendant brings error.

C. VAN ALLEN SMITH, for plaintiff in error.

LEO S. LE BOSKY, for defendant in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. **PLEDGES**—*when pledged articles may not be sold without disclosing their nature.* A pledgee of goods contained in a barrel, held under an agreement as security for a debt with authority to sell the goods if the debt is not paid at the time specified, is not justified in selling the barrel and its contents at auction without opening it and disclosing what its contents are.

2. **TROVER AND CONVERSION, § 39***—*when evidence is sufficient to sustain finding as to value of goods.* Evidence held to sustain the finding of the court as to the value of goods, in an action for their conversion.

3. **TROVER AND CONVERSION, § 28***—*when tender of debt by pledgor of goods is not condition precedent to maintenance of action for*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

American Hard Rubber Co. v. Howe, 203 Ill. App. 353.

The statement of claim alleged a debt due to plaintiff from the Swiss American Vaporator Company of \$2,000 balance for merchandise sold and delivered "to the defendant"; that the defendant guaranteed payment for such merchandise, that an action for that amount was brought against that company and, on admission of \$1,040 due, judgment was entered for such amount, on which execution issued and was returned "no part satisfied"; that that company was insolvent and delay in reducing the balance of the \$2,000 claimed to be due to plaintiff from that company which was disputed would endanger plaintiff's claim against the defendant. Defendant's affidavit of merits was as follows:

"That said plaintiff did not furnish and deliver the goods, wares and merchandise mentioned in said order and guarantees; that there was no balance of \$2,000 due on December 3, 1914; that Swiss American Vaporator Company has paid \$100 on account of said judgment of \$1,040 mentioned in said statement of claim; that defendant is not liable for costs and interest on said claim; that plaintiff on, to wit, March, 1915, in consideration of A. H. Freeman agreeing to pay \$100 on said judgment and \$100 each and every week thereafter until same was paid, agreed to extend the time of payment of plaintiff's claim so that same should be paid \$100 cash on, to wit, March 1, 1915, and \$100 each and every week thereafter, and that A. H. Freeman paid said plaintiff \$100 on account of said agreement and agreed to pay plaintiff \$100 each and every week thereafter."

This affidavit of merits was stricken from the files, and defendant ordered to file an amended affidavit in five days. He elected to stand by this affidavit, and was defaulted and judgment entered.

HARRY A. BLOSSAT, for plaintiff in error.

ELBERT C. FERGUSON, for defendant in error; EDWARD L. ENGLAND, of counsel.

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

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*what constitutes a clerical error in a statement of claim.* Where a statement of claim against a guarantor of payment for goods sold to a corporation set up that the goods were delivered "to the defendant" and that suit had been brought against the corporation for the debt, *held* that the words "to the defendant" were a clerical error and were shown by the entire statement to have referred to the corporation.

2. PLEADING, § 267*—*when clerical error may be corrected.* Where the context in a pleading affords the means of correction of a clerical error, the proper word will be deemed substituted.

3. GUARANTY, § 21*—*when guarantor is discharged.* Where an extension of time is given the principal for the payment of money due by him by a valid and binding agreement without his guarantor's consent, the latter is discharged.

4. PLEADING, § 153*—*when affidavit of merits filed by guarantor in action on guaranty is fatally defective.* An affidavit of merits filed by the guarantor of a debt when sued upon his guaranty which seeks to set up an extension of the time of payment as a defense is fatally defective in not alleging that such extension was without his consent.

5. PLEADING, § 153*—*when affidavit of merits may be declared insufficient in its entirety.* A court is not called upon to point out the particular parts of an affidavit of merits which are insufficient, and is warranted in holding it insufficient in its entirety.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

American Hard Rubber Co. v. Howe, 203 Ill. App. 353.

The statement of claim alleged a debt due to plaintiff from the Swiss American Vaporator Company of \$2,000 balance for merchandise sold and delivered "to the defendant"; that the defendant guaranteed payment for such merchandise, that an action for that amount was brought against that company and, on admission of \$1,040 due, judgment was entered for such amount, on which execution issued and was returned "no part satisfied"; that that company was insolvent and delay in reducing the balance of the \$2,000 claimed to be due to plaintiff from that company which was disputed would endanger plaintiff's claim against the defendant. Defendant's affidavit of merits was as follows:

"That said plaintiff did not furnish and deliver the goods, wares and merchandise mentioned in said order and guarantees; that there was no balance of \$2,000 due on December 3, 1914; that Swiss American Vaporator Company has paid \$100 on account of said judgment of \$1,040 mentioned in said statement of claim; that defendant is not liable for costs and interest on said claim; that plaintiff on, to wit, March, 1915, in consideration of A. H. Freeman agreeing to pay \$100 on said judgment and \$100 each and every week thereafter until same was paid, agreed to extend the time of payment of plaintiff's claim so that same should be paid \$100 cash on, to wit, March 1, 1915, and \$100 each and every week thereafter, and that A. H. Freeman paid said plaintiff \$100 on account of said agreement and agreed to pay plaintiff \$100 each and every week thereafter."

This affidavit of merits was stricken from the files, and defendant ordered to file an amended affidavit in five days. He elected to stand by this affidavit, and was defaulted and judgment entered.

HARRY A. BLOSSAT, for plaintiff in error.

ELBERT C. FERGUSON, for defendant in error; EDWARD L. ENGLAND, of counsel.

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

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*what constitutes a clerical error in a statement of claim.* Where a statement of claim against a guarantor of payment for goods sold to a corporation set up that the goods were delivered "to the defendant" and that suit had been brought against the corporation for the debt, *held* that the words "to the defendant" were a clerical error and were shown by the entire statement to have referred to the corporation.

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*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

American Hard Rubber Co. v. Howe, 203 Ill. App. 353.

The statement of claim alleged a debt due to plaintiff from the Swiss American Vaporator Company of \$2,000 balance for merchandise sold and delivered "to the defendant"; that the defendant guaranteed payment for such merchandise, that an action for that amount was brought against that company and, on admission of \$1,040 due, judgment was entered for such amount, on which execution issued and was returned "no part satisfied"; that that company was insolvent and delay in reducing the balance of the \$2,000 claimed to be due to plaintiff from that company which was disputed would endanger plaintiff's claim against the defendant. Defendant's affidavit of merits was as follows:

"That said plaintiff did not furnish and deliver the goods, wares and merchandise mentioned in said order and guarantees; that there was no balance of \$2,000 due on December 3, 1914; that Swiss American Vaporator Company has paid \$100 on account of said judgment of \$1,040 mentioned in said statement of claim; that defendant is not liable for costs and interest on said claim; that plaintiff on, to wit, March, 1915, in consideration of A. H. Preeman agreeing to pay \$100 on said judgment and \$100 each and every week thereafter until same was paid, agreed to extend the time of payment of plaintiff's claim so that same should be paid \$100 cash on, to wit, March 1, 1915, and \$100 each and every week thereafter, and that A. H. Preeman paid said plaintiff \$100 on account of said agreement and agreed to pay plaintiff \$100 each and every week thereafter."

This affidavit of merits was stricken from the files, and defendant ordered to file an amended affidavit in five days. He elected to stand by this affidavit, and was defaulted and judgment entered.

HARRY A. BLOSSAT, for plaintiff in error.

ELBERT C. FERGUSON, for defendant in error; EDWARD L. ENGLAND, of counsel.

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

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*what constitutes a clerical error in a statement of claim.* Where a statement of claim against a guarantor of payment for goods sold to a corporation set up that the goods were delivered "to the defendant" and that suit had been brought against the corporation for the debt, held that the words "to the defendant" were a clerical error and were shown by the entire statement to have referred to the corporation.

2. PLEADING, § 267*—*when clerical error may be corrected.* Where the context in a pleading affords the means of correction of a clerical error, the proper word will be deemed substituted.

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4. PLEADING, § 153*—*when affidavit of merits filed by guarantor in action on guaranty is fatally defective.* An affidavit of merits filed by the guarantor of a debt when sued upon his guaranty which seeks to set up an extension of the time of payment as a defense is fatally defective in not alleging that such extension was without his consent.

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*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

American Hard Rubber Co. v. Howe, 203 Ill. App. 353.

The statement of claim alleged a debt due to plaintiff from the Swiss American Vaporator Company of \$2,000 balance for merchandise sold and delivered "to the defendant"; that the defendant guaranteed payment for such merchandise, that an action for that amount was brought against that company and, on admission of \$1,040 due, judgment was entered for such amount, on which execution issued and was returned "no part satisfied"; that that company was insolvent and delay in reducing the balance of the \$2,000 claimed to be due to plaintiff from that company which was disputed would endanger plaintiff's claim against the defendant. Defendant's affidavit of merits was as follows:

"That said plaintiff did not furnish and deliver the goods, wares and merchandise mentioned in said order and guarantees; that there was no balance of \$2,000 due on December 3, 1914; that Swiss American Vaporator Company has paid \$100 on account of said judgment of \$1,040 mentioned in said statement of claim; that defendant is not liable for costs and interest on said claim; that plaintiff on, to wit, March, 1915, in consideration of A. H. Freeman agreeing to pay \$100 on said judgment and \$100 each and every week thereafter until same was paid, agreed to extend the time of payment of plaintiff's claim so that same should be paid \$100 cash on, to wit, March 1, 1915, and \$100 each and every week thereafter, and that A. H. Freeman paid said plaintiff \$100 on account of said agreement and agreed to pay plaintiff \$100 each and every week thereafter."

This affidavit of merits was stricken from the files, and defendant ordered to file an amended affidavit in five days. He elected to stand by this affidavit, and was defaulted and judgment entered.

HARRY A. BLOSSAT, for plaintiff in error.

ELBERT C. FERGUSON, for defendant in error; EDWARD L. ENGLAND, of counsel.

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

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*what constitutes a clerical error in a statement of claim.* Where a statement of claim against a guarantor of payment for goods sold to a corporation set up that the goods were delivered "to the defendant" and that suit had been brought against the corporation for the debt, *held* that the words "to the defendant" were a clerical error and were shown by the entire statement to have referred to the corporation.

2. PLEADING, § 267*—*when clerical error may be corrected.* Where the context in a pleading affords the means of correction of a clerical error, the proper word will be deemed substituted.

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5. PLEADING, § 153*—*when affidavit of merits may be declared insufficient in its entirety.* A court is not called upon to point out the particular parts of an affidavit of merits which are insufficient, and is warranted in holding it insufficient in its entirety.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Waldschmidt v. The Marsh & Bingham Co., 203 Ill. App. 365.

SAMUEL FRIEDLANDER, for defendants in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 320*—*when defendant may not recover on set-off for failure to deliver remainder of lumber on contract.* Where the sellers of a quantity of lumber refused to make further shipments under the contract with the purchaser on the ground that the purchaser had improperly rejected a large part of past shipments, and brought an action for deliveries already made, and defendant interposed a claim of set-off for damages for failure to deliver the remainder of the lumber under the contract, *held* that plaintiffs were entitled to recover although they may have been first in default for failing to make timely shipments, even if time were of the essence of the contract, where the purchaser had made no objection on that ground and insisted on further shipments.

2. SALES, § 309*—*when immaterial whether contract is severable or entire.* Under a contract for shipment of a quantity of lumber purchased, where the purchaser was guilty of a breach of the contract which entitled the seller to refuse to make further shipments, *held* that the seller would be entitled to recover for past deliveries and no question would arise as to whether the contract was severable or entire.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Harry Simmons, a minor, by Walter C. Simmons, Appellee, v. Commonwealth Edison Company, Appellant.

Gen. No. 21,686.

1. **ELECTRICITY, § 24***—*when declaration in action for injuries by electric light wire is sufficient after verdict.* In an action for damages for personal injuries sustained from coming into contact with a live electric wire of an electric light company, where the declaration charged that the defendant carelessly and negligently suffered the wire to be and remain in a bad and unsafe repair and condition and to be and remain lying upon the sidewalk for a long space of time, *held* that either charge was sufficient to sustain a judgment after verdict for plaintiff.

2. **ELECTRICITY, § 25***—*when doctrine of res ipsa loquitur applies.* The doctrine of *res ipsa loquitur* applies to a live electric wire extending over a public street, particularly when such wire is in charge of one having particular or peculiar knowledge of such wires, as an electric light company.

3. **NEGLIGENCE, § 120***—*necessity of pleading res ipsa loquitur.* The doctrine of *res ipsa loquitur* is not a matter of pleading but of proof, and a declaration alleging negligence in general terms, to which no objection is made, is sufficient where proof is offered of circumstances from which an imputation of negligence necessarily arises.

4. **ELECTRICITY, § 27***—*when evidence insufficient to rebut prima facie case of res ipsa loquitur.* In an action against an electric light company for damages for personal injuries sustained from a live electric wire, where the doctrine of *res ipsa loquitur* applied, and the defendant's evidence was to the effect merely that defendant used the usual and modern methods in regard to the wire, that it was in good condition, was a standard wire in similar use in the locality, that its ordinary life was twenty years and that this wire was in use for only five or six years, *held* that a finding by the jury that the prima facie case made out for the plaintiff had not been met, was not against the manifest weight of the evidence.

5. **ELECTRICITY, § 26***—*when evidence as to manner that live electric wire passes through a tree is admissible in action for injuries therefrom.* In an action against an electric light company to recover damages for personal injuries from a live electric wire strung through a tree, evidence as to the manner it passed

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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through the tree *held* admissible under a charge that the defendant negligently and carelessly suffered the wire to be and remain in unsafe repair and condition, although the manner in which the wire passed through the tree was not relied upon as a ground of recovery.

6. *ELECTRICITY, § 27*—when evidence is sufficient to show negligence of electric light company in leaving charged wire on sidewalk.* In an action against an electric light company to recover damages for injuries received from a charged electric wire which was lying on the sidewalk, evidence *held* sufficient to sustain a finding that defendant had been negligent in leaving the wire on the sidewalk for a long time.

7. *APPEAL AND ERROR, § 1410*—what is province of Appellate Court in determining sufficiency of evidence to sustain a finding.* It is not the province of the Appellate Court to weigh the testimony further than necessary to determine whether a finding is against the manifest weight of the evidence.

8. *APPEAL AND ERROR, § 1514*—when improper remarks of counsel are not ground for reversal.* Where argument of counsel to the jury was objected to on the trial, objection sustained, and counsel abandoned that line of argument, *held* that no error was shown by reason of such argument.

9. *DAMAGES, § 112*—when verdict for injury to boy is not excessive.* In an action to recover damages for personal injuries sustained by a boy eight or nine years old from a live electric wire, *held*, considering the nature and severity of the shock, pain and suffering, resultant less satisfactory work at school, and lowered tone of nervous system, and jury's observation of the boy in court, and evidence which, if true, would have justified the jury in believing the boy's perceptions and capabilities had been materially lessened, that a verdict of \$8,000 was not excessive.

Appeal from the Circuit Court of Cook county; the Hon. JOHN A. DOWDALL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 7, 1917. *Certiorari* denied by Supreme Court (making opinion final).

GOODRICH, VINCENT & BRADLEY, for appellant; RALPH R. BRADLEY, of counsel.

BRUNDAGE, SANDERS & HOLT, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

By this appeal the appellant, which is hereafter referred to as defendant, seeks the reversal of a judgment against it in favor of the appellee, who is hereafter referred to as plaintiff, for \$8,000 for damages caused by a broken electric service wire. The declaration charged, in substance, that the defendant was engaged in distributing electricity in the City of Chicago; that it was using the wire in question for that purpose, and that it was its duty to keep and maintain it in good and safe repair and condition, and to prevent it from breaking and falling upon the street; that it carelessly and negligently suffered this wire, while charged with electricity, to be and remain in a bad and unsafe repair and condition, so that it broke and fell upon the sidewalk, and carelessly and negligently permitted it to remain there for a long space of time charged with electricity, exposed, unprotected, and unguarded, without any warning of its dangerous character, and the plaintiff was injured by the wire while in the exercise of due care and caution for his own safety.

The testimony of one Mary E. Hubbard shows that she saw the wire in question lying on the sidewalk between seven and eight o'clock on the morning of the accident; that she told her son to watch it, and she called the police on the telephone, and afterwards notified the telephone company; that shortly thereafter a man came from the telephone company and told her it was an Edison wire; that she then called the Edison company about seven-thirty, getting their number from the telephone book, and told them the wire was down; that about three-quarters of an hour afterwards she sent her boy on an errand, and while he was away the plaintiff was injured. On cross-examination she said she would not say that she had not told one Pilkington that she did not call the Edison company; that she did call the Edison company about eight o'clock

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or half past seven; that it might have been later, but not much, and that she just called the Edison company's general number. She also testified that the wire in question ran through the alley to the south, and then through private property to the street; that right at the entrance of the alley there was a large tree, and that the wire ran through the branches. The son of this witness testified that this tree stood on the parkway of the house next to theirs; that the wire ran through the tree, which was a good sized one, and as high as the house.

Plaintiff, who was between eight and nine years of age, saw the wire about eight forty-five o'clock, picked it up, and was injured. After the injury, he was out of school a month. He testified that his writing was worse than it was before; that he could not throw as far, nor run as fast; that he had a scar on his hand and leg; that if he carried a heavy basket "the scar gets real raw and burns." The evidence showed that up to the time of the accident his health had been good.

A physician was called, who testified that the plaintiff had been under his medical care since the accident; that he treated him about six weeks; that he examined him about a week before the trial; that the effect of the passage of a strong charge of electricity through the body was to cause burns and shock, and that the severity of the shock depended upon the amount of the current. On cross-examination he said that the extension of the ring and middle fingers of the injured hand was somewhat limited, and that the headaches complained of by the plaintiff might be the result of the shock, and might be the result of a great many other things.

Plaintiff's mother testified that since the accident he had been very nervous and restless at night; that his nerves had been unstrung, and that he had headaches a great deal. The father testified that the plaintiff's right hand was badly burned.

One Ethel H. Walker, a public school teacher, testified that plaintiff was in her school; that before the time of the accident he was perfectly normal, but after his return to school after the accident he was thin, pale, and did not sit erect, as before; that he did not recover his former position during the year; that there was a marked difference in his writing; that he applied himself in his other work, but did not seem to get the same result; that before the accident he had ranked among the highest in his class, but after the injury he ranked among the lowest—about fortieth in his class; that she did not see him after June, 1912, until about a year before the trial.

The testimony on behalf of the defendant was to the effect that it never received notice of the accident from the witness Mary E. Hubbard, but that its trouble man was notified by a mail collector, and that he immediately came to the scene of the accident and cut down the wire. A witness testified that Mrs. Hubbard told him on two occasions that she did not notify defendant. Its testimony was also to the effect that the wire had been in use about six years; that the morning was damp, and the wire would therefore make a ground circuit. The wire, which was received in evidence, was burned at one end; this was the end that lay on the street.

One of defendant's engineers testified that he was familiar with the electrical equipment used throughout the country, and that the circuit in question was equipped at the time with all the devices which are customary and in common practice and use on such a circuit for the purpose of safeguarding the plant, equipment, and the public; that he did not mean to say that he was familiar with the situation in that particular location, but that he was familiar with the type of construction and the general method of construction.

A physician, called on behalf of the defendant, testi-

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fied that the plaintiff was a normal sized boy for his age; that he was not a large boy, but was practically a normal boy, and was likely to start growing at any time, and would grow rapidly; that his bones were naturally small.

The defendant claims that the negligence charged in the declaration was not proved as claimed. The negligence charged, however, was that defendant carelessly and negligently suffered the wire to be and remain in a bad and unsafe repair and condition, and to be and remain lying upon said sidewalk for a long space of time. Either one of these charges was sufficient to sustain a judgment after verdict. The only proof offered was as to the ownership of the wire, its position over the street, and the fact that it broke without the intervention of any third party and in circumstances which, to say the least, could not be said to be abnormal or unusual. This record shows, and it is a matter of common knowledge of which the court might properly take notice, that an electric service wire is highly dangerous, and its presence over a public street, therefore, casts upon its owners a duty to use a high degree of care to protect the public. Moreover, the tensile strength of the wire, the manner in which it is constructed, the way it is secured, and the precautions that are taken for the protection of the public, are, as between the plaintiff and the defendant, within the peculiar knowledge of the latter. When, therefore, an accident of the kind in question happens—an accident which in the ordinary course of things would not happen if those who had the management used proper care—it permits a reasonable inference, in the absence of explanation by the defendant, that the accident arose from a want of care. In such a case, the duty of explanation is thrown upon those having charge of the thing, particularly when, as here, information concerning the thing itself is within the particular or peculiar

knowledge of the defendant. (*Bolger v. City of Chicago*, 198 Ill. App. 123.) It would seem that there are few cases to which the application of the doctrine of *res ipsa loquitur* is more directly applicable than such a one as the case at bar. We are therefore of the opinion that proof that a charged wire broke and fell upon the sidewalk, and in no unusual circumstances, threw the burden of explanation upon the defendant. Did the evidence offered overcome the prima facie case thus made out? Defendant's evidence on this point was very meager; it consisted of a general statement that the usual and most modern methods were used by the company; that the condition of the wire was good; that it was the standard wire in similar use in Chicago; that its life was ordinarily twenty years, and that this had been used but five or six years. It may at least be said with confidence that when the fullest effect is given to all the testimony offered on behalf of the defendant, it is not sufficient to justify this court in saying that a finding by the jury that the prima facie case made out by the plaintiff had not been met, would be contrary to the manifest weight of the evidence.

Counsel contend, however, that the pleadings in the declaration, in the absence of a count in *res ipsa loquitur*, makes it impossible to sustain the judgment. The answer to this contention is that *res ipsa loquitur* is not and cannot be a matter of pleading, but is a matter of proof. The negligence was laid in general terms to which no objection was taken, and, in support of those general allegations, proof was offered of circumstances from which an imputation of negligence necessarily arose. This was a matter of evidence, and therefore plaintiff was not required to plead it. Defendant's counsel further contend that the court improperly admitted evidence in regard to the manner in which the wire passed through

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the tree. As the negligence charged was that defendant carelessly and negligently suffered one of said wires to be and remain in a bad and unsafe repair and condition, testimony in regard to any surrounding circumstances which might establish that condition was obviously proper. The argument of counsel for plaintiff was that the chafed condition of the wire proved that defendant had permitted it to get out of repair, and contended that this was corroborated by the fact that the wire passed through the branches of the tree. In determining whether or not the wire was out of repair, and whether or not defendant had permitted it to remain in that condition, the plaintiff had a right to show every surrounding circumstance which had a bearing on the case. An examination of the argument of counsel as it appears in the abstract of record shows that the manner in which the wire was passed through the tree was not relied upon as a ground of recovery, but, as indicated already, a fact tending to corroborate plaintiff's contention in regard to the condition of the wire.

Upon the question of the other negligence relied upon in the declaration, namely, that defendant negligently permitted the wire to lie and remain upon the sidewalk for a long time, it is enough to say that the evidence upon this point is conflicting. Mrs. Hubbard swore positively that she notified the defendant shortly after seven forty-five; the testimony on this point on behalf of the defendant is necessarily negative, and is supported by the statement of an investigator, who said that Mrs. Hubbard told him that she never notified the defendant, and she, herself, says that she might have told him that, but at the same time, she insisted that she did notify defendant. The testimony on behalf of defendant on this point was that none of the load distributors were notified. This might, of course, have been true even if Mrs. Hubbard called

up the general telephone number of defendant company, and reported the accident. Her testimony in regard to her talk with defendant's investigator was as follows: Q. "Didn't you tell Mr. Pilkington at that time that you called up the police and the Telephone Company and did not call up the Edison Company?" A. "I don't remember that I told him that; I know I called everybody that day." Q. "You would not say that you did not tell him that, that you did not call the Edison Company?" A. "No sir, I would not."

It is not the province of this court to weigh the testimony except in so far as it is necessary in determining whether the verdict is contrary to the manifest weight of the evidence. The jury saw and heard the witnesses, and observed their demeanor on the stand, and we, therefore, do not feel that we would be justified in saying that a conclusion by the jury that Mrs. Hubbard gave the defendant timely notice of the broken wire would be contrary to the manifest weight of the evidence.

The argument objected to in regard to what the jury had a right to consider in weighing the testimony of the witnesses was, in the main, as applicable to the witnesses for one party as the other, and it was not objected to on the trial. The only other portion objected to was a statement that if the jury believed from the evidence that the defendant allowed this wire to dangle over the fence and took a chance and were negligent, he could ask on this evidence, "exemplary damages as a punishment to teach them they should not do that sort of thing." When that was objected to on the ground that it was not counted on in the declaration, counsel said: "I placed the amount in my declaration at \$25,000." That remark was not objected to, and the objection to the former remark was sustained. Counsel thereupon proceeded with an

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argument strictly confined to actual damages and the jury were afterwards fully and accurately instructed on that subject. Counsel for plaintiff contend that under the declaration plaintiff was entitled to recover exemplary damages if the evidence justified such an allowance, and, apparently in good faith, he stated to the jury on the trial that if they believed certain things from the evidence, he could ask for such damages. The question of whether such damages would have been recoverable is not, we think, before us, in view of the fact that the court sustained the objection and counsel abandoned that line of evidence. In view of all the circumstances, the conduct of counsel for plaintiff cannot be said to have been in any way improper, and in view of the repeated decisions of our Supreme Court, the situation shown cannot be said to have brought error into the record. (*City of Chicago v. Leseth*, 142 Ill. 642; *Quincy Gas & Electric Co. v. Baumann*, 203 Ill. 295.)

Counsel for defendant further contend that the verdict is excessive. The measure of damages in such a case is a matter of extreme difficulty, and is purely a question of fact for the jury. In view of the testimony in regard to the nature and severity of the shock, of the pain and suffering which must have resulted from it, or the effect upon his capacity to do satisfactory work at school, of the lowered tone of his nervous system, and in view of the fact that the jury had ample opportunity during the trial to judge of the plaintiff's physical condition, we do not feel justified in saying that its verdict was excessive. There was evidence which, if believed, would have justified the jury in believing that plaintiff's perceptions and capabilities had been materially lessened by the accident, and we are not prepared to say that such an injury to a boy of his years would be more than compensated for by the judgment, especially when it is remembered how

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small an income it would produce, either at interest or in the form of an annuity.

As there appears to be no error in the record, the judgment of the Circuit Court is affirmed.

Affirmed.

**H. P. Hudson, Appellant, v. Grand Rapids & Indiana
Railway Company, Appellee.**

Gen. No. 21,732.

1. **CARRIERS, § 241***—*when failure of shipper of interstate car of live stock to present claim for damages within time limited is bar to recovery.* Where a contract for interstate shipment of live stock provided that no claim for damages should be allowed or sued for unless the shipper should make and deliver same to the railroad company's general agent within five days after removal of the stock from the car, *held* that a failure to give such notice or to show a waiver thereof barred an action on such claim.

2. **EVIDENCE, § 304***—*when sufficient to show mailing and receipt of letter.* Evidence that a letter was mailed in a government chute with a two-cent stamp on the envelope addressed to a certain party, and that such party acknowledged its receipt, *held* sufficient to warrant a finding that such letter was mailed and received by such party, although the testimony that the letter was "mailed" may have been a statement of a conclusion, no objection being made thereto.

3. **CARRIERS—what law governs rights and duties of interstate carriers.** The rights and duties of interstate carriers are governed by the common law except in so far as they may have been changed or modified by an act of Congress or by acts of the Interstate Commerce Commission within the scope of the authority delegated to it in regard to interstate commerce.

4. **CARRIERS, § 33a***—*what does not constitute an approval of clause limiting liability for loss in bill of lading by Interstate Com-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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merce Commission. The filing with the Interstate Commerce Commission of a tariff schedule and the publication of the rates in accordance with its regulations do not constitute an approval by that Commission of a clause in a bill of lading attempting to limit the carrier's liability for a loss.

5. CARRIERS, § 113*—*what is extent of liability of carriers for loss or damage to goods at common law.* At common law carriers in addition to their liability for negligence were absolutely liable for loss of or damage to goods intrusted to them unless it occurred as the result of an act of God or the public enemies.

6. CARRIERS, § 243*—*when provision in bill of lading for interstate shipment of live stock limiting liability for negligent delay is invalid.* The rule of public policy which prevents a carrier from securing a release from liability for its own negligence equally prevents it from obtaining a stipulation for its release from liability as to any part of the damage, and a stipulation in a bill of lading for an interstate shipment of live stock, that in event of unusual delay or detention due to the negligence of the carrier or its employees, or otherwise, the shipper will accept as full compensation for all loss or damages sustained thereby the amount actually expended by the shipper in the purchase of food and water for the stock while so detained, is invalid.

Appeal from the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1916. Reversed and remanded. Opinion filed February 7, 1917. Rehearing denied February 20, 1917.

CHARLES A. BUTLER, for appellant.

WINSTON, PAYNE, STRAWN & SHAW and LOESCH, SCOFIELD & LOESCH, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The appellant, who will be referred to as the plaintiff, seeks to reverse a judgment against him in favor of the appellee, who will be referred to as the defendant. The evidence shows that the plaintiff made two shipments of cattle to be carried from Wayland, Michigan, to the stockyards at Chicago, Illinois; there was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

a delay in each shipment which caused a shrinkage in the weight of the cattle and a further loss by reason of a falling market. There was no evidence that any claim was made in connection with the first shipment within five days, in accordance with the provisions in the bill of lading "that no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the G. T. freight agent of the said carrier at his office in Chicago, Ill., within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs." Nor was there any evidence tending to show a waiver of such notice. There was, however, evidence that notice of claim was mailed to the freight agent of the connecting carrier in apt time, and also a stipulation that witnesses called and sworn on behalf of the plaintiff would testify that on January 26, 1914, a letter was addressed and mailed in a government chute, with a two-cent stamp on the envelope, addressed to F. C. Nicholas, local freight agent of the Michigan Central Railroad, Chicago, Illinois, in which a claim was filed in connection with the shipment of January 24, 1914, and that he acknowledged it in due course of mail, January 29, 1914. This stipulation obviously refers to the shipment of January 20, which was unloaded January 21st, at five-thirty p. m. The bill of lading or live-stock contract also, in addition to the usual stipulations in regard to the value of the cattle, provided "that in the event of any unusual delay or detention

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of said live stock, caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby, the amount actually expended by said shipper, in the purchase of food and water for the said stock, while so detained." It was further stipulated that the defendant had published and filed with the Interstate Commerce Commission its classifications, tariffs, and schedules of freight rates from Wayland, Michigan, to Chicago, Illinois, wherein were promulgated two rates of freight—one of which applied only where the live-stock contract in evidence here was used, and the other, or higher rate, where it was not used, and that plaintiff paid the lower rate. At the close of the evidence, the court instructed the jury to find for the defendant, and entered judgment on the verdict so directed. This action of the court is relied upon as error.

We are clearly of the opinion that as the evidence fails to show notice or waiver of notice of any claim in connection with the first shipment, plaintiff is, under the uniform rulings of the State and Federal courts, debarred from recovering any damages in connection with that shipment. We think it is clear, however, that the evidence and the stipulation were sufficient to entitle a jury to conclude that proper notice had been mailed and received in regard to the claim made in connection with the second shipment. Plaintiff expressly testified that he mailed the letter in question January 23rd. To say that one mailed a letter may be a conclusion, but, if so, it was not objected to. As there was no evidence showing any expenditure in feeding and watering the stock, the question squarely arises as to whether the stipulation in the contract in regard to the measure of damages growing out of negligence or delay debars other recovery therefor; in

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other words, as to whether that provision in the live-stock contract is valid and binding. As this question has not been passed upon by any Federal court of review, it is one of first impression, except in so far as the decisions of other State courts may be persuasive.

In the first place, it is apparent that the rights and duties of interstate carriers are governed by the common law, except in so far as they may have been changed or modified by act of Congress or by acts of the Interstate Commerce Commission, within the scope of authority delegated to it in regard to interstate commerce. We are of the opinion that the filing of the schedules with the Interstate Commerce Commission, and the publication of the rates in accordance with its regulations, as shown by the stipulation, did not constitute an approval by the Interstate Commerce Commission of the clauses in the bill of lading attempting to limit the carrier's liability. No act of Congress or other act of the Commission is cited which in any way touches upon the validity of the stipulation. Common carriers, under the common law, in addition to their liability for negligence, were absolutely liable for loss of, or damage to, the goods intrusted to them, unless it occurred as the result of an act of God or the public enemies. They could, however, by contract relieve themselves of this absolute liability, but it is well settled "that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants." (*New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, at page 384.) But as the carrier's reasonable compensation depended, in a measure, upon the value of the goods shipped, it was held that where a shipper obtained a lower rate by representing that the value of the goods did not exceed a certain amount, he was thereafter

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estopped from claiming a right to recover a sum larger than the value declared. (*Hart v. Pennsylvania R. Co.*, 112 U. S. 331.) The case at bar, however, in no way falls within that principle, for here, the stipulation in the uniform shipping contract is plainly to the effect that the carrier shall not be liable for a part, at least, of the damages which flow from its own negligence. We are of the opinion that the rule of public policy which prevents a carrier from securing a release from liability for damages growing out of its own negligence equally prevents it from obtaining a stipulation for its release from liability as to any part of those damages. If it could lawfully stipulate against any damages arising out of its negligent delay, except for feed and water, it could, in the same manner, stipulate that it should be liable only for the cost of watering the stock, or that it should not be liable for any sum exceeding \$1. If it is contrary to public policy to permit a carrier to relieve itself of its liability for its negligence, it is equally contrary to public policy to permit it to relieve itself of its liability for any part of the damages arising therefrom. The identical point was passed upon by the Supreme Court of Vermont, in *Piper v. Boston & M. R. R.*, 97 Atl. 508, where the court said, at page 511:

“But it is not now, any more than formerly, possible for a carrier to make a binding agreement, stipulating against its own negligence or that of its servants. Such agreements are prohibited by section 20 of the so-called Carmack Amendment. * * * And an agreement to release a carrier from a part of the loss due to such negligence is no more valid than one making the exemption complete.”

The same question was before the Supreme Court of Appeals of Virginia, in *Norfolk & W. Ry. Co. v. A. J. Steele & Son*, 86 S. E. 124, where the court, after quoting the clause in the bill of lading in question here, said, page 126:

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“The extra feed and water bill in this case amounted to about \$20, and furnishes a very good illustration of how completely this clause might operate to exempt carriers from liability, if its validity can be sustained.”

We are therefore of the opinion that the stipulation limiting the defendant's liability for negligent delay to the cost of feeding and watering the stock is invalid, and that, consequently the action of the court in directing a verdict was erroneous. The judgment is reversed and the cause remanded to the County Court.

Reversed and remanded.

**Perfection Pulverizing Mills, Plaintiff in Error, v.
George E. Keiser, Defendant in Error.**

Gen. No. 21,504. (Not to be reported in full.)

Error to the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 7, 1917. Rehearing denied February 26, 1917.

Statement of the Case.

Action by Perfection Pulverizing Mills, a corporation, plaintiff, against George E. Keiser, defendant, to recover \$113.51 for work done, to which defendant claimed a set-off for \$681.13 for loss of his goods by fire while in plaintiff's possession. From a judgment for defendant for \$495.95, plaintiff brings error.

The defendant delivered to the plaintiff fifty barrels of sugar to be ground in plaintiff's mill into powdered sugar under an oral contract. The defendant claimed

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the sugar was to remain in the original packages in the mill until ordered by him to be ground. The plaintiff, without having such special order, removed the contents of forty-four or more of the packages and dumped them into its hoppers, bins and other parts of its machinery for the purpose of grinding them. That night a fire, not claimed to have been caused by plaintiff's negligence, destroyed all but six barrels of the sugar.

WEBSTER & NICHOLSON, for plaintiff in error; DANIEL WEBSTER and ARTHUR A. SHERRARD, of counsel.

JONES, ADDINGTON, AMES & SEIBOLD, for defendant in error; KEENE H. ADDINGTON and WALTER HAMILTON, of counsel.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 387*—*when evidence sufficient to show that sugar was to be taken out of original packages for grinding only on order of owner.* In an action to recover for grinding of sugar to which defendant claimed a set-off for sugar lost by fire, evidence held sufficient to sustain a finding that the contract for the grinding of defendant's sugar by plaintiff required that the plaintiff should not take the sugar out of the original packages for grinding after the packages had been delivered to plaintiff's mill until defendant had given an order so to do.

2. SET-OFF AND RECOURPMENT, § 10*—*when unliquidated damages may be set off.* Damages for a breach of the same contract sued on may be set off, although unliquidated.

3. CONTRACTS, § 297*—*when demand is unnecessary as basis for recovery for loss of sugar destroyed by fire.* Demand before bringing an action to recover for the loss of sugar destroyed by fire and due to a breach of contract in grinding it without author-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ity for the return of such sugar, would be a useless act and is unnecessary.

4. SET-OFF AND RECOUPMENT, § 13*—*when undisclosed agent may claim set-off available to principal.* An undisclosed agent sued upon a contract made by him with reference to his principal's business has as much right to claim set-off in such action as his principal.

5. JUDGMENT, § 475*—*when judgment on set-off by agent is res adjudicata as to principal.* Recovery on set-off made by an undisclosed agent when sued for a debt of the principal is *res adjudicata* as to both him and his principal.

6. APPEAL AND ERROR, § 1256*—*when party may not complain of instruction.* A party cannot complain of an alleged erroneous instruction which is favorable to him.

**Eugene Wendnagel and William Wendnagel, trading
as Wendnagel & Company, Defendants in Error, v.
M. F. Schiavone, Plaintiff in Error.**

Gen. No. 21,526.

1. FRAUDS, STATUTE OF, § 74*—*what constitutes a sufficient memorandum.* Where a written contract for the furnishing of material and labor by one and payment for same by the other party thereto was indorsed by a third party "O. K.," with his name and the date of such indorsement, *held* that the indorsement was a sufficient memorandum under the Statute of Frauds.

2. EVIDENCE, § 322*—*when parol evidence is admissible to explain terms of guaranty on contract.* In an action brought on an alleged guaranty of a written contract for the furnishing of material and labor by one and payment for same by another party thereto, *held* that parol evidence was admissible to show that defendant, who had written the words "O. K.," his name and the date of indorsement on the contract, intended thereby to guarantee payment under the contract.

Error to the Municipal Court of Chicago; the Hon. SHERIDAN E. Fay, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 7, 1917.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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I. B. PERLMAN, for plaintiff in error.

ADAMS, CREWS, BOBB & WESCOTT, for defendants in error; GEORGE B. McKIBBIN, of counsel.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a writ of error to review a judgment rendered in the Municipal Court of Chicago for the sum of \$629.24 in a suit by Eugene Wendnagel and William Wendnagel, doing business as Wendnagel & Company (hereinafter called plaintiffs) against M. F. Schiavone (hereinafter called defendant) brought upon an alleged contract of guaranty. The statement of claim of the plaintiffs recites that they furnished and delivered to M. F. Schiavone at his special instance and request certain materials for which there is a balance due of \$757.54. The defendant in his affidavit of merits admitted his liability for one item amounting to \$150 and as to the remaining items pleaded the general issue and the Statute of Frauds.

The evidence for the plaintiff shows that on August 7, 1914, the plaintiff and Peter Nasiopulos and John Ahamnos entered into a written contract whereby the plaintiffs were to furnish and set certain structural iron, for which Nasiopulos and Ahamnos were to pay the sum of \$560; that owing to Nasiopulos and Ahamnos being behind in their payments on a prior contract, plaintiffs refused to go on with the contract of August 7, 1914; that the defendant thereupon telephoned to the plaintiffs and said that he was taking a lease of the building and wanted to know why the plaintiffs did not go ahead with the work; that plaintiffs told him they could not go ahead until they got some money on the original contract; that the defendant said they should go ahead and that he would guar-

antee it; that the plaintiffs still held up the matter; that a few days later Nasiopulos and the defendant went to the office of the plaintiffs and the defendant wrote his O. K. on the contract of said August 7, 1914, and said he would stand good for the money; that afterwards the goods were accordingly delivered.

The only material evidence introduced by the defendant was the testimony of the defendant himself which was, in general, a denial of the testimony of the plaintiff's witness in regard to what was said at the time the O. K. was written on the contract in question. That denial, however, does not seem to have been positive but to have been in part qualified. The contract which was offered in evidence by the plaintiff, and upon which is written the "O. K." of the defendant, is as follows:

"CONTRACT, Made and concluded the 7th day of August one thousand nine hundred fourteen by and between WENDNAGEL & COMPANY, 22nd and Jefferson Sts., of the City of Chicago, County of Cook and State of Illinois, party of the first part, and John Ahannos and P. Nasapoulos, of the City of Chicago, County of Cook and State of Illinois, party of the second part, in these words: The said party of the second part covenants and agrees to and with the said party of the first part, to furnish and set the structural iron for the two new balconies for the Apollo Theatre, 40th Ave. near North Ave., including cutting of holes but not patching of same.

"And the said party of the first part covenants and agrees to pay unto the said party of the second part, for the same, the sum of Five hundred sixty (\$560.00) Dollars, lawful money of the United States.

"This price includes only structural material as shown on Plan which we made and submitted to Archt. Wm. A. Bennett. Any material added to be charged as an extra.

"TERMS: 85% as the work progresses, and the balance 15 days after completion of contract.

"IN WITNESS WHEREOF, the parties to these present

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have hereunto set their hands and seals the day and year first above written.

"Sealed and delivered in the presence of
WENDNAGEL & Co.
By JAMES MAGNUSEN
PETER NASIOPULOS
JOHN AHAMNOS.

"O. K.
M. F. SCHIAVONE,
September 3/14."

At the trial the defendant made certain objections to the evidence to the effect that the indorsement on the above-mentioned contract of August 7, 1914, could not be varied by parol testimony. The court overruled the objections and entered judgment in favor of the plaintiff in the sum of \$697.24.

It is contended by the defendant that the words, "O. K. M. F. Schiavone, Sept. 3/14" do not constitute a sufficient memorandum to comply with the Statute of Frauds and that oral testimony was not admissible to explain and amplify them. There seems to be no doubt but that parol testimony is admissible for the purpose of explaining or removing any uncertainty or ambiguity in a written contract, and that it was proper for the plaintiff in this case to explain and interpret, by competent testimony, the meaning of the words in question. Wigmore on Evidence, sec. 2463.

The danger in such cases is that in explaining and interpreting, something may be added, and the latter, of course, is not allowed. Commonly, of course, the law allows all abbreviations to be explained by oral testimony. The words, "O. K. M. F. Schiavone, Sept. 3/14" as they stood at the foot of the contract were ambiguous and uncertain and the plaintiffs were entitled to offer appropriate evidence to explain and interpret them. The witness for the plaintiff testified as follows:

"He (the defendant) says he would stand good for the money and so he wrote his O. K.

(Q) And upon that he put his O. K. there?

(A) Yes sir."

The trial judge, we assume, concluded that the testimony of the witness for the plaintiffs, which testimony purported to recount what actually was said at the time the letters "O. K." were written by the defendant, explained and interpreted the meaning of those letters as a written promise that he, the defendant, would pay that which was provided for in the written contract itself.

In the case of *Popper v. Spelz*, 184 Ill. App. 35, cited by the defendant, the court held, and according to the law, that the defendant having proved that the one who wrote the "O. K." on a certain order had refused to write it as a guaranty, there was, therefore, no liability.

In *Penn Tobacco Co. v. Leman* (Ga.), 34 S. E. 679, p. 680, the court said:

"The contract relied on by the plaintiff, evidenced by the letters 'O. K.' and the signature of the defendants, was ambiguous, and therefore parol evidence will be heard to explain the patent ambiguity appearing upon the paper. If the parties agreed among themselves, as alleged, that this signature and these letters should have a definite meaning as between themselves, then the signature and the letters so entered upon the order would constitute a contract between them, and the defendants would be liable to the plaintiff if the contract thus entered into was of the character alleged in the declaration."

Inasmuch as the meaning of words is always relative, it is only reasonable that parol testimony should be admitted for the purpose of eliciting the truth, whenever upon the face of the document there arises obvious doubt. The need of the court is to discover the special sense in which the parties mutually have used the words; and in discovering that sense, to re-

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quire sufficient and allow only appropriate proof; for in that way only may the true meaning of the writing be understood and enforced.

We are of the opinion that the trial judge was justified in admitting the evidence objected to by the defendant and was also justified in his conclusion that the indorsement on the contract constituted a written guaranty.

Finding no errors in the record which justify a reversal, the judgment will be affirmed.

Affirmed.

**William & Vashti College for use of Robert L. Watson,
Defendant in Error, v. Jefferson D. Shatford,
Plaintiff in Error.**

Gen. No. 21,571. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 7, 1917. Rehearing denied February 26, 1917.

Statement of the Case.

Action by William & Vashti College, a corporation, for use of Robert L. Watson, plaintiff, against Jefferson D. Shatford, defendant, to recover \$303.35 principal and interest on account stated for board, lodging, tuition and school books furnished defendant's minor son. From a judgment for plaintiff, defendant brings error.

HOAG & ULLMANN, for plaintiff in error.

A. W. MARTIN and EDWARD H. S. MARTIN, for defendant in error.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Abstract of the Decision.

1. PARENT AND CHILD, § 51*—*when evidence sufficient to show that father authorized minor son to contract college expenses.* In an action by a college to recover on an account stated for tuition, board and lodging furnished defendant's minor son, evidence held sufficient to show that defendant authorized his minor son to receive tuition, board and lodging from the plaintiff on defendant's account for one year.

2. WITNESSES, § 6*—*when witness fees and mileage are properly charged.* Witness fees and mileage are properly chargeable against a party who fails to give notice to the opposite party to an action that certain depositions, of which notice had been given, would not be taken in time to prevent such opposite party making the trip to take the depositions.

John Gulliksen, Defendant in Error, v. White Eagle Brewing Company, Plaintiff in Error.

Gen. No. 21,584.

1. ASSUMPSIT, ACTION OF, § 59*—*when action for use and occupation lies.* An action for use and occupation will generally lie where there is no question of plaintiff's title to the premises, but not where such title is questioned.

2. ASSUMPSIT, ACTION OF, § 59*—*when action for use and occupation lies against party in possession.* An action for use and occupation will lie by the owner of premises against a party in possession not holding under a hostile or adverse title after notice to pay rent; such was the rule at common law and has not been changed by the Landlord and Tenant Act (J. & A. ¶ 7039).

3. ASSUMPSIT, ACTION OF, § 89*—*when evidence is sufficient as to value of use and occupation of premises.* In an action for use and occupation, rent paid by a tenant is admissible in evidence as to the value of the use and occupation of the premises, and is sufficient.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gulliksen v. White Eagle Brew. Co., 203 Ill. App. 391.

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 7, 1917.

SMIETANKA, JOHNSON & MOLTHROP, for plaintiff in error; JAMES T. FALES, of counsel.

CHRISTIAN C. H. ZILLMAN, for defendant in error.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The writ of error in this case is prosecuted to reverse a judgment rendered by the Municipal Court of Chicago in favor of the defendant in error (hereinafter designated the plaintiff) and against the plaintiff in error (hereinafter designated the defendant).

The plaintiff's statement of claim recited that the suit was brought for use and occupation by the defendant of the premises No. 2654 W. 20th street, Chicago, for the period beginning November 5, 1913, and ending November 17, 1914, at the rate of \$65 per month; that said premises during all that time were owned by and the property of the plaintiff.

Defendant by its affidavit of merits denied that it was indebted to the plaintiff in the sum of \$780, or any other sum, but admitted being in possession of the premises from November 25, 1913, to November 17, 1914, under a lease dated June 11, 1913, from one Catherine Piekarz, who, the defendant claimed, was the owner of the premises. The defendant also denied that the premises were the property of the plaintiff during the period in question. The case was tried on January 21, 1915, without a jury, and judgment was entered in favor of the plaintiff for the sum of \$780 and costs.

The plaintiff offered in evidence a number of documents, one of which was a deed dated October 23, 1913,

executed by the bailiff of the Municipal Court, pursuant to a judgment obtained on May 1, 1912, against John Kieca and Katarzyna Kieca, conveying to the plaintiff (John Gulliksen) the premises in question. The plaintiff also offered in evidence a letter dated November 25, 1913, from the attorney of the plaintiff addressed to the defendant notifying it:

"That said Gulliksen is the owner of the property at 2654 W. 20th street now occupied by you under a lease from Katarzyna Kieca, and that as such owner the said Gulliksen claims the right of the premises from you and you are herewith notified and requested to pay all rents to said Gulliksen and that should you not comply with this request the said Gulliksen will hold you liable for use and occupancy of the premises."

The only other evidence offered by the plaintiff was the testimony of one Zillman, who stated that after sending the above letter he had a conversation over the telephone with the president of the defendant company; that the latter stated that the company was in possession of the premises under a written lease executed by Mrs. Kieca; that he, the witness, then told the president of the company that the plaintiff claimed the property under the bailiff's deed and that the plaintiff wanted the property and would hold the company liable for it; that the president of the company subsequently told him, the witness, that the company was paying \$65 a month for the property; that the company was still in possession and that since the notice above mentioned was served upon it, the company had paid its lessee, Mrs. Kieca, the rent due at the rate of \$65 per month.

The evidence was objected to by counsel for the defendant upon the ground that the action, being for use and occupation of the premises, the evidence was inadmissible, and further, that part of the evidence that pertained to the rent paid by the defendant was ob-

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jected to on the ground that it does not tend in any way to prove the rental value of the premises in an action for use and occupation. Counsel for the defendant then moved to strike out all the evidence offered by plaintiff and for a finding in favor of the defendant. Both of which motions were overruled.

The plaintiff was then called under section 33 of the Municipal Court Act (J. & A. ¶ 3345) by the defendant and testified that he did not get into possession of the premises in question and had no lease or any contract with the defendant and that the defendant never agreed to pay him anything for use and occupation; that he, himself, never made any demand for actual possession but that, through his attorney, he made a demand for rent.

The defendant offered in evidence a lease dated June 11, 1913, from Catherine Piekarz to the defendant of the premises in question for a term of five years from November 1, 1913, to October 30, 1918, at \$65 per month, and also offered in evidence testimony that the defendant was then in possession of the premises in question under said lease and that there was at that time pending in the Superior Court of Cook county, Illinois, in chancery, case number 38,418, a suit in equity brought by Katarzyna Kieca against Walter Gula, John Gulliksen and White Eagle Brewing Company to set aside as a cloud upon the title, on the ground of fraud, a deed from the bailiff of the Municipal Court of Chicago to John Gulliksen, which deed is the one hereinbefore mentioned. The defendant's evidence also showed that the defendant was in possession of the premises in question on the 11th day of June, 1913, and on November 26, 1914. The defendant contends that this is an action for use and occupation and that as there was no contract, express or implied, between the plaintiff and defendant, no recovery can be allowed. The defendant places great emphasis on

the case of *Fender v. Rogers*, 97 Ill. App. 280. In that case the title of the lessor did not appear, but the court says: "It does inferentially appear that her (lessor) possession (which preceded lessee's) was adverse and hostile to, and in no manner under or derived from appellant." There is obvious conflict in the statements of the law as they appear in many dicta in the cases that have to do with this subject; and the confusion seems to arise by reason of the fact that in some cases there is no question as to who has the title and therefore the right of possession, while, in others, the evidence does not sufficiently prove who has the title and therefore who has the right to possession. In the latter class of cases generally a suit for use and occupation will not lie while in the former it will. The *Fender* case (*supra*) and *Hill v. Coal Valley Min. Co.*, 103 Ill. App. 41, belong to the latter. In the instant case there is no evidence of an adverse or hostile title. The defendant makes the claim in his affidavit of merits and his argument; but as long as there is no evidence in support of that position, we must presume what the evidence proves, that is, the title to the premises since October 23, 1913, has been in the plaintiff. In fact in the brief of the defendant it is stated that, "The title of Mrs. Kieca was sold out by the bailiff of the Municipal Court in an action brought against Mrs. Kieca, the lessor of the Brewing Company." The case is therefore simplified and resolves itself into one wherein an owner of real estate, after notifying a party in possession, which possession is not based on a hostile or adverse title, to pay all future rent to him or to be held liable for use and occupation. This case may be considered as a simple suit by the owner against one in possession who was notified in season that he would be held liable for occupying and using the property. The plaintiff might have sued him in ejectment or forcible entry and detainer; he saw fit,

Slad v. Hajicek, 203 Ill. App. 396.

however, to rely upon the notice he gave and then sue him for the user. Such a cause of action was good at common law and that right has not been extinguished by the Landlord and Tenant Act. The defendant claims no defense save the technical one that such an action will not lie for use and occupation. We have been unable to find any such law. There are misleading dicta, but no apt decisions.

The defendant contends that the evidence as to the value of the use and occupation was incompetent and insufficient. We are of the opinion that the evidence was proper and, there being none in opposition, it was sufficient. *United States v. Whipple Hardware Co.*, 191 Fed. 945.

Finding no errors that justify a reversal, the judgment will be affirmed.

Affirmed.

**Marie Slad et al., by Marie Slad, Plaintiffs in Error, v.
Frank G. Hajicek, Defendant in Error.**

Gen. No. 21,608. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 7, 1917.

Statement of the Case.

Action by Marie Slad, Vaclav Slad, Frank Slad, Louis Slad, Mary Sykora, Emil Slad, Emily Slad, Charles Slad, and Anton Slad, Bessie Slad, Joseph Slad and Rosie Slad, minors, by Marie Slad, their next friend, plaintiffs, against Frank G. Hajicek, defendant, to recover for alleged conversion by defendant of moneys collected by him as agent for plaintiffs' de-

ceased ancestor prior to the latter's death. From a judgment dismissing the action at plaintiffs' cost, on demurrer to the declaration, plaintiffs bring error.

The declaration and bill of particulars set up that the defendant had been appointed administrator of the estate of Frank Slad, deceased, the husband of the plaintiff Marie Slad and father of the other plaintiffs, and that he had not inventoried as administrator any part of the sum alleged to have been collected by him as agent for the deceased and to have been retained for the purpose of investment for the benefit of the deceased.

CHARLES E. SELLECK, for plaintiffs in error.

JOSEPH Z. KLENHA, for defendant in error; HWASS & LUEBECK, of counsel.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Abstract of the Decision.

1. EXECUTORS AND ADMINISTRATORS, § 70*—*what constitutes part of personal estate of decedent.* Money collected by an agent and held by him for investment for his principal becomes on the principal's death a part of his personal estate and subject to administration by the Probate Court.

2. COURTS, § 104*—*when Probate Court has jurisdiction of action against administrator of estate collected as agent for decedent prior to latter's death.* Where a declaration filed against the administrator of an estate individually by the widow and heirs of the deceased charged him with converting funds of the deceased collected by him prior to the death of the decedent and held for investment for the decedent's benefit and which were not reported by him as administrator as assets of the estate, *held*, on demurrer that an action at law for such conversion would not lie, as the Probate Court had taken and retained jurisdiction and would have full power on proper petition to afford relief.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Muller v. Neumeister, 203 Ill. App. 398.

**Gustav Muller, Appellant, v. R. H. Neumeister,
Appellee.**

Gen. No. 21,631.

1. JUDGMENT, § 441*—*when note is not merged into.* A promissory note is not so merged into a judgment entered thereon as to preclude recovery in a subsequent action on the note aided by attachment where such judgment was vacated before plea filed in such suit.

2. BILLS AND NOTES, § 422*—*when note sued on in action aided by attachment and bearing indorsement of prior entry of judgment is admissible in evidence.* A note sued on in action aided by attachment bearing an indorsement thereon that judgment had theretofore been entered on such note is admissible in evidence in such attachment action under pleadings showing the entry of such judgment, notwithstanding the copy of the note set forth in the declaration does not contain such indorsement and although explanation of the presence of the notation is not first given.

Appeal from the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed February 7, 1917.

A. G. DICUS, for appellant.

WILLIAM A. ROGAN, for appellee.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an attachment suit commenced on January 31, 1913, in the County Court of Cook county by Muller against Neumeister on a judgment note dated July 18, 1908, for \$732.85 due six months after date. Nearly four years prior to the beginning of this suit, that is on March 24, 1909, Muller obtained judgment in the Municipal Court by confession for \$754.35 on the same note. That judgment was still outstanding at the time

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

of the institution of the present attachment suit. The declaration in the present case is on the common counts with an additional count on the note of July 18, 1908. The defendant pleaded nonassumpsit, and on November 22, 1913, two other pleas, the first of which was, in substance, as follows:

"That the plaintiff ought not to have his suit because on March 24, 1909, he impleaded defendant in the Municipal Court of Chicago for the non-performance of the same promises and on February 3, 1913, plaintiff came into that court and confessed that he would not further prosecute said suit but withdrew himself, therefore it was considered by the court that plaintiff should take nothing and that defendant should go hence without day as by the records appear, which judgment remains in force, etc."

and the second of which was, in substance, as follows:

"That plaintiff impleaded defendant in the Municipal Court for not performing the same promises; that plaintiff recovered judgment therein on March 29, 1909, for \$754.35, for his damages as by the record appears, which judgment remained in full force and effect at and after the commencement of suit, etc."

The plaintiff filed a replication and amended replication and a second amended replication. The first replication alleged that the judgment of March 24, 1909, had been set aside on February 3, 1913, on the motion of the defendant. The first amended replication alleged that the judgment of March 24, 1909, was not in force; that there was no such record; that on January 18, 1913, defendant entered his motion to vacate and set aside said judgment of March 24, 1909, which motion was continued from time to time until on February 3, 1913, the Municipal Court set aside and vacated the judgment of March 24, 1909, and dismissed said cause out of said court.

The second amended replication alleged that there was not on January 31, 1913, nor thereafter any record

of any supposed recovery or judgment such as is mentioned in defendant's pleas.

The court entered an order striking from the files the first amended replication and ordered the defendant to file a rejoinder to the second amended replication. The defendant filed a rejoinder setting up that the plaintiff ought not to have his action because on January 31, 1913, the Municipal Court granted a judgment against defendant upon the same promises for \$754.35, which judgment was in force at the time of the commencement of this suit.

The cause was tried by the court without a jury. Plaintiff offered in evidence a judgment note dated July 18, 1908, payable six months after date to Gustav Muller, or order, for the sum of \$732, which note was signed R. H. Neumeister.

Plaintiff in making the offer said that he confined it to the face of the note as originally made. Across the face of the note, as offered, there appeared the following words and figures:

"Judgment
For \$754.35 & Costs
Entered March 24, 1909
HOMER K. GALPIN."

The defendant objected on the ground that the note was merged in the judgment and that the copy of the instrument set forth in the declaration did not correspond with the note offered in evidence. The trial judge ruled that "the indorsement that judgment had been entered would preclude liability" and entered judgment for the defendant. Was the exclusion of the note with this indorsement upon it erroneous? While it is true that in many cases a document will not be received in evidence where there is indorsed upon it some statement which defeats the purpose for which it was offered, or renders it incompetent as evidence until the presence of the notation is first explained by the introduction of competent evidence, we do not think

the present case falls within that rule. An examination of the pleadings shows that it is alleged on behalf of the defendant that a judgment was entered against him in the Municipal Court on the same day as that indicated by the indorsement on the face of the note, and that an order of judgment was entered upon that date is expressly admitted by the plaintiff's amended replication, and impliedly by his second replication, and therefore no explanation in regard to the notation was required. It did devolve on plaintiff, however, to sustain the allegations made in his replications. If he offered evidence sustaining his second plea that there was no record of a judgment existing on January 31, 1913, either by reason of the fact that the judgment was void, if it was void, or for any other reason, that would have sustained his right of action on the note. But the question arises, and ought here to be answered, as to whether the first amended replication which sets out the vacation of the judgment on February 3, 1913, three days after this suit was started, was a good replication. The facts disclosed by the pleadings are as follows: The affidavit of attachment shows the nonresidence of the defendant and an indebtedness on the promissory note amounting to \$897.93; the declaration sets out the common counts and a special count on the note, and a copy of the note sued on; the defendant pleads that a judgment was entered in the Municipal Court prior to the bringing of this suit; the replication shows that a motion was made by the defendant to vacate that judgment before this attachment was sued out, and that the judgment was actually vacated three days thereafter. Defendant's contention is that the note was merged in the judgment, and that, in consequence, it could not be the basis of an attachment.

It is necessary for us first to consider what is meant when it is said that a cause of action is merged in a

judgment. Obviously nothing more is meant than that the court has considered a plaintiff's claim, and, after proper judicial proceedings, pronounced a judgment which invests the plaintiff with the right to enforce it by court process. The demand is the identical demand which the plaintiff had before, but it has taken on new attributes, and it cannot henceforth be pleaded except in its new form; in other words, as an adjudicated demand. It follows from this that if the judgment entered on the note is a valid judgment, the plaintiff, to be technically correct, should have declared upon the judgment, and a plea of former judgment on the notes was, in the absence of a replication, a good plea. Does a replication, which shows that at the time the plea was filed the judgment had already been vacated, show that the demand then stood in the identical form in which it was declared upon? We think that the analogy of a case where a prior suit was pending at the time suit is instituted is very persuasive. There, admittedly, the plaintiff had no right to maintain the second suit while the first suit was pending, but if the former suit is dismissed before plea, or even before trial, the second suit may be maintained. We think, moreover, that every dictate of reason is in favor of sustaining plaintiff's right to his attachment on the case made out by the declaration, plea and first replication.

The position taken by the defendant is based entirely upon a matter of form and is therefore technical. It cannot be claimed that at the time the attachment suit was begun there was not outstanding an obligation on the defendant towards the plaintiff. It is true that the evidence of that obligation had been temporarily changed from a promissory note to the record of the judgment, but at no time was the indebtedness of the defendant extinguished. Merger is not extinguishment. Counsel for the defendant likens this case

to one where the payee of a note sues the maker before the note is due. In the latter case, however, there does not exist at any time, until the note is due, an indebtedness to the payee; whereas, in the instant case, even though the plaintiff sued in attachment on the note and there was outstanding at that time a judgment on the note, there was in existence all the time a debt from the defendant to the plaintiff. The defendant does not deny that the plaintiff had a demand which entitled him to maintain his action, for a judgment may as well be the basis of attachment as the note, but the defendant claims that the evidence of that demand had been changed at the time he brought his suit. If, as stated in the replication, the plaintiff's demand had been restored to its original form, namely, a demand evidenced by a promissory note, it then became entirely consistent with the cause of action originally declared upon. We do not wish to intimate that a plaintiff may bring a suit when he has no rightful claim against the defendant, but only to hold that where, as here, there is outstanding, at the time of the institution of the proceeding, an obligation on the defendant, and the plaintiff in beginning his suit misconceives the evidence upon which it is based, he may be allowed, where such a change takes place in the interim, as to rectify the error as to the evidence, to proceed with his cause of action. We are, therefore, of the opinion that the replication, if sustained by evidence, would entitle the plaintiff to judgment, and that the fact that plaintiff's claim had been reduced to judgment at the time the attachment was sued out on the notes is sufficiently answered by the allegation in the replication that prior to the filing of the plea the judgment had been vacated. We think, moreover, that it would be extremely unfortunate if any technical rule were to compel a different holding in such a case, since the facts disclosed by the pleadings show an indebtedness due the plain-

Hodges Fiber Carpet Co. v. Hugro Mfg. Co., 203 Ill. App. 404.

tiff, and a ground entitling him to a judgment. If his right to maintain this attachment were to be denied by reason of the fact that the indebtedness had been changed from a judgment back to the form in which he had declared upon it, the result would unquestionably be to defeat the ends of justice. The judgment is, therefore, reversed and remanded to the Municipal Court for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

**Hodges Fiber Carpet Company, Defendant in Error, v.
Hugro Manufacturing Company, Plaintiff in
Error.**

Gen. No. 21,109. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed February 9, 1917.

Statement of the Case.

Action by Hodges Fiber Carpet Company, a corporation, plaintiff, against the Hugro Manufacturing Company, a corporation, defendant. From a judgment for plaintiff, defendant brings error.

WILLIAM D. JOHNSON, for plaintiff in error.

HERMAN S. WALDMAN, for defendant in error; MORRIS K. LEVINSON, of counsel.

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

Abstract of the Decision.

1. DEPOSITIONS, § 34*—*when will not be suppressed because of defect in notary's certificate.* The failure of a notary's certificate to depositions taken before him subsequent to the time set for taking same to show an adjournment is a mere irregularity which is not sufficient to warrant suppression of the depositions in the absence of evidence tending to show injury or surprise of one of the parties thereby.

2. DEPOSITIONS, § 35*—*when motion to suppress is too late.* Where depositions were returned promptly and notice of their taking given to the opposite party's attorney six months prior to trial, *held* that it was his duty to ascertain whether such depositions had been returned and to present a motion to suppress them before the case was called for trial, and it was then too late.

Globe Indemnity Company, Appellee, v. Jacob Kesner, Appellant.

Gen. No. 21,870.

1. INDEMNITY, § 1*—*what is nature of contract of.* A written obligation to indemnify a party in a certain amount on certain specified conditions has the characteristics of a bond.

2. INDEMNITY, § 21*—*what are not defenses to action on bond.* Failure of consideration or to execute another bond agreed to be executed are not defenses to an indemnity bond.

3. INDEMNITY—*when obligor of bond is estopped to deny recitals of bond.* Where the defendant had executed a bond reciting that the obligee had executed or agreed to execute a bond in a certain "penal sum" on appeal in a certain case and agreeing to indemnify the obligee as to any payment made by the obligee in consequence of having executed such appeal bond, *held*, in an action on such indemnifying bond, that the purport of such recitals in such bond was that the obligee therein had executed an instrument adequate to effect the appeal sought and defendant would be estopped from denying such recitals, whether the obligee executed a technical penal bond or not on such appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Globe Indemnity Co. v. Kesner, 203 Ill. App. 405.

4. DEBT, ACTION OF, § 17*—*when judgment is not reversibly erroneous.* A judgment for damages alone in an action in debt is irregular in form only and not reversible on that ground.

5. INTEREST, § 28*—*when rate of interest on foreign judgment is at rate fixed by domestic statutes.* Interest on a foreign judgment should be at the rate fixed by the domestic statute in the absence of competent proof of the foreign interest statute.

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and judgment here. Opinion filed February 9, 1917. Modified and refiled February 19, 1917. *Certiorari* denied by Supreme Court (making opinion final).

D'ANCONA & PFLAUM, for appellant.

ADAMS, CREWS, BOBB & WESCOTT, for appellee.

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

This action is founded on an indemnifying bond whereby appellant bound himself to pay appellee the sum of \$15,500 on certain conditions therein named. In that form it has all the characteristics of a bond. (*Chicago Sash Door & Blind Mfg. Co. v. Haven*, 195 Ill. 474.)

Following the paragraph containing the formal obligation the instrument reads:

"The condition of the foregoing obligation is such, that whereas, at the special instance and request of said obligors and on the security hereof, the company has executed, or agreed to execute, a bond in the penal sum of fifteen thousand five hundred dollars, to on appeal in re Margaret V. Hayes against J. L. Kesner Company dated the Twenty-Sixth day of November, 1912, conditioned for the payment of judgment and costs in the above.

"Now Therefore, if the above bounden Jacob L. Kesner shall and do pay annually in advance, the premium or charges of one hundred fifty five (\$155.00) Dollars, made by the Company for executing said bond

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

and continuing same, and shall hold and keep harmless the Company from and against any and all liability, loss, damages, costs, charges and expenses of whatever nature or kind which the Company shall or may at any time sustain, incur, or be put to, for, or by reason or in consequence of the Company having given and executed the said bond; also all costs and expenses which it may incur in investigating any claim made thereunder or in or about prosecuting or defending any action, suit or other proceedings which may be commenced or prosecuted against said Undertaking on Appeal or against the Company, upon the said bond or any wise in relation thereto; then this obligation to be void, otherwise it is to be and remain in full force and virtue.

(Signed) Jacob L. Kesner (Seal)"

Defendant pleaded failure of consideration, which was not proven and need not be considered, for it is no defense to a bond (*Haven* case, *supra*), and also failure "to execute a bond in the penal sum of \$15,500" on the appeal referred to in the instrument, which was practically the same defense. In fact there was no legal defense pleaded.

In conformity with undenied allegations of the statement of claim, plaintiff (appellee) made proof of the bond sued on, of the judgment of a New York Court for said Margaret V. Hayes against said J. L. Kesner Company, of the execution by plaintiff of an "undertaking on appeal" therefrom, of the dismissal of the appeal, of a suit and judgment against plaintiff on said undertaking, of the payment of \$14,656.14 in satisfaction thereof, of interest at six per cent. from date of payment, and of a due and unpaid premium for \$155, aggregating \$16,496.58, for which the court assessed plaintiff's damages, defendant offering no evidence.

The assigned errors relied upon go to the court's finding, the refusal to hold certain propositions of law,

admission of evidence, and the form of the judgment. All hinge on one fact—the undertaking referred to.

Appellant's point of law is that his liability on the bond sued on cannot be extended beyond express terms of his agreement. That is conceded. But his argument is predicated on considering the execution of a penal bond by plaintiff as a condition of the bond sued on. What is thus referred to as a "condition" of the bond is a mere recital in its "whereas" clause. The conditions thereof are stated in the following paragraph, and appellant's liability rests on his undisputed nonperformance of them. It is with the conditions to be performed by the obligor and not the obligee that this action is concerned.

When analyzed, appellant's only point is that proof of such undertaking on appeal, claimed by appellee to be authorized by the New York practice, is not proof of plaintiff's execution of a penal bond. As before stated, this seems to go merely to the question of failure of consideration, which could not properly be pleaded.

But regardless of whether plaintiff's agreement contemplated a technical "penal bond," or an "undertaking on appeal," as it is referred to in the quoted final paragraph, or whether by such reference the latter is not properly read as if incorporated in the indemnifying bond (5 Cyc. 757), especially as it was executed the same day and became a part of the same transaction, still the undisputed facts remain that appellant received the benefit of carrying up the *Hayes* case on appeal through plaintiff's execution of "said undertaking on appeal," and that plaintiff, in consequence of such undertaking, had to pay the judgment appealed from.

As we view it, the purport of the recitals in the bond sued on is that plaintiff executed an instrument adequate to effectuate the appeal sought, and appellant

is estopped from denying them. (*Arnott v. Friel*, 50 Ill. 174; *Courson v. Browning*, 78 Ill. 210; *Mix v. People*, 86 Ill. 329.)

It is difficult to see how this became an issue necessitating hearing evidence thereon, for the fact of the execution of an "undertaking on appeal" was pleaded and not denied, and the case does not come here on the sufficiency of the statement of claim to support a judgment.

In this view of the case it is unnecessary to inquire into the character of the instrument executed by plaintiff, or whether there was competent proof of the New York statutes authorizing it. It is enough, as the proof shows, and appellant admits, that the appeal sought was effected through an instrument executed by plaintiff in consequence of which it had to pay the judgment appealed from. It was to indemnify plaintiff against just such a consequence that appellant executed the bond here sued on, and, having failed to perform its conditions, he cannot escape liability thereon.

As the submitted and refused propositions of law required treating the above recital as a "condition" of the bond, they call for no additional comment.

A reversal is urged because the action is one of debt and the judgment should accordingly be in the usual form for the penalty, as the debt, to be discharged on payment of the damages. In *George J. Cooke Co. v. Burke*, 148 Ill. App. 155, this was treated as matter of form and not ground for reversal. Appellant urges it is matter of substance and cites *Frazier v. Laughlin*, 6 Ill. 347; *Freeman v. People*, 54 Ill. 153, and the *Haven* case, *supra*.

But as the interest on the judgment paid by appellee was computed at the rate of six per cent. as allowed by the statute of New York without competent proof of such statute, we should enter the judgment here

Devine v. Chicago City Ry. Co., 203 Ill. App. 410.

that should have been entered below, the case having been heard without a jury, and, in doing so, enter it in the usual form. Even if the rules of the Municipal Court are properly in the record, we do not think they authorize a different form of judgment there.

The judgment will be entered for the amount of the penalty, \$15,500 as a debt, to be discharged upon payment of the damages, assessed at \$17,479.25. This amount includes the amount of the Hayes judgment with interest at five per cent. from time of its payment and the unpaid premium of \$155 aforesaid. While the damages exceed the penalty, it is not and cannot be questioned that interest is recoverable in such case even though that be the result.

Reversed and judgment here.

John F. Devine, Administrator, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 21,938. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed with finding of fact. Opinion filed February 9, 1917.

Statement of the Case.

Action by John F. Devine, administrator of the estate of Hilda E. Hillman, deceased, plaintiff, against Chicago City Railway Company, defendant, to recover damages for the death of the deceased who was killed by defendant's street car. From a judgment for plaintiff, defendant appeals.

The deceased was struck down and killed in attempt-

ing to cross in front of a moving street car after passing behind another on a parallel track five feet away. The accident occurred at the intersection of three streets. The deceased was familiar with the locality. Immediately after a car started she walked from behind it to the other track and was struck and killed.

JOHN E. KEHOE and WATSON J. FERRY, for appellant.

RUSSELL M. WING and BERT WING, for appellee.

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

Abstract of the Decision.

1. STREET RAILROADS, § 111*—*when burden of proof is on plaintiff to prove exercise of ordinary care in action for negligent injuries.* In an action against a street railroad company to recover for personal injuries due to defendant's negligence, it is incumbent on the plaintiff to prove the exercise of ordinary care for his own safety and he cannot recover without making such proof irrespective of defendant's negligence.

2. STREET RAILROADS, § 98*—*when pedestrian passing from behind car over parallel track is guilty of contributory negligence.* It is negligence in fact for a pedestrian in passing from behind one street car that necessarily obstructs his vision of one approaching from an opposite direction on an adjacent parallel track to attempt to cross the latter track without first looking to see whether there is a car so approaching, when, in the ordinary course of affairs, one may be there.

3. STREET RAILROADS, § 133*—*when denial of motion for directed verdict in favor of defendant in action for death of pedestrian is erroneous.* In an action to recover for the death of plaintiff's intestate by being struck down and killed by defendant's street car, held that the evidence contained no direct proof that the deceased used ordinary care for her own safety and that the circumstances were not such as to supply it, and that the court erred in denying a motion for a directed verdict for defendant at close of plaintiff's case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Emerson v. Chicago City Ry. Co., 203 Ill. App. 412.

4. EVIDENCE, § 465*—*when positive testimony is stronger than negative testimony.* The negative testimony of witnesses that they heard no gong sounded is unavailing against the clear and positive testimony that the gong was sounded, in an action to recover for defendant's alleged negligence in the operation of its street car.

Gertrude L. Emerson, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 21,983. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLINTON F. IRWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed on remittitur; otherwise reversed and remanded. Opinion filed February 9, 1917.

Statement of the Case.

Action by Gertrude L. Emerson, plaintiff, against Chicago City Railway Company, defendant, to recover damages for injuries sustained by plaintiff while alighting from defendant's street car in which she was a passenger. From a judgment for plaintiff for \$5,000, defendant appeals.

The declaration charged negligence by defendant in starting the car while plaintiff was attempting to alight therefrom, and in permitting a metal strip on the rear step of the car to be in a loose and unsafe condition whereby the heel of plaintiff's shoe was caught under it, causing her to be thrown therefrom into the street.

JOHN E. KEHOE and CHARLES LE ROY BROWN, for appellant; JOHN R. GUILLIAMS, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

F. A. DENISON and JOHN L. McINERNEY, for appellee.

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

Abstract of the Decision.

1. CARRIERS, § 476*—*when evidence sufficient to show negligence in maintenance and operation of street car.* In an action to recover damages for injuries sustained while alighting from a street car, evidence *held* sufficient to sustain the findings of the jury both as to defendant's negligence in starting the car while plaintiff was attempting to alight therefrom and in permitting a metal strip on the step to be in a loose and unsafe condition.

2. EVIDENCE, § 108*—*when evidence of experiment is admissible.* In an action to recover damages for injuries sustained while alighting from a street car, where a witness testified that right after the accident he had put his heel on the step of the car to see if it would catch on the plate, as plaintiff claimed her injury had been caused, and that it did, *held* that such circumstance was not so dissimilar from plaintiff's as described as to make such evidence repugnant to the rule against allowing proof of experiments, and that the judgment would not be disturbed on account of the admission of such evidence.

3. DAMAGES, § 124*—*when verdict for personal injuries is excessive.* In an action by a woman to recover damages for personal injuries, where it appeared that her leg was fractured, that she suffered considerable pain and was laid up for six months, *held* that a verdict and judgment for \$5,000 should be reduced by \$1,000.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Augusta Lehmann et al., Appellees, v. City of Chicago,
Appellant.**

Gen. No. 22,041. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PETTIT, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 9, 1917. Rehearing denied February 19, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Augusta Lehmann, Emelie W. Peacock, Edward J. Lehmann, Augusta E. Spies, Otto W. Lehmann and Edith M. Behr, plaintiffs, against City of Chicago, defendant, to recover rent for certain premises for the months of March, April and May, 1911. From a judgment for plaintiffs, defendant appeals.

The defendant leased the premises from June 1, 1908, to June 1, 1910, with the privilege of renewal for another year provided defendant gave six months' notice. No notice was given, but in November, 1909, the defendant's agent had a talk with plaintiffs' agent as to extending the lease to March 1, 1911, and defendant claimed that they then so agreed, which plaintiffs denied. Possession was retained to March 1, 1911, and rent demanded and paid each month to December 1, 1910. Warrants were issued for the succeeding three months but not delivered, the comptroller not being "ready to pay."

SAMUEL A. ETTTELSON, for appellant; LEON HORNSTEIN, of counsel.

HENRY L. WALLACE, for appellees.

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

Abstract of the Decision.

1. LANDLORD AND TENANT, § 477*—*when notice by lessor's agent to quit at expiration of term does not affect character of tenure thereafter.* Where a lease expired by its terms at a certain date, a notice by the lessor's agent that possession of the premises would be expected to be surrendered at that date would have, if authorized, no legal effect or bearing upon the character of the lessee's tenure after expiration of the lease, if the landlord assented to the holding over.

2. LANDLORD AND TENANT, § 441*—*when evidence sufficient to show holding over under terms of lease.* Evidence held insufficient to show an oral agreement by lessor's agent to extend the lease to March 1, 1911, or his authority so to extend it, and sufficient to show a holding over on the terms of the lease without a new agreement, in an action to recover rent for such holding over.

3. LANDLORD AND TENANT, § 88*—*what does not constitute election by landlord to treat tenant as one from year to year.* Accepting payment of monthly rent after expiration of a lease according to its terms is an election by the landlord to treat the tenant as one from year to year.

4. LANDLORD AND TENANT, § 485*—*when notice to quit at expiration of term is waived.* A notice given a tenant to quit the premises at the expiration of his lease according to its terms is waived by the landlord demanding and receiving rent after such expiration of the lease.

5. LANDLORD AND TENANT, § 88*—*when city holding over is bound as tenant from year to year.* A city, lessee under an authorized lease, holding over after the expiration of the lease according to its terms without a new agreement is bound the same as a private individual to a tenancy from year to year.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The E. R. Stege Brewery v. Kostner, 203 Ill. App. 416.

The E. R. Stege Brewery, Appellee, v. Joseph O. Kostner, Appellant.

Gen. No. 23,020.

1. **VENDOR AND PURCHASER, § 160***—*when purchaser under contract of sale may procure equitable title.* Before a purchaser under a contract of sale has performed all of the conditions required of him by the contract he does not have even an equitable title to the property.

2. **ESTOPPEL, § 38***—*what are requisites of.* An estoppel must be reciprocal and binding on both parties.

3. **VENDOR AND PURCHASER**—*when purchaser of land is not estopped to claim right of possession as against tenant failing to exercise option of extending lease.* Where a lessee, under a lease giving him an option of extending the same upon giving notice on a certain date, told a prospective purchaser, prior to that date, under a contract of sale of the premises, that he intended to exercise such option, but he did not do so, and thereafter the premises were sold and were acquired by such purchaser, *held* that the purchaser was not estopped to claim the right of possession on a bill by the lessee to restrain the prosecution of a forcible detainer action for possession of the premises on expiration of the lease, nor was any right conferred on such lessee by reason of the lessee having so told the purchaser that he intended to exercise such option.

Interlocutory appeal from the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in the Branch Appellate Court. Reversed. Opinion filed February 9, 1917. Rehearing denied February 19, 1917.

MOSES, ROSENTHAL & KENNEDY, for appellant.

SIMEON STRAUS and IRA E. STRAUS, for appellee.

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

This is an appeal from an interlocutory order restraining appellant from prosecuting a forcible de-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tainer suit for possession of certain real estate and from attempting to assert in any way his claim that appellee's lease therefor expired September 30, 1916.

The order was entered on the bill of complaint, the answer and certain affidavits, and appellee attempts to justify it on the ground of equitable estoppel, but we find nothing in the facts averred and relied on that creates one.

The controlling facts, as admitted, are that appellee, the complainant, obtained a lease to the premises from the owner, the McGough estate, for a term beginning September 26, 1911, and terminating September 30, 1916, by the terms of which the lessee was given the option until March 1, 1916, of a five years' extension thereof; that complainant gave the lessor no notice of its purpose to exercise the option until March 7, 1916; that the lessor declined to regard the notice as a sufficient exercise of the option and conveyed the premises May 1, 1916, subject to said lease but without any special reservation of such privilege, to one Rothchild, who, on the same day, executed a ninety-nine year lease therefor to appellant, and later sold him the building thereon; that appellee continued to attorn to said lessor until July, 1916, after which it paid the rent to appellant.

On October 22, 1915, appellant entered into a contract with the lessor to purchase said premises, but never consummated it. The bill avers that prior to March 1, 1916, appellant informed complainant that he had such a contract and asked appellee's president whether it intended to exercise its option to extend the lease and was informed by him that it did so intend. It is mainly upon this particular circumstance that appellee predicates its claim of equitable estoppel. While the answer denies that anything was said between the parties with regard to the exercise of said option, and alleges that appellant merely undertook to

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negotiate for appellee's surrender of the premises before May 1, 1916, and is supported by the affidavits, the issues of fact thus raised are immaterial if the bill itself does not set forth facts that create an equitable estoppel.

The bill does not aver that complainant made an agreement of any kind with Kostner or relied on any promise, representation or act of his, fraudulent or otherwise, by reason of which it was misled or was induced not to give notice to the McGough estate before March 1, 1916, of its intention to exercise the option. The mere fact that when complainant learned that Kostner had a contract for the premises it informed him that it intended to exercise the option, created no estoppel against him, and conferred no right upon itself. It was bound to know that before a purchaser under a contract of sale has performed all of the conditions required of him by the contract he does not have even an equitable title to the property (*National Fire Ins. Co. of Hartford v. Three States Lumber Co.*, 217 Ill. 115; *Chappell v. McKnight*, 108 Ill. 570; *Walters v. Walters*, 132 Ill. 474); and that as its right to exercise such option was by virtue of its contract with the lessor, a notice to one who had neither a legal nor an equitable title to the premises and between whom and it there was no privity of contract or relationship, was wholly ineffective. There was nothing in this state of facts that excused complainant's failure to duly notify the lessor of its intention to avail itself of the option.

When, therefore, complainant's claim for equitable relief is reduced to a final analysis, it is not based on being misled or deceived by anything that Kostner said or did but rests solely on its own declaration to him that it intended to do something which in fact it never did and was not prevented by Kostner from doing, namely, exercise its option before March 1, 1916. An estoppel must be reciprocal and binding on both

parties. (*Siegel, Cooper & Co. v. Colby*, 176 Ill. 210.) Here there was no mutuality in anything said or done that is set forth in the bill, and nothing by way of false or fraudulent representation, or otherwise, on which complainant relied or had a right to rely. We fail to find in its averments any of the essential elements of an estoppel.

The restraining order must be reversed.

Order reversed.

**James L. Marino for use of Flavia Trucco, Executrix,
Plaintiff in Error, v. Antonio Parisi and Nicola
Monaco, Defendants in Error.**

Gen. No. 21,747. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1916. Reversed and judgment here. Opinion filed February 9, 1917.

Statement of the Case.

Garnishment proceeding by James L. Marino for use of Flavia Trucco, executrix under the last will and testament of Joseph Trucco, deceased, plaintiff, against Antonio Parisi and Nicola Monaco, defendants, based upon a judgment in favor of the executrix against Marino for \$277.50 and costs. From a judgment for defendants, plaintiff brings error.

ERNEST SAUNDERS and FRANK A. RAMSEY, for plaintiff in error.

No appearance for defendants in error.

Marino v. Parisi et al., 203 Ill. App. 419.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. GARNISHMENT, § 15*—*when cogarnishee furnishing funds to contractor may not be garnisheed.* In a garnishment proceeding against two defendants, where it was shown that one of such defendants had a contract with the other to furnish him the funds for constructing a certain building which the nominal plaintiff had contracted with the latter to construct for an agreed price, *held* that there was no claim or demand by the plaintiff against the cogarnishee furnishing the funds, so as to authorize garnishment.

2. MECHANICS' LIENS, § 62*—*when right of subcontractor to lien is waived by contractor.* Where a building contractor by his contract waives any and all liens for himself and all subcontractors, the latter have no enforceable lien.

3. GARNISHMENT, § 69*—*when garnishee paying debt after garnishment is wrongfully discharged.* Where the evidence showed that the garnishee had a building contract with the nominal plaintiff in the garnishee proceedings at the time of service of process and was indebted to such plaintiff and thereafter paid him a certain sum under such contract, *held* that it was error for the court to discharge such garnishee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Chicago & Riverdale Lumber Company, Appellee, v.
W. S. F. Tatum, trading as Tatum Lumber Com-
pany, Appellant.**

Gen. No. 21,894. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed February 9, 1917. Rehearing denied February 19, 1917.

Statement of the Case.

Action by Chicago & Riverdale Lumber Company, a corporation, plaintiff, against W. S. F. Tatum, trading as Tatum Lumber Company, defendant, to recover a balance claimed to be due on a sale of a quantity of millwork and material to be used in the construction of a dwelling house and of lumber and building material to be used in the construction of a garage. From a judgment for plaintiff for \$3,581.35, defendant appeals.

The parties executed two contracts, March 1, 1911, and July 3, 1911, in the State of Mississippi, relative to the material in question. The former contract consisted of the plaintiff's offer in writing to furnish for a specified sum the millwork and material described in a schedule attached to the writing to be used in constructing the dwelling house and for another specified sum the lumber and building material described in another schedule attached to the writing to be used in constructing the garage, and of defendant's acceptance in writing of such offer. The second contract referred to the former and to a controversy in regard to a portion of the work furnished and that this second contract was executed in order to make an amicable settlement of such controversy; and provided *inter alia* that the defendant should use such of the de-

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livered material as conformed to the plans, specifications and full-size details, that the plaintiff would replace and make good all such delivered material that did not so conform and any material damaged in shipping, and that plaintiff would so conform all future shipments of material; that should plaintiff not so conform all delivered material within fifteen days after notice, the defendant was authorized to replace or furnish same and charge the cost thereof to plaintiff, and to do the same as to all future material not so conforming within sixty days after the building was ready for measurement upon thirty days' written notice; and with bond by plaintiff for performance. Shipments, which had been stopped upon the controversy arising, were resumed after the second contract. Complaints continued that some of the material received did not conform to the measurements called for by the plans and specifications. Defendant was also a lumber dealer and shipped lumber to the plaintiff, receiving credit therefor and for defective millwork furnished by plaintiff and returned.

HERBERT A. SCHRYVER, for appellant.

ARCHIBALD CATTELL, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. BUILDING AND CONSTRUCTION CONTRACTS, § 1*—*what constitutes contract for furnishing building material.* Where an offer was made and accepted to furnish certain building material described in certain estimates and a schedule attached to the offer, but which made no reference to the plans and specifications for the building, although such plans and specifications were before the person making the offer when he prepared such estimates and schedule, *held*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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that the estimates and schedule were complete in themselves and constituted the contract of the parties.

2. EVIDENCE, § 322*—*when parol evidence is inadmissible to add to or vary terms of contract.* In an action by a person making an offer to furnish building material described in certain estimates and a schedule attached to the offer, but which made no reference to the plans and specifications for the building, to recover the price agreed to be paid under the contract, *held* that as the estimate and schedules constituted the contract, parol evidence to show that the plans and specifications were a part of the contract, that plaintiff had agreed to furnish all material called for by them, and that the contract was partly written and partly oral, was inadmissible.

3. ACCORD AND SATISFACTION—*when contract for furnishing building material is an accord and satisfaction as to damages arising under prior contract.* Where a controversy arose under a contract to furnish certain building material called for by estimates and schedule furnished as to certain of such material delivered not conforming to the plans and specifications for the building, which had not been made part of the contract, and a second contract was entered into by the parties as a settlement of such controversy and provided that material, delivered and to be delivered, should be made by the party furnishing such material to conform to the plans and specifications or upon his failure so to do after notice that the other party was authorized to so conform such material, *held* that the two contracts should be construed together and that the second contract was a complete accord and satisfaction for all damages accruing prior thereto.

4. SALES, § 364*—*when contract does not deprive buyer of right to recover damages for breach of contract.* Under a contract to furnish certain building material according to the plans and specifications for the building and providing that on the party agreeing to furnish such material failing so to furnish same the other party was authorized to purchase the material and charge same to the first party, *held* that such remedy of the other party was optional with him and did not deprive him of his common-law right to recover damages for a breach of the contract nor limit the first party's liability for such breach.

5. CUSTOMS AND USAGES, § 27*—*when evidence of custom is insufficient.* In an action to recover the value of material furnished, claimed to have been in part of scant dimensions, evidence *held* insufficient to show a custom permitting a lumber company to furnish material of scant dimensions so generally applicable or

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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recognized as to be admissible, or that defendant had knowledge of such a custom or presumably contracted with reference to it.

6. SALES, § 331*—*when instruction as to measure of damages in action to recover for value of millwork and material is erroneous.* In an action to recover for the value of certain millwork and material, an instruction that plaintiff was entitled to recover the fair market value of extras at the time and place they were furnished, *held* to be erroneous, as such instruction should have differentiated as to extras of the same general character as those specified in the contract, and should have stated that, as to those, recovery should be according to the contract price.

**Cedar Rapids & Iowa City Railway & Light Company,
Appellee, v. Sprague Electric Company, Appellant.**

Gen. No. 21,918.

1. DAMAGES, § 68*—*what is effect of not using reasonable diligence to mitigate.* The rule that a party may recover damages caused by defective construction of property presupposes that the injured party has used reasonable diligence to protect himself from avoidable consequences after discovery of the defect, and his damages are therefore limited to such expenses as he could not have avoided by the exercise of reasonable care.

2. DAMAGES, § 68*—*when buyer may not recover damages resulting from use of warranted article known to be defective.* Where a warranted article proves defective and the danger of its continued usage becomes obvious to the buyer of such article, who knowingly continues to use it without remedying the defect, he does so at his peril, and he cannot, in an action against the seller for breach of warranty, recover for such damages as result of such negligent conduct on his part.

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed. Opinion filed February 9, 1917.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cedar Rapids & I. C. Ry. & L. Co. v. Sprague E. Co., 203 Ill. App. 424.

CUMMINS, ROEMER, MILKEWITCH & MCKENNA, for appellant; ELIJAH N. ZOLINE, of counsel.

MOSES, ROSENTHAL & KENNEDY, for appellee; HENRY H. KENNEDY and S. SIDNEY STEIN, of counsel.

MR. JUSTICE McDONALD delivered the opinion of the court.

Appellee, the Cedar Rapids & Iowa City Railway & Light Company (plaintiff below) recovered a judgment on a directed verdict against the defendant, the Sprague Electric Company, for the sum of \$6,717.40, to reverse which this appeal has been prosecuted.

Plaintiff's action is predicated on a contract of warranty, by the terms of which defendant agreed to furnish and erect for the plaintiff at its plant in Cedar Rapids, Iowa, a monorail electric shovel and runway, to be used by the latter to convey coal to its power plant. This carrying device was operated on an overhead monorail mounted on a steel structure about thirty feet high and seven hundred feet long. This structure, also referred to as a runway, was supported on each side by a row of perpendicular columns, connected on top by transverse beams, all joined and braced so as to form a continuous structure.

The overhead monorail consisted of a series of adjoining I-beams placed midway between the steel columns, and extended the full length of the structure. The beams comprising the monorail or runway beam were fastened underneath the transverse beams above, and were secured thereto by means of iron brackets or lugs. These brackets were riveted to the bottom of the upper flange of the runway beam and to the transverse beams above, and were so secured that the weight of the conveyor as it passed over the runway beam was upon the brackets and not directly upon the rivets which held them in place.

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At one point on the runway, however, the lug or bracket was omitted, the runway beam or monorail being secured directly to the crossbeam above by means of four three-fourths inch rivets, two on each side of the beam, placed in holes drilled through the upper flange of the runway beam, so that when the conveyor passed this point its weight was directly upon these four rivets. The section of the monorail so fastened at one end is identified in the record as beam "B-20."

The conveyor was electrically propelled, and, when in operation, traveled along the lower flanges of the I-beams comprising the monorail. The operator's place was in a small inclosure, or "cage," suspended from the monorail.

After the conveyor had been in operation about eight months, the riveted end of the said beam B-20 gave way under the weight of the conveyor as it passed that point, precipitating it to the ground and causing the almost instant death of the operator, one Duncan, who was an employee of the plaintiff.

Subsequently the legal representative of the said Duncan sued plaintiff in the Iowa courts for wrongfully causing his death, and recovered a judgment for \$6,161.40 and costs, which amount plaintiff now seeks to recover over from defendant, on an alleged breach of the following warranty contained in the contract under which defendant constructed the said tramway apparatus and equipment:

"The company (defendant) guarantees the apparatus and equipment, covered by this agreement, to be free from imperfections in their manufacture for a period of one year from date of invoice. Should any such defects appear within that time traceable to above causes, the company will repair or replace such defective parts, if an inspection proves the claim. This guarantee also covers the runway beam against

rolling, curling or buckling, due to operation of monorail on its lower flange.”

It appears from the evidence that, shortly after the plaintiff began to operate the conveyor, one of the rivet heads sheared off and fell to the ground, when the conveyor passed the point at which beam B-20 was riveted to the crossbeam above, and after an inspection thereof by plaintiff's employees the rivet was replaced. Thereafter, the rivets continued to shear at this point—sometimes one and sometimes two at a time—and plaintiff continued to operate the conveyor, after replacing them. After the conveyor had been in operation for about six weeks, plaintiff substituted three-fourths inch bolts for the rivets. However, these too proved inadequate, for the weight of the conveyor caused the bolts to break or shear from time to time, as had the rivets.

No complaint was ever made by plaintiff to the defendant, regarding any defect in the construction of the tramway. Some difficulty was experienced with the electrical apparatus in the conveyor, and defendant's electrician, one Rowlands, was sent to Cedar Rapids to make some changes in the motor. On this occasion Duncan informed Rowlands of the insecure beam fastening; that the rivets and bolts had sheared, and that they came near having a serious accident a few days before; that he (Duncan) had noticed a severe jar as the conveyor passed that point, and that upon investigation he discovered that two of the bolts supporting the monorail had broken off. This took place shortly after the substitution by plaintiff of bolts for rivets.

The evidence further shows that Rowlands then took the matter up with one Ford, who was plaintiff's chief engineer and whose duty it was, *inter alia*, to look after the condition of the runway beam, i. e., the monorail, and informed him that it was dangerous to oper-

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ate the conveyor over it in that condition; whereupon Ford stated that he was well aware of the necessity of a bracket at this point, and referred Rowlands to his (Ford's) immediate superior, one Martin, who was the assistant superintendent of the plant, for permission to make the bracket. Rowlands further testified that he immediately went to the said Martin and told him substantially what he had already stated to Ford, and asked Martin to authorize the making of such a bracket; that Martin said he would have it attended to; that subsequently he (Rowlands) went back to Ford and discussed with him the manner in which the bracket should be made and put up.

The evidence also shows that at the time in question plaintiff's superintendent, one Green, was out of the city, and that the said Martin was in charge of the plant during Green's absence; that the said Ford took the matter up with Green upon the latter's return, but that Green refused to issue an order to make the bracket and stated it was "up to the Sprague Electric Company to fix that."

Rowlands further testified that at the time in question he made a written report of the matter to the defendant, wherein he stated the situation, and that he had arranged to have plaintiff make a bracket; that he sent one copy thereof to defendant's Chicago and the other to its New York office.

The testimony of Ford was, substantially, a corroboration of Rowlands' testimony, and also showed that the cost of making the bracket in question would have been approximately \$6, and that plaintiff had facilities for making it.

Pursuant to Green's direction, no bracket was made, and plaintiff continued to operate the apparatus in its then condition until the date of the accident, without notifying defendant that it had in the meantime decided not to make the necessary change, or that it was relying upon the defendant to do so.

Defendant contends that upon this state of the record plaintiff cannot recover over for the accident in question.

From the foregoing it clearly appears that, prior to the fatal accident, plaintiff had knowledge of the inadequacy of the fastening of the beam at the point in question, and fully realized the danger of operating the conveyor while in such condition; that, notwithstanding this knowledge on its part, it continued to operate the conveyor without making the necessary changes itself or notifying defendant to do so under its contract of warranty.

The rule, that a party may recover damages caused by defective construction of property, presupposes that the injured party has used reasonable diligence to protect himself from avoidable consequences, after discovery of the defect, and his damages are therefore limited to such expenses as he could not have avoided by the exercise of reasonable care. 13 Cyc. 76; Sedgwick on Damages (8th Ed.), vol. 1, p. 295, and cases there cited.

It is undisputed that the apparatus furnished by defendant was defective in the foregoing respect, and therefore unsafe. Plaintiff knew that if the runway beam gave way while the cage was passing the riveted end of beam B-20, serious consequences would follow; and plaintiff was fully aware that by supporting the said beam with an iron bracket, in place of rivets or bolts, the danger would have been obviated. Its assistant superintendent had already agreed to make the necessary alteration. Yet, in the face of this situation, plaintiff's superintendent (Green), upon his return to the city, concluded not to make the bracket, and stated that he would look to defendant to remedy this defect, but without giving defendant notice thereof.

While the purchaser of a warranted article may rely upon his warranty and recover damages for a breach

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thereof, yet where such warranted article proves defective and the danger of its continued usage becomes obvious to the purchaser, who knowingly continues to use it without remedying the defect, he does so at his peril, and he cannot, in an action against the vendor for breach of warranty, recover for such damages as result from such negligent conduct on his part. (*Merriam Chemical Co. v. American Tool & Machine Co.*, 192 Mass. 206, 78 N. E. 419; *Razey v. J. B. Colt Co.*, 106 N. Y. App. Div. 103, 94 N. Y. Supp. 59; *Uhlig v. Barnum*, 43 Neb. 584, 61 N. W. 749.) To hold otherwise would be to construe the contract of warranty as one of insurance.

Plaintiff makes the point that its assistant superintendent, Martin, had no authority to agree to make the bracket in question. From an examination of the evidence, we are of a contrary opinion, for it is clear that, when this agreement was made, Martin was in charge of plaintiff's plant; that Green was out of the city at the time, and that on such occasions Martin had full authority to act in Green's stead.

Plaintiff had, from the very beginning, replaced sheared rivets without ever notifying defendant, and had afterwards substituted bolts for the rivets, also without defendant's knowledge. When these too proved inadequate, and Rowland's attention was directed to their insufficiency while in Cedar Rapids, he immediately took the matter up with the man then in charge of the plant (Martin), explaining to him the urgency of supporting the runway beam with a bracket in place of rivets or bolts, and Martin assured him it would be attended to. Having consented to this arrangement, it was incumbent upon plaintiff to either carry it out or at least notify defendant that it had decided to annul it, and that it would require defendant to fulfil its warranty.

But even in the absence of any such agreement, it

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was plaintiff's imperative duty, upon discovery of the infirmity in the beam fastening, to either make the necessary alteration—the expense of which would have been trifling—or to notify defendant to do so, in the meantime discontinuing the use of the conveyor in its unsafe condition. In any view of the case, there can be no escape from the conclusion that plaintiff was flagrantly careless in this regard, and that its negligent conduct was the proximate cause of the fatal accident. Manifestly, therefore, the court erred in directing a verdict for the plaintiff in the sum of \$6,717.40, and in refusing to direct a verdict for the defendant. Accordingly, the judgment will be reversed.

Reversed.

Wood Street Planing Mill Company, Appellant, v. Industrial Board of Illinois et al., Appellees.

Gen. No. 21,941. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. HARRY C. MORAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 9, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Petition by Wood Street Planing Mill Company, petitioner, against J. B. Vaughn, Peter J. Angsten and Robert Eadie, Industrial Board of Illinois, for a writ of certiorari to review proceedings before that Board under the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475(1) *et seq.*], wherein an award

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of \$3,500 was made as compensation for the death of one Charles Brichacek. From a judgment quashing the writ of certiorari and dismissing the petition, petitioner appeals.

JOHN A. BLOOMINGSTON, for appellant.

DAVID K. TONE, for appellees.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. WORKMEN'S COMPENSATION ACT, § 13*—*when findings of Industrial Board will not be disturbed.* Where the evidence before the Industrial Board upon which an award was based was conflicting as to whether the deceased was engaged in the course of his employment when he was killed, but was sufficient from which to reasonably infer that he was then so employed, *held*, on a petition for a writ of certiorari to review such award, that as the statute has conferred on said Board the sole right to pass upon questions of fact and the credibility of witnesses, the Appellate Court was powerless to disturb its findings, notwithstanding the Board attached undue weight to suspicious circumstances.

2. WORKMEN'S COMPENSATION ACT, § 12*—*when evidence is sufficient to show that employee was killed while engaged in the course of his employment.* In proceedings before the Industrial Board under the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, § 5475(1) *et seq.*], to recover compensation for the death of an employee, evidence *held* sufficient from which to reasonably infer that the deceased was when killed engaged in the course of his employment while operating a rip saw in his employer's planing mill.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. La Salle Street T. & S. Bk., 203 Ill. App. 433.

The People of the State of Illinois ex rel. James J. Brady, Auditor of Public Accounts, Appellee, v. La Salle Street Trust & Savings Bank et al. In re Intervening Petition of Wexford Company, Appellant.

Gen. No. 21,954. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 9, 1917. Rehearing denied February 19, 1917.

Statement of the Case.

Bill by the People of the State of Illinois *ex rel.* James J. Brady, as auditor of public accounts, complainant, against La Salle Street Trust & Savings Bank and others, defendants, Wexford Company, a corporation, intervener, to dissolve the La Salle Street Trust & Savings Bank and for appointment of a receiver therefor. From an order dismissing the intervening petition, the petitioner appeals.

JOHN M. DUFFY, for Wexford Company.

HIRAM T. GILBERT and CHARLES LE ROY BROWN, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

EQUITY, § 110*—*when petition for intervention is properly dismissed.* Where a party petitioning to intervene in a suit failed on the hearing of his petition to present any evidence in support thereof or to apply for a continuance for the purpose of procuring the testimony of a witness stated by him to be material, then absent from the city, *held* that there was no error in dismissing such petition.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same title and section number.

White Oak Coal Co. v. Burns et al., 203 Ill. App. 434.

White Oak Coal Company, Appellee, v. William Foster Burns and Mrs. Mary F. Burns, Appellants.

Gen. No. 21,968. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. ANDREW D. WEBB, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed February 9, 1917.

Statement of the Case.

Action in assumpsit by White Oak Coal Company, a corporation, plaintiff, against William Foster Burns and Mary F. Burns, defendants. From a judgment for plaintiff, defendants appeal.

GEORGE F. ORT, for appellants.

ADAMS, CREWS, BOBB & WESCOTT, for appellee;
GEORGE B. MCKIBBIN, of counsel.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1165*—*what remains for review after striking bill of exceptions from record.* Where a bill of exceptions is stricken from the record there remains for consideration only such points as the common-law record presents for review.

2. APPEARANCE, § 8*—*when party is not properly before court.* Where one of two joint defendants was not served nor his appearance entered except as agent for his codefendant, held that such defendant was not properly before the court, and that no valid judgment could be entered against him, notwithstanding an order denying a motion to file an additional plea recited that the motion was made by "defendants," as the word "defendants" included only those defendants who had been served or entered appearance.

3. JUDGMENT, § 199*—*when void as to all joint defendants.* Where defendants are sued jointly, a judgment which is void as to one is void as to all.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

John Pflester, Appellee, v. Western Union Telegraph Company, Appellant.

Gen. No. 22,057.

1. TELEGRAPHS AND TELEPHONES, § 31*—*when evidence as to damages is inadmissible as being too speculative.* In an action to recover damages for failure to deliver a telegram offering to pay the plaintiff a certain salary, *held* that the plaintiff's testimony that had the telegram been delivered he would have accepted such offer was too speculative and conjectural to form the basis of a judgment for damages, and was inadmissible.

2. TELEGRAPHS AND TELEPHONES, § 37*—*when evidence is insufficient to show that sender would have accepted offer of employment if telegram had been promptly delivered.* In an action to recover damages because of failure so to deliver the telegram, evidence *held* insufficient to support plaintiff's contention that he would have accepted a certain telegraphic offer of employment had the telegram been delivered in due time.

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed. Opinion filed February 9, 1917.

WEST & ECKHART, for appellant.

GEORGE P. MERRICK, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

John Pflester, plaintiff below, recovered a judgment for \$2,000 against appellant, the Western Union Telegraph Company, for failure to deliver to him a certain telegram.

Plaintiff was a professional baseball player, employed by the Chicago League Ball Club. On May 3, 1912, he was notified by letter that his services were no longer required by that club, and that they had been

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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released to the Milwaukee club of the American Association, and directed that plaintiff report to the latter club at once for duty. Upon receipt thereof, plaintiff went to the Chicago office of the defendant company and sent the following telegram to the Milwaukee club:

"Chicago, Ill., May 3, 1912.

"Mr. H. Duffy,
Ball Park,
Milwaukee, Wis.

"Will pitch for you at three thousand per season.

JACK PFLESTER,
4525 Washington Blvd.,
Chicago, Ill.";

to which the Milwaukee Club replied as follows:

"Milwaukee, Wis., May 3, 1912.

"Jack Pflester,
4525 Washington Blvd.,
Chicago, Ill.

Will give you three hundred per month.

HUGH DUFFY."

Defendant, in transmitting the latter message to Chicago, erroneously gave plaintiff's address as 4526 Washington Boulevard, and owing to this error the said telegram was not delivered.

It appears from plaintiff's testimony that on May 14, 1912, he inquired at the Chicago office of the defendant regarding the telegram from the Milwaukee club which he was expecting, and was informed that a telegram had been sent him from Milwaukee which, however, had not been delivered, and that plaintiff might see a copy thereof at the Cincinnati office of the defendant. Why this telegram was sent to the Cincinnati office is not disclosed by the record. It further appears from plaintiff's testimony that on the following day (May 15th) he went to Cincinnati to interview the president of the National Commission of organized baseball, and, that while there, called at the office of

defendant, where he was shown a copy of the telegram in question.

It will be seen, by reference to the undelivered telegram hereinabove quoted, that the Milwaukee club rejected plaintiff's offer to pitch "at three thousand per season," and made a counter proposition to pay him three hundred dollars per month, which would have amounted to considerably less than the figure named in plaintiff's telegram. It was plaintiff's contention that he would have accepted this counter offer had he received it, and, over objection, he was permitted so to testify. His claim for damages rests entirely upon such contention, and without such testimony on his part there was no proof of any damage.

While the admissibility of evidence of this character has never been directly passed upon by our Supreme Court, yet both reason and the weight of authority reject it as being too speculative and conjectural to form the basis of a judgment for damages. It was plaintiff's mere conclusion, based on a condition which did not exist at the time, and arrived at in the light of events which had subsequently transpired. The evidence was therefore inadmissible. *Smith v. Western U. Tel. Co.*, 154 Ill. App. 499; *Tully v. Western U. Tel. Co.*, 141 Ill. App. 312; *Western U. Tel. Co. v. Ferguson*, 157 Ind. 64.

But plaintiff's testimony in this regard is refuted by his own admitted conduct, for the evidence shows that, even after having learned on May 15th of the offer in question, he made no effort to act thereon until several weeks later. The notice of May 3rd from the Chicago club expressly stated that the manager of the Milwaukee club desired him to report for duty at once. With this notice was inclosed a check to cover plaintiff's railroad fare to Milwaukee. The baseball season was already under way at this time, and the Milwaukee

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club had contracted with the Chicago club for plaintiff's services for the season. Plaintiff entered into telegraphic negotiations with the Milwaukee club on the very day he received notice of his release by the Chicago club. There can be no question that plaintiff realized the necessity for prompt action. Nevertheless, he waited from May 15th until sometime in June before acting upon the offer in question. Such conduct does not comport with plaintiff's assertion that he would have accepted said offer had he received the telegram in due time. On the contrary, it bespeaks the utmost indifference to the situation, and can be reconciled only with the theory that plaintiff for the first time gave serious consideration to the offer of the Milwaukee club when he reported there in June. His own evidence, therefore, tended to show that he would not have accepted the offer in question on May 3rd, had he received the telegram, conveying it, in due time. On this state of the record, it is obvious that the trial court erred in denying defendant's motion for a directed verdict. Hence, the judgment will be reversed.

Reversed.

Kittler v. Chicago & Western Indiana R. Co., 203 Ill. App. 439.

Mary Kittler, Administratrix, Appellee, v. Chicago & Western Indiana Railroad Company, Appellant.

Gen. No. 21,803. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 9, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Mary Kittler, as administratrix of the estate of Charles P. Kittler, deceased, plaintiff, against Chicago & Western Indiana Railroad Company, Chesapeake & Ohio Railway Company of Indiana and Chicago City Railway Company, defendants, to recover damages for alleged wrongful killing of the deceased. From a verdict and judgment against the Chicago & Western Indiana Railroad Company and assessing damages of plaintiff at \$10,000, and finding the other defendants not guilty, said company appeals.

WORTH E. CAYLOB, for appellant.

JAMES C. McSHANE, for appellee.

MR. JUSTICE McGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 48*—*when is proximate cause of injury.* Negligence may be the proximate cause of an injury of which it is not the sole cause, and if one party's negligence concurred with some other event, other than the fault of the injured party, to produce the injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kittler v. Chicago & Western Indiana R. Co., 203 Ill. App. 439.

closely connected with the injury in the order of events, such party is responsible, even though his negligent act was not the nearest cause in order of time.

2. RAILROADS, § 738*—*when evidence is sufficient to sustain finding that street car motorman is not guilty of contributory negligence.* In an action to recover damages because of the death of a street car motorman who was killed after he had started his car forward across an intersecting track upon a signal from his conductor and after the railroad gates were raised, evidence held sufficient to warrant the finding of the jury that the deceased was not contributorily negligent.

3. NEGLIGENCE, § 74*—*when no duty exists to anticipate.* Anticipation of negligence in another is not a duty which the law imposes.

4. RAILROADS, § 625*—*what constitutes implied invitation by gateman for street car motorman to cross tracks.* When a railroad gateman raises his gates it is an implied invitation from him to a waiting motorman on a street car on an intersecting track to proceed to cross the railroad tracks.

5. WORKMEN'S COMPENSATION ACT, § 12*—*when refusal of instruction as to unavailability of defenses of assumed risk, etc. is not reversible error.* In an action against three defendants to recover damages for alleged wrongful killing, held not reversible error to refuse an instruction requested by one defendant that the defenses of assumed risk, fellow-servant and contributory negligence were not available to a codefendant, the employer, found not guilty, because it had elected not to come under the Workmen's Compensation Act, where there was nothing in the record intimating that such defenses were not available as to such codefendant who alone was found guilty.

6. JUDGMENT, § 217*—*when refusal of motion in arrest of judgment is not error.* The mere fact that the declaration in an action to recover damages because of death contains in each count two separate causes of action, one against one defendant under the Workmen's Compensation Act and one against another defendant under the Death by Wrongful Act Statute, does not make the refusal of motion in arrest of a judgment against the latter defendant alone erroneous.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sarah Levitan, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 21,888. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed February 9, 1917.

Statement of the Case.

Action by Sarah Levitan, plaintiff, against Chicago City Railway Company, Chesapeake & Ohio Railroad Company, Chicago & Western Indiana Railroad Company and Calumet & South Chicago Railway Company, defendants, to recover damages for injuries sustained in a collision between a street car and a train of the Chesapeake & Ohio Railroad Company at a grade crossing. The action was dismissed as to the Chesapeake & Ohio Railroad Company and a verdict of not guilty was rendered as to the Calumet & South Chicago Railway Company. From a verdict of guilty and judgment against the remaining defendant and assessment of damages at \$10,000, the Chicago City Railway Company appeals.

It was urged by defendant that the trial court erred in giving the following instruction:

"The plaintiff is not bound to prove her case beyond a reasonable doubt, but is only bound to prove it by the preponderance of the evidence. The court instructs the jury that while, as a matter of law, the burden of proof is upon the plaintiff, and it is for her to prove her case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in her favor, although but slightly, it would be sufficient for the jury to find the issues in her favor."

Levitan v. Chicago City Ry. Co., 203 Ill. App. 441.

It was also urged that the court erred in giving the following instruction as to the measure of damages:

"If from the evidence and under the instructions of the court the jury find for the plaintiff then the jury will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should take into consideration all the facts and circumstances as shown by the evidence before them, the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence to be the direct result of the alleged accident, her suffering, if any, resulting from such physical injuries, if any, and such future suffering, if any, as the jury may believe from the evidence she has sustained or will sustain by reason of such injuries; her loss of time and inability to work, if any, on account of such injuries, and the jury may find for her such sum as they believe from the evidence and under the instructions of the court will be fair compensation for such injuries, if any, so far as such damages and injuries, if any, are alleged in the declaration and proved on the trial, and it is not necessary that any witness should express an opinion as to the amount of such damages."

This case arose out of the same occurrence as the case of *Kittier v. Chicago & W. I. R. Co.*, *ante*, p. 439.

FRANKLIN B. HUSSEY and CHARLES LE ROY BROWN, for appellant; JOHN R. GUILLIAMS, of counsel.

EDWARD J. GREEN and A. H. RANES, for appellee; HARRY F. BREWER, of counsel.

MR. JUSTICE McGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. INSTRUCTIONS, § 87*—*when instruction on preponderance of evidence is not erroneous.* In an action to recover damages for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Levitan v. Chicago City Ry. Co., 203 Ill. App. 441.

personal injuries, an instruction that the burden is upon the plaintiff to prove his case by a preponderance of the evidence and that if the jury find the evidence bearing on "plaintiff's case" preponderates in his favor even slightly it would be sufficient to find the issues in his favor, *held* not objectionable as leaving the jury to determine what constitutes "plaintiff's case," regardless of whether that case was alleged in the declaration or not.

2. DAMAGES, § 207*—*when instruction as to manner of arriving at verdict is erroneous.* In an action to recover damages for personal injuries, an instruction as to measure of damages which instructed the jury to consider "all of the facts and circumstances as shown by the evidence," *held* objectionable, and the giving of same reversible error where the damages found were very high and apparently excessive.

3. DAMAGES, § 24*—*what is measure of for loss of time because of injuries.* In an action to recover damages for personal injuries, the extent of recovery for loss of time on account of the injuries would be the value of the person's services in the conduct of the business then engaged in.

4. DAMAGES, § 207*—*when instruction as to non-necessity of any witness expressing an opinion as to the amount of, is erroneous.* In an action to recover damages for personal injuries, in the absence of specific evidence as to the value of services during the time lost due to disability, it is misleading and prejudicial to instruct the jury that it is not necessary "that any witness should express an opinion as to the amount of such damages."

5. INSTRUCTIONS—*when instruction directing a verdict is erroneous.* An instruction which directs a verdict as to one defendant but prefaces same with conditions as to a codefendant having no connection with the directed verdict is objectionable.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Levitan v. Chicago & Western Indiana R. Co., 203 Ill. App. 444.

Sarah Levitan, Appellee, v. Chicago & Western Indiana Railroad Company, Appellant.

Gen. No. 21,899. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed February 9, 1917.

Statement of the Case.

Action by Sarah Levitan, plaintiff, against Chicago & Western Indiana Railroad Company and Chicago City Railway Company, defendants, to recover damages for personal injuries. Case was consolidated for hearing with the case of *Levitan v. Chicago City Ry. Co.*, ante, p. 441.

WORTH E. CAYLOB, for appellant.

EDWARD J. GREEN and A. H. RANES, for appellee;
HARRY F. BREWER, of counsel.

MR. JUSTICE McGOORTY delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1803*—*when case reversed and remanded for new trial.* Where one of two consolidated cases is reversed and remanded for new trial, the same action must be taken regarding the other case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

J. L. Holmes, Appellee, v. City of Chicago, Appellant.**Gen. No. 21,957.**

1. MUNICIPAL CORPORATIONS, § 799*—*when want of power of city to employ person to do work on extension of waterworks system must be pleaded.* Where the commissioner of public works of a city having statutory authority to construct and maintain a waterworks system employed a party to perform certain work in the extension of a part of such system but without first complying with an ordinance of the city requiring prepayment by property owners or persons desiring the extension of the cost thereof, *held* in an action to recover for such work done and accepted by the city, to which the general issue only was pleaded, that such employment was within the general scope of the city's authority and not *ultra vires*, and that the obligation could only be avoided, on account of the city's want of power, by plea and proof.

2. MUNICIPAL CORPORATIONS, § 799*—*what capacity city acts in constructing and operating waterworks.* When a municipal corporation undertakes to construct and operate waterworks it does so in the exercise of its private and not its governmental functions.

3. ESTOPPEL, § 55*—*when city is estopped to deny validity of contract of employment on waterworks system.* Where a city constructing and operating its own waterworks accepts the benefit of work done at its request in laying water pipes and extending its waterworks system, it is estopped from denying the validity of its contract of employment for such work.

4. MUNICIPAL CORPORATIONS, § 1219*—*when party doing work for city may recover on quantum meruit for his services.* A party performing work for a city, at its request, upon the waterworks system constructed and operated by it may recover therefor on the basis of a *quantum meruit* for the fair value of the work accepted by the city, in the absence of a contract between the parties.

5. LIMITATION OF ACTIONS, § 121*—*when defense of statute may not be raised.* A defense of the statute of limitations cannot be raised for the first time on appeal.

Appeal from the Superior Court of Cook county; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 9, 1917.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Holmes v. City of Chicago, 203 Ill. App. 445.

SAMUEL A. ETTETSON and RICHARD S. FOLSOM, for appellant.

HIRSCH & SCHWARTZ, for appellee; ULYSSES S. SCHWARTZ, of counsel.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

The City of Chicago seeks to reverse a judgment of \$7,570.75, rendered against it for work performed in 1893 by James O'Laughlin, under the supervision and at the request of its commissioner of public works. This work, consisting of blasting rock for a trench in which to lay water pipe, was accepted by the city, and such trench was thereupon and has continued to be used by the city for that purpose. There was then in force and effect an ordinance of the City of Chicago, which so far as material is as follows: "The commissioner of public works shall extend the water main only where the owners of property or persons desiring such extensions shall advance and pay into the city treasury a sum of money equal to the entire cost thereof, * * * to be repaid * * * when from the surplus of the net income from the water rates not otherwise appropriated or pledged there is in the city treasury sufficient money therefor * * *." Said water pipe was laid without the advance payment required by said ordinance. Following the completion of the work of blasting, a certificate was issued by the city to O'Laughlin certifying, in substance, that he had blasted rock amounting to \$3,829 in certain streets for the purpose of laying water pipe, which amount would be refunded to him (and if not refunded within two years would thereafter bear interest) from any money belonging to the water tax fund not otherwise appropriated, whenever, upon survey, it was shown that a revenue from frontage water rates of ten cents per

lineal foot was being derived from said pipe. About six years thereafter, viz., on December 22, 1909, plaintiff, who became the bona fide assignee of said certificate, was notified by the city that the required revenue, for the first time, was being derived from said pipe, but that no appropriation would be available until the succeeding month. Later the city refused payment of said certificate upon the ground of its alleged invalidity.

The case proceeded to trial upon the common counts and a plea of the general issue. The city interposed as a defense upon the trial (and presents the same questions here) that there was no evidence: (a) of any contract entered into between O'Laughlin and the city to do said work; (b) that bids on the work (which amounted to more than \$500) were called for, or advertised; (c) that an appropriation was made; and (d) that a deposit was made as required by said ordinance.

The city had the power, under statutory authority, to construct and maintain a waterworks system. The employment of O'Laughlin by the city was within the general scope of its authority, and in such case "where there is general power to do an act, if the authorities have failed to take the requisite steps to authorize the act in the particular case, it must plead and prove the facts which render the particular contract illegal. The obligation is not *ultra vires*, as being beyond the authority conferred upon the defendant by its charter, and if it seeks to avoid the obligation on account of its want of power, it must make good its defense by plea and proof." *City of Chicago v. Peck*, 196 Ill. 260. In the instant case no evidence was offered by the city, and the only plea filed by it was that of the general issue.

The case of the *Merchants Loan & Trust Co. v. City of Chicago*, 182 Ill. App. 298, was a suit upon a claim

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evidenced by a certificate similar to the one in question, except such certificate was for money loaned. Questions similar in character to those presented here were raised in that case, and this court said: "As to all other objections to the finding that the city was liable on the certificate produced in evidence, it seems to us sufficient to say that there is no sufficient pleading by the city under which they can be considered."

It is admitted that the city by accepting the benefits of O'Laughlin's work is estopped from denying the validity of his employment, if, in laying said water pipe, and extending its system of waterworks, *it was acting in its private capacity*. It is well settled that when a municipal corporation undertakes to construct and operate waterworks it does so in the exercise of its private and not its governmental functions (*Wagner v. City of Rock Island*, 146 Ill. 139; *City of Litchfield v. Litchfield Water Supply Co.*, 95 Ill. App. 647); and it therefore follows that the city in the instant case was acting in a private capacity, and having accepted the benefits of the contract is estopped from denying its validity. *City of Chicago v. Norton Milling Co.*, 196 Ill. 580.

Furthermore, if there had been no contract between the city and O'Laughlin, plaintiff would be entitled to recover upon the basis of a *quantum meruit* for the fair value of the work accepted by the city. *Sexton v. City of Chicago*, 107 Ill. 323; *City of East St. Louis v. East St. Louis Gas Light & Coke Co.*, 98 Ill. 415. It is urged by counsel for the city that, even if plaintiff were otherwise entitled to recover upon that ground, he is barred by the statute of limitations. But that defense was not raised below.

The propositions of law presented to the trial court in behalf of the city were based upon the same theories of law presented here, and were properly refused. For the reasons herein stated the judgment of the Superior Court will be affirmed.

Affirmed.

**Chicago Railways Company, Appellant, v. Selig Morris,
George F. Davie and Louis Morris, copartners,
trading as S. Morris & Company, Appellees.**

Gen. No. 21,980.

1. **CONTRACTS, § 175*—how construed when containing words of doubtful meaning.** In construing a contract containing words of doubtful meaning, such contract should be construed in the light of the surrounding circumstances and the situation of the parties.

2. **MUNICIPAL COURT OF CHICAGO, § 13*—what is effect of motion to strike statement of claim from files.** A motion to strike from the files a statement of claim in an action under the Municipal Court Act is equivalent to a demurrer, and admits the material portions of such statement to be true.

3. **CONTRACTS, § 187*—when construction by parties governs.** Where the terms of a contract are uncertain or doubtful, the practical construction given to the contract by the parties thereto will govern.

4. **CONTRACTS, § 187*—when parties presumed to have contracted with reference to knowledge of subject involved.** Parties will be presumed to have contracted with reference to the knowledge they then had on the subject involved in the contract.

5. **SALES, § 15*—when not void for uncertainty or want of mutuality.** Where a party proposed to buy scrap iron to be taken from a street by a street railway company, reserving to the company the right to retain whatever portion "it may consider necessary," and the company accepted the proposal, and thereafter such party hauled away a large quantity of the iron and the company tendered all of the material it had removed on a certain street, *held* that the contract was not shown to be void for uncertainty or want of mutuality in an action to recover damages for breach of the contract by reason of such party's refusal to receive and pay for such tendered material.

6. **SALES, § 17*—when promise to purchase is not without consideration.** Where one party by accepting another party's proposal to buy a quantity of scrap iron parted with the right to sell elsewhere and bound himself to cut the material at his own expense into certain lengths, *held* that the other party's promise to purchase was not without consideration.

7. **CONTRACTS, § 173*—when construction which will uphold should be adopted.** Where an instrument is susceptible of two

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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conflicting constructions, one imputing bad faith or fraud to one of the parties to the instrument, the other not, the latter construction should be adopted.

8. MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim sufficient on motion to strike.* That a statement of claim, under the Municipal Court Act, enumerates some items which are not recoverable if true does not render it obnoxious to a motion to strike equivalent to a general demurrer.

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed February 9, 1917. Rehearing denied February 19, 1917.

Statement by the Court. This was an action for damages for breach of contract. Plaintiff (appellant) at the time in question and for a long time prior thereto was engaged in reconstructing its railway system in the City of Chicago. Defendants (appellees), who were dealers in scrap iron, made the following proposal to plaintiff:

“Chicago, April 23, 1913.

“We are pleased to offer the following prices on scrap material to be taken out of the streets:

Girder rails,	11.75	Gross ton.
Slot rails,	11.75	“ “
Crossings and switches,	10.25	“ “
Cast iron,	14.00	“ “
Sheet iron,	9.00	“ “
Miscellaneous scrap,	11.25	“ “

“We to haul as per instructions from the Chicago Railways Company.

“The Chicago Railways Company reserves the right to retain whatever portion of the scrap material it may consider necessary.

“All rails to be cut by the Chicago Railways Company at their expense in not over 30' lengths and all cast welded joints to be included in the weight of the rails.

“Each load to be weighed on Chicago Railways Company's scales if convenient, or on a public scale

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and tickets furnished daily showing the gross, tare and net weight of each load and kind of material.

"The above price to cover all scrap material removed in connection with track work from April 2nd to December 31st, 1913.

Yours truly,
S. Morris & Company,
By L. Morris.

"O. K. J. F. R. 5/2/13.

R. H. R.

"Accepted: Chicago Railways Company,
By J. M. Roach, president."

Plaintiff in its second amended statement of claim alleged that defendants for several years prior thereto had purchased from plaintiff large quantities of material of the kind described in said proposal; that at the time said contract was entered into defendants knew that plaintiff was removing from the streets large quantities of material and was selling all of same that plaintiff might not need, and that defendants knew that plaintiff only retained a small quantity which might be necessary for reuse; that in pursuance to said proposal, defendants began to remove large quantities of said scrap material, and continued to do so, so long as profitable to them; that on or about November 1, 1913, during the period covered by said proposal, plaintiff had removed from Montrose avenue a large amount of said scrap iron, including rails cut at plaintiff's expense, in not to exceed thirty-foot lengths, and thereupon notified defendants to take and pay for same as agreed, which defendants refused to do by reason of a decline in the prices thereof, and that plaintiff was thereby damaged in the sum of \$2,479.45. Upon motion of defendants, said statement of claim was stricken from the files on the ground that it was insufficient in law for plaintiff to maintain its action, and the suit dismissed at plaintiff's costs.

JOHN W. WALSH and FRANK L. KRIETE, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

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BENJAMIN B. MORRIS, for appellees.

MR. JUSTICE McGOORTY delivered the opinion of the court.

The principal question presented by this appeal for our determination is whether the contract in question is void for want of mutuality or uncertainty because of the following provision: "The Chicago Railways Company reserves the right to retain whatever portion of the scrap material *it may consider necessary*." The foregoing was the only limitation upon plaintiff's (The Chicago Railways Co.'s) absolute duty under defendants' proposal of purchase, and plaintiff's acceptance thereof, to sell to defendants all of its scrap material which it would remove from the streets during the period specified in said proposal. If plaintiff had sold such scrap material to another, it would have breached its contract with defendants, and the latter could have maintained an action for such breach. On the other hand, defendants became bound to take all of the scrap material which plaintiff might not consider necessary to retain, and, therefore, the contract was mutually obligatory, provided the amount of such scrap material was reasonably determinable.

In construing a contract containing words of doubtful meaning, such contract should be construed in the light of the surrounding circumstances and the situation of the parties. Defendants' motion to strike is equivalent to a demurrer, thereby admitting plaintiff's statement of claim (so far as material) to be true. In legal effect it is therefore admitted that defendants, when they made such proposal of purchase, knew, through a long course of similar business dealings with plaintiff, that the latter only retained a small quantity of such scrap, which was for reuse in reconstructing its street railway system. The parties will be presumed to have contracted with reference to the knowl-

edge they then had upon that subject. The intent of the parties must also be gathered from the practical construction given by them to the contract. "When the terms of a written agreement are in any respect uncertain or doubtful and the contracting parties by their own conduct have placed a construction upon the provisions of such contract which is reasonable, such construction will be adopted by the court, and evidence of acts showing a practical construction of the instrument by the parties themselves is admissible." *Gillett v. Teel*, 272 Ill. 106, 114.

The statement of claim alleges that defendants, after said proposal was accepted by plaintiff, began to haul away large quantities of the scrap removed from the streets by plaintiff, and continued to do so for several months. Furthermore, on or about November 1, 1913 (during the period covered by the proposal), plaintiff tendered to defendants *all of the material* which it had removed from its tracks on Montrose avenue. This indicates that at the time such proposal was made and accepted, the parties had in mind not only the purchase and sale of all of such scrap material, not required by plaintiff, but that plaintiff's requirements or needs were approximately ascertainable by defendants. Hence the contract was not void for uncertainty. Nor was it void for want of mutuality. *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85; *Burgess Sulphite Fibre Co. v. Broomfield*, 180 Mass. 283, 62 N. E. 367. As said in Clark on Contracts (Hornbook Series) p. 171:

"If a person agrees to buy, and another person to sell, all the supplies of a certain kind the former 'may need,' or that the latter 'may have to sell,' there is no want of mutuality, and the contract is binding. One of the parties binds himself absolutely to take all the supplies he may need, not merely to take what supplies he may choose to take; and the other binds

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himself absolutely to sell all he may have to dispose of; and each promise is a consideration for the other. They differ from options, for, if there are any supplies needed, they must be bought, and if there are any to be sold, they must be delivered."

The cases relied upon by defendants are clearly distinguishable from the case at bar.

Defendants' counsel urge that there was no consideration given by plaintiff. The latter, by its acceptance of defendants' proposal, not only parted with the right to sell its scrap material elsewhere, but also obligated itself to cut the rails at its own expense, in not to exceed thirty-foot lengths. It cannot be maintained therefore that defendants' promise to purchase is without consideration. In the case of *Burgess Sulphite Fibre Co. v. Broomfield*, *supra*, a proposal and acceptance similar to the one in question was under consideration and the court said: "The contract is not lacking in mutuality because the amount of iron to be removed is not defined. It is enough that the plaintiff came under some obligation to the defendants. *If he did, there is a consideration for their promise.* The extent of the plaintiff's obligation is not material."

It is further alleged in the statement of claim that from April 2, 1913, to November 1, 1913, both parties recognized the contract as valid and acted under it, and that not until plaintiff had fully performed all that was required of it did defendants refuse to comply with the terms of the contract. "Where an instrument is susceptible of two conflicting constructions, one of which imputes bad faith or fraud to one of the parties, and the other does not, the latter construction should be adopted." 9 Cyc. 587.

It is also urged by defendants that certain averments in plaintiff's statement of claim relative to damages claimed are defectively stated. "That the statement of claim contained among the items of damages enumerated some which were unrecoverable, if it

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be true, did not render it obnoxious to an equivalent to 'a general demurrer' in the 'motion to strike.''' *Muller v. Bernstein*, 183 Ill. App. 154, 158.

We are of opinion, for the reasons herein stated, that the statement of claim set forth a contract that was not void for uncertainty or want of mutuality, and that the trial court erred in striking plaintiff's second amended statement of claim from the files and in dismissing suit at plaintiff's costs. The judgment of the Municipal Court is therefore reversed and the cause remanded.

Reversed and remanded.

**Emily Scott, Appellee, v. United Order of Foresters,
Appellant.**

Gen. No. 22,005. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed February 9, 1917. Rehearing denied February 19, 1917.

Statement of the Case.

Action by Emily Scott, plaintiff, against United Order of Foresters, defendant, to recover \$1,000 on a certificate of membership in defendant Order on account of the death of her husband. From a judgment for plaintiff for \$1,000 on remittitur of \$45, defendant appeals.

FRANK F. ARING, for appellant.

HOYNE, O'CONNOR & IRWIN, for appellee.

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MR. JUSTICE McGOERTY delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 120*—*when interpretation of contract favorable to insured will be adopted.* If a contract of insurance is susceptible of two interpretations, that one will be adopted which is most favorable to the assured.

2. INSURANCE, § 747*—*when member of fraternal insurance association is bound by constitutional amendments or subsequently enacted by-laws.* A member of a fraternal insurance association is bound by constitutional amendments or by-laws enacted after his admission to the association which impair the obligations of his contract on admission injuriously only when he in express terms agreed to be so bound, and in the absence of such express agreement his contract of membership cannot be impaired by subsequent changes effected by the association.

3. INSURANCE, § 747*—*when member of fraternal insurance association is not bound by subsequently enacted by-law.* Where a benefit certificate issued and delivered to a member of a fraternal insurance association on his admission provided that he assented to the by-laws of the association "prescribed from time to time" by the association, held that a subsequent by-law of the association did not become a part of his contract of insurance and that he would not be bound by it.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

CASES
DETERMINED IN THE
SECOND DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1916.

**Chicago Mill & Lumber Company of Cairo, Appellee, v.
Mary Boynton Townsend, Appellant.**

Gen. No. 6,216.

1. COVENANTS, § 2*—*what is nature of.* A covenant is a species of express contract.

2. PLEADING, § 152*—*when defendant must file affidavit of merits with plea.* Where a covenant in a warranty deed provided that the warranty should be for a specified amount and that the grantor should be liable to the grantee for such amount, in the event of a breach of the covenant, for interest thereon, taxes paid and for a reasonable attorney's fee in defending any suit for the lands in which the claimants should prevail and costs of such suit, held that an action for recovery on such covenant is a suit on a contract for the payment of money within the provisions of section 55 of the Practice Act (J. & A. ¶ 8592), requiring the defendant to file an affidavit of merits with his plea, when the plaintiff attached an affidavit of his claim to his declaration.

3. LIMITATION OF ACTIONS, § 21*—*when cause of action accrues for breach of covenant of warranty.* Under a covenant of warranty contained in a deed of real estate providing that the grantor should pay a specified amount for all of the land which should be lost to the grantee in consequence of a breach of the warranty, held that no cause of action would accrue on such covenant until the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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grantee was actually evicted by the holder of the paramount title, and that the statute of limitations would not begin to run until that time.

4. *LIMITATION OF ACTIONS, § 9*—when foreign statute is inapplicable to cause of action arising in foreign State.* Under section 20 of the Illinois Limitation Act (J. & A. ¶ 7215), the statute of limitations of a foreign State does not apply to a cause of action arising therein unless the parties were nonresidents of the State of Illinois at the time the cause of action accrued.

5. *INTEREST, § 47*—how should be computed on contract not providing method of computation.* Where a contract for the payment of money contains a stipulation for the recovery of interest but does not, either expressly or impliedly, fix a time from which such interest is to be computed, the interest should be computed from the date of the contract.

6. *COVENANTS, § 42*—what damages are recoverable for breach of covenant in warranty deed.* In an action on a covenant in a warranty deed providing that the grantor should be liable for a specified amount, in the event of a breach of the warranty, interest thereon, taxes paid on the land, and a reasonable attorney's fee in defending any suit for the lands in which the claimant should prevail and costs of such suit, where the grantee was allowed in such a suit credit for such taxes paid on an accounting for timber taken by him from the land and charged against him in such suit, *held* that such accounting for the timber taken was a necessary part of that suit and its defense, and that the grantee would not be entitled to the amount of such taxes paid and credited in such accounting as a part of the damages to be recovered in such action on the covenant; and that the grantee would be entitled to recover all reasonable attorney's fees and the entire cost incurred in the defense of such suit both before and after it was remanded and redocketed by order of the Supreme Court.

7. *INTEREST, § 7*—when recoverable upon attorney's fees and costs allowable under covenant in deed.* Interest is recoverable, under Rev. St. sec. 2, ch. 74 (J. & A. ¶ 6691), upon reasonable attorney's fees and costs incurred and paid in defending a suit where the right to recover such fees and costs is based upon a covenant in a deed.

8. *COVENANTS—what questions are for court when defendant is in default.* Where a defendant is in default, in an action on a covenant in a deed, the only question for the court is as to the amount of the plaintiff's damages.

9. *SET-OFF AND RECOUPMENT, § 8*—when taxes paid by a grantor's*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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predecessors in title are properly matter of set-off in action on covenant of warranty. In an action by a grantee against his grantor to recover on a covenant of warranty for a breach of such covenant providing for recovery of taxes paid by the grantee, a recovery by the grantor for taxes paid by the grantor's predecessors in title, if recoverable at all, could only be as a matter of defense under a plea of set-off.

10. APPEAL AND ERROR, § 1810*—*power of Appellate Court to render final judgment.* The Appellate Court has power, on an appeal, to render such judgment as the trial court should have rendered.

11. COVENANTS, § 37*—*when defendant in default may introduce evidence to reduce amount of damages.* Where a defendant in an action on a covenant in a deed is in default and thus the only question for the court is the amount of damages, the defendant may, nevertheless, introduce evidence to reduce the amount of damages, but not by way of set-off.

Appeal from the Circuit Court of De Kalb county; the Hon. CLINTON F. IRWIN, Judge, presiding. Heard in this court at the October term, 1915. Reversed in part on cross errors, and judgment in this court. Opinion filed April 26, 1916. Rehearing denied October 5, 1916.

MONTGOMERY, HART, SMITH & STEERE, for appellant;
WILLIAM P. MACCRACKEN, JR., of counsel.

KNAPP & CAMPBELL, for appellee; JOHN R. COCHRAN,
of counsel.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

This is an appeal from a judgment in favor of the Chicago Milling & Lumber Company of Cairo, appellee, for \$4,795, in an action of covenant rendered in the Circuit Court of DeKalb county against Mary Boynton Townsend, appellant.

The covenant, which forms the basis of recovery, is a part of a warranty deed by which the appellant and nine other grantors on September 26, 1902, conveyed

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to the appellee 640 acres of timber land in Mississippi county, Arkansas, and is as follows: "It is hereby agreed that this warranty shall be for ten dollars (\$10) per acre upon the lands hereby conveyed and, in the event of a breach hereof, the above named warrantors shall be liable to the said Chicago Mill & Lumber Company for said sum of ten dollars (\$10) per acre for such lands as may be lost to said Chicago Mill & Lumber Company by a breach of the warranty herein, together with interest thereon at six per cent. (6%) per annum; all taxes and levee taxes that may have been paid by said Chicago Mill & Lumber Company, and a reasonable attorneys' fee for defending such suit or suits as may be brought by claimants for said lands in all suits in which claimants shall prevail, together with the costs of said suit."

The suit was commenced on April 24, 1913, against the appellant, Elmer E. Boynton and Frederick B. Townsend, who were all parties defendant in the original declaration. Afterwards, the appellee dismissed the case as to the defendants Frederick B. Townsend and Elmer E. Boynton, and by leave of court thereupon filed an amended declaration solely against the appellant. The amended declaration was filed November 16, 1914, and was supported by an affidavit of the amount due. The appellant moved to strike the affidavit of appellee's claim from the files upon the ground that the suit was not upon a contract for the payment of money, within the meaning of section 55 of the Practice Act (J. & A. ¶ 8592), which motion the court denied.

The appellant then filed pleas with an affidavit of merits, and subsequently, by leave of court, an amended affidavit of merits and additional pleas. The pleas filed by the appellant were *non est factum*, a plea denying all the allegations of the amended declaration with the exception of those setting forth the deed, and

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the statutes of Arkansas, and a plea in which appellant set up repayment of taxes to appellee by the Osceola Land Company; also pleas based on parts of the Illinois statutes of limitations, and on the Arkansas Limitation Act by which actions of this kind are barred within five years. The amended affidavit of merits, which the appellant filed with her pleas, is as follows:

“State of Illinois }
County of Cook. } ss.

“Wm. P. MacCracken, Jr., being first, duly sworn, on oath says that he is one of the attorneys for the defendant in the above entitled cause and the duly authorized agent of the defendant, in this behalf; that he verily believes that said defendant has a good defense to the above entitled suit, upon the merits, to the whole of the plaintiff's demand.

“Affiant further states that the nature of defendant's said defense is that each and all of the plaintiff's alleged causes of action are barred by the lapse of time, in that each and all of said causes of action arose in the State of Arkansas and that by the laws thereof an action thereon cannot be maintained by reason of the lapse of time, because they did not, nor did any or either of them, accrue to the plaintiff within five years next before the date of the filing of the amended declaration herein, as required by the laws of the State of Arkansas; and also in that they did not, nor did any or either of them, accrue to the plaintiff within 10 years next before the commencement of this suit, because at the time of the giving of the deed in plaintiff's amended declaration mentioned, the said Section Fourteen (14), in Township Fifteen (15) North, Range Eight (8) East, located in Mississippi County, Arkansas, was wild and unimproved land, and that the constructive possession of said land was in one A. H. Chatfield, who was the owner and holder of the legal title thereto, by reason of which fact the plaintiff herein was constructively evicted from said land at the date of the giving of the deed, to wit: on the 26th day of September, A. D. 1902, which date was more than

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10 years next before the commencement of this suit.

“Further affiant saith not.

Wm. P. MacCracken, Jr.

“Subscribed and sworn to before me this 15th day of December, A. D. 1914.

Lorenzo K. Wood,

(Seal)

Notary Public.”

The appellee thereon moved to strike appellant's amended affidavit of merits from the files, on the ground that the facts therein set forth did not constitute a defense to the appellee's right of recovery, and also moved to strike all of appellee's pleas from the files for want of a sufficient affidavit of merits. The court sustained appellee's motion, struck the appellant's affidavit of merits from the files, and the appellant's pleas. The appellant was thereupon defaulted and the case was set down for hearing to assess appellee's damages.

The proof shows that the land conveyed by the deed was located in the State of Arkansas, and that at the time of the conveyance it was all wild and uncultivated timber land; that appellee took possession of this land in May, 1904, had it surveyed and the corners ascertained, as established by Government survey, then established logging camps and built structures for housing men, horses and wagons, tools and machinery. Appellee also built a railroad track across the land to enable it to cut and remove the standing timber, and was engaged in removing timber from the land about May 1, 1908, when it was evicted by a decree of the Chancery Court of Mississippi county, Arkansas.

The suit to dispossess appellee of the land in question was commenced August 4, 1904, by the Osceola Land Company, which claimed to have the legal title. The appellee was served with process in that case, appeared in court and defended the suit, relying upon the deed, which it had received from appellant and her cogramtors, to establish its title. The Chancery

Court in October, 1905, entered a decree dismissing the complaint of the Osceola Land Company for want of equity, and finding the title of the land to be in appellee. The Osceola Land Company, however, appealed the case to the Supreme Court of Arkansas, which reversed the decree of the Chancery Court and remanded the case with directions to enter a decree cancelling the deeds under which appellee claimed its title, and quieting the title of the Osceola Land Company. It also remanded the case for further proceedings for the purpose of taking an account of the timber which appellee had taken from the land during its occupancy, and directed that the taxes paid by appellee and its predecessors in the title claimed, which were declared to be a lien upon the land.

The remanded case was redocketed May 1, 1906, in the Chancery Court, and a decree entered pursuant to the direction of the Supreme Court, and then referred to a special master to take proofs and report as to the taxes paid by appellee subsequent to 1902, and the taxes paid by those under whom appellee claimed title, giving the dates and amounts of the payment for each year, with interest at six per cent. per annum; also to take testimony and report how much and what kind of timber was cut and removed by appellee from the land, and the value thereof, with interest on the amount of the value, from the date the timber was removed.

The master took the evidence under the reference and on March 10, 1909, made a report concerning the matters embraced in the reference, which was approved by the court and a decree entered against the appellee in the sum of \$15,461, and all costs, including a master's fee of \$500. From this decree the appellee appealed to the Supreme Court of Arkansas where the decree was affirmed, but it was modified by reducing the master's fee to \$250. The appellee afterwards, on April 2, 1910, satisfied this decree in full.

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The ruling of the court striking the amended affidavit of merits from the files and the pleas filed in connection therewith is assigned by appellant as error, and she contends that this action is not a suit on a contract for the payment of money and therefore does not come within the provisions of section 55 of the Practice Act, whereby the plaintiff in a suit may file with his declaration an affidavit showing the nature of his demands, and the amount claimed to be due from the defendant, and thereby compel the defendant to file an affidavit of merits which must specify the nature of his defense, and show that he has a good defense to the whole or a portion of the plaintiff's demand; and it is further contended that the matters which are set up in the affidavit of merits constituted a good defense to the appellee's demand.

In reference to the first question raised, it may be said that a covenant is a species of express contract. (Vol. 2, Chitty's Blackstone, 126; *Clark v. Devoe*, 124 N. Y. 120; 11 Cyc. 1042.) And the covenant involved in this case expressly provides for the payment of money in the event of the breach thereof, thus coming clearly within the rule laid down by the Supreme Court in *Coursen v. Browning*, 86 Ill. 57; *Mestling v. Hughes*, 89 Ill. 389; *Myers v. Shoneman*, 90 Ill. 80. This is a suit, therefore, based upon an express contract for the payment of money.

The appellant's position that the affidavit contained matters which constituted a good defense to appellee's demand is equally untenable. One of the defenses alleged in the affidavit is that the action was barred by the ten-year limitation of the Illinois act, because the land conveyed by the warranty deed in question was wild and uncultivated land, and that the constructive possession of said land was in one A. H. Chatfield, who was the owner and holder of the legal title thereto, by reason of which fact the appellee was constructively

evicted from the land, at the date of the giving of the deed, namely, the 22nd day of September A. D. 1902, which date was more than ten years prior to the commencement of this suit. And appellant contends in this connection that "where land is unoccupied, the possession follows the legal title and an outstanding paramount title in a third person at the time a deed is given, carrying, as it does, possession with it, amounts to a constructive eviction, and there is a breach of all the covenants of warranty, *eo instanti*, and the statute runs from the date of the deed." But no allegation appears in the affidavit from which the inference can be legally drawn that the land was unoccupied; that the appellee did not take actual possession of the land after the execution and delivery of the deed in question. In the absence of such averment, it must be presumed that the land was occupied, and that appellee did take possession of the land; as the evidence shows it did, and that it was actually evicted therefrom subsequently, that is to say, about May 1, 1908. No breach of the covenant, therefore, occurred, and no cause of action accrued to appellee until the time it was actually evicted by the holder of the paramount title, and it could not have maintained suit against the grantors until that time. (*Scott v. Kirkendall*, 88 Ill. 465; *Moore v. Vail*, 17 Ill. 185; *Roberson v. Tippie*, 126 Ill. App. 582.) The statute of limitations did not begin to run until the cause of action had accrued to appellee. (*Davis v. Munie*, 235 Ill. 620.)

The other defense specified in the amended affidavit of merits is that the appellee's action was barred by lapse of time, because the Statute of Limitations of the State of Arkansas barred actions of this character after the lapse of five years, and appellant claims that by virtue of section 20 of the Illinois Limitation Act (J. & A. ¶ 7215) the Arkansas statute applied. It is well settled, however, that the Arkansas statute of

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limitations does not apply unless the parties were non-residents of Illinois at the time the cause of action accrued. This is the construction placed upon section 20 of the Illinois Act by the courts of review in this State. (*Davis v. Munie*, 235 Ill. 620; *Wooley v. Yarnell*, 142 Ill. 442, 46 Ill. App. 112; *Berry v. Krone*, 46 Ill. App. 82; *Story v. Thompson*, 36 Ill. App. 370.)

There is no averment in the affidavit that the appellant and appellee were nonresidents of Illinois at the time the cause of action accrued.

For the reasons stated, the trial court did not err in striking the amended affidavit of merits and appellant's pleas from the files.

Upon the hearing for the assessment of damages, the court allowed the sum of \$10 per acre for the 640 acres of land conveyed to appellee, and six per cent. interest on the total sum from the date of the deed, September 26, 1902. The court also allowed the amounts, with interest, claimed by appellee as a part of the cost of litigation in the State of Arkansas, but limited the cost of the litigation, and attorneys' fees which appellee had incurred and paid, to the items which accrued prior to the redocketing of the case and the reference to the special master for the accounting for timber removed, and the court refused to allow attorneys' fees and expenses of the litigation which appellee had incurred and paid after the reference to the master. The court also refused to assess as damages the amount of the general and levee taxes which appellee had paid, and for which appellee had already received credit in the accounting before the master. And the refusal of the court to allow appellee these additional damages claimed is assigned as cross errors.

The court allowed the appellant a set-off of \$644 as a credit on the amount of appellee's damages. This set-off was the sum total of taxes and interest thereon

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which had been paid by the predecessors of appellee in the title claimed. The amount of these taxes and interest had been allowed to appellee as a credit on the sum found to be due for the timber it had taken from the land in question. The allowance of this set-off is also assigned by appellee as a cross error.

We are of opinion that the court did not err in allowing interest on the sum of money to which appellee became entitled under the terms of the covenant from the date of the deed containing the covenant. Where a contract for the payment of money contains a stipulation for the recovery of interest but does not, either expressly or impliedly, fix a time from which such interest is to be computed, the interest should be computed from the date of the contract. (22 Cyc. 1538; 6 Am. & Eng. Encyc. of Law, 1040; *Miller v. Kavanaugh*, 99 Ky. 377; *Graham v. Burgiss*, 78 S. C. 404, 59 S. E. 29; *Smith v. Goodlett*, 92 Tenn. 230, 21 S. W. 106.)

Considering the cross errors assigned by appellee, we are of opinion that the court properly refused to allow appellee, as a part of the damages to be recovered, the amount of the general taxes and levee taxes paid by it. These taxes had already been allowed to the appellee in the accounting before the master in chancery in Arkansas, as a credit against the amount due for timber taken from the land in question, and appellee had been reimbursed thereby for the taxes so paid, and they were no longer a subsisting claim against the appellant at the time its damages were assessed. But the court should have allowed all reasonable attorneys' fees and the entire cost of the Arkansas case, which the appellee had incurred and paid in the defense both before and after the case had been remanded and redocketed by the order of the Supreme Court of Arkansas. The matter of accounting was a part of the case involving the title of the

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land, which appellee had to defend against. Appellee had removed the timber, which was a part of the land, on the assumption that it had title to it under appellant's deed and warranty, and the same question of the title was involved in the right to the timber as to the land itself. The Osceola Land Company having established its paramount title to the land had a legal right to recover the timber or the value of the timber taken, and the accounting for the timber taken was a part of the suit for the recovery of the land and a necessary part of the defense involved in the case.

The right to recover reasonable attorneys' fees and the cost incurred and paid by appellee in the Arkansas litigation being based upon an instrument in writing, appellee is also entitled to recover interest on the payments made in that regard, at the rate of five per cent. per annum, from the date of payment under section 2, chapter 74, of the Revised Statutes (J. & A. ¶ 6691). *Elgin, J. & E. Ry. Co. v. Northwestern Nat. Bank*, 165 Ill. App. 35; *A. B. Dick Co. v. Sherwood Letter File Co.*, 157 Ill. 325; *Holmes v. Standard Oil Co.*, 183 Ill. 70; *People v. Pacific Surety Co.*, 155 Ill. App. 586; *Le-man v. United States Fidelity & Guaranty Co.*, 137 Ill. App. 258.

We are of opinion that the trial court erred in allowing the appellant the set-off of \$644 on account of taxes paid by appellee's predecessors in title. If appellant was entitled to recover for this claim, which may well be doubted, it could not do so except as a matter of defense under a plea of set-off. Appellant being in default, however, the only question that remained for the court to inquire into was the amount of appellee's damages. (*Town of South Ottawa v. Foster*, 20 Ill. 296; *Herrington v. Stevens*, 26 Ill. 298; *Sandoval Zink Co. v. Hale*, 133 Ill. App. 196.)

While appellant had a right, though defaulted, to introduce evidence tending to reduce the amount of dam-

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ages claimed, she was not entitled to introduce evidence by way of set-off. (*Barnes v. Sisson*, 44 Ill. App. 327; *Jerseyville Shoe Mfg. Co. v. Bell*, 125 Ill. App. 496; *Sandoval Zink Co. v. Hale*, *supra*.) It is apparent, therefore, the judgment rendered is not for the proper amount of damages to which the appellee is entitled and is partly erroneous. This court has power to render such a judgment as the trial court should have rendered. (*Minnesota Mut. Life Ins. Co. v. Welsh*, 131 Ill. App. 103; *Manistee Lumber Co. v. Union Nat. Bank*, 143 Ill. 490.)

The C. D. Boynton Estate and Elmer E. Boynton, together, have paid appellee in liquidation of its claim, on March 13, 1914 \$ 6,663.66;
and the trial court therefore properly took the date of this payment, and the payment, as the basis for the adjustment of the damages.

The court allowed as damages:

\$10.00 per acre for the 640 acres of land.....	\$ 6,400.00
and six per cent. interest on \$6,400 from date of deed, September 26, 1902.....	4,402.18
and the cost of litigation prior to remanding and redocketing the case, May 1, 1908, with five per cent. interest from the dates of payment of the various items, to March 13th 1914	1,021.11
Total.....	\$11,823.24

To this should be added the following additional items of reasonable attorneys' fees paid, and necessary cost incurred in defense of the Arkansas case, and five per cent. interest from the date of payment of the same to March 13th 1914, viz.:

1908.	
(From date of payment to March 13th, 1914)	
Sept. 26, W. C. Gilbert's expenses.....	\$ 5.00
Interest	1.37
Sept. 30, M. L. Mathis, expenses.....	3.25
Interest	.88
Oct. 19, W. C. Gilbert's expenses.....	5.00
Interest	1.35
Nov. 30, W. J. Lamb, attorney, expenses.....	26.00
Interest	6.88
1909.	
April 20, Premium on appeal bond.....	80.00
Interest	19.49
Sept. 30, W. J. Lamb, court costs.....	11.50
Interest	2.58
1910.	
Jan. 31, W. C. Gilbert's expenses.....	25.00
Interest	5.15
Jan. 31, W. J. Lamb, printing briefs.....	31.50
Interest	6.49
March 28, Copy of opinion, Ark. Sup. Court.....	1.50
Interest	.30

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March 31, J. C. Coston, court costs:		
(\$80.50 of a total of \$426.25 shown		
under this date was on account of		
costs, first appeal; and the trial court		
allowed the \$80.50, thus leaving bal-		
ance of)	346.75	
Interest	68.28	
March 31, W. C. Gilbert's expenses.....	10.00	
Interest	2.00	
April 30, W. J. Lamb's fees and expenses.....	276.25	
Interest	53.44	
July 30, W. J. Lamb, court costs.....	42.85	
Interest	7.75	
		\$ 1,040.58
Which makes the total amount of appellee's damages,		
on March 13, 1914.....		\$12,863.80
Deducting from this sum the payment of \$6,666.66		
made by C. D. Boynton Estate and Elmer E. Boynton,		
leaves a balance due as of that date of.....		\$ 6,197.14
And appellee is entitled to five per cent. interest on		
this balance from the date of the adjustment, March		
13, 1914, to the date of the judgment here, which		
amounts to the sum of.....		\$ 630.89
and this should be added to the above balance. The		
judgment entered here, therefore, should be for....		\$ 6,828.03

The judgment of the trial court is therefore reversed in part, on cross errors, and it is ordered that judgment be entered in this court in favor of appellee against the appellant for \$6,828.03.

Reversed in part on cross errors, and judgment in this court.

Harry E. Jarvis, Appellee, v. G. & J. Coal Company, Appellant.**Gen. No. 6,203. (Not to be reported in full.)**

Appeal from the Circuit Court of La Salle county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed May 9, 1916. Rehearing denied October 5, 1916.

Statement of the Case.

Action by Harry E. Jarvis, plaintiff, against G. & J. Coal Company, defendant, to recover a rental of fifteen dollars per year for the years ending July 22, 1913, 1914 and 1915, for certain coal mining rights beneath the surface of certain lands pursuant to a written lease. From a judgment for plaintiff, on trial by the court without a jury, defendant appeals.

I. I. HANNA, for appellant.

R. A. GREEN, for appellee.

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

Abstract of the Decision.

1. LANDLORD AND TENANT, § 33*—*when description of premises in lease is not erroneous.* Where premises intended to be leased were correctly, completely and precisely described in the lease by boundary monuments, held that the lease was not rendered void by a purported description therein also of the lands according to legal sectional subdivisions which was erroneous.

2. NOTICE, § 13*—*when possession of surface of land is notice of rights to land underneath surface.* Possession of the surface of land is possession also of the land underneath the surface, and is notice to every one of the rights of the possessor.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. CORPORATIONS, § 175*—*when withdrawing stockholder may not buy adverse interest.* Where certain stockholders in a corporation took for the corporation in their own names a lease of the right to haul coal through all entries, passages and openings in certain land, which lease they thereafter assigned to the corporation, *held* that one of such stockholders would have the right, after his withdrawal from the corporation, to buy the lessor's interest in the lease and his mining rights in the land, and to enforce the payment of rent under the lease against the corporation as assignee of the lessees therein.

Frank H. Hayes, Administrator, Appellee, v. Chicago, Ottawa & Peoria Railway Company and Andrew Ward and Joseph Orr, copartners, trading as Ward & Orr, Appellants.

Gen. No. 6,185.

1. MASTER AND SERVANT, § 856*—*when relation of independent contractor exists.* The right under a construction contract of the party for whom the construction is to be done to forfeit or abrogate the contract does not create the relation of master and servant between the parties, nor the right under such contract of such party to exercise supervisory control over the character, quality and quantity of the work change an independent contractor into such party's servant.

2. MASTER AND SERVANT, § 857*—*when relation of independent contractor is not affected by control of work.* Where a construction contract taken as a whole showed there was no intention that the party for whom the work was to be done should have any control over the contractor's individual employees or the details of the work, *held* that a provision in the contract that the contractor should carry on the work in such manner and at such time and place as such party should direct would not take from the contractor the right to select, direct and discharge his own men, and would not militate against his independence as a contractor.

3. MASTER AND SERVANT, § 856*—*when subcontractor is an independent contractor.* Where a contract for the construction of a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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railroad provided that the contractor should carry on the work in such manner and at such time and place as the railroad company should direct, and that all subcontracts should be upon the same form, terms and conditions as the original contract, *held*, in an action against the company, the original contractor and a subcontractor for blasting work to recover damages for the death of a party by reason of alleged negligence in such blasting, that the subcontractor was an independent contractor, and neither the company nor the original contractor would be liable for negligence by the subcontractor's employees.

Appeal from the Circuit Court of Grundy county; the Hon. SAMUEL C. SROUGH, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed August 10, 1916. Rehearing denied October 5, 1916.

DUNCAN & O'CONOR, FRANK M. COX and R. J. FELLINGHAM, for appellants.

J. W. RAUSCH, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

This action resulted from the death of William Youngren, who was struck and fatally injured by a stump which was blasted out of a borrow pit on the right of way of the Chicago, Ottawa & Peoria Railway Company at a point between the City of Morris and the Village of Seneca. The suit as originally brought was by Frank H. Hayes, as administrator of the estate of William Youngren, and against the Chicago, Ottawa & Peoria Railway Company and E. S. McMillan; but afterwards the Chicago, Rock Island & Pacific Railway Company and Ward & Orr were also made defendants, and two additional counts to the declaration were filed, which contain the charges of negligence upon which the case was tried. No service was had upon the defendant E. S. McMillan.

At the time of his injury Youngren was looking

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after the safety and repair of telegraph wires, which were strung on poles located on the right of way of the Chicago, Rock Island & Pacific Railway Company, and adjacent to the point where blasting was carried on.

The first of the two additional counts charges that the Chicago, Ottawa & Peoria Railway Company was possessed of a certain right of way extending from the City of Ottawa to the Village of Crotty (also known as Seneca) and the Chicago, Ottawa & Peoria Railway Company and Andrew Ward and Joseph Orr, copartners as Ward & Orr, and E. S. McMillan, were, on the 17th of October, 1909, engaged in constructing a right of way roadbed; and, in order to carry on said business, the parties defendant owned, were possessed of and used ordinary drills and high and dangerous explosive powders and dynamite in blasting stumps, rocks, stone and other material; and that the Chicago, Rock Island & Pacific Railway Company on the date mentioned, owned, possessed and controlled a certain railway which ran contiguous to and parallel with the roadbed and right of way of the Chicago, Ottawa & Peoria Railway Company, and that the deceased, William Youngren, on the date mentioned, was in the employ of all of the defendants, and while in such employ was rightfully in and upon the right of way and roadbed of the Chicago, Ottawa & Peoria Railway Company; that the defendants used great quantities of dynamite and that in the ordinary use of the same, when exploded and discharged, great quantities of stumps, rocks, stone and other debris would be discharged and fly in all directions, all of which was well known to the defendants; that it was the duty of the defendants to afford and provide deceased with a safe place while he was in their employ where he might safely discharge his work, and that it was the duty of the Chicago, Rock Island & Pacific Railway Company to warn and instruct him of the dangerous and perilous position in

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which he was placed under its orders and directions, and that it was the duty of the Chicago, Ottawa & Peoria Railway Company and of Andrew Ward and Joseph Orr, and E. S. McMillan, to use reasonable care and caution to warn the deceased, who might then be in a position to be injured by the explosion of dynamite, that the explosion was about to take place; and further avers that while the deceased was in the exercise of due care for his own safety in discharging the duties imposed upon him by the defendants, without knowledge, or means of knowledge, that an explosion was about to occur, and in a position where the defendants knew he was likely to be injured, without warning him that an explosion was about to take place, or giving him sufficient time to escape to a place of safety, the defendants carelessly and negligently exploded a large amount of dynamite, towit, twenty-five pounds, which explosion caused rocks, stumps, etc., to strike and injure the deceased with such force that he was killed.

The particular negligence charged in the second additional count of the declaration is that, in the prosecution of the work mentioned, an unnecessary amount of dynamite, towit, thirty-five pounds, was used by the defendants, and that the deceased, while engrossed in his work and without any knowledge, or means of knowledge, that a great and unusual amount of dynamite was about to be used, the defendants without warning the deceased of the great and unusual amount of dynamite to be used, and without giving him an opportunity, before exploding the dynamite, to get to a place of safety, carelessly and negligently exploded said dynamite, and thereby the deceased was struck and killed.

The proof shows that the Chicago, Ottawa & Peoria Railway Company during the summer and fall of the year 1909 was engaged in building a line of railroad

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to be extended from Seneca, in LaSalle county, to Morris, in Grundy county; that the Central Illinois Construction Company, which for the purposes of this case is admitted to be the same company as the Chicago, Ottawa & Peoria Railway Company, let contracts for grading on the right of way for the purpose of laying the ties and railroad track on this extension; that on or about the 1st of June, 1909, this company entered into a written contract with Andrew Ward and Joseph Orr, as copartners, for grading the roadbed preparatory to laying the superstructure, the work to be finished in the best and most workmanlike manner and in conformity with the certain specifications and conditions annexed to the contract, and expressly made a part thereof. Ward & Orr sublet part of their contract to E. S. McMillan, which part was the grading of a roadbed for a distance of 3,300 feet between Seneca and Morris, and it was on this part of the right of way which McMillan was constructing that the deceased received the injuries from which he died.

The original contract awarded to Ward & Orr contained the provision that all subcontracts should be written on forms identical in terms and provisions with the original contract, and that a duplicate and original of such subcontract, properly executed by the parties, should be delivered to the chief engineer of the company after his written assent thereto had been secured; and it also contained the provision that the contract should not be assigned, nor any portion of the work subcontracted, without the written consent of the chief engineer of the company. The evidence does not show that in letting the subcontract to McMillan these provisions in the original contract were complied with; but the subcontractor was performing his work under a verbal contract with Ward & Orr and with the knowledge, acquiescence and consent of the construction company, and it must be assumed from the

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evidence that the work performed by McMillan was to be performed on the basis of and in accordance with the terms and provisions of the original contract between the construction company and Ward & Orr.

The case was tried by jury, and at the conclusion of the plaintiff's evidence the court directed a verdict in favor of the Chicago, Rock Island & Pacific Railway Company, then the case was afterwards submitted to the jury on the question of the liability of the appellants, the Chicago, Ottawa & Peoria Railway Company, and Andrew Ward and Joseph Orr. The jury returned a verdict in favor of the appellee for \$3,500 against both of the appellants, and a judgment was rendered on the verdict, from which judgment this appeal is prosecuted.

Various questions of law and fact are raised on this appeal. But the controlling question upon which all other questions of liability depend is whether or not the defendant, E. S. McMillan, in carrying out his contract, was an independent contractor. If he was, then in this action he alone would be liable for the negligence of his employees.

It is insisted by appellee that neither McMillan nor Ward & Orr were independent contractors, but that certain terms and provisions in the original contract, which they were carrying into effect, made them so dependent upon and subservient to the Chicago, Ottawa & Peoria Railway Company that the doctrine of *respondeat superior* applies, and that therefore the railway company is liable as master for the negligence charged in the declaration. The particular terms of the original contract which appellee contends transformed Ward & Orr and E. S. McMillan from independent contractors into servants of the railway company are specified as follows, namely: The clause which makes time the essence of the contract; the clause which provides that the contractor will carry on and prosecute the work in such manner, at such time,

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and at such places or points, as the chief engineer of the company shall direct, and will complete and prepare for the superstructure any portion of the work that may be required by the chief engineer of the company; also the clause which forbids the subcontracting of any part of the work without first obtaining the written consent of the engineer; and the clause that all subcontracts must be written on forms identical with the original contract, and a duplicate and original subcontract be furnished to the engineer; the clause which provides that the contractor shall remain responsible to the company for the proper performance of the work, notwithstanding any subcontracts; the clause which provides that such engineer may, on ten days' written notice, suspend operations, reduce the working force from time to time, at any particular point or points, or upon the whole work, such suspended work to be again resumed, either in whole or in part as the chief engineer of the company may think proper, and upon receipt of three days' written notice from the chief engineer of the company that the suspended operations are to be resumed; and the clause that requires that the contractor shall within three days resume work upon the contract and diligently carry on the same; and the clause whereby the engineer may forfeit the contract for imperfect work and eject the contractor from the works using such force as may be deemed necessary for the purpose; the clause by which the company shall also have the right, upon forfeiture of the contract, to employ such force and means as in the judgment of its engineer shall be necessary to complete the work in the manner and within the time provided for in the contract, and that the cost and expense thereof shall be paid by the contractor, and that the company may use in completing such work not only the horses and mules, machinery and other plate and materials provided on behalf of

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the company, but also such as may have been or may be provided by or on behalf of such contractor; also the clause by which the company has the right to stop the work contracted for and cancel the entire contract by giving ten days' written notice; and the clause by which the company is given power to cancel and annul the contract on failure of the contractor to comply with the provisions of the contract, and in such event that the contractor shall have no claim or demand whatever against the company for damages, or for compensation; and the clause by which it is agreed that the chief engineer of the company shall be constituted and appointed an umpire to finally settle all questions in case of dispute or misunderstanding between the parties in relation to any of the stipulations and provisions contained in the contract, and of the specifications annexed, and of the plans, profile and drawings relating thereto, or in the matter of the performance of the contract; and finally the clause by which it is agreed that the chief engineer shall have power to appoint the necessary assistant engineers and other agents who shall possess the same power as the chief engineer, in reference to the contract.

It is apparent that none of the provisions referred to interfere with the independence of the contractor or subcontractor while actually carrying into effect the contract, in the employment of the men or the means by which the contractor or subcontractor might see fit to accomplish the results provided for by the contract. Special emphasis is laid upon the reservations in the contract by which it is agreed that the company shall have the right to limit the number of men to be employed and the time and place and manner of doing the work, and the right of the company to forfeit the contract for imperfect work, or abrogate it entirely upon notice. It is clear, however, that the right to forfeit or abrogate the contract did not create the re-

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lation of master and servant between the parties; nor does the right to exercise a supervisory control over the character, quality and quantity of work change an independent contractor into a servant of the other party to the contract. (*Foster v. City of Chicago*, 197 Ill. 264.)

The stipulation in the contract that the contractor will carry on and prosecute the work in such manner at such times and at such points or places as the chief engineer of the construction company shall direct, and will complete and prepare for the superstructure any portion of the work that may be required by the chief engineer, must be construed in connection with all the other provisions of the contract to arrive at its meaning, and when so construed it is apparent that it has reference to the work of the contractor as a whole, and is not intended to give any control to the company over the individual employees of the contractor; nor does it give the construction company any control over the details of the work to be done by the contractor; nor the means, mechanical or otherwise, by which the work may be accomplished. There is nothing in this provision which takes from the contractor the right to select his own men and to direct their labors and to discharge them if negligent in the performance of their work; and hence it does not militate against his independence as a contractor. (*Pioneer Fireproof Const. Co. v. Hansen*, 176 Ill. 100.)

What the contract contemplated in giving the right of direction and supervision to the chief engineer of the company was to effect the kind of grading which would result from carrying out the contract in question with reference to its being done in the best and most workmanlike manner and according to the specifications designed for the work, such work to be taken as a substantive whole. The grubbing of stumps was incidental to the grading to be accomplished; and even

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if it may be assumed that the construction company, under the clause referred to, could have prevented the grubbing by blasting and could have compelled the substitution of other means, yet it must be remembered that it is not the blasting as such, which is complained of, in the declaration, but certain specified negligence which the appellants are alleged to have been guilty of in connection with such blasting. It is clear, therefore, that the men engaged in the blasting were the employees of the subcontractor and under his sole control, and that the means employed by them in the grubbing were under the sole control of the subcontractor. Neither Ward & Orr nor the railway company had any control over the kind of men to be employed or the conduct of the men employed in the work of blasting. They were employed by McMillan for that purpose and his employees only. McMillan under his contract was bound to furnish his own labor and such labor was under his sole control; he must, therefore, be regarded as an independent contractor. (*Rosenbaum Bros. v. Devine*, 271 Ill. 354.)

It is clear that neither the Chicago, Ottawa & Peoria Railway Company nor Ward & Orr could be legally liable for negligence of McMillan's employees. The judgment in this case against the appellants is therefore erroneous and should be reversed.

Judgment reversed and cause remanded.

ADDITIONAL OPINION ON REHEARING.

PER CURIAM: In his petition for a rehearing, appellee asks that if we deny the rehearing we so modify the judgment as to reverse the judgment without remanding the cause, so that he may have an opportunity to remove the cause to the Supreme Court, as McMillan is a bankrupt and appellee does not desire judgment against him. Accordingly the rehearing is denied but our former judgment is so modified as to reverse the judgment of the court below with the following finding of facts:

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We find that the death of plaintiff's intestate was caused by the acts of employees of E. S. McMillan, and not of the other defendants, and that McMillan was an independent contractor and that the other defendants are not responsible for his acts.

Susan K. Antrim, Appellee, v. A. M. Legg, Executor,
Appellant.

Gen. No. 6,213.

1. JUDGMENT, § 401*—*when finding acquitting defendant of negligence is an adjudicated matter.* Where no motion was made to set aside a verdict acquitting a defendant of negligence charged against him or for a new trial on that ground, or appeal prayed from the judgment on such verdict, *held* that such finding was an adjudicated matter.

2. MASTER AND SERVANT, § 848*—*when master not liable for alleged negligence of servant.* A master cannot be held liable for alleged negligence of his servant after the latter's acquittal of the charge.

Appeal from the Circuit Court of Livingston county; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of facts. Opinion filed August 10, 1916. Rehearing denied October 5, 1916.

H. E. TORRANCE and E. A. SIMMONS, for appellant.

F. A. ORTMAN and LYLE M. SHELLY, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

This case was considered by this court on a pre-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

vious appeal and reversed and remanded for another trial. (*Antrim v. Noonan*, 186 Ill. App. 360.) The opinion in the previous appeal fully states the facts involved in the litigation.

Upon the second trial, after the remanding order, the defendant Thomas Noonan was found not guilty by the verdict of the jury; and, in the same verdict, the appellant, A. M. Legg, executor of the estate of Adele L. M. Carothers, was found guilty and plaintiff's damages were assessed at \$3,500. The court rendered judgment on the verdict of the jury, and this appeal is prosecuted from the judgment rendered against the appellant, A. M. Legg, as executor.

The appellant insists that the declaration upon which the case was tried seeks to establish a liability on the part of the deceased testatrix, under the doctrine of *respondeat superior*; that is to say, that she was liable, because the negligence charged in the declaration was the negligence of her servant and employee, Thomas Noonan; and that inasmuch as the jury, by their verdict, have found that her servant and employee, Thomas Noonan, was not guilty of the negligence charged, she cannot be held liable for the negligence of which her servant and employee was acquitted.

The declaration in this case consists of nine counts, and it is charged in each of seven counts that Thomas Noonan was the driver or chauffeur or servant of the deceased intestate, Adele L. M. Carothers; and, as such driver, chauffeur or employee, he drove her automobile at a high and dangerous rate of speed; and that in consequence of this alleged negligence, the appellee was injured and damaged. In two counts, namely, the sixth and seventh, it is alleged that the defendant Noonan, as the servant of Adele L. M. Carothers and Adele L. M. Carothers as owner, carelessly and negligently permitted the brakes of the automo-

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bile to become out of repair, so that they would not act promptly and stop said automobile within a reasonable distance, when applied for that purpose; and that, in consequence thereof, the appellee was injured. No evidence, however, was offered to sustain these two counts; and at the conclusion of the case the court instructed the jury that there was no evidence before the jury to sustain the allegations of the counts mentioned, so that the case went to the jury to be determined upon the other seven counts, which based the liability of Adele L. M. Carothers, deceased, solely upon the negligence of her employee and servant, Thomas Noonan.

No motion was made to set aside the verdict of the jury acquitting Thomas Noonan of negligence, nor was any new trial asked on that ground, and no appeal was prayed from the judgment on the verdict acquitting Noonan, so that the finding of the jury, that Thomas Noonan was not guilty of the negligence charged in the declaration, must be regarded as an adjudicated matter; and the question is therefore fairly raised in the record whether, under these circumstances, the estate of Adele L. M. Carothers can be held liable.

There are decisions in some states to the effect that a master can be held liable on account of the negligence of his servant, even though the servant may be acquitted of such negligence, but the Supreme Court of this State has sanctioned the contrary doctrine, which also has the approval of the courts of review in most of the other States. Under the circumstances, as presented in this record, the master or principal cannot be held. (*Hayes v. Chicago Tel. Co.*, 218 Ill. 414; *Anderson v. West Chicago St. R. Co.*, 200 Ill. 329.)

In the case of *Hayes v. Chicago Tel. Co.*, *supra*, our Supreme Court quote with approval the language used by the Supreme Court of Washington, in the

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case of *Doremus v. Root*, 23 Wash. 710, which has also special application to the case at bar: "In such an action, whether brought against the employer severally or jointly with the employee, the *gravamen* of the charge is, and must be, the negligence of the employee; and no recovery can be had unless it be proved and found by the jury that the employee was negligent. Stated in another way: if the employee who causes the injury is free from liability therefor, his employer must also be free from liability." "So, too, from the principle that there can be no liability on the part of an employer for the act of his employee in which he took no part, if the employee is free from liability, it follows that a judgment in favor of the employee in an action brought against him for an injury caused by such an act is a bar to a recovery against the employer in an action brought against him for the same cause of action."

For the reasons stated, it is evident that the judgment against appellant is erroneous and must be reversed, and it is not necessary to discuss the other assignments of error.

Judgment reversed with finding of facts.

Finding of facts to be incorporated in the judgment.

We find that Adele L. M. Carothers, deceased, was not guilty of the negligence charged in the declaration.

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William H. Frederick, Appellee, v. City of Peoria, Appellant.

Gen. No. 6,260.

1. MUNICIPAL CORPORATIONS, § 120*—*when formal approval of bond of police officer does not affect its validity.* A surety company bond given by a police officer, as required by a city ordinance, is a valid and subsisting obligation, upon continued payment of the yearly premiums thereon, notwithstanding it was not formally approved by the city.

2. MUNICIPAL CORPORATIONS, § 135*—*when certificate of appointment as police officer is admissible in action for salary.* A certificate regularly issued to a police officer by a board of fire and police commissioners of a city, certifying to his appointment by the board as such officer, is competent and admissible evidence in an action by him to recover salary claimed to be due him as such officer.

3. MUNICIPAL CORPORATIONS, § 131*—*when status of police officer is not affected by failure to renew oath of office.* Where a police officer of a city was regularly issued a certificate by the board of fire and police commissioners of the city of his appointment as such officer, gave bond as required by the ordinances of the city, which he renewed from year to year by payment of the annual premium thereon, and took the required oath of office when first appointed as such officer, *held* that such officer was to all intents and purposes a legal officer of the city, notwithstanding he did not, under instructions of his superior officer, renew each year his oath of office, and such fact could not be taken advantage of by the city to defeat his claim for salary.

4. MUNICIPAL CORPORATIONS, § 135*—*when city is estopped from denying that police officer is entitled to salary.* Where a city paid a police officer a certain amount as salary and deducted therefrom a certain per cent. as a legal contribution for the pension fund, *held* that this would be a conclusive admission by the city that the amounts paid were the correct amounts to which such officer was entitled as salary, and by regularly paying such officer his monthly salary as an officer the city would be in effect estopped from denying he was legally entitled to such salary.

5. MUNICIPAL CORPORATIONS, § 135*—*when deduction from salary of officer may not be made.* A city has no right to withhold from

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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a police officer a part of his salary on account of his absence from duty when he was sick.

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed August 10, 1916. Rehearing denied October 5, 1916.

R. H. RADLEY, for appellant.

SUCHER & MOORE and KIRK & SHURTLEFF, for appellee.

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

This suit was instituted by the appellee, William H. Frederick, in the Circuit Court of Peoria county, against the City of Peoria, to recover \$239.53, which he claimed as a balance due him, on account of salary, as patrol officer in the police department of the City of Peoria. The case was tried by the court without a jury, and the court found in favor of the appellee, and gave him a judgment against the city for the sum of \$239.50; from this judgment appellant appealed.

It is not disputed that the appellee served the city as a patrolman, but it is claimed by the appellant that the proof does not show that appellee was an officer *de jure* and in order to establish a right to recover a salary, as an officer, it is necessary that there should be proof that he was an officer *de jure* and not merely a *de facto* officer.

The appellee was first appointed as a police officer in November, 1905, and qualified as such officer by giving the bond required by the ordinances of the city, and taking the required oath of office. He served as a police officer continuously until June, 1909, when he was laid off from service by the chief of police, his superior officer, until January, 1910, having, however,

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been assigned to some special work in the fall of the year 1909. In January, 1910, the appellee was again assigned to duty by the chief of police, and then served continuously as a patrol officer (except where sickness intervened) until the 14th of April, 1913.

Commencing with October, 1911, until April 13, 1913, there were certain periods of time when appellee was disabled from performing service as an officer by attacks of inflammatory rheumatism, a disease which he had contracted during his service for the city. During all the time that he served as police officer for the city, the city regularly paid him his monthly salary, but, in the last three years of such service, deducted therefrom certain amounts for the time that he was laid up on account of sickness. Appellee testified that in this way he was "docked" from October 15 to October 31, 1911, \$25.25; from November 1 to November 15, 1911, \$37.50; from January 1 to January 15, 1913, \$7.35; from September 16 to September 30, 1912, \$5; from October 1 to October 15, 1912, \$15; from October 15 to November 30, 1912, \$112.50; and from April 1 to April 14, 1913, \$36.92; a total of \$239.52.

Appellee's first appointments to office were made by the mayor of the city, with the approval of the city council, but on the 5th day of April, 1910, the City of Peoria adopted the Act of the General Assembly, providing for the appointment of a board of fire and police commissioners; and in conformity with this act the mayor, on the 26th of April, 1910, appointed a board of fire and police commissioners, consisting of John Newsam, P. A. Wendell and F. B. Dalzell, and this board was regularly approved by the city council. The appellee received his last appointment, which directly relates to this controversy, by this board of fire and police commissioners. The board, in the regular course of the official business, issued to him a certificate authenticating the fact that he had been

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examined by the board, as to his qualifications for the position of patrolman, had passed the necessary examination, and had been appointed and confirmed, by the board as such patrolman, with all the rights, powers and duties which by law pertain to that office.

The appellee had, under a previous appointment, in March, 1908, filed in the office of the city clerk a surety company bond, in the sum of \$1,000, in accordance with the requirements of the city ordinances. After his appointment by the board of fire and police commissioners, and during the years covering the matters in controversy, he had renewed this official bond by the payment of the annual premiums, by which the bond was renewed. The bond filed in 1908, and by its renewal during the years 1911, 1912 and 1913, was a valid and subsisting obligation as an official bond of appellee, without the formal approval of such bond by the city, according to the principles enunciated by the Supreme Court in *Ramsay's Estate v. People*, 197 Ill. 572. Appellee did not take his oath of office anew, because, as he testified, the chief of police, his superior officer, told him that he need not do so; that the oath previously taken would hold.

As evidence of the fact that he was regularly appointed as a police officer of the City of Peoria, the appellee offered in evidence the certificate of appointment, issued to him by the board of fire and police commissioners; and appellant contends that the certificate was not competent evidence of appellee's appointment to the office; that he should have proven such appointment by the records of the board. We are of opinion that the issuance of the certificate in question to appellee, which appears to have been done regularly in due course of the business of the board, though not especially required by law, was a proper official act of the board, for the purpose of furnishing the appellee with notice of his appointment, and the *indicia* of his

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authority to serve as a patrolman, and was competent evidence in a case of this kind brought to recover the salary pertaining to the office, to which the certificate shows he was regularly appointed. The certificate was therefore properly admitted in evidence.

We are of opinion that the competent and legal proof in the record not only shows that the appellee was legally appointed to the office of patrolman, but that he substantially complied with the requirements of the city ordinances in giving an official bond; and that, while he did not renew his oath of office, he was to all intents and purposes a legal officer of the city, recognized as such by the city, and served as such for the city during the years 1910, 1912 and part of 1913. The fact that he failed to renew his oath of office under the instructions of his superior officer could not be taken advantage of by the city, under the circumstances detailed, to defeat his claim for his salary.

Appellant also contends that there is no competent evidence offered to show that the amount of appellee's salary was fixed at \$70 during the time that he was receiving \$70 per month; and that there is no proof that it was raised to \$75 per month, and finally to \$80 per month. We are of opinion that the fact, which appears in evidence and which is undisputed, that the city paid these respective amounts at the different periods, and also deducted therefrom the one per cent. legal contribution for the pension fund, under the law, is a conclusive admission by the city that the amounts so paid were the correct amounts to which the appellee was entitled as salary, and no other proof was necessary in the first instance to establish these facts. Moreover, the city, by regularly paying appellee his monthly salary as a patrolman, is in effect estopped to deny that he was not legally entitled to such salary. In this state of the proof the only real question left for determination is the right of the city to withhold

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from the appellee certain parts of the salary which the city was paying him, on account of absence from duty when he was sick. It has been clearly settled in this State that the city had no such right. (*People v. Bradford*, 267 Ill. 486.)

For the reasons stated, the court did not err in finding the issues in favor of the appellee, and rendering judgment in his favor, and the judgment should be affirmed.

Affirmed.

A. W. Weston, Appellee, v. John Hicks, Appellant.

Gen. No. 6,304.

1. LANDLORD AND TENANT, § 249*—*when landlord not liable for negligence of tenant.* A landlord cannot be held liable for the negligence of his tenant in the use and occupation of the leased premises.

2. LANDLORD AND TENANT, § 249*—*when landlord voluntarily repairing awning not liable for negligence of tenant in lowering it.* Where a tenant who was in the sole possession and control of an awning which was appurtenant to the leased premises allowed same to be lowered so that it was below the height required by a city ordinance, and the plaintiff was thereby injured, *held* that the landlord, who was under no agreement to make repairs or improvements to such awning, would not be liable in an action to recover damages for such injuries, notwithstanding he had voluntarily contributed to the expense of putting canvas on the awning.

Appeal from the Circuit Court of Boone county; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the April term, 1916. Reversed with finding of facts. Opinion filed August 10, 1916. Rehearing denied October 5, 1916.

WILLIAM BIESTER and COVEY & ROBERTS, for appellant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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B. JAY KNIGHT and JAMES HUFF, for appellee; KARL J. MOHR, of counsel.

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

This is an appeal from a judgment for \$750 recovered by the appellee, A. W. Weston, in the Circuit Court of Boone county against John Hicks, appellant, for damages on account of alleged personal injuries suffered by appellee, in consequence of bumping into an awning which was attached to a building owned by appellant. As a ground for recovery, the appellee alleges in the first count of his declaration that at the time of suffering the injury, and previous thereto, the appellant was the possessor of and had control of a certain two-story store building in the City of Belvidere; and that he kept and maintained in front of said building a certain awning, which when in a lowered condition projected out over the sidewalk; and that it was the duty of the appellant to keep the same, and the appurtenances thereof, in a good, safe and suitable condition; and that at the time of the injury, the awning had become out of repair, and had been lowered to such an extent as to be dangerous to persons passing along the street; and that it was the duty of the appellant to keep said awning high enough above the top of the sidewalk so that persons could pass under without danger; and that the appellant, while so possessed of said property and awning, and while in control of the same, wrongfully, carelessly and negligently suffered the same to be and remain in a lowered, dangerous and unsafe condition; and that while the appellee was using due care and caution for his own safety, he ran into and struck against the awning, and was thereby injured.

In the second count, the appellee charges that it was the appellant's duty to keep and maintain the awning

above the sidewalk at a height of seven feet, by the requirements of a city ordinance of the City of Belvidere, which appellant neglected to do.

The proof shows that the awning in question was attached to iron arms, which were fastened to the building. James Devlin, who put up the awning in question, testified with reference to its construction as follows: "There is a roller that goes above the windows, all along the front part of the building; and canvas is tacked onto this roller; then there is a wood front-piece, and four projecting arms fastened into the building, and projecting out to the front-piece; and the canvas is put on the front wood piece with screw eyes."

The awning was raised or lowered by means of a crank. When the awning was lowered properly, the iron arms holding the canvas would stand out at a level, and in that case the lowest part of the awning would be seven feet above the sidewalk. An awning of this character can be lowered to the extent of the length of the canvas on the roller, and in this case an extra lap of canvas had been tacked on the roller, and if all the canvas was unrolled, the awning could be lowered a foot and a half more than seven feet above the sidewalk. At the time of the injury to appellee it had been lowered to about five feet seven inches above the surface of the sidewalk, and appellee's height was five feet ten inches.

The evidence also shows that appellant was the owner of the building, and that it was all leased to and occupied by tenants, and that the awning in question was appurtenant to the store appellant had leased to his tenant, Harry Brown; that Brown had the canvas put on the roller, to complete the awning for his use, and that the awning was used by and in the exclusive possession and control of Brown, as tenant of appellant. There was no agreement between appellant, as owner, and Brown, as tenant, by which appellant was

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bound to make any repairs or improvements with reference to the awning, or by which he could in any way control its use or possession, or by which he was bound to furnish the canvas which was necessary to complete the awning for use, but appellant did make a voluntary contribution of \$5 towards the expense of putting on the canvas.

The proof clearly shows that appellee was not injured on account of any defect in the iron frame work, but on account of lowering the awning below the height required for safety, which was a matter entirely under the control of appellant's tenant; and if it was negligence not to keep the awning at the height of seven feet above the sidewalk the negligence was that of the tenant. It is well settled that a landlord cannot be held liable for injuries resulting from the negligence of a tenant, in the use and occupation of premises leased. Our Supreme Court has stated the rule applicable to this class of cases to be as follows: "The landlord is not responsible for the misconduct or negligence of his tenants, even though occasioned by the manner in which the premises were constructed, provided they were capable of being used in a proper manner, whereby no injury could have resulted." (*West Chicago Masonic Ass'n v. Cohn*, 192 Ill. 210.)

It is apparent, therefore, that there is no cause of action against the appellant as landlord for the fault of his tenant in lowering the awning below the line of safety, and thereby causing an injury to the appellee. The judgment should therefore be reversed.

Reversed with finding of facts.

Finding of facts to be incorporated in the judgment.

We find that the appellant was not guilty of the negligence charged in the declaration.

**George E. Sadler, Appellee, v. Jacob P. Schnelbacher,
Appellant.**

Gen. No. 6,287. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the April term, 1916. Reversed with finding of facts. Opinion filed August 10, 1916. Rehearing denied October 5, 1916.

Statement of the Case.

Action by George E. Sadler, plaintiff, against Jacob P. Schnelbacher, defendant, to recover a commission as a real estate broker for effecting a lease of defendant's premises. From a judgment for plaintiff for \$7,500, defendant appeals.

Plaintiff occupied an office with another real estate broker. They were not partners, but were frequently on opposite sides of deals. Plaintiff, learning from his office associate that the latter had a client wanting a business location, went to defendant, who showed plaintiff over his building and told plaintiff to have the party come there and he could do business. Plaintiff called again for more information which the party, through plaintiff's associate, wanted, and thereafter the party came to the city and was introduced by plaintiff to defendant, and at a meeting in the office of defendant's attorney a proposition for a lease was made by said attorney and at first accepted, whereupon plaintiff suggested that defendant pay him a commission. Plaintiff's testimony was conflicting as to whether defendant then refused to pay any commission or to pay the amount asked by plaintiff. He later refused to pay any. The lease was abandoned at that time because of a mistake in figures, and was later concluded elsewhere as a result of negotiations between

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the parties and said attorney in which plaintiff had no part.

WILLIAM JACK and WINSLOW EVANS, for appellant.

GEORGE W. SPRENGER, for appellee; WEIL & BARTLEY, of counsel.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

BROKERS, § 88*—*when evidence insufficient to show contract for sale of property on commission.* In an action by a real estate broker against the owner of a building to recover a commission on a leasing of the building, evidence held insufficient to show any contract, express or implied, between plaintiff and defendant in relation to any service to be rendered by plaintiff for defendant in relation to the renting of defendant's property or by defendant to pay plaintiff for any services rendered.

Adelia Carr, Appellee, v. Melvin Carr, Appellant.

Gen. No. 6,297. (Not to be reported in full.)

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

Statement of the Case.

Action in forcible detainer by Adelia Carr, plaintiff, against Melvin Carr, defendant, to recover possession of premises leased by plaintiff to defendant. From a judgment for plaintiff, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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H. L. RICHOLSON and R. A. GREEN, for appellant.

R. D. MILLS, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 19*—*when evidence is insufficient to show promise to lease premises for life term.* In an action of forcible detainer, evidence held insufficient to show any promise by plaintiff, lessor of certain lands, that defendant, lessee of such lands, should remain in possession of the leased premises during the plaintiff's lifetime, instead of during the term of the lease only.

2. FORCIBLE ENTRY AND DETAINER, § 24*—*when making of promise for life term is unavailable as a defense in action against tenant.* A promise by the lessor of land that the lessee should occupy the premises for a life term which was made prior to or contemporaneous with the making of a written lease for a specified lesser term is unavailable as a defense in an action of forcible detainer for holding over after the expiration of the term of the lease.

3. LANDLORD AND TENANT, § 441*—*what delay to regain possession of premises is insufficient to raise inference of new tenancy.* The mere fact that a landlord took no steps for three weeks after the expiration of a lease according to its terms to regain possession of the leased premises does not raise an inference of a new tenancy.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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**George J. Davidson, Appellee, v. Peoria & Pekin Union
Railway Company, Appellant.**

Gen. No. 6,299.

1. MASTER AND SERVANT, § 147*—*what is duty of employer to keep cars equipped with safety appliances.* An employer's duty under the Federal Safety Appliance Act to use even great diligence in keeping cars equipped as therein required and his liability for defects in required appliances of which he has no notice and in the exercise of reasonable care could not have notice is absolute and imperative.

2. MASTER AND SERVANT, § 98*—*what law governs as to employer's duty and liability under Federal Safety Appliance Act.* The question of an employer's duty and liability under the Federal Safety Appliance Act is a federal question in which the decisions of the federal courts govern.

3. MASTER AND SERVANT, § 147*—*what is liability of employer for injuries to servant resulting from unknown defects in appliances.* A temporary defect and failure to work of an equipment required by the Federal Safety Appliance Act creates a liability in the employer for injuries to the servant and subjects him to the penalties and burdens of the act, even though it arises from some unknown defect which he could not, in the exercise of reasonable care, have ascertained and remedied.

4. MASTER AND SERVANT, § 98*—*when defenses of contributory negligence and assumed risk are unavailable.* Under sections 3 and 4 of the Federal Employers' Liability Act, the defenses of contributory negligence and assumed risk are not available to an employer against whom an action is brought to recover damages because of injuries sustained from defective appliances required by the Federal Safety Appliance Act, and an averment in the declaration of due care of plaintiff is surplusage.

5. MASTER AND SERVANT, § 147*—*when evidence is sufficient to show that coupling appliance does not comply with Federal Safety Appliance Act.* Evidence held sufficient to show that the coupling appliance causing plaintiff's injury was, at the time and place of the injury, defective and not in compliance with the Federal Safety Appliance Act, and the verdict of the jury so finding was not against the manifest weight of the evidence, in an action by a railroad switchman to recover damages for such injury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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6. MASTER AND SERVANT, § 147*—*what is extent of liability of employer for use of defective coupling appliance.* Where a coupling appliance, required by the Federal Safety Appliance Act, was defective at the time and place of an injury to a switchman caused thereby, *held* that it would be immaterial how long before that it had been defective, or how soon after that the defect was removed, or that no want of care or intent to evade the law could be imputed to the employer, in an action to recover damages for such injury.

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916. Rehearing denied October 5, 1916.

STEVENS, MILLER & ELLIOTT, for appellant.

WEIL & BARTLEY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

George J. Davidson, the appellee, forty-six years old, between three and four o'clock in the morning of March 11, 1915, was in the employ of the appellant railway company as switchman in its yards near East Peoria, and while assisting the crew with whom he was working in making up a freight train for the Vandalia Railroad Company an automatic coupler failed to work by impact. He went between the cars attempting to fix it. His right wrist was caught and injured, resulting in a necessary amputation about five inches below the elbow. Appellant was engaged and appellee was then employed by it in interstate commerce. He brought this action to recover for that injury and it was tried on two counts of his declaration alleging that the automatic coupler was in a defective condition, and could not be coupled automatically by impact, and that he was then and there employed in inter-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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state commerce, with other appropriate allegations to permit a recovery under the Federal Employers' Liability Act for an injury resulting from the violation of the federal act requiring cars to be equipped with couplers coupling automatically by impact without the necessity of employees going between the ends of said cars. He had judgment on a verdict of \$6,525, from which this appeal is prosecuted and a reversal asked on the grounds that no negligence of the defendant is shown; that the coupler in question was in perfect order and that the court erred in refusing certain instructions offered by the defendant.

Appellee testified that two sections of the train were about to come together; that he was in position to see that a proper coupling was made; that the foreman of the crew, Hurley, was stationed some distance away and another switchman, Saunders, some distance beyond Hurley so that signals from appellee could be communicated through those two men to the engineer; that signals were given by lantern and that the engineer was entirely governed thereby; that, as the cars approached and were about to come together, appellee gave a signal to slow down, or ease up, and the cars came together properly without too much violence but did not couple automatically as they should have done; the pin that held the coupling in place did not drop. Discovering this, he gave a stop signal, which was obeyed. He then gave a go ahead signal and the cars to which the engine was attached pulled away about a car length and stopped on appellee's signal. He then endeavored by shaking the lever to the coupler to cause the pin or lock to go down. This pin is so arranged on the coupler that when a coupling is about to be made the knuckle is opened and the pin, which works in a hole, or slot, is held up. If working properly, the pin is jarred by the impact and falls down into the slot, locking the knuckle. It can be pulled up and the knuckle released by means of a lever on the

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end of the car so that it is not necessary for men to go between the ends in working it. He could not make the pin go down where it belonged by shaking the lever. He then went between the ends of the cars and tried to adjust it—tried to hammer it down with his brake club without success. Then using his right hand he put his fingers up underneath the coupler into the hole into which this pin is supposed to drop, endeavoring in that way to loosen the pin. This placed his hand under the coupler and left his wrist and forearm alone exposed. He says while in this position, without any warning or signal, the cars came back and came together, crushing his wrist and forearm.

That the injury to the wrist and arm was inflicted because of appellee's going between the cars to do something to the coupler is beyond controversy. But the two men before mentioned stationed to communicate the signals from appellee to the engineer, and the engineer and his fireman all testify that the cars were not moved forwards after the first impact; that the engineer got and obeyed the signal to back his section of cars down to the point of coupling, and that the next thing that came to their knowledge was the injury to appellee. Appellant's theory of the accident, based on its testimony, is that when the cars came in contact the knuckles of the receiving coupler were not completely opened and that they were entirely closed by the impact without making connection, and that appellee, seeing that the knuckles did not interlock, used the cut lever to try to open or pull up the lock pin again and put his hand in there to open the knuckles supposing he could do it on the separation and rebound that follows in coupling a long train, but that he was not quick enough and was caught in this effort; that couplers do not always work in the first impact, sometimes two or three efforts are necessary. The pin may not drop perhaps because the knuckles are not entirely

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open or there may be some rust or temporary defect that prevents the free passage of the opposing knuckles. This theory of appellant as to how the accident actually happened is plausible except for one thing. There is no question that appellee's wrist and arm were injured and that his hand was not crushed, as it likely would have been if it had happened that way. This mute testimony strongly corroborates appellee's statement of what he was doing and how he was doing it at the time of the injury. The wound was what would happen in an accident occurring as he says it did. It was a fair question for the jury. It appears that the coupler was in working condition shortly before and shortly after the accident. Appellant says it is therefore unreasonable to suppose that it was out of order just at the time of the accident. But it cannot be denied in any view of the testimony that there was an apparent failure of the coupler to work at just that time, and that appellee, who was an experienced switchman and entirely familiar with such matters, thought it was necessary to go between the cars to remedy the difficulty. If there was a temporary defect which caused a failure to work just then and there it was sufficient ground for this action and judgment.

Whether the Federal Safety Appliance Act is complied with on the part of employers by using ordinary diligence or even great diligence in keeping their cars equipped, as therein provided, and whether employers should be held liable for defects in required appliances of which they have no notice, and in the exercise of reasonable care could not have notice, is no longer an open question. It is a federal question in which the decisions of the federal courts govern. The duty was held to be absolute in *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281. That position was strongly attacked by counsel but reaffirmed by the court in *Chicago, B. & Q. Ry. Co. v. United States*, 220 U. S. 559,

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in which case the authorities are so thoroughly discussed and reviewed that we do not cite or refer to cases there discussed. In *Chicago, R. I. & P. Ry. Co. v. Brown*, 229 U. S. 317, 320 [3 N. C. C. A. 826], the two last mentioned cases are treated as settling the law, "That the failure of a coupler to work at any time sustains the charge of negligence in this respect, no matter how slight the pull on the coupling lever." That the duty is imperative is recognized as the law in *Luken v. Lake Shore & M. S. Ry. Co.*, 248 Ill. 377. In *Erlinger v. St. Louis & O'Fallon Ry. Co.*, 152 Ill. App. 640, the court said that the law requires the equipment at all times so that when in use the necessity for going between the ends of the cars is avoided. The same court repeated and reaffirmed that statement in *Steckstor v. Cleveland, C., C. & St. L. Ry. Co.*, 169 Ill. App. 40, 44. It seems to follow from the federal cases that a temporary defect and failure to work of an equipment required by the Safety Appliance Act creates a liability and subjects the defendant to the penalties and burdens imposed by that act, even though such failure arose from some defect unknown to the employer, which in the exercise of reasonable care he could not have ascertained and remedied. Under sections 3 and 4 of the Employers' Liability Act neither the defense of contributory negligence nor of assumed risk is available to appellant. An averment in the declaration of due care of the plaintiff is surplusage. *Lucas v. Peoria & Eastern Ry. Co.*, 171 Ill. App. 1.

The instructions to the jury were much more favorable for appellant than the law heretofore stated warranted. We conclude that there is sufficient evidence showing and tending to show that the coupling was at the time and place in question defective and not in compliance with the federal statute to forbid our disturbing the verdict on the ground that it is manifestly against the weight of the evidence; that if the coupling

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was then and there so defective it is not material how long before that time it had been defective, or how soon after that time the defect was removed, and not material that no want of care or intent to evade the law can be imputed to appellant; that the instructions, as a series, were much more favorable to appellant than it had a right to ask, and that there was no reversible error in giving or refusing instructions. No question is raised as to the action of the court in ruling on the evidence, and no error is suggested not hereinbefore mentioned. The judgment should therefore be affirmed.

Affirmed.

The People of the State of Illinois, Defendant in Error, v. Louis Peck, Plaintiff in Error.

Gen. No. 6,233. (Not to be reported in full.)

Error to the County Court of De Kalb county; the Hon. WILLIAM L. POND, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

Statement of the Case.

Prosecution by the People of the State of Illinois, plaintiff, against Louis Peck, defendant, for violating the statute relating to anti-saloon territory (J. & A. ¶ 4647 *et seq.*). From a judgment of conviction and fine and imprisonment and abatement of the place described in the indictment, defendant brings error.

CLIFFE & CLIFFE, for plaintiff in error.

LOWELL B. SMITH, for defendant in error.

The People v. Peck, 203 Ill. App. 504.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 140*—*when record need not be introduced to show description of premises where liquor is sold.* On trial under an indictment for selling intoxicating liquor in anti-saloon territory, *held* that the legal description of the property on which the building wherein the intoxicating liquor was sold was located could be given by any one who knew it, and it would not be necessary to introduce the record.

2. INTOXICATING LIQUORS, § 131*—*what evidence is admissible to show character of place in prosecution for sale in anti-saloon territory.* Evidence that a witness had seen intoxicated persons come out of a place wherein it was charged that intoxicating liquors had been sold, *held* admissible in a prosecution for selling intoxicating liquor in anti-saloon territory.

3. INTOXICATING LIQUORS, § 140*—*when certified copy of record of internal revenue collector's office showing issuance of special stamp is admissible in prosecution for selling intoxicating liquor in anti-saloon territory.* A certified copy of a record of the internal revenue collector's office for the district within which intoxicating liquors were charged to have been sold, showing the issuance of a special stamp or license to carry on the business of a retail liquor dealer at a certain place for a certain period, *held* to be competent evidence without proof that it was posted in said place, in a prosecution for selling intoxicating liquor in anti-saloon territory.

4. CRIMINAL LAW, § 494*—*when accused cannot complain of alleged erroneous admission of evidence.* Under an indictment against one Louis Peck charged with selling intoxicating liquor in anti-saloon territory, where defendant contended that error was committed by the trial court in permitting the State to prove that his full name was Louis E. Peck and that he was commonly known as L. E. Peck, *held* that there was no merit in such contention where it appeared such defendant's counsel had called him L. E. Peck in examining his own witnesses and in an instruction given at his request.

5. INTOXICATING LIQUORS, § 132*—*when statements of accused indicating guilt are admissible in prosecution for selling intoxicating liquor in anti-saloon territory.* In a prosecution for selling intoxicating liquor in anti-saloon territory, evidence that the accused

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Peck, 203 Ill. App. 504.

had told a witness he had sold whisky to parties named and that they did not dare expose him, and that he had tried to prevent a witness from testifying before the grand jury to the truth of the matter and to so shape his testimony that it would not include intoxicating liquor; *held* properly admitted.

6. CRIMINAL LAW, § 212*—*when action of court in reciting portions of evidence in ruling upon objections is not erroneous.* Where a judge, in ruling upon objections to evidence before the jury, in a criminal case recited or repeated portions of the testimony, *held* no error if he correctly stated the evidence, especially where no objection was made.

7. INTOXICATING LIQUORS, § 131*—*when evidence as to place being quiet and orderly is properly excluded in prosecution for selling in anti-saloon territory.* As the sale of intoxicating liquor in anti-saloon territory is a nuisance under the Anti-Saloon Territory Act (J. & A. ¶ 4650); notwithstanding the place where it is sold may be a quiet and orderly place, *held* that there was no error committed by the court in refusing to permit a witness in a prosecution for violation of the act to testify that the place in question was quiet and orderly, particularly where the accused had testified that he so kept it and no one had testified directly to the contrary.

8. INTOXICATING LIQUORS, § 158*—*when instruction in prosecution for sale of in anti-saloon territory is not erroneous.* Where the anti-saloon law was adopted in certain territory on April 7, 1914, *held* that such law became effective in that territory May 7, 1914, and that an instruction covering the period "after May 6, 1914," would not be open to the objection that it covered one day before the law went into effect.

9. CRIMINAL LAW, § 417*—*when question of variance between proof and indictment may not first be raised on appeal.* Where a nuisance count in an indictment for selling intoxicating liquor in anti-saloon territory described the place where such liquor was charged to have been sold as "No. 123 South California street" and an internal revenue stamp in evidence described it as 123 California street, and there was no proof of any other 123 California street than 123 South California street, *held* no ground for reversal of a judgment of conviction where the variance was first suggested on appeal.

10. INTOXICATING LIQUORS, § 162*—*when instruction in prosecution for sale of in anti-saloon territory is not reversibly erroneous.* Even if an instruction in a prosecution for selling intoxicating liquor in anti-saloon territory was improper because covering a day before the law went into effect in such territory, the giving

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of such instruction is not ground for reversal where no sales of intoxicating liquor in the place charged were proved to have been made on the particular day.

Thede Brothers, Appellees, v. Newton Matthews, Appellant.

Gen. No. 6,253. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916. Rehearing denied October 5, 1916.

Statement of the Case.

Action by Thede Brothers, plaintiffs, against Newton Matthews, defendant, to recover fifteen dollars for moving a building from defendant's premises. From a judgment for plaintiffs, defendant appeals.

KIRK & SHUTTLEFF, for appellant.

FRANK A. HALL, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 107*—*when telephone conversation is admissible.* A telephone conversation is admissible in evidence if the witness identified the voice, and its force would depend on whether the jury believed the witness.

2. CONTRACTS, § 385*—*when evidence sufficient to show promise to pay for removal of building.* Evidence held sufficient to sustain

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the finding of the court that defendant promised to pay plaintiff's the expense of moving a certain building from his land, in an action to recover for such expense.

3. *CONTRACTS, § 85*—when promise to pay for removal of building is based upon sufficient consideration.* Where defendant had consented that a certain building should be placed on his land, held sufficient consideration appeared for his promise to pay for its subsequent removal.

**Knight Light Company, Appellant, v. C. M. Morrison,
Appellee.**

Gen. No. 6,301. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916. Rehearing denied October 5, 1916.

Statement of the Case.

Action in replevin by Knight Light Company, plaintiff, against C. M. Morrison, defendant, for possession of a soda fountain and other goods. From a judgment for defendant, plaintiff appeals.

Defendant gave plaintiff a written order, prepared by plaintiff for the goods in question to conform to certain plans and specifications prepared by plaintiff to defendant's satisfaction and to be installed in defendant's store, defendant to pay therefor \$2,500, \$100 with the order, \$700 on receipt of the goods with bill of lading, and the remainder at stated times thereafter, and to execute notes and a chattel mortgage for the deferred payments when the goods were delivered and to procure and assign an insurance policy, title to remain in plaintiff until the chattel mortgage

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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was executed and delivered and until the purchase money was paid in full, and the order to be subject to plaintiff's approval, blank for which appeared on the order. The order was not formally approved by plaintiff's signature thereto until two days before trial. The goods were in part manufactured by plaintiff after receipt of the order and in part obtained elsewhere, and were shipped to defendant, knocked down and crated, and installed in defendant's place of business by plaintiff's employees. Defendant paid the \$800 called for by the order, but refused to execute the notes and mortgage or procure the insurance policy or make further payment, claiming the goods were not according to contract, but allowed them to be installed on assurances of plaintiff's employees that when installed they would be according to contract. Defendant offered to return them upon return of the \$800 paid by her. She gave forthcoming bond and retained the goods.

QUINN & QUINN and JOSEPH P. MAHONEY, for appellant.

PAGE, HUNTER, PAGE & DALLWIG, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 19*—*what constitutes implied acceptance of order for goods.* Where the defendant in a replevin action gave to the plaintiff a written order for certain goods subject to plaintiff's acceptance of the order, on which a blank appeared for such acceptance held that the plaintiff by manufacturing, shipping and installing the goods ordered, impliedly accepted the order, although the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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written acceptance thereof was not signed by plaintiff until after bringing of the action and delivery of the goods.

2. SALES, § 301*—*when replevin lies to recover goods sold under conditional sale contract.* Where goods were sold on a contract which provided that title should remain in the seller until they were paid for, *held* that replevin by the seller would not lie for the goods unless the purchaser was in default or unless the seller first tendered back the money paid thereon.

3. SALES, § 301*—*when return of payments is condition precedent to recovery of goods sold under conditional sale contract.* Where a party contracted to purchase goods of a specified kind and quality and the goods when delivered were found to be not of such kind or quality, *held* that such party would not be in default in refusing to pay for same, and replevin would not lie by the seller of the goods without his first returning to such party what he had paid thereon.

4. SALES, § 296*—*when purchaser is not estopped from complaining that goods do not comply with contract.* A purchaser of goods is not estopped from complaining that they do not comply with the contract by having retained them after offering to return them upon return of the money paid thereon, in an action in replevin by the seller for such goods.

John B. Bartholomew et al., Appellees, v. Lura H. Bartholomew, Appellant.

Gen. No. 6,310.

1. PARTITION, § 72*—*what compensation should be allowed to those making improvements on land in partition suit.* In a partition suit, where sale was had, those who had lawfully made improvements on the land would be allowed by way of compensation the actual increase of the price received at the sale in consequence of the improvements.

2. TENANCY IN COMMON, § 5*—*right of one tenant to make improvements.* A tenant in common may make proper improvements on the land without his cotenant's consent.

3. PARTITION, § 72*—*what compensation should be allowed in partition suit to tenant in common making improvements on land.*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bartholomew v. Bartholomew, 203 Ill. App. 510.

Where a tenant in common had so improved the land as to add to its value a certain sum, but at a sale of the land, in a suit for partition thereof, a sum less than the aggregate of the original value and the added value was realized, *held* that the depreciation should be charged proportionately to both the original and the added value, and such tenant credited with the fraction of the sum found to be the enhanced value of the land which such tenant's interest bore to the entire interest in the land.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed August 10, 1916. Rehearing denied October 11, 1916.

H. CLAY CALHOUN and SUCHER & MOORE, for appellant.

R. RADLEY, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

Albertus Y. Bartholomew died intestate leaving a widow and five children surviving him as his only heirs at law, and leaving a farm of about five hundred and twenty-two acres in Peoria county. John B. Bartholomew, one of his children, bought the interests in said farm of all the other children, except his sister Lura H. Bartholomew, and thereupon became the owner of four-fifths and she of one-fifth. Thereupon he made extensive improvements upon said farm and filed a bill in partition against his sister and others. There were incumbrances and questions of dower and matters of rent, all of which have been adjusted by the decrees of the court below and those matters are disposed of. The decree sought to compensate complainant for the improvements, which compensation was asked in the bill. His sister's answer denied that he was entitled to any compensation for said improvements, because they did not increase the value of the premises and because she had never

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requested or consented to said improvements. She claims here that if any allowance should be made to him, the allowance which was made is grossly excessive. This is an appeal by her on that subject only.

From *Louvalle v. Menard*, 6 Ill. (1 Gilm.) 39 to *Bayley v. Nichols*, 263 Ill. 116, the rule prevailing in this State has been that in partition, where a sale is had, those who have lawfully made improvements upon the premises are allowed by way of compensation the actual increase of the price received at the sale in consequence of the improvement. It is also clear that a tenant in common in possession may make proper improvements without the consent of his cotenant. The real dispute here arises in the application of these principles.

The cause was twice referred to the master to report proofs and conclusions and he did make such reports, and the decree on this subject is based thereon. The reports are not set out in the abstract and we might very properly refuse to consider the question, but we have concluded to pass upon the merits of the controversy. The court found that before the improvements were made the premises were worth \$44,000; that the improvements increased the value of the premises \$5,000; and that after the improvements were made the premises were worth \$49,000. The farm brought at the sale \$45,500. It is the contention of the appellant that this showed that the improvements only added \$1,500 to the value of the farm and that she should pay to her brother only one-fifth of that sum. She seeks to place the entire depreciation upon the improvements. The court below distributed the depreciation pro rata between the value of the farm before the improvements were made and the value of the farm afterwards, and held that the sale was for four hundred and fifty-five four hundred and ninetieths of the value as improved, and allowed

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the complainant to be credited with that fraction of the sum which it had been found that the premises were enhanced in value by the improvements. That fraction of \$5,000 would be \$4,559.10, and \$911.82 is one-fifth of that sum and is the amount which the court found the improvements had added to the selling price of her share. The proof is very clear that these improvements had added to the actual value of the farm, at least as much as the court found. There is nothing to indicate that the shrinkage at the sale from the values, which the court had found, was only in the improvements and not in the land itself. In *Bradley v. Simpson*, 93 Ill. 93, where a similar question was involved, it was held that as there was nothing in the case to indicate to the contrary it would be assumed that the depreciation was in the same proportion upon the land and buildings. We think the court justly followed that rule in this case. The decree is therefore affirmed.

Affirmed.

MR. PRESIDING JUSTICE NIEHAUS took no part.

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Richard v. Brunner Foundry & Machinery Co., 293 Ill. App. 514.

Albert Richard, Appellee, v. Brunner Foundry & Machinery Company, Appellant.

Gen. No. 6,168. (Not to be reported in full.)

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed October 12, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Albert Richard, plaintiff, against Brunner Foundry & Machinery Company, defendant, to recover damages for injuries to plaintiff's right eye. From a judgment for plaintiff for \$5,000, defendant appeals.

Plaintiff was employed as a fireman in the boiler room of the St. Paul Coal Company, where defendant was engaged in putting in new flues in a boiler adjoining the one on which plaintiff was at work. Defendant's employees were engaged in expanding a new flue by hammering on the head of a steel driftpin so as to drive it into the expander. Plaintiff's eye was injured by a piece of the head of the pin flying off when it was struck by the hammer in the hands of defendant's employee.

McDOUGALL & CHAPMAN and HOWARD H. BAYNE, for appellant.

DUNCAN & O'CONOR, for appellee.

: MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 697*—*when evidence sufficient to show injury to servant by inexperienced coemployee. Evidence in an*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Meers v. Daley, 203 Ill. App. 515.

action by an employee for personal injuries, held to tend to show plaintiff's injury was caused by improper or careless handling of a hammer by defendant's employee and that he was inexperienced in that line of work.

2. DAMAGES, § 196*—*when evidence as to possible results of injury is inadmissible.* Evidence as to possible results of plaintiff's injury to his right eye and its possible effect on his other eye, held incompetent and properly excluded in an action to recover damages for such injury.

3. DAMAGES, § 244*—*when admission of improper evidence is harmless error.* In an action for damages for personal injuries, held that the improper admission of evidence as to the possible results of the injury was harmless error where there was nothing to show that the jury considered or were influenced by such evidence in finding for the plaintiff.

CARNES, J., dissenting.

E. Meers, Appellee, v. Edward J. Daley, Appellant.

Gen. No. 6,244. (Not to be reported in full.)

Appeal from the Circuit Court of Will county; the Hon. ARTHUR W. DE SELM, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed October 12, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by E. Meers, plaintiff, against Edward J. Daley, defendant, to recover fees for professional legal services. From a judgment for plaintiff for \$2,000, defendant appeals.

O'DONNELL, DONOVAN & BRAY, for appellant; J. L. O'DONNELL, of counsel.

EDWARD R. NADELHOFFER, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Meers v. Daley, 203 Ill. App. 515.

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

Abstract of the Decision.

1. ATTORNEY AND CLIENT, § 134*—*what weight should be given by jury to testimony of experts as to value of professional services.* The opinion of attorneys testifying as experts as to the value of professional legal services rendered by an attorney should be considered as merely advisory to the jury in an action to recover for such services to aid them in forming their own judgment concerning the amount properly to be allowed for such services, and they should use their own knowledge and judgment based upon all of the evidence as to what would be reasonable compensation therefor.

2. INSTRUCTIONS, § 87*—*when on preponderance of evidence deemed not erroneous.* An instruction that a slight preponderance only of the evidence in favor of the plaintiff would be sufficient to warrant a finding in his favor, *held* proper and not misleading, in an action to recover fees for professional legal services wherein several attorneys testified as experts and the finding of the jury was less than the amount testified to by such witnesses.

3. ATTORNEY AND CLIENT, § 135*—*when verdict in action for legal services is not excessive.* In an action to recover fees for professional legal services rendered, where plaintiff was retained as solicitor for defendant in a suit against defendant and others to set aside a will disposing of an estate valued at \$150,000, under which defendant was the principal beneficiary, in which suit plaintiff had leading charge of the defense litigation, and performed valuable and successful service, and which resulted in a settlement quite favorable to defendant's interests, and on account of which services plaintiff had received \$500, *held* that a judgment for \$2,000 was not excessive.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**William Lostutter by Margaret Lostutter, Appellant,
v. Brown Shoe Company, Appellee.**

Gen. No. 6,317.

1. **WORKMEN'S COMPENSATION ACT, § 4***—*what minors are included within.* The second paragraph of section 5 of the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475(5)], including within that act "minors who are legally permitted to work under the laws of the State," includes only minors who can legally perform the work under the laws of the State, and does not include a minor who cannot legally perform work under the Child Labor Act.

2. **STATUTES, § 152***—*when statute deemed not to repeal conflicting statute by implication.* The repeal of a statute by implication is not favored, and where two acts of the Legislature come in question unless they are clearly inconsistent with and repugnant to each other, or unless in the later statute some express notice is taken of the former plainly indicating an intention to repeal it, the later statute will not be considered as operating to repeal the former by implication.

3. **WORKMEN'S COMPENSATION ACT, § 1***—*as not repealing any part of Child Labor Act.* No legislative intent is anywhere apparent in the provisions of the Workmen's Compensation Act to repeal or abrogate any part of the Child Labor Act, nor any conflict in the legitimate operation of both acts, and the object and purpose for which each act was passed can be fully effectuated by allowing both acts to remain in full force.

4. **MASTER AND SERVANT, § 22***—*how Child Labor Act should be construed.* The Child Labor Act was passed to prevent absolutely the employment of children in the prohibited occupations named therein, and such construction should be given it by the courts as will effectuate such purpose if it can consistently be done.

5. **MASTER AND SERVANT, § 22***—*what is duty of employers as to employment of children within Child Labor Act.* Those who are liable under the provisions of the Child Labor Act are bound at their peril to see that children are not employed contrary to its provisions.

6. **WORKMEN'S COMPENSATION ACT**—*what are rights of minors illegally employed within Child Labor Act to compensation under.* Compensation for injuries received by a minor while engaged in

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lostutter v. Brown Shoe Co., 203 Ill. App. 517.

work contrary to the provisions of the Child Labor Act is not recoverable under the Workmen's Compensation Act.

CARNES, J., dissenting.

Appeal from the Circuit Court of Lee county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed October 12, 1916.

JOHN P. DEVINE, for appellant.

W. G. SHOCKEY and CLYDE SMITH, for appellee.

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

This suit was instituted by Margaret Lostutter as next friend of the appellant, William Lostutter, who is a minor under sixteen years of age, to recover damages for personal injuries received by him while employed in the factory of appellee, the Brown Shoe Company, alleging such employment to be in violation of the provisions of the Child Labor Act. It is alleged in the declaration, which contains two counts, that appellee was operating a certain shoe manufacturing establishment; and that it unlawfully employed the appellant, he being a minor under the age of sixteen years, to work and operate a machine known as a leveling machine, which is propelled by steam power; that the work of operating this leveling machine was dangerous employment, and that the appellant's life and limbs were thereby endangered; that while he was thus operating the machine in question his left thumb came in contact with a part of the machine, and was drawn into it, and that it was thereby lacerated, and compound dislocation of the first and second joints were caused thereby; and that by reason of the injuries the minor suffered the loss of the use of the thumb, and his damages are laid at \$3,000.

The appellee entered a special appearance in the

case and moved the court to dismiss it for want of jurisdiction; and the motion was sustained, and the court ordered the cause dismissed, and rendered judgment against the appellant for costs of suit, from which order and judgment the appellant prosecutes this appeal.

Section 11 of the Child Labor Act (J. & A. ¶ 5317), prohibits the employment of a child under the age of sixteen years, in any employment that may be considered dangerous to its life or limbs, or where its health may be injured or its morals depraved. It is contended by appellee that the appellant, William Lostutter, who is conceded to be a minor over fourteen and under sixteen years of age, was at work in its factory, under the provisions of the Workmen's Compensation Act of 1913; and that by virtue of the provisions of paragraph 2 of section 5 of that Act [Cal. Ill. St. Supp. 1916, ¶ 5475(5)], he could lawfully be employed to perform the labor at which he was engaged at the time of his injuries.

The question therefore involved in this appeal, and presented for our decision, is whether the Workmen's Compensation Act was intended to, and did in effect, by the language employed in the paragraph mentioned, repeal or abrogate the provisions of the Child Labor Act, to the extent that children under the age of sixteen, who were over the age of fourteen, could be legally employed at work is considered dangerous to their lives or limbs. If children who come within the age limit mentioned may thus be employed, by virtue of the Workmen's Compensation Act, then the judgment of the court below in dismissing the case for want of jurisdiction is correct, and the compensation to which the appellant is entitled for the injuries received should have been fixed by and in accordance with the provisions of the Workmen's Compensation Act; if, however, the Compensation Act does not legal-

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ize appellant's employment, then it is well settled that a cause of action accrued to appellant under the allegations of the declaration, and the court had jurisdiction of the subject-matter of the suit. (*Purtell v. Philadelphia & R. Coal & Iron Co.*, 256 Ill. 110; *Beauchamp v. Sturges & Burn Mfg. Co.*, 250 Ill. 303; *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509.)

The language of the second paragraph of section 5 of the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475(5)], under which it is claimed by appellee that the minor in question could be employed, is as follows: "Every person in the service of another, under any contract for hire, express or implied, oral or written, including aliens and minors who are legally permitted to work under the laws of the State, who for the purposes of this act shall be considered the same, and have the same power to contract, receive payments and give acquittances therefor as adult employee * * *." It is contended by the appellee that the clause "minors who are legally permitted to work under the laws of the State," in the foregoing paragraph, should be construed to mean that minors over the age of fourteen years, because they are legally permitted to work at some kind of employment, come within the class of minors which is considered as embraced within the provisions of the act. While this may be true, in regard to work which such minors are permitted to perform under the laws of the State, it does not follow that they may be considered as coming within its provisions with reference to work which the law prohibits.

The clause "legally permitted to work under the laws of the State" must necessarily have reference to the work which the minors are to perform under the Compensation Act; in other words, it must be considered as including the minors who can legally perform the work under the laws of the State, at which they

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are employed, under the operation of the Compensation Act. It does not appear reasonable that minors, because they are legally permitted to work at some kind of work, under the laws of the State, that therefore under the provisions of the Workmen's Compensation Act, they may also be employed at work which is unlawful under the Child Labor Act.

It is not claimed that there is a direct repeal of the provisions of the Child Labor Act in question. If there is a repeal or abrogation of any part of the act, it must therefore be by implication. The repeal of a statute by implication is not favored; and unless, where two acts of the Legislature come in question, they are clearly inconsistent with and repugnant to each other, or unless in the later statute some express notice is taken of the former, plainly indicating an intention to repeal it, the later statute will not be considered as operating to repeal the former by implication. (*Holton v. Daly*, 106 Ill. 131; *Village of Ridgeway v. Gallatin County*, 181 Ill. 521.) Under this rule of construction, even where statutes which are seemingly repugnant, the later statute is not regarded as operating to repeal the former, unless the provisions of the later one be clearly inconsistent with the former, and plainly indicate an intention to repeal it.

No legislative intent is anywhere apparent in the provisions of the Workmen's Compensation Act, to repeal or abrogate any part of the provisions of the Child Labor Act; and the legitimate operation of the Workmen's Compensation Act does not necessarily interfere with the operation of the Child Labor Act; and there is therefore no conflict between the two acts; the object and purpose for which each act was passed can be fully effectuated by allowing both acts to remain in full force.

Our Supreme Court has repeatedly expressed the legislative purpose in the passage of the Child Labor

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Act of 1903 (J. & A. ¶ 5307 *et seq.*), and emphasized that it was passed to prevent, absolutely, the employment of children in the prohibited occupations named therein and that such a construction should be given this act by the courts as will effectuate its purpose, if it can consistently be done. (*Purtell v. Philadelphia & R. Coal & Iron Co.*, *supra*; *American Car & Foundry Co. v. Armentraut*, *supra*.) Those who are liable under the provisions of the act referred to are bound, at their peril, to see that children are not employed contrary to its provisions. (*Strafford v. Republic Iron & Steel Co.*, 238 Ill. 371; *Beauchamp v. Sturges & Burn Mfg. Co.*, *supra*.) As was said by Justice Carter in *Purtell v. Philadelphia & R. Coal & Iron Co.*, *supra*: "It is the child's working that is prohibited by the statute and not his hiring."

Adopting the rule of construction universally adhered to by the courts of review in this State, we must hold that both of the statutes in question remain in full force and operation and that minors, though they may be considered as having adopted the provisions of the Workmen's Compensation Act, concerning the work they are legally permitted to perform, cannot be considered as having adopted it for the purpose of performing work which is prohibited by law; and, therefore, compensation for injuries which they receive while engaged in the unlawful work cannot be recovered under the provisions of such act.

We are aware that the Supreme Court of Wisconsin has placed a somewhat different construction upon similar language concerning minors' employment, under the Workmen's Compensation Act of that State; but the construction there adopted appears to us to be contrary to the well-recognized rule of construction prevailing in this State, and clearly in conflict with the legislative purposes embodied in the statutes under consideration.

Meixner v. Western Live Stock Ins. Co., 203 Ill. App. 523.

The judgment is therefore reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

MR. JUSTICE CARNES dissenting. The only case directly in point that has come to my attention is *Foth v. Macomber & Whyte Rope Co.*, 161 Wis. 549. The conclusion of that court that their Workmen's Compensation Act applied in a similar case under similar statutes is not based on the repeal of one of the statutes. I do not understand that a question of the repeal of our Child Labor Act is involved in this case. I am of the opinion that in the absence of other direct authority we should follow the reasoning of the Wisconsin case and affirm the judgment and permit the parties to obtain the decision of the Supreme Court on the controlling question, which is one of great general importance, without incurring the necessary expense and delay of a jury trial.

Fred Meixner, Appellant, v. Western Live Stock Insurance Company, Appellee.

Gen. No. 6,259. (Not to be reported in full.)

Appeal from the County Court of Peoria county; the Hon. CHESTER F. BARNETT, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed October 12, 1916.

Statement of the Case.

Action by Fred Meixner, plaintiff, against Western Live Stock Insurance Company, defendant, to recover one hundred and fifty dollars, part payment of plaintiff's subscription of five hundred dollars to defendant's capital stock. From a judgment on a directed verdict for defendant, plaintiff appeals.

Meixner v. Western Live Stock Ins. Co., 203 Ill. App. 523.

Plaintiff subscribed for twenty-five shares of defendant's capital stock, amounting to five hundred dollars, through a subagent upon the latter's solicitation and statement that he himself owned some of the stock and had all he could get from the company, and if plaintiff would subscribe for twenty-five shares and advance one hundred and fifty dollars thereon this agent would sell it within sixty days and pay back to plaintiff the one hundred and fifty dollars with interest and a profit in addition. Plaintiff subscribed accordingly for five hundred dollars of the stock and paid this subagent one hundred and fifty dollars, which the latter forwarded to defendant, and defendant sent one hundred dollars thereof to the agent under whom the subagent was working as his commission and retained the remainder.

EAGLETON, STONE & ISLEY, for appellant.

MILES & FULLER, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. FRAUD, § 18*—*when fraudulent representations are actionable.* Fraudulent and deceitful representations relied on must be concerning an existing fact or facts to furnish a ground of action.

2. SALES, § 411*—*what does not constitute actionable false representation.* Where an agent for the sale of the capital stock of a company made a sale thereof upon his promise to resell within a certain time for the first purchaser's benefit, which he did not do, *held* that even if he did not intend when he made such promise to keep it, it was not such a false representation as would furnish ground for an action of fraud and deceit by such purchaser to recover money paid on the purchase.

3. CONTRACTS, § 63*—*when promise is unsupported by consideration.* The fact that there was a motive for a promise does not

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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supply the necessary element of consideration to make it enforceable.

4. *CONTRACTS, § 69*—*when moral obligation is insufficient consideration.* Where an agent for the sale of the capital stock of a company made a sale of the stock upon his promise to the purchaser to resell within a certain time for the purchaser's benefit, which he did not do, *held* that there would be no legal obligation upon the company to refund the money paid by such purchaser and no sufficient moral obligation to furnish a consideration for the company's promise to refund it.

Vera Thompson, Appellant, v. J. D. Thompson Carnation Company et al., Appellees.

Gen. No. 6,271. (Not to be reported in full.)

Appeal from the Circuit Court of Will county; the Hon. DOB-
RANCE DIBELL, Judge, presiding. Heard in this court at the April
term, 1916. Affirmed. Opinion filed October 12, 1916.

Statement of the Case.

Suit by Vera Thompson, complainant, against the J. D. Thompson Carnation Company, Helen T. Fish, Charles M. Fish, Fannie T. Quintero, P. W. Peterson, B. Wunderlick and Frank M. Fairfield, defendants, to recover six and one-half shares of the capital stock of the defendant company. From a decree finding the title to five shares of the stock to be in the defendant, Helen T. Fish, complainant appeals.

The bill claimed title to one and one-half shares of the stock under an agreement set out therein, and the decree found title to those shares to be in complainant, to which no cross error was assigned. The other five shares were claimed by complainant by purchase from her brother John D. Thompson during her father's

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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lifetime, and were claimed by her sister Helen T. Fish under a contract dated August 10, 1908, between herself, her father, who then owned the five shares, and her husband Charles M. Fish, all of whom were stockholders in the defendant company, the capital stock of which was nearly all owned by complainant, Helen T. Fish and Charles M. Fish. The father died intestate January 15, 1912, leaving as his only heirs at law complainant, Helen T. Fish and John D. Thompson. There had been no administration on his estate. The chancellor held that the contract was valid and enforceable, that it was not a testamentary disposition of property, and that the legal equitable right and title in and to the five shares vested in Helen T. Fish at the death of her father, subject to the payment of dividends and of a certain sum of money to complainant, as provided in the contract.

HOWARD W. HAYES and CHURCH, SHEPARD & DAY, for appellant; HOWARD W. HAYES and CLYDE L. DAY, of counsel.

OLIN & LABAWAY, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. CORPORATIONS, § 172*—*when agreement between stockholders is not void as against public policy.* Where three holders of stock in a corporation entered into a written agreement to vote for each other and for no others as directors and that they should be elected to certain offices in the corporation, and one of said holders of stock, owning five shares thereof, further agreed in such agreement that in his absence or on his death a certain other of said holders should vote the shares and on his death should pay the dividends thereon and one-third of the par value thereof to his

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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daughter, and another one-third of the par value thereof to his son, and the agreement provided further that it should not be changed or terminated except by the unanimous consent of the signers thereof and should be binding on their heirs, executors, administrators and assigns, *held* that such agreement was not void as against public policy.

2. CORPORATIONS, § 172*—*when contract for pooling of stock is valid.* A valid, irrevocable contract by the owner of corporate stock passing title upon the death of the original owner, based upon a sufficient consideration, and not a testamentary disposition of such property, is created where the three owners of the stock in such corporation enter into a written agreement to vote their respective shares for each other for directors, and no other purposes, and such agreement provides that they shall be elected to specified offices and one of such stockholders agreed that in his absence or on his death a certain other of the parties to the agreement should have the voting of the stock standing in his name and that on his death the dividends on the shares should be paid to the other party, as well as one-third of the par value of the stock and another one-third of the par value thereof to his son, and the agreement further provides that it should not be changed or terminated except by the unanimous consent of the signers thereof, and should be binding on their heirs, executors, administrators and assigns.

3. PROPERTY, § 2*—*what is.* Property is strictly speaking that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects.

Pontiac Mutual County Fire & Lightning Insurance Company, Appellee, v. W. M. Sheibley, Appellant.

Gen. No. 6,272.

1. INSURANCE, § 518*—*what is extent of recovery where compensation received from wrongdoer causing loss.* A contract of insurance is for indemnity, and if the insured receives satisfaction or part satisfaction for his loss from a wrongdoer who caused it, the amount so received should be applied in full or partial discharge of the policy.

2. INSURANCE, § 520*—*when insurer is entitled to subrogation.* If an insured fire loss is not satisfied by the wrongdoer causing

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pontiac Mutual County F. & L. Ins. Co. v. Sheibley, 203 Ill. App. 527.

it and the insurer pays the loss, he is entitled to equitable subrogation to the claim of the insured against such wrongdoer to the extent the insurer has paid.

3. INSURANCE, § 522*—*what is right of insurer as to action against wrongdoer causing loss.* An insurer paying a loss cannot bring an action in his own name against the wrongdoer causing the loss, but has an enforceable right to participate in an action brought by the insured.

4. INSURANCE—*what are rights of insured upon compromising of judgment against wrongdoer causing loss.* Where an insured recovers a judgment against a wrongdoer who caused the loss which was insured, he cannot compromise such judgment without consent of the insurer without incurring liability to the insurer to the amount paid by the latter, but where the insured compromises such judgment with the insurer's consent on condition that he pay the insurer a certain portion of the insurer's claim, the insured is bound by such terms.

5. APPEAL AND ERROR, § 864*—*when court will not examine record for matters not abstracted.* Reviewing courts will not examine the record for matters not abstracted to find some reason for reversing a judgment.

Appeal from the Circuit Court of Livingston county; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed October 12, 1916.

ARTHUR H. SHAY, for appellant.

BERT W. ADSIT, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

A barn and other buildings and property belonging to appellant, W. M. Sheibley, were destroyed by fire claimed to have been set by the Chicago & Alton Railroad Company. The barn was insured for \$800 by appellee, County Fire Insurance Company. Appellant collected the amount of his policy from appellee, and at about the same time presented a claim against the railroad company for the entire loss. Appellee, by agreement with appellant and on his statement that it was interested in the claim against the railroad com-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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pany to the extent of \$800, employed counsel and actively assisted in the prosecution of a suit against the railroad, which resulted in a verdict and judgment of \$4,000 for appellant, that amount presumably being what the jury found was the total loss of property occasioned by the fire. The railroad company moved for a new trial, which was successfully resisted by appellant. It obtained orders for an appeal to this court and filed its appeal bond, then suggested a settlement with appellee. Negotiations for a settlement were participated in by appellant, appellee and the railroad company, and afterwards appellant accepted \$3,000 in compromise of the judgment. Appellee did not advise the settlement, but told appellant he had the greater amount at stake and could do as he thought best about compromising the claim. If he did compromise for three-quarters of the judgment appellee would take three-quarters of its claim, or \$600, and if he did not compromise it would furnish counsel to assist in the trial on appeal as it had in the lower court. There is no controversy about the facts except two witnesses for appellee testified that appellant made no response to the suggestion of appellee that it would take \$600 in case of settlement, and two witnesses for appellant testified that he then said he would not pay \$600. It is proved without contradiction that he afterwards talked with an officer of appellee about the compromise and was told that he would not advise him about that, but if he did compromise it would take \$600. Appellee brought this action of assumpsit to recover that sum of \$600, and had judgment on a verdict for that amount, from which this appeal is prosecuted. The court below tried the case on the theory that the total loss by fire was fixed at \$4,000 by the judgment in the case against the railroad company in which the parties to this suit both participated, and refused evidence offered by appellant to the effect that

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the total loss was \$4,800, and that the evidence introduced in the railroad case conclusively showed it was \$4,800. The jury were instructed, at the instance of appellee, that by reason of the undisputed facts (reciting them) it was entitled to recover \$800 of the appellant unless the parties had agreed that in case of such settlement appellee would take \$600, in which event it was entitled to recover only that amount; and refused instructions offered by appellant conflicting with that theory of the law. It also refused to admit evidence offered by appellant that he had expended \$460, in attorneys' fees and expenses in and about the prosecution of his claim against the railroad company. In short, the loss of appellant was at least \$4,000. His recovery from the wrongdoer and insurance company was \$3,800, and deducting his expenses leaves his net recovery \$3,340. He received \$660 less than full indemnity for his loss. The court practically directed the verdict. If appellee was not entitled to a directed verdict the judgment should be reversed.

The general rule, we think, is that the contract of insurance is for indemnity, and if the insured receives satisfaction or part satisfaction for his loss from a wrongdoer who has caused the loss, the amount so received will be applied in full or partial discharge of the policy. (19 Cyc. 891.) If the loss is not satisfied by the wrongdoer, and the insurance company pays it, it is entitled to equitable subrogation to the claim of the insured against such wrongdoer. 19 Cyc. 893; *Peoria Marine & Fire Ins. Co. v. Frost*, 37 Ill. 333; *American Exp. Co. v. Haggard*, 37 Ill. 465; or, as said in *Chicago & A. R. Co. v. Glenney*, 175 Ill. 238, in such cases the insurer, after paying the loss caused by a wrongdoer, stands in the position of a surety, and becomes subrogated to the rights of the insured to the extent it has paid.

In the present case appellee, after paying the \$800,

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had an interest in the claim against the railroad company, but it could not bring an action in its own name against the wrongdoer. (*Peoria Marine & Fire Ins. Co. v. Frost, supra.*) It had a right to participate in the action brought by appellant. That right was recognized by the parties and acted upon. If appellant had refused to recognize appellee's rights in bringing and conducting the suit, he would in some proper proceeding have been compelled to recognize them. (*Hartford Ins. Co. v. Pennell*, 2 Ill. App. 609.) Still, it is very likely true that appellee's interest in the claim against the railroad company was primarily limited to any excess that appellant might receive from both the railroad company and itself over full indemnity for his loss. It is argued by appellee that this rule is changed by the fact that it participated in the suit against the railroad company with the understanding and implied contract between the parties that its interest was \$800 in the amount recovered. There is much force in this suggestion, but we do not think the decision of the case necessarily turns on its validity. We are of the opinion that if appellant had compromised the judgment without the consent or knowledge of appellee, he would by that act have become liable to appellee in the full amount paid by it; that he did compromise with the consent of appellee that he might do so if he paid it three-quarters of the amount it had paid. He had no consent to compromise on any other terms, and we conclude that when he accepted the compromise with the railroad company he became bound by the conditions imposed by appellee, and this regardless of the question whether he had ever expressly or impliedly agreed to pay that amount, or had expressly said he would not pay it.

The only direct authority we have found on the effect of appellant's compromise is the late case of *Fire Ass'n of Philadelphia v. Schellenger*, 83 N. J. Eq. 144.

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The insured had recovered from a wrongdoer the full amount of his loss, \$6,000, and afterwards, without the knowledge or consent of the insurer, compromised the claim for \$3,000. It was a case of hardship on the insured, as the court said, because he very likely settled with the wrongdoer under the belief that he was not liable to the insurance company. But the court said, without citing authorities, that there could not be the slightest doubt touching the law that the insurance company was subrogated to the rights of the assured to the amount of its payment; that the insured became a trustee of the insurer to the amount of its payment in the event of future collection from the person primarily liable for the loss; that when the loss should be paid by the wrongdoer to the assured he would of necessity become trustee for the insurance company to the amount it had paid under its policy of insurance; that the insurance company occupied the position of an equitable assignee of the rights of the assured to the extent of the payment; that when the assured brings a suit against the wrongdoer, the fact that he has received payment of the amount for which the insurance company was liable cannot be utilized by the wrongdoer as a defense or partial abatement of the claim; therefore any recovery against the wrongdoer is not affected by the fact that the insurance has been paid prior to that time. Any suit that is brought must be in the name of the assured. The railroad company is entitled to be protected against two suits. The assured cannot sue for the balance which is due to him over and above the insurance, and the insurance company bring another simultaneous suit in the name of the assured for the amount of insurance which has been paid. The railroad company is entitled to protection against the claim being split and two independent suits prosecuted, although the rights of the insurance company and the assured

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are essentially independent rights. When the assured brings a suit against the wrongdoer it necessarily includes, and must include, the amount that the insurance company would be entitled to receive back by reason of insurance which it had paid; that when the assured assumes, without the knowledge or consent of the insurance company, to make a compromise settlement, he necessarily assumes to settle the claim of the insurance company. The assured had no right to settle or discharge the lien of the judgment without the co-operation, or at least an opportunity of co-operation, upon the part of the insurance company in that settlement. If he did so, he necessarily assumed the liability to repay to the insurance company the amount that had been paid to him; that the insurance company had rights in the judgment as well established, and as well settled, and as clearly defined, as the insured.

We are cited to no controlling authority in this State. The reasoning of the New Jersey court seems to us sound, and it seems to necessarily follow if appellant could not compromise the judgment without the consent of appellee without incurring a liability to pay appellee the full amount of \$800, that, when he did get the consent of appellee to compromise for three-quarters of the judgment on condition that he pay appellee three-quarters of its claim, he was bound by the terms so imposed.

If we are right in the view of the case above expressed, it is immaterial whether the amount received by appellant from both the railroad company and appellee was \$200 or \$1,000 less than his loss, or whether the expenses incurred by him in prosecuting the suit against the railroad company should or not be taken into account in determining whether he had received full indemnity for his loss. Whatever may be the answer to those questions, the verdict was properly directed for appellee.

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This disposes of the questions urged here except it is argued that the court erred in refusing appellant's application for a change of venue. That action of the court is abstracted as follows: "Petition for change of venue. Notice of application for change of venue. Order denying petition for change of venue," referring to pages 13, 16, 18 and 32 of the record. Reviewing courts have so many times said that they would not examine the record for matters not abstracted to find some reason for reversing a judgment that it is not necessary to cite the cases. The action of the court in that regard is not before us.

We conclude that on the admitted facts in this case appellee was entitled to the judgment it obtained; that the court, in effect, directed the verdict and did not err in so doing. The judgment is affirmed.

Affirmed.

**George Randall, Administrator de bonis non of the
Estate of Philip Krummel, Deceased, Appellee, v.
Crescent Coal Company, Appellant.**

Gen. No. 6,273.

1. MINES AND MINERALS, § 117*—*when assumed risk and contributory negligence are unavailable as defenses.* Under the Mining Act neither assumed risk nor contributory negligence is available as a defense to an action for damages caused by a wilful violation of the provisions of that act.

2. MINES AND MINERALS, § 82*—*when provision of Mining Act that mine manager shall prohibit men from returning to an unsafe mine is complied with.* It is not necessary that sec. 20-8 of the Mining Act (J. & A. § 7494), should be literally followed, in its provision that the mine manager shall prohibit the men from returning to an unsafe mine, but it is sufficient if any officer of the mine owner in authority performs some act to accomplish that purpose.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. MINES AND MINERALS, § 80*—*when employer furnishing unsafe place is liable for death of employee.* A mine owner's liability on account of the death of an employee must rest on some neglected duty to such employee, and it is not enough that such owner had an unsafe place, but the deceased must have been rightfully there before liability attaches to such owner.

4. MINES AND MINERALS, § 133*—*when master is not liable for death of employee disobeying orders.* In an action to recover under the Mining Act for the death of defendant's employee, where the deceased, after going some distance into his employer's mine, by order of his employer, to look for two men who had preceded him in search of two others who had failed after an explosion to reach the surface, received an order by telephone from his employer to return to the surface, but he continued in search of the two men who had failed to reach the surface after the explosion and was overcome by gas and killed, *held* that such employee lost his life because of his wilful disobedience of an express, reasonable and proper order of his master, and the latter would not be liable in such action.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the April term, 1916. Reversed with finding of facts. Opinion filed October 12, 1916. Judgment vacated and former opinion refiled December 6, 1916.

QUINN & QUINN and WEIL & BARTLEY, for appellant; FRANK J. QUINN, JOSEPH A. WEIL and JOHN E. DOUGHERTY, of counsel.

J. L. MURPHY, for appellee; SUCHER & MOORE, of counsel.

MR. JUSTICE CARNES delivered the opinion of the court.

Philip Krummel, while in the employ of the appellant, Crescent Coal Company, at its mule barn outside of its coal mine, lost his life by going into a part of the mine where, because of an accident to the fan, there was a dangerous condition of air caused by the lack of circulation. Appellant, having elected not to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

provide and pay compensation under the Workmen's Compensation Act, appellee brought this action to recover for the death, relying upon an alleged wilful violation of the Mines and Miners Act, chapter 93, Revised Statutes, and especially section 20-8 (J. & A. ¶ 7494), requiring in case of accident to fan or machinery by which the air currents are stopped or materially obstructed, that the mine manager shall at once order the withdrawal of the men from the mine and prohibit their return until the required ventilation has been re-established. And section 23-6-d (J. & A. ¶ 7497), requiring rules to be posted at some conspicuous point at the entrance to the mine. There was judgment on a verdict of \$5,000 against the coal company, from which it prosecutes this appeal.

There is little controversy about the controlling facts. January 15, 1913, about 3:30 p. m., there was an explosion in the mine which suspended the circulation of air. The miners were at the time on their way out, and all except two shot firers reached the surface in safety. Koepple, the assistant mine manager, went back into the mine with one Cannon. After Koepple and Cannon had entered the mine Case, an officer of appellee authorized to so act, ordered Krummel by phone to go into the mine to look for Koepple and Cannon. Krummel did so, taking Read, a mule driver, with him. Appellant had a telephone system consisting of one in the mine office, one in the mule barn, and one at the "parting" about 1,500 feet in on the main entry of the mine. When Krummel and Read reached the "parting" Read testified the telephone bell was ringing, and Krummel talked back to the office, and then told him that Koepple and Cannon were out of the mine; that the message was to come out of the mine; not to go in any further; not to run any danger, but that he was going on any way. Read says he tried to induce Krummel not to go further

because of the danger of bad air, but that Krummel insisted on going on to look after the two shot firers. They went into the mine several hundred feet further where Krummel was overcome by the bad air, and Read so much affected by it that he only succeeded in getting back to the "parting" where he was found in a state of semiconsciousness. Krummel was dead when the rescuing party reached him.

Appellant does not concede that Krummel was ordered into the mine by an officer in authority, but appellee insists the officer had that authority, the evidence tends to prove it, and we accept it as the fact. There is no question that Krummel was ordered out by the same man that ordered him in. Appellee says it was not an imperative order, but the testimony of Krummel's companion, Read, and other witnesses who knew of the sending of the order, leaves no doubt that it was a direct order to return, and there can be no question that Krummel so understood it. Appellee suggests that Krummel may have been in a dazed condition at the time he received the order and for that reason may not have understood it. There is no ground in the evidence for this contention. There was no considerable danger from bad air at the "parting," or from the "parting" to that entrance to the mine where Krummel came in. There is no question but Krummel might have returned from the "parting" in safety. It follows that he lost his life in a dangerous part of the mine where he was expressly ordered not to go.

If, as matter of law, a servant cannot recover of his master for an injury occasioned by his wilful disobedience of a reasonable order, then, without regard to other questions raised in this case, the judgment should be reversed. Appellant cites numerous authorities on the proposition that such violation of an order by a servant bars his right of recovery on the

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ground of contributory negligence and assumed risk. It is said in 26 Cyc. 1271: "A servant cannot recover for an injury caused or contributed to by his failure to regard a proper warning or signal." There are a great number of cases cited in Cyc. in that connection. Many cases are collected in the note to 24 L. R. A. 657, but in most of the reported cases that we have examined it is said either that the servant assumed the risk or was guilty of negligence in acting in disobedience to his orders. In this State the cases of *Simmons v. Chicago & T. R. Co.*, 110 Ill. 340; *Jorgenson v. Johnson Chair Co.*, 169 Ill. 429; *Illinois Cent. R. Co. v. Houck*, 72 Ill. 285; *Chicago & W. I. R. Co. v. Flynn*, 154 Ill. 448; and *Keeley v. Cleveland, C., C. & St. L. Ry. Co.*, 158 Ill. App. 237, all denying the right of the servant to recover for an injury that he received because of his disobedience of a valid rule or order, leave it at least doubtful whether that rule as there announced was not regarded as resting on the doctrine of contributory negligence or assumed risk, or both. It has long been settled in this State that under the Mining Act neither assumed risk nor contributory negligence is available as a defense to a suit for damages caused by wilful violation of the provisions of the act. (*Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244, 258 [1 N. C. C. A. 828].) Therefore it is necessary to consider whether in the absence of those defenses a servant can recover for an injury that he receives in going into a dangerous place against the express order of his master. The provision of the Mine and Mining Act relied on by appellee recognizes just such a danger as existed in the present case, and provides that the mine manager shall prohibit the men from returning into the mine until a condition of safety is re-established. It is not necessary that this statute should be literally followed. It was said in the late case of *Arkley v. Niblack*, 272 Ill. 356, 362, in discussing a portion

of the act requiring a dangerous place to be marked, that "if the plaintiff in error had failed to mark a dangerous place, the failure was not beyond his power to correct." In the present case it may be said on the authority of that case that it was not necessary that the mine manager, although expressly named in the statute, should prevent the men from returning into the mine, but that it was sufficient if any officer of appellant in authority performed some act to accomplish that purpose. The statute was enacted for the safety of employees, and must be substantially, if not literally, complied with. If an officer of appellant in authority had attempted to prevent any miner from re-entering the mine, and that miner, from his desire to save his fellows in danger or some other worthy motive, had overcome the officer and entered the mine in spite of his efforts to keep him out, it would occur to no one that the mine owner had incurred a liability for any injury that resulted from such action of the miner. We see no difference in principle between the supposed case and the present one. Assume that appellant ordered deceased into the mine and in so doing violated the statute—as in *Arkley v. Niblack*, *supra*, the defendant violated the statute by not marking a dangerous place. We think the action of appellant in this case in violating the statute was, as said in the *Arkley* case, not beyond its power to correct, and that it did correct it by ordering Krummel not to proceed into the place of danger but to return to a place of safety, which he might have done.

We have been referred to no authority and have found none where under statutes abolishing the defense of contributory negligence and assumed risk the question before us has been discussed. But we see no reason why, with those defenses excluded, it should not still be true that appellant owed deceased no duty to protect him in a place of danger where he, in the

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course of his employment, had no right to be. Appellant's liability, if any, must rest on some neglected duty to the deceased. It is not enough that appellant had an unsafe place. It must also appear that deceased was rightfully in that place before liability attaches to appellant. This seems too plain a principle to require the support of authority. The cases of *Mackey v. Northern Milling Co.*, 210 Ill. 115; and *McAndrews v. Chicago, L. S. & S. E. Ry. Co.*, 222 Ill. 232, forcibly illustrate the application of this rule.

Appellee says that the certified mine manager was absent at the time in question; that no rules were posted, as required by the act. And it is true that there was a failure to literally comply with the act; but what we have before said disposes of that consideration.

Appellee with much feeling calls our attention to the heroic action of deceased in his attempt to save the lives of the shot firers. If it is true, as we think it is, that he risked his own life that he might save others, his memory is entitled to that homage and respect which mankind always pay to the victims of their own courage and unselfishness. But that consideration affords no ground for the judgment in this case.

We assume that the admitted facts in the record before us could not be made to differently appear on another trial, and being of the opinion that they preclude a recovery, the judgment is reversed without remanding the cause.

Reversed with finding of facts.

MR. PRESIDING JUSTICE NIEHAUS took no part.

Finding of facts. We find that deceased lost his life because of his wilful disobedience of an express, reasonable and proper order of appellant, his master.

**Ferdinand Leynaud, Appellee, v. Village of Cherry,
Appellant.****Gen. No. 6,286.**

1. MUNICIPAL CORPORATIONS, § 892*—*how street grade may be established.* A street grade may be established by user.

2. MUNICIPAL CORPORATIONS, § 1114*—*what is liability for abandoning street grade and allowing surface waters to follow former course.* After the establishment by a municipality of a street grade by user or ordinance, such grade cannot be abandoned and surface waters returned to their natural course without incurring liability for damages occasioned abutting owners.

3. MUNICIPAL CORPORATIONS, § 1114*—*what is liability of for diverting surface water from streets.* A municipality is liable in damages for diverting surface waters upon premises of a lot owner in the proper construction of its streets.

4. MUNICIPAL CORPORATIONS, § 1116*—*what is duty as to repair of gutters and grades of streets.* Where a municipality has built gutters and grades of streets, it becomes its duty to abutting owners to keep them in repair.

5. MUNICIPAL CORPORATIONS, § 1114*—*what is liability of city for overflow of land due to building culvert returning surface waters to former course.* Where a municipality built a certain culvert which carried waters from their natural course across certain lots elsewhere and so maintained the drainage for six or seven years, and in the meantime plaintiff purchased said lots and built a dwelling house thereon, and thereafter the municipality built a second culvert which returned the waters to their natural course over plaintiff's lots, *held* that the condition prior to the building of the second culvert had lasted long enough so plaintiff had a right to assume the municipality would not attempt to return the waters to their natural course, and he would be entitled to substantial damages, in an action for damages for such overflowing of his lands by reason of the second culvert.

6. PLEADING, § 32*—*what constitutes surplusage.* In an action against a city to recover damages for overflowing of plaintiff's lands, *held* that an allegation in an amended declaration that the waters complained of did not flow in a natural water course was surplusage where the allegation in the original declaration and the proof showed the defendant's liability.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Leynaud v. Village of Cherry, 203 Ill. App. 541.

Appeal from the Circuit Court of Bureau county; the Hon. JON A. DAVIS, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed October 12, 1916.

J. L. SPAULDING, for appellant.

J. L. MURPHY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Appellant, Village of Cherry, was organized in 1905. Appellee, Ferdinand Leynaud, owns lots five, six and seven in block thirteen in Myrick's First Addition to the village. He purchased lot seven in June, 1906, and lots five and six in August, 1910. Six is a corner lot fronting south on Cherry avenue and west on Second street. Five joins it on the north and fronts on Second street. Seven fronts on Cherry avenue and is across an alley east from lot six. Appellee had a store on lot seven, and built a dwelling house on lot six in 1911. He brought this action on the case to recover damages for injury to said real estate and some personal property there kept caused by a flow of water across lots five and six, in some counts of his declaration basing his right of recovery on an alleged depreciation in market value and permanent injury to his real estate caused by the necessary improvement of Second street. He had a verdict and judgment for two hundred dollars which is not excessive if he was entitled to substantial damages. The village brings the record here for review.

It appears that in a state of nature there was a natural depression in which the water drained from the northwest across what is now Second street over lots five and six and across what is now Cherry avenue; that there was a low spot on a part of the land where lots five and six are now located making a swale there in wet weather. Before the organization of the

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village there was a public highway where Second street now is. Within a year after the incorporation of the village a wooden culvert was placed in the natural water course somewhat diagonally across Second street, and not the entire width of the street. This culvert was not of sufficient capacity to take all the water from the northwest that came in that direction in a wet time, and some of it flowed down the west side of Second street, some down the east side, and in times of high water some of it across lots five and six in the old natural course. Appellant built a concrete culvert clear across Second street in 1913, so that none of the water reaching Second street from the northwest would be discharged upon that street, but would be conducted across it and discharged on lot five to flow in the old natural depression as it had not all theretofore done in the preceding six or seven years. It is this flow of water that appellee complains of. In his declaration he charged the wrongful turning of water upon his lands. During the trial he amended by adding the averment that the water complained of did not flow in a natural water course. The court refused appellee's instructions to the effect that he might recover damages if the water did flow in a natural water course after having been so diverted from that course by appellant for six or seven years, and instructed the jury that there could be no recovery if the flow was in a natural depression or water course. Appellee assigns cross errors on this action of the court.

The evidence leaves little, if any, doubt that the water complained of flowed in a natural depression, or water course, except as it had been slightly changed across lots five and six by appellee's grading on those lots. There was some evidence as to an increase of flow and damage at a particular time complained of because of a dam that had been constructed by a coal company in the water course some distance northwest

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of the culvert, and some evidence that the natural course of the water had been obstructed by operations of a railroad company some distance southeast of the place in question. (Appellant had constructed another culvert across Cherry avenue to take care of the water after it had crossed lots five and six.) If it is true as matter of law that appellant had the right to disregard the diversion of the water caused by its street and wooden culvert in 1906 and seven years later return it to its old water course across appellee's premises, the evidence furnishes no ground for the recovery of substantial damages. But we are of the opinion that no such right existed. It does not appear that appellant had by ordinance established any street grade, but we think a grade may be established by user, and that a municipality after establishing a grade of its streets by user or ordinance cannot be permitted to abandon that grade and return surface waters to their old natural water course without incurring liability for damages occasioned abutting owners.

It is well settled in this State that a municipality is liable in damages for diverting surface waters upon the premises of a lot owner in the proper construction of its streets. (*City of Aurora v. Reed*, 57 Ill. 29; *Nevins v. City of Peoria*, 41 Ill. 502; *City of Aurora v. Gillett*, 56 Ill. 132; *City of Dixon v. Baker*, 65 Ill. 518; *City of Elgin v. Kimball*, 90 Ill. 356.) And that when a municipality has built gutters and grades of streets it becomes its duty to abutting owners to keep them in repair. (*City of Alton v. Hope*, 68 Ill. 167; *City of Shawneetown v. Mason*, 82 Ill. 337; *Stack v. City of East St. Louis*, 85 Ill. 377; *Tearney v. Smith*, 86 Ill. 391; *City of Chicago v. Seben*, 165 Ill. 371.)

In some States the municipality is not held liable for casting water upon the abutting lot owner in the proper improvement of its streets, as will be seen by reference to cases cited in 36 Cent. Dig. "Municipal

Corporations," sec. 1784. Therefore expressions in the opinions of courts of those States must be read remembering the radical difference in holdings from this and other States as to liability resulting from damages occasioned by proper street improvements.

Appellee purchased his premises and built a dwelling house thereon when the condition of Second street was such as not to precipitate all of the natural drainage across his land. A substantial part of it went down Second street and turned east on Cherry avenue instead of going diagonally across his lots. We are of opinion that such condition had lasted long enough so he had a right to assume that the village was taking care of a portion of the surface water in this way, and would not attempt to change it back to its natural course across his lot; therefore, that he was entitled to substantial damages when it did so. Appellant in this proceeding has acquired the permanent right to discharge this flow of water across appellee's premises. That is a substantial benefit relieving it of expense and burden in taking care of Second street. This benefit has been obtained at so small a cost that the judgment ought not to be disturbed, unless the law imperatively requires it.

Appellant argues that appellee should be held to his allegation in his amended declaration that the water complained of does not flow in a natural water course, and that the proof, failing to establish that fact, he should not be permitted a recovery on the present condition of the pleadings. We think that averment may be treated as surplusage. The material facts under our view of the law were stated in the declaration, and proven on the trial. Appellee did not prove this added averment. We regard his case complete without it.

It is argued that the court erred in excluding certain evidence of the admission of appellee as to there being

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a natural water course across his lots. If this was error, and we do not hold it was, it did not harm appellant because there was no question as to that fact. We are of the opinion that the only substantial error in the record was in holding, in substance, that appellee could not recover if the water complained of was flowing in an old natural water course, and as this error was in favor of appellant the judgment is affirmed.

Affirmed.

Everett Fogelsong by Irvine R. Wasson, Appellee, v.
Peoria Railway Terminal Company, Appellant.

Gen. No. 6,305.

1. STREET RAILROADS, § 93*—*when questionable whether child sliding upon tracks should be held free from contributory negligence.* Where a boy eight and one-half years old went to a certain street car crossing to warn his companions of the approach of cars while they were coasting, and was injured by a car as he reached the tracks at the crossing, *held*, taking his age and capacity into account, it would be questionable whether he should be held free from contributory negligence in sliding upon the tracks.

2. DAMAGES, § 110*—*when verdict for personal injuries to child is excessive.* Where the testimony as to plaintiff's injury, was contradictory and the only evidence showing a serious permanent injury was that of the plaintiff, a boy nine or ten years old, his mother, and one physician, and his and his mother's testimony was on some questions false or mistaken, *held* that a verdict for \$3,300 was excessive.

3. STREET RAILROADS, § 78*—*what constitutes prima facie case of negligence in operation in cities.* Under the statute fixing the liability of railroad companies in operating trains in cities (J. & A. ? 8836), the violation of an ordinance as to the speed of trains makes a prima facie case of negligence for the plaintiff, in an action against a street railroad to recover damages for injuries sustained by reason of such violation.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. NEGLIGENCE, § 8*—*when question of character of in violation of ordinance is immaterial.* Whether the violation of an ordinance is negligence *per se* or prima facie negligence is of no consequence unless it contributed to the injury complained of, in an action to recover damages for personal injuries.

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed October 12, 1916.

JACK, IRWIN & JACK, for appellant.

BERNARD KELLY, for appellee; SHELTON F. McGRATH, of counsel.

MR. JUSTICE CARNES delivered the opinion of the court.

The appellant is a railroad corporation operating cars propelled by electric power on certain streets in the City of Peoria. The ordinance of that city licensing such operation provides that it should not run its cars at a speed greater than fifteen miles per hour. On December 27, 1914, the appellee, Everett Fogelsong, a boy eight and a half years old, was with other boys coasting down Chicago street to and across Washington street in a densely populated portion of said city. He was going to the crossing of said two streets for the purpose of standing on Washington street to warn his companions of the approach of appellant's cars on that street and thus avoid danger. As he reached appellant's track on Washington street he came in contact with an approaching car at the street crossing and was injured. There was an ordinance of the city prohibiting coasting on any of the streets except where it might be suspended by the public proclamation of the mayor. This action was brought to recover for that injury. Appellee had judgment on a verdict of \$3,300, and the railroad company prosecutes this appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Appellee's evidence tended to show that appellant was driving the car at a high and dangerous speed and in excess of fifteen miles per hour; that the view of the crossing was obstructed and no signal was given in time to warn him of danger. Appellant's evidence tended to show that the car was not driven at an excessive speed and not driven to exceed the rate fixed by the ordinance. It pleaded and offered in evidence the coasting ordinance above mentioned, and relied on its violation as a defense, and also claims that independent of that ordinance appellee was guilty of contributory negligence in sliding upon the track, and here argues that appellee's violation of that ordinance was negligence *per se* and therefore the judgment must be reversed if such negligence essentially contributed to the injury. It also claims that, even conceding the defendant's liability, the verdict is so excessive as to indicate passion and prejudice on the part of the jury.

There is a question whether the coasting ordinance was at the time suspended by public proclamation of the mayor. Both parties in instructions to the jury tendered and given treated that question as one of fact to be determined by the jury.

We are not satisfied that the evidence warrants the conclusion that appellee, independent of the question of the coasting ordinance, was exercising reasonable care for his own safety. He knew the danger and had undertaken to warn his companions of the approach of cars. Of course his age and capacity must be taken into account, but under the rules governing in such cases it is very questionable whether he should be held free from contributory negligence in sliding upon the track as he did. We are also of the opinion that the great preponderance of the evidence shows that appellee's injury was not of such a serious, permanent character as to warrant the verdict of \$3,300. He was no doubt injured, but the only evidence showing a

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serious, permanent injury is that of himself and his mother and one physician that testified in his behalf. This testimony is much of it contradicted by other physicians that had examined him, and other disinterested witnesses that had opportunities to see him from time to time after the accident, including his public school teacher. It also appears beyond question that the testimony of appellee and his mother on some questions affecting his disability was false or mistaken, thus materially discrediting their entire testimony. For these reasons alone the case should be submitted to another jury.

If there was a valid ordinance in force prohibiting coasting on that street, and we assume on another trial it will be made clearly to appear whether there was or not, then the question of the effect of the violation of that ordinance will become important. The record does not present the question whether the violation of a valid ordinance is negligence *per se*. The court at appellant's instance instructed the jury that such violation, if proved, should be "taken as *prima facie* evidence of contributory negligence on the part of the plaintiff." And on the part of the appellee instructed the jury that such violation would not bar a recovery if they believed he was at the time "exercising that degree of care and caution that an ordinarily careful and prudent boy of his age, experience and intelligence would have exercised under the same or similar circumstances." These instructions, read together, mean that a child eight and one-half years old may recover for a personal injury caused in part by the negligence of another, notwithstanding his own violation of a valid law or ordinance was the proximate and efficient cause of the injury, if other ordinarily careful and prudent children of his age and capacity would, in the opinion of the jury, have under like circumstances so violated the law or ordinance. The Supreme Court of Massachusetts in *McGuinness v. Butler*,

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159 Mass. 233, in speaking of a similar question, said:

"The principle for which the plaintiff contends would require us to hold that in no case would trespassing or intermeddling by a child, or participation by him in the act resulting in injury to him, be a bar, as matter of law, to his recovery, provided it appeared that the defendant was negligent, and that the child was only doing what he might naturally have been expected to do. We do not think that such is the law." Perhaps if a violation of the ordinance was only *prima facie* evidence of negligence (and appellant is responsible for the adoption of that theory by the court), then it might follow that the *prima facie* showing could be rebutted in the way indicated in the court's instructions. But if a violation of the ordinance is to be taken as negligence *per se*, we do not see how it can reasonably be said to be overcome by the fact that other prudent and reasonable boys under the same circumstances would have done the same thing.

Whether the violation of a public law or ordinance is to be taken as negligence *per se* or as *prima facie* negligence is a question upon which there is conflict and confusion of authority. (29 Cyc. 436.) Appellee argues that if appellant violated the city ordinance in its rate of speed it was *prima facie* evidence of negligence, and seems to assume that it necessarily follows that the violation of any ordinance is only *prima facie* negligence. Our statute fixing the liability of railroad companies in operating trains in cities (J. & A. ¶ 8836) provides that in case of such violation "such corporation shall be liable to the person aggrieved for all damages done to the person or property by such train, locomotive engine, or car; and the same *shall be presumed* to have been done by the negligence of said corporation, or their agents." Under that statute the violation of the ordinance makes a *prima facie* case for the plaintiff, and it is easily seen why the courts should speak of it as *prima facie* neg-

ligence. But in the absence of such a statute there is much authority in this State that the violation of a public law or ordinance by either plaintiff or defendant is negligence as matter of law, and if it essentially contributes to the injury complained of it bars recovery by the plaintiff except in cases of wilful and wanton conduct on the part of the defendant, which are not, strictly speaking, cases of negligence. It should also be borne in mind that whether such violation is negligence *per se* or *prima facie* negligence it is of no consequence either to the plaintiff or defendant unless it contributed to the injury complained of. Whether there is negligence is one inquiry, but, if there is, still it is immaterial if it did not contribute to the injury. Proof of negligence does not make a case or a defense either *prima facie* or *per se* unless it so contributed. It is also true that the law or ordinance violated must be one enacted for the benefit of the plaintiff as distinguished from an ordinance manifestly enacted to control some situation other and different from that in which the parties were placed.

Independent of the question of contributory negligence, plaintiffs engaged in the violation of some public law or valid ordinance have been denied the right of recovery on the ground that they are asking to be relieved from the consequences of their own illegal acts.

Appellant in its briefs here suggests the court could properly have informed the jury that a violation of the coasting ordinance would not absolutely bar recovery if the jury believed the plaintiff was incapable of appreciating that he was engaged in an unlawful act, and was also in the exercise of such care as might have been expected of him. Appellee says the instruction might have been properly so framed. Appellant cites Massachusetts cases to support its contention that the law making the violation of an ordinance negligence *per se* is applicable to children as well as adults.

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Appellee says the position may be well taken as to adults, but does not apply to children, and cites no authority. The question of affirming or reversing the judgment in this court does not depend upon whether counsel for either side is right in the construction of the law applicable to the violation of a valid ordinance by a child over seven years of age. Whatever the conclusion on that question, the judgment should be reversed. We do not know that it will on another trial appear that there was a valid ordinance violated by the plaintiff, or what position counsel may take as to the effect of such violation if it occurred. In the condition of the record here and in view of the position taken by counsel both in the court below and in their argument here as to the construction of the law, we will not attempt to anticipate and answer questions that may or may not arise on a future trial, but submit what we have said on that question and the following authorities for the consideration of the court and counsel, with such other authorities on the subject as they may find.

In *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540, it was said on page 555 that nonperformance of a statutory duty resulting in injury to another may be pronounced to be negligence as a conclusion of law. In *Lake S. & M. S. Ry. Co. v. Parker*, 131 Ill. 557, the court said on page 566:

"While it is true that the omission of a duty imposed by positive law is negligence *per se*, yet such negligence becomes actionable, as a rule, only when it causes or contributes to the injury complained of." In *Chicago & E. I. R. Co. v. Goyette*, 133 Ill. 21, on page 28, this language is used:

"It is not disputed that a failure to perform a duty commanded by the statute may properly be denominated negligence *per se*."

In *Star Brewery Co. v. Hauck*, 222 Ill. 348, on page 352, in discussing the acts of a boy ten years and ten months old, the court said:

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"Even if deceased had been engaged in the violation of an ordinance, to bar a recovery on that ground it must appear that such violation of the ordinance was the proximate and efficient cause of the injury." (Citing authorities.)

This court in *Knickerbocker Ice Co. v. Leyda*, 128 Ill. App. 66, quoted with approval from *Newcomb v. Boston Protective Department*, 146 Mass. 596, 602, as follows:

"No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff, whose violation of law contributed directly and proximately to cause him an injury, has been permitted to recover for it, and the decisions are numerous to the contrary. (Citing authorities.) And it is quite immaterial whether or not a plaintiff's unlawful act contributing to his injury is negligent or wrong when considered in all its relations. He is precluded from recovering, on the ground that the court will not lend its aid to one whose violation of law is the foundation of his claim."

In *Gilmore v. Fuller*, 198 Ill. 130, the court cited *Harris v. Hatfield*, 71 Ill. 298, where the rule announced in *Heland v. City of Lowell*, 3 Allen (Mass.) 407, "that when a plaintiff's own unlawful act concurs in causing the damage he complains of, he cannot recover compensation for such damage," was adopted. In *Frye v. Chicago, B. & Q. R. Co.*, 73 Ill. 399, the court said on page 403:

"The rule is well settled that if a party suffers injury whilst violating a public law, the other party being also a transgressor, he cannot recover for the injury, if his unlawful act was the cause of the injury." *Lynch v. Public Service Ry. Co.*, 82 N. J. L. 712 [3 N. C. C. A. 514], 42 L. R. A. (N. S.) 865, with its notes in L. R. A. is instructive on the question of injuries to children and effect of violation of an ordinance as a defense. In 29 Cyc. 525, and following pages, is found a discussion of these subjects and citation of authorities.

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Appellant urges error in the admission of evidence as to the possible future effects of the injury and on the opinion of a witness as to whether certain conditions resulted from the injury. The latest controlling authority on those questions is *Fellows-Kimbrough v. Chicago City Ry. Co.*, 272 Ill. 71, where the court said on page 76:

“Mere surmise or conjecture cannot be regarded as proof of an existing fact or of a future condition that will result. Expert witnesses can only testify or give their opinion as to future consequences that are shown to be reasonably certain to follow.” (Citing authorities.)

And on page 77:

“A physician may be asked whether the facts stated in a hypothetical question are sufficient, from a medical or surgical point of view, to cause and bring about a certain condition or malady, or he may be asked whether or not a given condition or malady of a person may or could result from and be caused by the facts stated in the hypothetical question, but he should not be asked whether or not such facts did cause and bring about such condition or malady.” (Citing authorities.)

The judgment is reversed and the cause remanded.

Reversed and remanded.

**Ella Rynearson, Appellee, v. William McCartney and
Jennie McCartney, Appellants.**

Gen. No. 6,309.

1. **WITNESSES, § 253***—*when party entitled to benefit of greater number in his behalf.* A party to an action is entitled to whatever benefit the jury might consider arose from the greater number of witnesses on his behalf on a material question.

2. **APPEAL AND ERROR, § 1535***—*when instruction on preponderance of evidence is not reversibly erroneous.* An instruction is not reversibly erroneous in so far as it states that a preponderance of the evidence does not necessarily mean a greater number of witnesses who testify on any issue involved where such instruction is read in connection with other instructions which inform the jury they should consider all of the evidence.

3. **INSTRUCTIONS, § 81***—*when erroneous in singling out particular testimony.* An instruction held erroneous in singling out particular testimony, in an action to recover damages for personal injuries.

4. **INSTRUCTIONS, § 18***—*when misleading.* An instruction may properly enumerate the elements to be considered by the jury, but is liable to be misleading in telling them they "must" or "should" consider certain elements.

5. **MASTER AND SERVANT, § 191***—*what is duty of master to inform servant as to danger in employment.* The duty of a master to inform his servant as to the danger in the servant's employment depends upon the apparent understanding of the servant.

6. **INSTRUCTIONS, § 7***—*when accuracy essential.* Great accuracy in instructions is required where the preponderance of the evidence is a close question.

7. **INSTRUCTIONS, § 87***—*when instruction on preponderance of evidence is erroneous.* An instruction on the preponderance of evidence as affected by greater number of witnesses, held erroneous where it contained the limiting word "necessarily" in one place, but omitted it in another and the testimony was conflicting.

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed October 12, 1916.

CAMERON & CAMERON, for appellants.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rynearson v. McCartney et al, 203 Ill. App. 555.

WEIL & BARTLEY, for appellee; CLARENCE D. MURPHY, of counsel.

MR. JUSTICE CAENES delivered the opinion of the court.

This is an appeal by the defendants from a judgment of \$2,500 rendered on a jury trial in an action on the case for a personal injury to the plaintiff caused by an explosion of gasoline vapor in a room in which she was employed by them doing their family ironing with a gasoline laundry iron. Her claim is based on an alleged failure of the defendants to warn her of such danger in the use of gasoline, of which danger she says she was ignorant. It is defended on the ground that she represented herself to understand the nature of gasoline and how to fill and operate the iron, and that she was, notwithstanding, advised as to the proper method of filling the iron, and the accident happened because of her violation of her instruction.

It appears that appellee was at the time (June 30, 1914) about forty-eight years old; that in addition to her own housework she was sometimes engaged by the day in washing and house cleaning for others; that she had periodically been so employed by appellants, who were farmers, for about two months before the accident; that she had before done their ironing with the gasoline iron that she was using on this occasion; that it was filled by bringing gasoline in a small pitcher from a tank in the yard near by; that at the time of the accident she, out of the presence of Mrs. McCartney, brought into the room a pitcher of gasoline and filled the receptacle on the iron, then, while lighting a match to start the flame there was an explosion of gas from which she was seriously injured. Her claim, supported by her individual testimony, is that Mrs. McCartney asked her if she could fill the iron and start it; and she replied that she guessed she could; that she

had never received any instructions as to the operation of the iron or how it was to be filled, and had never been warned of the dangers incident to lighting it, and did not know that gasoline gave off explosive gases, but that she had before seen Mrs. McCartney fill the iron and prepare it for use. She said she took the pitcher to the tank in the yard and partially filled it, then took it into the laundry room and poured the gasoline from the pitcher into the tank, leaving none in the pitcher, and when she struck the match the explosion and flames came so quick that she could not tell where they started. Appellants' claim, supported by Mrs. McCartney's testimony, is that appellee herself suggested that she would go and iron, and said to Mrs. McCartney: "You don't need to go out there with me, because I have fixed the iron and can do it again to-day"; that before that time she, Mrs. McCartney, had filled the iron and started it for her and expressly warned her of the danger of leaving any gasoline in the room in the pitcher from which she filled the iron; that generally the amount brought in was not all used in filling the iron, and appellee was expressly told to carry the pitcher back in the yard and empty the remaining contents into the tank before lighting the iron; that on this occasion there was gasoline remaining in the pitcher and the explosion came from that source, and therefore the injury was caused by violation of an express order and warning. Mrs. McCartney also testified that before that time appellee had told her she was familiar with the use of gasoline and had used it at other places where she had worked.

No one other than Mrs. McCartney and appellee testified as to these conversations between them. Their testimony was in direct conflict. If the jury believed appellee she was entitled to a verdict on the ground of failure of the duty of the master to warn his servant of a danger known to him and not to the

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servant. If Mrs. McCartney is to be believed, there was no liability. It was quite material whether the flame started from gasoline left in the pitcher. Mrs. McCartney testified that there was a dark ring on the inside of the pitcher immediately after the accident that might indicate the fire had burned there. The physician called to attend appellee testified that she, appellee, told him that the accident occurred in that way, and that it was entirely her fault. Several other witnesses testified for appellants that within a few hours of the accident appellee stated that there was nobody to blame but herself, or something to that effect. These witnesses also said that at the time appellee made these statements she was apparently clear in her mind and knew what she was saying. Appellee does not deny making such statements, but says she was so distressed and under the influence of medicine given her that she has no recollection of what she said to these parties. If appellee, in the possession of her mental faculties, made statements that the accident was all her own fault, such statements tend strongly to contradict her testimony and corroborate that of Mrs. McCartney. Appellants were entitled to whatever benefit the jury might consider arose from the greater number of witnesses on a material question.

The court, at the instance of appellee, instructed the jury:

“You are instructed that while the plaintiff must prove her case by a preponderance of the evidence, that does not necessarily mean a greater number of witnesses who testify on any issue or issues involved in the case; the preponderance of evidence does not depend upon the number of witnesses, and does not mean the greater number of witnesses, but it depends upon the weight of evidence, and means the greater weight of evidence; and if the plaintiff in this case has so proven her case as explained herein and in the instruction of the court and as alleged in the declaration

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or some count thereof, you should find the defendant guilty.”

And also:

“That even though you may believe from the evidence that the plaintiff, at different times after the accident in question, made statements to the effect that her injuries were caused through her own fault still, you are further instructed that in determining the weight to be given to such evidence, you have a right to and should take into consideration the fact, if proven by the evidence, as to whether or not the plaintiff at the time she made such statements, knew that she was making them, together with all the other facts and circumstances in evidence before you.”

Appellants urge these instructions as reversible error. It would seem on the authority of *St. Louis & O'Fallon Ry. Co. v. Union Trust & Savings Bank*, 209 Ill. 457, 460; *Chenoweth v. Burr*, 242 Ill. 312, 319; *Lyons v. Ryerson & Son*, 242 Ill. 409, 417; *Chicago Union Traction Co. v. Hampe*, 228 Ill. 346; *Elgin, J. & E. Ry. Co. v. Lawlor*, 229 Ill. 621; *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 626; *North Chicago St. R. Co. v. Fitzgibbons*, 180 Ill. 466, 468; and *Gough v. Illinois Cent. Traction Co.*, 180 Ill. App. 708, that the instruction, in so far as it states that a preponderance of the evidence does not necessarily mean a greater number of witnesses who testify on any issue or issues involved in the case should not be held reversible error, and perhaps is permissible in cases where it is read in connection with other instructions that inform the jury they should consider all the evidence. But its propriety, even when the word “necessarily” or some equivalent limiting word is used, has been several times questioned. There is no doubt that the number of witnesses is not to be ignored by the jury, although it is not necessarily controlling; neither are any of the other elements that are often stated to the jury in instructions as to what they may consider in determining the weight of the evidence necessarily controlling. There

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is an obvious danger in selecting any one of several elements and telling the jury it does not necessarily control, notwithstanding that statement is true. And where such instructions have been discussed and held not error in some of the above-cited cases, it has been apparently for the reason that the limiting word "necessarily" or some equivalent word was used. In the present case, while that limiting word appears in the first part of the instruction, the jury were afterwards informed that the preponderance of evidence does not "depend upon the number of witnesses and does not mean the greater number of witnesses," thus partially destroying the force of the word "necessarily" that had been before used in the instruction. We think in the condition of the evidence the instruction in that form should be held substantial error.

The other instruction above quoted seems subject to criticism because in effect it singles out the plaintiff's testimony that she did not know what she was saying when she was making the statements that the injuries were caused through her own fault. It also violates the rule announced on the authority of an earlier case in *Lyons v. Chicago City Ry. Co.*, 258 Ill. 76, 84, that while it may be proper to enumerate elements which the jury may consider, an instruction which tells them they "must" or "should" consider is liable to be misleading.

Appellants complain of instructions on the duty of the master to inform the servant of dangers, and on the question of assumption of risk by the servant; that they direct the attention of the jury to the capacity of appellee, or people of that class, instead of to persons of average intelligence and prudence. These instructions seem to conform to the principles announced in the text of 26 Cyc. 1196, and following pages, supported by numerous authorities, including Illinois cases. The duty to inform a servant must certainly depend upon

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the apparent understanding of the servant. Information in English writing would very likely be sufficient for the ideal, average man or woman, but it would not avail the master in a case where he knew, or ought to have known, that the servant could not read and did not understand the English language.

It is doubtful whether the verdict is not so manifestly against the preponderance of the evidence that a new trial should be granted upon that ground. If not, it is certainly so close a question upon the evidence that great accuracy in the instructions was required.

For the reasons above stated the judgment is reversed and the cause remanded for further proceedings.

Reversed and remanded.

**Chicago, Burlington & Quincy Railroad Company,
Appellant, v. Merchant's National Bank, Appellee.**

Gen. No. 6,313.

BANKS AND BANKING, § 144*—when bank is not liable to holder of check for refusal to make payment. Where a declaration in assumpsit by special count set up as ground for recovery against a bank its refusal to pay, accept or certify a certain check drawn in favor of the plaintiff against a certain account of the drawer in said bank and that there were when the check was presented sufficient funds in said account to pay the check, held that section 188 of the Negotiable Instruments Act (J. & A. § 7828), providing that a bank is not liable to the holder of a check drawn upon it unless and until it accepts or certifies the check, controlled, and demurrer to the declaration was properly sustained.

Appeal from the Circuit Court of Jo Daviess county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed October 12, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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F. J. CAMPBELL, for appellant; J. A. CONNELL, of counsel.

SHEEAN & SHEEAN, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

This is an appeal from a final judgment for the defendant entered by the court after sustaining a general demurrer to the plaintiff's declaration. The only error assigned is "the court erred in sustaining the demurrer to the additional counts."

Appellant held the check of the Galena Commission Company for \$362.46, drawn in the usual form on the appellee bank, payable to appellant, or its order. It presented that check to the bank and payment was refused. It then began this action in assumpsit and filed a declaration consisting of a special count and the common counts in assumpsit. A demurrer to the special count was sustained and appellant asked and obtained leave of court "to withdraw all counts to the declaration heretofore filed herein, and to file additional counts." It then filed two counts as follows:

"For that whereas, also, the Galena Commission Company, by its duly authorized agents, in the county aforesaid, on, to wit, the 17th day of July, 1915, being indebted to plaintiff, made and delivered to plaintiff a check on defendant, which check is in the following words and figures, to wit:

'Galena, Ill., July 17th, 1915.

No. 153.

Merchant's National Bank,

Pay to Chicago, Burlington & Quincy R. R. Co., or order

Pay \$362 and 46 cents

Dollars

Galena Commission Co.

William Micurio,

S. R.'

The plaintiff further avers that on, to wit, the 19th day of July, 1915, in the county aforesaid, plaintiff

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presented said check to defendant, during banking hours of said day, for payment, and then and there demanded payment thereof according to the tenor and effect thereof; that the defendant is a national bank doing a general banking business in said City of Galena in said county; that at the time said check was presented to defendant for payment and payment thereof demanded as aforesaid, the maker of said check had on general deposit in the hands of defendant, sufficient moneys of said Galena Commission Company subject to check to pay said check, which moneys were deposited by said Galena Commission Company in said bank subject to check and known as a checking account to be paid to the holder of any check made and delivered by said Galena Commission Company, presenting said check for payment, upon presentment thereof; that upon presentment of said check as aforesaid to defendant by plaintiff, it then and there became and was the duty of defendant, according to the tenor and effect thereof, to pay, accept or certify said check as by law required. Yet the defendant, not regarding its duty in this behalf, wrongfully, negligently, unlawfully and improperly failed, neglected and refused then and there to pay, accept or certify said check, and, at all times thence hitherto, has failed, neglected and refused to pay, accept or certify said check; that by reason of the failure, neglect and refusal of defendant to pay, accept or certify said check as aforesaid, the plaintiff has been deprived of said sum of money and the use thereof, and the said sum of money and the use thereof has become wholly lost to the plaintiff, to the damages of the plaintiff in the sum of five hundred dollars."

"For that whereas, also, on, to wit, the 17th day of July, 1915, The Galena Commission Company, being then indebted to plaintiff in the sum of \$483.93, and having on deposit with defendant a sum in excess

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thereof, to wit, the sum of \$500, which was subject to its check, executed and delivered to plaintiff its certain check upon defendant, thereby directing defendant to pay plaintiff said sum of \$362.46, and the plaintiff, on, to wit, the 19th day of July, 1915, presented said check to defendant and requested that payment be made then and there; and it then and there became and was the duty of defendant to then and there pay said check, or to accept or certify the same; yet the defendant, wholly disregarding its said duty, wilfully, and wrongfully failed and refused and ever since has failed and refused to pay said check or to accept or certify the same; and the defendant, afterwards, to wit, on the 20th day of July, 1915, diverted the said sum of \$362.46 to, and used the same for other purposes, whereby the said sum has been wholly lost to the plaintiff and the plaintiff has been deprived of and is now deprived of the use thereof; to the damage of the plaintiff in the sum of \$500, wherefore it brings its suit, etc."

The court sustained a demurrer to these two counts, and the plaintiff, standing by its declaration, judgment in bar was entered against it. The controlling question is whether section 188 of our Negotiable Instruments Act (J. & A. ¶ 7828), providing that: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check," controls. Appellant cites many Illinois cases decided before the passage of our Negotiable Instruments Act of 1907 in support of its contention that a banker is bound to honor the check of its depositor if the drawer has that amount on deposit; and that the check operates as an assignment in favor of the drawee of that part of the fund on deposit, and that there is an implied promise on the part of the banker to pay it to

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the payee of the check. It is true that under the law as it formerly stood there was a liability of the banker to the legal holder of a check presented for payment, provided there was sufficient bankable funds to pay it on deposit belonging to the drawer. The court held in *Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids*, 68 Ill. 398, that there was an implied agreement between the banker and depositor that whoever should become the owner of such check shall, upon presentation thereof, become the owner and entitled to receive the amount specified in the check, provided the drawer shall at the time have that amount on deposit. While this was the law of Illinois as indicated by the above cited and many other cases, it was not so held in most jurisdictions. The general rule was that the holder of an unaccepted check has no right of action against the bank for refusing to pay such check. (5 Cyc. 536, and authorities there cited.) Therefore the rule that the holder of a check has no right of action against the bank on which it is drawn before acceptance, while new in this State, is a familiar one in the world of commerce. Appellee only cites *Standard Trust Co. of New York v. Commercial Nat. Bank*, 166 N. C. 112 (81 S. E. 1074), in support of its contention that the statute in question does not control, but that case was decided on the ground that there was evidence of a constructive or implied acceptance of the check by the bank, and it was there said that where a bank refuses to pay a check "the holder has no cause of action thereon against the bank but must seek his remedy against the drawer." Justice Brown in an opinion of the First District Appellate Court, in *Rauch v. The Bankers Nat. Bank of Chicago*, 143 Ill. App. 625, said:

"By the law of Illinois as it exists to-day (since the passage of the Negotiable Instruments Act of June 5, 1907), a bank is not liable in any case to the holder of a check drawn on it 'unless and until it accepts or cer-

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tifies' the same. This conforms to the law as it before existed in most jurisdictions, but in Illinois before the passage of the act in question * * * a different doctrine prevailed."

While this statement as to the effect of the late Negotiable Instruments Act was not necessary to the decision of the case and may be taken as *dicta*, we believe it correctly states the law. This court recognized the effect of that provision of the act in *Eshbach v. Byers*, 164 Ill. App. 449. It is not alleged in the declaration in the present case that appellee either expressly or impliedly accepted the check upon which the action is brought. We conclude, therefore, that no liability of the bank to appellee is shown, and that the demurrer was properly sustained.

The judgment is affirmed.

Affirmed.

Jessie Frazier, Administratrix, Appellee, v. City of Geneva, Appellant.

Gen. No. 6,238.

1. **ELECTRICITY, § 8***—*when city not obligated to inspect electric appliances inside house of customer receiving current.* A city operating an electric lighting plant is not required to make inspection of appliances connected with the system inside the house of a customer which are put there by such customer without notice to the city and over which the city has no control and in which it has no interest, and the city is liable in an action for damages for injuries occasioned by such appliances.

2. **ELECTRICITY**—*when city does not adopt wiring inside house of customer as part of its system of lighting.* Where a city operating an electric lighting plant required customers to bring their house wires a certain distance outside the house where it attached its wires to such house wires, *held* that the city did not, by so

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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attaching its wires to the house wires, adopt the wiring inside the house as part of its system of lighting.

3. *ELECTRICITY, § 27**—*when evidence insufficient to show existence of excessive volume of electricity in wires in house of customer.* Evidence held insufficient to show that an excessive volume of electricity was in the electric lighting wire in the house of the deceased, in an action to recover damages for his death.

4. *EVIDENCE, § 232**—*when coroner's verdict is competent evidence.* A coroner's verdict is competent evidence, although not filed with the clerk of the Circuit Court.

5. *EVIDENCE, § 442**—*when opinion of physician as to cause of death is inadmissible.* The testimony of a physician giving his opinion as to the cause of a party's death, based in part upon what he was told by another party, but not stating what such other party had told him, held improperly admitted in an action to recover damages for such death.

6. *NEGLIGENCE, § 228**—*when instruction limiting question of contributory negligence to the time of death is improper.* An instruction limiting the question of contributory negligence of deceased to the time of his death from contact with an electric appliance placed by him in his house without the knowledge of or notice to the city furnishing electricity for his house, held improper, in an action to recover damages for his death.

7. *WITNESSES, § 187**—*when leading questions are improper.* Leading questions on examination in chief are, as a general rule, improper.

Appeal from the Circuit Court of Kane county; the Hon. CLINTON F. IRWIN, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed October 12, 1916.

ALDRICH & WORCESTER and LEONARD C. MEAD, for appellant.

RUSSELL & McNEBRY, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

David Frazier died suddenly in the basement of his home in Geneva, Illinois, on the evening of July 8, 1913, and this suit was brought by his administratrix

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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for the benefit of the next of kin, upon allegations in the declaration that his death was due to the negligence of the City of Geneva in the control of its electric lighting plant. Plaintiff had a verdict and a judgment for \$5,000, from which defendant appeals.

The city operated an electric lighting plant and supplied electricity to business houses and homes within the city and to the home of Frazier, situated on the north side of James street, between Third and Fourth streets. A severe wind, electrical and rainstorm passed over the city on the afternoon of July 8th, but abated about six o'clock in the evening. At some places in the city poles carrying the electric wires were broken down, and primary wires carrying 2,300 volts and secondary wires carrying 110 volts went down together. The poles and wires near the Frazier house were not broken down, but a pole in front of the Frazier residence, to which a guy wire was attached, had fire on the outside of it, and sparks were seen to come from the wires in front of his house. He reported this by telephone to an officer of the city in its electrical department and the latter inquired if the lights were burning all right in Frazier's house and received the answer that they were. Thereupon said officer paid no further attention to Frazier's house. The city received many notifications of trouble at various places, and did work at some of those places. The city officers testified that they received no notice that the wires were down a block and a half or two blocks from Frazier's house until after his death, but did receive notice that the wires were down at a place still more distant, and they did not make any repairs there at that time, and they left the works early in the evening. About nine o'clock Frazier carried a crate of fruit into the basement and his wife accompanied him. Part way down the stairs there was a button with which to turn on the lights in the basement.

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There were two electric lights in the main room of the basement. One of these had been turned off at the socket so that it did not light when Frazier turned the button. The other one did light. In the fruit room an electric cord came down from the ceiling and there was a socket at its end several feet above the floor. The afternoon of the preceding day Mrs. Frazier had taken out that lamp and had inserted in the socket a fixture connected with a flat iron which she used that afternoon upon her ironing table in the basement. When she finished her ironing she detached that fixture from the socket, but she did not put back the lamp. She did not remember whether the current was shut off at the socket when she left it. When they reached the main basement Mrs. Frazier turned to one side for some other errand and Frazier passed into the fruit room, the door of which was open, and into which room shone the light that was burning in the basement. An instant later Mrs. Frazier heard a groan and went to the fruit room and found her husband lying on the floor. She testified that there was electricity in the air and she was thrown down and could not immediately get up or detach her hands from the floor. She found herself unable to move her husband and went and called a neighbor, and then telephoned her husband's physician, who came at once. Frazier was dead. He had a burn in the palm of his hand. The doctor testified in chief that it was half the size of the palm of the hand. Counsel say this was a mistake of the stenographer. On cross-examination the doctor said that it was three-fourths the size of a ten-cent piece. Another witness said it was a quarter of an inch in diameter; another one that it was as large as the head of a pin. Counsel for appellee have argued the case as if the testimony showed that it was a fresh burn. We do not find that any witness testified that it was fresh or that it had the appearance of being caused by electricity. If this was a fresh burn, caused by electric-

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ity, then it is highly probable that when Frazier entered the fruit room he did not know that the lamp had been removed from the socket at the end of the cord, and that he then put up his hand to that socket for the purpose of turning on the light and then received the shock and fell and died. This cord in the fruit room and the socket thereon were not a part of the original wiring of the house, which had been done many years before, but was put in by Frazier, either personally or by some person whom he employed, and it was not shown that the city or any one connected with its electrical department knew of its existence. An employee of the city took off this socket soon after the death of Frazier and substituted a standard socket and produced in court the socket that was upon the cord when Frazier died; and the city proved that that was an improper and defective socket and that because of its defects a person placing his hand upon it could receive the shock of a short circuit. There was no evidence in denial of this testimony, so that the reasonable inference from this testimony is that if Frazier received the shock from the city's current it was through and because of a defective fixture that he had installed and of which the city had no notice.

Appellee contends that because of the dangerous character of electricity the city owed to all its customers and to Frazier, the duty of constantly inspecting the wires inside of houses and the fixtures, and to constantly keep them in proper repair, and this position is based upon *Alton Railway & Illuminating Co. v. Foulds*, 190 Ill. 367. That case should be read in connection with the report of the same case on the same record in 81 Ill. App. 322. In that case the defendant had wired the house and the basement and had installed the lamps; and the declaration so charged. Also, in that case the defect found to exist and which could have caused the death of the deceased in the

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basement was a condition existing at the pole outside the house by which the high potential current on the primary wire could pass around the transformer and to the secondary wire, without passing through the transformer. The question here involved whether the seller of electricity is liable for a defective condition inside a house which it did not wire, for injury to the owner who did install it without the knowledge of the seller of the electricity, was not involved in that case, and is not there decided. This question was discussed in *Memphis Consol. Gas & Electric Co. v. Speers*, 113 Tenn. 83, where it was held that liability for an injury occasioned by a defect in a fixture of this kind depends upon the interest in or control over the defective appliance by the defendant which furnished the electricity, and that if it neither had interest in nor control over the appliance, then there would be no liability, and that the argument which would make an electric company an insurer against defects in appliances over which it had no control would, to avoid liability, impose upon it the duty of continued inspection of the wires of every customer supplied with its product, and that this would be a burden which no such company could bear and live, and would be a source of annoyance to its customers to which they would not long submit. That court therefore refused to follow the Kentucky case to the contrary (*Maysville Gas Co. v. Thomas, Adm'r*, 25 Ky. L. Rep. 403 (75 S. W. 1129)), and held that there was no liability where there was no control over the wires and no knowledge of the defect that caused the injury. To the like effect is *Harter v. Colfax Electric Light & Power Co.*, 124 Iowa 500; and *Peters v. Lynchburg Light & Traction Co.*, 108 Va. 333. This subject is exhaustively considered and many authorities reviewed in *Minneapolis General Elec. Co. v. Cronon*, 166 Fed. 651. In that case the wiring in the building where the death occurred had been done by

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the defendant, but that was some three years before, and the court said that there was no pretense that the work then done was improper or imperfect or that the fire resulted from any such cause, but that the occupant of the building had hung a suspended wire over a nail for so long a time that the insulation became broken and exposed the live wire to the inflammable wooden wall, but for which the fire would not have occurred, and that this was the direct fault of the occupant, over whose action defendant had no right of control. It was there contended for the plaintiff, as here, that as the defendant was manufacturing and furnishing to the building a highly dangerous force under its immediate control in the transmission, it was its duty to see that the inside wires were, at the instant, in such condition of repair and insulation as to prevent electricity from the exposed live wire to be conveyed to the building. The court reviewed the Kentucky case, which does so hold, and refused to follow it, and said:

"Its recognition and enforcement by the courts would impose upon the company furnishing electricity under a contract with the owner of a building who had wired it and owned and controlled the wires inside, an intolerable burden. * * * Can the company, unbidden, enter at will a private house of the citizen and pass into its various rooms to inspect these wires every day to see that they are in proper condition for the reception of the electricity it has contracted to sell? If so, it must employ a large retinue of competent men to do this work; and, as absolute insurers, under the rule contended for, the necessities of the situation would demand that they should have free access to these buildings at all times and under all conditions. Such a rule of law would tend to put concerns furnishing electricity to private houses out of business."

Among the cases there reviewed is *National Fire Ins. Co. v. Denver Consol. Elec. Co.*, 16 Colo. App. 86, to

which we have not access. That court is there quoted as saying:

"Where parties undertake to wire their own property and then apply to a light company to deliver a current to light the building, they must be assumed to take all risks resulting from the character of the wire which is put in the building and the method of construction which is adopted in putting it in. * * * We are quite ready to concede that, when an electric light company undertakes to supply a dangerous current to a dwelling house or to a building, they are bound to see that the wires they put in and the connections they make are properly insulated and protected, so that no harm will come to the property. Where, however, they are only employed to deliver the current by connection with wiring already made by the individual who owns the property, it seems to us that their responsibility ends when the connection is properly made under proper conditions, and they deliver the current in a manner which will protect both life and property."

We follow the principle announced in the foregoing cases and hold that no inspection of this wire in the fruit room was required of appellant by reason of anything thus far discussed. As to the electricity upon the floor, testified to by Mrs. Frazier, there is nothing in the evidence to justify the jury in finding that that electricity came from the wires of appellant. But appellee seeks to avoid the application of the foregoing authorities to this case by reason of one answer given by Peterson, superintendent of the electrical plant on cross-examination by counsel for appellee. The following occurred:

Q. "What is required by the City of Geneva in making its contract with the property owner, is that he shall bring his wires out for you to hitch on to?"

A. "Yes, sir." Q. "And the city adopts that wiring as part of the means to carry the electrical current to the customer?" A. "Yes, sir." It is contended

that this answer proves that the wires inside of the house, including this cord and socket, put in the fruit room by Frazier without the knowledge of the city about a year before his death, became a part of the wires which the city was bound to inspect and keep in proper condition. We are of opinion no such conclusion can be drawn from that answer. The proof abundantly shows that the city did none of the wiring in this house, but that it required the house owner to bring his wires a certain distance outside of the house and the city attached its necessary wires to the house wires at that place. Of course, it is entirely true that the city sends its electricity into the house over the wires of the owner and that it is only by that method that its current can get to the lamps in the house. It cannot be held that the witness meant that the city thereby adopted the wires in the house as its own, or contracted to keep them in repair and duly inspected. In every building where the owner wires his own house and furnishes his own fixtures, the manufacturer of the electricity attaches its wires to the wires of the owner and the rule here contended for would make every manufacturer of electricity responsible for the inside wiring and lamps, and bound to inspection. No such consequence can follow the mere connecting of the wires outside of the building. The court therefore erred in modifying certain instructions so as to submit to the jury the question whether the city had adopted the wiring inside the house as part of its system of lighting. There was no evidence to justify those modifications.

There are three other facts under which, in our judgment, the jury could not reasonably find that an excessive current of electricity reached deceased over the wire hanging in the fruit room. The light in the cellar which was lighted when deceased turned the button as he went down the stairs remained burning. There was a light burning in the back bedroom upstairs, and it

remained burning. The primary wire was arranged to carry 110 volts, which is not dangerous to life. There was a fuse in the attic where the wires first entered the house, which would melt and cut off all current from the building if it was loaded beyond 110 volts, and that fuse did not melt. As we understand the evidence the secondary wires did not come from the plant, but there were separate secondary wires for each transformer. On a pole near the corner of James and Fifth streets there was a transformer, the office of which was to take from the primary wire, which carried 2,300 volts, and transfer to the secondary wires 110 volts only, and those secondary wires led to four dwellings, including Frazier's, and those secondary wires did not enter any other houses or come near any other transformer. If, because of a storm or a stroke of lightning more than 110 volts had passed from the primary wire to the secondary wires, it would have destroyed or wrecked the transformer. This transformer was in perfect condition after Frazier died. We are therefore of opinion that under this evidence the jury could not reasonably find that Frazier died because of an excessive volume of electricity upon the wire in the house, and that the condition of other primary wires at other places could have no effect upon the primary wires running to these four houses. But it is said that Mrs. Sawyer, the occupant of one of these four houses, received a shock in her cellar the same evening from her electrical appliances. It was shown that this was from a cord put in by her husband and wound around some pipes in the basement and that, because of the storm and moisture in the air, these pipes became covered with moisture and the insulation of the wires became moist, and therefrom a current of electricity would pass to the floor and that when Mrs. Sawyer took hold of the fixture a slight current of electricity might pass through her body, producing the shock to which she testified. No such

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condition was shown to exist in Frazier's case. The reasonable inference from the evidence is that Frazier received a shock because of the defective condition of the fixture which he had installed, and it is entirely possible from the evidence that he was not in physical condition to withstand a slight shock of electricity; and if there was electricity on the floor of the strength testified to by Mrs. Frazier, that came from some source not disclosed by this evidence, and may have assisted in producing Frazier's death.

The court admitted in evidence the coroner's verdict, which attributed the death of Frazier to being accidentally electrocuted in the basement of his home. Appellant contends that this was incompetent because it was produced by the man who was coroner when this death occurred, and that it had not been filed in the Circuit Court. It is contended that it does not become competent evidence until it has been filed with the clerk of the Circuit Court, and some of the earlier cases base its competency on the fact that it is a record of the Circuit Court. *Stollery v. Cicero & Proviso St. Ry. Co.*, 243 Ill. 290, was a case where such a verdict was introduced over the specific objection, set out in the opinion, that it was not shown to have been filed with the circuit clerk. The court did not discuss that objection, but in effect overruled it by holding that the verdict was properly admitted in evidence. That is decisive of the same question here.

Dr. Scott, a witness for plaintiff, gave his opinion as to the cause of death, based in part upon what Mrs. Frazier told him. The court refused to exclude that answer. He did not testify what Mrs. Frazier told him and the jury therefore had no means of knowing the basis of his opinion, and the answer should have been excluded. A hypothetical question could have been put involving what Mrs. Frazier testified to, and we are not called upon to decide whether in any other

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way his opinion based upon her statements could have been made competent.

The court by instructions limited the question of contributory negligence of Frazier to the time of his death. It was the contention of appellant that he was guilty of negligence contributing to his death in installing this defective fixture in the fruit room. For that reason the limitation in the instruction was improper.

Counsel for appellee put many leading questions to his witnesses on examination in chief, over the objections of appellant. Why the court overruled these objections does not appear. The general rule prevailing in this country forbids leading questions on examination in chief. Jones on Evidence (2nd Ed.) 816; *Cannon v. People*, 141 Ill. 270; *Flynn v. Fogarty*, 106 Ill. 263; *Coon v. People*, 99 Ill. 368. There are exceptions to this rule, but no reason for departing from the general rule appears here. We mention this to prevent a like course at another trial.

The judgment is reversed and the cause remanded.

Reversed and remanded.

**Woman's American Baptist Home Mission Society,
Appellee, v. George W. Rayburn, Executor, Appellant.**

Gen. No. 6,248.

1. **COURTS, § 94***—*when County Court exercises equitable jurisdiction.* In the allowance of claims against an estate, the County Court exercises an equitable jurisdiction and is governed by equitable rules.

2. **LIFE ESTATES, § 12***—*what was liability at common law for rent of lessee of life tenant to reversioner upon death of life tenant prior to expiration of lease.* At common law the lessee of a life

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tenant who died prior to the expiration of the lease, according to its terms, was not liable to the representative of the life tenant for rent which had not yet become due, and the lessee could quit on the life tenant's death, or the reversioner could put him out, subject to the lessee's right to emblements, but if the lessee remained with the reversioner's consent the latter could recover for the lessee's use of the lands after the life tenant's death.

3. LIFE ESTATES, § 12*—*what are rights under statute of reversioner as to rent accruing after life tenant's death.* Under the Act of July 1, 1897 (J. & A. § 1075), providing that, when a life tenant of lands dies on or after the day when rent becomes due and payable under a lease by him of the lands, his executors or administrators may recover from the undertenant the whole rent due, but only the proportion of rent accruing before the life tenant's death when he dies before the day when rent is to become due under such lease, and the remainderman the residue, the reversioner is not required to permit such lessee to remain after the life tenant's death, but if the lessee does remain with the reversioner's consent the rent should be apportioned as provided in the act, and the reversioner may recover from such lessee or from the executor or administrator of the life tenant to whom the lessee may have paid it his proportion of the rent accruing after the life tenant's death.

4. EQUITY, § 7*—*when will not relieve against force of a statute.* It is not within the province of a court of equity to relieve against the force of a statute the meaning of which is not doubtful.

Appeal from the Circuit Court of Warren county; the Hon. ROBERT J. GRIER, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed October 12, 1916.

SAFFORD & GRAHAM, for appellant.

O. V. STOOKEY and HANNA & LAUDER, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Mrs. Melissa Hayes was life tenant of a quarter section of land in Warren county and the Woman's American Baptist Home Mission Society was the reversioner. Mrs. Hayes' affairs were in the hands of a conservator, and J. B. and George E. Pratt were in

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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possession of the land as tenants for a term expiring March 1, 1914, when, on October 6, 1913, said conservator executed with Pratt & Pratt a written lease of said premises from the conservator to the tenants for one year, from March 1, 1914 to March 1, 1915, for \$1,430, payable on March 1, 1914, which was the first day of the term. They paid the rent to the conservator on March 7, 1914, and continued in possession under said lease until March 1, 1915. Mrs. Hayes died on May 4, 1914. Thereafter the conservator paid over said rent to her executor. On May 5, 1915, the reversioner filed a claim against her estate in the following language:

"To money had and received for the use of said Corporation of Messrs. Pratt & Pratt, such money having been paid for the rent or use and occupation of real estate and premises in Warren County, Illinois, known and described as the North-west Quarter (N W $\frac{1}{4}$) of Section Nineteen (19), Township Nine (9) North, Range Two (2) West of the Fourth (4th) Principal Meridian, from May 4, 1914, to and including February 28, 1915, at \$1,521.00 per annum.

\$1,250.58."

The County Court disallowed the claim and the cause was appealed by the claimant to the Circuit Court, where it was heard without a jury and was allowed in the sum of \$1,175.33. The term of the lease was one year and Mrs. Hayes died on the sixty-fifth day, and this allowance in the Circuit Court was for three hundred days or three hundred three-hundred-sixty-fifths of the rent agreed for that year. The claim filed stated the rent at more than the true amount but this was immaterial. The executor appeals from the judgment of the Circuit Court.

If there can be an apportionment of this rent between the life tenant and the reversioner, then the judgment of the Circuit Court should be sustained, because it is equitable. Appellee relies upon the doctrine that in the allowance of claims the County Court ex-

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ercises an equitable jurisdiction and is governed by equitable rules, as has been laid down in many cases, including *Wolf v. Beaird*, 123 Ill. 585; *Shepard v. Speer*, 140 Ill. 238; and *Thomson v. Black*, 200 Ill. 465. But it is said in *Donoghue v. City of Chicago*, 57 Ill. 235: "It is not in the power of a court of equity to relieve against the force of a statute, the meaning of which is not doubtful." The statute which appellant claims to be applicable to this case is the Act of July 1, 1897, as follows:

"When a tenant for life shall demise any lands and shall die on or after the day when any rent becomes due and payable, his executors or administrators may recover from the undertenant the whole rent due, but if any such tenant for life shall die before the day when any rent is to become due, his executors or administrators may recover the proportion of rent which accrued before his death, and the remainder-man shall recover for the residue."

Hurd's Rev. St. 1913, p. 1540; 1916, p. 1635 (4 J. & A. ¶ 7075).

That statute was passed after the common law, relating to the liability for rent of those leasing from a tenant for life who died during the term of the lease, had been stated in *Hoagland v. Crum*, 113 Ill. 365. It was there held that as the contract had been broken by the death of the life tenant, the undertenant was not liable to the representative of the life tenant for rent which had not yet become due; that the lease did not bind the reversioner; that the undertenant could quit, and that the reversioner could put him out; but that if the undertenant remained with the consent of the reversioner, the latter could recover of the former a reasonable satisfaction for the use of the lands after the determination of the lease by the death of the life tenant.

There is one exception to this rule. If the premises are tillable lands, and the life tenant or his subtenant

has put in his crops, and the estate then ends by the death of the life tenant, an event the time of which could not be foreseen, the legal representatives of the life tenant, or his subtenant, can thereafter harvest the crop. This is called "the right to emblements." *Keays v. Blinn*, 234 Ill. 121. The record in this case does not show whether any crops had been put in before the life tenant died. After the proofs were closed, claimant sought to show what the facts were in that respect, and the estate objected that the doctrine of emblements was not involved. The court permitted claimant to call a witness on that subject but he did not know the facts, and the court declined to hold the case open for further proof to be procured. Claimant's counsel then stated that some oats were in, but no corn. This was not evidence, and was not admitted by the other side, and did not become a stipulation. We cannot know what crops the subtenant put in nor whether they were in on May 4th, when the life tenant died. In this state of the record we treat the case as if the right to emblements was not involved.

The main object of the statute, we think, was to prevent the undertenant from escaping liability for rent where the life tenant dies before the lease expired by its terms. The statute provides that whatever rent is due when the life tenant dies may be recovered from the undertenant in an action by the executor or administrator of the life tenant; but if any such rent is not due when the life tenant dies, the executor or administrator of the life tenant may recover from the undertenant the proportion of the rent which accrued before the life tenant died, and the remainderman may recover for the residue. The thing specially sought was to make the undertenant liable to some one for each part of the rent, and to prevent his escaping liability, as he could do at common law and under *Hoagland v. Crum*, *supra*. It sought to provide who should bring the action. If any rent was due when the life tenant died, the

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suit for the sum so due could be maintained by his representatives; if any rent was not yet due when the life tenant died, the representative of the life tenant could maintain an action for the part of the rent which accrued before the life tenant died, and the reversioner could maintain an action against the undertenant for the part which accrued after the life tenant died. It was not the main purpose of the statute to determine how the rent should be divided between the representative of the life tenant and the reversioner. The statute provided for an apportionment between the two if the rent was not due when the reversion took effect, but left that already due by the lease to be sued for by the representative of the one to whom it was payable by the terms of the lease. The position of appellant is, in effect, that if the rent had fallen due on September 30th and the life tenant had died on October 1st, the representative of the life tenant could collect and keep all the rent for the entire year; but if the life tenant died October 1st, and the rent was due October 2nd, then the representative of the life tenant could recover and keep the rent for seven months and the reversioner for five months. We cannot impute to the Legislature so unreasonable an intention. An apportionment having been provided for by this statute, we think the reasonable import thereof, though not expressly so stated, is that all the rent should be so divided. The statute does not intend to compel the reversioner to permit the undertenant to remain. If that could be so compelled under a lease for one year, it could be so enforced under a lease for five or ten years. The statute does not intend to permit the life tenant to make a contract enforceable against the reversioner after the death of the life tenant. As to the rent accruing after the death of the life tenant (leaving out of consideration the right to emblements), it depends upon the consent of the reversioner to permit the undertenant to occupy until the expiration of the

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lease. If he so consents, and thereby ratifies the lease to the end of the term, the implied consideration therefor is the rent earned during the rest of the time. Here the remainderman practically ratified the lease for the rest of the rental year. The meaning of the accruing of rent, as distinguished from the date when it is payable by the terms of the contract, is well explained in *Noble v. Tyler*, 61 Ohio St. 432. The principle of apportionment is established by the statute. The portion of the rent which accrued, that is, was earned, after the life tenancy expired, equitably belongs to the reversioner. It is in the hands of the executor of the life tenant. It does not equitably belong to him or to the estate. In equity and good conscience the executor should pay it to the reversioner. A year is three hundred and sixty-five days. The life tenant was entitled to the rent for sixty-five days. The remainderman was entitled to the rent for three hundred days. That method of apportionment under the statute was approved in *Wilson v. Hagey*, 251 Ill. 452. The Circuit Court made a like apportionment here. The case may be stated in another way. If the reversioner had sued the undertenants for the use of this farm, it could have recovered from them the reasonable value of the use and occupation of the farm for the period from the death of the life tenant to the end of the rental year, that is, for its use and occupation for three hundred days, under *Hoagland v. Crum, supra*. There is no evidence that such reasonable value would be anything less than three hundred three-hundred-sixty-fifths of what the undertenants paid for the year. That fraction of \$1,430 is \$1,175.33, and the reversioner could have recovered that sum from the undertenants. If the undertenants had been compelled to pay that sum, they could have recovered it from the representative of the life tenant, because, to that extent at least, they failed to receive what the conser-

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vator of the life tenant contracted to give them, and the executor has the money which they paid the conservator for the rental for that period. To permit the reversioner to recover that sum from the executor of the life tenant avoids circuity of action. The judgment is affirmed.

Affirmed.

Daniel W. Zehr, Defendant in Error, v. Reuben F. Zehr, Plaintiff in Error.

Gen. No. 6,251.

1. CORPORATIONS, § 208*—*when evidence sufficient to sustain verdict in action by third person against stockholders.* Evidence held to warrant the amount of the verdict and the finding that plaintiff had a just demand against the corporation in which the defendants were shown to be the sole stockholders for such amount and judgment, in an action against several defendants sued jointly as partners.

2. CORPORATIONS—*what are powers as to engaging in brokerage business.* Under section 1 of the Corporation Act as originally enacted and as amended in 1915 (Cal. Ill. St. Supp. 1916, ¶ 2418), an Illinois corporation could not engage in real estate brokerage business but could engage in buying personal property.

3. PARTNERSHIP, § 243*—*when plaintiff must prove joint liability.* Under a declaration in assumpsit alleging joint liability of the defendants as partners, the plaintiff must prove such liability even without a plea denying it.

4. PARTNERSHIP, § 243*—*when plaintiff must prove joint liability of defendants.* Under a declaration alleging and a verified plea denying joint liability of several defendants as partners, such liability must be proved as to all even though only one of such defendants was served and pleaded.

5. CORPORATIONS, § 208*—*when evidence sufficient to show existence of.* Where plaintiff offered in evidence certain contracts between himself and another party referred to in such contracts as "incorporated," held that this was sufficient evidence against plaintiff that such other party was a corporation.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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6. CORPORATIONS, § 208*—*when plaintiff must prove joint liability of stockholders.* Where certain defendants were sued jointly as partners but were shown in proof to have been not partners but sole stockholders in a corporation, *held* that it would be necessary for plaintiff to show all defendants were liable upon the claim sued on.

7. EVIDENCE, § 33*—*when presumed common law in force in foreign State.* In the absence of proof as to the laws of another State, it is presumed the common law is in force there.

8. CORPORATIONS—*right at common law to engage in real estate brokerage business.* The common law contained no restrictions on a corporation engaging in a real estate brokerage business.

9. CORPORATIONS, § 678*—*what is basis of privilege of doing business within State.* A foreign corporation is permitted to do business in the State of Illinois only on the principle of comity.

10. CORPORATIONS, § 197*—*what is liability of all of stockholders for illegal acts of officers.* There is no statute or decision in the State of Illinois which makes all stockholders liable if the officers of a corporation in its name undertake an illegal act.

11. CORPORATIONS, § 197*—*what law governs liability of stockholders.* A mere stockholder incurs only the liability which the laws of the State where the corporation was organized places on him.

12. CORPORATIONS, § 208*—*when evidence insufficient to show joint liability of stockholders.* Evidence *held* to show plaintiff had not established joint liability of defendants, in an action against several stockholders sued jointly as partners.

Error to the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the April term, 1916. Reversed with finding of facts. Opinion filed October 12, 1916.

KEITHLEY & KEITHLEY, for plaintiff in error.

SCHOLES & PRATT and ROBERT N. MCCORMICK, for defendant in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

Daniel W. Zehr brought this action of assumpsit against Reuben F. Zehr, Christ Stoller, John Zehr and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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L. T. Hammond, and apparently had service only on Reuben F. Zehr, as he only appeared and defended, although the summons and return are not in the record before us, nor are many of the orders of court. That the other defendants were not served and defaulted is only an inference from the fact that the verdict and the judgment, which were for \$6,541, were only against Reuben F. Zehr. From that judgment Reuben F. Zehr prosecutes this writ of error. We shall call the parties plaintiff and defendant, as in the court below.

In the declaration, filed October 30, 1914, as it appears in the original record before us, the defendants were described as "co-partners, doing business under name and style of Hammond & Zehr." It appeared in argument that there were indorsements on said declaration and an affidavit of claim which were not in the record, and thereupon, by stipulation and leave of court, the parties filed a supplemental record containing said declaration filed October 30, 1914, together with a copy of the account sued on and plaintiff's affidavit of amount due and a subsequent bill of particulars. The declaration as contained in this supplemental record contains no part of the words above quoted describing the defendants as partners. As the first plea was to the declaration as amended, and answered its allegations of partnership, we infer that the part first above quoted by us was added by some subsequent amendment, and in this court plaintiff claims that defendants are liable as partners. Defendant Reuben F. Zehr filed two pleas, the first of which averred that there had never been any such partnership as Hammond & Zehr and that the four defendants named never were partners, and this plea was duly verified. The second plea was nonassumpsit, and was verified by an affidavit of Reuben F. Zehr that his defense was that plaintiff never had any such contract with this defendant nor with all the defendants, express or implied, as is sued upon in this case, and

that all the dealings of plaintiff with said defendant and with all the defendants had been settled with plaintiff before the commencement of the suit, and that at the time said suit was begun defendant did not nor did any or all of the defendants owe plaintiff anything. This affidavit was made necessary by the affidavit of plaintiff to the declaration that plaintiff's demand was for money loaned and goods sold and delivered, and that there was due to the plaintiff from the defendants, after allowing them all just credits, deductions and set-offs, \$30,000. The body of the specific bill of particulars was as follows:

- “(1) 320 acres of land in Iron County, Missouri, sold and delivered.....\$8,000.00
- “(2) Machinery (threshing machines, etc., water tanks, etc., corn sheller, etc.) sold and delivered..... 8,300.00
- “(3) Two automobiles, sold and delivered at \$2,000.00 each 4,000.00
- “(4) Money loaned 107.00
- “(5) Expenses incurred and money paid out . 65.19
- “(6) Money expended for feed..... 21.65
- “(7) Commission on sale of 3 sections of land 3,840.00
- “(8) Money paid in settlement of note and interest 370.00
- “(9) Increase in value of farm in Grand Forks County, N. D..... 5,280.00

“The date of transactions (1) and (2) is on or about April 4th, 1911; transaction (3) occurred on or about the same date; transaction (4) covered a period from on or about October 15th, 1911, to January 31st, 1912; transactions (5) and (6) and (7) extend over a period from April 4th, 1911, to April 4th, 1912; transaction (8) bears date on or about January 15th, 1912.”

Under date of April 4th, three written contracts were executed which plaintiff offered in evidence as Exhibits “A,” “B” and “C.” They were admitted in evidence over objection. In each of them “Hammond & Zehr (incorporated)” is party of the first part

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and Daniel W. Zehr is party of the second part and they are each executed by the corporation by L. T. Hammond, as president, with the corporate seal attached, and by Daniel W. Zehr. The first paragraph of Exhibit "A" provides that the first party employs the second party to find for it purchasers for lands or other property which the first party owns or has for sale in North Dakota and Minnesota, and elsewhere, and agrees to pay the second party for such services \$2 per acre for all land sold by the first party to purchasers found by the second party, and a reasonable commission on all property other than lands. The fourth paragraph provides for paying to the second party his reasonable expenses in finding such purchasers. The fifth paragraph provides that the first party shall not employ any other person as its agent in Peoria and that the second party shall not work for any other person offering for sale lands in the location where the first party is now operating in North Dakota and Minnesota. The contract was limited to one year from date. Exhibit "B" is a duplicate of Exhibit "A." In Exhibit "C" the first party agrees to execute a contract for a warranty deed to convey to the second party 480 acres of land in the county of Grand Forks, North Dakota, known as the McCoulan farm, subject to a mortgage for \$12,500, with interest at six per cent. per annum, principal and interest to be payable at a time satisfactory to the second party, and that the first party shall execute the deed when certain sums have been paid at certain dates, and that at the execution of said contract the second party is to convey by warranty deed to the first party certain lands described, amounting to 160 acres, in Iron county, Missouri, subject to a mortgage for \$1,600; which the first party assumes and agrees to pay, and subject to certain taxes; and it also provides for merchantable abstracts to be furnished by the respective parties. It

also provides that the second party shall deliver to the first party two threshing machine outfits, and two water tanks with pump, hose and belting, and one Memphis corn sheller and one 40-horse power Glide touring car (seven passenger), subject to \$800, which the second party owes on said threshing machine outfit and which the first party agrees to pay. Under these contracts the parties had various dealings under which plaintiff claims there is due him the several items specified in the bill of particulars, the total of which items amounts to \$29,983.84. The evidence offered by plaintiff tended to establish his right to recover substantially said sums from some one. Defendant introduced evidence tending to contradict some of plaintiff's claims. Plaintiff's actual dealings were mostly with Reuben F. Zehr, who was the vice president of the corporation, "Hammond & Zehr (incorporated)" and with L. T. Hammond, who was its president. There is proof that the four defendants were together at one time in Peoria, and that Reuben F. Zehr introduced the other three as his partners, but this is denied by proof introduced by defendant. Two of the defendants, not served, lived in Indiana. Defendants' proof makes it entirely clear that no partnership in the ordinary sense was ever entered into by the four defendants, and that if any of them used the term "partners" it was in a loose sense, without distinguishing between a partnership and a corporation. The proof warranted the jury in finding that the four defendants were the sole stockholders at the time here involved, although one witness named still another party as a stockholder in the corporation. Plaintiff's claim that defendants are liable as partners is not based upon any proof that any partnership was ever actually formed between the four, but upon the claim that the corporation, Hammond & Zehr, could not legally transact business relating to real estate broker-

age in the State of Illinois, and that as these contracts made by the corporation were illegal, the stockholders are liable as partners and each partner is bound by the acts of the other partners.

Section 1 of the Corporation Act (Cal. Ill. St. Supp. 1916, ¶ 2418), authorizes corporations for any lawful purpose with certain exceptions, one of which is "real estate brokerage." In Hurd's Statutes, now before us, a comma is placed between the words, "real estate" and the word, "brokerage," but in the original session laws when this section was adopted in 1872, as it was in force when these contracts were made and these transactions were had, the comma was not there, nor is it in the session laws of 1915, when this section was amended. An Illinois corporation, therefore, could not engage in the business of real estate brokerage, but it could engage in buying the personal property described in Exhibit "C" and in the bill of particulars. Defendant produced testimony that this personal property, although received by the defendants, who were actively engaged in carrying out the business, was only received for plaintiff and was not accepted on the contract. One or two of the defendants caused the automobile in question and another automobile put with it to be overhauled at an expense of \$350 and to be shipped to another defendant in the State of Indiana. They paid the money which, under the contract, was assumed by the first party, with added interest. The defendants claimed that this property was never accepted and that they afterwards sold it in Indiana to recoup themselves for the expenses that they had been to and the moneys they had paid out. There were also some horses which passed into the hands of some of the defendants. Defendant claimed a settlement and somebody did write at the foot of Exhibit "A" these words: "This contract is settled and cancelled by mutual agreement." Plain-

tiff testified that he did not know that said indorsement had ever been made thereon. He admitted that he did deliver the contracts to the defendant or his attorney, but claimed it was not as a settlement, but for another purpose. As to these conflicting contentions we think it sufficient to say, without discussing the evidence, that we are of opinion that the evidence warranted the amount of the verdict, and that plaintiff had a just demand against the corporation for the amount of the verdict and judgment.

Plaintiff alleged in his declaration, which was in assumpsit, the joint liability of the four defendants. Even without a plea denying the joint liability, it was necessary for him to prove that joint liability as to all the defendants. *United Workmen v. Zuhlke*, 129 Ill. 298. When, as here, the joint liability is denied by a plea properly verified, then for that additional reason the joint liability must be proved as to all, and that is true even if only one of several defendants is served and pleads. *Griffith v. Furry*, 30 Ill. 251; *Yocum v. Benson*, 45 Ill. 435; *M. W. Powell Co. v. Finn*, 198 Ill. 567. Section 54 of the present Practice Act (J. & A. ¶ 8591) on this subject is the same as section 35 of the Practice Act discussed in the decisions above cited. The execution by plaintiff of Exhibits "A," "B" and "C," in which the other party to the contract was called a corporation, was sufficient evidence against plaintiff that the first party to said contracts was a corporation. *West Side Auction House Co. v. Connecticut Mut. Life Ins. Co.*, 186 Ill. 156. Therefore, as the proof does not disclose any intentional partnership between the four defendants, but only that they were stockholders in Hammond & Zehr, incorporated, it was necessary for plaintiff to show that all the stockholders are liable under the facts in this case. Section 8 of the Corporation Act (J. & A. ¶ 2425), makes stockholders liable for unpaid stock under certain circumstances, but there is no proof that there was any unpaid stock here. Sec-

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tions 16 and 19 (J. & A. ¶¶ 2433, 2436), make the officers and directors of a corporation liable under certain circumstances, but those circumstances are not shown here, nor is it shown that all the defendants were officers or directors. Section 18 (J. & A. ¶ 2435) makes the stockholders liable under certain circumstances, but there is no proof here to bring these stockholders within that section. Our attention is not called to any other statutory provision making stockholders liable. There is no direct proof under the laws of what State this corporation was organized. It is proved that its corporate seal was in Indiana and that it had an attorney in Indiana, and counsel for both sides seem to assume that it is an Indiana corporation. At common law there was no such restriction as in this State forbidding corporations to be engaged in real estate brokerage. In the absence of any proof as to the laws of Indiana, Minnesota, North Dakota and Missouri, we must presume that the common law is in force there. *Dalton v. Taliaferro*, 101 Ill. App. 592; *County of Jo Daviess v. Staples*, 108 Ill. App. 539. Plaintiff argues this cause as if this corporation was organized to do a real estate brokerage business, but there is no proof in this record what its corporate powers were. A witness did call it the "Hammond & Zehr Land Company," but that was not its corporate name nor was there proof from which the court could draw an inference as to the purpose for which the corporation was organized. We regard it as really immaterial in what State it was organized, for as the law of this State does not permit a corporation organized under its law to do a real estate brokerage business, no foreign corporation could lawfully do such a business in this State. A foreign corporation is permitted to do business in this State only on the principle of comity. *Carroll v. City of East St. Louis*, 67 Ill. 568. In Illinois a corporation organized for the sole purpose of buying and selling real estate is unlawful and such a corpora-

tion cannot exercise its powers in Illinois, even though it is organized under the laws of another State. *Walker v. Taylor*, 252 Ill. 424. For various applications and illustrations of this principle, see *Dunbar v. American Telephone & Telegraph Co.*, 238 Ill. 456; *Imperial Building Co. v. Chicago Open Board of Trade*, 238 Ill. 100; *People v. Shedd*, 241 Ill. 155; *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354; *Africani Home Purchase & Loan Ass'n v. Carroll*, 267 Ill. 380. It was the intention of the parties to this contract that plaintiff, who lived in the vicinity of Peoria, should seek to interest parties in and about Peoria in the purchase of lands in Minnesota, North Dakota and elsewhere, and before the transactions were completed there were also dealings in real estate in Illinois. So far as the real estate transactions were to be conducted in Illinois, they were beyond the power of the corporation to transact, and the illegal part seems to have been inextricably combined with the transactions in Minnesota and North Dakota and Missouri, and it may be that the entire dealings were thereby rendered illegal. We are not aware of any statute or decision in this State making all the stockholders liable if the officers of the corporation in the name of the corporation undertake an illegal act. Plaintiff relies upon *Wing v. Slater*, 19 R. I. 597, 33 L. R. A. 566, as so holding, but that case was under a statute making the stockholders of a company jointly and severally liable for its debts if the directors failed to file a certain certificate by a certain annual date, and even there the stockholders were relieved of liability. There are several other States whose decisions are there referred to, making stockholders personally liable for debts of the corporation, but none of them seem to be in point here. It is stated in 10 Cyc. 652 and 676, that where a corporation engages in a business which is prohibited by law or public policy, its members become liable as partners, but we are of

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opinion that that is too strong a statement of the law so far as appears from authorities within our reach. In *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385, the stockholders were held liable for debts incurred before the capital was fully paid in, but that was under a statute providing that in such case each stockholder should be liable but not beyond the par value of his stock; and that case was in equity. *Same v. Same*, 111 Mass. 200, was another stage of the same case. *First Nat. Bank v. Almy*, 117 Mass. 476, was a suit at law on a note given by a corporation in its business, which business it was not yet entitled to transact because its capital stock had not all been subscribed and paid in. It was held that the stockholders could only be held liable in equity after a judgment against the corporation, and the court there said: "Even if the organization of the corporation had been defective, there would have been great difficulty in holding the associates to the liability of co-partners which they never intended to assume." In *Empire Mills v. Alston Grocery Co.* (Tex. App.), 12 L. R. A. 366, stockholders were held liable as partners, but in that case the corporation had been organized in Iowa for the sole purpose of carrying on a business in Texas for which the laws of Texas did not permit a corporation to be organized, so that the corporation was conducting a wholly illegal business. In the present case, at least one of these defendants had practically no part in the transactions here involved and apparently had no knowledge that any such contracts were made. If every stockholder is liable for the performance of a contract entered into in the corporate name by the officers of the corporation where the contract was beyond the corporate powers, then stockholders who are in the minority, who did not elect the directors, who had no knowledge that they had performed an illegal act or entered into an illegal contract, are bound. It seems to us that this is a responsibility that we ought not to fix upon a

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mere stockholder when there is no statute providing therefor. It seems to us that a mere stockholder incurs the liability, and only the liability, which is placed upon stockholders by the laws of the State where the corporation is organized. *Baker v. Backus' Adm'r*, 32 Ill. 79. If this corporation had been organized in Illinois for the sole purpose of real estate brokerage, or if it had been organized under the laws of the State of Indiana for any purpose which was wholly forbidden by the laws of that State, so that it was organized to do only a business which was illegal, then every person who subscribed for a share of stock in that corporation would be charged with notice that it was organized to do only an illegal business; and under such circumstances it may very well be that the principle stated in 10 Cyc. would be applicable, but if the plaintiff here relied upon any such ground for holding the defendants liable merely as stockholders, the burden was on the plaintiff to prove that the corporation was organized solely for an illegal purpose. That proof is entirely wanting. In whatever State this corporation was organized, we must assume, in the absence of proof, that it was organized for some lawful purpose, and we are unable to hold that if such a corporation engages in one or two illegal contracts, the owner of a single share of stock would become liable as a partner for all the debts incurred under such contract or contracts, even where, as here, it amounts to nearly \$30,000. We are therefore of the opinion that the evidence in this case does not fix the liability upon all of the defendants, and that therefore plaintiff cannot recover under this declaration against the one stockholder who was served and appeared. If he alone had been sued and his liability had been placed upon his violation of his duty as an officer and a director, a different question would be presented which we do not here decide.

The declaration contains only the common counts. Defendant has raised the serious question whether a recovery could be had against stockholders in such a case upon the common counts, but owing to our other conclusions above stated, we have not thought it necessary to discuss that question.

As our conclusion appears to be decisive against plaintiff we do not remand the case. If, however, plaintiff desires to retry the case in the expectation of being able to overcome our view of the facts by further proofs, he may make an application to that effect to this court during this term and it will be duly considered.

For the reasons above stated the judgment is reversed.

Reversed with finding of facts.

Finding of facts to be incorporated in the judgment.

We find from the evidence that plaintiff has not established the joint liability of the four defendants named in the declaration and has not established a partnership between the four defendants and therefore he cannot have a judgment against the one defendant who appeared and pleaded.

**Mae Kalman, Administratrix, Plaintiff in Error, v.
Max Cohen et al., Defendants in Error.**

Gen. No. 6,255.

1. NEGLIGENCE, § 19*—*what constitutes an attractive nuisance.* To bring a case within the attractive nuisance doctrine, the dangerous thing must be so located as to attract children from the street or some public or other place where they may be expected to be, and an owner would not be liable if he maintained something for his own use which might be dangerous but would only be found by children going on his premises as trespassers.

2. NEGLIGENCE, § 125*—*when declaration insufficiently alleges existence of attractive nuisance.* Where the declaration alleged the defendants possessed a building in which they stored old rags, saturated with grease, and old papers, with open doors; that the contents were attractive to children; that they, with defendants' knowledge, were accustomed to play among such contents; that plaintiff's intestate was a child six years old and was killed while playing in such building by a fire starting therein from a locomotive engine or blast furnace in the vicinity, *held* that there was nothing dangerous to children about such contents of the building and no liability to injury from children playing with such contents, and demurrer to the declaration was properly sustained.

Error to the Circuit Court of Warren county; the Hon. ROBERT J. GRIER, Judge, presiding. Heard in this court at the April term, 1916. *Affirmed.* Opinion filed October 12, 1916.

C. M. HUEY and HANLEY & COX, for plaintiff in error.

SAFFORD & GRAHAM, for defendants in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

Mae Kalman, administratrix, sued Cohen Brothers for causing the death of Sol Kalman, her intestate. A demurrer to an amended declaration of nine counts was sustained, plaintiff abided by her declaration, and defendants had judgment in bar, from which plaintiff

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kalman v. Cohen, 203 Ill. App. 597.

prosecutes this writ of error. Each count charged sufficiently that defendants possessed a building in the City of Monmouth in which they had stored old rags saturated with grease, and old papers; that the doors of the building were open; that its contents were attractive to children of tender years; that such children were with the knowledge of defendants accustomed to enter said building and to play among said papers and rags; that said child was only six years old and was attracted to said building by said contents; and that while playing there, said rags and paper caught fire and he was burnt and thereby lost his life. Some counts averred that he was too young to exercise any care for his own safety and others that he exercised such care as a child of that age would exercise.

Some allegations are clearly insufficient. One count charged that the fire was caused by spontaneous combustion of said rags and paper, without any fact being averred which should charge defendants with a knowledge that it might be so ignited. Another count charged that the fire was caused by accident, without stating any fact to charge defendants with notice that a fire might be so caused. Several counts set up an ordinance of the City of Monmouth requiring dealers in old iron, rags and paper to take out licenses as junk dealers and averred that defendants had not taken out such a license. The ordinance was not intended for protection against fire and no fact is alleged tending to show that this fire was caused by the lack of a license. One count charged that west of the building were old iron and junk which made it difficult to get to the building from a certain street and prevented people from reaching the building on the west when the fire occurred. These allegations contained nothing to charge defendants with liability for the death of this child. One count implies that the father of the child owned the building. It either must be understood from that count that defendants were lawfully

occupying the building or else that it was the duty of the father to keep the doors closed. With these charges ignored, there still remain counts which contain a part of the elements required by the law, as laid down in what are known as the "turntable" cases, and it must be conceded that the decisions in this State are very liberal to children injured because of attractive nuisances. Two elements, however, required in *McDermott v. Burke*, 256 Ill. 401, are omitted from this declaration. It is there held that the dangerous thing must be so located as to attract children from the street or from some public or other place where they may be expected to be, and that an owner would not be liable if he maintained something for his own use which might be dangerous but which would only be found by children going upon his premises as trespassers. No allegation in this declaration shows deceased attracted into this building from the street or from the premises where his parents lived in front of this building. It is also there held that it is essential to liability in such a case that the attractive thing or something inseparably connected with it must be the proximate cause of the injury. Here the cause of the injury alleged in all the counts in which defendants might otherwise be liable was a spark from a locomotive engine or from a blast furnace in the neighborhood. There was nothing dangerous to children about the old rags nor the old papers and nothing is charged that would make a child liable to injury by playing with the contents of the building. In this respect this case is wholly different from the "turntable" cases. Probably every barn in the country contains things attractive to children, but it does not follow therefrom that the owner is obliged to keep its doors closed or barricaded under the penalty of being liable if a tender child is injured therein. We are of opinion that the demurrer was properly sustained.

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The judgment erroneously awarded execution against the administratrix, but that error is not argued nor assigned for error and it is therefore waived.

The judgment is affirmed.

Affirmed.

**Alfred M. Swengel, Administrator, Appellee, v. Illinois
Third Vein Coal Company, Appellant.**

Gen. No. 6,264.

1. MINES AND MINERALS, § 92*—*what is insufficient refuge place.* Under section 21 (b) of the Act of April 18, 1899, as to mines and miners (J. & A. ¶ 7489), requiring places of refuge two and one-half feet deep in side walls or a clear space two and one-half feet wide between the car and the rib, a clear space on one side only of a passageway is sufficient, but a clear space of two and one-half feet between tracks, both of which were being used, is not a compliance with the act where such space is accustomed to be used in travel by the car mules.

2. DEATH, § 45*—*when whole of coroner's verdict is admissible.* The whole of a coroner's verdict is competent evidence in an action to recover damages for death, although containing a finding that the jury "finds no blame" on the defendant in the action.

Appeal from the Circuit Court of Bureau county; the Hon. JOM A. DAVIS, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed October 12, 1916.

MCDUGALL, CHAPMAN & BAYNE, for appellant; MARTIN & SHERLOCK, of counsel.

J. L. SPAULDING and J. L. MURPHY, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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On April 7, 1907, Ricardo Milani was killed in the mine of the Illinois Third Vein Coal Company at Ladd, while he was in the employ of said company as a coal miner. His administrator brought a suit against said company in the Circuit Court of Bureau county to recover damages for the benefit of his next of kin. That case was tried and a judgment for plaintiff was reversed by us and the cause was remanded in *Swengel v. Illinois Third Vein Coal Co.*, 154 Ill. App. 409. This record does not show what was afterwards done with that suit, but a special plea filed in this case and setting up the former proceeding was withdrawn and is not abstracted nor relied upon. This suit was begun by the widow of Milani in supposed compliance with the statute then existing and, upon a change in that legislation, the administrator was substituted for the widow as plaintiff. Neither side raises any question because of the pendency or result of the former suit. The case went to a jury on the first and third counts of the declaration, as amended, and the general issue. Plaintiff had a verdict and a judgment for \$3,000, and defendant appeals.

When this accident occurred, the Act of April 18, 1899, concerning mines and miners, was in force. Section 21 (b) was as follows (J. & A. ¶ 7489):

“On all hauling roads or gangways on which the hauling is done by draft animals, or gangways whereon men have to pass to and from their work, places of refuge must be cut in the side-wall at least two and a half feet deep, and not more than twenty yards apart; but such places shall not be required in entries from which rooms are driven at regular intervals not exceeding twenty yards, and wherever there is a clear space of two and one-half feet between the car and the rib, such space shall be deemed sufficient for the safe passage of men. All places of refuge must be kept clear of obstructions and no material shall be stored nor be allowed to accumulate therein.”

The first count charged a failure to have such places of

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refuge where Milani was killed. The third count alleged the failure to give signals or warning of certain dangerous conditions, as required by another part of said statute. In one place in this count the word "not" is omitted, but it is agreed that the case shall be treated as if it were inserted so as to make that clause read, "not under the direction of the mine manager."

At the bottom of the shaft in this mine two car tracks go north and two go south. The shaft is double and when one cage is at the bottom the other is at the top. At the bottom of the shaft the place where the two tracks are north of the shaft is called the north bottom, and where the south tracks are is called the south bottom. On the north bottom the west track is for cars loaded with coal and ready to go to the top, and the east track is to receive empties that come down. When the west cage descends it has on it one or two empties. Loaded cars from the north are pushed on to the west cage and their force drives the empty cars south. When the east cage descends it brings empty cars, and loaded cars from the south bottom are pushed on to that cage and this forces the empties to the north. The north bottom with two tracks extends from two hundred and fifty to three hundred feet north from the cage and then they merge into one track which proceeds out towards the face of the coal, and it has many switches turning in various directions. Several hundred men were working in this mine and were taken down in cages between 6:30 and 7:00 a. m., and no miners were taken down after 7:00 a. m. The whistle was blown at 7:00 a. m. for the men to go to work. Most miners left their tools in the mine. When a miner left his tools on top they were taken down in an empty car after the men had all gone down, and such miner had to wait at the shaft bottom after 7:00 o'clock for his tools to come. On the morning in question Milani's tools were at the top and he waited at the bottom

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for them, and they came down a few minutes after seven in an empty car, which was put off on the north side. When the work began at 7:00 a. m. the empty track on the north bottom had several empty cars on it, which were to be taken to the face of the mine, and it had three cars south of those empty cars which had been loaded with coal and refuse from the sump during the night. A driver came with a team, fastened the empties to those three loaded cars and took them all north beyond the bottom. Another driver, Cramer, with a team of five mules, traveling tandem, as all teams in the mine did, hitched on to those three loaded cars and went south with them on the west or loaded track. The mules did not travel between the rails of that track but in the space between the two tracks. As this trip went south, Milani and four other miners were coming north in the same space between the two tracks, each of them carrying a light. There was a light on the head mule and another on the driver's cap, the proof in this respect being different from that in the former case. Milani called out, "A team is coming," and turned to the west towards the loaded track. A man behind him called out, "A trip is coming." By "team" Milani apparently meant that he supposed it was a team of mules not attached to any car. If it had been only a team Milani would have been safe in turning to the west, but after something like two mules had passed to the east of him he apparently discovered the cars and started on the run to the south and something knocked him down onto the east rail of the west or loaded track and he was caught, either between the stationary cars and the cars of the trip, or by the head car of the trip, and was killed. Of the other men, one went to the west to a place between the timbers next to the rib, another went to the east over the empty track, a third got into an empty car on the empty track, and the fourth escaped by running towards the shaft.

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There were no places of refuge along this north bottom. The main question is whether there was the clear space of two and one-half feet required by the statute above quoted. There was not such a space between the outside rail of either track and the rib next to it. The gauge of each track was three feet and two inches. The space between the two tracks was more than two and one-half feet. The coal cars did not extend over the rails. Defendant contends that the space between the tracks was the clear space required by the statute, and also that the east track was the clear space required by the statute. We must regard it as settled by *Cook v. Big Muddy-Carterville Min. Co.*, 249 Ill. 42, that there need not be a place of refuge or a clear space of two and one-half feet wide on both sides of such a passageway, and that a clear space on one side is sufficient. That case has some tendency to show that such a space between the tracks can be considered a clear space, but upon careful consideration we think it should not be so treated here. The object of this statute is to enable a miner going to or coming from his work in a way where cars of coal and empty cars are hauled to be able to protect himself from injury if he meets or is overtaken by cars being hauled on such track. In the ordinary narrow passageways in a mine the mules must travel between the two rails on which the cars they are hauling run. The proof appears to show that in this north bottom the mules were accustomed to travel in the space between the two tracks. The only time when the miner going to or coming from work in a passageway needs to be protected is when a trip of loaded or empty cars is approaching him from the front or coming up behind him. At every such time the space between these two tracks in this north bottom is not clear space and cannot be used by the traveling miner for that purpose. It is not enough that it is a clear space when no trips are going in either direction. If it had been a custom of the

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mules at that bottom to travel between the rails of the track on which the cars they were hauling were traveling, then this space between the two tracks might fairly be considered a clear space, but under the circumstances which appear to be shown by the evidence we hold it was not. If the east track was entirely free of cars, then it was a clear space, but the evidence places that in doubt. When the trip already spoken of went north, it did leave that east track vacant. When Milani's tools came down a few minutes later an empty car was set on this track. A witness testifies that immediately after the accident to Milani there were at least six empty cars standing upon that track. If they were anywhere near where this trip was when Milani discovered it so that that space was occupied, then it was not a clear space. If, on the other hand, those empties were in fact not there or were far south of Milani, then that east track may have been a clear space. On that subject the evidence was contradictory and the jury found for plaintiff.

There is, however, an error that requires a reversal. A coroner's inquest was held upon the death of Milani and a verdict was rendered which contained, among other things, the following: "According to the evidence the jury finds no blame on said coal company," the reference being to appellant. By the twenty-eighth instruction, given for the plaintiff, the jury were told that this finding is in excess of the duties and powers of that jury and is not evidence, and has no bearing on the case and should be absolutely disregarded. In *Devine v. Brunswick-Balke-Collender Co.*, 270 Ill. 504, a coroner's verdict was offered in a death case, which found that the driver of a truck of the defendant which caused the injury "was blameless for the unfortunate occurrence." The trial court admitted the entire verdict, and it was there argued that the portion above quoted was beyond the powers of the coroner's jury. It was held that the whole verdict was competent evi-

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dence. Following that decision we must hold that the whole of the present coroner's verdict was competent evidence, and that it was error to give the instruction just referred to. The verdict was produced by the man who was coroner at the time of the accident, and it bore upon it a file mark by "H. Fuller, Clerk." It is argued by appellee that there is nothing to show that H. Fuller was the clerk of the Circuit Court. The *placita* to the record before us shows Henry Fuller clerk, and his name is signed to the filing of the documents in the record. Appellee argues that the case is so clear for plaintiff that we should not reverse on account of this error. We are of opinion that the question whether the east track was empty and therefore afforded a clear space is doubtful under the evidence, and that we cannot say how much importance the jury would have given to this portion of the coroner's verdict if it had not been withdrawn from their consideration. A strong argument is made against the competency of such evidence. Its competency has been established by many decisions in this State, and relief therefrom cannot now be had in the courts.

Several other instructions are criticized, but we assume that the suggestions made by counsel will cause them to be more carefully prepared at another trial without our discussing them. Many of the refused instructions were properly refused because of defects therein.

For the giving of the instruction concerning the coroner's verdict, the judgment is reversed and the cause remanded.

Reversed and remanded.

Otto Kannenberg, Appellee, v. Deere & Mansur Company, Appellant.**Gen. No. 6,290.**

1. WORKMEN'S COMPENSATION ACT, § 13*—*when appeal lies from decision of Circuit Court in arbitration case.* An appeal lies from the decision of the Circuit Court under the Workmen's Compensation Act of 1911, in an arbitration case appealed to the Circuit Court.

2. WORKMEN'S COMPENSATION ACT, § 12*—*when instruction on right to recover for hospital bill is erroneous.* In proceedings in the Circuit Court to recover compensation under the Workmen's Compensation Act of 1911, upon appeal from the decision of a board of arbitrators, an instruction under section 5, clause (a) of the Act (J. & A. ¶ 5453), held erroneous where there was no proof that there was a hospital bill for which the employee was liable and of the amount thereof.

3. WORKMEN'S COMPENSATION ACT, § 7*—*when recovery may be had for permanent disfiguration and permanent incapacity.* Recovery may be had under both section 5, clause (c) of the Workmen's Compensation Act of 1911 (J. & A. ¶ 5453), and clause (d).

4. WORKMEN'S COMPENSATION ACT, § 12*—*when instruction on amount of recovery for partial permanent disfigurement is erroneous.* In proceedings in the Circuit Court for compensation under the Workmen's Compensation Act of 1911, upon appeal from the decision of the board of arbitrators, an instruction under section 5, clause (c) (J. & A. ¶ 5453), that the damages allowed should not be less than \$375, held to be erroneous.

5. WORKMEN'S COMPENSATION ACT, § 2*—*what is liability of employer under Act of 1911.* The liability of an employer under the Workmen's Compensation Act of 1911 is a contract liability.

6. WORKMEN'S COMPENSATION ACT, § 12*—*what should be form of verdict in Circuit Court on appeal from decision of board of arbitrators.* The form of a verdict for the plaintiff in proceedings for compensation under the Workmen's Compensation Act of 1911, upon appeal to the Circuit Court from a board of arbitrators, should be to find the issues for the plaintiff, etc.

7. WORKMEN'S COMPENSATION ACT, § 13*—*when verdict in Circuit Court upon appeal from decision of board of arbitrators is not reversibly erroneous.* A verdict of guilty in the Circuit Court in proceedings for compensation under the Workmen's Compensa-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tion Act of 1911, upon appeal from the decision of a board of arbitrators, is a mere irregularity, and does not constitute reversible error.

8. WORKMEN'S COMPENSATION ACT, § 12*—*when court may distribute amounts allowed as lump sum in verdict.* Where a verdict in the Circuit Court upon appeal from the decision by a board of arbitrators under the Workmen's Compensation Act of 1911 is in a lump sum, the court may properly distribute it where there is no dispute as to the amounts that should be allowed if plaintiff recovered.

9. WORKMEN'S COMPENSATION ACT, § 12*—*what is preferable form of verdict.* Where, by a judgment for the employee to be entered in the Circuit Court in proceedings for compensation under the Workmen's Compensation Act of 1911, upon appeal from the decision of a board of arbitrators, one or more amounts are to be paid at once and other sums in instalments over several years, the preferable practice is for the jury to find each item separately as well as to return a verdict for a total amount.

Appeal from the Circuit Court of Rock Island county; the Hon. WILLIAM T. CHURCH, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed October 12, 1916.

DIETZ & SINNETT, for appellant.

J. B. & J. L. OAKLEAF and J. T. & S. R. KENWORTHY, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court

There was an arbitration between the parties to this suit under the Employers' Liability Act of 1911, and an allowance to Kannenberg, the employee, of \$888.72, and an appeal therefrom by Deere & Mansur Company, the employer, to the Rock Island Circuit Court, where the cause was tried by a jury and a verdict was rendered in favor of Kannenberg for \$1,803.24. A motion for a new trial by defendant was denied and a judgment was rendered that plaintiff recover from de-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

fendant \$701.46, being weekly payments to the date of the judgment at \$4.33 per week, and the further sum of \$1,101.78, to be paid plaintiff at the rate of \$4.33 per week for 254 weeks, the first payment to be made December 28th, 1915, and a like sum thereafter each week until the whole amount was fully paid, and that plaintiff have execution for said \$701.46, and for the different payments as they became due. The slight error in the computation is cured by the general language in the judgment. This is an appeal by defendant from that judgment.

Appellee moved to dismiss the appeal and we took that motion with the case. Appellee claims that no appeal lies from the decision of the Circuit Court under said Act of 1911. We discussed that question in *Carlson v. Avery Co.*, 196 Ill. App. 262, and we there held that such an appeal did lie. Thereafter the Supreme Court disposed of the same question in the same way in *Lavin v. Wells Bros. Co.*, 272 Ill. 609. The motion is therefore denied.

The compensation for appellee is measured by section 5 of said Act (J. & A. ¶ 5453). Instruction No. 3, given at the request of appellee, authorized a recovery under each of clauses (a), (b), (c) and (d). It was error to permit a recovery under clause (a), for the reason that there was no testimony under which the jury could find for appellee as to that clause. There was proof that appellee was in a hospital a certain number of weeks. What the hospital charges were or what would be reasonable charges was not shown. Appellee testified that he supposed that it was paid, but that he did not pay it. In the absence of proof that there is a hospital bill for which he is liable, and the amount thereof, it was error to give that part of the instruction.

It is contended that there cannot be a recovery under both clauses (c) and (d). A forcible argument is made

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in support of that position, but we held that there could be such a recovery under both of those clauses in *Stevenson v. Illinois Watch Case Co.*, 186 Ill. App. 418 [5 N. C. C. A. 858], and *Watters v. P. E. Kroehler Mfg. Co.*, 187 Ill. App. 548 [8 N. C. C. A. 352]. We did say in the *Watters* case that there could be no recovery under clause (d), but the opinion shows that the reason was that the evidence disclosed that when the plaintiff there returned to work after the injury he was able to earn as much or more wages than before. No doubt the trial judge in this case ruled in that respect in conformity with our decisions, and we do not feel disposed to reconsider that ruling until the Supreme Court holds otherwise.

In directing the jury what should be allowed under clause (c), the instruction directed them to allow in no event less than \$375 nor more than \$875. Clause (c) allows the employee a reasonable compensation, not exceeding one-fourth of the compensation in case of death. This refers to clause (a) of section 4 (J. & A. ¶ 5452). The highest sum allowed thereby in case of death is \$3,500, and one-fourth thereof is \$875, but clause (c) of section 5 (J. & A. ¶ 5453) contains no authority for requiring that not less than \$375 should be allowed for the serious and permanent disfigurement proved in this case. That part of the instruction is erroneous.

The jury found the defendant guilty and it is contended that the form of verdict should be that the jury find the issues for the plaintiff, etc. The liability of an employer under the act here in question is a contract liability (*Lavin v. Wells Bros. Co.*, 272 Ill. 609), and the form of verdict should have been to find the issues for plaintiff, etc., but that irregularity would not constitute reversible error. The verdict was in a lump sum only, and the court undertook to distribute it. This is permissible where there is no dispute as to

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the amounts that should be allowed if the plaintiff recovers, as was held in *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478 [10 N. C. C. A. 475]. But here there were disputes. In distributing the money the court allowed nothing under clause (a), but the court had no means of knowing but that the jury allowed something for the hospital bills for the time appellee was in the hospital. There was a dispute as to the amount of appellee's earnings before he was injured. He worked a certain number of hours per day at a certain employment, but he also worked as janitor one hour each day before his regular employment began, and sometimes acted as janitor after his day's work was ended, and he did work of that kind on Sunday. The bookkeeper for appellant treated this janitor work as overtime, and overtime earnings are excluded by section 6 (J. & A. ¶ 5455), while appellee claimed that it was a part of his regular employment, and that the amounts he so earned were to be treated as a part of his regular earnings in determining the difference between what he earned before and after the judgment and therefore the amount he should be compensated for such loss of earnings. The verdict did not inform the court how the jury decided that question. We are of opinion that in such a case as this, where by the judgment to be entered one or more amounts are to be paid at once and other sums in instalments for several years, the preferable practice is to have the jury find each item separately as well as to return a verdict for a total amount.

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

Reversed and remanded.

Godby v. Wilson, 203 Ill. App. 612.

Neal Godby, Appellee, v. Bluford Wilson et al., Appellants.

Gen. No. 6,300.

1. **COMMERCE, § 4***—*what constitutes interstate.* Where certain railroad ties were shipped from outside the State to a railroad at a point within the State, in care of its agent there for the distribution, and on his direction were shipped from there to another point in the State on the same bill of lading indorsed for shipment to that place in care of the railroad's section foreman there, *held* that the jury were warranted in finding that the ties were in interstate commerce when unloaded at the latter point.

2. **COMMERCE, § 4***—*what are matters within Federal Employers' Liability Act.* The repair of the main track of an interstate railroad and bringing materials to the place of repair for that purpose, *held* to be matters coming within the Federal Employers' Liability Act.

3. **MASTER AND SERVANT, § 830***—*when presumed jury made proper reduction in damages on account of contributory negligence in action under Federal Employers' Liability Act.* Under the Federal Employers' Liability Act, a plaintiff's contributory negligence does not bar recovery, but should be considered by the jury in mitigation of damages, and it will be presumed they made a proper deduction in the amount of damages where a case was tried on that theory and they were instructed on the subject and found the plaintiff guilty of such negligence.

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed October 12, 1916.

STEVENS, MILLER & ELLIOTT, for appellants; PHILIP BARTON WARREN and HENRY L. CHILD, of counsel.

DAILEY & MILLER and ROBERT N. MCCORMICK, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

In 1915, and for several years before that time, the Chicago, Peoria & St. Louis Railroad was operated by receivers. On May 1, 1915, Neal Godby, a section hand under said receivers at Pekin, Illinois, while assisting in unloading a carload of railroad ties, had his hand severely injured and was thereby permanently disabled from performing any manual labor requiring the use of both hands. He sued the receivers to recover damages for said injuries and filed a declaration in which he alleged the injury, and that he and the receivers were then engaged in interstate commerce; that he was injured by the negligence of another servant of said receivers; and that the receivers were liable in damages to him under the Federal Employers' Liability Act. There was a plea of the general issue and a jury trial, and Godby had a verdict and a judgment for \$2,500, from which the defendants appeal. Their main contentions are that at the time in question neither appellee nor appellants were engaged in interstate commerce, and that the injury to appellee was not caused by any negligence of any other servant of appellants, and that it was caused by appellee's negligence.

The railroad in question conducts a freight and passenger business between Pekin, Illinois, and St. Louis, Missouri, and is therefore engaged in interstate commerce. The car in question was known as T. P. & W. 1887. The ties with which it was loaded were purchased by the receivers in Missouri and elsewhere, outside of the State of Illinois, and were shipped from St. Louis to the receivers at East St. Louis in care of one E. E. Barrow, who was the agent of the receivers for the distribution of ties which it purchased. As soon as the car reached East St. Louis, instructions were asked of him and he directed it to be sent to Pekin in care of Dyson, who was the foreman of the section crew to which appellee belonged. Appellants

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contend that the interstate shipment ended at East St. Louis. Appellee contends that it ended at Pekin.

The question when a particular transaction is to be considered as occurring in interstate commerce and governed by the federal act, and when in intrastate commerce and governed by the laws of the State, has been the subject of much difference of opinion in the courts of the different States and in the United States Circuit Courts of Appeals. The Supreme Court of the United States is the final arbiter of this question, and much light has been thrown upon it by the decisions of that court in *Gulf, C. & S. F. Ry. Co. v. Texas*, 204 U. S. 403; *Second Employers' Liability Cases*, 223 U. S. 19 [1 N. C. C. A. 875]; *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146 [3 N. C. C. A. 779]; *North Carolina R. Co. v. Zachary*, 232 U. S. 248 [9 N. C. C. A. 109]; *Chicago, M. & St. P. Ry. Co. v. Iowa*, 233 U. S. 334; *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473 [10 N. C. C. A. 153]; *Pennsylvania R. Co. v. Mitchell Coal & Coke Co.*, 238 U. S. 251. Some of the same questions have been discussed in this State in *Patry v. Chicago & W. I. R. Co.*, 265 Ill. 310; *Devine v. Chicago, R. I. & P. Ry. Co.*, 266 Ill. 248; and *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356. We discussed one of the questions here involved in *Mattocks v. Chicago & A. Ry. Co.*, 187 Ill. App. 529. The general subject is discussed in Roberts on Injuries to Interstate Employees on Railroads, in chapters 3 and 4. We think it unnecessary to set out in detail the special facts of each of these cases and the application of the law to them by the courts. It is clear that if this car had been unloaded at East St. Louis the interstate shipment would have been at an end; and that if the original shipment had been to Pekin, Godby and the receivers would each have been engaged in interstate commerce in unloading this car. We are of opinion that the jury could fairly find from all the evidence that this carload of ties was purchased by the receivers, not for use at East St. Louis, but for

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use at some other place on its line in repairing its main track. The original bill of lading was to receivers, care of Barrow, the officer who had charge of the distribution of such ties, and with the intention that Barrow should designate the point to which they should be sent. Accordingly the original bill of lading was amended in red ink instead of preparing a new bill, and by the amendment the car was to go to Pekin in care of Dyson, the section foreman. We therefore conclude the jury might fairly find that this was a continuation of the original interstate shipment. There is another ground under which the case may be brought under the federal act. The proof shows that there are two classes of ties, first and second. Second-class ties are purchased and used to repair switch tracks, while first-class ties are purchased and used for the repair of the main track. This car was loaded with first-class ties and they were designed for the repair of the main track. Complaint is made that the court permitted proof that they were afterwards used in the repair of the main track. We think this proof, if improper, was harmless because we are of the opinion that other proof shows that they were purchased and delivered at Pekin for that purpose. We regard this repair of the main track of an interstate railroad and the bringing of materials to the place of repair for that purpose to be matters coming within the federal act, under authorities above cited. We approve the conclusion reached in the trial court that Godby and the receivers were engaged in interstate commerce in the unloading of this car of ties at Pekin.

The ties were to be piled on a bank a short distance from the railroad car. To assist in this work one end of one tie was placed on the cross brace underneath the car and the other end rested on the ground. When a tie was thrown out of a car, one end of it would fall upon this crosstie. A part of the section crew were in

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the car, throwing out ties, and the other part were outside, receiving and piling them. Godby stood next to the crosstie and handled that end of the ties. He had his hand on one tie which had just been thrown out and was just about to move it when another tie was thrown from the car and struck his hand. These ties fell about eight feet. We are of opinion that, under the evidence, it was a fair question for the jury to determine whether the man who threw that particular tie from the inside of the car before the last preceding tie had been removed was negligent in so doing. Under the federal law, the fact that he was a fellow-servant of Godby is immaterial. It is argued that Godby was also guilty of negligence in not keeping out of the way of the second tie. Under the federal act the contributory negligence of the plaintiff, if any, does not bar a recovery, but the jury are required to diminish the damages in proportion to the amount of negligence attributable to the plaintiff. The case was tried on that theory and the jury were instructed on that subject, and if plaintiff was found by the jury guilty of contributory negligence, we must presume that the jury made a proper deduction in the amount of damages.

The rulings of the court upon the instructions, when all considered, seem to be in accord with the rules laid down in the authorities above cited. The judgment is therefore affirmed.

Affirmed.

Comorouski v. Spring Valley Coal Co., 203 Ill. App. 617.

**Joseph Comorouski, by Mike Comorouski, Appellee, v.
Spring Valley Coal Company, Appellant.**

Gen. No. 6,084. (Not to be reported in full.)

Appeal from the Circuit Court of Bureau county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed November 9, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Joseph Comorouski, by Mike Comorouski, his next friend, plaintiff, against Spring Valley Coal Company, defendant, to recover damages for personal injuries sustained by plaintiff in defendant's coal mine. From a judgment for plaintiff for \$1,600, defendant appeals.

Plaintiff was driver of a car hauled by a mule through an entryway in the long wall system of mining of defendant. The mule became obstreperous and was backing against plaintiff, who, to avoid being crushed against his moving car, jumped off on one side and struck a rock which caused him to slip and fall in front of the car so that the car ran over his limb and broke it. It was charged in the declaration that defendant had rejected the Workmen's Compensation Act.

MCDougall, Chapman & Bayne, for appellant; Martin & Sherlock and Josef T. Skinner, of counsel.

J. P. Lawson and J. L. Murphy, for appellee.

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

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Abstract of the Decision.

1. JURY, § 80*—*when question asked juror on voir dire is proper ground for peremptory challenge.* Where a juror was asked on voir dire if he would give plaintiff all the damages he was entitled to under the law and the evidence in case the jury found the defendant guilty and that plaintiff was entitled to damages, held that the question was competent and allowable as ground for a peremptory challenge.

2. JURY, § 53*—*when answer of juror on voir dire shows his competency.* An answer of a witness to a question, if he would give plaintiff all the damages he was entitled to under the law and the evidence in the case, in case the jury found the defendant guilty and that plaintiff was entitled to damages, that he would go according to his own judgment on the evidence and the law, shows his competency.

3. MINES AND MINERALS, § 176*—*when evidence sufficient to show unlawful accumulation of refuse.* The preponderance of the evidence held to show that refuse was allowed to accumulate on both sides of the haulage road in defendant's coal mine in violation of the statute (J. & A. ¶ 7489), and as charged in the declaration, in an action by a mine employee to recover damages for personal injuries charged to have been sustained by reason of such refuse.

4. EVIDENCE, § 365*—*when opinions of experts are not competent.* The opinions of expert witnesses are not competent evidence as to actual conditions, and their safety, which are matters of common observation.

5. INSTRUCTIONS, § 87*—*when instruction on preponderance of evidence is proper.* An instruction as to the sufficiency of a slight preponderance of evidence is proper.

6. INSTRUCTIONS, § 111*—*when instruction applicable to one count only of declaration is not erroneous.* An instruction which is applicable to one count, only, of a declaration is not erroneous because it does not refer to that fact.

7. MINES AND MINERALS, § 191*—*when instruction on liability of mine owner is not erroneous.* In an action against a mine owner by an employee for damages for personal injuries, an instruction setting out the particular provisions of the statute charged in the declaration to have been violated, and stating that if the defendant failed to comply with such provisions and such violation caused plaintiff's injury the jury should find defendant guilty, not approved but held not erroneous.

8. INSTRUCTIONS, § 20*—*when requested cautionary instruction properly refused.* A requested instruction cautioned the jury to ex-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ercise their individual judgment and conscience, *held* that its refusal was not erroneous as it tended to induce some jurors to neglect to confer and consider arguments of cojurors.

9. INSTRUCTIONS, § 151*—*when requested instruction properly refused*. Refusal to give instruction as to matters sufficiently set out in other given instructions is not error.

10. MINES AND MINERALS, § 194*—*when refusal of instruction in action for injuries to mine employee is not erroneous*. An instruction that the court was not intimating that a dangerous condition existed in defendant's coal mine, *held* permissible but refusal to give same not error under circumstances of the case, in an action by an employee to recover damages for personal injuries sustained in such mine.

11. MINES AND MINERALS, § 194*—*when refusal of instruction as to nonliability of owner if mine examiner did not consider mine unsafe proper*. An instruction that if the mine examiner did not consider a certain condition in the mine dangerous the plaintiff could not recover, *held* erroneous and properly refused, in an action by a mine employee to recover damages for personal injuries sustained in defendant's mine.

12. INSTRUCTIONS, § 20*—*refusal of cautionary as not error*. Cautionary instructions *held* permissible, but refusal to give same not error.

13. INSTRUCTIONS, § 138*—*when requested instruction is properly refused*. An instruction as to what was not the law as to a matter not material to the questions in controversy, *held* properly refused.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Staver Carriage Co. v. Richardson, 203 Ill. App. 620.

Staver Carriage Company, Appellant, v. B. E. Richardson, Appellee.

Gen. No. 6,265.

1. SALES, § 422*—*what constitutes conditional sale contract.* A contract for the sale of goods by the terms of which the title and ownership remain in the seller until they are paid for in cash is a conditional sale contract.

2. SALES, § 425*—*when conditional sale is fraudulent as to bona fide purchasers and execution creditors of judgment debtor.* The owner of personal property will not be permitted to sell it conditionally and deliver it to another and successfully maintain the reservation of title to himself as real owner by contract as against a bona fide purchaser for value or an execution creditor of the judgment debtor to whom such property was delivered under a contract of conditional sale, and such sale is considered constructively fraudulent as to such purchasers and creditors.

3. SALES, § 425*—*what is effect of conditional sale contract between parties.* As between the parties, a conditional sale contract with reservation of title to personal property until payment is made therefor is valid and enforceable.

4. SALES—*what constitutes delivery of possession to seller of automobile sold under conditional sale contract.* Where, prior to the issuance and levy of an execution upon a quantity of automobiles stored in a judgment debtor's warehouse and which had been purchased by him under a conditional sale contract, he agreed to return the automobiles to the seller and for the purpose of their removal from the warehouse unlocked the warehouse and gave access thereto to the seller's employees for such removal, and they entered and had removed a part of the automobiles when such execution was issued and levied, *held* that there was a delivery of the property to the seller, and the ownership and possession thereof were in him at the time of the issuance and levy of the execution, and he had the right of possession at the time of suing out a writ of replevin thereafter.

Appeal from the City Court of Aurora; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in this court at the April term, 1916. Reversed with finding of facts. Opinion filed November 9, 1916. *Certiorari* denied by Supreme Court (making opinion final).

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Staver Carriage Co. v. Richardson, 203 Ill. App. 620.

BULKLEY, MORE & TALLMADGE and NATHAN J. ALDRICH, for appellant.

FRANK G. PLAIN, for appellee.

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

This action of replevin was brought by the Staver Carriage Company, appellant, in the City Court of Aurora, against the appellee, B. E. Richardson. The appellant by this action recovered the possession of thirty-four vehicles, which had been levied upon by the appellee as sheriff by virtue of executions issued upon judgments by confession, recovered by the German American National Bank of Aurora, against Andrew Welch, amounting to the sum of \$5,086.53. The vehicles in question had been manufactured by the appellant and delivered to Welch, under the terms of what under the authorities must be considered a conditional sale contract, by which the title to and ownership of the vehicles were to remain in the appellant until the price thereof was paid in cash. (*Gilbert v. National Cash Register Co.*, 176 Ill. 288; *Peoria Mfg. Co. v. Lyons*, 153 Ill. 434; *Chickering v. Bastress*, 130 Ill. 215.)

Andrew Welch, about the time of the commencement of this suit, was in business in Aurora and had been for many years previously. He had a salesroom or repository and warehouse in that city for the purpose of selling various kinds of carriages and vehicles, and at the time in question was in failing circumstances financially, and breaking down in health. When it became apparent that Welch would be unable to pay for the goods in question, it was thought best, by his relatives and his agent and business representative, Mrs. Mahaffey, that the goods in question should be returned to appellant, and a conference of the creditors

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who had an interest in the goods which Welch had in the salesroom and warehouse was called. At that conference the business agent and representative of Welch, with Welch's subsequent approval, offered to return to the appellant the thirty-four vehicles involved, in discharge of the amount which Welch had obligated himself to pay for the same, namely, the invoice price of \$2,714, which offer was accepted by the appellant through its official representative, and thereupon appellant made arrangements to take back the vehicles at once. A list of the vehicles to be returned was prepared by Welch's representative, and they were checked over by the representative of appellant, and agreed upon.

Part of the vehicles were in the showroom or repository and a part were across the street in the warehouse; those in the warehouse were still in the same condition that they were in when received, that is, uncrated. The next day, April 6th, the list mentioned was given to Peter Bickelhaupt, an employee, of the appellant, who with two other employees went to Aurora to take possession of the vehicles in question, and to attend to the removal of them from Aurora to Chicago. They reached Aurora about nine o'clock, and saw Mrs. Mahaffey, Welch's business agent, who had charge of the matter of the return of the vehicles to appellant, and she sent a man with them to unlock the warehouse and locate the vehicles in the warehouse and the repository, which was done. They checked up on the list which Bickelhaupt had brought, and located the vehicles in the repository and in the warehouse across the street, and then immediately proceeded with the work of removing them, having previously hired the necessary wagons and teams to haul them from the premises to the freight cars which had been provided by the railroad company to carry them to Chicago.

While they were engaged in this work of removal, the German American National Bank had two judgments entered by confession against Andrew Welch, one for \$4,814.13 and the other for \$272.40, in the City Court of Aurora; executions were issued thereon immediately, and placed in the hands of appellee, as sheriff, who, by virtue of these executions, levied upon the vehicles in question, not only those which still remained in the repository and warehouse, but also those which had been already packed in the freight cars; and, under this levy, appellee took complete possession of all the vehicles.

After the suing out of the writ of replevin here involved on the 26th day of April, 1907, bankruptcy proceedings were commenced against Andrew Welch in the United States District Court for the Northern District of Illinois, and he was adjudged a bankrupt on the 15th day of May, 1907, a trustee in bankruptcy was appointed, and all the goods levied upon by the appellee as sheriff, which had remained in appellee's possession and not replevied up to that time, were turned over to the trustee in bankruptcy.

The German American National Bank filed its two claims, based upon the judgments referred to, in the bankruptcy court, and afterwards received the dividend declared in the bankruptcy proceeding, with the other creditors of the bankrupt. It does not appear that any effective effort was made at any time by the trustee in bankruptcy to have any claim of lien of the executions in question against Andrew Welch continued for the benefit of the general creditors of the bankrupt. There was an attempt made to have the trustee in bankruptcy substituted as defendant in the place of appellee as sheriff of Kane county, and an order was obtained from the referee in bankruptcy granting the trustee leave to be substituted in this replevin suit, but the trustee never took any further

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steps in that direction nor obtained any order of substitution. It appears that he filed some pleas in the case, but, inasmuch as he never obtained leave to file them nor any order of substitution, they were ignored, and thereafter no further effort of any kind was made by the trustee in the matter, and the estate of the bankrupt was closed, the referee's final report being filed on January 6, 1914, and the trustee was discharged.

To the declaration filed in this action the appellee interposed four pleas: first, *non cepit*; second, *non detinet*; third, property in the defendant; and fourth, property in Andrew Welch, and executions in favor of the German American National Bank against Andrew Welch for \$5,086.53 and costs, with an averment that appellee took said goods and chattels in execution of said writ. A *similiter* was filed to the first and second pleas, and replications to the third and fourth pleas, averring property in the appellant and not in the appellee, nor in Andrew Welch, and issues were joined on these replications. There was a trial by the court, and the court found the issues in favor of the appellee, and rendered a judgment against the appellant, awarding a writ of *retorno habendo*.

It is apparent that the rights of the parties must be determined by the answer to the question, as to who was the owner and in possession of the property in question at the time of the recovery of the judgments, and the issuance and the levy of the executions mentioned. There is practically no dispute concerning the facts and the circumstances under which the judgments were recovered, the executions issued, and the levy made. It is the well-settled law of this State that the owner of personal property will not be permitted to sell it conditionally and deliver it to another, and successfully maintain the reservation of title to himself as real owner, by contract, as against bona fide purchasers for value, or execution creditors of the judg-

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ment debtor, to whom such property and the possession thereof has been delivered, under a contract of conditional sale. To suffer the real ownership of such property to be in one person, and the ostensible ownership in another, without notice to the world, is considered to be constructively fraudulent as to creditors and bona fide purchasers for value. (*VanDuzor v. Allen*, 90 Ill. 499; *Chickering v. Bastress*, 130 Ill. 215; *Gilbert v. National Cash Register Co.*, 176 Ill. 296; *Peoria Mfg. Co. v. Lyons*, 153 Ill. 427; *Singer Mfg. Co. v. Ellington*, 103 Ill. App. 521; *Rosenbaum v. King*, 114 Ill. App. 648; *Jacobson v. Patterson*, 190 Ill. App. 266; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664.)

But as between the parties, a conditional sales contract with a reservation of title to personal property until payment is made therefor, is enforceable; and such a contract is valid. (*Lucas v. Campbell*, 88 Ill. 447; *Murch v. Wright*, 46 Ill. 487; *People v. Kirkpatrick*, 69 Ill. App. 207; *Hallbeck v. Stewart*, 69 Ill. App. 225.)

In this case, as between the appellant and Andrew Welch, under the conditional sales contract in question, the title and ownership of the vehicles replevied remained in the appellant, and were in the appellant at the time that the arrangement was entered into for the return of the vehicles to appellant; therefore, if appellant regained possession of them before the German American National Bank acquired any rights with reference thereto, or any lien by virtue of its executions, it had the legal right to maintain replevin, and the sheriff had no right to levy upon the vehicles as the property of Andrew Welch.

The controlling question, really is, whether at the time of the issuance and levy of the executions the appellant had in fact repossessed itself of the property levied upon, that is to say, as to whether or not, at that time, the property had been redelivered to

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appellant. And the evidence clearly shows that the employees of appellant at the time mentioned were in control and exercising dominion over the property in controversy. The property was bulky in its character, but it had been located and turned over to the disposal of appellant's employees; the warehouse had been unlocked and opened for the purpose of enabling them to remove it, and the dominion and control which they were exercising over it is clearly evidenced by the fact that they were in the act of removing it, and had already removed a portion of it, from the premises.

The unlocking of the warehouse for appellant's employees for the purpose of the removal of the vehicles and giving appellant's employees access to the repository for such removal, under the circumstances stated, amounted to actual delivery. It was said by Lord Kenyon in *Chaplin v. Rogers*, 1 East 194, that a delivery to the vendee of the key of the warehouse in which goods were lodged or other *indicia* of ownership, where goods are ponderous and incapable of being handed over from one person to another, amounts to actual delivery; and in *Jewett v. Warren*, 12 Mass. 300, which was a case involving the transfer of ownership of a boom of logs, it was held, following the rule announced by Lord Kenyon, that where the person, who was appointed by the vendor to deliver the logs lying within the boom, and who went within sight of them with the vendee and showed them to him, and the vendee accepted them, that this was all the delivery which could be usefully made of property of this nature, and was effectual, for that kind of property, as a delivery over in hand of a chattel capable of such personal possession.

In *Rice v. Austin*, 17 Mass. 197, following in the same line of authority, it was said that, "It is not necessary, to effect the transfer of bulky articles, that there shall be a manual delivery of them. The delivery

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of things, which may be considered as the proper *indicia* of the property, is sufficient''; and that the fact of possession might be inferred from the plaintiff's undertaking to deal with the property as his own. The courts of review in our own State have directly followed in the line of decisions referred to on the question of delivery. (*Ticknor v. McClelland*, 84 Ill. 471; *Morrison v. Woodley*, 84 Ill. 192; *May v. Tallman*, 20 Ill. 443; *Funk v. Staats*, 24 Ill. 632; *Hart v. Wing*, 44 Ill. 141; *Moser v. Kreigh*, 49 Ill. 84; *O'Leary v. Bradford*, 39 Ill. App. 182; *Barker v. Livingston County Nat. Bank*, 30 Ill. App. 591; *Jacobson v. Patterson*, 190 Ill. App. 266.)

Under the facts and the law it is apparent therefore that, at the time of the issuance of the execution in question and the levy referred to, the appellant was the owner of and in actual possession of the property in question. And the holding of the court on the issues joined, that the property at the time of the levy by the sheriff was the property of Andrew Welch and in his possession, and that it was subject to the levy of the executions referred to, was erroneous; and the judgment entered in accordance with such finding and awarding a writ of *retorno habendo* for the property replevied should therefore be reversed.

The conclusions herein expressed make it unnecessary to consider and determine the other questions raised on this appeal. The judgment is reversed.

Reversed with finding of facts.

Finding of facts to be incorporated in the judgment.

We find that the ownership and the possession of the property in question were in appellant at the time of the issuance and levy of the executions involved, and that the ownership and the right of possession of said property were in appellant at the time of suing out of the writ of replevin.

Leslie P. Voorhees, Defendant in Error, v. Hannah E. Mason, Executrix, et al., Plaintiffs in Error.

Gen. Nos. 6,241, 6,242. (Not to be reported in full.)

Error to the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed November 9, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Suit by Leslie P. Voorhees, complainant, against Truman A. Mason (Hannah E. Mason, executrix, substituted) and five others, defendants, for an accounting by the defendants as directors of a corporation in which complainant was also a stockholder. From a decree for accounting, defendants appeal and also bring error to review the whole record.

The bill alleged the defendants had issued to themselves individually each thirty shares of stock in the corporation, each share of the par value of ten dollars and thirty income certificates, each of the par value of two hundred and ninety dollars, at one-half of the established price thereof, and that they had received ten per cent. commission on the par value of other shares of stock and income certificates sold by them. Their answer admitted these facts, but sought to justify by stating they were so authorized by a vote of the stockholders on account of compensation to them for services rendered. The bill was dismissed on hearing, but, on an appeal to the Appellate Court (148 Ill. App. 647), an accounting was directed, with order to charge each defendant with full price of stock and certificates held by each and dividends thereon and one-half dividends paid. On further appeal the Supreme Court (245 Ill. 256) remanded the case on other grounds, without reversing the order for accounting.

A cross-bill was then filed claiming discharge of liability, and on demurrer thereto being overruled the original bill was dismissed, but on appeal the Appellate Court (182 Ill. App. 569) sustained the demurrer and dismissed the cross-bill and ordered accounting as in first decree. March 2, 1914, the case was referred to a master in chancery to state an account under such decree. January 13, 1915, the defendants filed a petition to modify the decree as to the value of the certificates and interest, and a new decree was entered, adhering to the former as to stating an account of the stock and certificates, and directing a statement also of further details. Accounts were stated accordingly, showing particular amounts chargeable against each defendant as to stock, certificates and commissions, and that under the contracts for the stock and certificates payment after the first four payments, which amounted to the stock value at par, was voluntary. Decree was then rendered confirming report as conforming to the decree of March 2, 1914, and that the corporation recover the amount stated from each defendant, with interest. The board of directors thereupon, by majority vote, caused entry of a release of this money decree in favor of the corporation for the expressed consideration of one dollar, with a release to the corporation of all claims by the defendants for services rendered. Petition was filed by complainant alleging that the corporation because of the revolution in Mexico, where its properties were located, was worthless except for assets recoverable under the decree in this suit, and asking receiver and injunction against defendants from prosecuting suit for services passed upon by the former decree and order, and that the satisfaction of the decree be canceled. Decree was entered expunging the satisfaction of the former decree of record, allowing injunction as prayed, and appointing trustee to collect the

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proceeds of that decree; also denying complainant's prayer for solicitor's fees and expenses in the litigation.

Defendants filed writ of error to review the whole record, and the corporation filed confession of the errors assigned, and the complainant assigned as cross error that the defendants should be decreed to pay jointly and severally instead of individually. Appeal also brought by the defendants from the final order. The two cases were consolidated.

C. E. ANTRAM and JOHN H. GARNSEY, for plaintiffs in error; EDWARD C. HALL, of counsel.

C. B. CHEADLE, for Joliet Tropical Plantation Co.

GEORGE F. BORMAN, for defendant in error.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1783*—*when confession of errors by corporation not ground for reversal of decree.* Where the law compelled continued prosecution of a suit against the directors of a corporation for an accounting by them of the corporate funds for the benefit of the corporation, although prosecuted by a single small stockholder and against the wishes of the directors, officers, and all the other stockholders, *held* that neither the officers nor all of the stockholders, except the complainant, may release a decree rendered in such suit requiring the defendants to pay an account stated by a former decree therein as due from them to the corporation, and the confession by the corporation of errors assigned for reversal of a decree canceling such release would not warrant reversal of said decree.

2. APPEAL AND ERROR, § 1725*—*when decision on former appeal is law of case.* Where certain so-called income certificates issued by a corporation were treated by it as having a certain fixed value, although they had in fact technically no par, market or intrinsic

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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value, and were so treated and acted upon by the court in rendering a decree against the directors of the corporation for an accounting as to such certificates, and an account stated was made in such decree upon the basis of such accepted value, *held* that the question that said certificates were of less value could not be raised in a subsequent proceeding on writ of error or appeal, and that the effect of a provision in the contract under which such certificates were issued that payment on the certificates should be optional after certain partial payments had been made could not be questioned for the first time in such subsequent proceeding.

3. CORPORATIONS, § 287*—*when allowance of commissions to directors of corporation on sales of stock is proper.* The allowance by the master in chancery and the chancellor of ten per cent. commission to the directors of a corporation on sales of stock of the corporation made by them, *held* proper under the evidence, in a suit for accounting brought against said directors.

4. CORPORATIONS, § 275*—*when decree charging amounts against directors severally in suit for accounting is proper.* A decree charging certain amounts against the defendants severally instead of jointly and severally, in a suit brought against the directors of a corporation for an accounting of the corporate funds, *held* proper under prior decisions in the same suit of the Supreme and the Appellate Courts.

**James Savio et al., Appellees, v. Anton Vieno et al.,
Appellants.**

Gen. No. 6,268.

1. INJUNCTION, § 256*—*when decree from which no appeal is taken may not be questioned in subsequent contempt proceedings.* A decree from which no appeal was taken by the parties against whom it was rendered cannot be questioned by them, as to the things determined thereby, on their appeal from a sentence for contempt for their violation of an injunction order entered in the suit.

2. FRATERNAL AND MUTUAL BENEFIT SOCIETIES, § 55*—*what does not constitute justification for violation of injunction restraining officers of seceding body from disposing of funds of society.* Where certain officers of a seceding body of a fraternal beneficiary society

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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were enjoined from disposing of any funds of the society in their hands, *held* that the fact that one of such officers merely signed the vouchers upon which such funds were paid out, or that such funds were paid out by the vote and direction of the seceders, or that the name of the body had been changed and they were no longer affiliated with the society, would not justify the violation of such injunction by any of such officers.

3. APPEAL AND ERROR, § 1265*—*when existence of convening order of court presumed.* Where the record on appeal from a sentence for contempt for violation of an injunction order showed in evidence a decree enrolled in the suit in which such order was entered on a certain day signed by the presiding judge but failed to show a convening order for that day, to which evidence no objection was made because of such failure, *held* that it must be presumed in support of such record that there was a convening order which would have been introduced had objection been made.

4. JUDGMENT, § 360*—*when decree imports verity and may not be contradicted by parol.* Where a record of court proceedings offered in evidence showing the entry on a certain day of a certain decree by a certain judge was preceded by a proper convening order showing such judge present, *held* that such record would import verity and could not be contradicted by parol.

5. INJUNCTION, § 256*—*what is not defense in contempt proceedings for violating.* The fact that no decree may have been rendered in a suit would not relieve parties who had violated an injunction against them in such suit from a sentence for contempt for such violation.

6. INJUNCTION, § 245*—*what is binding force of.* An injunction issued by a court having jurisdiction must be obeyed until it is modified or dissolved.

7. CLERKS OF COURTS, § 3*—*when may enter on own motion omitted part of record of proceedings.* A clerk of court may enter any omitted part, as a convening order on a particular day, of a record of proceedings in court of his own motion whenever he discovers such omission during the term or before the first day of the next term, and an order of court to make such correction is not necessary.

8. APPEAL AND ERROR, § 1273*—*what presumptions arise as to existence of daily convening orders by city courts.* A court organized under the statute as to city courts has both chancery, common law and criminal jurisdiction, and it will be presumed, from its common-law and criminal character, that it had at a certain term both a common-law and a criminal record and a convening order

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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for every day it was in session, and it will not be presumed there was no convening order also in its chancery record.

9. JUDGMENT, § 2*—*when defect of record as to time of convening of court does not invalidate.* In many respects a term of court is regarded in the law as a day, and the fact the record showed the court convened at 10:30 p. m. instead of at 10:30 a. m., when it actually convened and acted, would not invalidate a judgment entered on that day.

10. INJUNCTION, § 262*—*when amendments to injunctive order without leave of court do not work dissolution of injunction.* Amendments to an injunction order which only enlarged and strengthened the allegations of the bill would not affect the force of the injunction or work its dissolution, even though leave of court was not obtained to amend without prejudice to the injunction, and even though the injunction could have been dissolved on motion because such amendments had been made without such leave.

11. APPEAL AND ERROR, § 41*—*when Appellate Court has jurisdiction of appeal in contempt proceedings.* An appeal in contempt proceedings arising in a city court is properly taken to the Appellate Court.

12. CONTEMPT, § 70*—*when order sentencing for is erroneous.* An order sentencing a party found guilty of contempt "from the date hereof" regardless of delay caused by appeal from such order is erroneous in so restricting the sentence, and the words will be stricken out on such appeal.

Appeal from the City Court of Spring Valley; the Hon. HARRY W. McEWEN, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed November 9, 1916. Modified and refiled December 6, 1916.

J. L. SPAULDING and J. L. MURPHY, for appellants.

GILBERT F. WAGNER, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

Anton Vieno, Joseph Corna, Dominick Bobbio, Joseph Compasso and John Salvetti, defendants in a chancery cause in the City Court of the City of Spring Valley, and John L. Murphy, their solicitor in said

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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cause, were adjudged guilty of contempt of court in violating an injunction in said cause. This is an appeal by them from the sentence imposed upon them for said contempt.

On the merits the case is clear. On November 29, A. D. 1913, Robert J. Blum, James Savio and Andrew Savio filed a bill of complaint in said City Court against said five defendants above named, and Court Rose No. 12 of the Foresters of America of Spring Valley, Illinois. The bill alleged that the Foresters of America is a fraternal beneficiary society, composed of a supreme court, and grand and subordinate courts, and that said Court Rose No. 12 was a subordinate court thereof located in said City of Spring Valley; that Anton Vieno was then treasurer of said Court Rose No. 12; that said Joseph Corna was then financial secretary of said society; that Joseph Compasso, Dominick Bobbio and John Salvetti were then trustees of the said society, and were then and had been acting in their official capacities. The bill charged that on November 24, 1913, a meeting of said Court Rose No. 12 of Spring Valley, Illinois, was held, at which the majority then present undertook to secede from the order of the Foresters of America; that the complainants are members of said society, and received no notice of said meeting (which was a special meeting), and that the notice given of said meeting did not comply with the constitution and rules of the order, and that the acts and proceedings of said meeting of November 24, 1913, were in violation of the constitution of the order, and that said meeting was not properly called, but was fraudulently called and held; that there then was in the hands of the defendants a large sum of money collected from the members of said Court Rose No. 12, and belonging to said Court Rose No. 12; and that it also owned certain real estate in Spring Valley, which is described; and that the officers named as defendants threaten to dispose of the funds

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and property of said Court Rose No. 12 to the irreparable injury of the complainants and will do so unless restrained by injunction. The bill made defendants the said five officers and said Court Rose No. 12 and asked that they be restrained from selling, assigning, incumbering or otherwise disposing of the moneys, funds and property, real and personal, of said Court Rose No. 12 until the further order of the court; and that the acts of said society at said meeting on November 24, 1913, be declared illegal, void, and of no force or effect; and also prayed for further relief. The bill was verified by said three complainants. On said day the judge of the City Court of Spring Valley entered an order for an injunction pursuant to the prayer of the bill, and on the said 29th day of November, 1913, an injunction was duly issued, which commanded the defendants and their attorneys, solicitors, agents and servants to absolutely desist and refrain from selling, assigning, incumbering or otherwise disposing of the moneys, funds and property, real and personal, of Court Rose No. 12 of the Foresters of America of Spring Valley, Illinois, until the court otherwise ordered. This injunction was duly returned served on the 1st day of December, A. D. 1913, upon each of the defendants therein named. At some subsequent date Blum died, and his death was suggested, and his name ceased to appear in the cause. The summons in that cause was returnable to the May term, 1914. Thereafter the seceding body changed its name and Court Rose No. 12 elected other officers, and thereafter Court Rose No. 12 was changed from a defendant to a complainant, and on June 22, 1914, the complainants by leave of court filed an amended and supplemental bill against the said five defendants and the Grand Court, Foresters of America of the State of Illinois. In this amended bill the laws of the order were set out in detail, and it was therefrom shown in detail that said meeting of November 24, 1913, was not held in com-

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pliance with the laws of the order. It was also shown that, by the laws of the order, if a subordinate lodge such as Court Rose No. 12 undertook to secede from the order and there were left fifteen members who did not secede, including one who was competent to preside, then such remaining members should continue to constitute the society, and should be entitled to all of its property; and that if less than that number did not secede, the property of the society should belong to the Grand Court of the order. The amended bill charged that there were nearly sixty members who did not join in the secession, and among them were numerous persons competent to preside, and it was charged that therefore the funds of this Court Rose No. 12 belonged to that part of the society which did not secede. There were several slight amendments to the amended and supplemental bill, and an additional verification thereto. Defendants made a motion to dissolve the injunction, and that was denied, and they then answered and made another motion to dissolve the injunction, which was denied, and from each of these orders the defendants appealed to this court, and we heard the two appeals together, and affirmed the orders in *Savio v. Vieno*, 193 Ill. App. 395. The proofs were taken and reported by a master, and there was a hearing and the cause was taken under advisement, and there was a decree on March 20, 1915, in favor of the complainants. This decree, so far as appears, has never been appealed from nor questioned by a writ of error. It is very full in its findings of fact, and decides every issue against the defendants. Appellants in their argument here give an alleged history of the various matters pertaining to Court Rose No. 12, and the secession therefrom or its change of name, but this narrative is not supported by this record; and the decree which is binding upon the defendants at the present time presents a very different history of the transactions involved, and appellants

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are not at liberty here and now to dispute the things determined by that decree. Appellants here seek to find imperfections in the decree and some slight variance from the pleadings, and to claim that it is not sufficiently supported by the evidence. We are of opinion that in this contempt proceedings the defendants and their solicitor cannot question the sufficiency of that decree. The court unquestionably had jurisdiction at the suit of the minority members of the society to restrain the transfer of its moneys to another society formed by an act of secession, and to determine to whom those funds rightfully belonged. That decree is final until it shall be modified or reversed on appeal or writ of error. The defendants cannot in this proceeding again try the issues settled by that decree.

The facts turn out to be that when said injunction was served upon said defendants on December 1, 1913, there was in the hands of said five defendants \$2,329.52 belonging to the local society, and arising from dues, etc., paid in by the members. This money was in their possession and under their control when the injunction was served. During December, 1913, Murphy was hired by the seceders to procure a change of name for the body formed of the seceders. In January, 1914, the defendants presented to him a copy of the injunction which had been served upon them. At that time he became fully aware of the language of the injunction, and he became solicitor in the chancery cause for said five defendants, and he thereafter was bound by that injunction as fully as they were. On May 28, 1914, the five defendants paid Murphy, and he received from them, \$100 of these funds. On July 28, 1914, the five defendants paid Murphy, and he received from them, \$1,600 of these funds. He took these sums to apply in payment for his professional services rendered and to be rendered in said chancery cause and other matters. About that time the five defendants

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paid out \$500 more of this money on bills owing by the seceders, and the rest of this fund they afterwards paid out. Before these moneys were paid out by the defendants or received by Murphy, a discussion was had on the question whether this would be a violation of the injunction, so that they acted with the injunction in mind. Murphy spoke very slightly to them of the injunction and they paid out the money. They thereby disposed of the entire fund in litigation, which the decree found belonged to the society composed of those who did not secede from the Foresters of America. It would be difficult to conceive of a more flagrant and intentional violation of an injunction, and the rights of the complainants are practically destroyed, so far as here appears, unless the order adjudging the defendants guilty of contempt produces the results which were intended. By the judgment in the contempt proceedings the five defendants were sentenced to imprisonment in the county jail for six months, but it was provided that they could at any time relieve themselves of that imprisonment by paying direct to the clerk of the court the sum of \$2,329.52, which they so wrongfully expended. The same judgment sentenced Murphy to imprisonment in the county jail for one month, but with the proviso that he could relieve himself from imprisonment by paying to the clerk of the court the sum of \$1,700 so wrongfully received by him. It is said that the five defendants are poor and unable to raise that sum of money, but it is fairly evident that if Murphy turns back the \$1,700 which he received, the other defendants will then be able to comply with the rest of the order, and the funds so wrongfully withdrawn will be placed in the hands of the clerk of the court. The clerk of the court will hold these funds subject to the decree which has been entered, and subject to the control of the court, and the sole purpose of the order is to have the money restored to a place where it can be applied as the

decree finds that it should be. We see no injustice in this. It is insisted that Corna ought not to have been convicted of contempt because he did not actually pay out the money. He signed the vouchers upon which it was all expended. The defendants seek to justify themselves by the vote and direction of the seceders, who, before this time, had changed their name, and were no longer affiliated with the order of Foresters of America. We are of opinion that this does not excuse them.

Before the trial of the original cause, a change of venue was taken from Judge Hawthorne of the City Court of Spring Valley, and Judge Sheldon, of the City Court of Sterling, tried the case. In this contempt proceeding, complainants offered in evidence certain pages of the chancery record of the said City Court, including the enrolled decree of March 20, 1915, and the respondents made no objection thereto. It does not appear in the record before us that said chancery record contains a convening order for that day, and this is the only defect in said decree as introduced by the petitioners; and it is signed by "Carl E. Sheldon, presiding judge." As no objection was made to its introduction because a *placita* or convening order was not put in evidence, we must presume in support of the record that there was such a convening order, which would have been introduced if objection had been made because it was not offered. In their defense the respondents introduced the original draft of this decree, which bore the file mark of March 20, 1915, and sought to prove that, in fact, it did not reach the clerk until nearly a month later, and that Judge Sheldon was not present on March 20, 1915, presiding in the City Court of the City of Spring Valley, but that this decree was sent by him from some other place with the statement that Judge Hawthorne could cause it to be entered. It is therefore claimed that there was no decree entered on March 20, 1915, and

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that the decree is a nullity. We are of opinion that if the record offered in evidence of the proceedings of that day was preceded by a proper convening order showing Judge Sheldon present, that record imported verity, and could not be contradicted by parol. Some other suggestions hereinafter made concerning court records are also applicable; but if there is no such decree as this it does not relieve the respondents of the charge of contempt of court. Appellants argue here that if this decree is of no effect, then the cause ended when it was heard by Judge Sheldon and was taken under advisement, or ended at the date of such ineffective decree. We cannot assent to this conclusion. If Judge Sheldon has not yet entered a decree in said cause, then he still has the case under advisement, but the contempt of court was actually committed nearly a year before that time. The funds were dissipated in May to July, 1914, and the defendants are equally guilty of contempt and equally subject to punishment if the case has never yet reached a final decree. True, if there is in fact no decree, the alleged decree cannot be used to prove complainants' contentions as to the rights of the parties, but whether respondents are guilty of contempt does not depend upon the final result of the litigation. As the court had jurisdiction, respondents were not at liberty to disregard the injunction even if they thought it had been improvidently granted, or that it would be modified or dissolved on the final hearing. An injunction issued by a court having jurisdiction must be obeyed until it is modified or dissolved. *People v. McWeeney*, 259 Ill. 161; *Flannery v. People*, 225 Ill. 62; *Christian Hospital v. People*, 223 Ill. 244; *Franklin Union No. 4 v. People*, 220 Ill. 355; *Clark v. Burke*, 163 Ill. 334. If there is no final decree, the funds which may be paid by respondents under the order appealed from will remain in the hands of the court subject to such final decree as shall be entered.

In the contempt proceedings the court, on September 15, 1915, found the respondents guilty, and gave them until September 29, 1915, to purge themselves of such contempt if they should see fit; and on September 29th the final order was entered, sentencing the defendants to imprisonment in the county jail unless they should relieve themselves thereof by paying to the clerk of the court the moneys so wrongfully paid out. This all purports to be of the May term, 1915. It is the contention of the appellants that the City Court was never legally in session in said May term after the first day, and therefore was not in session when this judgment was entered. The May term, 1915, began on May 3rd, and the proceedings of that day in the chancery docket were preceded by a proper convening order showing Judge Hawthorne present. At the end of the proceedings in the chancery docket of that day was an order that the court now adjourn until May 5th, at 10:30 p. m. The chancery record of May 5th, shows chancery business transacted, and was not preceded at that time by a convening order showing a judge present, and the court then adjourned to another day. There were in this chancery record various adjournments at different times during said term, some of which showed a proper convening order on the day that the adjournment was made, and the others did not. Later in the term the question of the existence of the court was raised before Judge McEwen of the City Court of DeKalb, who presided at the hearing of this entire contempt proceeding, and he entered an order directing *placitas* to be supplied at the dates of sessions of court where they did not then appear in the record of that term, and they were so supplied, and the record as now before us contains the proper *placitas*. It was also proved before him that, in fact, the adjournment before mentioned was not to 10:30 p. m. but to 10:30 a. m., and that there was another

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order which incorrectly stated the hour to which an adjournment was taken, and the court directed those orders to be amended. The theory of appellants is that there never was any court in session at the May term after the first day, and that the court expired because it was not legally convened on May 5th, and that the subsequent proceedings to amend were had when there was no court in session, and therefore the amendments could not be made. At common law it was the duty of the clerk to write up the proceedings of each day by the following morning, so that the judge could then sign the record. *Governor v. Dodd*, 81 Ill. 162. By sections 14 and 15 of chapter 25 of the Revised Statutes (J. & A. §§ 2139-2140), pertaining to clerks of courts, first adopted in 1859, the time within which clerks of courts could perform this duty was very much enlarged. It is there provided that it shall be the duty of clerks of courts to enter of record all judgments, decrees and orders of their respective courts before the final adjournment of the respective terms thereof, or as soon thereafter as practicable, and a penalty is there provided if any clerk should so fail to enter of record any order, judgment or decree of his court by the next succeeding regular term after the same is rendered. In construing this statute it was held, in *McNamara v. People*, 183 Ill. 164, that the clerk of a court is not bound to enter the orders or judgments on the day they may be made; but he should do so during the term unless for some good cause they cannot be so made. So, in *People v. Petit*, 266 Ill. 628, it was held that a judgment can ordinarily be proved only by the record, but that the judgment exists from the time the court acts, even though the entry of the judgment may not have been formally written by the clerk; that the statute contemplates that the judgments, decrees and orders of the court cannot be immediately entered of record, and directs the clerk to enter them by the final adjournment of

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the term or as soon thereafter as practicable; that the Supreme Court will take judicial notice that the record of the proceedings of a court is frequently not written up during the term; that the judgment of a court does not cease to be a judgment because the clerk failed to enter it of record, and if the clerk should become liable to a penalty for neglect of his duty, still the judgment of the court would not lose its binding effect, and it would still be the duty of the clerk to enter it of record; and that until the expiration of the term a judgment was still under the control of the court. We are of opinion that these principles should apply as well to a convening order as to the body of the judgment or decree. It is also a matter of common practice in chancery cases that when the judge directs a decree in favor of a particular party, a memorandum thereof is usually made upon a minute book kept by the judge or clerk, and that the successful attorney thereafter takes some considerable time in which to prepare the decree in such manner as to meet the views expressed by the court, and that it, in fact, does not usually reach the clerk for enrollment in the record until some later day. If that should chance to be the only decree on that particular day, it might very often happen that there would not be, in the chancery docket, any convening order until the enrollment of that decree. Therefore the clerk was not obliged to enter of record this decree or any part thereof prior to the time these amendments were made. We cannot doubt that if he could enter the whole of a decree during any day of the term, he could enter any omitted part of his own motion whenever he discovered such omission during the term, or before the first day of the next term; and that when he discovered that on some particular day in which proceedings were entered in his chancery record he had failed to place a convening order before the proceed-

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ings of that day in the chancery record, he had power, of his own motion, during that term, or before the first day of the next succeeding term, to enter such convening order; and that therefore the direction by the court to him to supply these convening orders was unnecessary. Moreover, the City Court of Spring Valley, organized under the general act relating to city courts, is not merely a chancery court, but is also a court of common-law and criminal jurisdiction. We have a right to presume that at the May term, 1915, it had a common-law record and a criminal record; and these different records of the court being usually kept in different books, we have a right to presume, in support of the jurisdiction of the court, and in the absence of evidence, that there was either in the common-law record or the criminal record a proper convening order for every day the court was in session; and we will not assume, because the clerk on May 5th, or at any other day of the term, did not write a convening order in the chancery record, that therefore there was no convening order in the other record, and therefore there was no court. It is instructive that in the appeal bond executed by all the respondents, and by which this matter is brought to this court, it is recited that the said complainants "did, on the 29th day of September, A. D. 1915, at a term of the City Court of the City of Spring Valley in said county, then and there being holden within and for said city, obtain and recover" the judgment here sought to be reversed.

Appellants appear to contend that because court adjourned to 10:30 p. m. on a certain day, when, in fact it met at an earlier hour, therefore the court lost jurisdiction. In many respects a term of court is regarded in the law as one day. *Shoemate v. Lockridge*, 53 Ill. 503; *Chiniquy v. People*, 78 Ill. 570; *Brown v. Leet*, 136 Ill. 203. In *Richardson v. Beldam*, 18 Ill. App. 527, in an opinion by McAllister, J., in a case

where a court on Saturday adjourned to the following Monday at ten o'clock a. m. and on Monday opened court before that hour and entered a judgment, it was held that reason, justice and the law all combine in requiring the court to hold that such a judgment should not be regarded as void or so irregular as to be set aside for that reason only. However, if a party to a suit were taken by surprise by the convening of the court at an earlier hour than that to which it had adjourned, he might have a right to relief. The court there said: "To hold that the powers of the court were absolutely suspended until the precise time to which it adjourned, would be the recognition of a doctrine fraught with inconvenience and dangerous consequences. In addition to a standard city and a standard railroad time, it would be necessary to have a standard court time, because the other two vary from each other. If the principle be recognized, five minutes too soon would be as fatal as forty or sixty minutes too soon. This case illustrates the wisdom of the old common-law rule, that the term of a court, as fixed by law, though running through weeks and even months, is to be regarded as one day, and that the law takes no recognizance of parts of a day." Moreover, although the court convened at 10:30 a. m. on the particular day here in question instead of at 10:30 p. m., there is no proof but that it may have been continued in session until 10:30 p. m. or later, and the action in this case may have been taken after that hour for all that this record discloses.

Appellants' brief contains a quotation from *Binney's* case, 2 Bland 99, which suggests that under certain circumstances therein stated, the making of an amendment to an injunction bill destroys the injunction previously granted thereunder, unless an order of court is obtained that the amendment be without prejudice to the injunction. It is said in 22 Cyc. 981, that such an amendment may render a temporary injunc-

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tion ineffective, but the notes there show that in numerous English cases it is held that the dissolution does not follow as a matter of course on the making of the amendment. We discussed this question in *Savio v. Vieno*, *supra*, and held that amendments which only enlarge and strengthen the allegation of the bill do not affect the force of the injunction. In *Selden v. Vermilya*, 4 Sandf. Ch. (N. Y.) 573, it was held that in New York, "an injunction does not drop on amending the bill, although the order granting leave may be silent on that subject." Based upon this and other authorities, 2 High on Injunctions (4th Ed.), sec. 1594, states the following as the law on this subject: "The prevailing doctrine now is that whenever, pending an injunction, an amendment is allowed to the bill, it is without prejudice to the injunction, which still stands, although the order granting leave to amend is silent as to its effect upon the injunction." In the present case, the bill was evidently hastily prepared, and its allegations were general, and the amended and supplemental bill and the subsequent amendments were for the purpose of setting out the laws of the order in detail, and showing in detail wherein the action of the meeting of November 24, 1913, was unlawful under the laws of the order, and not binding upon the complainants and the members who did not secede from the Foresters of America. Additional verification of the bill was made, but, in the former case before us, we held that the original verification was not defective, but was sufficient. We are of opinion that amendments which do not change the character of the case, but only enlarge the allegations of the bill and support the case already made, do not work a dissolution of the injunction, even though leave of court was not obtained to make the amendment without prejudice to the injunction, and that even if defendants could have had the injunction dissolved because of the amendments made without

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an order that they be without prejudice to the injunction (a defect which the complainants could then have cured), the defendants should have moved to dissolve the injunction instead of violating it.

Appellants suggest doubt whether they have appealed to the right court, and cite cases where the Supreme Court has taken jurisdiction of contempt proceedings appealed from the trial court to that court. In most of the cases above cited by us as to the duty to obey an injunction, the appeals were to the Appellate Court and thence to the Supreme Court without question. There were like appeals in *People v. Diedrich*, 141 Ill. 565, and *Leopold v. People*, 140 Ill. 552, and in many other cases. *Schmidt v. Cooper*, 274 Ill. 243, is a recent contempt case which passed through the Appellate Court to the Supreme Court without question. The proceeding is civil or remedial and is between the parties to the litigation. We conclude we have jurisdiction to decide the cause.

Several other minor points discussed by appellants have received our consideration and are overruled by us, and we think it unnecessary to discuss them. Some questions involved in this record were discussed by us in *Rubendall v. Tarbox*, 200 Ill. App. 260.

The order appealed from in certain parts uses the words "from the date hereof," and thereby seems to restrict the imprisonment to begin on that precise date, regardless of the delay caused by this appeal. Other parts of the order are not so restricted. To avoid future dispute as to the meaning of the order, we modify said order by striking out of it the words "from the date hereof" wherever they appear, following the course pursued in *Harris v. Harris*, 156 Ill. App. 336.

The judgment as so modified is affirmed at the costs of appellants.

Affirmed.



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