

the particulars which he then knew and obtained the blank proofs. On his return he handed the blanks to one of the plaintiff's representatives saying at the time, "When you get them completed I want you to return them to me." They were filled out and delivered to him July 3, 1882. He retained them for several months and then returned them to a brother of the plaintiff saying that they were incomplete, and demanded additional information. On the twenty-ninth of January, 1883, they were again delivered to Phillips and by him sent to the company on or about the seventh of February. The company, in acknowledging the receipt of the proofs, made no objection that they were received too late and retained them in its possession: they were produced on the trial by the defendant's counsel.

It must be held that if the plaintiff has not followed the contract literally in these particulars it was because she was misled by the course of the defendant, and that the defendant is not now in a position to take advantage of the plaintiff's omissions, having waived a strict performance of the contract.

I have examined other exceptions argued, but do not think any of them well taken.

The motion for a new trial is denied.

MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK *v.* SAMUEL and another.¹

(Circuit Court, E. D. Missouri. April 10, 1884.)

NEGOTIABLE INSTRUMENTS—PAYMENT BY CHECK—LIABILITY OF DRAWER.

Where the indorsee of a draft accepts the drawee's check in payment, instead of cash, and neglects to present it for payment or certification until the next day, and the check is dishonored in consequence of the delay, and the draft has to be protested for non-payment, the drawer cannot be held liable.

Instruction of Court on Motion to Nonsuit.

This was a suit by the plaintiff, as indorsee of a draft, against the defendants as drawers. The draft was payable at sight. It was received by the plaintiff on the eighteenth of June, 1883, and presented for payment on the same day. Instead of paying cash the drawers gave the plaintiff a check on their bank in New York, which was accepted without direction or authority, and the draft was delivered up to the payee. The check was not presented for payment until the next day, June 19th, and when presented was dishonored. Upon payment being refused, the plaintiff went to the drawees of said draft and returned the check and received the draft back again, and upon the same day had it protested for non-payment. Thereafter it instituted this suit.

The case was tried before a jury, and, the above facts appearing in

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

evidence, the defendants moved the court to enter a nonsuit. The court thereupon charged the jury as follows:

Finkelnburg & Rassieur, for plaintiff.

McKerghan & Jones, for defendants.

TREAT, J., (*charging jury*.) The draft in question having been sent forward to New York for acceptance and payment, if the same was accepted, being a sight draft, and a check received in payment, during bank hours, instead of cash, and the said check was retained in plaintiff's possession, instead of having the same collected or certified on the same day during bank hours; if said check could have been presented for payment, or certification had, during the banking hours of the same day; and if the said check had been presented on the same day, and would have been paid if presented; and if the said check was not presented until the following day, and in the intermediate time the funds of the drawer of the check had been exhausted, and consequently said check dishonored,—the verdict must be for the defendant. This instruction is based upon the proposition that when a loss is suffered under the circumstances stated, the loss must fall upon the party through whose negligence the same occurs.

The payment of the draft was to be in cash; and if anything except cash was received, and in consequence thereof the drawer of the draft was damnified, then the damages sustained he has a right to be indemnified for by the negligent party. In this case, the plaintiff bank having received the draft, and presented the same, and received a check for the amount thereof instead of cash, the drawee having had funds to meet his check, which would have been paid if presented that day, and before the said check passed through the clearing house on the next day the drawers, Parks & Co., whose check had been received, had failed, whereby the check was dishonored, the loss so caused must fall on the plaintiff, and not on the defendant. The draft should have been paid in cash; and if the plaintiff chose to receive, instead of cash, the drawee's check, it did so at its own risk, and, if any loss followed, the plaintiff must bear the same.

At the defendant's request, the court then charged the jury as follows: "The court instructs the jury to find for the defendants;" and they returned a verdict for the defendant accordingly.

A motion for a new trial has since been filed by the plaintiff, and, after being duly considered, has been overruled.

MORGAN and others v. EGGERS.

(Circuit Court, D. Indiana. June 24, 1884.)

1. EJECTMENT—FINDING AND JUDGMENT AS TO PART OF PREMISES.

In an action of ejectment tried by the court, the finding and judgment may be given (in one sentence) for the plaintiff for a *part* of the premises described in the complaint, and such finding will not be construed to be an unqualified finding for the plaintiff in respect to the entire premises.

2. SAME—USE OF THE WORD "FENCE."

It is competent for the court, under the issue in ejectment, to find to what extent the defendant is guilty, and if, under the evidence, it appears that a fence has become the boundary of the unlawful occupation, it is proper that such fact should be mentioned in the finding and judgment of the court.

Motion to Amend Judgment.

U. J. Hammond, for plaintiff.

A. C. Harris, for defendant.

Woods, J. Morgan and Smith sued Eggers in ejectment for the recovery of real estate, described as follows: All of the north part of lot 2, in section 36, etc., which lies west of the track of the Lake Shore & Michigan Southern Railroad, and north of a line parallel with the north line of said lot 2, and 753 feet south therefrom. The defendant answered by a general denial; and, upon the issue so joined, a jury being waived and trial had by the court, a finding and judgment of the tenor following were entered:

"Come the parties, and, by agreement, this cause is submitted to the court for trial; and the court, having heard the evidence, and being fully advised, finds for the plaintiff, and orders and adjudges that they are entitled to, and shall have and recover of defendant, the possession of so much of said lot two (2) as lies south of the south line of lot one, (1,) as indicated by a fence constructed and maintained by the defendant as and on on said south line," etc.

The plaintiffs now insist that there is an unqualified general finding for the plaintiff, and that in conformity with this the judgment should have been for the recovery of the land as described in the complaint, and that so much of the description set forth in the judgment as refers to the fence constructed by the defendant should be expunged. It was competent for the court, under the issue, to find to what extent the defendant was guilty, or had held unlawful possession of the premises described, and if, under the evidence, it appeared that a fence had become or was the boundary of such occupation, it was proper that the fact should be stated in the finding and judgment of the court. The finding and judgment in this instance are not separate and distinct, as perhaps it would have been better to have had them. The meaning however is clear. It is as if the entry read in this way: "And the court having heard the evidence, etc., finds and orders and adjudges that the plaintiffs are entitled to and shall have and recover of the defendant," etc.

The motion for correction is therefore overruled.