1904 CHANGE OF VENUE

(Criminal Court of Cook County)

The People of the State of Illinois

vs.

William J. Davis, Thomas J. Noonan and James E. Cummings.

(September 30 and October 4, 1904.)

1. Change of Venue from County in Criminal Cases—Time of Application. Where a petition for a change of venue from the County alleges that there Is such a prejudice on the part of the people against the petitioner that he cannot have a fair and Impartial trial, and that he did not become aware of such prejudice until September 27, 1904, at some time after 4 p. m., and notice of the application for a change of venue was served at 9:30 a. m. on the following day, It was held that the application was made in apt time.

2. Change of Venue—-criminal Cases. Where a defendant in a criminal case cannot have a fair trial in the County where he resides or where the offense is committed he is entitled to a change of venue.

3. Same. Nor is such right affected by the fact that such change of venue would greatly increase the expense of trial to the state.

4. Same—Duty of State. If the state's attorney on an application for a change of venue believes that no prejudice in fact exists it is his duty to contest the application. If, on the other hand, he believes that a prejudice does exist he should consent to the making of the change and not charge the court with the responsibility of doing so.

Indictment for manslaughter. Petition for change of venue on the ground of local prejudice. Heard before Judge George Kersten.

Statement of facts. The defendants were indicted for manslaughter. The defendants Noonan .and Cummings filed their respective petitions for a change of venue from Cook County on the ground of the prejudice of the inhabitants. The petition of the defendant Cummings is in the following form: To the Honorable George Kersten, Judge of the Criminal Court of Cook County:

Your petitioner, James E. Cummings, defendant in the above entitled cause, respectfully presents this, his petition, for a change of venue from said Cook County, because of the prejudice of the inhabitants thereof, and represents unto this court and states the following:

1. That this petitioner now resides, and for more than fifteen years continuously last past has resided in the city of Chicago, County and state aforesaid; that he has been connected in different capacities with various theatres in said Cook County for a great many years last past.

2. That on February 23, 1904, your petitioner was indicted for manslaughter in said above entitled cause conjointly with said defendants Davis and Noonan; and your petitioner refers to said indictment, as aforesaid, and makes said indictment a part hereof; that as appears upon the back of said indictment, one hundred and thirty-eight witnesses were called before said grand jury and gave their said evidence, and, as your petitioner is informed and believes and therefore states the fact to be, said indictment was returned upon the evidence of said one hundred and thirty-eight witnesses, and that most if not all of said witnesses were then and there and now are inhabitants of said Cook County.

3. That, as will more fully appear from said indictment, your petitioner is charged therein with the offense of manslaughter, alleged therein to have been committed in said Cook County on December 30, A. D. 1903, by your petitioner with said defendants Davis and Noonan by reason of the death of the person named in said indictment, and that said crime is alleged in said indictment to have been committed by your petitioner and said defendants on said date last aforesaid, by reason of the negligence of your petitioner and said defendants in not providing certain appliances and apparatus, alleged in said

indictment to be required by the laws and ordinances of said city of Chicago for the safety of persons then and there on said December 30, A. D. 1903, assembled in a theatre then and there alleged in said indictment to have been located in said city of Chicago, and known as the Iroquois Theatre.

4. That it is alleged in said indictment that your petitioner on said December 30, A. D. 1903, and before then, was engaged in the business of stage carpentering of the building in which said Iroquois Theatre was located and of said Iroquois Theatre in said city of Chicago.

5. That it is further alleged in said indictment that a large number of persons were then and there assembled in said building and in said Iroquois Theatre to witness said theatrical performance, to-wit, "Mr. Bluebeard, Jr.," and that at the time of said performance a certain arc lamp was then and there without due caution and circumspection placed near a certain drapery situated on, in and about the stage of said Iroquois Theatre, and that said drapery was then and there ignited and set on fire by said arc lamp; and it is further alleged in said indictment that by reason of the fact that said defendants, as alleged in said indictment, had not complied with said ordinances, said fire was not then and there extinguished and not then and there confined to said stage, and a large amount of fire and smoke then and there poured and went forth from said stage to, towards, against and upon a large number of persons then and there assembled in said building and in said Iroquois Theatre, and against and upon said deceased then and there in said building, and in said Iroquois Theatre, and that by reason of said large amount of fire, smoke, heat, gas and flame, said deceased was then and there asphyxiated, strangled and died.

6. That it is true that on said December 30, A. D. 1903, a fire occurred on the stage of said Iroquois Theatre; that at said time of said fire, a performance of said "Mr. Bluebeard, Jr.,"" was being produced at said theatre, and that at said time a large number of persons, consisting of men, women and children, were in said theatre witnessing said performance; that immediately after said fire, it was publicly announced through the papers, and otherwise, throughout said Cook County and throughout the United States, that said fire

was a great calamity and that about six hundred lives had been lost by reason of the occurrences at or about the time of said fire in and about said theatre; and that, included among said list of persons, who had lost their lives as aforesaid, was the name of said deceased, mentioned in said indictment.

7. That after said fire, and on, to-wit, January 7, A. D. 1904, one John E. Traeger, then and there the coroner of said Cook County, held a coroner's inquest upon the body of said deceased mentioned in said indictment, and upon about six hundred other bodies then and there stated to have met their death in the way mentioned in said indictment; that said coroner's inquest was held in the council chamber of the common council of the city of Chicago; which said council chamber was then and there a large auditorium with many rows of seats and benches, and in which said council chamber there was a gallery; that the public were admitted to said inquest, and as your petitioner is informed and believes and so states the fact to be, many thousands of persons, inhabitants of said Cook County, attended said inquest and heard the testimony there given; that upon said inquest, as stated by said coroner, between two and three hundred witnesses were subpoenaed to testify, and more than one hundred and seventy witnesses were actually called by said coroner and did then and there testify before the coroner's jury; that said inquest covered a period of, to-wit, twenty days, and that the testimony so taken was published verbatim or in substance, in all the daily newspapers published in said County.

8. That said Iroquois Theatre, on December 30, 1903, was a new structure, located at 79 and 81 Randolph street, in said city of Chicago, of beautiful design, and opened to the public for the first time on, to-wit, November 23, A. D. 1903, and prior to such opening was extensively advertised as a new theatre about to be opened, and the residents and inhabitants of said Cook County were generally aware, as was then and there publicly stated and announced throughout said Cook County by the press, of the opening of said theatre, and the opening of said theatre was a matter of public interest to the inhabitants of said Cook County.

9. That on said December 30, A. D. 1903, and for many months prior thereto and continuously thereafter up to and including the present time, there were and now are duly

published in the English language throughout said Cook County, each day, certain newspapers which had the respective circulations among the inhabitants of said Cook County and were respectively read by the number of inhabitants of said Cook County, as follows, to-wit:

Name of Paper	**Circulation**	**No. of Readers.**
Chicago Daily News	300,000	600,000
Chicago Record Herald	150,000	300,000
Chicago Tribune	150,000	300,000
Chicago Inter-Ocean	60,000	120,000
Chicago Chronicle	50,000	100,000
American	200,000	400,000
Examiner	120,000	240,000
Chicago Evening Post	16,000	32.000
Chicago Evening Journal	100,000	200,000

10. That immediately after said fire, the mayor of the city of Chicago issued a public proclamation, with reference thereto, deploring the calamity of said fire and directing that a day should be set apart for mourning for the dead hereinbefore referred to, and that business throughout said city should be suspended; that such proclamation was recognized and concurred in by the inhabitants of said Cook County, and immediately thereafter all business in said city of Chicago, in said Cook County, was suspended and such proclamation was generally recognized and observed; and the people of said city of Chicago immediately entered into a state of mourning; and said fire and the death of the great number of people alleged to have been occasioned by said fire was the paramount and all-absorbing topic of conversation by the inhabitants of said Cook County; and the public press of said Cook County devoted many editions of their respective newspapers

to publishing the alleged details of said fire for many days, weeks and months thereafter; and it was publicly iterated and reiterated in said public press that said fire was occasioned and the great loss of life alleged to have been attendant thereon was alleged to have been occasioned by the negligence of your petitioner and other parties alleged to have been connected with the management and ownership of said building and said Iroquois Theatre.

11. That immediately after said fire the hospitals and morgues in said Cook County, as was alleged in the public press of said Cook County and believed by the inhabitants of said Cook County, were filled with the dying and dead alleged to have come from said theatre building and said theatre, and many tens of thousands of people congregated for days after said fire at said morgues and hospitals, and many other thousands of people congregated at the newspaper offices in said Cook County and at the police and fire headquarters in said Cook County, and the inhabitants of said Cook County were wrought up to a high pitch of excitement, lasting many days, weeks and months after said December 30, A. D. 1903, and a great and popular prejudice was then created in the minds of the inhabitants of said Cook County against your petitioner and against other persons connected with the said Iroquois Theatre and said building wherein said theatre was located, and that public sentiment became so great and strong that the mayor, the building commissioner and the fire marshal of said city of Chicago, together with others, were held to the grand jury of said Cook County by said coroner's jury, and that thereafter, and on said February 23, A. D. 1904, said building commissioner and one of his chief assistants were indicted by the grand jury of said Cook County for alleged culpable negligence in their conduct in connection with said building.

12. That a great number of civil suits have been instituted and are now pending against the Iroquois Theatre Company and persons connected therewith, and against several public officials charged with negligence causing said fire, and the institution of said suits has been greatly discussed and heralded throughout said Cook County as a matter of public interest.

13. That immediately after said fire, there was formed in said city of Chicago an

association or corporation, publicly known and designated as the "Iroquois Memorial Association;" that said association has been continuously publishing and circulating great quantities of literature, in which they have directed the attention of the inhabitants of said Cook County to your petitioner and to the other persons alleged to have been connected with said theatre and said building as aforesaid, and in which they have charged your petitioner and said other persons with gross negligence, carelessness and willful intentions, and in which said literature they have claimed that your petitioner and others were guilty of occasioning the great loss of life alleged to have resulted by reason of said fire as aforesaid; that ministers from their pulpits in said County have publicly denounced the persons alleged to have been connected with the management of said theatre and said building as aforesaid, including your petitioner; that school teachers throughout said Cook County have frequently since said fire formed societies in and among the children attending their respective schools, for the purpose of constantly creating, and such associations do constantly create, a prejudice in the' minds of said children and in the minds of the parents of said children, inhabitants of said Cook County as aforesaid, against persons alleged to have been connected with the management of said theatre and said building as aforesaid, including your petitioner; that your petitioner, together with the persons alleged to have been connected with the management of said theatre and theatre building, have frequently been referred to, in the public press of said Cook County, as murderers and felons, and said public press of said Cook County has frequently demanded that your petitioner be punished for the alleged death of said persons as aforesaid; that said public press has frequently referred to the fact of the alleged violations of the city ordinances of said city of Chicago, pretendedly set forth in said indictment, and has directed the attention of the inhabitants of said Cook County to such alleged violations, and have stated, on their own responsibility, that such violations existed, and that such violations were criminal, and that said theatre was not constructed, maintained or operated according to the ordinances of said city of Chicago.

14. That on said December 30, A. D. 1903, there were from twenty-five or thirty operating theatres in said city of Chicago, and that immediately after said fire, as aforesaid, and on, to-wit, January 1, 1904, Honorable Carter H. Harrison, then and there

the mayor of said city of Chicago, ordered each and every one of said theatres to shut down and remain closed, and said theatres did for a long time thereafter shut down and remain closed; that prior to said December 30, A D. 1903, more than twenty thousand persons were in the habit of visiting said theatres daily, and that more than, to-wit, ninety per cent. of said people so visiting said theatres were and now are inhabitants of said Cook County; and that the mayor of said city of Chicago, in ordering said theatres to close and in closing said theatres as aforesaid, publicly announced, and such announcement was circulated throughout said Cook County in the public press, that said theatres were closed and shut down for the reason that said theatres were violating the ordinances of said city of Chicago, and said mayor and other officials of said city of Chicago then and there directed the attention of the inhabitants of said Cook County to the alleged violations of said ordinances by the said persons alleged to be connected with the management of said Iroquois Theatre and said building as aforesaid; that by reason of such facts, the attention of many hundreds of thousands of inhabitants of said Cook County was directed to the alleged violations of the ordinances of said city of Chicago set forth in said indictment.

15. Your petitioner particularly refers to and herewith brings into court several editions of said newspapers hereinbefore referred to which were printed, published and circulated throughout said Cook County, between the dates of December 30. A. D. 1903, and January 29, A. D. 1904, both inclusive, and particularly refers to each and every part of said newspaper and makes such parts of said newspapers a part of this, his said petition, for a change of venue with the same force and effect as if your petitioner had set forth said parts of said newspapers in this, his said petition, referring to said Iroquois fire and your petitioner and the alleged owners, managers and operators of said theatre and said theatre building, and to such parts of said newspapers referring to any of the facts hereinbefore stated.

16. That said prejudice had apparently died out at the time of the indictment on February 23, A. D. 1904, and until September 19, A. D. 1904 and upon said latter date said Iroquois Theatre was again opened for amusements, whereupon the public protests against the opening of said Iroquois Theatre by the press of said Cook County and by

ministers, school teachers, school children and by others, recalled the horrors of said fire and aroused the passion and revived the prejudice of the inhabitants of said Cook County against those connected with said theatre, including the petitioner.

That the reopening of the Iroquois Theatre and the agitation attendant thereon were given wide publicity throughout said Cook County; that immediately upon said reopening and thereafter up to and including the present time, the occurrence of said fire and the great loss of life attendant thereon, and the surrounding facts and circumstances have been again agitated and republished, and brought again to the attention and knowledge of the inhabitants of said Cook County, and in addition thereto the state's attorney of said Cook County at certain public gatherings, including relatives of those whose lives were so lost, has been charged with dereliction in not convicting said defendants herein, and that a great prejudice against said defendants has again been occasioned and is now in the minds of the inhabitants of said Cook County.

17. That your petitioner particularly refers to and herewith brings into court several editions of said newspapers hereinbefore referred to, which were printed, published and circulated throughout said Cook County on September 20, A. D. 1904, the day after the re-opening of said Iroquois Theatre and building as aforesaid, and the edition of the Chicago Inter-Ocean of Sunday, September 25, A. D. 1904, and particularly refers to each and every part of said newspapers and makes said parts of said newspapers a part of this your petitioner's said petition for a change of venue, with the same force and effect as if your petitioner had set forth such parts of said newspapers in said petition referring to the Iroquois fire and to the prosecution of your petitioner and the other defendants herein and the re-opening of said Iroquois Theatre as aforesaid.

18. Your petitioner further states that this petition is made at the first opportunity since the knowledge of the existing prejudice of said inhabitants of said Cook County came to this petitioner, and that knowledge of the existence of said prejudice first came to this petitioner on the 27th day of September, A. D. 1904; that at the time petitioner was indicted as aforesaid, said publications in said newspapers practically ceased and public excitement was apparently over, and that 1 after petitioner was indicted he believed that

without any renewed agitation of the matters and things herein set forth in connection with said fire he could, without prejudice to his rights to obtain a fair and impartial trial, submit to a trial in said Cook County; that although said defendants were indicted on said February 23, A. D. 1904, the state's attorney of said County did not as against petitioner move to place said case on trial until September 26, A. D. 1904, and this petitioner or his counsel had no notice whatever of said move or that said case was to be called for trial, until September 26, A. D. 1904; that thereupon petitioner, by himself, numerous friends and associates at once instituted extensive inquiries among the inhabitants and citizens of said Cook County for the purpose of ascertaining whether such a prejudice now exists against said petitioner among said inhabitants of said Cook County as to prevent petitioner from obtaining a fair and impartial trial in said Cook County, and your petitioner further avers as the result of such inquiries as aforesaid he, for the first time since the indictment herein believed on September 27, A. D. 1904, that such a prejudice exists against him among said inhabitants of said Cook County that he cannot in said County obtain a fair and impartial trial, and that knowledge of such prejudice first came to petitioner on said September 27, A. D. 1904.

Wherefore, the premises considered, your petitioner prays for a change of venue from the criminal court of said Cook County.

And your petitioner will ever pray.

James E. Cummings.

State of Illinois
County of Cook

James E. Cummings, being first duly sworn, upon oath deposes and says that he has read the above and foregoing petition by him subscribed, and knows the contents thereof, and that the contents of said petition, and the allegations and facts therein stated, are true in substance and in fact.

James E. Cummings. Subscribed and sworn to before me, a notary public of Cook

County, Ill., on this 28th day of September, A. D. 1904. [Seal.] Eugene A. Moran,

Notary Public, Cook County, Illinois.

A similar petition was filed by Thomas J. Noonan.

Many thousands of affidavits were filed to show the existence of prejudice. No counter affidavits were filed by the state. The state finally conceded that prejudice did in fact exist and withdrew its objection to the granting of the change of venue. The affidavits were in the following form:

> _____ _____ being first duly sworn, upon oath deposes and says that he now is and for more than a year last past has been a resident, inhabitant and citizen of said Cook County, in said state of Illinois, and that he now resides at in the city of Chicago, in the County and state aforesaid, and that his occupation is that of _____.

That he is not of kin or counsel to any or either of the defendants herein; that said defendants herein were indicted in the criminal court of said Cook County on February 23, A. D. 1904, for manslaughter alleged in said indictment to have been occasioned by a fire which occurred on December 30, A. D. 1903, at a place in said city of Chicago known and designated as the Iroquois Theatre.

That immediately after said fire it was universally reported and the inhabitants of said Cook County believed that a great number, to-wit, more than six hundred lives were lost at said fire; that by reason of said great numbers of deaths and the statements contained in the public press which were circulated in said Cook County, and by reason of the indictment herein, and of the indictment of divers public officials of said city of Chicago because of the facts and circumstances arising out of said fire, and by reason of the closing of all the theatres in the said city of Chicago, on, to-wit, January 2, A. D. 1904,

and the same being kept closed for several months by order of the mayor of said city and by reason of statements made by members of certain memorial associations, which statements were printed, published and circulated throughout said Cook County, a very great and popular prejudice arose in the minds of the inhabitants of said Cook County against the defendants herein and against other persons connected with said Iroquois Theatre and against said theatre, and that by reason of all such facts a great popular prejudice and clamor arose in the minds of the inhabitants of said Cook County against said defendants herein.

The said prejudice had apparently died out at the time of the indictment on February 23, A. D. 1904, and until September 19, A. D. 1904, and upon said latter date said Iroquois Theatre was again opened for amusements, whereupon the public protests against the opening of said Iroquois Theatre by the press of said Cook County and by ministers, school teachers, school children and by others, recalled the horrors of said fire and aroused the passion and revived the prejudice of the inhabitants of said Cook County against those connected with said theatre including the defendants herein.

That the reopening of the Iroquois Theatre and the agitation attendant thereon were give wide publicity throughout said Cook County; that immediately upon said reopening and thereafter up to and including the present time, the occurrence of said fire and the great loss of life attendant thereon, and the surrounding facts and circumstances have been again agitated and republished, and brought again to the attention and knowledge of the inhabitants of said Cook County, and in addition thereto the state's attorney of said Cook County at certain public gatherings, including relatives of those whose lives were so lost, has been charged with dereliction in not convicting said defendants herein, and that a great prejudice against said defendants has again been occasioned and is now in the minds of the inhabitants of said Cook County, and this affiant believes and says that said defendants, Noonan and Cummings, will not and cannot receive a fair and impartial trial in the criminal court of said Cook County in which the case herein is pending, because the inhabitants of said Cook County are prejudiced against said Noonan and Cummings and each of them.

And further affiant saith not.

_____ _____

The motion for a change of venue was thereupon granted and the case was transferred to Peoria County. The court rendered two opinions: one on September 30, 1904, and the other on October 4, 1904.

Charles S. Deneen, state's attorney, A. C. Barnes and E. C. Lindley, assistant state's attorneys for the people.

Levy Mayer, Alfred S. Austrian, Moritz Rosenthal, W. J. Hynes, E. C. Higgins and Howard O. Sprogle, for the defendants.

Opinion rendered September 30th, A. D. 1904.
Kersten, J.:—

This is a motion on the part of the state to deny the petition for a change of venue on the ground that it is not made in apt time. That is the sole question under consideration, and not the question, shall a change of venue be granted even at this time? Much of the argument has been unnecessarily addressed to the latter proposition. The question is, was the petition presented or filed in apt time? The state has denied that the application for change of venue was made at the earliest opportunity, and that the state's attorney's office did not receive the requisite legal notice, and that therefore the petition should be denied.

The state has abandoned the latter proposition, thus leaving the first open to be passed upon.

The petition recites that there exists at the present time such a prejudice on the part of the people of this County against the petitioner that he fears that he cannot have a fair and impartial trial in this County and that he did not become aware of said prejudices of the people of said County against him until September 27th, 1904, at some time after four p. m. It has been shown that notice was served on the state's attorney about 9:30 a. m.

on the next day, that the petitioner was about to apply for a change of venue.

If it is true that the petitioner had no knowledge of the existing prejudice against him on the part of the people of this County until the 27th of September, 1904, at four p. m., the latter having served notice at 9:30 a. m. on the next day upon the state's attorney of his intention to pray for a change of venue, then he has fulfilled, I think, the requirements of the statute.

The court has no other legal evidence upon this proposition than that which is disclosed by the petition itself. The petition technically fulfills the requirements of the law and shows prima facie that there exists such a prejudice on the part of the people of this County against the petitioner that he cannot receive a fair and impartial trial in this County and that he did not become aware of this prejudice until the evening of September 27th, 1904. It is also shown that on the next morning at about 9:30 o'clock he served notice on the state's attorney of his intention to pray for a change of venue.

The facts stand uncontradicted and therefore must be accepted as true.

The motion to dismiss the petition is denied.

Opinion rendered October 4, 1904:
Kersten, J.:—

Before granting this change of venue, I desire to say this: This is a very important matter, much more important than any matter that has arisen in this court for a long time. Under the law, if a defendant cannot have a fair trial in the County where he resides or where the offense was committed, he is entitled to a change of venue. There is no question in regard to that. When these defendants filed their petition asking for a change of venue it was contested by the state, it was bitterly contested, I might say up to this morning. Suddenly the state ceases to contest this application for a change of venue, first on the ground of expense, secondly on the ground that the state did not know just what number of affidavits the defendants would bring forward.

Now, so far as the expense is concerned, the matter is so important that no expense should prohibit the state in any way, shape or manner from contesting this petition for a change of venue if the state is of the opinion that there is not such prejudice which would justify this court in granting a change of venue.

Mr. Barnes: And if it can get the money to do so.

The Court: The money should be there.

Mr. Barnes: But it is not.

The Court: That is absolutely no excuse.

Mr. Barnes: Well, it is not there.

The Court: I will say to the state that the reason I make these remarks is that I am being put in a false position in granting this change of venue, if I do grant it, which of course, the petition not being contested, I am compelled to do. There has been some newspaper talk, I do not know whether it came from the state's attorney's office or not, which in a manner brought the burden of granting this change of venue upon this court. Now, I wish to say that I am acting in this matter as I will in every matter that comes before me, strictly in accordance with the law, and I want to do justice in this case, as I will in every case, as I see it. If I am mistaken about any proposition, that is a different-question. But as I said before, if the state is of the opinion that there is no prejudice existing in this county it is the duty of the state to contest this petition, it was the duty of the state to file counter affidavits, and not say, "well, the court has ruled against us on the preliminary petition, and if you have all these affidavits we won't contest it because the court will probably grant the change of venue anyway." In doing that the office of the state's attorney is not acting in good faith.

Mr. Barnes: Has the state's attorney said that?

The Court: Not in so many words.

The Court: I don't care to say anything more on that subject. It is sufficient to say that already cranks have commenced to write letters, one of which I received this morning, which was threatening in the extreme, and stated that if I granted a change of venue in this case I might look for a vigilance committee or something of that kind. Not only could things of that kind be averted, if the state's attorney would come right out and say there is no prejudice in this County and we will contest the change, or say, "well, gentlemen, it seems to me that there is prejudice in this County and we will not contest it." That would be the manly way of treating a matter of this kind.

Mr. Lindley: It was not until after the affidavits were presented chat we could have any conception of the prejudice which they say exists.

The Court: There is no rule of law compelling any living man to produce his testimony beforehand. This is an issue of fact that is tried in the same manner as any other issue, and no court would have the right to say to the plaintiff, "Mr. Plaintiff, I want to know what kind of evidence you have on which you base your claim; I want to know how many witnesses you have whom you intend to introduce; I want to know the nature of the evidence on which you will depend, any more than the court would have the right to ask the defendant similar questions. It is an issue of fact that this court and any other court would be bound to hear whatever evidence, proper legal evidence, either litigant would bring forth.

Mr. Lindley: Wasn't it announced by the state's attorney most promptly, when the number of affidavits was stated, that he believed too that the change should be granted?

Mr. Mayer: The state's attorney in his argument stated to the court that every County in the state was prejudiced, and I advanced that as one of the reasons why a change of venue should be granted.

1906 CHANGE OF VENUE

(Criminal Court of Cook County.)

The People of the State of Illinois
vs.

William J. Davis.

(June 14, 1906.)

1. Change of Venue—Local Prejudice. A change of venue will seldom be granted from a large city where many men are eligible for jury service; but where the defense presents over 12,000 affidavits as to the existence of prejudice, and the state about 4,000 counter affidavits, the change of venue must be granted.

2. Same—Application for—Mere Number of Affidavits. Mere numbers alone of affidavits that the defendant cannot receive a fair trial in the County do not govern the granting of the change of venue, but the character and reputation of the persons making the affidavits will be considered.

3. Same—Character and Number of Affidavits. Where vast numbers of affidavits of prejudice are presented, among which are those of large numbers of prominent men, the court will grant the change of venue, and such a record is conclusive upon the court that prejudice still exists although the catastrophe for which the defendant was indicted occurred a year or more previous.

Indictment for manslaughter. Motion for change of venue from Cook County, Illinois, on the ground of local prejudice. P. G. D. No. 76,382. Heard before Judge Ben. M. Smith.

Statement of facts.

William J. Davis, as manager of the Iroquois Theatre, was indicted on February 25, 1904,

for manslaughter as the result of a fire in the Iroquois Theatre building, in the city of Chicago, on December 30, 1903, by which several hundred persons lost their lives, due, it was alleged, to the failure of the owners and managers of the theatre building to comply with the building ordinances of the city of Chicago, etc. This indictment was quashed by Judge Kersten of the criminal court of Cook County on February 9, 1905. Subsequently on March 4, 1905, a second indictment was returned against Will. J. Davis, charging him with manslaughter as the result of the same fire. A petition for a change of venue from Cook County on account of the prejudice, of the inhabitants was filed on March 10, 1905, and a motion to quash the second indictment was filed. The motion to quash was heard in June, 1905, and on January 23, 1906, the motion to quash was denied as to certain of the counts and granted as to others. The motion for a change of venue was heard by the criminal court in June, 1906. The petition for a change of venue alleged that Will J. Davis had for many years been connected with the management of various theatres in the city of Chicago, and that he was by name and reputation well known to a large part of the inhabitants of the city of Chicago and Cook County; that the Iroquois Theatre in Chicago was on November 23, 1903, opened to the public for the first time after much advertisement and that said opening attracted great public attention; that on the afternoon of December 30, 1903, a fire occurred in the Iroquois Theatre during the course of the matinee performance, and as a result of this fire five hundred and ninety-seven men, women and children lost their lives; that after said fire the hospitals and morgues in Cook County were filled with the dead and dying alleged to have come from said theatre building, and that many tens of thousands of people congregated for days about the hospitals, etc., inquiring for persons supposed to have died or been injured in the fire, and that as a result the inhabitants of Cook County were wrought up to a high pitch of excitement; that immediately after the fire the mayor of Chicago issued a proclamation with reference to and directing that a day be set apart for mourning and asking that business be suspended, and that such proclamation was generally observed; that the fire and its consequences was then the paramount topic of conversation by the inhabitants of Cook County; that immediately after the fire on January 1, 190-4, the mayor of Chicago ordered closed all the twenty-five to thirty theaters in the city of Chicago, for the reason that all of the theaters were violating the ordinances of the city of Chicago; that

immediately after the fire there was formed an association designated as the "Iroquois Memorial Association," which had been publishing a great amount of literature calling the attention of the inhabitants of Cook County to the petitioner, and charging the petitioner and other persons with gross negligence, carelessness and willful intentions and claiming that the petitioner was guilty of causing the great loss of life by reason of the fire and that similar charges were made by ministers from their pulpits, and by school teachers to their pupils; that on January 7, 1904, the coroner of Cook County held a coroner's inquest over the victims of the fire; that the inquest was held in the city council chamber of Chicago, and that many thousands of inhabitants of Cook County attended said inquest and heard the testimony, and that between two and three hundred witnesses were called to testify at said inquest and that one hundred and seventy witnesses actually did testify; that the inquest covered a period of twenty days and the testimony was published verbatim or in substance in all the daily newspapers in Chicago; that the daily newspapers of Chicago had enormous circulation and reached amounting to almost one million five hundred thousand copies per day, and that immediately after the fire their newspapers devoted many editions to publishing accounts of occurrences at the fire, and alleged that the loss of life was occasioned by the negligence of the petitioner; that the newspapers alleged in great detail heart-rending occurrences at the fire and the various defects alleged to exist in the theatre building and its management and construction; that the newspapers published that the petitioner with others, including the fire inspector and building inspector and the mayor of the city of Chicago, were responsible for the hundreds of deaths from the fire; and published statements such as that "nearly all exits save the main doors were locked," etc., and that their statements were published and printed in large bold type and head-lines upon the first pages; and that large pictures were published showing horrible scenes at the fire; that lists of names of the injured and dead were published; that it was published that the laws and building ordinances of the city of Chicago were violated by the petitioner in the construction and operation of the theatre; that on December 31, 1903, certain employees of the theatre were placed under arrest, and that the news of the arrests was heralded and published in the newspapers; that all these things incited the public mind and prejudice against the petitioner; that a coroner's jury was summoned on January 1, 1904, to investigate into the catastrophe, and that its proceedings were

published at length in the newspapers; that on January 2, 190i, the petitioner with others was arrested for manslaughter and great publicity was given to the arrest; that other arrests were made; that great numbers of damage suits were instituted against the petitioner and others arising out of the fire; that many pictures of the injured were published in the newspapers; that from January 8, 1904, almost continuously certain newspapers continued to publish statements charging the petitioner as the cause of the catastrophe; that on January 25, 1904, the coroner's jury held eight persons to the grand jury, including the petitioner, the mayor, building commissioner, and chief of the fire department of the city of Chicago, which was published at length in the newspapers; that on February 25, 1904, the petitioner was indicted together with others for manslaughter as the result of the fire; that all the time the newspapers printed articles derogatory to the petitioner, which incited in the minds of the inhabitants of Cook County great prejudice against the petitioner; that no steps were taken in the cases until September 28, 1904; that in the meantime the Iroquois Memorial Association circulated large numbers of articles and letters to the inhabitants of Cook County, asking for contributions of funds to assist in the prosecution of the petitioner; that in the meantime many articles and pictures were published in the papers tending to excite the public mind against the petitioner. That on October 4, 1904, a change of venue was granted to two co-defendants with petitioner; that on October 4, 1904, petitioner moved to quash the indictment against him and the motion to quash was argued on November 1 and 2, 1904; that on February 9, 1905, the indictment was quashed by Judge Kersten; that immediately after the quashing of the indictment a grand jury was impaneled on February 20, 1905, and on March 4, 1905, a second indictment was returned charging the petitioner with manslaughter as the result of deaths due to the fire; that several hundred damage suits (in one day as many as sixty, asking damages amounting to $500,000) were started against petitioner, and the institution of such suits was given great publicity by the press of the city of Chicago; that 600 persons lost their lives in the fire, of whom over 500 resided in Chicago, in Cook County. The petitioner added as exhibits to his petition files of the daily newspapers of Chicago covering the period since the fire, with all references thereto marked.

On June, 1906, a supplemental petition was filed by the petitioner referring to and

making a part thereof all of the averments of the petition for a change of venue filed March 10, 1905, and further alleging that there had existed continually since December 30, 1903, and then existed a great prejudice against petitioner.

Upon the hearing of the motion the petitioner filed 12,150 affidavits signed by men in all walks of life and by large numbers of men prominent in their professions and business and well known reputation; such affidavits were in the following form:

_____ _____, of lawful age, being first duly sworn, upon

oath deposes and says:

1. That he now is and for many years continuously last past (beginning at a period long before the Iroquois fire hereinafter referred to) has been a resident and citizen of the city of Chicago, in said County and state, and now resides at

In said city, and his occupation is that of and

His place of business is at street in the said city.

2. That he is not of kin or counsel to the defendant herein.

3. That this affiant is well acquainted and familiar with the occurrence of the fire at the Iroquois Theatre, in said city, on December 30,'1903; and the subsequent developments growing out of such fire; that since said fire, up to and including the present time, this affiant has frequently discussed with and heard discussed, among many of the inhabitants of said County, the occurrences connected with and growing out of said fire, including the facts and circumstances relating to the great loss of life in and by reason of said fire, the investigation of the causes of the loss of life by the coroner's jury in said County, the arrest of said defendant and other persons connected with said Iroquois Theatre, the hearing before and the binding over to said criminal court by the coroner of said County of said defendant herein and

others, the closing following said fire, of the theatres in said city by order of the mayor thereof, the petition for a writ of habeas corpus by the mayor of said city, who on account of said fire had been bound over by said coroner to the grand jury of said County; the discharge of said mayor under said writ, the indictment of the building commissioner of said city and his assistant, and of the said defendant herein and one Thomas J. Noonan and one James E. Cummings, the quashing of said indictment against said Noonan, Cummings and said defendant and the re-indictment of said defendant, being the present indictment; and has read and seen in the Chicago daily papers, a great many articles, cartoons, and pictures, detailing and portraying the said fire and said loss of life, the progress of said investigations and prosecution, and the incidents connected therewith, and other facts and circumstances relating to said subject-matter, and to the Iroquois Memorial Association (composed of members of the families that suffered loss of life in said fire), and detailing also statements purporting to emanate from persons connected with said association, and reciting also the facts and circumstances connected with the re-opening of said theatre.

4. That this affiant has frequently up to the present time, talked with many persons, inhabitants of said County, regarding the various matters aforesaid and concerning the guilt or innocence of those alleged to have been in the management and control of said theatre, including said defendant, and that from said publications as aforesaid, and from said facts and circumstances hereinbefore detailed, and from said conversations, this affiant verily believes and states the fact to be that great prejudice against said defendant has been occasioned, and is now prevalent in the minds of the inhabitants of said Cook County, and this affiant verily believes and states the fact to be that said defendant will not and cannot possibly receive a fair and impartial trial in the above entitled cause of People v. Davis, now pending in the criminal court of said Cook County, because the inhabitants of said Cook County are now prejudiced against him, said Davis.

And further affiant saith not.

The state in opposition to the motion filed about 4,000 affidavits in the following form:

_____ _____, being first duly sworn, upon oath deposes and says:

That he now is and for many years continuously last past has been a resident, inhabitant and citizen of the city of Chicago, in said County of Cook, in said state, and now resides at _____ in said city, and his occupation is that of _____ and his place of business is at street in the said city.

That this affiant has knowledge of and is generally familiar with the occurrence of the fire at the Iroquois Theatre, in said city, on December 30, 1903; and the subsequent developments growing out of such fire; that since said fire, this affiant has frequently discussed with and heard discussed, among different inhabitants of said Cook County, occurrences connected with and growing out of said fire, including the facts and circumstances relating to the loss of about 600 lives in and from said fire, and the indictment of said defendant, William J. Davis, and has seen and read newspaper accounts of said fire.

That this affiant has very frequently talked with different inhabitants of said Cook County, regarding said fire and concerning the guilt or innocence of those alleged to have been in the management and control of said Iroquois Theatre at the time of said fire, including said defendant, and that from said publications as aforesaid, and from said facts and circumstances hereinbefore detailed, and from said talks had with said persons this affiant states that in his opinion there exists now no prejudice on the part of the inhabitants of Cook County, Illinois, against William J. Davis sufficient to prevent him from receiving a fair and impartial trial in the above entitled cause of People v. Davis, now pending in the criminal court of said Cook

County.

And further affiant saith not.

Moran, Mayer & Meyer for petitioner. (Levy Mayer and Alfred S. Austrian, of counsel.)

1. The petitioner is entitled to a fair and impartial trial, (a) By constitution and statutes. Sec. 9, art. 2, constitution of Illinois; sees. 18, 22, ch. 146, Revised Statutes of 11linois; Clark v. People, 1 Scam. 117, 120; Riggen v. Commonwealth, 3 Bush (66 Ky.) 494. (b) At common law. 4 Encl. P1. & Pr. 397; State v. Burris, 4 Harr. (Del.) 582.

2. The right to a fair and impartial trial should not be affected by suggestions or arguments of inconvenience or delay. Wormley v. Commonwealth, 10 Gratt. (Va.) 658, 662; 4 Encl. Pl. & Pr. 397, note 4.

3. The right to a change of venue must be liberally interpreted. Packwood v. State, 24 Ore. 261, 33 Pac. 674; Price v. State, 8 Gill (Md.) 296, 302; Gardner v. State, 25 Md. 146, 152; 4 Encl. P1. & Pr. 380, 381. And in case of a doubt it is best to resolve it in favor of the application for a change of venue. State v. Gray, 113 La. 671, 37 So. 597.

4. There are many strong illustrations where the evidence shows that there were reasonable grounds to believe that the defendant could not have a fair trial even though there were a large number of negative affidavits showing that he could have a fair trial. Alarcon v. State (Tex. Cr. App.), 83 S. W. 1115; Seams v. State, 84 Ala. 410, 4 So. 521; Johnson v. Commonwealth, 82 Ky. 116; Posey v. State, 73 Ala. 490, 494; People v. Long Island R. Co., 4 Parker's Crim. Repts. 602; Commonwealth v. Ronemus, 205 Pa. 420, 54 Atl. 1095; State v. Billings, 77 Iowa, 417, 423, 47 N. W. 456. Notoriety of a case and aroused feelings of the people are to be considered. Alarcon v. State (Tex. Cr. App.), 83 S. W. 1115; Richmond v. State, 16 Neb. 388, 20 N. W. 282. The passions only slumber and may break out again at any moment. Commonwealth v. Ronemus, 205 Pa. 420, 54 Atl. 1095. "When a proper case is presented, to refuse such a change of the place of trial would be mob law inside instead of outside the court house." Garcia v. State, 34 Fla. 311, 16 So. 223, 228.

5. Affidavits of leading citizens have great weight, and counter-affidavits which simply say that there is no prejudice that will prevent a fair and impartial trial and do not controvert the particular facts alleged in the affidavits for the change are of little avail. Richmond v. State, 16 Neb. 388, 20 N. W. 282; Hickmam v. People, 137 1l1. 75; State v. Billings, 77 Iowa, 417, 423, 42 N. W. 456.

6. The overwhelming number of affidavits filed on behalf of the petitioner entitles him to the change of venue from Cook County. The petitioner files 12,150 affidavits for the change while the state files only about 4,000 counter-affidavits.

John J. Healy, state's attorney, and Harry Olsen, assistant state's attorney, for the people.

Mere numbers of affidavits should not control. MacDonald v. People, 49 1ll. App. 357. «

Smith, J.:—

The court has given this matter very careful consideration. The question now before the court seems to be whether or not such prejudice now exists in the minds of the inhabitants of this County that this defendant cannot get a fair and impartial trial in this County. And in the consideration of that question it is brought to the attention of the court that on a former indictment against this defendant for the same offense a change of venue was allowed to another County with, as I understand, no opposition; that it has been substantially conceded by the state, up to about a year ago, that there was such a prejudice that the defendant would be entitled to a change of venue. Therefore, about the only question that is left to the court is whether or not during the past year there has been a change so that at the present time any feeling of prejudice against this defendant has so abated that he could now safely go to trial in this County.

It would seem that there are very few occasions that in a great city like this a man would be entitled to a change of venue. So far .as we can look forward and anticipate cases it is very seldom that circumstances arise that would make a situation in a great cosmopolitan city where a man would not get a fair and impartial trial. But it does seem on the other hand that if there were a case, a case similar to this would entitle a man to a

change of venue. In a horrible catastrophe such as this was, where some six hundred lives were lost, I undertake to say that there is hardly a neighborhood in the city of Chicago and Cook County but what has some victim of that terrible fire, and it would seem to the court that a jury from this County would be influenced more or less, many of them, by the fact that their neighbors or their friends were interested in the outcome of this suit. However that may be, the court is confronted with a record here that seems to the court to allow but one conclusion. The defense has presented over twelve thousand affidavits in this case as to the prejudice, and the state something like four thousand. Now, while we all concede that it is not a matter of numbers, because if it were numbers that govern that would simply mean a contest in many counties between opposing factions until you get a majority of the people of an entire County who would testify one way or the other, but in this case there are over twelve thousand affidavits presented to the court; among them are hundreds and thousands of men who stand high, foremost citizens of the state, intelligent, the peers of any, men high in their efforts to enforce law and order, and it is difficult for the court to say that these men, prominent, influential citizens of Chicago, who come into this court and under oath testify, for that is substantially what they do, that this defendant cannot receive a fair and impartial trial on account of the prejudice of the inhabitants of this County—they must be entitled to some credence. Such men as Judge Payne. Dr. Emil Hirsch, Dr. Frank Billings, and hundreds of others, men who ought to know, men who it would seem would know what the situation is in this County, the court will hardly assume that these men are testifying to something that they know nothing about, or willfully testifying to something that is not true. And with the testimony of so many men of influence and standing, so high in the community, it leaves the court nothing else to do on this record but grant a change of venue. Men of that character and in such vast numbers, puts the court in a position that this community is in such condition and frame of mind that their testimony cannot be ignored by the court on the record that is made here, and the motion will therefore be allowed.

As to the County, counsel may confer upon that. The court will say this, however, that the court will not send it to any remote County in the state and not send it to any County except some County that can be easily reached from Chicago that will be accessible and

convenient. If counsel can agree upon such a County it will be perfectly satisfactory to the court, and if they cannot the court will determine.

1905 MOTION TO QUASH

(Criminal Court of Cook County.)

The People of the State of Illinois
vs

William J. Davis, Thomas J. Noonan and James E. Cummings.1

(February 9, 1905.)

1. Motion to Quash at Common Law. At common law a motion to quash an Indictment was addressed to the sound discretion of the court. (Kersten, J.)

2. Rule in Illinois. But in Illinois error may be assigned upon the overruling of a motion to quash, and it is the duty of the court to quash if the indictment is insufficient to sustain a conviction. (Kersten, J.)

3. Statutes—Rule of Construction. As a general rule the courts will construe statutes as declaratory of the common law and not in derogation of it. And when words are used in a statute which have a well-known meaning at common law, the courts will give such words their common law meaning. (Kersten, J.)

i See also People v. Davis, 1 Ill. C. C. 245, for a contrary decision on a second Indictment for the same offense.—Ed.

4. "Unlawful Act"—Defined. The words "unlawful act," as used in the statute denning manslaughter, mean unlawful as defined by the common law, and include not only criminal acts, but trespasses and civil wrongs which are not prohibited by statute. (Kersten, J.)

5. Negligence—Man Slaughter. If a death occurs through the negligent use of dangerous agencies it is manslaughter. But the negligence to be "unlawful" must amount to an omission of a legal duty and not a mere neglect of a social or moral duty. (Kersten, J.)

6. Manslaughter—Proximate Cause. The unlawful act or omission must have been the proximate cause of the death. (Kersten, J.)

7. Statutes—Revision of Entire Subject—Repeal. A statute which is an entire revision of a particular subject-matter repeals the common law upon that particular subject. (Kersten, J.)

8. Criminal Code Does Not Repeal Common Law. The criminal code was not intended as a complete codification of the criminal laws; the common law remains in force except in so far as it is expressly repealed. (Kersten, J.)

9. Fire Ordinances—Upon Whom Duty Falls. Where city ordinances prescribe that buildings of a certain class shall be equipped with fire apparatus, equipment, etc., but fail to designate the person upon whom the duty rests, it will be presumed that it was the intention of the city council to impose such duties upon the owner or lessee of the building. (Kersten, J.)

10. Ordinances—Judicial Notice—Pleading. The rule is well settled in 11linois that courts will not take judicial notice of city ordinances, nor are such ordinances admissible in evidence unless properly pleaded. (Kersten, J.)

11. Indictment—Conclusions In. In an indictment the facts constituting the offense must be set out. The indictment cannot be aided by the averment of conclusions of law or fact. (Kersten, J.)

12. Criminal Negligence—Legal Duty. A defendant cannot be found guilty of manslaughter on account of alleged negligence in omitting to perform an act unless the law imposed a legal duty upon him to perform such act, or unless such duty had been directly assumed by contract or otherwise. (Kersten, J.)

13. Allegations of Indictment. An argumentative averment of fact is not sufficient in an indictment. (Kersten, J.)

14. Common-law Duty. In the absence of statute there is no duty on the part of the owner

of a building to furnish fire apparatus and where it is not alleged that it was reasonably necessary or usual and customary to furnish such apparatus, the offense of manslaughter cannot be predicated upon a failure to so equip whereby death was caused. (Kersten, J.)

15. Assumed Duty. An allegation that the defendants had undertaken the care, charge, management and control of a theater building and stage and that it became the duty of the defendants to see that the ordinances and laws in relation to the installation of fire apparatus and equipment were complied with, is not a sufficient allegation that the defendants had assumed or taken upon themselves the duty imposed upon the owner or lessee of the building to furnish such fire apparatus and equipment, (Kersten, J.)

16. Allegation as To Duty. An allegation that it was the duty of a defendant to perform certain acts is a mere conclusion of the pleader. (Kersten, J.)

17. Involuntary Manslaughter—Willful Act. It is a serious question whether the offense of voluntary manslaughter can be "willfully" committed. (Kersten, J.)

18. Misjoinder. Whether several defendants who are charged with failure to perform several duties can be joined in the one indictment, doubted. (Kersten, J.)

19. Indictment—Conclusions. An allegation that if certain fire equipment had been provided as required by an ordinance, a fire could have been extinguished, is a mere conclusion of the pleader. (Kersten, J.)

20. Ordinances—Duty Under. An ordinance which provides that every building of a certain class shall be equipped with certain fire apparatus and equipment, but which does not specifically designate the person by whom the duty shall be performed, cannot be made the basis of an indictment for manslaughter against the manager, business manager or stage carpenter of a theater for criminal negligence in failing to comply with such ordinances, whereby death was caused. (Green, J.)

21. Proximate Cause—Failure to Supply Fire Apparatus. Where a fire was caused in a theater building by a spark emitted from an electric light placed in close proximity to

certain draperies upon the stage, and a large number of persons are burned to death, an indictment for manslaughter cannot be sustained for negligence in failing to equip the building with fire apparatus and equipment. The fire will be considered the proximate cause of the death, and not the failure to supply the fire apparatus and equipment, even though it is alleged that if such apparatus and equipment were installed, the fire would have been extinguished. (Green, J.)

22. Misjoinder The manager of a theater and building, the business manager of such theater and the stage carpenter thereof, cannot be joined in an indictment for manslaughter for an alleged failure to equip such theater and building and the stage i thereof with certain fire apparatus and equipment. (Green, J.)

Indictment for manslaughter. Motion to quash. P. G. D. 76,382. Heard before Judges T. N. Green of Peoria County and George Kersten of Cook County.

Statement of facts.

The defendants were jointly indicted for the crime of manslaughter for negligently causing the death of one Viva R. Jackson. The defendant Davis was the manager of the Iroquois Theatre at Chicago, the defendant Noonan was the business manager thereof and the defendant Cummings was the stage carpenter in said theatre. On December 30, 1903, a fire broke out in said theatre and over 600 persons lost their lives. The defendants Noonan and Cummings moved for a change of venue on account of the prejudice of the inhabitants of Cook County and the case was removed to Peoria County. The defendant Davis then moved to quash the indictment. As a matter of convenience Judge T. N. Green of Peoria County, to which County the case of Noonan and Cummings had been transferred, sat with Judge Kersten on the argument of the motion to quash. That motion was granted and the same order was thereafter entered by Judge Green in Peoria County.

The indictment charged that on December 30, 1903, a certain building called the Iroquois Theatre was open and used for the purpose of producing and giving a performance of a spectacular play called "Mr. Bluebeard, Jr.;" that said building was before then planned,

constructed and erected for the purpose of producing and giving therein plays; that there was then and there in the said theatre in said building a certain stage which had before then been erected; that said defendant Davis was before then, and then and there engaged ""in a certain lawful business and act, to-wit, the business and act of managing generally said building and said Iroquois Theatre therein;" that the defendant Noonan was before then, and was then and there engaged in a certain lawful business and act, to-wit, "the business and act of managing as business manager said building and said Iroquois Theatre therein," and that said Noonan was before then, and was then and there the business manager of said building and said Iroquois Theatre therein as aforesaid.

That said defendant Cummings was before then and was then and there engaged in a certain lawful business and act, to-wit, "the business and act of stage carpentering on said stage in said building and in said Iroquois Theatre," and that said Cummings was before then and was then and there the stage carpenter of said stage in said building and in said Iroquois Theatre.

That a certain law and ordinance of the city of Chicago, which was then and there in force and operation, did then and there require said building to have over the stage thereof a flue pipe (of certain dimensions) to be made of metal and be opened by a close circuit battery, and that a switch be then and there placed near the electrician's station on said stage, and have a sign thereon, said ordinance being as follows:

"Section 184. There shall be over the stage of every building of class V a flue pipe of sheet metal construction, extending not less than fifteen (15) feet above the highest part of the roof over the stage of said building—flue shall have an area of at least one-thirtieth of the total area of the stage. The dampers for flue shall be made of metal and opened by a close circuit battery; a switch to be placed in the ticket office and one placed near the electrician's station on the stage, each to have a sign and these words printed on it: 'Move switch to left in case of fire to get smoke out of building."

That said Iroquois Theatre was then and there a building of said class; that there was before then, and then and there in force a certain ordinance which required a system of

automatic sprinklers (describing the kinds and manner of construction thereof), said ordinance being as follows, to-wit:

"Section 185. In every building of class V there shall be a system of automatic sprinklers to be supplied with water from a tank located not less than 20 feet above the highest part of roof of building. Sprinklers shall be placed above and below the stage; also in paint room, store room, property room and dressing rooms, if they are in or connected with class V building and not separated by approved double iron doors. Tank not to be connected to stand pipe and ladder system, but to have separate pipe for filling from fire pump, and a 3-inch iron pipe extending from tank to outside of building, with Siamese connections for fire department use. The entire sprinkler equipment to be approved by the commissioner of buildings, fire marshal and the board of underwriters of Chicago."

That stationary scenery was then and there used on said stage in said building as said defendants then well knew; that a certain ordinance was then and there in force, which did then and there require that there be then and there kept in said building for use portable fire extinguishers or hand fire pumps on and under said stage and in the fly gallery and rigging loft thereof, and which said ordinance is in the words and figures as follows:

"Section 188. In buildings of class V, and also class IV, where stationary scenery is used, there shall always be kept for use portable fire extinguishers or hand fire pumps, on and under the stage; in fly gallery and in rigging loft; also at least four (4) fire department axes, two twenty-five (25) feet hooks, two fifteen (15) feet hooks, two ten (10) feet hooks, on each tier or floor of the stage, all subject to the approval of the fire marshal."

That it was then and there the duty of said defendants and each of them, to then and there see that the said ordinances and laws of said city of Chicago were then and there complied with in respect to said building and said Iroquois Theatre, and to then and there have the things required by said laws and ordinances in and about said building, said Iroquois Theatre and said stage, as required by the said laws and ordinances; that each of said defendants were then and there empowered and vested with authority to

purchase, procure and furnish each and all of said apparatus, appliances and things required by said laws and ordinances to be placed in and about said building.

That there was not over said stage a flue pipe of, etc., as said defendants then and there well knew (and all of the other things described) then required by said ordinances, as said defendants well knew; that said defendants "then and there negligently failed and omitted to have in and about said building, said Iroquois Theatre and said stage, the matters and things aforesaid, so required by said laws and ordinances of said city of Chicago, as aforesaid;" that said theatre was then and there opened to the public to witness the production of said certain theatrical performance, as said defendants well knew; that said Davis "then and there had and took upon himself the care, charge, management and control of said building and of said Iroquois Theatre," and that said Noonan "then and there had and took upon himself the care, charge, management and control of the business of said building and said Iroquois Theatre," and that said Cummings "then and there had and took upon himself the care, charge, management and control of the said stage, as stage carpenter thereof, as aforesaid;" that it was then and there the duty of said defendants to use due caution and circumspection for the safety of the persons then and there assembled as aforesaid, and to then and there have in and about said stage the fire appliances, apparatus and things aforesaid "mentioned and by said laws and ordinances of said city of Chicago provided and required as aforesaid, for the safety of the said persons so then and there assembled, as aforesaid, to witness said theatrical performance, spectacle and play as aforesaid."

That one Viva R. Jackson was then and there among and was then and there one of the said large number of persons so then and there assembled to witness the production of said certain theatrical performance: that said defendants, on said December 30, 1903, while so then and there having the care, charge, management and control of said building, and while the said Jackson was then and there in said theatre witnessing the said theatrical performance, and during the progress of the same in and upon the body of said Jackson "did unlawfully, negligently, feloniously and willfully, and without due caution and circumspection, make an assault;" that a certain lighted arc lamp was then and there, during the progress of said performance, "negligently and carelessly and without due

caution and circumspection put, placed and kept near a certain drapery, which was then and there situated on, in and about said stage," by reason of which said putting "said drapery was then and there ignited and set on fire by said arc lamp;" that "said fire could then and there have been easily extinguished had there then and there been in said building and on said stage the required proper fire apparatus, appliances and things required by said laws and ordinance of said city of Chicago;" that by reason of the lack of said fire apparatus, appliance and things "as aforesaid, required by said ordinances and laws," said fire was not extinguished, the said defendants knowing that there was a large amount of combustible and inflammable material on said stage, near said drapery, which was then and there ignited and set on fire, then and there causing a large amount and quantity of smoke to then and there be upon and over said stage, and that by reason of the lack of an open flue in the roof over said stage, as required by said ordinances, said smoke did not go through said roof of said stage and was not confined to said stage, and that by reason of the lack of said automatic sprinklers, as required by said ordinances, said fire could not be extinguished and put out; that if there had been the proper flue, dampers and switches, as required by said laws and ordinances, a large amount of fire, smoke, gas and flame could have gone through said roof, and would then and there have gone through said roof, and if there had been sprinklers, as aforesaid, said fire could have been extinguished and put out by the same; that by reason of the lack of said apparatus, appliances and things, so required by said laws and ordinances, said large amount of fire, heat and flame was not then and there thrown off, and was not then and there extinguished and put out, and was not then and there confined to said stage; that said defendants did, then and there, by their said negligence in not providing said appliances aforesaid required by said laws and ordinances for the safety of said persons, and in not seeing that said apparatus and things were then and there in and about said building, as required as aforesaid, "and by their then and there being engaged in their said lawful business and act without the due caution and circumspection, which was their duty so then and there to use, unlawfully, negligently, feloniously and willfully caused a large amount of said fire, smoke, heat, gas and flame" to pour and go from said stage towards, against and upon a large number of persons then and there assembled in said theater, and to, against and upon said Jackson, then and there being in said building, and in said

Iroquois Theatre as aforesaid, whereby and by reason of said large amount of fire, gas and flame against said Jackson, the body of said Jackson was then and there mortally burned, and said Jackson was then and there asphyxiated, strangled and choked, and said Jackson did languish and thereafter died on said December 30, 1903.

That the death of said Jackson was then and there caused by said negligence of said defendants "by their not then and there providing for, and by their not then and there seeing that the same were then and there provided, the apparatus, appliances and things aforesaid required as aforesaid, to be in and about said building and said stage, for the protection of the life of said Jackson," and by their then and there not using due caution "while so being engaged in their said lawful business and act, as aforesaid, as well as by their said carelessness and negligence in then and there putting, placing and keeping said arc lamp, as aforesaid;" that said defendants the said Jackson "in manner and form aforesaid, did then and there negligently, feloniously, unlawfully and willfully kill and slay, contrary to the statutes, and against the peace and dignity of the people of the state of Illinois."

John J. Healy, state's attorney, A. C. Barnes and Harry Olsen, assistant state's attorneys for the people.

Levy Mayer, Alfred S. Austrian, Moritz Rosenthal, W. J. Hynes, E. C. Higgins and Howard 0. Sprogle, for defendants.

Kersten, J.

At the last February term, the defendants were indicted on the charge of manslaughter. A motion to quash the indictment having been made and fully argued, it is now the duty of the court to pass upon the sufficiency of the indictment.

It seems that at common law, the motion to quash was considered addressed to the sound discretion of the court. 1 Bish. Crim. Proc. (3rd. ed.), § 763; 1 Chitty, Crim. Law. 299; Archbold, Crim. Pleadings & Practice, p. 35; 2 Hawk. P. C, •chap. 25, sec. 146; State v. Wilson, 43 N. H. 415, 82 Am. Dec. 163; 10 Ency. of Pleading & Practice, 567; Ex parte

Bushnell, 8 Ohio St. 599, 600, 601; Slate v. Dayton, 23 N. J. Law, 49, 53.

This rule of practice seems never to have been adopted in Illinois. It is true the Supreme Court said in one case:

"But if it appear before the defendant has pleaded or the jury are charged, that he is to be tried for separate offenses, it has been the practice of the judges to quash the indictment, * * * but these are only matters of prudence and discretion." Thompson v. People, 125 1ll. 256, 260 (quoting from the opinion by Buller, J., in Young v. King, 3 Term Rep. 106).

But, in practice, our courts of review have uniformly treated the decision of the trial court, overruling a motion to quash, as matter upon which error might be assigned. Lamkin v. People, 94 1ll. 501, 505; Gunning v. People, 189 1ll. 165, 171; Cochran v. People, 175 1ll. 28, 32; McNair v. People, 89 1ll. 441, 444, 445. It would, therefore, seem to be clearly the duty of the court in this case to quash the indictment if, as a matter of law, it is insufficient to sustain a conviction.

The state contends that under the statutes of 11linois concerning involuntary manslaughter, a conviction may be sustained upon proof of a smaller degree of negligence than was necessary thereto at common law, the contention being— as stated in the brief of the state's attorney that "at common law the negligence which resulted in death, in order to be the basis of a criminal charge of manslaughter, must have been gross negligence; while under the statute, negligence, in order to be the basis of a charge of manslaughter, must have been of such character as to amount to the performance of a lawful act without due *caution and circumspection*."

On the other hand, counsel for the defense, in their contention, go to the other extreme and urge that, in order to constitute the crime of involuntary manslaughter under the statutes of this state, the *unlawful act* committed or the *unlawful manner* of committing a lawful act, must be "unlawful" in the sense that it is in direct violation of some statute or public law of the state.

According to the contention of counsel for the state in this case, the statutory definition of involuntary manslaughter in 11linois is much broader than it was at common law; whereas counsel for the defense contend that it is narrower than at common law. Let us examine these statutes. The statutes relating to involuntary manslaughter in this state are as follows:

"Section 143. Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary in the commission of an *unlawful act*, or a *lawful act without due caution or circumspection*."

"Section 145. Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an *unlawful act*, or *a lawful act, which probably might produce such a consequence, in an unlawful manner*."

The statutes as to *excusable* homicide are as follows: "Section 152. Excusable homicide by misadventure is when a person in doing a lawful act, without any intention of killing, yet unfortunately kills another, as where a man is at work with an axe and the head flies off and kills a bystander, or where a parent is moderately correcting his child, or master his servant or scholar, or an officer punishing a criminal, and happens to occasion death, it is only a misadventure, for the act of correction was lawful; but if a parent or master exceed the bounds of moderation, or the officer the sentence under which he acts, either in the manner, the instrument or quantity of punishment, and death ensue, it will be manslaughter or murder, according to the circumstances of the case.

"Section 153. All other instances which stand upon the same footing of reason and justice as those enumerated, shall be considered justifiable or excusable homicide."

All four of these sections are taken from the original Criminal Code of this state, first enacted by the legislature of 1827 (Revised Laws of 11linois of 1827, pages 128, 130; sections 25, 28, 37, 38) and were embodied without change in the Revisions of 1833 (Revised Laws of Illinois, 1833, pages 175, 177, sections 25, 28, 37, 38) and of 1845

(Revised Statutes of 11linois, 1845, pages 155, 157, sections 25, 28, 37, 38); and again by the legislature of 1874, in our present Criminal Code.

Being thus all parts of the same act, they must, of course, be construed together, and so as to give effect to every part of each section, and to make one harmonious whole. In considering the true meaning and construction to be put upon them, several well-established canons of interpretation of statutes must be borne in mind. It is to be remembered that the law does not favor the repeal of the common law by implication. Nor will it be presumed that the legislature, in enacting a statute, intended to legalize acts which, by the common law, are opposed to public policy or which tend to the demoralization of society. *Swigart v. People*, 154 1ll. 284. And a statute is not to be construed as changing the common law any further than its terms expressly declare. *Can. Bank of Com. v. McCrea*, 106 1ll. 281, 289; *Cadwallader v. Harris*, 76 111. 370, 372.

And, so, a statute will not be construed to repeal, by implication, a rule of the common law, unless the implication is absolutely imperative. *Deatherage v. Rohrer*, 78 1ll. App. 248, 251; *Smith v. Laatsch*, 114 1ll. 271, 276, 279. Citing and quoting with approval, Potter's Dwarris on Statutes, page 185. See also *State v. Wilson*, 43 N. H. 415, 82 Am. Dec. 163, 164.

Thus it will appear that the tendency of the courts will be rather, in the absence of a clearly expressed intention of the legislature to the contrary, to construe a statute as declaratory of the common law instead of in derogation thereof; and a mere change in the phraseology is not necessarily to be construed as indicative of an intention to change the substance of the law.

Again, it is an established rule of construction that when a term or word which had a well-known common-law meaning—as, for instance, the phrases "without due caution or circumspection," "unlawful act," "in an unlawful manner"—is used in a statute, it will be understood, in the construction of the statute, in the same sense as at the common law. *Bedell v. Janney*, 4 Gilm. 193, 205, 206. And the presumption will be indulged that the same words,—as, for instance, the term "involuntary manslaughter"—are intended to

have the same meaning when used in different places in the same act; and the meaning of a word or phrase may often be ascertained by reference to others with which it is associated.

In applying these principles to the construction of the statutes under consideration, it becomes important to ascertain, first, whether or not the statutes of Illinois relating to involuntary manslaughter are declaratory of the common law; or whether the common law on that subject has been abrogated in this state; and, if so, then what, exactly, is the meaning of our statutes. "Manslaughter," at common law, is defined by Blackstone, as follows:

"Manslaughter is, therefore, thus defined: the unlawful killing of another without malice, either express or implied; which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act." (p. 191.)

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this, that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. So, where a person does *an act lawful in itself, but in an unlawful manner, and without due caution* and circumspection, as when a workman flings down a stone or piece of timber into the street and kills a man, this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder if he knows of their passing and gives no warning at all, for then it is malice against all mankind. And, in general, when an involuntary killing happens in consequence of an *unlawful* act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or, in its consequences, naturally tended to blood-shed, it will be murder; *but if no more was intended than a mere civil trespass, it will only amount to manslaughter*." 4 Blackstone, Com. (Cooley's ed.), pp. 191, 192, 193.

Again, Blackstone says of excusable homicide: "Homicide *per infortunium* or misadventure is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person qualified to keep a gun is shooting at a mark and undesignedly kills a man, for the act is lawful and the effect is merely accidental. So, where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only a misadventure; for the act of correction is lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument or the quantity of punishment, and death ensues, it is manslaughter at least and, in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. * * * (p. 182). Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful; but manslaughter in the person who -whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequences. And in general, if death ensues in consequence of an idle, dangerous and unlawful sport, as shooting or casting stones in a town * • * in these and similar cases the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts." 4 Blackstone, Com. (Cooley's ed.), pp. 182, 183.

It will be observed that our statute concerning excusable homicide is copied almost word for word from Blackstone's definition of homicide by misadventure, and also that the word "unlawful" as used in these common-law definitions quoted from Blackstone, includes not merely acts which are in themselves violative of some public law, but also acts amounting to mere civil trespass; and such was the undoubted common-law acceptance of this term, as used in the law of homicide.

Bishop says, "Every act of gross carelessness, even in the performance of what is legal, * * * and every negligent omission of a legal duty, whereby death ensues," is either murder or manslaughter at common law. 1 Bishop, New Criminal Law, 8th ed., sec. 314. And, again, the same author says that the term "unlawful act" as used in the law relating to manslaughter, "is not restricted to what is indictable, but it includes what is contrary to or reprehensible under any law, civil or criminal." 2 Ibid., sec. 642, par. 2.

To the same effect, see also 1 Archbold, Criminal PI. & Prac, pp. 209, 210, 216, 217, 219; *Regina v. Marriott*, 8 Car. & P., 425, 433. And so it was manslaughter at the common law where the death of another occurs through the defendant's negligent use of dangerous agencies. "Wharton on Homicide, par. 6. And the care required to make the killing excusable must have been in proportion to the danger. Wharton on Homicide, par. 155. But the neglect, to be "unlawful," must amount to an omission of some legal duty, not a mere neglect of a social or moral duty only.

It must be presumed, as already observed, that the legislature, in making use of the words, "unlawful," "in an unlawful manner," in these statutes, intended to employ them in the same sense in which they were understood at common" law. And the supreme court of this state has treated those sections of this same act, which define the crime of murder, as declaratory of the common law; and has cited and relied upon the common-law definitions of that crime. *Butler v. People*, 125 1ll. 641, 644, 645. And, inferentially at least, it has very recently treated the section of the criminal code defining justifiable homicide, as declaratory of the common law. *Hayner v. People*, 213 HI. 142, 151. And in that connection has treated the word "unlawful" as including mere civil trespass, and as being used in the same sense in the statutes relating to murder as was attached to it at common law. And, at common law, our supreme court has said the word "unlawful" includes civil, as well as criminal, wrongs, and trespasses which are not positively violative of any statute, civil or criminal. *Smith v. People*, 25 1ll. 17, 24.And, in another case, the court set off the words "criminal" and "unlawful" against each other, as of different meanings. Heaps v. Dunham, 95 1ll. 583, 586.

It cannot be presumed that the legislature intended to leave any gap or *hiatus*, on the one hand between excusable homicide and involuntary manslaughter, or on the other hand between manslaughter and murder. The section of the statute defining excusable homicide is, as appears from the quotation from Blackstone, *supra*, undoubtedly declaratory of the common law, and, as above noted, that relating to murder has been so treated by our supreme court. Those sections of this act defining the two extremes, namely, excusable homicide and murder, being thus declaratory of the common law, it must be presumed that the sections of the same act defining the middle ground of

manslaughter were likewise intended to be declaratory of that law, unless the language of the act clearly forbids such presumption. The court will be the more ready to indulge this presumption in view of the rule of interpretation above noticed, that a repeal of the common law by implication is not favored.

Reading the two sections as to involuntary homicide, as quoted above, together, it appears that they practically follow the wording of Blackstone's definitions of that crime, with only a slight transposition and change of the phraseology. The statute says: "Manslaughter * » * must be voluntary * * * or involuntary in the commission * * * or a lawful act without due caution or circumspection (sec. 143). Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of * * * a lawful act which probably might produce such a consequence, in an unlawful manner (sec. 145). Blackstone says it is manslaughter: "Where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection" (4 Blackstone, Com., *supra*, p. 192).

The phrases used both in the statute and by Blackstone are practically identical, and both the statute and Blackstone treat the terms "in an unlawful manner" and "without due caution and circumspection" interchangeably. In Blackstone they are used together in the same sense, and in immediate juxtaposition. In the statute (bearing in mind that it must be presumed that the legislature meant to use the term "involuntary manslaughter" in the same sense in both sections of the statute) they are likewise used as convertible terms. The only new clause introduced into the statute consists of the words, "which probably might produce such a consequence" (sec. 145); which seem to be nothing more than a positive enactment of the established common-law rule that the unlawful act or omission, charged against the defendants, must have been the proximate cause of the death.

It is true that the rule is stated to be: "A statute which is an entire revision of the subject is negative and repeals the common-law with which it is inconsistent." 2fi Ency. of Law, 2d ed., 530; *State v. Wilson*, 43 N. H. 415, 82 Am. Dec. 163, 165; *III. & Mich. Canal v. Chicago*, 14 1ll. 334, 336.

But the supreme court of this state has held that the criminal code of 1845 (of which our present code of 1874 is substantially a re-enactment) was not intended by the legislature as a complete codification of the criminal laws of this state; and that the common law on that subject remains in force in Illinois except in so far as it is expressly repealed or changed by a statute. *Johnson v. People*, 22 1ll. 314; *Smith v. People*, 25 1ll. 17, 25.

On the whole, I am of the opinion that our statutes defining the crime of involuntary manslaughter are substantially declaratory of the common* law, and I will so hold. As a necessary corollary to this holding, it follows that the statute is to be construed as was the rule by the common law (26 Ency. of Law, 2d ed., p. 529), and that the court may properly resort to the common-law precedents for aid in determining whether the particular acts or omissions alleged in this indictment, fall within the definition of the crime.

Does the indictment before ^ls in this ease sufficiently charge the offense of involuntary manslaughter within the meaning of the common-law precedent?

It charges, in substance, that the defendant Davis was the general manager of the Iroquois Theatre and building; that defendant Noonan was business manager of said theatre and building; and that defendant Cummings was the stage carpenter of said theatre; that there were then in effect valid ordinances of the city of Chicago, requiring that in buildings of the class of this theatre, certain equipment shall be provided; that the equipment required by the ordinances was not in this theatre, that the defendants, and each of them, had the power and authority to provide that equipment and neglected to do so; that if the equipment required by the ordinances had been provided, the death of the decedent would not have occurred; that thus the defendants negligently and willfully caused the death of the decedent. None of the sections of the ordinances, set out in the indictment, declare upon whom the duty of furnishing the equipment, thereby required, is imposed; and. in the absence of such a provision in the ordinance, it must be presumed that it was the intention of the city council to impose the duty upon the owner or lessee of the building. *Arms v. Ayer*, 192 1ll. 601, 616. And it is not averred in the indictment that either of the defendants sustained that relation to the property.

The state's attorney in his brief has quoted some other sections of the building ordinance of the city of Chicago, which he contends should be considered by the court as showing that the city council intended to impose the duty of furnishing this equipment upon the persons occupying the relation to the property which, it is alleged in the indictment, the defendants occupied in this case; and he cites several decisions from the courts of other states to the point that these sections of the ordinance would be admissible in evidence upon a trial, under this indictment, without pleading them. He argues, therefore, that the fact—or the possibility—of their existence should be considered by the court in passing upon this motion to quash the indictment.

None of the cases cited sustain the state in this contention, except two of the cases cited from Minnesota (Faber v. St. Paul, M. & M. Ry. Co., 29 Minn. 465, 13 N. W. 902; *Klotz v. Winona, etc., Ry. Co*., 68 Minn. 341, 71 N. AY. 257), both of which were civil actions to recover damages for personal injuries sustained by the plaintiffs. In those cases the supreme court of Minnesota does lay down the rule that, in that state, a city ordinance is admissible in evidence in an action for damages for personal injuries, as tending to prove negligence on the part of the defendant (in connection with proof that it was violated by the defendant), even though the ordinance had not been pleaded by the plaintiff. This rule is, of course, in direct opposition to the settled law of this state, which is that the courts of Illinois do not take judicial notice of city ordinances, and that such ordinances cannot be introduced in evidence in support of an averment of negligence in common-law actions, unless the existence of the ordinance has been properly pleaded. Our supreme court has said:

"Courts do not take judicial notice of an ordinance of an incorporated town or city—and. hence, when they may be material in an action or in the defense of an action they must be specially pleaded. * * * The pleader was not required to set out the ordinance in haec verba, but he was required at least to set out the substance of the ordinance. * • » That part of the ordinance relied upon, or all the substantial parts of the ordinance, should be set out, so that the requirements of the ordinance may be seen and known." *III. Cen. E. Co. v. Ashline*, 171 1ll. 313, 315, 316.

And this is believed to be the usual rule, in almost all the states of the union. Neither of the cases cited by the supreme court of Minnesota in the Faber case, *supra*, (29 Minn. 465, 467, 13 N. W. 902) support the doctrine announced in that case; and the Klotz case, supra (68 Minn. 341, 71 N. W. 257), was decided solely upon the authority of the Faber case. The doctrine of the Minnesota court is opposed to the general current of authority on this question.

It is familiar law, applicable to criminal, as well as civil, pleadings, that facts sufficient to establish the offense charged must be set out in the indictment, and that a failure in this respect cannot be aided by allegations of the conclusions of the pleader. "In every indictment, facts must be averred which, in the eye of the law, constitute the charge." *Rank v. People*, 80 1ll. App. 40, 43. It is a fundamental rule, both of civil and criminal pleading, that facts and not conclusions of law must be averred. Ibid, at pages 43, 44.

And this indictment must stand or fall by the allegations of fact appearing upon its face. It cannot be aided by any consideration of other matters, of which the court cannot take judicial notice; and, if the case were permitted to go to trial upon it, it could not be aided by the introduction of any evidence or proof of facts not properly averred in the indictment. The familiar rule of pleading applies in indictments as well as to all other common-law pleadings that "proofs without allegations are as ineffectual as allegations without proofs." *Gunning v. People*, 189 1ll. 165, 166.

The court cannot consider any sections of the city ordinances except those properly pleaded; and under the rule of law announced by our supreme court in the case of *Arms v. Ayer, supra*, 192 1ll. 601. 616, the duty of providing the equipment required by the ordinances rested upon the owner or lessee of the building, and there is no direct averment in this indictment that that duty had ever been assumed in any way by the defendants in this case, or either of them. It is not denied by the state that the defendants cannot be found guilty of manslaughter, on account of any alleged negligence in omitting to perform any act, unless there was a legal duty to perform that act directly imposed upon them by law—either statutory, or municipal, or by the common law—or unless they had voluntarily, by contract or otherwise, directly assumed the duty of its performance.

"It is likewise essential that the party charged must be obligated to do what he omitted to perform, by the terms of some contract, by which he is bound, or the law must have cast on him the obligation of performance." *Thomas v. People*, 2 Colo. App. 513, 31 Pac. 349, 350.

Neglect or omission, to be "unlawful," must be an omission of some legal duty—not a mere neglect of a social or moral duty. 2 Bishop, New Criminal Law, 8th ed., sees. 642, 644, 645; 21 Ency. of Law, 2d ed., p. 99 It is true that "if a man takes upon himself an office requiring skill or care if by his ignorance, carelessness or negligence, he cause the death of another, he will be guilty of manslaughter." 1 Archbold, Crim. PI. & Prac. p. 220 (Pomeroy's ed.) p. 665.

So, the case of a mine foreman neglecting his duty and allowing fire damp to collect, whereby a fatal accident happens, has been held manslaughter; and, likewise, that of an iron founder who cast a cannon so imperfectly that it burst, with fatal results; and, for like reasons, surgeons and physicians are similarly liable for gross carelessness, whereby their patients die; but it is nowhere positively alleged in this indictment that these defendants, or either of them, ever took upon themselves the duties imposed by this city ordinance upon the owner or lessee of the building. It is averred that each of the defendants was empowered and vested with authority to purchase, procure and furnish each and all of said apparatus, appliances and things required by said laws and ordinances to be placed in and about said building, and that said defendants "then and there negligently failed and omitted to have in and about said building, said Iroquois Theatre, and said stage, the said matters and things aforesaid, so required by said laws and ordinances of said city of Chicago aforesaid," and that said Davis "then and there had and took upon himself the care, charge, management and control of said building, and of said Iroquois Theatre," and that said Noonan "then and there had and took upon himself the care, charge, management and control of the business of said building, the said Iroquois Theatre," and that said Cummings "then and there had and took upon himself, the care, charge, management and control of the said stage, as stage carpenter thereof." That it was then and there the duty of said defendants to "see that the said ordinances and laws" were complied with, and to then and there have in and about said

stage the fire appliances, apparatus and things aforesaid mentioned and by said laws and ordinances of said city of Chicago provided and required as aforesaid, for the safety of the said persons so then and there assembled as aforesaid, to witness said theatrical performance, spectacle and play.

But this does not amount to a direct and positive allegation that the defendants, or either of them, had ever assumed or taken upon themselves the duty imposed, under this ordinance, upon the owner or lessee of the building, to furnish this equipment. It is not a necessary inference from the averment that the defendant Davis had taken upon himself the "care, charge, management and control of said building," and that Noonan had taken upon himself the "care, charge, management and control of the business of the building," and that Cummings had taken upon himself the "care, charge, management and control of the stage, as stage carpenter thereof," that the defendants, or either of them, had taken upon themselves the duty imposed by law, under the ordinances set forth in the indictment, of furnishing this equipment for the building. Non constant, but that the defendants merely assumed the management and control of the property as they found it; and did not by any contract or agreement with the owner of the building, or otherwise, specifically agree to attend to furnishing the articles or equipment required by the ordinance. The words "manage and control" would not seem necessarily, in the absence of any further averments, to include a duty to' furnish equipment itself, or the fixtures of the building, without a specific agreement to undertake those duties. The most that can be said is that it might be inferred or argued from these averments that the defendants had taken that duty upon themselves. But an argumentative averment of fact is not sufficient, in an indictment. The facts necessary to constitute the offense must be charged in direct and positive terms. Thus, where, in an indictment for bigamy, it was alleged in the indictment that the defendant, at the time of his second marriage, knew that his first wife was then living, it was held by our supreme court that this was not a positive or direct averment that the first wife was actually living on that date; and the indictment was quashed for insufficiency in this respect, the court saying: " Reliance is placed upon the averment that the defendant, at the time of his second marriage, knew that his first wife was living. If this is to be taken as an allegation that his former wife was then living, it was

merely argumentative. The allegation being that the defendant knew that his former wife was living, it is sought to be inferred, by way of argument, that she must have been in fact living, but it is an elementary rule of pleading, both civil and criminal, that allegations of fact in pleading should be direct and positive and not merely argumentative or inferential." *Prichard v. People*, 149 1ll. 50, 54.

And so also the indictment against Richard Gunning, formerly assessor of the town of South Chicago, was recently held insufficient by the Supreme Court for a similar reason, the court saying:

"The point is also made that from the allegation that Gunning offered to receive the alleged bribe to influence his official action as assessor, in reducing the assessment on the said lot (*id est*, the lot described in the indictment), it is properly deducible that, as his official action was confined to the assessment of property in the town of South Chicago, the lot must have been situated in that town. It is not permissible in pleading to leave a fact necessary to be averred to be derived by inference from an allegation of a mere conclusion of law. All necessary facts should be pleaded with reasonable certainty, and section 6, of division 11, of the criminal code has not dispensed with that rule." *Gunning v. People*, 189 Ill. 165, 171.

So also in the case of *People v. Davis*, 112 1ll. 272, which was an action of debt to recover delinquent taxes, it was held on demurrer that a declaration was insufficient in law which failed to state the facts from which the liability as a conclusion of law resulted: that the averment that the property was taxable at the place in which it was assessed, was the statement of a conclusion of law and was bad on demurrer (at pp. 281, 282).

This last mentioned case was cited with approval in the Gunning case, *supra* (189 1ll. 171). The averment in the indictment in the case at bar "that it was then and there the duty of said defendants to then and there have in and about said stage," the fire appliances, apparatus and things "mentioned and by said laws and ordinances of said city of Chicago provided and required," is merely the conclusion of the pleader and, under the authorities last cited, is wholly ineffectual to sustain the indictment unless facts

sufficient to warrant the conclusion are properly averred. See also case of *Rank v. People*, 80 1ll. App. 40, 43, 44, *supra*.

In my judgment, the indictment is not sufficient to sustain a conviction for a violation of any supposed duty imposed upon the defendants, or either of them, by the ordinances of the city of Chicago as pleaded. *It remains to consider whether it sufficiently charges the defendants with the crime of involuntary manslaughter, by reason of their neglect of any common-law duty resting upon them.*

I have already quoted the material averments of the indictment, as to the duties charged to have been assumed by the defendants respectively, and as to their violation thereof. It is nowhere alleged in the indictment that the equipment, or any part of it, required by the said ordinance, was reasonably necessary in buildings of that class, for the protection of the patrons of the theatre; nor that such equipment was usually or customarily furnished; nor are any other facts directly or positively averred tending to show that it was negligence on the part of the defendants, or either of them, aside from any requirements of the city ordinances, to fail to provide the equipment which, it is charged, was lacking. It is true that it is averred that if the equipment mentioned and which was required by the ordinance, had been furnished the fire *could* have been easily extinguished, but this, again, if relied upon as an averment that this equipment was reasonably necessary to the safety of the patrons of the theatre, is, at most, but an argumentative or inferential statement thereof, and, as such, wholly insufficient under the authorities above cited (*Prichard v. People*, 149 H1. 54; *Gunning v. People*, 189 1ll. 171); and again, in this aspect of the case, as in the other, the allegations of the pleader's mere conclusion that it was the duty of the defendants " to then and there have in and about said stage," the fire appliances, apparatus and things "mentioned and by said laws and ordinances of said city of Chicago provided and required," is wholly insufficient to supply the lack of averment of facts. The pleader must aver facts, not merely conclusions, in order to make the indictment good.

I am constrained to the conclusion that the indictment does not charge the defendants with any offense, either by reason of the omission of any duty imposed upon them by any

ordinances of the city of Chicago averred in the indictment, nor by reason of the omission of any common-law duty resting upon them. I am, therefore, of the opinion that the indictment is insufficient and the motion to quash it should be sustained.

This view of the case renders it unnecessary to consider the other questions raised by counsel upon the argument and discussed in their briefs. It seems, however, proper to say that the question of the effect of the word "willfully" in that part of the indictment for. *Involuntary* manslaughter alleging assault, which is raised by counsel for the defendants, is to my mind a serious one; and I also entertain grave doubts as to the propriety of joining these defendants in the same indictment. It is not, however, necessary to discuss or consider these questions at the present time.

In view of what has been said, I believe that the interests of the public, and of the prosecution itself, will be subserved by quashing this indictment. I am convinced that no conviction that might be had upon it could be sustained upon review.

Since no statute of limitations runs against the crime of manslaughter, no serious inconvenience will be entailed upon the people by quashing this indictment. It would not, in my opinion, be right to permit a long and expensive trial to be had upon an indictment, the sufficiency of which is so questionable, or—rather—the insufficiency of which is so unquestionable, as is that of the indictment in the case at bar. The difficulties and embarrassments that beset the state's attorney in preparing an indictment in so unusual and even extraordinary a case as this, are fully appreciated. The prosecution has now, however, had the benefit of its own careful legal research preparatory to the arguments upon the motion to quash this indictment, and of the very elaborate and able briefs prepared by counsel for the defendants and, with this aid, will doubtless be in much better position to draft another and legally sufficient indictment, in case another grand jury should find that the defendants, or either of them, or any other persons, can lawfully be charged with being criminally accountable for that terrible disaster.

The motion, on behalf of the defendant Davis, to quash the indictment is sustained.

Green, J.:—

Through the courtesy of Judge Kersten, and the gentlemen representing the defendant in this case, I was invited to be present and listen to the arguments on the motion to quash, and was advised at the same time, that I would be furnished by counsel representing the defendants Noonan and Cummings, with printed briefs, with the understanding that in the near future I would be able to pass upon the motion to quash in the case of The People, etc. v. Noonan and Cummings, under the same indictment, supposing that a transcript of the record in that case would be filed in Peoria County, Illinois, but upon examination I have ascertained that the transcript of the record has not been filed there.

It seems to me it would be proper, under the circumstances, to devise some means whereby the order changing the venue to Peoria County as to the defendants, Noonan and Cummings, might be vacated, in which event the motion to quash in their behalf could be passed upon and determined by Judge Kersten. I will state to counsel that I have read, and heard read, the opinion of Judge Kersten in the Davis case and that I am in full accord with the views expressed by him in that opinion. In addition thereto I deem it proper to state that it is apparent to me the indictment in this case is predicated upon an ordinance of the city of Chicago set up in haec verba in the indictment, that all of the alleged acts of negligence charged against the defendants, and each of them, are manifestly based upon alleged neglect of duty on their part to comply with the provisions of this ordinance. I recall one particular feature with reference to the switch in case of fire. The ordinance provides that there shall be a switch placed near the ticket office and one near the electrician's stand on or near the stage, each switch to then and there have a sign with the words as follows, to-wit: "Move switch to left in case of fire to get smoke out of building." In my judgment all of the alleged acts of negligence on the part of these defendants, and each of them, relate to, or are connected directly with, the provisions of this ordinance.

The sole object and purpose of pleading the ordinance in this ease is to advise the court with reference to the provisions thereof so far as it relates to these defendants and the Iroquois Theatre building; and also, that the court might be enabled on an inspection thereof to ascertain what duties, if any, devolved upon these defendants, or either of them thereunder. It certainly does not seem to me, that the pleader in this case is warranted in

the conclusion reached by him under the averments of this indictment as to the alleged duty of these defendants, or either of them. The court, upon a careful reading of this ordinance, fails to discover that it imposes any special duty upon all, or any, or either of these defendants. It certainly is not the duty of the court to criticize the indictment, or sustain a motion to quash the same, upon mere technical grounds, and if the indictment is to be quashed it should be by reason of some substantial defect. It appears to me, that the direct and proximate cause of this terrible disaster was not brought about, or occasioned, by reason of the alleged fact that these defendants (even had the duty devolved upon them as alleged in the indictment) had not placed in said theatre building the flue pipe of sheet metal construction, the automatic sprinkler and other appliances therein enumerated, but the direct cause was the fire itself. The object and purpose of these safe-guards was to do away with the smoke in case of fire and, at the same time, provide means for extinguishing the same. It is also alleged in the indictment that a certain lighted arc lamp was being operated on the south side of the stage in said theatre during the progress of said theatrical performance therein mentioned, negligently and carelessly and without due caution and circumspection, put, placed and kept near a certain drapery which was then and there situated on, in and about said stage, by reason of which said putting, placing and keeping said arc lamp near said drapery, said drapery was then and there ignited and set on fire by said arc lamp, which said fire could then and there have been easily extinguished had there then and there been in said building, and on said stage, the fire apparatus, appliances, etc., as required by said laws and ordinances of said city of Chicago, and which said fire could then and there have been easily extinguished and put out if there had then and there been in said building, and on said stage, any portable fire extinguishers, or hand fire pumps, as provided by said ordinances.

It will be observed that there is no averment in this indictment to the effect, that these defendants, or either of them, placed, or caused to be placed, or exercised, or attempted to exercise, any control over said arc lamp; neither are they charged with negligence or lack of due caution and circumspection, relative to said lamp. Every intendment being against the pleader, the presumption is, that said arc lamp was not placed there by these defendants and that they did not, or either of them exercise, or attempt to exercise, any

control over the same. In my judgment the lack of an averment of this character is fatal to this indictment, and if *for no other reason*, the indictment, on motion to quash, should not be sustained.

In passing, I desire also to state, that it is my judgment, that there is no privity between these defendants and that a motion to quash should be sustained on the ground of a misjoinder. I realize fully how difficult it is to draw an indictment to fit the facts, or the alleged facts, in this case. It is easy to find fault with an indictment and yet more difficult to draw it. So I am inclined to hold, in addition to the reasons given by Judge Kersten, and for the reasons therein indicated, that these substantial objections to this indictment should be sustained. It does not appear to me to be proper at this time or place to pass upon the motion to quash in behalf of the defendant Noonan and Cummings, but when the case properly comes before me at Peoria, I will say frankly to counsel, that I shall not hesitate to sustain a motion to quash for the reasons herein indicated.

(Criminal Court of Cook County.)

The People of the State of Illinois
vs.

William J. Davis.

(January 23, 1906.)

1. Fire Apparatus—Duty To Provide. There is no duty at common law requiring the owner or occupant of a building to provide fire-escapes and fire apparatus.

2. Places Of Amusement—Duty To Provide Safe Place. Proprietors of places of amusement are bound to provide a safe place for their patrons and to exercise reasonable care for their safety.

3. Duty—Necessity Of. Where there is no duty imposed either by law or contract upon a particular person to do a particular act, no penalty can be imposed upon him for its non-performance. The duty must be a plain one and the person who must perform it must be specifically designated.

> i See also *People v. Davis*, et al., 1 111. C. C. 217, for a contrary decision on a prior indictment for the same offense.—Ed.

4. Statutes—Ordinances—Duty To Uphold. It is the duty of courts to so construe all legislative enactments as to uphold their validity if it can reasonably be done.

5. Ordinances—Duty To Comply With. Although an ordinance providing for the installation of certain fire apparatus in buildings of a certain class fails to designate the person who shall perform the duty, it is a violation of the ordinance to use and occupy a building constructed in violation of the law, without complying with the ordinance.

6. Ordinance—Invalid, Where Subject To Approval Of Non-official Body. Where an ordinance, which provides that every building of a certain class shall be equipped with a

fire sprinkler equipment, makes the installation of such equipment subject to the approval of a non-official body, the requirement In regard to such approval is invalid.

7. Same—Whether Entire Ordinance Invalid. Where an ordinance is entire, and each part has a general influence over the rest, and one part of it is void, the entire ordinance is void. The void part of the ordinance makes the whole ordinance void if the void and valid parts are so connected as to be essential to each other. If the invalid part can be separated from the other provisions of the law, and the purpose and intent of the legislature remains plain and effective, the invalid part may be disregarded.

8. Same. The provision in the ordinance requiring the approval of the non-official body may be disregarded without impairing In any degree the purpose or usefulness of the law.

9. Causa Proxima Non Remota Spectator. It is elementary that to establish liability for the doing of an unlawful act, the wrong must be the direct and proximate cause of the injury.

10. Same—Manslaughter—Violation of Ordinance or Statute.

The mere violation of an ordinance or statute whereby death ensues does not of itself subject the wrongdoer to punishment for manslaughter.

11. Manslaughter—Commission of Unlawful Act. A .person cannot be held liable for the crime of manslaughter merely because at the time of the killing he was engaged in an unlawful act, unless the unlawful act or omission was in its nature wrongful independent of statutory enactment, or unless the natural consequences of the unlawful act or omission are dangerous to life or limb, or the act is *malum in se*.

12. Proximate Cause of Death—Failure to Supply Fire-escapes. Where an ordinance providing that theaters shall be supplied with fire apparatus and equipment is not complied with, and a fire breaks out and death Is caused, the failure to comply with such ordinance is the proximate cause of the death.

13. Negligence—Violation Of. Ordinance. The violation of an ordinance is *prima facie*

evidence of negligence.

14. Manslaughter—Due Caution And Circumspection—Question For Jury. It is a question for the jury to determine whether the defendants used due caution and circumspection in failing to equip a theater with fire apparatus and equipment as required by law, whereby death is caused.

Indictment for manslaughter. Motion of defendant to quash. Heard before Judge Marcus A. Kavanagh. Statement of facts.

The defendant was the manager of the Iroquois Theatre in Chicago, and president and director of the Iroquois Theater Company. On December 30, 1903, a fire broke out upon the stage of the theatre among the scenery, and 600 persons who were witnessing a performance were suffocated and burned. The defendant was indicted for manslaughter, for failure to properly equip said theatre with fire apparatus, etc. The indictment contained six counts. Counts 1. 2, 3 and 4 are based on an alleged non-compliance with certain ordinances of the city of Chicago. Counts 5 and 6 are based upon an alleged common-law duty.

Count one alleges that on December 30, 1903, there were certain ordinances of the city of Chicago, defining and prescribing the fire limits of the city, classifying the buildings therein, and requiring buildings of Class V to have a flue pipe over the stage, with a switch operating the dampers of the same, and a system of automatic sprinklers, to be supplied with water from a tank above the roof, and portable fire extinguishers, axes and hooks, upon the stage; that buildings of Class V should employ an expert fireman; that the owners, lessees and managers of every such building should cause a diagram of the building to be printed on programs; and providing a penalty for a violation of the provisions of the ordinance.

That the Iroquois Theatre was planned, constructed and built, and operated and used for the purpose of giving theatrical performances, spectacles and plays, and contained on the stage in said building movable and stationary scenery; that the building also contained a large auditorium and assembly hall, with seats, and a ticket office, where tickets were

sold for compensation; that the said building was one of Class V, and within the fire limits as prescribed by the ordinances; that Davis was president and managing director of the Iroquois Theatre Company, and general manager of the building for and on behalf of the Iroquois Theatre Company, and in absolute management and control of the building with full power and authority to open, close, manage, direct and do all other things, and that he as such president, director and manager of the Iroquois Theatre Company, and general manager of the building was producing, permitting to be produced, having produced and causing to be produced a play entitled "Mr. Bluebeard, Jr.;" that he invited the public to enter the building and witness the play, for compensation; that movable and stationary scenery, electric lights, combustible draperies, etc., were used in producing the play; that there was among the .scenery, etc., a fire which spread rapidly because of the combustible scenery, etc., and produced smoke, heat, gas and flame; that the laws and ordinances aforesaid required certain apparatus, equipment, appliances, etc., and it was the duty of Davis as president, director and general manager of said corporation, and as general manager of the building and theatre to so equip the building, and Davis as such officer was authorized and empowered to thus equip the building, and he undertook so to do; that as Davis well knew, there was not over said stage a flue pipe, extending not less than 15 feet above the roof, and not a flue pipe having an area not less than one thirtieth of the area of the stage, and not flue dampers, and not a switch, etc., and not a system of automatic sprinklers supplied with water from a tank located not less than twenty feet above the building, and not sprinklers above and below the stage, and not on stage or in fly galleries or any place in the building portable extinguishers, hand fire pumps, fire department axes and not fire-hooks on each tier of floor of stage or building; and that Davis did negligently fail and omit to have in and about said building or theatre or on the stage the matters aforesaid required by the laws and ordinances of Chicago. That one Viva R. Jackson was among the persons assembled in said theatre to witness said play, etc., and that on December 30, 1903, Davis, while being, and as the president, director and general manager of the Iroquois Theatre Company, and the manager of the said building and theatre for and on behalf of said company, and as manager of said stage and building and theatre, and in possession and management and control of said theatre, building and stage, did unlawfully, negligently and feloniously and without due caution

and circumspection make an assault, in and upon said Jackson while within said theatre and witnessing the play; that the fire could have been extinguished, etc., had there been fire extinguishers, fire pumps, automatic sprinklers, fire hooks and axes in the theatre as required by the ordinances, and by reason of the lack of these, the fire was not and could not be put out; that by reason of the lack of flue dampers and switches, etc., the fire was not and could not be confined to the stage, and by reason of the lack of sprinklers and tank the fire was not and could not be extinguished, nor could the smoke, flame, etc., go off through the roof over the stage, and that Davis by not providing the things aforesaid as required by the ordinances did unlawfully, negligently and feloniously cause a large amount of fire, heat, smoke, gas and flame to issue, pour and go over the stage and over, against and upon the persons assembled in the theatre, and by reason of the smoke, etc., so issued and thrown over and upon her, the said Jackson was mortally burned and asphyxiated, suffocated, strangled and choked and did die on December 30, 1903, which was then and there caused by the negligence of Davis in not seeing that there were provided the things required by the ordinance and that by then and there not using due caution and circumspection while being engaged in his lawful business as aforesaid, and that Davis did negligently, unlawfully and feloniously kill and slay said Jackson contrary to the statute and against the peace and dignity, etc.

The second count is substantially similar to the first count and is predicated on the same ordinances. Davis is charged as president, director and manager of said corporation and as manager and agent of said building and theatre.

The third count is also similar, except that Davis is charged as owner and occupant of the theatre.

The fourth count alleges that on December 30, 1903, in Chicago, etc., a certain building called the Iroquois Theatre was opened and used for the purpose of producing a theatrical performance, spectacle and play designated as "Mr. Bluebeard, Jr.;" that said building had been planned, constructed and erected for the purpose of producing and giving therein and in the Iroquois Theatre located in said building, certain theatrical performances, etc., and that in said Iroquois Theatre in said building there was a stage

erected for the purpose of therein producing plays, etc., the plays, etc., aforesaid; that there was in said building a large number of seats for the seating of persons there congregated to witness the aforesaid theatrical performance, and that there was in said building a ticket office where tickets were sold for compensation to persons to attend the certain performance aforesaid, and that said building was used as an assembly hall for large gatherings of people, and that there was in said building and on said stage movable scenery, which was used for producing the play aforesaid; that said building and theatre was situated within and in the fire limits of the city of Chicago, and was a building of class five within said ordinances, hereinafter set forth. That Davis was engaged in a certain lawful business and act, the business and act of managing generally said building and said Iroquois Theatre therein, and was the general manager of said building; that there was a law and ordinance of said city, duly passed, adopted and promulgated by the city council and mayor which was a valid law prescribing and defining the fire limits of said city, which ordinance is set out in the indictment.

That Davis as manager of said building and theatre was empowered, authorized and invested by the owners of said building to procure and furnish the apparatus, etc., required by said laws and ordinances; that Davis as general manager of said building did undertake and assume the duty to furnish, supply and equip said building, theatre and stage with the apparatus, etc., required by said laws and ordinances; that Davis as the general manager of said building and theatre was empowered, authorized and directed to open and close said theatre and to provide the things required by said ordinances; that there was not then and there the things required by said ordinances.

That Davis was in charge, management and control of said building for and on behalf of the owner thereof, and had taken upon himself the care, charge, management and control of said building and theatre and the duty of providing the things required by said ordinances; that it was the duty of Davis to use due caution and circumspection for the safety of the persons and lives of the persons there congregated, and to have about said building the things required as aforesaid; that one Jackson was one of the persons assembled therein to witness said performance; that a certain lighted arc lamp being operated on the south side of the stage during the progress of the play aforesaid, was

put, placed and kept near a certain drapery on the stage, by reason of which the drapery was ignited, and which fire could have been easily extinguished if there had been in said building and on said stage the appliances, etc., required by said ordinances, and fire extinguishers, and hand pumps; that by reason of the lack of extinguishers and pumps, as aforesaid, and the apparatus required by the ordinances, said fire was not and could not be put out; that by reason of the fire being in said drapery and a large amount of combustible material and scenery being on said stage, as Davis well knew, and being ignited, causing a large amount of fire, smoke, heat. gas and flame to be upon, etc., said stage and that by reason of the lack of flue, dampers and switches the fire, etc. did not and could not go through the roof of said stage, and could not be and was not confined to the stage, and by reason of lack of sprinklers and tank required by ordinances, the fire, heat and flame on the stage could not be put out, and the grand jurors present that had there been flue, dampers and switches, as aforesaid, a large amount of fire, etc., could and would have gone through the roof over the stage, and could and would have been confined to the stage; and if there had been sprinkler and tank as aforesaid the flames, etc., could have been extinguished and put out by the same; that by reason of lack of appliances required by ordinances, the fire, etc., was not thrown off through the roof over said stage and was not put out and was not confined to said stage.

That Davis by his negligence in not providing and in not seeing provided the appliances, etc., required by ordinances, and by being engaged in his lawful business and act without the due caution and circumspection which was his duty then to use, did unlawfully, negligently and feloniously cause fire, smoke, heat, gas and flame to issue, pour and go from said stage to, towards, against and upon the persons assembled, and upon said Jackson who was then and there mortally burned, etc. and did die; that said death was caused by said negligence of Davis in not providing and seeing provided the apparatus, appliances and things aforesaid for the protection of the life of said Jackson, and by his not using due caution and circumspection, while engaged in his lawful business and act. And so Davis did slay, and kill, etc., contrary to the statute, etc.

Count five alleges that on December 30, 1903, the Iroquois Theatre Company, a corporation, was the owner and occupant of a certain building and theatre before then

created, constructed and built by the corporation; that there was a large amount of movable scenery on the stage and a large amount of curtains, etc., used in the production of plays, a large number of "lights," and appliances and equipment of combustible material; that a certain play was being produced during which production there was used, changed, raised, lowered, etc., the said lights, scenery, etc.; that a large number of persons were assembled in said theatre; that Davis was then and there "the president and director and general manager" and the "general manager" of said building on behalf of the corporation; that Davis was "in care, possession, management and control of said building and theatre" for and on behalf of said corporation; that Davis had before then been "president, general manager and director" of said company at and during the period of construction, etc., and was in control and management of its erection, equipment, etc., for said corporation; that said theatre was not wholly completed and equipped; that Davis opened said building and theatre as a public place of amusement, etc., and invited the public to enter for compensation to witness the production, etc.; that Davis was producing, causing and permitting to be produced and given the said play, etc.; that Davis was empowered and authorized by said corporation to provide for the safety of the lives of said spectators; that Davis on behalf of said corporation undertook to provide for their safety; that it was the duty of Davis to use "due caution and circumspection" for the safety, etc., and to provide a safe place for the persons assembled; that one Jackson was present witnessing said play at the invitation of Davis; that it was the duty of Davis to use due caution and circumspection to provide for the safety of the life and person of the said Jackson and to provide a safe place to witness said play; that because of the large amount of movable scenery, drapery, lights and wires, and of the changing of the same, there was imminent danger of fire by reason of the likelihood of the scenery, etc., being brought in contact with said lights and being ignited by the same, all of which Davis knew or ought to have known; that it was Davis' duty to use due caution and circumspection to provide against fire and to use due caution and circumspection in providing equipment, appliances and apparatus for the purpose of extinguishing any fire which might occur and which was then and there probable; that it was the duty of Davis to use a high degree of care in providing apparatus, appliances and equipment and things to then and there extinguish any fire which might occur; that there was not then and there sufficient

apparatus, etc., with which to extinguish or put out a fire which Davis knew; that Davis while so having the care, charge, management and control, upon said Jackson, while witnessing said play, did unlawfully, negligently, feloniously and without due caution and circumspection make an assault, and that a certain light was brought in contact with a certain drapery which became ignited; that said fire could have been easily extinguished and put out had there been in said building, theatre and stage any fire apparatus, appliances, equipment or things provided for that purpose, but that by reason of the absence and the lack of any such apparatus, appliances, equipment or things, said fire was not and could not be extinguished and put out, and that by reason of said fire the scenery, etc., ignited, which Davis knew was probable in case of a fire; that by reason of said fire a large amount of smoke, etc., was caused to be around said stage, etc.; that by reason of the absence of any apparatus, etc., the said fire, etc., was not extinguished, and could not be confined to said stage, as could have been done had such apparatus, etc., been provided; that said Davis by his negligence in not providing and in not seeing that the said apparatus, etc., was not in said theatre, etc., and by being engaged in the said business and act of so managing, running and ^operating said building, etc., without due caution, etc., as it was his duty, did unlawfully, etc., cause a large amount of smoke, etc., to pour from said stage upon the said Jackson, and by reason thereof death was caused; that said death was caused by the neglect of Davis by not providing for and not seeing that there was provided the, necessary apparatus, etc., for the protection of Jackson against death by fire and by his not using due caution, etc., for the safety of the life, etc., of the said Jackson; that the said Davis did negligently, feloniously and unlawfully kill and slay contrary to the statute.

The sixth count is substantially similar to the fifth count.

A motion to quash the indictment was made, and the motion was overruled as to the first four counts and sustained as to counts five and six.

John J. Healy, state's attorney, and E. C. Lindley, assistant state's attorney, for the people.

Levy Mayer, for defendant.

Kavanagh, J.:—

The defendant moves to quash severally the six counts of an indictment against him in each of which is charged the statutory crimes of manslaughter. The first four of these counts are bottomed upon a fire ordinance of the city of Chicago, which prescribes certain fire limits and regulates the kinds of buildings to be therein erected and the manner of their use. For convenience of reference the buildings within the fire limits are divided into classes, as follows:

Class I. In this class shall be included all buildings devoted to the sale, storage or manufacture of merchandise, and all stables over 500 square feet area.

Class II. This class shall embrace all buildings used as residences for three or more families, all hotels, all boarding or lodging houses occupied by twenty-five or more persons, and all office buildings.

Class III. This class shall embrace all buildings used as residences for one or two families or for less than twenty-five persons, and stables under 500 square feet area.

Classes IV and V. These shall include all buildings used as assembly halls for large gatherings of people, whether for purposes of worship, instruction or entertainment.

Buildings of Class IV embrace all buildings in which no movable scenery is used upon the stage thereof. Class V embraces all buildings in which movable scenery is used.

In this controversy we are only concerned with Classes IV and V. Concerning these two classes the ordinance further provides:

"There shall be over the stage of every building of Class V a flue pipe of sheet metal construction, extending not less than fifteen (15) feet above the highest part of the roof over the stage of said building—flue shall have an area of at least one-thirtieth of the total area of the stage. The dampers for flue shall be made of metal and opened by a close

circuit battery; a switch to be placed in the ticket office and one placed near the electrician's station on the stage, each to have a sign and these words printed on it: 'Move switch to left in case of fire to get smoke out of building' (sec. 184).

"In every building of Class V a system of automatic sprinklers to be supplied with water from a tank located not less than twenty feet above the highest part of roof of building. Sprinklers shall be placed above and below the stage; also in paint room, store room, property room and dressing rooms, if they are in or connected with Class V building, and not separated by approved double iron doors. Tank not to be connected to stand pipe and ladder systems, but to have separate pipe for filling from fire pump, and a 3-inch pipe extending from tank to outside of building, with Siamese connections for fire department use. The entire sprinkler equipment to be approved by the commissioner of buildings, fire marshal and the board of underwriters of Chicago (sec. 185).

"In buildings of Class V and also of Class IV where stationary scenery is used, there shall always be kept for use portable fire extinguishers or hand fire pumps, on and under the stage; in fly gallery and in rigging loft, also at least four (4) fire department axes, two twenty-five (25) feet hooks, two (2) fifteen feet hooks, two (2) ten (10) feet hooks, on each tier or floor of the stage, all subject to the approval of the fire marshal (sec. l88).

"Every portion of any building of Class IV and V devoted to the uses or accommodation of the public, also all outlets leading to the streets, and including the open courts and corridors, stairways and exits shall be well and properly lighted during every performance, and the same shall remain lighted until the entire audience has left the premises (sec. 192). •

"It shall be the duty of the owner, lessee or manager of every building of Classes IV and V during the performance of which programs are issued, to cause a diagram showing the exits of such building to be printed on such programs (sec. 186).

"Any person, firm, company or corporation who violates, disobeys, omits, neglects or refuses to comply with, or who resists or opposes the execution of any of the provisions of this ordinance, shall be subject to a fine of not less than $25 nor more than $200; and

every such person, firm, company or corporation shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue, and shall be subject to the penalty imposed by this section for each and every separate offense; and any builder or contractor who shall construct any building in violation of any of the provisions of this ordinance, and any architect designing or having charge of such building who shall permit it to be so constructed, shall be liable to the penalties provided and imposed by this section" (sec. 216).

The indictment then charges that there was a certain building and theatre known as the Iroquois Theatre used then and there for the purpose of producing theatrical performances, to which the public were invited and for which an admission was charged; and that there was in this theatre movable scenery, and that there was at the same time stationary scenery, thus bringing the building within Classes IV and V; that there were also a large number of curtains, draperies and borders and drops upon the stage of the theatre in close proximity to a great number of lights, thus creating a danger of fire.

The indictment charges that the building was owned and in the possession of the Iroquois Theatre Company, a corporation, and that the defendant, William J. Davis, was president of the company, and the managing director thereof, and also the general manager of the building and theatre for this company; again it is charged that he himself was the owner of the building; that he was in absolute management and control of the building and theatre with full power to open, close, manage, direct and do all other things with the said building as he then and there might determine; and that he for the corporation was producing and permitting to be produced on behalf of the corporation a certain play; and that on the 30th day of December, 1903, there was assembled to witness this play a great number of persons, to-wit: eighteen hundred in response to the invitation of said William J. Davis, and that there occurred a fire in this theatre which produced a large amount of smoke and heat and gas and flame; and that it was the duty of the said William J. Davis to use due caution and circumspection in equipping, providing and supplying the building with equipment and apparatus required by the ordinances of the city of Chicago.

The indictment further charges that the defendant failed in this duty in that he neglected

to provide, first, the flue pipe and its equipment, as above described; second, automatic sprinklers and their accessories, as called for in the ordinance, and third, the portable extinguishers or fire pumps and the other hand apparatus required by the ordinance.

The indictment goes on to declare that one Viva R. Jackson was in the audience so assembled and that by reason of this failure upon the part of the said William J. Davis, Viva R. Jackson was suffocated and burned to death, and that if "William J. Davis had fulfilled the requirements of the ordinance as above set forth, that the life of Viva R. Jackson would have been saved, the fire would have been extinguished and the gas and flame and the smoke would have escaped through the roof of said building.

The second, third and fourth counts of the indictment substantially follow the first count; the only material difference so far as the discussion of this question is concerned being in the relations borne by the defendant to the theatre and to the Iroquois Company.

He is charged in the second count in addition to the other relations set forth in the first count, with being the agent of the building and theatre. He is charged in the third count with being the owner and occupant of the building and theatre, and in the fourth count with managing generally the building of the Iroquois Theatre.

The fifth and sixth counts, called in argument for convenience of description common-law counts, charge the defendant with being the president, director and general manager of the Iroquois Theatre Company and general manager of the building; that he was in the possession, management and control of the building. It charged that Davis was producing a play in the theatre and that it was then and there his duty to use due caution and circumspection for the safety of the audience; that because of the large amount of movable scenery, drapery, lights and wire and of the changing of the same there was imminent danger of fire by reason of the likelihood of the scenery and materials being brought into contact with the lights and being ignited, all of which Davis knew or should have known; and that there was not then and there sufficient apparatus to extinguish or put out a fire, a failure which the defendant knew, and that he failed to furnish such apparatus, and by reason of such failure Viva R. Jackson was killed.

These last counts proceed solely upon the theory that it was the duty of the defendant to provide, irrespective of the ordinance, fire escapes and apparatus for the putting out of a fire. For the purposes of expediency in presentation we may dispose of the objections to these last two counts at this time.

The supreme court of Illinois in the case of *Landgraf v. Kuh*, 188 1ll. 484, says: "The duty of providing fire-escapes did not exist at common law, but has its origin and measure in the statute, requiring that such fire-escapes be placed upon buildings."

In *Arms v. Ayer*, 192 1ll. 601, our court says: "It is equally well settled that at common law there was no liability imposed upon the owner of a building to provide fire-escapes or other means of exit in case of fire, as a general rule, and that for this reason, as well as because of the penal character of the act, it must be strictly construed."

Outside of our own state there seems a practical uniformity of decision upon the question. Opinions to the same effect are found in *Pauley v. S. G. L. Co*., 131 N. Y. 90, 29 N. E. 999; *Huda v. American Glucose Co*., 154 N. Y. 474, 48 N. E. 897; *Schmalzreid v. White*, 97 Tenn. 36, 36 S. W. 393; *Jones v. Granite Mills*, 126 Mass. 84; *Keeley v. O'Conner*, 106 Pa. St. 321. .

In *Jones v. Granite Mills*, the court says: "The narrow question is presented whether a master is required by the common law so to construct the mill, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible. We know of no principle of law by which a person is liable in an action of tort for mere non-feasance by reason of his neglect to provide means to obviate or ameliorate the consequences of the act of God, or mere accident, or the negligence or misconduct of one for whose acts towards the party suffering he is not responsible. * * * It is no part of the contract of employment between master and servant so to construct a building or place where the servants work that all can escape in case of fire with safety, notwithstanding the panic and confusion attending such a catastrophe. No case has been cited where an employer has been held responsible for not providing such means of escape. The construction and arrangement of manufactories and places

where large numbers of persons are employed, may be proper subjects of legislative action, and such an act has been passed since this catastrophe."

It is true that at common law independent of statutory enactment, proprietors of places of amusement owe a duty to exercise reasonable care for the safety of those rightfully upon their premises, but under the above authorities that this foresight is required to extend to the erection of fire escapes and the provisions of apparatus for the extinguishment of fires, I do not think well established, and therefore the motion to quash counts five and six of the indictment are sustained.

The real difficulty presents itself when we come to consider the first four counts of the indictment.

Section 145 of the Criminal Code provides that: "Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: *Provided, always*, that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder."

The first objection made to these counts goes to the ordinance itself. It maintains that nothing contained in the sections above quoted imposes an act of duty upon any one concerned; that these sections are merely an affirmative expression of the intent and desire of the legislators, and go no further.

The defendant argues first: That where no duty is imposed by law or by contract no penalty follows its nonfulfillment. That there must be a legal obligation before there can arise a legal duty. In support of the general proposition there are many decisions. The general doctrine is well stated by Justice Field sitting in *nisi prius* in the case of V. 8. v. Knowles, reported in the 26th Federal cases, page 800. In that case a sailor fell from the mast of his ship into the ocean and the defendant, the master of the ship, could have rescued the sailor Swainson had he stopped his ship, could have lowered either of his

boats, but from his negligence and omission in this respect Swanson was drowned. The defendant was indicted for manslaughter, and Judge Field in charging the jury said:

"In the first place the duty omitted must be a plain duty by which I mean that it must be one that does not admit of any discussion as to its obligatory force; one upon which different minds must agree or will generally agree. Where doubt exists as to what conduct should be pursued in a particular case, and intelligent men differ as to the proper action to be had, the law does not impute guilt to any one, if, from omission to adopt one course instead of another, fatal consequences follow to others. The law does not enter into any consideration of the reasons governing the conduct of men in such cases to determine whether they are culpable or not.

"In the second place, the duty omitted must be one which the party is bound to perform by law or contract, and not one the performance of which depends simply upon his humanity or his sense of justice or propriety. In the absence of such obligations it is undoubtedly the moral duty of every person to extend to others assistance when in danger; to throw, for instance, a plank or rope to a drowning man, or make other efforts for his rescue; and if such efforts should be omitted by any one when they could be made without imperiling his own life, he would by his conduct draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society."

The court further says that in case of a person falling overboard from a ship at sea there is no question as to the duty of the commander. Nothing will excuse him for an omission to take any steps necessary to save a person overboard, provided they can be taken with a due regard for the safety of the ship and others remaining on board, and any neglect to make such effort would be criminal, and if followed by the loss of the person overboard, when he might have been saved, the commander would be guilty of manslaughter.

That the duty must be a specific, personal duty, there can be no doubt. It is so laid down in all the books. Wharton's Criminal Law, sec. 110; *Bex v. Gray*, 4 F. & F. 1098; *Regina v. Pocock*, 5 Cox, C. C. 172; *U. S. v. Eaton*, 144 U. S. 677; *Belk v. The People*, 125 1ll.

584; Commonwealth v. Watson, 97 Mass. 562; *Hitchcock v. Chicago*, 72 1ll. App. 196; *Ex parte Railway*, 18 Lower Canada Jurist, 141; *City of Chicago v. Rumpf*, 45 1ll. 90.

Wharton says: "A light-house keeper permits his light to go out and a vessel is consequently wrecked. Is he penally responsible? Certainly so, if he is specially charged with the office of light-house keeper at that point, and if this is the kind of light on which seamen depend for guidance. But supposing a number of persons volunteer in order to warn vessels to keep lights in their windows, the omission of one of these persons to light his windows from which serious mischief ensues, would not be indictable. The same distinction may be applied to parties employed to give fire alarms."

The best illustration perhaps from a court of last resort is contained in the case of *Anderson v. State*, 27 Tex. App. 177, 11 S. W. 33. The defendants in that case were brakemen and were riding upon the engine when one Sing Morgan was struck and killed, and it was charged that if they had used a degree of care and caution in regard to giving signals or keeping lookout which an ordinarily prudent person would have used under like circumstances, the accident would not have happened.

The court says: "These appellants were brakemen; they had no control whatever of the engine and tender. They were riding upon the same for the purpose merely of performing their specific duties as brakemen, which duties had no connection with or relation to the homicide. * * * As we understand both the common law and the statute, there can be no criminal negligence or carelessness by omission to act unless it was the special duty of the party to perform the act omitted."

So in the case of *United States v. Mitchell*, 58 Fed. 993, where the defendant was indicted for refusing to answer questions put to him by the census supervisor, the court held that there was no provision in the act requiring corporations or their officers to answer the questions, and that therefore the defendant was not liable.

In *Thomas v. The People*, 2 Colo. App." 513, 31 Pac. 349, the defendant was indicted because of the caving in of an excavation in the street by reason of which accident four men were killed.

"To fasten any criminal responsibility upon Thomas (the foreman) it is indispensable to demonstrate that he omitted to do something which he ought to have done or that he did that which he should not have committed in such a grossly negligent way that the law would impute to him the criminal intent which is the essential ingredient of all crime. This cannot be done. * * *

"It was not shown either that he was negligent in the direction of the construction of the ditch nor that anything which he did with reference to that construction was negligently done and that from such negligence the accident resulted. * * * He was simply a gang boss, entrusted with the naked execution of his principal's orders and without any discretion with reference to any of the particulars of that execution. * * * "When the defendant is accused because of his neglect to do a particular thing the duty must be a - plain one requiring no discussion to establish its obligatory force and concerning it there must be a general consensus of opinion. It is likewise essential that the party charged must be obligated to do what he omitted to perform by the terms of some contract by which he is bound, or the law must have cast on him the obligation of performance."

To the same effect are the following 11linois cases: Mackey v. Milling Co., 210 1ll. 115 j Schueler v. Mueller, 193 1ll. 402; R. E. Co. v. Clausen, 173 1ll. 100.

From these general principles the defendant proceeds to his more direct contention that before a person can be held liable for the violation of such an ordinance he must be specifically designated in the law itself as one obligated to fulfil its requirements. To illustrate: The sections of the ordinance under consideration containing the requirements which are the subject of complaint in this indictment provide "there shall be on the stage of every building" certain appliances and "in every building of Class V a system of automatic sprinklers * * * shall be placed above and below the stage," and again "in buildings of Class V and also IV there shall always be kept for use fire extinguishers, etc.," but who shall supply the automatic sprinklers or other equipment is not set forth in the ordinance, therefore it is contended that the duty not being cast upon the defendant and he being in no manner obligated in terms to provide these appliances, he cannot be made liable for their absence.

In contradistinction to the sections quoted, it is further provided that "it shall be the duty of the owner, lessee or manager * * * to cause a diagram of such building to be printed on the programs." Here it is pointed out the owner, lessee or manager is named in the section itself, a precaution which is not taken in the sections before cited.

In other words, defendant's contention is, as expressed by Judge Kohlsaat in the case of *McCulloch v. Ayer*, 96 Fed. 178: "That even if it was the intention of the legislature to impose a duty to construct, irrespective of notice by the inspector, the person upon whom it was intended to impose such duty and the resulting liabilities, was not designated in the statute with certainty and that this court should not inflict such liabilities upon any one where the duty may only be determined by inference that such person was the one "intended by the legislature to be charged with the duty."

To aid the defendant in his contention he brings citations from many authorities. Wharton on Homicide, sections 72 and 73, lays down the general proposition that "When a responsibility exclusively imposed upon the defendant is such that an omission in its performance is in the usual course of events casually followed by an injury to another person or to the state, then the defendant is indictable for such an omission. But the "responsibility must be one exclusively assumed by the defendant. The omission to perform acts of mercy even though death to another result from such omission is not within the rule."

So far no decision of a court of final resort of this country has been referred to in this opinion in which the doctrine for which the defendant contends has been applied. But in the case of *Maker v. The Slater Mill & Power Co*., 15 Rhode Island, 112, 23 Atl. 63, the identical question here under discussion comes frankly under the observation of the court; and, as that case is directly in point and of considerable importance, I deem it advisable to consider it at length.

First, it may be necessary to understand the course of judicial decision which had preceded its determination.

In Rhode Island the history of judicial decision upon this question is properly traceable

from the case of *Aldrich v. Howard*, reported in the 7th Rhode Island, page 199, and decided in 1862. This case, is cited in all the subsequent opinions of the court. The plaintiff there in an action on the case relied upon an act of the general assembly, passed in 1843, prescribing certain fire limits and prohibiting the erection or maintenance of buildings of a certain size within such limits unless they were composed of non-combustible material.

The declaration alleged that the defendant erected within the forbidden district a large wooden building prohibited by the law to be erected therein, and which structure was within two feet of the plaintiff's dwelling, thereby putting plaintiff's property in danger of destruction by fire. This it was charged was all done in violation of the statute and the plaintiff asked damages. The law upon which he relied provided:

"Section 1. After the passing of this act no building of any kind whatever which shall be more than eighteen feet high from the ground to the highest point of the roof thereof shall be erected within the limits hereinafter described in the city of Providence, unless such building be constructed of such material and be situated in such manner as hereinafter described." The act also declares that every person who shall erect, construct, add to or continue to use any such building shall be punished, etc.

The court in its decision construes the act as imposing upon any one erecting a building within the fire limits, a duty in regard to adjoining owners and in regard to the public—the duly of building in the manner and of the materials prescribed by the act. The prohibition is imperative upon him if he builds at all to build as the act prescribed and in no other manner; and quite as effectually imposes upon him the legal duty of so building as if the statute had expressed the duty in affirmative form.

In answer to the objection that the penalties set forth in the statute are exclusive of all other penalty the court says:

"We have no doubt that when the statute makes the doing or omitting of any act illegal and subjects the offending parties to penalties for the public wrong only, a party specially injured by the illegal act or omission has the right of suing therefor at common law."

In 1878 the act upon which this last decision was based was amended in many material particulars and thereafter a conflagration occurred in a building owned by the Slater Milling & Power Company, in which conflagration a great many persons were injured and many suits were brought.

The first of these suits reported is the case of *Grant v. The Power Co*., decided in 1884, contained in the 14th Rhode Island, page 380. In this case the court advances to a question nearer to the one at bar because its underlying facts are of closer kindred.

The declaration set forth that the defendant, although subject to their provisions, neglected to comply with the public laws of Rhode Island, chapter 1688, and in consequence of such neglect the plaintiff was compelled by a conflagration in the building of the defendant to leap from a window in the upper story in order to save his life; that his leg was fractured in the leap and amputation became necessary. The defendant demurred generally.

Section 23 of the new statute provided: "Every building already built or hereafter to be erected in which twenty-five or more operatives are employed in any of the stories above the second story shall be provided with proper and sufficient, strong and durable, metallic fire escapes or stairways constructed as required by this act, unless exempted therefrom, by the inspector of buildings, which shall be kept in good repair by the owner of such building, and no person shall at any time place any encumbrance upon such fire escapes."

The court points out that the present statute provided not only a punishment by fine for its violation but also, unlike the former law, ordained that the Supreme Court might now restrain by injunction any violation of the act, and the court in deciding the case, says:

"If the remedy by fine were the only remedy given, the inference would be, as decided in *Aldrich v. Howard*, that it was intended only as punishment for the public offense and the remedy by action on the case in favor of a person specially injured, if such remedy were proper, could not be excluded. But in this respect the case at bar differs from *Aldrich v. Howard*, for in the case at bar there is the remedy by suit in equity which is not purely a

public remedy."

The court also concludes that a large discretion was left by the new act to the public inspector of buildings and that "evidently the inspector of buildings was mainly relied upon to carry it into effect. The remedy by penal prosecution and the remedy in equity are clearly his only weapons."

At the following term the case of *Maker v. The Slater Mill & Power Co., supra*, was decided and concerned itself with the same law and the same catastrophe with this addition, that the statutes of Rhode Island, chapter 204, provided "That whenever any person shall suffer any injury to his person, reputation or estate by the commission of any crime, or offense, he may recover his damages for such injuries."

Section 22 of this chapter described, however, that such action should not be commenced until after the complaint had been made to some magistrate and process issued, and the case was decided against the plaintiff for the reason that no such complaint had ever been made. The court in this case was called upon by counsel to end a long course of litigation by passing upon the validity of the ordinance itself but it declined to do so, and in declining suggested the questions which would arise in such a consideration. The question here under consideration was not then suggested by the court as -being involved. It will be observed that up to this time the supreme court of Rhode Island had determined that in case of the violation of these fire laws, first, when the statute prescribed a public penalty alone, a private action resulted to one damaged; second, when the statute provided a public and a private remedy, the remedies set forth in the statute were exclusive; third, that there could be no civil proceeding under section 21 of chapter 204, unless a complaint had first been formally laid with some magistrate and it had gone no further.

But in the case of *Maker v. The Slater Mill & Power Co., supra*, the plaintiff put himself within the provisions of chapter 204, and the question of the liability of the defendant under the fire statute came squarely before the court for determination, namely: the question whether "the defendant's omission to provide its buildings with fire escapes or

stairways as required by chapter 688, is a crime or offense."

The facts were the same as in each of the two preceding cases. The court set forth upon the inquiry thus:

"But upon whom does the duty rest? When is it to be performed and what facts are necessary to constitute a violation of the duty? The plaintiff claims that the reasonable construction of the act puts the duty upon the owner. He argues that as there is an alternative between fire escapes or stairways, the duty must be upon one and the same person, and that person the owner, because only he could provide stairways.

""We do not see that this is necessarily so. * * * The plaintiff further urges that the defendant in this case is liable because it is both the owner and the party in control." Nor does this view find favor with the court. The court argues that it is more reasonable to assume that the act indicates that the requirement is to be discretionary with the inspector,, dependent perhaps upon his judgment of danger in a particular case, or of other equivalent provisions for safety. It also indicates that the time for requiring fire escapes is when the inspector requires them.

The decision of the New York court of appeals in *Willy v. Mulledy*, 78 N. Y. 310, to the effect that the defendant in that case was not permitted to wait until he should be directed to provide a fire escape, and that he is bound to do it of his own accord in such a way as the commissioners should direct and approve, and that it was for the defendant to procure the direction and approval of the commissioners, was cited to the court, and the Rhode Island judges meet the citation by saying that under the law in that case there was no discretion in the commissioners and that there was no power of exemption, and that the owner was bound to provide fire escapes in any event. The duties of the commissioners were simply to direct and approve the kind to be used.

The court concludes: "But upon this fundamental point we think it sufficiently appears that the provisions in regard to fire escapes and stairways are too indefinite and uncertain to impose a criminal liability upon an owner of a building for not providing one or the other before the inspector required it."

Study of the decision fails to disclose whether it was the opinion of the court that if the inspector had in fact required the erection of fire escapes the defendant would be liable; and whether as a matter of fact they hold the declaration bad because of such lack of requirement by the inspector, or whether they hold that the penalty of the statute is actually non-enforceable because the act did not specifically impose the duty upon the owner, there are no decisions referred to by the court in its opinion, nor are there any cited in the argument of counsel.

But in the case of *Beehler v. Daniels*, 18 R. I. 563, 29 At1. 6, the supreme court of Rhode Island placed an interpretation upon that decision and say plainly that in the Maker case, the terms of the act were too indefinite and uncertain to impose a criminal liability for non-compliance with the statute, and hence no action could be maintained for such alleged offense.

In addition to the two Rhode Island eases, Judge Kohlsaat in the case of *McCulloch v. Ayer, supra*, Judge Green in *The People v. Davis*,[1] and Judge Landis in a recent case[2] have had under consideration the identical ordinance with which we are now concerned, and each has decided that because of its indefiniteness and uncertainty the ordinance imposed no duty, and its violation involved no civil liability.

It must be conceded that to sustain the indictment in this case it will be necessary for the court to rule directly against these last authorities, and, while the Maker case upon which the others seem to be more or less directly founded, is indecisive, and, as we have seen, almost incoherent upon this question, yet, the formidable array of opinions which follow that decision lends to it a weight which otherwise it might not possess.

Also the case of the United States v. Mitchell, 58 Fed. 993, must be added to this list which directly sustains the contention of the defendant in this case. If, however, the subtlety of criticism employed in this last case were to be adopted generally as a canon of construction for city ordinances and oven for the statutes, it would invalidate a large number of our existing laws.

If then the doctrine announced in the Maker case and those cases which depend on it

is found to be the law governing the case at bar, the ordinance under consideration possesses no effectiveness or force and is without life or substantial value.

1 See I Ill. C. C. 217, supra— Ed.

2 Hunter v. Iroquois Theatre Co., U. S. Clr. Ct. N. D. of Ill. (unreported).—Ed.

Such a conclusion, however, should not be drawn if another reasonable determination can be arrived at which will uphold the ordinance. It is the duty of courts to uphold legislative acts whenever possible rather than to overthrow them. While penal statutes must be strictly construed so as not to include persons or acts not clearly within their terms, yet when the question arises as to whether these acts are to retain life and validity, another principle of law intervenes. *C. B. & Q. v. Jones*, 149 1ll. 361; *Hankins v. People*, 106 1ll. 628; chapter 131, Hurd's Revised Statutes, rule 1.

Even larger consideration in this regard should be given municipal ordinances than to acts of more exalted deliberative bodies. The former laws are in great part framed by persons unskilled in the law and rarely by persons skilled in the preparation of statutes. And yet this class of legislation bears with the greatest directness upon the health, the peace, the comfort and the safety of the inhabitants of municipalities. From the exigencies of the situation these laws will often of necessity be loosely drawn and at times their meaning will be imperfectly expressed. So far from burdening them with hard and restrictive theories of construction, our own court in the case of *Arms v. Ayer*, 192 1ll. 601, thus expresses the rule which obtains in 11linois and which should prevail I think everywhere.

"It must be admitted that the act is loosely drawn," the court says, "but the rule that it is the duty of courts to so construe statutes as to uphold their constitutionality and validity if it can be reasonably done, is so well established that a citation of authorities is needless. In other words, if the proper construction of a statute is doubtful, courts must resolve the doubt in favor of the validity of the law. Statutes and city ordinances providing for fire escapes are usually somewhat general in their enactments, and necessarily so, for the reason that it is impossible for the legislature to describe in detail how many fire escapes

shall be provided, how they shall be constructed, and where they shall be located in order , to serve the purpose of protecting the lives of occupants in view of the varied location, construction and surroundings of buildings; and hence, so far as we have been able to ascertain, acts similar to the first section of this statute have been sustained in other states though perhaps the question here raised has never been directly presented."

It is true here that the sections under consideration fail to designate who shall provide the appliances for the theatre, but it must be remembered that the defendant is not charged with any default in the original construction or arrangement of the building in question. It is charged that after the building had been thus imperfectly erected and equipped that he with knowledge of these conditions took it in hand and used it as a theatre. " Any person, firm, company or corporation who violates, disobeys, omits, neglects or refuses to comply with * * * shall be subject to a fine," and again "Any builder or contractor who shall construct any building in violation of the provisions of the ordinance shall be liable." How can any person other than the builder or contractor be guilty?

In the case of the *United States v. Van Schaick*, 134 Fed. 592, heard on demurrer in the United States district court for the southern district of New York (otherwise known as the Slocum eases) it was sought to hold Van Schaick, the master of a vessel, for the loss of life consequent on the destruction of the boat, and the basis of the charge against him consisted among other derelictions in his going to sea with his vessel while the same was insufficiently equipped with life preservers and while it was equipped with life preservers which were rotten, insecure and defective. The initial duty of equipping the vessel with life preservers was placed upon the owners by the United States statutes and the master of the vessel was nowhere specifically designated by the law as a person upon whom this duty in any way devolved. Judge Thomas in an able and exhaustive opinion, among other things, says:

"While it is not the duty of the master to equip the vessel with life preservers, and while he may not be chargeable, in the first instance, with the duty of making what would be regarded as a proper inspection thereof, necessary to discover the presence or absence

of the qualities and material required by law, yet it is the duty of the master of a vessel, aboard and in command, to use ordinary observation and inquiry and if thereby, or if from report to him, he has notice of defects either in his vessel or equipment, some diligence is required on his part, tending to the restoration of the defective place or appliance. At least it would be his duty to report the condition, and make requisition for repairs or sound facilities.

"Assume that no life preservers were provided. Could the master, with actual or constructive knowledge, navigate the vessel with impunity? If he knows of some total omission of requisite equipment, itself perilous to human life may he deliberately continue to navigate its vessel, wholly indifferent to any catastrophe that may result therefrom? It is thought that such attitude on the part of the master would not be tolerated. And so, if the master blindly uses what he is proffered, however bad or destructive it may be, or constructively or actually knows of defects and does nothing, he is certainly not performing the duty of a master. It is not the duty of the master to provide the hull of the ship, yet if he navigate his vessel without any care as to the condition of the hull, or with a hole in the bottom, of which he has knowledge, actual or constructive, and she sinks, and death thereby ensues, he would, it is thought, fall within the punishment of section 5344. Much more evident would be his guilt if he caused the hole 'to be and remain' in the vessel. In other words, if he suffered and permitted it to be and remain in such vessel, knowing or enabled to know in the use of ordinary observation of its existence and danger, he would be guilty; and he would likewise be guilty if he caused the defective thing to be on the vessel and to remain thereon. The master's duty requires him to exercise some care to discover both the soundness and safety of the hull and equipment."

This reasoning seems unanswerable. Applying it to the present case and testing the situation now involved, what results? Conceding for the moment that because of the indefiniteness of the ordinance no one was charged with the duty of supplying the equipment and appliances therein described, and that no prosecution could be had for the mere ownership or inactive control of the building, what was the situation in which the defendant found himself before he began using the theater?

Here was a building constructed and arranged in violation of the law because the ordinance provided that "No wall, structure, building, or part thereof, will hereafter be built, constructed, altered or repaired within the fire limits of the city of Chicago, except in conformity to the provisions of this ordinance," and this building was constructed admittedly in violation of the terms of the ordinance. Also someone had offended against the law in its erection because the penalty clause provided that "any builder or contractor who shall construct any building in violation of the provisions of this ordinance shall be liable."

There, then, was a building erected in violation of the law which the defendant desired to use for the purpose of an assembly hall. Granting that there was no obligation upon him either as agent, owner, lessee or manager to arrange the theatre in conformity with the ordinance, had he no further duty in the premises? It seems to me there was a plain one, to-wit: The obligation to refrain from using it as a theatre, and if he insisted upon so using it, knowing of its unlawfully defective and dangerous condition, did he not come within the direct inhibition of the penalty clause of the ordinance which enacted, "Any person, firm, company or corporation who violates, disobeys, omits, neglects or refuses to comply with the provisions of the ordinance shall be subject to a fine?" But. pursuing the argument further, may it be fairly said that the ordinance in question is defective in its provisions?

Classes IV. and V. are thus defined in the ordinance: "These shall include all buildings used as assembly halls, etc." Suppose we simply transpose the language of the ensuing paragraph from "there shall be over the stage of every building of Class V. a flue pipe, etc," to "there shall be no building used as an assembly hall unless there be over the stage thereof a flue pipe, etc.," would it be insisted that the indictment here did not charge an offense: that he who used the building without the flue pipe did not disobey the ordinance. The mere change from the affirmative form to the negative form of expression would do no violence to the rules of interpretation. *Aldrich v. Howard, supra*. And yet if this is allowed the ordinance stands with its indent clearly expressed and the obligations plainly denned, a valid, enforceable law. As we have seen, it is the duty of the court to favor a construction which shall uphold the law rather than one which will take from the law its force and efficacy, and are we not then after considering all parts of the ordinance

together, obliged to the conclusion that all persons were forbidden to use the building in question without complying with the requirements of the fire ordinance under pain of the punishments therein devised. And so it seems to me clearly that the weight of reason is in support of the indictment so far as this question is concerned. However, if even this reasoning be not well founded, or if it be overborne by the weight of authority brought against it, still I am convinced that the objection to the indictment is not well taken.

On two other occasions a similar question has been before our own supreme court. The first of these instances is recorded in *Landgraf v. Kuh*, 188 1ll. 484.

The case of *Landgraf v. Kuh*, was an action of trespass on the case brought against the defendants because of their failure to provide a certain building, owned by them and situated in the city of Chicago, where the deceased was engaged in work, with sufficient and proper means of egress, ladders and fire escapes, by reason of which the plaintiff's intestate was killed. There was in force at the time an act relating to fire escapes for buildings wherein it was provided, section 1, '' that all buildings in this state which are four or more stories in height, except such as are used for private residences exclusively, but including flats and apartment buildings, shall be provided with one or more metallic ladder or stair fire escapes * * * the number, location, material and construction of such escapes to be subject to the approval of the * * * board of County commissioners," etc.

Section 2 of the act provided that "all buildings of the number of stories and used for the purposes set forth in section 1 of this act which shall be hereafter erected in this state, shall upon or before their completion each be provided with fire escapes."

Section 3 provided for giving of notice by the authorities to "the owner or owners, trustees, lessee, or occupant of any building," etc., not provided with such fire escapes, commanding, "such owners, trustees, lessee or occupant of either of them, to place or cause to be placed upon such building, such fire escape or escapes" within a certain time.

Section 4 provided that any of the persons so served with notice who shall not within thirty days comply with the notice shall be subject to a fine.

It will be observed that neither section 1 nor any other section of the act in terms put a primary duty upon either owner, trustees, lessee or occupant to provide fire escapes. And it was urged there as it is claimed now, such duty could not arise from mere inference; and "the statutes of this state impose no duty upon the owner of a building to provide fire escapes. "Even conceding" the defendant said, "(which we do not) that the building was a building for manufacturing purposes then the statute does not impose a duty upon the owner of the fee but upon the owner of the factory." But the Supreme Court decided against all these contentions. It held that the owner of the fee is liable because of the inference arising from the fact that these appliances were to be put on when the building was completed. The court also intimates that any person to whom it is provided in the law notice may be given is liable without the notice, for the court says: "The fact that the buildings are to be provided with fire escapes 'upon or before their completion' indicates that the duty of providing such fire escapes devolves upon the owners of the buildings. The fire escapes are required to be a part of the construction of the building itself; moreover the notice commanding such fire escapes to be placed upon the building is required by section 3 to be given to the owners, trustees, lessee or occupant, or either of them.' The injunction being in the alternative the notice may be given to the one as well as to the other and therefore to the owner as well as to the lessee or occupant. We are therefore of the opinion that the appellees were not relieved from liability in regard to the placing of fire escapes upon their building because the fourth floor of the premises, where appellant's intestate was at work at the time of her death was in the possession and under the control of the tenants or appellees instead of being directly in the possession of appellees themselves.

While in direct terms the supreme court in that case does not determine the question herein presented, yet this is accomplished by necessary implication, for the liability of the appellees under the law is sustained, nor is the liability limited to the owner of the fee by the decision, but in the opinion it is clearly foreshadowed that this liability extends to "the owner as-well as the lessee or occupant."

When we come to consider this case in connection with that of *Arms v. Ayer*, 192 1ll. 601, it seems to me that all question disappears as to what the law is now on that point in this

jurisdiction. The latter case was an action by an administrator for the death of her intestate resulting from injuries sustained, it was alleged, through the violation of the fire escape act, approved May 27, 1897.

That act was quite as impersonal in its creation of obligations as is the present ordinance. Section 1 of the act provided, that within three months next after the passage of this act all buildings, etc., shall be provided with metallic fire escapes "provided that all buildings more than two stories in height used for manufacturing purposes * * * shall' have at least one ladder fire escape for every fifty persons and one such automatic metallic escape or other device for every twenty-five persons," etc.

It will be observed that this section contains no reference to who shall provide this apparatus or be responsible for buildings yet to be erected. Section 4 provides that it shall be the duty of said inspector of factories to serve a written notice upon the owner or owner's trustees or lessees or occupant of any building commanding him to comply with this law. Section 5 provides that in case such person so served shall not within thirty days thereafter comply with its demand he shall be punished. This law was practically, it will be noticed, the same as the ordinance now under examination in all the features which are being criticized. The declaration was in ten counts, in four of which the statutory notice was alleged to have been given the defendants, while in the other six that allegation was wanting. The defendants were charged as owners, lessees, and with being in possession and control of the building. A demurrer was sustained to each count in the court below, and the upper court was called to examine the sufficiency of each count.

The objection being urged to the ordinance in the case at bar was then as strenuously urged to the statute. "Here then," says the appellee Ayer, upon page 51 of his argument, "is an act which imposes a new obligation, *but fails to point out with certainty on whom the obligation rests* or to prescribe the rule by which in a given case *he* is to be ascertained." The italics are copied.

The appellant began his argument with the statement, "The principal question and perhaps the only question which your honors will consider as of any moment is, whether

or not the statute in question is void because the first section does not name specifically on whom is placed the duty of putting fire escapes on buildings over four stories in height."

The appellees argued that the statute must be strictly construed. The case of *Beehler v. Daniels*, 18 Rhode Island, 563, 29 Atl. 6, evidently had not come under their observation so they construed the Maker case as deciding that the liability depended upon the service of the statutory notice. They say, "even though it is assumed that the law is capable of enforcement, no one can be held liable for non-compliance therewith, until the inspector of factories has served the notice required by the act." And they cite in support of the proposition, *Maker v. Slater, supra*, *Grant v. Slater, supra*, *McCulloch v. Ayer, supra*, *Schott v. Harvey*, 105 Pa. 222, and the other Pennsylvania cases.

The court says in its opinion: "It is said that 'Even though it is assumed that the law is capable of enforcement, no one can be held liable for the non-performance therewith, until the inspector of factories has served the notice required by the act.' With this contention we cannot agree. It is true the first and second sections do not say who shall provide the fire escape, but we thing the fair and reasonable intendment is that the owner or owners shall perform that duty and we so held in construing the fire escape act of 1885, the provisions of which in this regard are the same as the act under consideration in the recent case of *Landgraf v. Kuh*, 188 1ll. 484. The language of section 6, 'who shall be required to place one or more fire escapes upon any building or buildings under the provisions of this act,' does not mean, who shall be required by the inspector of factories, but who shall be required by the act. The duty to provide fire escapes upon buildings described in section 1 does not depend upon the performance of any duty by the inspector of factories." The court then proceeds to quote with approval from the case of *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153, and from *Willy v. Mulledy*, 78 N. Y. 310, two cases directly hostile to the position taken by the defendant in this case.

The court then continues, and it seems to me that now its language becomes conclusive upon the question before us: " When the act went into effect," it says, " it was the duty of every owner, trustee, lessee or occupant in the actual control of any building within the description mentioned in the first section in obedience to section 6, to file in the office of

the inspector of factories a written application for a permit to erect or construct fire escapes, and if these defendants failed to do so, as alleged in the several counts of the declaration, and injury resulted from their failure to place the required fire escapes in the building described, they incurred a liability to the person injured and cannot escape that liability merely because they may not have been designated by the inspector of factories as the persons upon whom the duty was imposed to comply with the law. In other words, the law imposed upon them the performance of the duty and the action of the inspector of factories * * * is only made necessary in case they failed to do that duty. It has been held that the term 'owner' in similar statutes does not mean the owner of the fee but may mean the lessee in actual possession and control of the building; but we are not aware that any court has held such laws invalid because of their failure to definitely designate who should be liable. We think it clear that under this statute the owner is primarily liable for a failure to perform this duty." Thus it must be considered that the supreme court of our own state, in passing upon a statute strikingly similar to the one set forth in this indictment holds that the mere omission to specifically designate the person upon whom the duty of furnishing the appliances and requirements devolves, does not render the statute inoperative but that under the statute then in question that duty devolved at once upon the owner and without the notice provided for in the statute, and that a civil liability for failure to comply extended to the lessee, trustee or occupants in the actual control of any building within the description mentioned in the first section of the statute.

This conclusion finds substantial support in the following decisions outside of our own state. *Willy v. Mulledy*, 78 N. Y. 310; *Rose v. King*, 49 Ohio St. 213, 30 K. E. 267; *McRickard v. Flint*, 114 N. Y. 222, 21 N. B. 153; *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068; *Hayes v. Michigan Cent. R. R.*, Ill U. 3. 228.

It is next objected, and many authorities are brought to the attention of the court on the proposition that the ordinance is invalid because it requires the approval of a nonofficial body. It is provided in one section of the ordinance that "The entire sprinkler equipment to be approved by the commissioner of buildings, fire marshal, and the board of underwriters of Chicago." There can be no doubt but what the requirement in regard to the board of underwriters is void, and it is claimed that this provision affects the whole

ordinance and renders it void.

Also it has been often decided that "where an ordinance is entire, and each part has a general influence over the rest, and one part of it is void, the entire ordinance is void. The void part of the ordinance makes the whole ordinance void, if the void and valid parts are so connected as to be essential to each other." *Cicero Lumber Co. v. Town of Cicero*, 176 1ll. 21.

But if the invalid part can be separated from the other provisions of the law and the purpose and intent of the legislature remains plain and effective, then the invalid part may be altogether disregarded. *C. B. & Q. R. R. v. Jones, supra*. It does not seem to me that this provision requiring the approval of the board of underwriters is at all necessary to the meaning or effectiveness of the ordinance and that it may be omitted without impairing in any degree the purpose or usefulness of the law. Therefore, this provision may be disregarded and the law considered as if this requirement had never been, leaving only the sound parts of the statute intact.

It is elementary that even if an injury may follow the commission of a wrongful act, still if the wrong be not the direct and proximate cause of the injury itself, that no liability results to the wrong-doer. *Causa proxima non remota spectatur*, is the maxim. And in this case it is strenuously argued that the fire and not the lack of saving appliances, was the direct and proximate cause of the death of Viva R. Jackson.

Many authorities are cited in support of that contention. Thus in a Kentucky case a tenant was sued for removing water pipes from the leased building, it being charged that because of such removal it became impossible to extinguish a fire which afterwards occurred. But the court said:

"It seems to us that to make the appellees liable for the destruction of this building there must be some proof showing that the act of disconnecting and removing the pipes was the cause of the destruction of the building: and as this removal had been done some time and no fire had happened, and in the absence of proof that if the pipes had been in perfect order, \ the engine and pumps would have worked * * * and that all that having

been done it would of necessity have saved the building, the damage is entirely too problematical and speculative to permit a recovery. The acts of negligence complained of are too remote." *Stone v. Boston & A. R. Co*., 171 Mass. 536, 51 N. E. 1; *Franke v. Head*, 19 Ky. L. Rep. 1128, 42 S. W. 913.

In *Stone v. Boston R. R*., a teamster not connected with the defendant dropped a lighted match underneath the defendant's freight platform. The platform was loaded with oil which, contrary to law, had been standing there for more than forty-eight hours. In the conflagration which ensued plaintiff's buildings situated across the way were destroyed. It was held in an action for the loss of the buildings that the fire and not the illegal storing of the oil on the defendant's platform was the proximate cause of the destruction of plaintiff's buildings. And in deciding the cause the court says:

"The rule is very often stated that in law the proximate and not the remote cause is to be regarded; and, in applying this rule it is sometimes said that the law will not look back from the injurious consequences beyond the last sufficient cause. * * * It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrong doer. Many instances to the contrary have occurred and these are usually cases where it has been found that it was the duty of the original wrong-doer to anticipate and provide against such intervention because such intervention was a thing likely to happen in the ordinary course of events."

These two cases out of the multitude offered sufficiently illustrate the claim of the defendant, but it seems to me that the supreme court of this state has in *Landgraf v. Kuh, supra*, determined also the question. The court says:

"It is further claimed on the part of appellees, that the absence of a fire-escape, if it was a cause of the injury which resulted in the death of the appellant's deceased, was only the remote, and not the proximate cause of such injury. It is said, that appellant cannot fasten any liability upon the appellees, unless she not only shows omission by appellees of a duty, but unless she also shows that such omission of duty was the direct and proximate cause of the accident complained of. It is often difficult to determine whether

the cause of an injury is the remote or the proximate cause thereof. Where, in the absence of a fire-escape, a person in a burning building is destroyed by the flames it is unquestionably true that the fire is the proximate cause of the death, but yet it cannot be said that the absence of the fire-escape is not, in the view of the law, a proximate cause, if the presence of such fire-escape would have prevented the death. So, if a person in a burning building where there is no fire-escape or non-accessible, is forced to seek escape from the building by descent from a ladder or otherwise, it may be a question whether the defective condition of the ladder, or its unskillful use, is, in such a case, so far the proximate cause of the accident as to make the absence of the fire-escape merely a remote cause. Certainly, the effort to escape in some other mode than by a fire-escape might be directly caused by the absence of such fire-escape. But we do not wish to be understood as expressing any opinion upon the question, whether the obstruction of the double window communicating with the fire-escape, or an accident in connection with the use of the fireman's ladder, was the proximate cause of the death of appellant's intestate, or not. What we decide is, that the question, what is the proximate cause of an injury, is ordinarily a question to be determined by the jury under the instructions of the court. In *Fent v. Toledo, Peoria & Warsaw Railway Co*., 59 1ll. 349, we said (p. 362): 'We understand * * * the position of counsel for appellee to be that, if fire is communicated from a locomotive to the house of A. and thence to the house of B. it is a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate cause of the injury to B.; and the railway company is, for this reason alone, to be held not responsible. This rule we repudiate as in the teeth of almost numberless decisions, and as unsupported by that reason which is the life of the law. We hold, on the contrary, * * * that it is in each case a question of fact, to be determined by the jury under the instructions of the court. * * * If the fire is the consequence of the carelessness of the railway company, and the question of remote or proximate cause is raised, the jury should be instructed that, so far as the case turns upon that issue the company is to be held responsible, if the loss is a natural consequence of its alleged carelessness which might have been foreseen by any reasonable person, but is not to be held responsible for injuries which could not have been foreseen or expected as the results of its negligence or misconduct.' In *Milwaukee, etc. Railway Co. v. Kellogg*, 94 U. S. 474, it was said: 'The

true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it.' (*Ford v. Illinois Refrigerating Co*., 40 1ll. App. 222)."

The defendant is accused of involuntary manslaughter, that is, the killing of a human being, in the commission of an unlawful act, or a lawful act done without due caution or circumspection. The crime is further denned by the statute as the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such consequences in an unlawful manner.

Now, it must be conceded at once that the mere violation of a city ordinance or even of a statute notwithstanding death ensues during the violation and in connection therewith, does not of itself render the law-breaker liable to punishment for manslaughter.

In *Commonwealth v. Adams*, 114 Mass. 323, one who while violating a city ordinance against fast driving, drives over another, is not guilty of criminal assault and battery merely because of his violation of the ordinance.

In *Potter v. State*, 162 Ind. 213, 70 N. E. 129, the defendant at the time of the homicide was unlawfully carrying a pistol in violation of the statute. During a friendly scuffle the pistol was accidentally discharged and a person was killed, and the court says that, "It is undoubtedly true as a general rule of law that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily result or flow from such unlawful act. But before this principle of law can have any application under the facts in the case at bar, it must appear that the homicide was the necessary or natural result of the act of appellant in carrying the revolver in violation .of the statute. * * * The mere fact that the accused was unlawfully carrying the weapon in question at the time it was accidentally discharged is not under the circumstances a material element

he ease, for it is manifest that such unlawful act did not during the scuffle between the parties render the pistol any more liable to be discharged than though the carrying thereof

had been lawful."

Again, the court says in its opinion: "It is not charged in the indictment in this case that the homicide resulted from the reckless, careless or negligent manner in which appellant was using or handling the pistol at the time it was discharged. Consequently under the pleading, even though the facts could be said to justify or sustain such a charge, the case is not brought within the rule of culpable negligence as affirmed, and enforced in *State v. Dorsey, su*pra, where the defendant • was charged in the indictment with having carelessly and negligently run a locomotive engine into a passenger car, thereby killing a person who was a passenger thereon."

Nor would the mere fact that a person unlawfully attempted to pass through a toll-gate without paying his toll, and while so doing caused the death of another, render the offender guilty of manslaughter. Such act done in the exercise of due care is at worst *malum prohibitum*, in itself devoid of dangerous tendency, and therefore not criminal. But it was said that "if the unlawful act were done under conditions dangerous to the toll-keeper; as, if he drove through the gate at a rapid pace, or urged his team of mules on after they had been seized by the deceased, or if from their known fractiousness it was dangerous to stop them—the criminality consisting of two elements, the unlawfulness of the act and the unlawfulness and danger in the mode of its execution," the defendant would be criminally liable*. Estell v. State*, 51 N. J. L. 182, 17 Atl. 118.

However, in the case of *The People v. Pearne*, 118 Cal. 154, 50 Pac. 376, the supreme court of that state held that in a case charging fast driving in violation of an ordinance by reason of which driving a person was killed, that the ordinance did not strengthen the case of the people, but left the case just where it stood before, upon the actual occurrences, as to whether the act was done with "due caution and circumspection." Nevertheless the law upon this question seems reasonably clear from the authorities, and it may be thus summarized:

The defendant can only be held liable criminally for the consequences, not intended of an unlawful act: First, when the act or omission is in its nature a wrongful act

independently of the enactment, such as breaches of public order injurious to person or property, outrages upon public decency 1 or good morals, and the like. Or, second, when the natural consequences of the unlawful act or omission are dangerous to life or limb, which last clause may after all be included within the term *malum in se*.

Suppose, however, that the act complained of here was not *malum in se*, then was it in its natural consequences dangerous to life?

It must be remembered both in the consideration of this question and the consideration of the question of proximate cause that the ordinance supposes always a fire to have happened before its provisions will be of avail. The persons for whose benefit the law was enacted are always in danger and the apparatus and appliances mentioned in the ordinance are commanded to be supplied them in their then situation, to relieve them of their peril.

Does it require more than the mere statement of this feature of the law in question to establish that the natural consequences of an omission to perform its commands will be fraught with danger to life and limb? If, as stated in the Potter case, "a person engaged in an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow or result from such unlawful act; is not the person charged with the duty of supplying fire escapes responsible for the injury caused to persons by reason of his failure to supply them?

Contending for the sake of the argument even that the ordinance in question has not the dignity or force of a public law but, it placed a positive duty upon the shoulders of the defendant which is as high at least in character as the duty created by contract, and the natural and probable result of a failure to perform that duty, it must be assumed, as we have seen, for the purposes was a danger to life. And it would seem incontrovertible that the wrong-doer is responsible for such omission.

But if this conclusion be wrong, then there is another consideration which disposes of the objection: Though a violation of the ordinance in question in the manner charged, may not constitute an unlawful act within the meaning of the statute even though its natural

consequences were dangerous, yet there can be no question but what the omission makes prima facie a case of negligence.

It has been held repeatedly by the supreme and appellate courts, that a failure to observe a statutory precaution, or one created by municipal ordinances, raises a prima facie case of negligence.

In the recent case of the *United States Brewing Co. v. Stoltenberg*, 211 1ll. 531, our supreme court says: "The violation of a statute is prima facie evidence of negligence. This is also true as to the violation of a city ordinance where the ordinance is such a one as the city is authorized by its charter, or by statute, to make. The ordinance when passed by a power conferred by statute, has the force and effect of the statute. (*Morse v. Sweenie*, 15 1ll. App. 486; *Penn. Co. v. Frana*, 13 Id. 91, and authorities cited). * * * Inasmuch, therefore, as the city council of Chicago had the power to pass the ordinance, set up in the additional count, and introduced in evidence in the case at bar, such ordinance has the force and effect of a statute."

The court then cites in support of its position *Channon v. Hahn*, 189 1ll. 28; *True & True Co. v. Woda*, 201 1ll. 315, and many other authorities.

Then if it is assumed that this omission to supply the apparatus and appliances described in the indictment was negligent, who is to say whether this negligence failed of the due caution and circumspection required by law? Surely not the court, in the face of the charges made in this indictment. The indictment charges in each count that upon the stage there were a great many lights and draperies, borders and curtains and that the latter were highly combustible and inflammable and that if the equipment called for by the ordinance had been provided, Viva R. Jackson would have been saved.

So it seems to me that under the charges of the indictment all of which are admitted to be true, that in the view most favorable to the defendant there is a question for a jury to pass upon, and that it is conclusively established that it is for a jury to determine whether his omission to provide the equipment constituted a lack of due caution and circumspection within the meaning of the statute.

There are several minor objections presented against the indictment which I do not deem important. On the whole the indictment seems to me to present a state of facts which if true at least raises a charge triable by a jury. The motion to quash is overruled as to the first, second, third and fourth counts, and is sustained as to the fifth and sixth counts.

With the truth or falsity of the charges, with the manifest difficulty of proof, this opinion, of course, has nothing to do; for the purposes of this motion, all the charges in the indictment are admitted to be true. I have arrived at these conclusions with diffidence and after great labor, realizing fully as I do the seriousness of the cause both to the people and to the defendant, the difficulty of the questions presented and the high authority of the courts from the opinions of which I have been obliged to differ.

The great industry and ability of counsel engaged, combined with the intense interest they have taken in the controversy have lightened the labors of the court and greatly facilitated his research.