INDEX

WITNESSES

Plaintiffs':

Defendant's:

EXHIBITS

Plaintiffs':

New Jersey
Court of Errors and Appeals

Notice of Appeal.

(*Filed March 23rd, 1926*)

NEW JERSEY SUPREME COURT

HARRY C. SMITH and ROBERT E. SMITH, Trustees of Smith Trust Estate, Plaintiffs, vs. MARGARET D. SWART, Defendant.	Action at Law

To Earle A. Merrill, Esq.,
Attorney of Defendant,
Westfield, N. J.

Take Notice: That the plaintiffs appeal to the Court of Errors and Appeals from the whole of the judgment of non-suit entered in this cause, on the following grounds:

1. Because the court erred in granting the defendant a judgment of non-suit against the plaintiffs; and

2. Because the court erred in refusing to grant

the motion for a direction of the verdict in favor of the plaintiff for the amount sued on.

Dated, Plainfield, N. J., March 20th, A. D. 1926.

WILLIAM NEWCORN,
Attorney of Appellants.

Summons.

The State of New Jersey to MARGARET D. SWART:

(L. S.)

You are Summoned to answer the annexed complaint of HARRY C. SMITH and ROBERT E. SMITH, Trustees of the Smith Trust Estate in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton, N. J., within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you. (And see Notice endorsed hereon.)

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this third day of April, Nineteen Hundred and Twenty-five.

EDWARD J. KELLEHER,
Clerk.

HARVEY J. ROTHBERG,
Attorney.

Complaint.

NEW JERSEY SUPREME COURT

UNION COUNTY

HARRY C. SMITH and ROBERT E. SMITH, Trustees of the Smith Trust Estate, Plaintiffs, vs. MARGARET D. SWART, Defendant.	Action at Law

Plaintiffs, Harry C. Smith and Robert E. Smith, residing at in the City of Chicago, in the County of Cook and State of Illinois, says that:

On the second day of November, A. D. 1922, Judgment was obtained in the Municipal Court of Chicago against the Defendant, Margaret D. Swart, in the sum of Fourteen Hundred and Forty ($1440.) Dollars, exemplified copy of which Judgment is as follows:

UNITED STATES OF AMERICA

In the Municipal Court of Chicago

State of Illinois, County of Cook, City of Chicago. } ss:

Pleas, Proceedings and Judgments, before The Municipal Court of Chicago, held in the City of Chicago, in the County of Cook and State of Il-

linois, at the places in the First District in said City provided by the corporate authorities of said City for the holding of said Court in the year of our Lord, one thousand nine hundred and twenty-two and the Independence of the United States, the one hundred and forty-seventh.

Present: Honorable John Richardson, one of the Judges of The Municipal Court of Chicago.

ROBERT E. CROWE, State's Attorney
DENNIS J. EGAN, Bailiff.

Attest: James A. Kearns, Clerk.

Be It Remembered. To-wit: that on the second day of November A. D. 1922, the following among other proceedings were had in said Court and entered of record therein, to-wit:

SMITH TRUST ESTATE vs. MARGARET D. SWART.	No. 859918 Contract-Confession

Now comes the plaintiff in this cause; also comes the defendant, who by virtue of defendant's warrant of attorney files herein a cognovit confessing the action of the plaintiff against the defendant and that the plaintiff has sustained damages herein against the defendant in the sum as set forth in said cognovit.

Whereupon the plaintiff moves the Court for final judgment herein. It is therefore consid-

ered by the Court that the plaintiff have and recover of and from the defendant Margaret D. Swart the damages of the plaintiff amounting to the sum of Fourteen Hundred Forty Dollars ($1440.00) in form as aforesaid confessed, together with the costs by the plaintiff herein expended, and that execution issue therefor.

State of Illinois,
County of Cook, } ss:
City of Chicago.

I, James A. Kearns, Clerk of The Municipal Court of Chicago, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of certain proceedings made and entered of record in said Court in a certain cause lately pending in said Court, between Smith Trust Estate, Plaintiff, and Margaret D. Swart, Defendant.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court, at Chicago, aforesaid, this eighth day of November, 1922.

(Signed) JAMES A. KEARNS, Clerk.

Complaint

UNITED STATES OF AMERICA

In The City of Chicago

County of Cook

State of Illinois

State of Illinois,
County of Cook, } ss:
City of Chicago.

I, Harry Olson, Chief Justice of The Municipal Court of Chicago, do hereby certify that James A. Kearns, whose name is subscribed to the foregoing Certificate of Attestation, now is, and was, at the time of signing and sealing the same, the Clerk of said The Municipal Court of Chicago, and keeper of the Seal and records thereof, duly elected, commissioned and qualified; that full faith and credit are, and of right ought to be given to all his official acts as such, in all Courts of Record in the United States and elsewhere, and that the attestation is in due form of law and by the proper officer.

Given under my hand at my chambers in Chicago, this 15th day of November A. D. 1922.

(Signed) HARRY OLSON (Seal)
Chief Justice of the Municipal
Court of Chicago.

Complaint

UNITED STATES OF AMERICA

State of Illinois,
County of Cook, } ss:
City of Chicago.

I, James A. Kearns, Clerk of The Municipal Court of Chicago, do hereby certify that Hon. Harry Olson, whose name is subscribed to the foregoing Certificate of Attestation, now is, and was, at the time of the signing thereof, the Chief Justice of the Municipal Court of Chicago, duly elected, commissioned and qualified, and that his said signature is genuine.

In Witness Whereof, I have signed my name and affixed the Seal of said The Municipal Court of Chicago, this 15th day of November A. D. 1922.

(Signed) JAMES A. KEARNS,
Clerk of The Municipal Court of Chicago.

(Seal)

Plaintiffs have demanded payment of said Judgment, but defendant has refused to pay.

Plaintiffs demand payment in the sum of Fourteen Hundred and Forty ($1440.) Dollars, together with interest thereon from the second day of November, 1922, besides cost of this suit.

Attorney for Plaintiffs.

Answer.

NEW JERSEY SUPREME COURT

(*Filed May 7th, 1925*)

HARRY C. SMITH and ROBERT E. SMITH, Trustees of Smith Trust Estate, Plaintiffs, vs. MARGARET D. SWART, Defendant.	Action at Law

The defendant, answering the plaintiff's complaint, says that:

1. She denies that the Municipal Court of the City of Chicago, County of Cook, and State of Illinois, had jurisdiction of the cause set forth in the plaintiffs' complaint.

2. She denies that the judgment set forth in said complaint was ever obtained, or had, in said Municipal Court of Chicago.

3. She denies that she was within the jurisdiction of the Municipal Court of Chicago, or of any other court of Illinois, or that she was a resident of Illinois at the time said judgment was alleged to have been obtained.

4. She denies that process in said action in the Municipal Court of Chicago was ever served upon her, either directly or indirectly, or that she had notice of said action, or any judgment entered therein.

Reply

5. She denies that she owes the plaintiffs the sum of $1440.00, or any other sum.

6. She denies that the plaintiffs have suffered damage in the sum of $1440, or any other sum for which she is, or can be, held liable.

E. A. MERRILL,
Attorney of Defendant.

Reply.

(*Filed May 29th, 1925*)

NEW JERSEY SUPREME COURT

HARRY C. SMITH and ROBERT E. SMITH, Trustees of Smith Trust Estate, Plaintiffs, vs. MARGARET D. SWART, Defendant.	Action at Law

The plaintiffs, replying to the answer of the defendant, say that they join issue with the answer of the defendant.

HARVEY I. ROTHBERG,
Attorney for Plaintiffs.

Postea.

(*Filed Feb. 16th, 1926*)

NEW JERSEY SUPREME COURT

HARRY C. SMITH and ROBERT E. SMITH, Trustees of Smith Trust Estate, Plaintiffs, vs. MARGARET D. SWART, Defendant.	Action at Law

This cause being regularly on the calendar, at the January term, nineteen hundred and twenty-six, and the case having been called, and the parties having appeared, and the plaintiffs having moved their case, and the jury having been impaneled and sworn, and the evidence of the plaintiff having been given, and the defendant having moved for a nonsuit, and the court having heard the argument of the respective counsel, and having considered the matter, and being of the opinion that the motion of the defendant should be granted and the plaintiff nonsuited;

It is, on this eighth day of February, one thousand nine hundred and twenty-six, ordered that judgment of nonsuit be entered in favor of the defendant, Margaret D. Swart, and against the plaintiffs, Harry C. Smith and Robert E. Smith, Trustees of the Smith Trust Estate, besides costs of suit to be taxed.

On motion of E. A. Merrill, attorney of defendant.

PETER F. DALY,
C. C. J.

Testimony.

NEW JERSEY SUPREME COURT

UNION COUNTY CIRCUIT

January Term, 1926.

HARRY C. SMITH and ROBERT E. SMITH, Trustees of the Smith Trust Estate,

vs.

MARGARET D. SWART.

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before HON. PETER F. DALY, Circuit Court Judge, and a Jury, at the Union County Court House in the City of Elizabeth, New Jersey, on the eighth day of February, A. D. 1926, at 9:30 A. M.

Appearances:

Harvey Rothberg, Esq. (William Newcorn, Esq., present), counsel for the plaintiffs.

Earl A. Merrill, Esq. (Archibald F. Slingerland, Esq., present), counsel for the defendant.

(A jury being empanelled and found satisfactory, they were sworn.)

(Mr. Newcorn opens the case for the plaintiffs.)

(Mr. Slingerland opens the case for the defendant.)

Exhibits Offered in Evidence

Mr. Newcorn: I desire to offer in evidence an exemplified copy of a judgment obtained in the Municipal Court of Chicago in the State of Illinois in a suit wherein the Smith Trust Estate was plaintiff and Margaret D. Swart was defendant, which transcript of judgment is exemplified in accordance with the Act of Congress, said judgment bearing date the 2nd day of November, 1922, and exemplified on the 8th day of November, 1922.

Mr. Slingerland: I object to its admission in evidence, if your Honor please, on the ground that it does not include the entire proceedings in that suit. In other words, it is not an exemplified copy of the judgment roll in that suit, merely a transcript of the bare judgment itself.

The Court: The objection is overruled. You may take an exception.

(Papers referred to, consisting of three sheets, entered in evidence and marked Plaintiffs' Exhibit P-1.)

Mr. Newcorn: I offer in evidence an exemplified copy of Section 88 of an Act in Relation to Practice and Procedure in Courts of Record, bearing date the 22nd day of January, 1926, which act was approved on the 3rd day of June, 1907.

Mr. Slingerland: I object to its admission, if your Honor please, on the ground that it is immaterial and on the further ground that it does not appear from the exemplified copy that it was an act in force at the time of the entry of this judgment.

The Court: The objection is overruled. You may take an exception. I will admit the papers.

(Papers referred to, consisting of two sheets, entered in evidence and marked Plaintiff's Exhibit P-2.)

MARGARET D. SWART, the defendant, produced as a witness on behalf of the plaintiffs, being duly sworn according to law on her oath, saith:

Direct-examination by Mr. Newcorn:

Q. Mrs. Swart, you are the defendant named in the suit of the Smith Trust Estate against Margaret D. Swart? A. Yes, I am.

Q. Have you paid any portion of the judgment of $1,440 entered in the suit against you in the Municipal Court of the City of Chicago in the State of Illinois? A. No, I have not because I didn't know of any judgment until last fall.

Mr. Newcorn: I move that the last portion be stricken out.

The Court: The last part is stricken out as not responsive.

Mr. Newcorn: Plaintiffs rest.

CROSS-EXAMINATION by Mr. Slingerland:

Q. You say you have not paid the judgment, Mrs. Swart? A. No.

Q. Why not? A. Because I didn't know of it.

Q. Well, weren't you summoned in that suit? A. No.

Q. Didn't you appear in that suit? A. No.

Q. Did you authorize anybody to appear for you? A. No.

Q. Were you in Illinois at the time of the entry of that judgment? A. No, I wasn't.

Q. Or at the time of the institution of that suit? A. No.

Q. Where did you live? A. Westfield.

Q. New Jersey? A. Yes.

Mr. Slingerland: That is all.

By the Court:

Q. When did you leave Chicago? A. The middle of December.

By Mr. Slingerland:

Q. What year? A. 1921.

By the Court:

Q. Have you ever been back there since? A. I was back there last week.

Q. When did you move to Chicago? A. In September, in October rather, 1921.

Q. 1921? A. Yes.

Q. And you lived there continuously until you left? A. Yes.

Q. Which was the middle of December? A. Yes.

Q. Of 1924? A. 1921.

Q. 1921. Did you ever live in Chicago before that time? A. No.

Q. Where had you lived? A. In Westfield.

Q. How long had you lived in Westfield before you went to Chicago? A. About six or seven years.

RE-DIRECT-EXAMINATION by Mr. Newcorn:

Q. Mrs. Swart, when you moved to Chicago, when you went to Chicago in September, 1921, did you intend to stay there? A. Absolutely.

Q. And you intended to make your permanent residence there? A. Yes.

Mr. Slingerland: I object, if your Honor please, to what her intention was.

The Court: She can tell her own intention. I will allow it. You may take an exception.

Q. In conformity with that intention you entered into a lease for the premises which forms the subject matter of this judgment, is that right? A. Yes.

Q. I show you a lease and ask you whether that is your signature? A. It looks like my signature.

Q. And you entered into possession of the premises, is that right? A. Yes.

Q. Under this lease you rented this place for a year, didn't you?

Mr. Slingerland: I object, if your Honor please. The lease speaks for itself.

The Court: She can state if she knows that as a fact so that it may clearly come before the jury. Is there any dispute about that?

Mr. Slingerland: No. I will withdraw the objection.

(Last question read by stenographer.)

A. Yes.

Q. Before you signed this lease you read it? A. Read part of it. It was rather long to read.

Q. I show you that lease and ask you whether there have been any changes in it since you signed it. A. Not that I see.

Q. There is one change on there, is there not? A. I don't see any change.

Q. I see the endorsement on the side. That wasn't on there at the time you signed it? A. No, that wasn't on there, no.

Mr. Newcorn: I offer this lease in evidence.

Mr. Slingerland: I have no objection.

The Court: There being no objection it it admitted.

(Lease entered in evidence and marked Plaintiffs' Exhibit P-3.)

MOTION FOR NONSUIT

Mr. Slingerland: If your Honor please, I desire to move for a nonsuit on the ground that there is no evidence that the statute authorizing a confession of judgment in Illinois was in existence at the time of the entry of this judgment; second, that there is no proof as to the jurisdiction of the Municipal Court of the City of Chicago. It being a statutory court it is incumbent upon the plaintiff as part of his case to prove the statute so that this court may see what the jurisdiction of that court was at the time of the entry of the judgment. In other words, this court under the rule as laid down in the case of *Godfrey* v. *Myers,* 23 Law 197, cannot presume that the Municipal Court of the City of Chicago had jurisdiction in this court.

Argument

(Argument.)

The Court: The motion for a nonsuit is denied. You may take an exception.

Mr. Slingerland: May I add one further ground to that motion for a nonsuit, if your Honor please?

The Court: Oh, certainly.

Mr. Slingerland: It appears from the plaintiffs' own case and out of the mouth of the plaintiffs' own witness that the defendant was never summoned and did not appear and did not authorize anyone to appear for her, and that she was without the jurisdiction of the Chicago court at the time of the entry of the judgment; and that being the evidence as disclosed by the plaintiffs' case, it seems to me that we are entitled to a nonsuit.

The Court: That may be entered as an additional ground for the motion for nonsuit. The motion is still denied. You may take an exception.

DEFENDANT'S CASE

MARGARET D. SWART, the defendant, recalled in her own behalf, saith:

Direct-examination by Mr. Slingerland:

Mr. Slingerland: I offer in evidence an exemplified copy of the entire proceedings in the suit instituted in the Municipal Court of the City of Chicago.

Mr. Newcorn: I have no objection.

The Court: It is admitted.

(Papers referred to entered in evidence and marked Defendant's Exhibit D-1.)

Q. Now, Mrs. Swart, I show you Exhibit D-1 and call your attention to the copy of lease annexed thereto. Will you look at it, please, and tell me whether that is the lease that you signed, a copy of the lease which you signed? A. No, this is not the copy of the lease which I signed.

Q. Why do you say that? A. Well, there is interlineation here near the fifth clause, and the sixteenth clause has been changed, and there is a typewritten piece pasted on here.

Q. I show you another paper and ask you if you have seen that before? A. That is a duplicate copy of the lease which I did sign.

Q. And when did you receive that? When did you get this? You say that is a duplicate. A. Yes.

Q. Well, did you get that at the time you signed the lease? A. Yes, I got that at the time I signed my lease.

Mr. Slingerland: I offer the duplicate in evidence.

Mr. Newcorn: It is the same as what is already in evidence.

Mr. Slingerland: Yes.

Mr. Newcorn: I have no objection.

(Copy of lease entered in evidence and marked Defendant's Exhibit D-2.)

The Court: What were the changes that were made in that which is part of the exemplification which you offer?

Mr. Slingerland: Clause sixteenth is the very important change, your Honor. It reads entirely differently. Shall I read it?

The Court: Yes.

(Argument.)

Q. Mrs. Swart, did you ever know any attorney by the name of Ralph E. Brown? A. No, I have never known anybody of that name.

Q. Did you ever authorize any man by the name of Ralph E. Brown to appear for you in this suit at that time? A. No, I did not.

Q. Mrs. Swart, did you know any man by the name of Charles F. Beau, Jr.? A. No.

Q. Was there any such man present at the time that you executed this lease? A. No, there was not.

Q. Did any man by the name of Charles F. Beau, Jr., ever see you write your name? A. No, not that I know of.

Q. When Charles F. Beau, Jr., makes an affidavit that he is acquainted with your handwriting and that the signature to this lease is your

signature, is that true or false? A. It is not true as far as I know. I have never known that he has seen my writing.

Q. You never were served with a summons in this suit, were you? A. No.

Q. You never appeared there? A. No.

Q. In that suit. And you were without the jurisdiction of the court of Illinois at the time of the institution of that suit and at the time of the entry of the judgment, were you not? A. Yes, sir.

Mr. Slingerland: I offer in evidence, if your Honor please, the file in the case of Harry C. Smith and Robert E. Smith, Trustees of the Smith Trust Estate, in a suit instituted in the Union County Court of Common Pleas, being case No. 1095.

Mr. Newcorn: For what purpose? What is the purpose of the offer?

Mr. Slingerland: Do I have to state my purpose?

The Court: Yes.

Mr. Slingerland: There is a copy of the lease annexed to that, if your Honor please, which I want to hook up with the leases which are in evidence.

(Papers referred to entered in evidence and marked Defendant's Exhibit D-3.)

Q. You were served in Westfield, were you not, Mrs. Swart, with a summons and complaint in this suit to which I have just referred? A. Yes, in 1922.

Q. Do you remember about when that was? A. Sometime after 1922.

Q. You mean sometime in 1922? A. Sometime during that time, around that time, 1922.

Q. Now, when did you vacate these leased premises in Chicago? A. Around the 1st of December in 1921.

Q. Did you pay the December rent? A. Yes, I did.

Q. Did you notify the landlord that you were about to vacate? A. Yes, I did, and I was assured that they would have no trouble about vacating the premises.

Q. Did you surrender the keys to them? A. I did.

Q. Was there any objection on his part? A. No objection.

Q. And then you came east? A. In two weeks. I stayed—

Q. Did you hear anything more from this landlord until the service of these papers in the Common Pleas suit? A. Not a word.

Q. Did you interpose a defense to the Common Pleas suit? A. No.

Q. Did they ever press the Common Pleas suit? A. No, nothing more than the papers.

Q. When did you next hear from this landlord? A. Last Fall.

Q. When this present suit which we are now trying was instituted? A. Yes, just last fall.

Mr. Slingerland: Cross-examine.

CROSS-EXAMINATION by Mr. Newcorn:

Q. Mrs. Swart, you retained your lease from the day you left your apartment up to the present time? A. Yes.

Q. You knew that lease provided in Section 13 that upon the surrender of the apartment the landlord reserved the right to try to rent it upon your account? Section 13 of the lease, to rent it upon your account, did you not, and to hold you liable for the time that the place was unoccupied, and if rented for a lesser amount to hold you for the balance to the end of the term? You knew that, didn't you? A. I don't know that I did.

Q. Look at paragraph 13 of the lease. What is the answer? A. Well, I didn't read that paragraph, I suppose, at the time.

Q. But still you have always had that lease in your possession from 1921 up till today when it was produced in court? A. Yes, but I didn't look at it and study it.

Q. You weren't very much interested, is that it? A. I didn't feel that I needed to be interested in it.

Q. Your term didn't expire till the 30th day of September, 1922, is that right? A. It didn't.

Q. And all you occupied the premises under your annual lease was for a period of two months and a half although you paid for three months' rent? A. Well, I didn't occupy it for all of that time. I was out. I went out of the apartment on the 1st of December.

Q. Then you occupied it two months? A. Yes, they had the whole month.

Q. When was it you gave the keys to the landlord? A. Turned the keys over to the janitor when I went out.

Q. You didn't turn them over to the landlord? A. No.

Q. You had no conversation with him at all? A. He knew I had turned it over to the janitor. I had several conversations with him.

Q. Oh, you did. After you turned the keys over to the janitor you stayed in Chicago several weeks? A. I stayed in Chicago two weeks because one of my children was too sick to come east.

Q. And you did have knowledge, though, shortly after, that your landlord was holding you for your rent, did you not? A. Not until 1922, not until spring.

Q. December 1st, 1921, to the spring of 1922 is not so very long after. You knew it in March, 1922, didn't you, that the landlord was holding you liable for the rent? A. But in the spring when these papers were served—I have forgotten.

Q. And this summons was served upon you in March, 1922, or the 6th day of April, 1922. Then you knew on the 6th day of April of 1922? A. When the papers were served, yes.

Q. That the landlord was holding you liable for the rent for the months of January, February, and March, is that correct? A. Is that what it says in the paper?

Q. Well, you knew that there was a claim for rent? A. Yes, I did.

Q. Did you take it up at all with the Smith Trust Estate? A. No.

Q. Had you ever received any letters prior to the service of this summons upon you in connection with this claim from any attorney of the Smith Estate? A. You mean about the papers?

Q. Yes. A. No.

Q. Not before these were served? A. No.

Q. Wasn't there a demand made upon you by Mr. English for the payment of the rent before he started suit? A. I don't remember.

Q. You aren't sure about that? A. No, I don't remember.

Q. And you didn't try to get in touch with the Smith Trust Estate and tell them you didn't owe them any money? A. No.

Q. And you didn't bother at all with them up to the present time as far as the Smith Trust Estate was concerned, or their attorney, is that correct? A. Correct.

Q. But you knew about the entry of this judgment last year and the year before that? A. Last fall is the only time that I knew about the judgment.

Q. Is that so? Now, are you sure, Mrs. Swart, that when you were served with these papers in the present suit on April 9th, 1924, that you didn't know about this suit? A. I say I didn't know about the suit. I say I didn't know about the judgment.

Q. You didn't know about the judgment? A. Not until last fall.

Q. You were served, according to the record in the present case, on April 9, 1924, with the summons and complaint. Then you knew about this judgment, did you not, because the complaint contained the judgment set out at length? Isn't that correct? A. What date was that?

Q. April 9, 1924, according to the Sheriff's return. A. I don't recall knowing about it until last fall.

Q. You were served with a copy of the summons and complaint first, were you not, in this suit? A. When?

Q. Whenever you were served. A. Well, the only papers that were ever served on me were served in 1922.

Q. I am talking about this case here. A. No, I wasn't served.

Q. Then why are you in court today? A. The only papers that I have ever been served were the ones in 1922.

Q. And you weren't served with the papers in this suit? A. Which case?

Q. The case we are trying. A. I wasn't served with any. My lawyer took care of that. I didn't have any papers.

Q. Weren't you served first with the papers and took them to your lawyer, Mr. Merrill?

Mr. Slingerland: I think she is confused. I think there is no question about her having been served.

Mr. Newcorn: I don't want to confuse Mrs. Swart.

A. I don't know of any papers that were served upon me except these.

Q. I show you a copy of the original summons and complaint. A. Yes, this was in 1922, was it? That is the only papers I remember I was served.

Q. Mr. Merrill represented you? A. Yes, Mr. Merrill represented me.

Q. In this case? A. Yes.

Q. And Mr. Slingerland represents Mr. Merrill in the trial of this case? A. Yes, he does.

Q. Now, this summons was attested on the 1st day of April, 1924, and the return shows you were served upon the 6th day of April, 1924. The summons, as you will notice, contains a copy of the exemplified judgment, if you will look at it, Mrs. Swart. May I ask you did you HAVE your attorney in your behalf make any attempt in the court where that judgment was obtained to have that judgment reopened upon any ground? A. No.

Q. And you paid no attention at all to it? A. No.

Q Then you were mistaken when you said after having refreshed your mind with an inspection, when you said you didn't know anything at all about the judgment in Illinois until last fall? A. No, I didn't really know anything about it until last fall, if I remember it.

Q. You will not deny that you were served with these papers in the present suit?

The Court: That is admitted by her attorney.

Mr. Newcorn: That is all.

RE-DIRECT-EXAMINATION by Mr. Slingerland:

Q. Mrs. Swart, in this suit in the Union County Court of Common Pleas instituted in April, 1922, you engaged a lawyer to defend that suit, did you not? A. Yes, Mr. Merrill.

Q. And then is it not true that that suit was abandoned by the plaintiff's attorney? A. Yes.

Mr. Newcorn: I object. She doesn't know whether it was abandoned or not.

The Witness: Well, I do. I know there was nothing else heard from it.

Mr. Newcorn: I will withdraw the objection to save time.

Q. Then you heard nothing more about this claim until the institution of this suit? A. No, I did not.

Mr. Slingerland: That is all. Defendant rests.

MOTION FOR DIRECTION OF A VERDICT

Mr. Slingerland: If your Honor please, I desire to move for a direction of a verdict for the defendant in this case in addition to the grounds of my motion for a nonsuit, which I again urge in support of this motion. There are the following additional grounds.

It appears by the uncontradicted evidence in the suit that the contract upon which the judgment was entered was not the contract signed by the defendant, and if that is so, then the judgment is invalid.

It appears from the exemplified copy of the proceedings and from the 16th clause of the copy of the lease annexed thereto, "that the obligation of the lessee to pay the rent reserved hereby during the balance of the term thereof or during any extension thereof shall be deemed to be waived, released, or determined." If it has been waived,

released, or determined, then of course this plaintiff has no cause of action.

It appears from the evidence that the judgment entered in the Municipal Court of the City of Chicago was for the sum of $1,440, and the certificate of the clerk affixed or secured on the copy of the lease annexed to the exemplified copy states that judgment entered this 2d day of November, A. D. 1922, for $1,440 and costs, being the rent for the months of January, February, March, and April, 1922. The lease called for monthly rentals at $275. Four times $275 does not make $1,440. I therefore contend that the judgment has been entered for an excessive amount and is therefore illegal.

The Plaintiffs' Exhibit P-3 also contains the stamp of the clerk to the same effect, that the judgment is entered for the rent for the months of January, February, March, and April, 1922, $1,440. It appears on the face of the papers in evidence that the judgment is for an excessive amount and is therefore illegal.

Further than that it appears in the exemplified copy of the statement of claim, being part of Defendant's Exhibit D-1, that the judgment—this is in the statement of claim—"the plaintiff claims rent of monthly instalments of $275 on the 1st day of each"—

The Court: And every month.

Mr. Slingerland: It claims rent for the months of January, February, March, and April, 1922, and $50 per month for balance of term. Presum-

ably—I don't know, there is nothing to indicate it except presumption—the judgment includes some such sum as $50 a month for the balance of the term. If that be true, then the judgment, if your Honor please, is illegal because the attorney exceeded his authority. The rule I think is, as your Honor well knows, universal that an attorney appointed for the purpose of confessing judgment has no authority to confess judgment for unliquidated damages, but is confined strictly to the entry of a judgment of liquidated damages or liquidated debt. That that is the rule of Illinois is illustrated by the case of *Little* v. *Dyer,* 138 Illinois, 272, 27 Northeastern 905, when it was held that a confession of judgment entered by the attorney for rent due under a lease containing authority for any attorney to confess judgment for the tenant for any rent which may be due by the terms of this lease is void where the lease provides that all sums paid by the landlord for water or gas or for cleaning the demised premises shall be so much additional rent, since power cannot be given to confess judgment on an unliquidated claim.

Now, this amount of $50 a month for the balance of the term cannot be ascertained from an inspection of the lease, and *Little* v. *Dyer* held that the power to confess judgment is limited to a confession of an amount that is ascertainable from an inspection of the lease itself, and that lease was very similar to the lease in suit here. It must be an amount ascertainable from the terms of the lease itself. We cannot ascertain

any such amount as $50 a month here from the inspection of this lease, and it follows that there must have been some evidence, some testimony to show how they arrived at the sum of $50 a month, and the minute that occurs this defendant is entitled to be heard by a jury, and no attorney appointed by her to confess judgment has any right to confess judgment for unliquidated damages such as $50 a month.

PLAINTIFFS' MOTION FOR DIRECTION OF VERDICT

Mr. Newcorn: Will your Honor entertain a motion so both matters can be discussed at the same time?

I move for a direction of a verdict in favor of the plaintiff for the amount claimed plus interest.

(Argument.)

The Court: There is no question, Judge Newcorn, in my mind as to the correctness of the general position you take relative to the force and efficacy of a judgment obtained in a sister state. It is undisputed law that a judgment properly obtained in a court of competent jurisdiction in a sister state is recognized as to its dignity and force by every other state in the Union.

Here is a judgment obtained in the First Municipal Court of the City of Chicago, according to the exemplification before us. It is certified by the clerk and by the judge in so many words that that is a court of record. It is not in the category

of such a tribunal as that of a mere justice of the peace, and so far as that point is concerned I am holding that it did have jurisdiction; but there is a presumption that it had jurisdiction in view of the nature of the exemplification, and to prove that it did not have jurisdiction the burden of such proof would be upon the defendant, and there is no such proof in this case. Now, that being so, the only defense that the defendant can put in against the judgment obtained in a sister state is one of two, rather of three: First, that the court did not have jurisdiction. To that I say there is no evidence that the court did not have jurisdiction of such a cause. Second, that the court had no jurisdiction because the defendant was not brought within the jurisdiction by proper process. Or third, fraud.

Fraud has not been alleged in the pleadings, and since a charge of fraud must be specially pleaded that leaves us with simply one question in this case. That question is whether this lady was ever brought within the jurisdiction of the First Municipal Court of the City of Chicago.

It is claimed, according to the plaintiff, that she was brought within the jurisdiction of that court through the action of an attorney at law in a court of record in Chicago, who made a confession of judgment as her attorney.

There is not a complete analogy between such a confession of an attorney as has been exercised in this case and such as is exercised under the general warrant of an attorney in this State where an attorney for another confesses a judgment,

because in this State in such cases as that there is first the power specifically given to some attorneys to confess judgment in favor of a certain person and for a particular amount. In this remarkable lease under section 15 it is provided that in case there is any default in the payment of the rent, then the lessee authorizes any attorney of any court of record in the state to confess judgment for the amount of rent then due. That is not like our warrant of attorney. The tenant does not in such a case as that say so in writing —the admission that he or she owed so much rent and authorizes any attorney of a court of record to confess in that amount in favor of a certain person—but the result of that practice under such a lease as that evidently is that any Tom, Dick, or Harry of an attorney upon the strength, not of what the debtor says she owes or she may say she owes, but upon the strength of an affidavit upon the part of the landlord, confesses judgment.

In this case we have the remarkable situation that this woman the defendant leaves Chicago about the middle of December in 1921, and in November of 1922—November 2nd I think—a Mr. Brown, who claims to be an attorney in a court of record, confesses a judgment amounting to $1,440. She is then in New Jersey and has been in New Jersey with the family from the middle of December. Harsh as that provision 15 of this lease seems to be, still she signed that lease and she agreed when she made this lease that in case she became in default of any rent any attorney of any court of record in the State of Illinois could confess judgment against her for the amount of rent due.

Plaintiffs' Motion for Direction of Verdict

Now, then, that being the situation, what does it bring it up to in this suit to obtain a judgment in New Jersey upon the strength of this Illinois judgment? Was she brought within the jurisdiction of the First Municipal Court of the City of Chicago? Did this attorney of record have a right to confess judgment against her? Under the terms of this lease he had the right, even though she never knew him, to confess a judgment against her for any amount of rent that she owed at the time that he made such a confession of judgment. That was her contract. That was the agreement that she signed.

But no attorney had a right to bring the defendant, the tenant, within the jurisdiction of the First Municipal Court of Chicago unless there first was rent due, and that brings the question of whether or not there had been a termination or rescission of the lease. I do not see where there is any evidence to show that the landlord agreed to the termination of this lease. If I remember the defendant's testimony, about the 1st of December, 1921, she concluded because of her child's or her children's illness to return to Westfield where she had been living for six or seven years. When she left Westfield she reached Chicago with the intention of making that a permanent residence, but after being there about two months occupying these premises, about that time she concluded to return, and what does she do? She says she had several conversations with the landlord, but those conversations have not been given. She paid the rent for December; that would be for the third

month according to the terms of the lease. She was required to pay the rent monthly in advance, a rent of $275 a month. She lived there about half of the month of December and there and then left. Before she left she left the key with the janitor.

Where is there any evidence that there was an agreement upon the part of the landlord to terminate her obligation under this lease? I don't know; I may have missed some of the evidence in looking at these papers while the oral testimony was being produced, but I think that is the substance and all there is along that line, and if that is so I hold as a matter of law that there was no proof that would allow the jury to find that there was a rescission of lease.

Now, then comes a further question. This confession of judgment was not made until November 2nd. Is that right, November 2nd?

Mr. Newcorn: November 2nd.

The Court: The lease ended on September 30th. A year was up on September 30, 1922, and he confesses judgment for four months' rent at $275 a month, the regular rent. That would still leave five months of the year's term, and he confesses rent so far as these five months are concerned at about $50 a month, making $1350. Then there is added in $90. This remarkable lease provides that in case there is a confession of judgment attorney's fees may be added provided that they are not less than ten dollars, leaving the determination of the limit on the other end I do not

know where, but in this case it was made $90. Ninety added to 1350 gives us the amount of the judgment which was actually entered, $1440.

Of course we cannot go into the reopening of the case, but on the face of this where did he get the authority to confess judgment for such an amount as that? He had the right under the terms of the lease to confess judgment against this lady if she owed rent and for the amount that she owed, and he did, but we do not know whether she owed that rent or not excepting so far as this record shows. The record contains the affidavit of someone—I do not know whom it is made by; I suppose one of the owners; I have not looked at that—that there was this rent due, four months at $275, and for the balance of the term, five months at $50.

Whether those premises as a matter of fact were idle all of that time or only part of that time we do not know. Whether for the last four months or for five months he rented it for $50 a month less than the $275 we do not know. All we do know is that this lady signed one of these remarkable leases. I never heard of such a lease as that. I have seen some remarkable ones in the State of New Jersey, but this Chicago lease is certainly very windy in all that it contains, but still it is there and the decisions in the Illinois courts apparently have sustained such a remarkable provision as that and have held that a person could in such a blanket fashion as that bind themselves as tenants.

Of course I suppose it is not so bad in Chicago if the parties continue to live there. The courts could take care of that to see that it was not a wide power that could be wildly abused, but it has concerned me a great deal.

I have given you gentlemen about how I feel about this. As I said in the beginning, a judgment of a sister state carries with it such dignity under the comity and respect which one state owes to another that when it comes along properly exemplified as to the fact of its having been obtained in the court of a sister state, then in order to obtain a judgment here in the State of New Jersey it goes upon the strength of its face unless one of three things can be proved by the defendant: Fraud, lack of jurisdiction in the court, or lack of jurisdiction over the defendant by the court which gave the verdict.

Now, I am willing to listen to you gentlemen for anything that you have got to say. I have given you my mind on it.

(Argument.)

(A brief recess was taken.)

The Court: On further examination of this exemplified record, it shows that the $90 attorney's fees were allowed by the court. And the court in ordering the judgment, recites as follows: Leave to plaintiff to withdraw original lease upon filing certified copy.

We have in evidence the original lease which was brought into evidence in this trial, admitted

as the original lease by the defendant. We also have in evidence the duplicate, which was given to the defendant as the tenant, and that is the same as the original, and yet the certified copy contains a sixteenth clause which is different from the sixteenth clause as contained in the original lease. I have read this sixteenth clause in the certified copy which is attached to the exemplification and the conclusion formed in my mind is that in typewriting this sixteenth clause the word *not* is omitted. Anything else would be senseless. Where it says, "The obligations of lessee to pay the rent reserved hereby during the balance of term hereof or during any extension hereof shall be deemed to be waived, released, or determined, nor shall the right or power to confess judgment given in clause 16 hereof be deemed to be waived or terminated by the service of any five days' notice."

That does not read sensibly. There was a space left after the word *shall,* and clearly that was an omission on the part of the clerk in preparing his exemplification. That is my view of that. It doesn't read with any sanity unless that word *not* is there. However, I will hear you gentlemen as far as you want to go.

(Argument.)

The Court: I thoroughly appreciate the seriousness of declaring a verdict obtained in a sister state as being an ineffective verdict, and where a person has been personally served and so directly brought within notice of the existence of an action and so directly brought within the jurisdiction of

the court, it would be almost next to an impossibility unless fraud were proved to set aside that judgment when it was sued upon in a sister state. The comity between the states and the respect which the states should hold for one another makes that situation what I have asserted, but where a person has been brought within the jurisdiction in a way such as it contended for here, the court should be solicitous to ascertain whether that party living without the physical jurisdiction of the court at the time was properly brought within the jurisdiction of that court.

This defendant was not living within the jurisdiction of this Chicago court at the time this judgment was obtained. She had not been in Illinois for eight or nine months preceding that time. She had entered into a lease that generally authorized any attorney of a court of record to confess judgment against her for any rent due at the time of the confession of the judgment.

I have already held that there was not a termination of this lease, that she was liable for any rent that was due from her, and that under this lease an attorney of a court of record in Chicago could confess judgment in her name for the amount of rent then due, but all he could do would be to confess judgment for the amount of rent due at the time of the confession of judgment.

Now, what does this attorney do? It does not say in the exemplification that he is an attorney of a court of record. It simply says he is an attorney, but we will assume that appearing

before the judge, the judge took notice and knew that he was an attorney of record.

But what does he do? At the time of the confession of this judgment if there was rent due, and if it was not a case of damages, if there was rent due, there was rent due for nine months at $275 a month, which would have amounted to $2,200 and odd dollars. Instead of confessing judgment for such an amount as that, nine months at $275, which according to the papers would be the rent due if it were simply for rent—and he only had a right to confess judgment for rent—he confesses judgment for $1,350, and the papers say it is rent. How could it be rent? There was a certain amount for rent, four months at $275. Then it says there was five months at $50 for rent. How could $50 be for rent? So when he made that judgment for $1,350 the inevitable conclusion upon the mind is this: That they must have rented that place for part of the time, maybe for less money than the $275, and that they were looking for that loss. That was not rent; that was damages, and he only had a right to confess judgment for the rent. They simply about bulked this—on what basis? When were the premises rented after she left—one month, two months, three months, or what time?

He never had any power of attorney to bring her within the jurisdiction of the court, she living in New Jersey at the time, excepting to confess judgment in her name for rent due. There was more than rent due involved in this thing, and as I said before, the conclusion is inevitable that

when this man Brown, whoever he was, attempted to confess judgment against this woman he had no such basis of authority, even taking the lease and giving it its widest interpretation, as justified him to confess judgment in her name. It was not for rent. It must have been for damages. It must have been as a matter of compromise on the basis of damages.

Having gone through this thing thoroughly and examined these papers I am forced to the conclusion that he did not confess judgment for rent then due at the time of the confession but did confess for damages as well as possibly rent, since we cannot separate it. He simply can do only one thing, confess that rent alone, and since the conclusion is inevitable to my mind from an examination of the papers that he confessed for damages as well as for rent—something he had no right to do—I am constrained to the conclusion that this lady the defendant was never properly brought within the jurisdiction of the First Municipal Court of Chicago, and therefore the motion of the defendant is granted and an exception may be had.

Mr. Newcorn: May I take an exception to the granting of the motion and also to the refusal of the Court to grant my own motion.

Exhibit P-1.

UNITED STATES OF AMERICA

IN THE MUNICIPAL COURT OF CHICAGO

State of Illinois,
County of Cook, } ss:
City of Chicago.

PLEAS, PROCEEDINGS AND JUDGMENTS, before The Municipal Court of Chicago, held in the City of Chicago, in the County of Cook and State of Illinois, at the places in the First District in said City provided by the corporate authorities of said City for the holding of said Court, in the year of our Lord, one thousand nine hundred and twenty-two and the Independence of the United States, the one hundred and forty-seventh.

Present:

Honorable John Richardson, One of the Judges of The Municipal Court of Chicago.

Robert E. Crowe, State's Attorney.

Dennis J. Egan, Bailiff.

Attest: James A. Kearns, Clerk.

BE IT REMEMBERED, to-wit: that on the second day of November A. D., 1922, the following among other proceedings were had in said Court and entered of record therein, to-wit:

Exhibit P-1

SMITH TRUST ESTATE vs. MARGARET D. SWART.	No. 859918 Contract-Confession

Now comes the plaintiff in this cause; also comes the defendant, who by virtue of defendant's warrant of attorney files herein a cognovit confessing the action of the plaintiff against the defendant and that the plaintiff has sustained damages herein against the defendant in the sum as set forth in said cognovit.

Whereupon the plaintiff moves the Court for final judgment herein. It is therefore considered by the Court that the plaintiff have and recover of and from the defendant Margaret D. Swart the damages of the plaintiff amounting to the sum of Fourteen Hundred Forty Dollars ($1,440.00) in form as aforesaid confessed, together with the costs by the plaintiff herein expended, and that execution issue therefor.

State of Illinois,
County of Cook, } ss:
City of Chicago.

I, James A. Kearns, Clerk of The Municipal Court of Chicago, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of certain proceedings made and entered of record in said Court in a certain cause lately pending in said Court, be-

tween Smith Trust Estate, Plaintiff, and Margaret D. Swart, Defendant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at Chicago, aforesaid, this eighth day of November, 1922.

JAMES A. KEARNS, Clerk.

Endorsed on back:

No. 859918

THE MUNICIPAL COURT

OF CHICAGO

SMITH TRUST ESTATE

VS.

MARGARET D. SWART.

CERTIFIED TRANSCRIPT OF JUDGMENT.

Exhibit P-1

UNITED STATES OF AMERICA

IN THE CITY OF CHICAGO

County of Cook, State of Illinois

State of Illinois,
County of Cook,
City of Chicago. } ss:

I, Harry Olson, Chief Justice of The Municipal Court of Chicago, do hereby certify that James A. Kearns, whose name is subscribed to the foregoing Certificate of Attestation, now is, and was, at the time of signing and sealing the same, the Clerk of said The Municipal Court of Chicago, and keeper of the Seal and records thereof, duly elected, commissioned and qualified; that full faith and credit are, and of right ought to be given to all his official acts as such, in all Courts of Record in the United States and elsewhere, and that the attestation is in due form of law and by the proper officer.

Given under my hand at my chambers in Chicago, this 15th day of November, A. D. 1922.

HARRY OLSON (Seal)
Chief Justice of The Municipal Court
of Chicago.

Exhibit P-1

UNITED STATES OF AMERICA

County of Cook,
City of Chicago. } ss:
State of Illinois,

I, James A. Kearns, Clerk of The Municipal Court of Chicago, do hereby certify that Hon. Harry Olson, whose name is subscribed to the foregoing Certificate of Attestation, now is, and was, at the time of the signing thereof, the CHIEF JUSTICE OF The Municipal Court of Chicago, duly elected, commissioned and qualified, and that his said signature is genuine.

IN WITNESS WHEREOF, I have signed my name and affixed the Seal of said The Municipal Court of Chicago, this 15th day of November A. D. 1922.

JAMES A. KEARNS,
(Seal) Clerk of The Municipal Court of Chicago.

Endorsed on back:

859918

THE MUNICIPAL COURT OF CHICAGO

SMITH TRUST ESTATE,

vs.

MARGARET D. SWART,

CERTIFIED EXEMPLIFIED TRANSCRIPT OF JUDGMENT

Exhibit P-2.

OFFICE OF THE SECRETARY OF STATE

United States of America,
State of Illinois. } ss:

I, Louis L. Emmerson, Secretary of State of the State of Illinois, do hereby certify that the following is a true copy of Section 88 of an Act in relation to practice and procedure in Courts of record, the original of which is now on file in my office.

In Witness Whereof, I hereunto set my hand and affix the Great Seal of State. Done at the City of Springfield, this 22nd day of January, A. D. 1926.

(Seal)

LOUIS L. EMMERSON,
Secretary of State.

EXECUTIVE DEPARTMENT

United States of America,
State of Illinois. }

I, Len Small, Governor of the State of Illinois, do hereby certify that Louis L. Emmerson, who signed the foregoing certificate, was at the time of signing the same, and is now, Secretary of State of the State of Illinois, duly elected and qualified to that office, and that full faith and credit are due his official attestations; that he is the custodian of the above documents and authorized by law to certify to same, and that the same is in due form and by the proper officer; and that

Exhibit P-2

he is the custodian of the Great Seal of State of the State of Illinois.

IN WITNESS WHEREOF, I hereunto set my hand. Done at the City of Springfield, this 22nd day of January, 1926.

LEN SMALL,
Governor.

OFFICE OF THE SECRETARY OF STATE

United States of America,
State of Illinois. }

I, Louis L. Emmerson, Secretary of State of the State of Illinois, hereby certify that LEN SMALL, who signed the foregoing certificate, was at the time of signing the same, and is now, Governor of the State of Illinois, duly elected and qualified, and that as such, full faith and credit is, and ought to be, given to his official attestations; and I further certify that under the Constitution and laws of the State of Illinois, the Secretary of State is the custodian of the Great Seal of State, and that the Governor has no official seal. And I further certify that the foregoing signature is the genuine signature of Len Small, Governor, and that the foregoing certificate signed by him is in due form.

IN TESTIMONY WHEREOF, I hereunto set my hand and cause to be affixed the Great Seal of State. Done at the City of Springfield, this 22nd day of January, A. D., 1926.

(Seal)

LOUIS L. EMMERSON,
Secretary of State.

Exhibit P-2

An Act in relation to practice and procedure in Courts of record.

Section 1. Be it enacted by the People of the State of Illinois represented in the General Assembly:

* * * * * *

Section 88. Any person for a debt *bona fide* due may confess judgment by himself or attorney duly authorized, either in term time or vacation, without process. Judgments entered in vacation shall have life force and effect, and, from the date thereof become liens in like manner and extent as judgments entered in term.

* * * * * *

EDWARD D. SHURTLEFF
Speaker of the House.
LAWRENCE Y. SHERMAN
President of the Senate.

Approved June 3d, 1907.
CHARLES S. DENEEN
Governor
Filed Jun 3 1907
James A. Rose
Sec'y of State

Exhibit P-3.

Form A—Apartment Lease—Chicago Real Estate Board. No. 10

THIS INDENTURE, Made this 17th day of August A. D. One Thousand Nine Hundred and 21 between Smith Trust Estate hereinafter called Lessor, and Mrs. Harmon B. Swart hereinafter called Lessee.

WITNESSETH, That Lessor, for and in consideration of the covenants and agreements hereinafter contained and made on the part of the Lessee, does hereby demise and lease to Lessee for use only by Lessee, and for a private residence or dwelling only, the premises known and described as follows, to-wit: Apartment No. 1 on the 1st floor of the building located at 5100 Hyde Park Boulevard, together with the appurtenances thereto belonging, in the City of Chicago, County of Cook and State of Illinois.

TO HAVE AND TO HOLD THE SAME for and during the term commencing on the First (1st) day of October, A. D. One Thousand Nine Hundred and Twenty-One (1921), and expiring on the Thirtieth (30) day of September A. D., One Thousand Nine Hundred and Twenty-two (1922), inclusive.

In consideration of said demise, and the covenants and agreements hereinafter expressed, it is covenanted and agreed as follows:

FIRST: Lessee shall pay to Lessor, at the office of H. O. Stone & Co., Chicago, Ill., the rent per month of Two Hundred Seventy-five Dollars

Exhibit P-3

$275.00 in advance for the term created by this lease. Said rent shall be due and payable on the first day of each and every month of said term, it being agreed by the parties hereto that the time of each and all such payments is of the essence of this agreement.

SECOND: Said premises shall not be occupied in whole or in part by any person other than Lessee, and lessee, shall not sublet the same, or any part thereof, nor assign this lease without in each case, the consent in writing of Lessor first had and obtained; nor permit to take place by any act or default of himself or any person within his control, any transfer by operation of Law of Lessee's interest created hereby; nor offer for lease or sublease the said premises, nor any portion thereof, by placing notices of signs of "To let," "furnished Room" or "Rooms to Rent" or any other similar sign or notice in any place, nor by advertising the same in any newspaper or place or manner whatsoever without, in each case the consent in writing of Lessor first had and obtained. If lessee, or any one or more of the Lessees, if there be more than one, shall make an assignment for the benefit of creditors, or shall be adjudged a bankrupt, Lessor may terminate this lease, and in such event Lessee shall at once pay Lessor a sum of money equal to the entire amount of rent reserved by this lease for the then unexpired portion of the term hereby created, as liquidated damages.

THIRD: Lessee shall not permit any unlawful or immoral practice with or without his knowledge

or consent, to be committed or carried on therein by himself or by any other person whomsoever; nor use nor permit to be used said premises nor any part thereof as a boarding or lodging house, nor for rooming or school purposes, nor to give instructions in music or singing, nor for any use other than that of private residence or dwelling, nor allow said premises to be used for any purpose that will increase the rate of insurance thereon, nor keep or use or permit to be kept or used in or on said premises, or in or on any place contiguous thereto, any inflammable fluids or explosives without the written permission of Lessor first had and obtained; nor permit said premises to be used for any purpose of trade, business or entertainment, nor for any purpose whatsoever that will injure the reputation of the premises or of the building of which they form a part or which will disturb the tenants of said building or the inhabitants of the neighborhood.

FOURTH:—Lessee has examined said premises prior to and as a condition precedent to his acceptance and the execution hereof, and is satisfied with the physical condition thereof, and his taking possession thereof shall be conclusive evidence of his receipt thereof in good order and repair, except as otherwise specified hereon, and agrees and admits that no representation as to the condition or repair thereof has been made by Lessor or his agent prior to or at any time of the execution of this lease, which is not herein expressed, or endorsed hereon; and likewise agrees and admits that there are not and have not been other representations, agreements, cov-

enants or promises for decorating said premises or for other alterations, repairs, improvements or other modifications made by Lessor or his agent which are not contained in this instrument.

FIFTH:—Lessee shall keep the said premises and the walls, ceilings, floors, woodwork, paint, plastering, plumbing, pipes, fixtures, kitchen ranges, globes and glassware, and appurtenances thereto in said demised premises in a clean, sightly and healthy condition, and in good repair, all according to the statutes and ordinances in such cases made and provided, and the directions of public officers thereunto duly authorized, all at his own expense, and shall yield the same back to Lessor upon the termination of the said lease, whether such termination shall occur by expiration of the term or in any other manner whatsoever, in the same condition of cleanliness, repair and sightliness as at the date of the execution hereof, loss by fire and reasonable wear and tear excepted. Lessee shall make all necessary repairs and renewals to walls, ceilings, floors, woodwork, paint, plastering, plumbing, pipes and fixtures in or upon said premises whenever damage or injury to the same shall have resulted from misuse or neglect, and replace broken globes, glass and fixtures with material of the same size and quality as that broken. Lessee likewise shall replace broken or wornout parts of kitchen ranges or appurtenances thereto or appliances thereof when the same shall have been lost or broken by Lessee or any other person. If, however, the said premises shall not thus be kept in good repair and in a clean, sightly and healthy condi-

tion by Lessee, as aforesaid, Lessor may enter the same, himself or by his agents, servants or employees, without such entering causing or constituting a termination of this lease or an interference with the possession of the premises by Lessee, and Lessor may replace the same in the same condition of repair, sightliness, healthiness and cleanliness as existed at the date of execution hereof, and Lessee agrees to pay Lessor, in addition to the rent hereby reserved, the expenses of Lessor in thus replacing the premises in that condition. Lessee shall not cause or permit any waste, misuse or neglect of the water, or of the water, gas or electric fixtures.

SIXTH: Lessee shall allow Lessor, his agents, employees or servants, or any other person thereunto authorized by Lessor, free access to the premises hereby leased for the purpose of examining the same, to ascertain if the same are in a clean, sightly and healthy condition, and to make such repairs or alterations as Lessor may see fit to make, and to exhibit the same to prospective purchasers of the building in which said premises are contained, and to prospective tenants in the place of Lessee, and for the last mentioned purposes to allow to be placed in and upon said premises, at such places as may be directed by Lessor, notices of "For Rent"; and Lessee undertakes and agrees that neither he nor any person within his control will interfere with said notices when thus placed. Lessor shall have the right of access herein mentioned with or without Lessee's consent. If Lessee shall refuse or fail to allow access to said premises as in this para-

graph provided, or to allow the placing of any "For Rent" notice as in this paragraph provided, or shall interfere with any such notice, he shall pay to Lessor, as liquidated damages and not a penalty, for each such violation a sum equivalent to three months' rent, it being recognized that the actual damages caused by such violations, while real and substantial are very difficult, if not impossible, of ascertainment.

SEVENTH:—Lessor shall not be liable to Lessee for any damage or injury to him or his property occasioned by the failure of Lessor to keep said premises in repair, and shall not be liable for any injury done or occasioned by wind or by or from any defect of plumbing, electric wiring or of insulation thereof, gas pipes, water pipes or steam pipes, or from broken stairs, porches, railings or walks, or from the backing up of any sewer pipe or down-spout, or from the bursting, leaking or running of any tank, tub, washstand, water closet or waste pipe, drain, or any other pipe or tank in, upon or about said building or premises, nor for any such damage or injury occasioned by water, snow or ice being upon or coming through the roof, skylight, trap-door, stairs, walks or any other place upon or near said premises, or otherwise, nor for any such damage or injury done or occasioned by the falling of any fixture, plaster or stucco, nor for any damage or injury arising from any act, omission or negligence of co-tenants or of other persons, occupants of the same building or of adjoining or contiguous buildings or of owners of adjacent or contiguous property, or of Lessor's

agents or Lessor himself, all claims for any such damage or injury being hereby expressly waived by Lessee.

EIGHTH:—Lessee shall not attach, affix or exhibit or permit to be attached, affixed or exhibited, any articles of permanent character to any window, floor, ceiling, door or wall in any place in or about said premises, or upon any of the appurtenances thereto, without in each case the written consent of Lessor first had and obtained; and shall not commit or suffer any waste in or about said premises; and shall make no changes or alterations in the premises by the erection of partitions or the papering of walls, or otherwise, without the consent in writing of Lessor; and in case he shall affix additional locks or bolts on doors or window, or shall place in said apartment lighting or bathroom fixtures without the consent of Lessor first had and obtained, such locks, bolts and other fixtures shall remain for the benefit of Lessor, and without expense of removal or maintenance to Lessor. Lessor shall have the privilege of retaining the same if he desires. If he does not desire to retain the same, he may remove and store the same, and Lessee agrees to pay the expense of removal and storage thereof.

NINTH: Where the building is equipped for the purpose, Lessor shall furnish to Lessee, only in the tubs, basins, pipes and faucets, provided for such purpose, hot water during the term of this lease, and in the radiators a reasonable amount of hot water heat or steam heat at reasonable hours, if the weather and temperature

Exhibit P-3

require it, from the 1st day of October until the 30th day of April of the succeeding year for the use of Lessee, except when prevented by strike, accident, or other cause beyond the control or prevention of Lessor, and except during the repairing of the apparatus provided in said building for the furnishing of said water and heat. Lessor shall not be held liable for any injury or damage whatsoever which may arise or accrue from his failure to furnish cold or hot water or heat, regardless of the cause of such failure, all claims for such injury or damage being hereby expressly waived by Lessee.

TENTH: In case said premises shall be rendered untenable by fire, explosion or other casualty, Lessor may, at his option terminate this lease or repair said premises within thirty days. If Lessor does not repair said premises within said time, or the building containing said premises shall have been wholly destroyed, the term hereby created shall cease and determine.

ELEVENTH: At the termination of this lease, by lapse of time or otherwise, Lessee shall yield up immediate possession to Lessor, and return the keys to said apartment to Lessor at the place stipulated herein for the payment of rent, and failing so to do, shall pay as liquidated damages for the whole time such possession is withheld a sum equal to twice the amount of rent herein reserved, pro rated and averaged per day of such withholding. But the provisions of this clause and the acceptance of any such liquidated damages by Lessor shall not constitute a waiver by

Exhibit P-3

Lessor of his right of re-entering as hereinafter set forth, nor shall any other act in apparent affirmance of the tenancy operate as a waiver of the right to terminate this lease or operate as an extension thereof.

TWELFTH: If Lessee shall vacate or abandon said premises or permit the same to remain vacant or unoccupied for a period of ten days, or in case of the non-payment of the rent reserved hereby, or any part thereof, or of the breach of any covenant in this lease contained, Lessee's right to the possession of the demised premises, thereupon shall terminate, with or without any notice or demand whatsoever, and the mere retention or possession thereafter by Lessee shall constitute a forcible detainer of said demised premises, and if the Lessor so elects, but not otherwise, and with or without notice of such election or any notice or demand whatsoever, this lease shall thereupon terminate and upon the termination of Lessee's right of possession, as aforesaid, whether this lease be terminated or not, Lessee agrees to surrender possession of the demised premises immediately without the receipt of any demand for rent, notice to quit or demand for possession of the demised premises, whatsoever, and hereby grants to Lessor full and free license to enter into and upon said premises or any part thereof, to take possession thereof with or without process of Law, and to expel and remove Lessee or any other person who may be occupying the said premises or any part thereof as a member of his family or otherwise, and Lessor may use such force in and about expelling

and removing Lessee and said other person as may reasonably be necessary, and Lessor may repossess himself of the said premises as of his former estate, but said entry of said premises shall not constitute a trespass or forcible entry or detainer, nor shall it cause a forfeiture of rents due by virtue thereof, nor a waiver of any covenant, agreement or promise in said lease contained to be performed by Lessee. Lessee hereby waives all notice of any election made by Lessor hereunder, demand for rent, notice to quit, demand for possession, and any and all notices and demands whatsoever, of any and every nature, which may or shall be required by any statute of this state relating to forcible entry and detainer, or to landlord and tenant, or any other statute, or by the common law, during the term of this lease or any extension thereof. The acceptance of rent whether in a single instance or repeatedly, after it falls due, or after knowledge or any breach hereof by Lessee or the giving or making of any notice or demand, whether according to any statutory provision or not, or any act or series of acts except an express written waiver shall not be construed as a waiver of Lessor's right to act without notice or demand or of any other right hereby given Lessor, or as an election not to proceed under the provisions of this lease.

THIRTEENTH: If Lessee's right to the possession of said premises shall be terminated in any way, said premises, or any part thereof may, but need not, be relet by Lessor, for the account and benefit of Lessee, for such rent and upon such

terms and to such persons and for such period or periods as may seem fit to the lessor, but lessor shall not be required to accept or receive any tenant offered by Lessee nor to do any act whatsoever or exercise any diligence whatsoever, in or about the procuring of another occupant or tenant to mitigate the damages of Lessee or otherwise, Lessee hereby waiving the use of any care or diligence by Lessor in the reletting thereof; and if a sufficient sum shall not be received from such reletting to satisfy the rent hereby reserved, after paying the expenses of reletting and collection, including commissions to agents, which shall be figured and allowed to Lessor at the rate of five per cent on the total amount of the rent reserved by such reletting, but in no event to be less than Ten Dollars, and including also expenses of redecorating, Lessee agrees to pay and satisfy all deficiency; but the acceptance of a tenant by Lessor in place of Lessee, shall not operate as a cancellation hereof; nor to release Lessee from the performance of any covenant, promise or agreement herein contained, and performance by any substituted tenant by the payment of rent, or otherwise, shall constitute only satisfaction *pro tanto* of the obligations of Lessee arising hereunder.

FOURTEENTH: Lessee shall pay and discharge all costs, expenses and attorneys fees, which shall be incurred and expended by Lessor in enforcing the covenants and agreements of this lease, whether by the instituting of litigation or in the taking advice of counsel or otherwise.

Exhibit P-3

FIFTEENTH: If default be made in the payment of the rent hereinabove reserved, or of any installment thereof as herein provided, Lessee does hereby irrevocably constitute any attorney of any Court of Record in this State, attorney for him and in his name from time to time to waive the issuance of process and service thereof, to waive trial by Jury, to confess judgment in favor of Lessor, his heirs, executors, administrators or assigns, and against Lessee, for the amount of rent which may be then due, by virtue of the terms hereof, or of any extensions or renewals hereof, or by virtue of any holdover after the termination hereof, and which may be in default, as aforesaid, together with the cost of such proceedings, and a reasonable sum, but at no time less than Ten Dollars, for the plaintiff's attorney's fee in or about the entry of said judgment, and for said purpose to file in said cause, his cognovit thereof, and to make an agreement in said cognovit or elsewhere, waiving and releasing all errors which may intervene in any such proceeding, and waiving and releasing all right of appeal and right to writ of error, and consenting to an immediate execution upon such judgment; and Lessee hereby confirms all that said attorney may lawfully do by virtue hereof. Lessors shall have a first lien on Lessee's interest hereunder, and on Lessee's property now or hereafter located in said premises, or elsewhere, to secure the payment of all moneys due hereunder, which lien may be foreclosed in equity and in case of any such foreclosure proceeding, a receiver shall be appointed to take possession of said

premises and property and relet the premises under order of court.

SIXTEENTH:—The service of any five-days' notice or other notice to quit, or demand for possession, or notice that the tenancy hereby created will be terminated on a date therein named, shall not of itself be deemed a termination hereof, nor shall the institution of any action of forcible entry or detainer be deemed a termination hereof, nor shall any judgment for possession that may be rendered in such action be deemed a termination hereof, whether such judgment shall have been rendered for non-payment of rent, or for breach of any of the covenants, or agreements, in this lease contained, nor shall the entry of such judgment release Lessee from the obligation to pay the rent thereby reserved to be paid during the balance of the term hereof, or during any extension hereof, but Lessor may receive and collect any rent due from Lessee, and the payment or receipt of said rent shall not waive or affect any such notice, suit or judgment, or in any manner whatsoever waive, affect, change, modify or alter any rights or remedies which Lessor may have by virtue hereof.

SEVENTEENTH: The rules and regulations contained on the reverse side hereof are made a part hereof by reference and incorporated herein, and Lessee shall observe the same. Failure to keep and observe the said rules will constitute a breach of the term of this lease in the same manner as if the said rules were contained herein as

covenants, and a failure to observe the same shall be of the same effect. Lessees shall keep and observe such further reasonable rules and regulations as may later be required by lessor, which may be necessary for the proper and orderly care of the building of which the premises herein demised are a part.

EIGHTEENTH: All covenants, promises, representations and agreements herein contained shall be binding upon, apply and inure to the benefit of the heirs, executors, administrators or assigns respectively of Lessor and Lessee.

NINETEENTH: The rights and remedies hereby created are cumulative, and the use of one remedy shall not be taken to exclude or waive the right to the use of another.

TWENTIETH: The words "Lessor" and "Lessee" wherever and whenever used herein, though expressed in the singular number, shall nevertheless be taken to apply to the persons, one or more, male or female, and by the firms or corporations, though plural in number, respectively as the same may be described as Lessor or Lessee hereinabove, and all pronouns used herein and referring to said parties shall be construed accordingly, regardless either of number or gender thereof. If there be more than one Lessee the warrant of attorney contained in Clause "FIFTEENTH" is given jointly and severally and shall authorize the entry of appearance of, waiver of issuance of process and trial by jury, by the confession of judgment, against, any one or more of such lessees, and shall authorize the perform-

ance of every other act mentioned in said Clause "FIFTEENTH," in the name of and on behalf of any one or more of such Lessees.

WITNESS the hands and seals of the parties hereto the day and year first above written.

SMITH TRUST ESTATE (Seal)
By H. O. Stone and Co. per C C E
MARGARET E. SWART (Seal)

Endorsed on back:

FORM A—APARTMENT LEASE

Adopted by Renting Division, Chicago Real Estate Board

FROM

SMITH TRUST ESTATE

TO

MRS. HARMON B. SWART

Apartment No. 1 on 1st Floor
No. 5100 Hyde Park Blvd.
Monthly Installments $275.00
From October 1st A. D. 1921
To September 30th A. D. 1922

Exhibit P-3

H. O. STONE & CO.

Conway Bldg.

111 W. Washington Street

Phone: Main 1865

KENWOOD OFFICE

1007 East 43rd Street
Phone: Oakland 1302

JACKSON PARK OFFICE

6802 Stony Island Avenue
Phone: Midway 2013

WILSON AVE. OFFICE

1029 Wilson Avenue

Phone: Edgewater 1700

Filed: 1922, Nov. 2, A. M. 9:40.

The Municipal Court of Chicago,
James A. Kearns,
Clerk.

Stamped and written in ink on face of lease:

Judgment entered this 2d day of November, A. D. 1922, for $1440.00 and costs being the rent for months of January, February, March and April of 1922, Including as part of said judgment $90.00 Attorney's fees.

THE MUNICIPAL COURT OF CHICAGO,
James A. Kearns.

Exhibit D-1.

2-8-26 J. W.

The Municipal Court of Chicago M C C 20B 5M
1-25 10645 Transcript of Proceedings

UNITED STATES OF AMERICA

In The Municipal Court of Chicago

State of Illinois,
County of Cook, } ss:
City of Chicago.

PLEAS, PROCEEDINGS AND JUDGMENTS, before the Municipal Court of Chicago, held in the City of Chicago, in the County of Cook and State of Illinois, at the places in the First District in said City provided by the corporate authorities of said city for the holding of said Court, in the year of our Lord, one thousand nine hundred and twenty-two, and the Independence of the United States, the one hundred and forthy-seventh.

Present:

Honorable John Richardson,
One of the judges of the Municipal Court of Chicago.

Robert E. Crowe, State's Attorney.
Dennis J. Egan, Bailiff.

Attest:

James A. Kearns, Clerk.

BE IT REMEMBERED, to wit: that on the second day of November A. D. 1922, the following among other proceedings were had in said Court and entered of record therein, to wit:

Exhibit D-1

Smith Trust Estate, vs. Margaret D. Swart.	No. 859918

CONTRACT CONFESSION

Now comes the Plaintiff in this cause; also comes the defendant, who by virtue of defendants warrant of attorney files herein a cognovit confessing the action of the Plaintiff against the defendant and that the Plaintiff has sustained damages herein against the defendant in the sum as set forth in said cognovit.

Whereupon the plaintiff moves the Court for final judgment herein. It is therefore considered by the Court that the Plaintiff have and recover of and from the defendant Margaret D. Swart, the damages of the Plaintiff amounting to the sum of Fourteen Hundred forty dollars ($1440.00) in form as aforesaid confessed, together with the costs by the Plaintiff herein expended, and that execution issue therefor.

Be It Remembered, that to-wit: on the 2nd day of November, A. D. 1922, a certain Statement of claim was filed in the office of the Clerk of the Municipal Court, in words and figures following to wit:

The Municipal Court of Chicago. M CC 418 25M 3-22 7916 Statement of Claim and Cognovit on Lease

Exhibit D-1

IN THE MUNICIPAL COURT OF CHICAGO

State of Illinois, City of Chicago, First District

SMITH TRUST ESTATE, vs. MARGARET D. SWART.	Contract No. 859918 Claim for $1500.00

STATEMENT OF CLAIM.

Plaintiff's claim is for rent accrued and now due and payable upon a lease of certain real estate, which lease is hereto attached and made a part of this statement of claim, said lease dated the 17th day of August, 1921, executed by the Plaintiff as lessor and the defendant as lessee, whereby the Plaintiff demised to the defendant the premises therein described for and during the term of October 1, 1921, to September 30, 1922, and next ensuing, the defendant thereby undertaking and agreeing to pay to the plaintiff therefor during said term the annual rent of thirty three hundred dollars $3300.00 payable in monthly installments of $275.00 on the first day of each and every month beginning on October 1, 1921, to and including the month of September, 1922, by virtue of which demise the sum of $1350, dollars $1350.00) of the rent aforesaid for the months of January, February, March and April, 1922 and $50.00 per month for the balance of term, became due and payable from the defendant to the plaintiff and still is in arrears and unpaid to the plaintiff, wherefore the plaintiff sue for the sum of

Exhibit D-1

Thirteen Hundred Fifty Dollars ($1350.00) of the rent aforesaid, together with the sum of Ninety Dollars ($90.00) for attorney's fees provided for in said lease.

ARCHIBALD C. CATTEEL,
Attorney for Plaintiff,
501-11 W. Monroe St., Chicago, Ill.,
Business Address.

AFFIDAVIT OF EXECUTION OF LEASE OF PLAINTIFF'S CLAIM

State of Illinois,
County of Cook, } ss:
City of Chicago.

Charles F. Beau, Jr., being first duly sworn on oath states that he is the duly authorized agent for Plaintiff in the above entitled cause; that the nature of Plaintiff's demand is a claim for rent accrued and now due and payable under the lease described in the foregoing statement of claim, and that there is due to plaintiff from the defendant after allowing to the defendant all just credits, deductions and set-offs, the sum of Thirteen Hundred fifty Dollars ($1350.00) rent for the period stated in said statement of claim, in addition to said attorney's fees.

Affiant further says that he is acquainted with the handwriting of said plaintiff and defendant Margaret D. Swart that the signatures to said lease are the genuine signatures of said plaintiff, Smith Trust Estate, by H. C. Stone & Co. and defendant, and that said lease was duly executed

Exhibit D-1

by said plaintiff and defendant, and that said defendant is still living.

CHAS. F. BEAU, JR.

Subscribed and sworn to before me
this 2nd day of November, 1922.
Ralph E. Brown,
Notary Public.
(Seal.)

IN THE MUNICIPAL COURT OF CHICAGO

State of Illinois, } ss:
City of Chicago. }

MARGARET D. SWART,
ads
SMITH TRUST ESTATE.

COGNOVIT

AND SAID Margaret D. Swart, defendant in the above entitled suit, by Ralph E. Brown, attorney come and waive service of process, and say that he cannot deny the action of said plaintiff, but confesses that she, said defendant owes to and is indebted to the said plaintiff in manner and form as said plaintiff has above complained against her, the said Margaret D. Swart; and that said Plaintiff has sustained damages on occasion of the non-performance of the agreement in said statement of claim mentioned to the amount of Thirteen Hundred Fifty Dollars ($1350.00) over and above all costs and attorney's fees in this behalf ex-

Exhibit D-1

pended; and said defendant agrees that judgment may be entered herein for said sum of money, and in addition thereto for Ninety Dollars, to be allowed to the plaintiff for attorney's fees in entering up this judgment, and also for all costs of this suit; and said defendant further agrees that no writ of error or appeal shall be prosecuted on the judgment entered by virtue thereof, nor any bill in equity filed to interfere in any manner with the operation of said judgment, and that she hereby releases all errors that may intervene in entering up the same, or issuing execution thereon, and consents to immediate execution upon such judgment.

RALPH BROWN,
Defendant's Attorney.

If the amount to be allowed for attorney's fees is certain in the power of attorney and the amount thereof is reasonable such amount may be here stated; otherwise the statement may be "such reasonable attorney's fees as the Court may deem just and proper."

Let judgment be entered for Fourteen Hundred forty ($1440) and costs, including as a part of said judgment the sum of Ninety ($90.00) Dollars which are allowed as attorney's fees for entering upon this judgment. Leave to Plaintiff to withdraw original lease upon filing certified copy.

Dated November 2nd, 1922.

1220 J. RICHARDSON, Judge.

FORM B. APARTMENT LEASE
Chicago Real Estate Board No. 10

Exhibit D-1

THIS INDENTURE, made this 17th day of August, A. D. One Thousand Nine Hundred and twenty-one, between SMITH TRUST ESTATE, hereinafter called lessor, and Mrs. Harmon B. Swart, hereinafter called lessee.

WITNESSETH, That Lessor, for and in consideration of the covenants and agreements hereinafter contained and made on the part of the lessee, does hereby demise and lease to lessee for use only by Lessee, and for a private residence or dwelling only, the premises known and described as follows, to wit: Apartment No. 1 on the first floor of the building located at 5100 Hyde Park Boulevard, together with the appurtenances thereto belonging, in the City of Chicago, County of Cook and State of Illinois.

TO HAVE AND TO HOLD THE SAME for and during the term commencing the First (1st) day of October, A. D. one Thousand Nine Hundred and twenty-one (1921), and expiring on the Thirtieth (30) day of September, A. D. One Thousand Nine Hundred and twenty-two (1922) inclusive.

In consideration of said demise, and the covenants and agreements hereinafter expressed, it is covenanted and agreed as follows:

FIRST: Lessee shall pay to Lessor, at the office of H. O. Stone & Co., Chicago, Ill., the rent per month of Two Hundred Seventy-five Dollars $275.00 in advance for the term created by this lease. Said rent shall be due and payable on the first day of each and every month of said term, it being agreed by the parties hereto that the time

of each and all such payments is of the essence of this agreement.

SECOND: Said premises shall not be occupied in whole or in part by any person other than, and lessee, shall not sublet the same, or any part thereof, nor assign this lease without in each case, the consent in writing of Lessor first had and obtained; nor permit to take place by any act or default of himself or any person within his control, any transfer by operation of Law of Lessee's interest created hereby; nor offer for lease or sublease the said premises, nor any portion thereof, by placing notices of signs of "To let," "furnished Room" or "Rooms to Rent" or any other similar sign or notice in any place, nor by advertising the same in any newspaper or place or manner whatsoever without, in each case the consent in writing of Lessor first had and obtained. If lessee, or any one or more of the Lessees, if there be more than one, shall make an assignment for the benefit of creditors, or shall be adjudged a bankrupt, Lessor may terminate this lease, and in such event Lessee shall at once pay Lessor a sum of money equal to the entire amount of rent reserved by this lease for the then unexpired portion of the term hereby created, as liquidated damages.

THIRD: Lessee shall not permit any unlawful or immoral practice with or without his knowledge or consent, to be committed or carried on therein by himself or by any other person whomsoever; nor use nor permit to be used said premises nor any part thereof as a boarding or lodging house,

Exhibit D-1

nor for rooming or school purposes, nor to give instructions in music or singing, nor for any use other than that of private residence or dwelling, nor allow said premises to be used for any purpose that will increase the rate of insurance thereon, nor keep or use or permit to be kept or used in or on said premises, or in or on any place contiguous thereto, any inflammable fluids or explosives without the written permission of Lessor first had and obtained; nor permit said premises to be used for any purpose of trade, business or entertainment, nor for any purpose whatsoever that will injure the reputation of the premises or of the building of which they form a part or which will disturb the tenants of said building or the inhabitants of the neighborhood.

FOURTH: Lessee has examined said premises prior to and as a condition precedent to his acceptance and the execution hereof, and is satisfied with the physical condition thereof, and his taking possession thereof shall be conclusive evidence of his receipt thereof in good order and repair, except as otherwise specified hereon, and agrees and admits that no representation as to the condition or repair thereof has been made by Lessor or his agent, which is not herein expressed, or endorsed hereon; and likewise agrees and admits that no agreement or promise to decorate, alter, repair or improve said premises, either before or after the execution hereof not contained herein has been made by the Lessor or his agent, which are not contained in this instrument.

FIFTH: Lessee shall keep the said premises and the walls, ceilings, floors, woodwork, paint,

plastering, plumbing, pipes, fixtures, kitchen ranges, globes and glassware, and appurtenances thereto in said demised premises in a clean, sightly and healthy condition and in good repair, all according to the statutes and ordinances in such cases made and provided, and the directions of public officers thereunto duly authorized all at his own expense, and shall yield the same back to Lessor upon the termination of the said lease, whether such termination shall occur by expiration of the term or in any other manner whatsoever, in the same condition of cleanliness, repair and sightliness as at the date of the execution hereof, loss by fire and reasonable wear and tear excepted. Lessee shall make all necessary repairs and renewals to walls, ceilings, floors, woodwork, paint, plastering plumbing, pipes and fixtures in or upon said premises whenever damage or injury to the same shall have resulted from misuse or neglect or any cause other than lessor's acts, and replace broken globes, glass and fixtures with material of the same size and quality as that broken. Lessee likewise shall replace broken or worn-out parts of Kitchen ranges or appurtenances thereto or appliances thereof when the same shall have been lost or broken by Lessee or any other person. If, however, the said premises shall not thus be kept in good repair and in a clean sightly and healthy condition by Lessee, as aforesaid, Lessor may enter the same himself, or by his agents, servants or employes, without such entering causing or constituting a termination of this lease or an interference with the possession of the premises by Lessee, and Lessor may re-

Exhibit D-1

place the same in the same condition of repair, sightliness, healthiness and cleanliness, as existed at the date of execution hereof, and Lessee agrees to pay Lessor in addition to the rent hereby reserved, the expenses of Lessor in thus replacing the premises in that condition. Lessee shall not cause or permit any waste, misuse or neglect of the water, or of the water, gas or electric fixtures.

SIXTH: Lessee shall allow Lessor, his agents, employes or servants or any other person thereunto authorized by Lessor, free access to the premises hereby leased for the purpose of examining the same, to ascertain if the same are in a clean and healthy condition, and to make such repairs or alterations as Lessor may see fit to make, and to exhibit the same to prospective purchasers of the building in which said premises are contained, and to prospective tenants in the place of Lessee, and for the last mentioned purposes to allow to be placed in and upon said premises, at such places as may be directed by Lessor, notices of "For Rent"; and Lessee undertakes and agrees that neither he nor any person within his control will interfere with said notices when thus placed. Lessor shall have the right of access herein mentioned with or without Lessee's consent. If Lessee or any person under his control, shall refuse or fail to allow access to said premises as in this paragraph provided or shall interfere with any such notice, he shall pay to Lessor, as liquidated damages, and not a penalty, for each such violation a sum equivalent to three month's rent, it being recognized that the actual damages caused by such

violation, while real and substantial are very difficult if not impossible, of ascertainment.

SEVENTH: Lessor shall not be liable to lessee for any damage or injury to him or his property occasioned by the failure of Lessor to keep said premises in repair, and shall not be liable for any injury done or occasioned by wind or by or from any defect of plumbing, electric wiring or of insulation thereof, gas pipes, water pipes or steam pipes, or from broken stairs, porches, railings or walks, or from the backing up of any sewer pipe or down spout, or from the bursting, leaking or running of any tank, tub, washstand, water closet or waste pipe, drain, or any other pipe or tank in, upon or about said building or premises, nor from the escape of steam or hot water from any radiator, it being agreed that said radiators are under the control of Lessee, nor for any such damage or injury occasioned by water, snow or ice being upon or coming through the roof, skylight, trap door, stairs, walks, or any other place upon or near said premises, or otherwise, nor for any such damage or injury done or occasioned by the falling of any fixture, plaster or stucco, nor for any damage or injury arising from any act, omission or negligence of co-tenants or of other persons, occupants of the same building or of adjoining or contiguous buildings or of owners of adjacent or contiguous property, or of Lessor's agents or Lessor himself, all claims for any such damage or injury being hereby expressly waived by Lessee.

EIGHTH: Lessee shall not attach, affix or exhibit or permit to be attached, affixed or exhibit-

ed, except by Lessor or his agent, any articles of permanent character or any sign, attached or detached with any writing or printing thereon, to any window, floor, ceiling, door or wall in any place in or about said premises, or upon any of the appurtenances thereto, without in each case the written consent of Lessor first had and obtained; and shall not commit or suffer any waste in or about said premises; and shall make no changes or alterations in the premises by the erection of partitions or the papering of walls, or otherwise, without the consent in writing of Lessor; and in case he shall affix additional locks or bolts on doors or window, or shall place in said apartment lighting or bathroom fixtures without the consent of Lessor first had and obtained, such locks, bolts and other fixtures shall remain for the benefit of Lessor, and without expense of removal or maintenance or Lessor, Lessor shall have the privilege of retaining the same if he desire. If he does not desire to retain the same, he may remove and store the same, and Lessee agrees to pay the expense of removal and storage thereof.

NINTH: Where the building is equipped for the purpose, Lessor shall furnish to Lessee, only in the tubs, basins, pipes and faucets, provided for such purpose, hot water during the term of this lease, and in the radiators a reasonable amount of hot water heat or steam heat at reasonable hours, if the weather and temperature require it, from the 1st day of October until the 30th day of April of the succeeding year for the use of Lessee, except when prevented by strike,

accident, or other cause beyond the control or prevention of Lessor, and except during the repairing of the apparatus provided in said building for the furnishing of said water and heat. Lessor shall not be held liable for any injury or damage whatsoever which may arise or accrue from his failure to furnish cold or hot water or heat, regardless of the cause of such failure, all claims for such injury or damage being hereby expressly waived by Lessee.

TENTH: In case said premises shall be rendered untenable by fire, explosion or other casualty, Lessor may, at his option terminate this lease or repair said premises within thirty days. If Lessor does not repair said premises within said time, or the building containing said premises shall have been wholly destroyed, the term hereby created shall cease and determine.

ELEVENTH: At the termination of this lease, by lapse of time or otherwise, Lessee shall yield up immediate possession to Lessor, and return the keys to said apartment to Lessor at the place stipulated herein for the payment of rent, and failing so to do, shall pay as liquidated damages for the whole time such possession is withheld a sum equal to twice the amount of rent herein reserved, pro rated and averaged per day of such withholding. But the provisions of this clause and the acceptance of any such liquidated damages by Lessor shall not constitute a waiver by Lessor of his right of re-entering as hereinafter set forth, nor shall any other act in apparent affirmance of the tenancy operate as a waiver of

the right to terminate this lease or operate as extension thereof.

TWELFTH: If Lessee shall vacate or abandon said premises or permit the same to remain vacant or unoccupied for a period of ten days, or in case of the non-payment of the rent reserved hereby, or any part thereof, or of the breach of any covenant in this lease contained, Lessee's right to the possession of the demised premises, thereupon shall terminate, with or without any notice or demand whatsoever, and the mere retention or possession thereafter by Lessee shall constitute a forcible detainer of said demised premises, and if the Lessor so elects, but not otherwise, and with or without notice of such election or any notice or demand whatsoever, this lease shall thereupon terminate and upon the termination of Lessee's right of possession, as aforesaid, whether this lease be terminated or not, Lessee agrees to surrender possession of the demised premises immediately without the receipt of any demand for rent, notice to quit or demand for possession of the demised premises, whatsoever, and hereby grants to Lessor full and free license to enter into and upon said premises or any part thereof, to take possession thereof with or without process of Law, and to expel and remove Lessee or any other person who may be occupying the said premises or any part thereof as a member of his family or otherwise, and Lessor may use such force in and about expelling and removing Lessee and said other person as may reasonably be necessary, and Lessor may repossess himself of the said premises as of his

former estate, but said entry of said premises shall not constitute a trespass or forcible entry or detainer, nor shall it cause a forfeiture of rents due by virtue thereof, nor a waiver of any covenant, agreement or promise in said lease contained to be performed by Lessee. Lessee hereby waives all notice of any election made by Lessor hereunder, demand for rent, notice to quit, demand for possession, and any and all notices and demands whatsoever, of any and every nature, which may or shall be required by any statute of this state relating to forcible entry and detainer, or to landlord and tenant, or any other statute, or by the common law, during the term of this lease or any extension thereof. The acceptance of rent whether in a single instance or repeatedly, after it falls due, or after knowledge or any breach hereof by Lessee or the giving or making of any notice or demand, whether according to any statutory provision or not, or any act or series of acts except an express written waiver shall not be construed as a waiver of Lessor's right to act without notice or demand or of any other right hereby given Lessor, or as an election not to proceed under the provisions of this lease.

THIRTEENTH: If Lessee's right to the possession of said premises shall be terminated in any way, said premises, or any part thereof may, but need not, be relet by Lessor, for the account and benefit of Lessee, for such rent and upon such terms and to such persons and for such period or periods as may seem fit to the lessor, but lessor shall not be required to accept or receive any ten-

Exhibit D-1

ant offered by Lessee nor to do any act whatsoever or exercise any diligence whatsoever, in or about the procuring of another occupant or tenant to mitigate the damages of Lessee or otherwise, Lessee hereby waiving the use of any care or diligence by Lessor in the reletting thereof; and if a sufficient sum shall not be received from such reletting to satisfy the rent hereby reserved, after paying the expenses of reletting and collection, including commissions to agents, which shall be figured and allowed to Lessor at the rate of five per cent on the total amount of the rent reserved by such reletting, but in no event to be less than Ten Dollars, and including also expenses of redecorating, Lessee agrees to pay and satisfy all deficiency; but the acceptance of a tenant by Lessor in place of Lessee, shall not operate as a cancellation hereof; nor to release Lessee from the performance of any covenant, promise or agreement herein contained, and performance by any substituted tenant by the payment of rent, or otherwise, shall constitute only satisfaction *pro tanto* of the obligations of Lessee arising hereunder.

FOURTEENTH: Lessee shall pay and discharge all costs, expenses and attorneys fees, which shall be incurred and expended by Lessor in enforcing the covenants and agreements of this lease, whether by the instituting of litigation or in the taking advice of counsel or otherwise.

FIFTEENTH: If default be made in the payment of the rent hereinabove reserved, or of any installment thereof as herein provided, Lessee does hereby irrevocably constitute any attorney

of any Court of Record in this State, attorney for him and in his name from time to time to waive the issuance of process and service thereof, to waive trial by Jury, to confess judgment in favor of Lessor, his heirs, executors, administrators or assigns, and against Lessee, for the amount of rent which may be then due, by virtue of the terms hereof, or of any extensions or renewals hereof, or by virtue of any holdover after the termination hereof, and which may be in default, as aforesaid, together with the cost of such proceedings, and a reasonable sum, but at no time less than Ten Dollars, for the plaintiff's attorney's fee in or about the entry of said judgment, and for said purpose to file in said cause, his cognovit thereof, and to make an agreement in said cognovit or elsewhere, waiving and releasing all errors which may intervene in any such proceeding, and waiving and releasing all right of appeal and right to writ of error, and consenting to an immediate execution upon such judgment; and Lessee hereby confirms all that said attorney may lawfully do by virtue hereof. Lessors shall have a first lien on Lessee's interest hereunder, and on Lessee's property now or hereafter located in said premises, or elsewhere, to secure the payment of all moneys due hereunder, which lien may be foreclosed in equity and in case of any such foreclosure proceeding, a receiver shall be appointed to take possession of said premises and property and relet the premises under order of court.

SIXTEENTH: The obligation of Lessee to pay the rent reserved hereby during the balance of

Exhibit D-1

the term thereof, or during any extension hereof, shall not be deemed to be waived, released or determined, nor shall the right or power to confess judgment given in clause fifteen hereof be deemed to be waived or terminated by the service of any five day's notice, other notice to collect, demand for possession, or notice that the tenancy hereby created will be terminated on the date therein named, the institution of any action of forcible detainer or ejectments or any judgment for possession that may be rendered in such action, or any other act or acts resulting in the termination of Lessee's right to possession of the demised premises. The Lessor may collect and receive any rent due from Lessee, and payment or receipt thereof shall not waive or affect any such notice, demand suit, or judgment or in any manner whatsoever waive, affect, change, modify or alter any rights or remedies which lessor may have by virtue hereof.

SEVENTEENTH: The rules and regulations contained on the reverse side hereof are made a part hereof by reference and incorporated herein, and Lessee shall observe the same failure to keep and observe the said rules will constitute a breach of the term of this lease in the same manner as if the said rules were contained herein as covenants, and a failure to observe the same shall be of the same effect. Lessees shall keep and observe such further reasonable rules and regulations as may later be required by lessor, which may be necessary for the proper and orderly care

of the building of which the premises herein demised are a part.

EIGHTEENTH: All covenants promises, representations and agreements herein contained shall be binding upon, apply and inure to the benefit of the heirs, executors administrators or assigns respectively of Lessor and Lessee.

NINETEENTH: The rights and remedies hereby created are cumulative, and the use of one remedy shall not be taken to exclude or waive the right to the use of another.

TWENTIETH: The words "Lessor" and "Lessee" wherever and whenever used herein, though expressed in the singular number, shall nevertheless be taken to apply to the persons, one or more, male or female, and by the firms or corporations, though plural in number, respectively as the same may be described as Lessor or Lessee hereinabove, and all pronouns used herein and referring to said parties shall be construed accordingly, regardless either of number or gender thereof. If there be more than one Lessee the warrant of attorney contained in Clause "FIFTEENTH" is given jointly and severally and shall authorize the entry of appearance of, waiver of issuance of process and trial by jury, by the confession of judgment, against, any one or more of such lessees, and shall authorize the performance of every other act mentioned in said Clause "FIFTEENTH," in the name of and on behalf of any one or more of such Lessees.

Exhibit D-1

WITNESS the hands and seals of the parties hereto the day and year first above written.

SIMITH TRUST ESTATE (L. S.)
MARGARET E. SWART (L. S.)

By H. O. Stone and Co. Per C. C. E. (L. S.)
In the Presence of

Judgment entered this 2d day of November, A. D. 1922, for $1440.00 and costs being the rent for months of January, February, March and April of 1922, Including as part of said judgment $90.00 Attorney's fees.

THE MUNICIPAL COURT OF CHICAGO,
James A. Kearns.
The Municipal Court M C C 21
Certificate of Copy

State of Illinois,
City of Chicago. }

I, James A. Kearns, Clerk of the Municipal Court of Chicago, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true and perfect and complete copy of a certain lease, the original of which was this day drawn from the files by leave of Court, first had and obtained in a certain cause lately pending in said Court, on

the law side thereof, between Smith Trust Estate, Plaintiff and Margaret D. Swart, Defendant.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said
(SEAL) Court at Chicago, aforesaid, this 4th day of November A. D. 1922,

JAMES A. KEARNS, Clerk.

State of Illinois, } ss:
County of Cook. }

I, James A. Kearns, Clerk of the Municipal Court of Chicago, in said County State, and the keeper of the records and files thereof, in the City, County and State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete transcript of the record in a certain cause, lately pending in said Court, wherein Smith Trust Estate, is Plaintiff, and Margaret D. Swart, is Defendant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at Chicago, aforesaid, this 11th day of June, 1925.

JAMES A. KEARNS, Clerk.

Exhibit D-1

UNITED STATES OF AMERICA

In the City of Chicago

County of Cook, and State of Illinois

State of Illinois,
County of Cook,
City of Chicago. } ss:

I, Harry Olson, Chief Justice of The Municipal Court of Chicago, do hereby certify that James A. Kearns, whose name is subscribed to the foregoing certificate of Attestation, now is, and was, at the time of signing and sealing the same, the Clerk of said The Municipal Court of Chicago, and keeper of the Seal and Records thereof, duly elected, commissioned and qualified; that full faith and credit are, and of right ought to be given to all his official acts as such, in all Courts of Record in the United States and elsewhere, and that the attestation is in due form of law and by the proper officer.

Given under my hand at my chambers in Chicago, this eleventh (11th) day of June, A. D. 1925.

HARRY OLSON (Seal)
Chief Justice of the Municipal Court
of Chicago.

Exhibit D-2

UNITED STATES OF AMERICA

State of Illinois,
County of Cook, } ss:
City of Chicago.

I, James A. Kearns, Clerk of the Municipal Court of Chicago, do hereby certify that Hon. Harry Olson, whose name is subscribed to the foregoing Certificate of Attestation, now is, and was, at the time of the signing thereof, the Chief Justice of The Municipal Court of Chicago, Duly elected, commissioned and qualified, and that his said signature is genuine.

In Witness Whereof, I have signed my name and affixed the Seal of said The Municipal Court of Chicago, this Eleventh (11th) day of June, A. D. 1925.

JAMES A. KEARNS,
Clerk of The Municipal Court of Chicago.

Exhibit D-2.

Defts Original Copy of Lease and is the same as Plaintiff's Exhibit P-3.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HARRY C. SMITH and ROBERT E. SMITH, Trustees of the Smith Trust Estate, *Plaintiffs-Appellants,* *vs.* MARGARET D. SWART, *Defendant-Appellee.*	*Action at Law.* *On Appeal.*

BRIEF OF THE DEFENDANT-APPELLEE.

In September, 1921, the defendant Mrs. Margaret D. Swart leased from the appellants an apartment in Chicago for a period of one year, beginning October 1, 1921, and expiring September 30, 1922. The lease ~~made~~ was made through the agents of the lessors, and Mrs. Swart signed two copies of the lease. One copy was retained by Mrs. Swart and the other was retained by the agents of the lessors.

In November of that year it became necessary for Mrs. Swart to remove to the East, and she notified one of the lessors, and also the agents of the lessors, that she would give up the apartment in December. The statement in appellants' brief that the defendant "never had any conversations with the landlord" is erroneous. On the contrary, defendant testified that "He (referring to one of the lessors) knew I had turned it (the key) over to the janitor. I had several conversations with him" (Case, p. 23; l. 4). And again: "Q Did you notify the landlord that you were about to vacate? A Yes, I did, and I was assured that they would have no trouble about vacating the premises" (Case, p. 21; l. 13).

Nothing was said as to rental payments after December, and Mrs. Swart understood that there had been a surrender of the lease and an acceptance of such surrender.

On or about the first of December, 1921, Mrs. Swart paid the December rent, her furniture was removed about December 3rd, and she left Chicago about the middle of the month.

In April, 1922, while Mrs. Swart was residing in Westfield, a summons and complaint were served on her in a suit by the trustees of the Smith Trust Estate, the lessors, for unpaid rent. This action was brought in the Union County Common Pleas Court, but was not prosecuted after demand made for security for costs.

Two years later, in April, 1924, a summons and complaint were served in a new action, in the Supreme Court, based on judgment by confession entered under warrant of attorney embodied in the lease.

It appeared that in November, 1922, nearly a year and a half before the present action was begun and without the knowledge of or any notice to Mrs. Swart, a judgment was entered in the Municipal Court of Chicago for $1,440.00 under said warrant of attorney to enter judgment by confession, and it is this judgment which is now being sued upon. A judgment entered without her appearance in court, and never disclosed to Mrs. Swart until this suit was brought on it a year and a half later.

The defense was that the Municipal Court of Chicago was without jurisdiction to enter the judgment, that the judgment was not within the terms of the warrant of attorney, and that there was a defense to the action. After hearing the testimony and examining the evidence the Court granted a non-suit.

POINT I.

A foreign judgment and a warrant of attorney to confess judgment, may be impeached.

There is nothing *sacro-sanct* about a foreign judgment, but it may be impeached for want of jurisdiction over the person of the defendant. A warrant of attorney to confess judgment may, likewise, be impeached, and the holder required to account for its proper use. *Price* v .*Ward,* 25 N. J. L. 225; *Alsasser* v. *Haines,* 52 N. J. L. 10-25.

This judgment was entered under warrant of attorney embodied in the Fifteenth of twenty paragraphs of conditions in the lease. All but the first of these conditions, which occupy more than *thirteen pages* of the case (p. 71, *et seq.*) are in print almost microscopically fine. Little wonder that the court remarked: "I never heard of such a lease as that. I have seen some remarkable ones in the State of New Jersey, but this Chicago lease is certainly very windy in all that it contains" * * * (Case p. 35, l. 30). The warrant is in the following terms: "If default be made in the payment of the rent hereinabove reserved, or of any installment thereof as herein provided, Lessee does hereby irrevocably constitute any attorney of any Court of Record in this State, attorney for him and in his name, from time to time, to waive the issuance of process and service thereof, to waive trial by jury, to confess judgment in favor of Lessor, his heirs, executors, administrators or assigns, and against Lessee, for the amount of rent which may be then due, by virtue of the terms hereof, or of any extensions or renewals hereof, or by virtue of any holdover after the termination hereof, and which may be in default, as aforesaid, together

with the costs of such proceedings, and a reasonable sum, but at no time less than Ten Dollars for plaintiff's attorney's fees in or about the entry of said judgment, and for said purposes to file in said cause his cognovit thereof, and to make an agreement in said cognovit, or elsewhere, waiving and releasing all errors which may intervene in any such proceeding, and waiving and releasing all right of appeal and right to writ of error, and consenting to an immediate execution upon such judgment; and Lessee hereby confirms all that said attorney may lawfully do by virtue hereof" (Case p. 81; l. 37).

If the lessors urge that the lessee, having executed the contract, is bound by its conditions notwithstanding their number and intricacy, and the difficulty of reading and comprehending then, they at least, cannot complain if, under the circumstances, the rule that a writing will be construed most strongly against the writer be applied with some strictness. Experienced landlords, dealing with a woman unversed in the technicalities of leases and in a strange jurisdiction cannot, with justice, claim that they have dealt with frankness where they fail to explain the terms and conditions of such a lease before its execution, if they expect, thereafter, to rely on those technicalities in the application of so harsh a remedy as a judgment without notice, without appearance, and without a hearing.

POINT II.

There was a surrender of the lease by operation of law.

Surrender by operation of law "destroys the privity of contract between the lessor and lessee, as well as the privity of estate." It "has the

effect of putting an end to the lease, as well as of ending the term," and "terminates as well that relationship of the lessor and lessee which inheres in covenant, as that which inheres in estate." *Hunt* v. *Gardner,* 39 N. J. L. 530.

A surrender by operation of law will be raised from the acts of the parties "when the intent to accept a proffered surrender is made reasonably clear and unequivocal, or is the logical and necessary result of the landlord's conduct." *Whitcomb* v. *Brant,* 90 N. J. L. 245.

Mrs. Swart, on finding that it was necessary for her to go East, went at once to one of the trustees and explained the situation to him (Case p. 21, l. 12; p. 23, l. 5). So far as appeared a surrender of the lease was acceptable, and nothing was said about her liability for rent after she should vacate the apartment. Doubtless the court will take judicial notice of the fact that during the winter of 1921-1922 rentals were scarce, and owners had no difficulty in keeping their apartments occupied. It is a fair inference that, because of that well known condition, the lessors were content to accept the rent for December, with the whole of that month in which to make a new lease at a possibly higher figure. Their abandonment of the Common Pleas action suggests a recognition of the weakness of their case. Their falling back on a judgment by confession without notice to or demand upon the lessee, and their failure to sue on that judgment for a year and a half after its entry, lend further support to the inference that they knew such judgment, without any disclosure to the court of the actual circumstances attending the surrender of the lease, was unjust and indefensible. Knowing that the defense of lack of jurisdiction would be interposed they failed to send a representative to testify here upon that critical issue.

Taking into account Mrs. Swart's intent to surrender the lease, the apparent acquiescence of the lessors, and the subsequent conduct of the lessors, the case falls squarely within the rule laid down in *Miller* v. *Dennis,* 68 N. J. L. 320-323, where the court say: "We approve the doctrine that when the minds of parties to a lease concur in the common intent of relinquishing the relation of landlord and tenant and execute this intent by acts which are tantamount to a stipulation to put an end thereto, there at once arises a surrender by act and operation of law." To the same effect the court say, in the recent case of *Earlington Realty Co.* v. *Berkow* (not officially reported), 128 Atl. 605: "When the minds of parties to a lease concur in the common intent of relinquishing the relation of landlord and tenant, and execute this intent by acts which are tantamount to a stipulation to put an end thereto, there at once arises a surrender by act and operation of law."

The failure of the lessors to advise the lessee that a surrender would not be accepted, their failure to advise her that she would be expected to continue paying the agreed rent, their failure to send bills for rent as it accrued, their abandonment of the suit in Common Pleas in which the real merits must have been disclosed, their recourse to a judgment by confession without notice to or demand upon the lessee, their laches in not suing upon that judgment for a year and a half after its entry, and their failure to have a representative present to testify at the trial here, all support the contention of the defendant lessee that there was a surrender in fact, and constitute such conduct as raises a surrender by operation of law.

There having been a surrender of the lease by agreement or by operation of law no action will lie upon the lease, and the course of the lessors in entering a judgment by confession, without personal service upon the defendant or even notice to her, closely approaches, if it does not overstep, the line of fraud.

POINT III.

The judgment entered was for an unliquidated amount, but a judgment by confession can be entered only for a sum certain.

It is the law in Illinois, as generally if not universally, that judgments may be entered by confession for such liquidated sums only as are ascertainable from the terms of the instrument granting the warrant of attorney to enter such judgment. *Little* v. *Dyer,* 138 Ill. 272; 27 N. E. 905. *Fortune* v. *Bartholemei,* 164 Ill. 51; 45 N. E. 274.

In a note in 7 A. L. R. 735 the case of *Harwood* v. *Hildreth,* 24 N. J. L. 51, is cited as one of the authorities for the statement that "a warrant of attorney to confess judgment should state the amount, or else facts and figures from which it can be certainly determined."

But here the amount of the judgment cannot be squared with the terms of the lease.

Furthermore, the premises having been vacated by the tenant there was, both as a matter of law and by the terms of paragraph Twelfth, of the lease (Case, p. 79), a termination of the relationship of landlord and tenant. That paragraph provides that "if Lessee shall vacate or abandon said premises or permit the same to remain vacant and unoccupied for a period of ten

days * * * Lessee's right to the possession of the demised premises thereupon shall terminate, with or without any notice or demand whatsoever" * * *. The right of possession gone the relationship of landlord and tenant immediately ceased, as there can be no such relationship apart from right of possession. No action, therefore, could be brought for rent as such, or for use and occupation, there being no privity of estate. *Donovan* v. *Brennin,* 79 N. J. L. 202; *Mason* v. *Haurand,* 79 N. J. L. 375.

The only right of the lessors, if any, was to sue upon the covenants in the lease as a contract, and they had no right, if they proposed to rely upon the warrant of attorney to enter judgment by confession, to tamper with those covenants, or to so act as to make it impossible to square the judgment with the express terms of the lease.

The judgment record leaves one in doubt as to what would have been the allegations in the complaint, had the defendant been sued on the covenants. The record recites: "Judgment entered this 2d day of Nov. A. D. 1922 for $1,440.00 and costs, being the rent for months of Jan. Feb. Mar. and Apr. 1922, including as part of said judgment $90.00 Atty's fees." (Case P. 85; l. 14). But the statement of claim recites that "by virtue of which demise the sum of $1,350 of the rent aforesaid for the months of January, February, March and April, and $50 per month for balance of term 1922 became due and payable * * * together with the sum of $90 for attorney's fees." (Case p. 67; l. 34).

Neither statement squares with the terms of the lease, but the statement as to what was the judgment entered must take precedence over a

mere "statement of claim," and the judgment entered cannot be corrected here, if wrong.

Assuming, but not admitting the right of the court to make such assumption, that the $1350 is made up of four months rental at $275 per month, and five months rental alleged to be at $50 per month, the plaintiffs are no better off.

In that event it appears that they have elected to accept a surrender of the lease and to deal with the premises on their own account, or they have elected to act as the agent of the defendant in making a new lease for her account. If they have accepted a surrender of the lease that is an end of the matter. If, on the other hand, they have acted as the agent of the defendant they cannot collect an unliquidated balance upon their power of attorney, but must make their claim certain by judgment obtained after notice to the defendant and an opportunity to try the issue in open court. The defendant would, on that assumption, be entitled to an accounting, and the warrant of attorney does not, and could not, authorize the entry of an *ex parte* account as an agreed and liquidated sum.

Admitting, for the sake of argument but without admitting its applicability to the situation here presented, that the lessors were not *required* to relet the premises (*Whitcomb* v. *Brant,* 90 N. J. L. 245), it must follow nevertheless, that when they elected so to do they opened the door to the defendant to come in and question the result of such election, as affecting her interests.

POINT IV.

The lease executed is not the lease sued on.

It appeared by the exemplified copy of the proceedings in the Municipal Court of Chicago (Case p. 61; l. 7) that a type-written paragraph numbered "Sixteenth" was pasted over the paragraph of the same number printed in the lease actually executed (Case p. 82; l. 40). The two paragraphs differ. It is not incumbent upon the defendant to speculate why this variance appears, or what advantage the plaintiffs may have thought would accrue to them from the change, or if there is any substantial difference between the paragraphs.

This is a statutory proceeding, it is drastic in its remedy, it is in derogation of the common law, and the defendant has a right to require the proceeding to be regular in all respects. Standing alone this exception might appear trivial, but taken in conjunction with the other exceptions it is entitled to consideration.

POINT V.

The judgment entered is not within the terms of the statute.

The Illinois statute provides that "any person for a debt *bona fide* due may confess judgment by himself or attorney duly authorized" * * * (Case, p. 48; l. 12).

A debt can only be "*bona fide due*" when, from the terms of some instrument, or by admission, or by judgment or decree, a sum certain has been fixed which the defendant cannot dispute. By the record, and by the testimony of the defendant, the sum for which judgment was entered could not be calculated from the lease, it

was not admitted, it had not been made certain by judgment or decree, and there was a defense raising an issue of fact which was never tried.

The judgment, therefore, was not for "a debt *bona fide* due," and was not within the terms of the statute—it was for an *unliquidated* amount.

In *Little* v. *Dyer,* 138 Ill. 272; 27 N. E. 905, a case frequently cited, it is squarely held that a judgment for an unliquidated sum, entered by warrant of attorney, is void.

In *Fortune* v. *Bartholemei,* 164 Ill. 51; 45 N. E. 274, it is held that judgment for unpaid rent may be entered on a warrant of attorney *provided* the debt is "*bona fide* due," and "due by the terms of the lease," neither of which conditions is here true.

POINT VI.

The judgment of non-suit should be affirmed.

A judgment of non-suit will not be set aside when, upon a re-trial, a motion for non-suit must prevail. *Rankin* v. *C. R. R.,* 77 N. J. L. 175.

Upon the issue of the jurisdiction of the Municipal Court of Chicago both sides were heard, and the merits were clearly on the side of the defendant. As to the judgment of non-suit appealed from the rule applies that: "Every intendment that can be, should be, made in aid of a judgment and verdict thereon, where the parties have gone to trial upon the merits of the case and where no attack has been made upon the pleadings and procedure prior to appeal." *Giardini* v. *McAdoo,* 93 N. J. L. 138-148.

As to the proceedings on the lease it is clearly apparent that the defendant ought, of right, to

have had her day in court in order to there present and maintain her contention that there was in fact, as well as by operation of law, a surrender of the lease. The right was denied her.

It is equally apparent that the plaintiffs have attempted to foreclose any defense, and to take an unconscionable advantage of the defendant, by abandoning the suit in Common Pleas and substituting therefore a judgment entered and prosecuted under a more than doubtful claim of right.

Paragraph Fifteen of the Lease (Case p. 81; l. 37) makes the warrant of attorney conditional upon a default in the payment of rent. But the defendant denies a default, and claims a surrender of possession and an acceptance of such surrender, and the record of the Municipal Court action discloses no proof of default, and no evidence in contradiction of defendant's testimony here.

The issues raised in the Supreme Court were issues of law for the Court to decide. By the record the judgment entered did not square with the terms of the lease. By the record, upon the uncontradicted testimony of the lessee, there was a surrender of the lease by operation of law. By the record the Illinois statute permits the entry of a judgment by confession on warrant of attorney only for "a debt *bona fide* due," and that the judgment entered was for such debt cannot be determined from the record. By the record the judgment was not within the terms of the warrant of attorney. By the record the judgment was for damages in an unliquidated sum, and not for rent ascertainable from the terms of the lease.

The record justified a verdict directed for the defendant. The judgment of non-suit was more favorable than plaintiffs deserved, and should be affirmed.

Respectfully submitted,

E. A. MERRILL,
Attorney of and of Counsel
with Defendant-Appellee.

New Jersey
Court of Errors and Appeals

HARRY C. SMITH and ROBERT E. SMITH, Trustees of the Smith Trust Estate, Plaintiffs-Appellants, vs. MARGARET D. SWART, Defendant-Appellee.	Action at Law. On Appeal.

BRIEF OF PLAINTIFFS-APPELLANTS.

This is an appeal from the judgment of non-suit granted by the Honorable Peter F. Daly, Judge of the Circuit Court, trying Supreme Court issues at the Union County Circuit, and there are two reasons assigned for the reversal of the said judgment, to wit:

1. Because the court erred in granting the defendant a judgment of non-suit against the plaintiffs; and

2. Because the court erred in refusing to grant the motion for a direction of a verdict in favor of the plaintiffs for the amount sued on.

Facts.

The action was instituted in the New Jersey Supreme Court by the plaintiffs against the defendant to recover the sum of Fourteen Hundred and Forty ($1440.00) Dollars, together with interest thereon from the second day of November, 1922, upon a judgment recovered by confession in the Municipal Court of Chicago, arising out of a lease entered into between the plaintiffs and the defendant on the 17th day of August, 1921, wherein the plaintiffs leased an apartment to the defendant at No. 5110 Hyde Park Boulevard, for a term of one year, and which apartment was vacated by the defendant sometime during the month of December of the same year.

The lease was a written lease (Exhibit P-3, State of Case, p. 49). The complaint contains an exemplified copy of the judgment in accordance with the Act of Congress (State of the Case, p. 3); the Answer filed by the defendant (State of the Case, p. 8) denies the jurisdiction of the Court; denies the judgment; denies that the defendant was within jurisdiction, or that process had been served upon her, to which answer the plaintiffs joined issue.

The plaintiffs, at the trial of the cause, placed in evidence an exemplified copy of the judgment obtained in the Municipal Court of Chicago (Exhibit P-1, p. 41, State of the Case) and an exemplified copy of Section 88 of an Act in Relation to Practice and Procedure in Courts of Record, which act was approved the 3d day of June, 1907, and which exemplification was made on the 22d day of January, 1926, (Exhibit P-2, p. 46) and

then called the defendant as his witness, who testified that no part of the judgment had been paid l. 23, p. 13). The witness further testified (p. 14-15) that she moved to Chicago for the purpose of making that place her domicile; that she entered into the lease in question (Ex. P-3, p. 15); that she read the lease before she signed it, and identified her signature upon the lease; the lease being offered in evidence (Exhibit P-3). The plaintiffs then rested.

A motion for non-suit was made, which was denied.

The defendant was then recalled in her own behalf and offered in evidence an exemplified copy of the judgment, statement of claim and cognovit (Exhibit P-1) and denied that she knew an attorney by the name of Ralph P. Brown (l. 22, pp. 19) who had entered judgment as her attorney; and she denied that he was present at the time of signing of the lease, or was acquainted with her handwriting, or knew her signature, as contained in the affidavit made by him in the Chicago proceedings (p. 19). She testified that she surrendered the keys to the landlord; produced her original copy of the lease, which was placed in evidence as Exhibit D-3, and which was an exact copy of Plaintiff's Exhibit P-3.

On cross-examination, she testified she turned the keys over to the janitor and not to the landlord, and never had any conversation with the landlord. That she had knowledge in the Spring of 1922 (l. 14, p. 23) that the landlord was holding her for the rent, and that after having knowledge that judgment had been obtained in the State of Illinois, she never made any attempt in the court

where that judgment was obtained to have that judgment re-opened or vacated upon any ground (p. 26).

A motion was then made upon the part of the defendant for a direction of a verdict in favor of the defendant upon several ground (p. 27); and at the same time, the plaintiffs likewise moved for a direction of a verdict in favor of the plaintiffs for the amount sued for.

The court, after hearing argument of counsel, and reviewing the legal situation, in which he sustained the argument of counsel for the plaintiffs upon every legal question raised, upon the contention of the counsel for the defendant that the $50.00 per month for the five months, included in the judgment sued upon, was unliquidated damages, granted a non-suit upon the ground that under the Illinois decisions, confession by judgment could not include unliquidated damages.

LAW.

POINT I.

The Court erred in granting the motion of non-suit.

Article 4, Section I of the Constitution of the United States, reads as follows:

> "Full Faith and Credit shall be given in each state to the public acts, records and judicial proceedings of every other State. And the Congress may, by general law, pre-

> scribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The power conferred on Congress by this Section has been exercised by enactment of R. S. paragraph 905; Compiled Statutes, paragraph 1519, prescribing the manner in which judicial proceedings shall be proved. *Turnbull* v. *Peyson,* 95 U. S. 408.

The authenticated copy of the judgment obtained in the Municipal Court of Chicago, in the State of Illinois, is in evidence and discloses that it is in compliance with the provisions of the enactment of Congress. (Defend. Exhibit D-1, pp. 65-85 incl.) contains the pleas, proceedings and judgment, having attached to it a complete record of the proceedings under which the judgment was obtained, including a contract confession, the statement of the claim, the affidavit of the execution of lease of plaintiffs' claim, the cognovit and the lease under which the cause of action arose.

The fifteenth paragraph of the said lease reads as follows:

> FIFTEENTH: If default be made in the payment of the rent hereinabove reserved, or of any installment thereof as herein provided, Lessee does hereby irrevocably constitute any attorney of any Court of Record in this State, attorney for him and in his name from time to time to waive the issuance of process and service thereof, to waive trial by Jury, to confess judgment in favor of Lessor, his heirs, executors, administrators or assigns, and against Lessee

for the amount of rent which may be then due, by virtue of the terms hereof, or of any extensions or renewals hereof, or by virtue of any holdover after the termination hereof, and which may be in default, as aforesaid, together with the cost of such proceedings, and a reasonable sum, but at no time less than Ten Dollars, for the plaintiff's attorney's fee in or about the entry of said judgment, and for said purpose to file in said cause, his cognovit thereof, and to make an agreement in said cognovit or elsewhere, waiving and releasing all errors which may intervene in any such proceeding, and waiving and releasing all right of appeal and right to writ of error, and consenting to an immediate execution upon such judgment; and Lessee hereby confirms all that said attorney may lawfully do by virtue hereof. Lessors shall have a first lien on Lessee's interest hereunder, and on Lessee's property now or hereafter located in said premises, or elsewhere, to secure the payment of all moneys due hereunder, which lien may be foreclosed in equity and in case of any such foreclosure proceeding, a receiver shall be appointed to take possession of said premises and property and relet the premises under order of Court.

Under the provisions of this paragraph, any attorney of any Court of Record of the State of Illinois was authorized to appear for her and in her name, to waive the issuance of process and service of summons, to waive trial by jury and to confess

judgment in favor of the plaintiffs for the amount of rent which may then be due, together with the costs of such proceedings, and a reasonable attorney fee which should not be less than $10.00, and for that purpose to file a cognovit therefor, waiving and releasing all errors which may intervene in the proceedings, and waiving and releasing all rights of appeal and right to writ of error and consent to an immediate execution upon such judgment.

In accordance with this authorization, Ralph P. Brown, an attorney of the State of Illinois, after the expiration of the said lease, and accrual of all the rent under the lease, to wit—for four months at $275.00 per month, and for five months at $50.00 per month, being the balance of the rent, confessed judgment for and in behalf of the defendant for the sum of Thirteen Hundred and Thirty ($1330.00) Dollars for the rent due upon the unexpired portion of the lease since the vacation of the premises by the defendant; the sum of $90.00 having been allowed by the Court for attorney fees.

The validity of judgments by confession as above set forth has been passed upon repeatedly by the Courts of the State of Illinois; first, under the authority conferred (the provisions of the Act in evidence) Exhibit P-2; and second, by the decisions of its tribunal.

In the case of *Fortune* v. *Bartolomei,* 164 Illinois, p. 51; 45 N. R. p. 274, which involved the construction of a similar lease, the Court held:

"1. Under Rev. St. c. 110, Par. 66, providing that any person, for a debt *bona*

fide due, may confess judgment by himself or attorney, duly authorized, either in term time or vacation, without process, a valid judgment by confession can be entered on a lease for rent where the power has been given and strictly followed. 62 Ill. App. 290, affirmed.

"2. A lease provided for payment of rent in monthly installments, and contained a power of attorney to confess judgment 'from time to time for any rent which may then be due by the terms of the lease.' Held, that a confession of judgment for 32 installments of rent due was valid."

Section 16 of An Act Concerning Evidence, Revision of 1900, provides:

"16. Suit on foreign judgment. In any suit upon a foreign judgment, or a judgment of any court out of this state, the defendant, or person sought to be affected by such judgment may show that the defendant therein was not summoned, did not appear, or was not within the jurisdiction of such foreign court, notwithstanding it may be recited in the record of such proceedings that he was summoned or did appear, or was within the jurisdiction of such court; and such recital shall not conclude said defendant, or estop him from proving that the same is not true." (P. L. 1900, p. 366.)

It is established, practically without dissent, that the fact that a judgment of a court of another state was entered under a warrant of at-

torney to confess judgment executed contemporaneously with the principal obligation, and without service of process or appearance, other than that pursuant to the warrant itself, does not take it out of the full faith and credit provision of the Federal Constitution, or disentitle it to the recognition and effect recorded to other judgments of sister states when asserted as the basis of an action or defense.

Therefore, applying this rule, the only defenses that could be interposed in the case at bar, were that she was not summoned and did not appear, or was not within the jurisdiction of the Court of Illinois, and upon proof that there was jurisdiction, the judgment is conclusive as to the validity, construction and effect of the principal obligation and also other matters going to the merits of the cause of action.

The case of *Hazel* v. *Jacobs,* 78 N. J. L., p. 459, was a suit instituted to recover the amount of a judgment entered by confession under warrant of attorney, upon a promissory note before a Justice of the Peace in the State of Delaware. The defendant pleaded that he was never served with any process in the State in which the judgment was obtained, and he did not appear to the said suit in person or by attorney, and that he was not a resident nor within the jurisdiction of the said court in which judgment was rendered.

Upon the trial, an exemplified copy of the Delaware judgment was put in evidence; also a copy of the Statute of Delaware, admitting the entry of such judgment before a justice of the peace upon warrant of attorney.

Justice Reed, writing the opinion for the Court of Errors and Appeals, said:

> " * * * both the *National Exchange Bank* v. *Wiley,* 195 U. S., 257, 25 Sup. Ct. Rep. 70, and *Grover & Bee Sewing Machine Co.* v. *Radcliff,* 137 U. S. 287, assumed as a settled doctrine that when the authority conferred by the warrant of attorney is strictly pursued, the judgment entered is entitled to full faith and credit in other states."

He likewise said:

> "Nor can it be denied that the warrant of attorney authorizing another to appear and enter judgment without process, is a waiver of such right."

In the case of *Hendrickson* v. *Fries,* 45 N. J. L. p. 555, the Court of Errors and Appeals affirmed a judgment obtained in the Circuit upon a foreign judgment by confession. Here, the judge at Circuit admitted evidence that the defendant was not summoned, and did not personally appear in the Pennsylvania suit. He overruled the defendants' offer to show that the sealed bill was, in fact, executed and delivered in this state, and the payment of it was demanded here, on the grounds that such evidence was immaterial. Justice Depew said "that the Judge properly treated the evidence excluded as immaterial, and that the judgment should be affirmed."

In the case of *Shelmerdine* v. *Lippincott,* 69 N. J. L., p. 82, Justice Pitney, writing the opinion for the Supreme Court, held that power of at-

torney authorizing an appearance and waiving service of process, etc. was valid until the contrary appeared.

In the case of *Gulick* v. *Loder,* 13 N. J. L. p. 68 the Court said:

> "A judgment of a court of record in another state of the Union, is not to be regarded here as what is technically called, in common-law language, a foreign judgment—the mere *prima facie* evidence of a debt. It has such "faith and credit" here, as in the state where it may have been rendered, and it is here, as there, deemed conclusive evidence of debt. 13 N. J. L. (1 Gr.) 68; (1819) *Oldens* v. *Hallett,* 5 N. J. L. (2 South.) 466, 469; (1805) *Curtis* v. *Martin,* 2 N. J. L. (Pen.) 399.
>
> Until the contrary is proved, every presumption must be made here in favor of the validity, regularity and justice of the judicial proceednigs of a sister state. *Supreme Council of Royal Arcanum* v. *Carley,* 52 N. J. Eq. (7 Dick, Ch.) 642, 29 Atl. 813.
>
> The judgment of a court of general jurisdiction in any state in the Union, is equally conclusive upon the parties in all the other states, as in the state in which it was rendered. This, however, is subject to two qualifications: (1) If it appear by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and (2) If it appear by the record that the de-

> fendant appeared by attorney, the defendant may disprove the authority of the attorney to appear for him. *Nichols* v. *Nichols,* 25 N. J. Eq. (10 C. E. Gr.) 60.
>
> The purpose of the act entitled "An Act relation to foreign judgments" was simply to permit the record of foreign judgments to be contradicted, with reference to recitals showing jurisdiction in the court rendering the same. *Mackay v. Gordon,* 34 N. J. L. (5 Vr.) 286."

The Court, in summing up the case on the argument of the motions for the direction of the verdict, found as propositions of law, first; that there is no evidence that the Court did not have jurisdiction of such a cause (p. 31, l. 18); second, that fraud had not been alleged in the pleadings and since the charge of fraud must be specifically pleaded, that leaves one question in the case (p. 31, ll. 23 &c.); third, that there is no evidence that there was an agreement upon the part of the landlord to terminate her obligation under this lease; (p. 34, ll. 11 &c.) fourth, under the terms of this lease he had the right, even though she never knew him, to confess a judgment against her for any amount of rent that she owed at the time that he made such a confession of judgment. That was her contract. That was the agreement that she signed (p. 33, ll. 12 &c.).

The Court having found these facts, to wit: That there was no termination of the lease, and that she was liable for any rent that was due from her; and that under this lease an attorney of a court of record in Chicago could confess judgment

in her name for the amount of rent then due, and that under the warrant of attorney and authorization in the lease, she was within the jurisdiction of the court, there was no other question left open to be decided by the Trial Court.

The Court, however, contrary to the cases above cited, and the limitation under our Evidence Act, assumed to go into the merits of the case itself, by determining that the judgment confessed by the attorney under the authorization, included unliquidated damages, which, even if true, would not have justified the court in granting the non-suit, as the proper tribunal to have questioned the validity of the judgment, and the nature of the claim, was the Courts of the State of Illinois.

The evidence of the Plaintiffs' Exhibit P-3 and the Defendant's Exhibit D-3 showed that the contract was an entire contract for a term of one year, payable at the monthly rent of $275.00 each and every month, for the term created by the lease. The undisputed evidence is that the defendant paid three months' rent, leaving rent due for nine months at $275.00 a month; the total obligation at the expiration of the term, provided the premises remained vacant, would have been $2[illegible].00; the claim being predicated on the lease, was an obligation in debt or contract. Judgment was confessed for rent is the sum of $1350.00. The affidavit attached to Defendant's Exhibit D-1 set forth that there was due under the lease, for rent accrued and now due and payable, the sum of $1350.00, rent for the period stated in said statement of claim, which was the rent for the months of January, February and March, 1922, and $50.00 per month for the balance of the term.

In other words, credit was given for the difference between the $2400.00 due for the nine month period, and the balance of $1350.00, for which judgment was confessed. The remaining $90.00 was for attorney's fees, provided for in the warrant for confession contained in the lease, and which was allowed by the Court. At no time did any portion of this claim lose its character of being a debt or moneys due under the contract or lease.

The Court said, page 39, line 25:

> "that they must have rented that place for part of the time, maybe for less money than $275.00, and that they were looking for that loss. That was not rent. That was damages, and he only had a right to confess judgment for the rent."

This construction is a new proposition in law. Debts are obligations for the payment of money found on contracts; express or implied. *N. J.* v. *Anderson,* 203 U. S. 483. The word "debt" in the statute is used as indicative of a sum certain that is owing from one person to another. The standard upon which the defendant's liability is to be measured shall be furnished by the contract, and not left open to mere speculation or vague conjecture.

At common law a confession by judgment without process or any action pending, was by means of a warrant of attorney, and unless the amount was mentioned in the warrant was restricted to notes, bills, bonds or other instruments, or evidence of indebtedness, wherein the amount for which judgment was to be confessed was so speci-

fied that it could readily be determined by mere inspection or computation and did not require judicial inquiry for its ascertainment.

The character of the indebtedness is not changed by a credit given upon the entire indebtedness due where it is undisputed that the premises had been vacated by the tenant, and that the total amount under the lease had accrued. The presumption of the court that the premises may have been rented for a lesser amount than the monthly fixed rental, no doubt, is correct, as under the thirteenth paragraph of the Plaintiffs' Exhibit P-3, there was conferred the right upon the lessors to rent the premises

> "and if a sufficient sum shall not be received from such re-renting to satisfy the rent reserved, after paying the expenses of re-renting and collection, including commissions to agents, it shall be figured and allowed to lessor at the rate of five per cent the total amount of such reserved by such reletting, but in no event to be less than $100, and including also expenses of redecorating, lessee agrees to pay and satisfy all deficiency; but the acceptance of a tenant by lessor in place of lessee, shall not operate as a cancellation hereof, nor to release lessee from the performance of any covenant, compromise or agreement herein contained, and performance by any substituted tenant by the payment of rent, or otherwise, shall constitute only satisfaction *pro tanto* of the obligation of lessee arising hereunder" (p. 59).

The judgment in the Illinois Court was entered in open court upon an order made by the judge of the court. The Court had all the facts before it, to wit: the lease, the statement of the claim and the cognovit, and proof of the execution of the lease, and the court found that there was due the amount set forth in the judgment. Therefore, under the faith and credit to be given to a judgment obtained in another state, the amount of the judgment is conclusive as against the defendant, and should not have been inquired into by the Court.

Even if this was not true, it would require a great stretch of the imagination to construe that a fixed monthly rental, founded on a contract, becomes unliquidated damages because an amount is credited thereon.

The case of *Little* v. *Dyer,* 138 Ill. p. 172, urged by the defendant, and upon which evidently the court arrived at its conclusion, does not apply, because in that case, the judgment confessed included claims for water, gas and cleaning, as well as rent. The Court there held that "power cannot be given to confess judgment on an unliquidated claim." This case was distinguished in the case of *Fortune* v. *Bartolomei, supra.*

It is, therefore, respectfully submitted that the conclusions of the court were erroneous, and the judgment of non-suit improvidently granted.

POINT II.

The Court erred in refusing to grant the motion for a direction of the verdict in favor of the plaintiffs for the amount sued on.

For the facts, reasons and law above set forth in Point I, the Court, having resolved the jurisdictional facts in favor of the plaintiffs, erred in refusing to direct a verdict in favor of the plaintiffs for the amount sued on.

It is, therefore, respectfully submitted that the judgment of non-suit should be set aside and for nothing holden, and the court below directed to enter a judgment in favor of the plaintiffs for the sum of $1440.00 together with interest from the 22d day of November, 1922, besides the costs in this behalf sustained.

WILLIAM NEWCORN,
Attorney and of Counsel with
Plaintiffs-Appellants.