

Merrimack, }
Nov. 4, 1914. }

SAMUEL F. CHESBROUGH v. K. & C. MANUFACTURING CO.

An objection to argument of counsel is not effectual until it is made known to the presiding justice and an exception claimed.

CASE, for negligence. Trial by jury and verdict for the plaintiff. Transferred from the October term, 1913, of the superior court by *Pike, J.*, on the defendant's exceptions to the denial of motions for a nonsuit and the direction of a verdict and to remarks of counsel in argument. The facts are stated in the opinion.

Doyle & Lucier and *Martin & Howe* (*Mr. Lucier* orally), for the plaintiff.

David F. Dudley (by brief and orally), for the defendant.

PEASLEE, J. The plaintiff was injured by the falling of an elevator which he was operating as the defendant's servant. He complains, among other things, that the elevator was so constructed that it was to be expected that the cable would break and allow the elevator to fall. There was evidence that the sheaves over which the wire cable ran were so small as to subject the cable to a strain beyond its elastic limit, and that the break was at a point where the cable ran over the sheaves. It is sought to prevent the drawing of the inference that this was the cause for the accident by the introduction of evidence to the effect that the cable was carefully inspected, that no signs of weakening were discovered, and that from a dent in the under side of a timber making a part of the frame to the elevator well, it appeared as though the wheel of the wheelbarrow which the plaintiff had on the elevator had struck the timber, thereby stopping the elevator and causing the cable to break.

This evidence merely raised issues to be passed upon by the jury. There was testimony to the effect that when the cable was bent beyond its elastic limit it might begin to give way at points not discernible upon inspection; and as to the wheelbarrow, the plaintiff testified that it was properly placed upon the elevator platform.

In argument for the plaintiff, counsel said: "They have brought in here the defence of contributory negligence. That is a defence which always bobs up and is of no consequence here." Objection.

being made, counsel added: "I am arguing that the defence is an old shadow which has no substance in this case, and I am going to try to demonstrate it." So far as appears from the record, no exception was asked for. Objection was made, counsel explained what he meant by the language used, and the matter was dropped there. The statement in the case, that "the defendant excepted as appears," does not warrant the inference that it excepted as does not appear. "It is not necessary to give reasons for the proposition that an objection is not taken until it is made known to the presiding justice and an exception claimed of him." *Story v. Railroad*, 70 N. H. 364, 380.

Exceptions overruled.

All concurred.

Hillsborough, }
Nov. 4, 1914. }

ARTHUR G. TOMUSCHAT & *a.* *v.* NORTH BRITISH AND MERCANTILE
INSURANCE Co.

SAME *v.* AACHEN AND MUNICH FIRE INSURANCE Co.

Where the owner of a burned building delivers to the insurers thereof within the time limited a notice which is plainly intended as a fulfilment of the requirements as to proof of loss, the question whether they ought reasonably to have notified him of its insufficiency and their insistence upon a strict compliance with the statutory provisions is one of fact for the jury; and evidence that they so conducted themselves as to lead the insured to believe that the question of damages was the only matter in issue warrants a finding that they are estopped to set up his omission in defence to a suit upon the policy.

The word "buildings," as used in section 5, chapter 170, Public Statutes, includes both finished and unfinished structures.

ASSUMPSIT, on fire insurance policies. Trial by jury and verdicts for the plaintiffs. Transferred from the January term, 1914, of the superior court by *Chamberlin, J.*, on the defendants' exceptions to the denial of a motion for nonsuit and to a ruling that the policies in suit were valued policies.

September 26, 1911, the defendants issued policies insuring the plaintiffs' buildings and personal property against loss by fire. The buildings were then in process of construction, and the plaintiffs