

doubt quite honestly, that he was entitled to fifty per cent. more than the arrangement with him under the regulations would warrant was not held to be a sufficient reason for making the payment.

In the next place, it would be especially difficult to accept your recommendation for this reason: When Mr. Capps put his matter in the hands of an attorney the University on March 12, 1909, proposition: That the whole matter should be referred to arbitration, each side agreeing to abide by the decision of the arbitrator with-

My dear Mr. Zueblin:- for instance, the president of any large university, including t Your favor of the 26th of February was duly received. I am sure that you write in a kindly spirit toward the University, and that your recommendation is based on the facts as you know them. However, there are some facts which probably are not within your knowledge. I regret that the matter was not arbit. The decision as to what the University really owed Mr. Capps at the time he left us was made by the Board of Trustees on careful consideration by its legal members, especially by the President of the Board and by the Chairman of the Committee on Instruction, who is a Judge in the Appellate Court of the State. The question of the amount of money involved was of no importance, but it was believed that the regulation in question was a wise one, and that it could not in justice to all concerned be rescinded for the benefit of a single individual. The fact that that individual believed, no

Mr. Charles Zueblin,
6 Marlborough St.,
Boston, Mass.

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Forwarded to G. H. G.

March 2, 1909

My dear Mr. Kuehlin:-

Your favor of the 26th of February was duly received. I am sure that you write in a kindly spirit toward the University, and that your recommendation is based on the facts as you know them. However, there are some facts which probably are not within your knowledge.

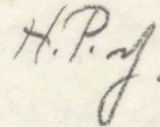
The decision as to what the University really owed Mr. Gappa at the time he left us was made by the Board of Trustees on careful consideration by its legal members, especially by the President of the Board and by the Chairman of the Committee on Instruction, who is a Judge in the Appellate Court of the State. The question of the amount of money involved was of no importance, but it was believed that the regulation in question was a wise one, and that it could not in justice to all concerned be rescinded for the benefit of a single individual. The fact that that individual believed, no

doubt quite honestly, that he was entitled to fifty per cent. more than the arrangement with him under the regulations would warrant was not held to be a sufficient reason for making the payment.

In the next place, it would be especially difficult to accept your recommendation for this reason: When Mr. Capps put his matter in the hands of an attorney the University made to him this proposition: That the whole matter should be referred to arbitration, each side agreeing to abide by the decision of the arbitrator without any appeal; that, for instance, the president of any large university, including the president of Princeton University, would be acceptable to the University of Chicago. This suggestion to arbitrate was refused. Under these circumstances the Board has felt that it could do nothing other than prosecute the case under the ordinary operations of law. I regret that the matter was not arbitrated in the way indicated, which seems to me to have been eminently just to both parties. As to the newspaper press, it is not to be expected that they will be fair in such a matter, or that they will try to ascertain all the facts.

Thanking you for your suggestion, I am,

Very truly yours,



H. P. Judson

Mr. Charles Zueblin,
6 Marlborough St.,
Boston, Mass.

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more than the arrangement with him under the regulations would
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It could not in justice to all concerned be rescinded for the benefit
of a single individual. The fact that individual
Mr. Charles Zuehlke,
6 Marlborough St.,
Boston, Mass.

H. P. Judson

39

Judah, Willard, Wolf & Reichmann
Attorneys & Counselors at Law

Nelle B. Judah
Monroe L. Willard
Henry M. Wolf
A. F. Reichmann
Donald F. Trumbull

Corn Exchange Bank Building
Chicago

December 2, 1909.

December 4, 1909

Dr. Harry Pratt Judson,
President, The University of Chicago.

Dear Mr. Page - City.

Dear President Judson,

I am sending you, under separate cover, our brief in the Capps case, which we filed in the Appellate Court yesterday.

Very truly yours,

Cecil Page

U. of C.

Mr. Cecil Page,
Corn Exchange Bank Bldg., Chicago.

P.O. C.

Dear Mr. C.

Very truly yours,

the Abbessate Court yesterday.

cover, our brief in the Gibbs case, which we filed in

I am sending you under separate

Dear President Johnson,

City.

President, The University of Chicago.

Dr. Kelly staff Johnson,

Handwritten:
John D. Kelly
University of Chicago
Chicago, Ill.
Dec 10, 1888

Original

Handwritten:
John D. Kelly
University of Chicago
Chicago, Ill.

December 8, 1888.

Handwritten:
University of Chicago
Chicago, Ill.

December 4, 1909

Dear Mr. Page:-

Yours of the 2d inst. received. I shall be
interested in reading your brief in the Capps case.

Very truly yours,

H P J

H. P. Judson

Mr. Cecil Page,
Crown Exchange Bank Bldg., Chicago.

3
J. Edgar Hoover, U.S. Department of Justice
Washington, D.C.

December 2, 1903

December 4, 1903

Dr. Harry Pratt Johnson,

President, The University of Chicago,

Dear Mr. Page:-

Yours of the 24 inst. received. I shall be

interested in reading your paper in the Gaps case.

Very truly yours,

the Appellate Court yesterday.

Very truly yours,

H. P. Johnson

U.S.O.

Mr. Cecil Page,
Cotton Exchange Bank Bldg., Chicago.

34
Judah, Willard, Wolf & Reichmann

Attorneys & Counselors at Law

*Noble B. Judah
Monroe L. Willard
Henry M. Wolf
A. F. Reichmann
Donald L. Trumbull*

Corn Exchange Bank Building

Chicago

March 4, 1909

March 3, 1909.

Capp
Dr. Harry Pratt Judson,

President, The University of Chicago,

C I T Y.

Dear Doctor Judson:

I am sending you, under separate cover, at
Mr. Heckman's request, one of the copies of Official Bulletin
No. 1, used in the Capp's case.

Unless you desire differently, the other will
be kept in our files, with the other exhibits, until the case
is finally disposed of.

Very truly yours,

The U.C.

Carl Page

The U.C.

Very truly yours,

is finally disposed of.

be kept in our files, with the other exhibits, until the case

unless you desire differently, the other will

No. 1, used in the Cobb, a case.

Mr. Heckman, a ledger, one of the copies of Official Bulletin

I am sending you, under separate cover, of

Dear Doctor Johnson:

C I L X.

President, The University of Chicago,

Dr. Henry Bass Johnson,

March 3, 1908.

Chicago
Received of Dr. H. B. Johnson

Received of Dr. H. B. Johnson
and forwarded to Dr. H. B. Johnson

March 4, 1909

My dear Sirs:

I beg to acknowledge your favor of the 3rd.
instant, with copy of Official Bulletin No. 1 enclosed.
The other copy of same you may keep in your files un-
til no longer needed.

Very truly yours,

H. P. J.

Mr. Cecil Page,
Corn Exchange Bank Bldg.,
Chicago,

John W. Alden, M.D., Chairman
Chicago, Illinois

March 4, 1909
March 5, 1909

COPY

Dr. Harry Pratt Judson,
President, The University of Chicago,

My dear Sirs: I beg to acknowledge your favor of the 3rd.

Dear Doctor Judson:
Instant, with copy of Official Bulletin No. 1 enclosed.
The other copy of same you may keep in your files un-
less you desire it, in which case I will be glad to
send it to you. No. 1, used in the case of
Mr. Beckman's request, one of the copies of Official Bulletin
No. 1, used in the case of

Very truly yours,
H. P. J.
Mr. Cecil Page,
121 Corn Exchange Bank Bldg.,
Chicago,
Very truly yours,

The U.C.

Term No. 105.

Gen. No. 15643.

IN THE
Appellate Court of Illinois,

FIRST DISTRICT,

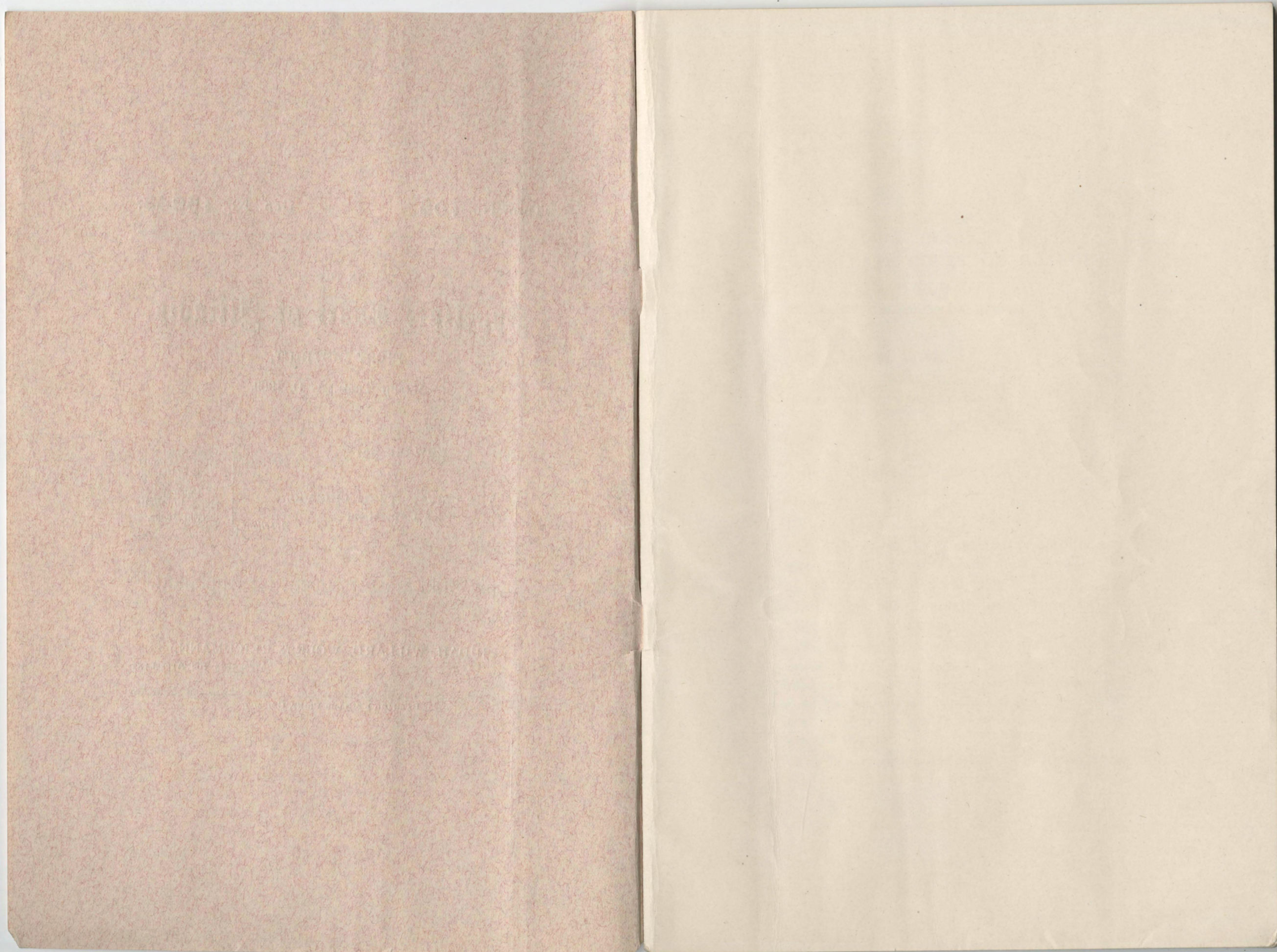
MARCH TERM. A. D. 1909.

EDWARD CAPPS,	<i>Appellee,</i>	} Appeal from Municipal Court of Chicago. Honorable Hosea W. Wells, Trial Judge.
<i>vs.</i>		
THE UNIVERSITY OF CHICAGO,		
a corporation,	<i>Appellant.</i>	

Reply Brief and Argument for Appellant.

JUDAH, WILLARD, WOLF & REICHMANN,
ATTORNEYS FOR APPELLANT.

BARNARD & MILLER PRINT, CHICAGO.



IN THE
APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT.
MARCH TERM, A. D. 1909.

EDWARD CAPPS,	} Appeal from Municipal Court of Chicago.
<i>Appellee,</i>	
<i>vs.</i>	
THE UNIVERSITY OF CHICAGO,	} Honorable Hosea W. Wells, Trial Judge.
a corporation, <i>Appellant.</i>	

Reply Brief and Argument for Appellant.

MAY IT PLEASE THE COURT:

We shall take up the points made by appellee, and attempt to answer such as we deem necessary, in the order in which they are made.

In the first place, we agree with counsel for appellee that this is a plain and simple case.

But the various statements of facts made by counsel for appellee are so inaccurate and one-sided, and the arguments predicated thereon are so misleading and sophisticated, that a very careful scrutiny of the record is necessary to avoid being deceived thereby.

The first vital mis-statement lies in the effort of

counsel, appearing on page 3, to confuse and mislead as to what was meant by regular vacation and "extra vacation," as used in the rules and statutes of the university, and as manifestly understood by Capps. There is a marked distinction, and Capps understood it very well, as the evidence discloses. Section 18 of the statutes (Abst., 41) clearly discloses the distinction. It provides,

"The instructor takes his vacation *in any one of the four quarters*, according as it may be arranged, or he may take *two vacations of six weeks each at different periods of the year*. The instructor may vary his work from quarter to quarter. For every quarter or term *in a year* he may teach *in addition* to the number of hours required, he received either an *extra two-thirds pro rata* salary or an *extra full pro rata* vacation; but no work will be credited for extra vacation or extra salary except that which may have been accepted by the president and the head of the department in which the work is done."

It is thus seen that each instructor is entitled, during each year of twelve months, to twelve weeks of regular vacation. This, of course, corresponds with the usual university vacation during the summer months. The university is closed to all in-tents and purposes, and the instructor is not re-quired to work. He has the election to take two periods of vacation during each year, of six weeks each, instead of twelve consecutive weeks. He necessarily uses up and is required to use up this regular vacation period during the course of each year of twelve months, in either one of the two ways indicated, and receives his pay during the vacation period just exactly the

same as he receives it during the remainder of the active school year; that is to say, he is paid regularly his proportionate share of his yearly salary divided into twelve months, or, in other words, as in the case of plaintiff, \$250 each month. He is not given "credit" for this regular vacation, but on the contrary it comes to him regularly and automatically. Nor can the enjoyment of this vacation be extended to some other time, since he receives monthly his regular installment of \$250 during the regular vacation period, whether he is actually taking the vacation or is engaged during the regular vacation period in extra work. The most that can come to him by working during the period of regular vacation is to receive a *pro rata* "extra vacation" credit; that is to say, if he teaches the full vacation of twelve weeks, he receives an "extra vacation" credit of four additional ~~weeks~~ *months*, and this extra vacation credit the instructor can avail himself of either by taking an actual vacation at full pay, or by cashing it in on the basis of two-thirds of his regular salary. This is the distinction between *vacation*, that is to say, regular vacation, and "extra vacation." It will thus be seen how utterly fallacious is the statement of counsel (Brief, 3) that "at the end of 48 weeks, or 12 months' service, he had to his credit 4 months vacation." He had, after 12 months' service, nothing of the kind, since he necessarily used up, and was bound to use up, the regular 3 months vacation by receiving his regular monthly installment of salary, and as the result of 12 months' work, during which he was paid his regular salary every month, he earned an additional ~~one month~~ of "extra vacation," to be

four months

availed of either by taking a vacation in fact, or by cashing it in on the basis of two-thirds of his regular salary. It is thus apparent also that counsel is in error in saying (Brief, 3): "We think the court will find no other difference between regular and extra vacation than as above indicated. The same amount of work gave the same proportion of vacation, whether 'regular' or 'extra.'"

Capps does not pretend that he was not paid his regular monthly salary of \$250 a month down to the time that his engagement with the university ceased, on September 30, 1907, and hence it is, of course, clear that there is no such thing as a regular vacation involved in this case. Yet the effect of counsel's argument is that what the university is seeking to do in this case is to deprive Capps of a part of his stipulated yearly salary, by depriving him of the monthly payment of salary that he would be entitled to from month to month during the regular vacation period. The only thing involved in this case is "extra vacation" credit, and the question is, how was Capps entitled to avail himself of or to be paid for this extra work done by him during the regular vacation period, or outside of the requirements of his regular work during the school year, for which, under special arrangement with President Harper, he was allowed 13 weeks of extra vacation credit, which it is agreed plaintiff subsequently reduced to 10 weeks. Counsel admits and is, of course, forced to admit, in the face of the evidence and the undisputable facts, that Capps is seeking to recover compensation, not for regular work done, in consideration of which the university agreed to pay him the stipulated annual salary

of \$3,000, but for extra work, as we have indicated, for which he became entitled to "extra vacation" credit.

In the light of these considerations, it will be seen how utterly misleading the following statements of counsel are, namely (Brief, 4):

"The parties agree that on October 1, 1907, Professor Capps had to his credit 10 months' vacation at \$250 a month, which makes the \$2,500 for which he sued."

And, again:

"Thus we have as an established fact, upon which the parties are agreed, that on October 1, 1907, Professor Capps had to his credit with the university 10 months vacation at \$250 a month, or \$2,500, the amount claimed."

In gross, he did have what might have been tantamount to a credit of \$250 a month, or \$2,500, provided he had continued with the university and had not resigned and taken employment permanently in another institution of learning, and then had taken a vacation, and by this is meant a vacation in the proper sense of the term, as we have suggested in our original brief, with the privilege of receiving full pay, or, in other words, \$250 a month, during the period of such vacation. On the other hand, if he elected not to take a vacation, but on the contrary to cash in his extra vacation credit of 10 months, amounting in gross as we have before stated, to \$2,500, then he was entitled to receive only two-thirds of that amount in payment for his extra work, in consideration of which he was given the extra vacation credit in question. And, as we urged in our original brief, if he resigned, then in

the very nature of things he could not take a vacation, and hence the only thing left to him was to accept the other alternative, namely, two-thirds in cash.

It is not disputed that appellee was in the employ of the university at an annual salary of \$3,000 per year, payable in monthly installments of \$250 per month at the time he left the university, and for some considerable period before. It is not disputed that the regulations, at the time appellee entered the service of the university and ever since (Abst., 41-43), divided the school year into four quarters of 12 weeks each, of which period instructors were required to teach but three quarters, or 36 weeks, and were allowed a vacation of 12 weeks; that the instructor took his vacation, *i. e.*, his *regular* vacation, in any one of the four quarters of *such year*; and that for any time taught in addition to the number of hours required, he received either an extra two-thirds *pro rata* salary or an extra full *pro rata* vacation. (Abst., 41). We, therefore, most earnestly contend that appellee's regular vacation for each year necessarily came during one of the four quarters of that year. And if he taught during such period his regular vacation period was not thereby transferred to some future date, but that was still his "vacation period." He was paid in full during the same (Abst., 55, 60; Rec., 290, 310), and it was his teaching during such regular vacation period that became *extra* credit, for which he could be paid either in an actual vacation at full pay or in two-thirds cash.

In this connection it should be constantly borne

in mind that neither in the statutes or regulations (except the amendment to Statute 19), or in Capps' testimony, is there any provision in evidence which entitled Capps or his heirs to receive anything at all on account of any such extra vacation credit in case Capps died or resigned, leaving a portion of it untaken. "Extra" vacation credit is the only thing sued for in this case. (Abst., 82, 74, 72, 70.)

Counsels' argument, on page 3 of their brief, practically admits that the regular vacation period was restricted to the year in which it was earned. They say: "But if, instead of taking his vacation then, he worked for the university *during the vacation period*, he became entitled," etc.

In order to recover in this case, it was incumbent upon appellee to prove that upon resignation he was entitled, by the terms of some contract, express or implied, to be paid at the full rate of \$250 per month in cash for all of the extra vacation standing to his credit on the books of the university at the time he left its employ; in other words, that he had some contract which required him to be paid more than appellant has paid him. If appellee has failed to prove this proposition, all of the other questions in the case become immaterial and he cannot recover.

Counsels' statement (on p. 4 of their brief) regarding the statement of the number of vacation credits earned by appellee, should be changed to *extra* vacation credit. That is the term used by him in referring to such credits in his letter to President Harper in October, '03 (Abst., 70), and his letter to Mr. Arnett in December, '05. (Abst.,

72.) Therefore, by the statement on the same page of appellee's brief, that it was an established fact that Capps had to his credit at the university ten months "vacation" at \$250 per month, on October 1, 1907, must be meant *extra* vacation credit. In the next paragraph of their brief (pp. 4, 5) counsel said that the thing of value to Capps was his right to receive his salary from month to month *during the vacation period*. Mr. Capps *was* paid his full salary during the vacation period in each year, but it is only the pay which should be allowed him for the extra work done during such vacation periods and for extra work on the decennial publications that is in controversy. We do not deny that he had the right to utilize such *regular* vacation period in any way he might desire, and he did utilize much of it to earn extra credit by extra teaching.

Regarding the teaching at Harvard, mentioned on page 5, appellee says: Part of it was my *regular* earned vacation and part of it was a vacation granted me for that particular purpose, that I might teach at Harvard, under special arrangement with President Harper (Abst., 25, 26), and was subsequently made up for by teaching during the following vacation periods of the following years. (Abst., 77.) The statement that in the fall of 1906 Capps arranged with Professor Shorey that he should go on a vacation for the whole of the following year, referred only to the preliminary step that he was required to take, *i. e.*, of arranging with the head of the department so that he could get along without his services during that period. That arrangement had nothing whatever to do with how he

should be paid during that period; that was a matter which he had to arrange with the president. (Rec., 86, 87, 106, 179, 182 and 333.)

The statement at the bottom of page 5 that appellee talked the matter of his going to Princeton over with President Judson at least once before his tendering his written resignation, is undoubtedly an error on the part of counsel. President Judson did say he thought he had a conversation with Mr. Capps before the letter of resignation was written on June 19, but he was not certain of it, and his testimony that appellee in a conversation with him claimed that he should be paid for his extra credit in full referred to the conversation in July (Abst., 68), and we also have the positive statement of appellee that the only conversation with President Judson on the subject was had in August, or late in July, 1908. (Abst., 12; Rec., 113.)

If, as stated at the top of page 6 of appellee's brief, appellee was then claiming the credit on account of special work done on the Decennials, then he certainly is entitled to recover only on the two-thirds cash basis, as President Harper, when he allowed appellant the 3 months' credit for his work on the Decennials, referred to the *extra* vacation credit requested by appellee, and at that time the amendment to Statute 19 providing, in case of death or resignation, extra vacation credit should be paid for on the two-thirds basis had been published, and President Harper could have had no other statute in mind.

Appellee's resignation, we earnestly submit, was not a conditional one, "to take effect at the end of

the vacation he has earned," as characterized by opposing counsel, but was an absolute and unconditional resignation. He wrote to President Judson on June 19 (Abst., 13):

"Since I have just been notified of my election at Princeton I place in your hands my resignation as professor of Greek, to be presented to the trustees *at your convenience*.

"In order not to prejudice my case as regards my outstanding vacation credit, *may* I ask that this resignation take effect constructively at the end of the period covered by this vacation," etc.

This we contend is an unqualified resignation and became effective when he gave up his duties at the university and joined the faculty at Princeton in October, 1907.

In this connection we urge that appellee's employment was not for any stated time, but was for an indefinite period; and that he could abandon same whenever he saw fit so to do, without any consent or action on the part of the university authorities. In other words, it being for an indefinite period, it could be terminated by either party at any time.

Brougham v. Paul, 138 Ill. App. 455, 456.

Dean v. Fire Ins. Co., 208 Ill. 375.

Gray v. Wulf, 68 Ill. App. 376.

Greenburg v. Erly, 23 N. Y. Supp. 1009-1013.

Campbell v. Jimenes, 23 N. Y. Supp. 333.

Lord v. Goldberg, 22 Pac. 1126 (81 Cal. 596).

Perry v. Wheeler, 12 Bush 541.

Wood on Master and Servants (2d ed.)
sec. 133.

Butler v. Regents, 32 Wis. 124, 132.

26 Cyc. 974, and cases cited under note 46.

This being the case, no action on the part of the board of trustees was necessary to complete the resignation, but the same took effect upon appellee abandoning the university's employment, and President Judson's letter meant nothing more than the appellee having decided to abandon the employ of the university placed it beyond his power to take "a vacation," and there remained as the only alternative the payment of two-thirds in cash.

The point that certain questions were not raised in the trial below we shall consider in discussing the argument on pages 21 *et seq.* of appellee's brief.

On page 7. of his brief appellee again makes the statement that he had arranged with Professor Shorey to go on his vacation for the whole academic year of 1907, and that such arrangement precluded the idea of a settlement on a two-thirds cash basis; that his vacation credits were allowed to accumulate on the basis that he was to receive the amount due on the monthly payment basis, and that he was not paid for his vacation credits from time to time as they were earned. We have already shown that he was paid in full during his regular yearly vacation period, and the record is barren of any evidence that his vacation credits were allowed to accumulate under any such understanding. Professor Shorey had nothing whatever to do with the manner in which appellee should be paid for his services. As appellee said: "Mr. Shorey was head

of the department. I arranged with him simply as regards the time, as he made the budget, and he put that into figures." (Rec., 36; Abst., 6.) * * * "President Harper arranged with me for the employment. I always had my arrangements with President Harper." (Abst., 7; Rec., 87.) * * * "The budget of a department is a recommendation to the president and to the financial committee, in which the president has membership for the year ensuing." (Abst., 10; Rec., 106.) President Judson testified: "The arrangements for teaching, or for absence, were approved by the acting president or the president on the recommendation of the head of the Greek department, Mr. Shorey." (Abst., 64; Rec., 333.)

It will thus be seen that before appellee was entitled to claim a vacation away from the university on full pay he was required to obtain the consent of the president. This consent, according to the record, he did not get. He did take the matter up with President Judson before he left the university, and requested that he be allowed to be paid *as if* on an actual vacation, which was not allowed. He, therefore, had notice in advance that his request for payment of vacation on the basis of full pay would not be allowed; therefore, the only way remaining in which he could be paid was in cash on the two-thirds basis. Appellee said: "My only conversation on the subject was, I believe, in August or late in July, 1907, and in that conversation we discussed only the question of my vacation; my right to a certain amount of payment during a certain period, which we call vacation." (Abst., 12,

13.) On this subject President Judson said: "The conversation was confined to the question of vacation credits, and how it should be paid; the matter was discussed without any conclusion being reached." (Abst., 68; Rec., 351.) As appellee again says, referring to another time when he requested cash for extra work and was paid on the two-thirds basis, he "took Mr. Arnett's or the president's word for it as to how he was to be paid." (Abst., 31; Rec., 179.) Appellee's own letter, quoted on page 8 of his brief, shows that it was a matter of gaining the consent of the president as to whether he should be allowed to take an actual vacation or should receive two-thirds cash. Counsel say, on page 9 of the brief, that there was no arrangement in advance with the president that Capps should be paid on the two-thirds cash basis, and we submit neither was there any arrangement with the president that he should be allowed to take a vacation on full pay. They say President Judson not only raised no objection to appellee's request that he be allowed the actual vacation on full pay and not be paid on the two-thirds basis, but that he, President Judson, "positively approved the same." This is a mis-statement of fact that has not the slightest basis in the record. On the contrary, as shown before, President Judson expressly stated (Abst., 68; Rec., 351): "The matter was discussed without any conclusion being reached"; and the letter referred to on page 14 of the Abstract also states: "The questions, of course, are in the hands of the counsel, Mr. Heckman, and the Committee on Faculty and Equipment." The statement in the letter that the question of appel-

lee's taking up the work at Princeton in the winter or postponing it until the fall was immaterial to the question, and was a mere technicality, had reference to the fact that since appellee had resigned and decided to leave the university, and thus put it out of his power to take an actual vacation, it made no difference when he took up his work at Princeton. The final and decisive point was, that appellee had accepted a position at Princeton and had resigned from the University of Chicago, hence postponing the taking up of his duties at Princeton and attempting to simulate the taking of an actual vacation, would have been a mere subterfuge, and an attempt to accomplish by indirection what he knew could not be done directly.

We are at a loss to understand on what part of the record counsel base their statement, at top of page 10: "At least there was evidence fairly tending to show that he (Capps) had arranged with the president that he would take his full vacation credit and not two-thirds of the amount due him." On the contrary, the portions of the record above quoted show beyond question that such an arrangement was denied him.

The case of *Board of Trustees v. Bruner*, 66 Ill. App. 665, quoted at length on pages 17 and 18 of appellee's brief, is in no wise applicable. That was a case in which the University of Illinois attempted to withhold from Professor Bruner his salary due him during the *regular* vacation period at the end of his yearly period of teaching, on the ground that he had taught at the University of Chicago and had been paid by it for his services during such period. In the case at bar, Professor

Capps' regular vacation periods are not involved. He has been paid in full for those each year as they accrued. It is only the pay for the extra work done during that regular vacation period that is now involved.

The above statement leaves out of consideration our contention that the credits sued for in this case must be considered as earned on the decennial publications, as argued in our original brief. This point is not answered in appellee's reply brief, and we do not desire to be considered as waiving it in any degree.

Counsel say, on page 20 of the brief, that prior to 1903 the statutes did not provide that extra work should be paid for, either by extra two-thirds *pro rata* salary or extra full *pro rata* vacation, "as may be arranged by the president." This is immaterial, as Professor Capps testified time and again that he arranged with the president whether he was to receive two-thirds salary or full vacation, and counsel so state this to be a fact in their brief. Hence Capps' contract, according to his own evidence, was in accord with the amendments to the statute. The mere fact that extra vacation credits were allowed to accumulate does not raise an inference that they were to be paid for in either one way or the other, and even if such an inference did arise it certainly could not overcome the positive testimony of appellee and the other witnesses that the manner of taking such credits, whether accumulated or not, was a matter of arrangement with the head of the department and the president.

Counsel here (p. 20) repeat the statement made

at the bottom of page 7, that Capps arranged with Professor Shorey to go on a vacation during the whole of the following academic year. If appellee at the time he made this arrangement was contemplating leaving the university, it would seem that he was resorting to trickery and subterfuge in attempting to obtain a vacation on full pay on false pretenses of return; but, as we have said before, since he did not obtain the president's approval, any arrangement with Professor Shorey, if any were made, counts for naught.

In connection with the remarkable statement made on page 21 *et seq.* that the point that Professor Capps could be compelled to accept two-thirds in cash of the extra vacation credit was not raised on the trial below, we deem it necessary to make but a short reply.

It was a part of appellee's case at the trial to prove some arrangement which entitled him to pay on a basis different from that tendered him by the university. His testimony referred to in our original brief, pages 53, 54, 55 and 56, showed that he was always paid for his extra work in one of two ways; (a) either in two-thirds cash or (b) vacation at full pay, *provided the same had been arranged for with the president.* This was the only contract (if any) established by appellee. There is an utter absence of proof on his part as to how he would be paid for extra work, or extra vacation credit, in case he died or resigned from the service of the university. Therefore, as argued by us in our original brief (pp. 55 and 56), appellee's own evidence shows that, previous to the amendment of Statute 19, there

was no way in which he could be paid for such extra credit in case of death or resignation, except upon the two-thirds cash basis. This amount was tendered him before suit was brought, and was actually paid to him before trial. Upon this state of facts, and the above evidence, appellee was not entitled to recover anything further from appellant, and therefore there was no evidence in the record which would support a verdict in his favor for any further amount. On page 46 of the record (not abstracted), in the opening statement, counsel for appellant stated: "When a man's vacation period comes to him, he can do what he wants to with it. But whatever he does with it, it is used up at that time and no other. Whatever he gets after that is what is known by the statutes as extra vacation, and is payable in cash at two-thirds of the regular salary, or may be taken, *if arranged for*, in actual extra vacation afterwards."

Counsel say: "Prior to 1903 the statutes did not provide how it should be determined whether there should be an extra two-thirds *pro rata* salary or an extra full *pro rata* vacation. The amendment of 1903 provided it should be 'as may be arranged by the president.'" We have already sufficiently urged that plaintiff was bound by the statutes and the amendment of 1903, but conceding the correctness of counsel's statement just quoted, the evidence shows nevertheless, and plaintiff's own testimony is clear, that he knew in any event there was one of two ways in which he could be compensated for his extra vacation credit, and this was always a matter of arrangement between him and the president. (Abst., 6, 7, 31, 32, 35.)

Again, it is said (Brief, 20): "Professor Capps made his arrangements with President Harper, and from the fact that he did not receive pay for his vacation credits from time to time as earned, but they were allowed to accumulate, the only legitimate inference is that the arrangement was for 'extra full *pro rata* vacation.'" No such inference arises from the fact that the credits were allowed to accumulate. The proper inference is that plaintiff had not made up his mind how he wished to avail himself of the extra vacation credits. If he wished to avail himself of them in the form of a vacation, he necessarily had to wait until he took his vacation. In the meantime, if at any time he wished to capitalize his vacation credit and convert it into cash and take a lump sum for the entire 10 months, instead of installments of \$250 a month during 10 months of vacation, he could do so, by arrangement, but in such case was required to and could only receive two-thirds of the total amount otherwise payable to him on a monthly basis.

At the close of appellee's evidence (Abst., 35), and again at the close of all the evidence (Abst., 85), appellant presented written motions, requesting the court to instruct the jury to find the issues for the appellant, and also that the appellee had failed to make out a case against appellant, and accompanied said motions with written instructions to that effect. These motions were overruled and denied and the instructions refused, and exceptions to such rulings preserved by appellant. The appellant also made a motion for new trial, and filed a statement of the points made on the same, among which appeared the following:

- "1. The verdict is against the evidence.
- "2. The verdict is against the weight of the evidence.
- "3. The verdict is against the law.
- "23. The court erred in refusing proper instructions asked on behalf of defendant."

Exceptions were preserved to the overruling of the motion for new trial, motion in arrest of judgment and the entry of judgment (Abst., 104, 105, 107), and error on the above mentioned rulings of the court has been assigned in this court. (Abst., 108, 109.)

That a motion to direct a verdict raises for review the question, whether as a matter of law there is any evidence legally tending to prove the appellee's case, has long been held the law of this state:

E. J. & E. R. Young Co. v. Meyers, 226 Ill. 358, 364.

Variety Mfg. Co. v. Landaker, 227 Ill. 22, 24.

I. C. R. R. Co. v. Swift, 213 Ill. 207, 213.

Wallner v. Chicago Traction Co., 245 Ill. 148, 152.

In the case last above cited, which was an action for personal injuries, one of the questions passed upon by the Supreme Court was, whether or not the defense of accord and satisfaction was properly preserved for consideration on appeal. The court said (p. 151):

"The question of accord and satisfaction was raised by motions made at the close of the plaintiff's evidence and at the close of all the evidence to direct a verdict for the defendant. It is insisted on behalf of the defendant in error that these motions did not preserve the

question for review because they were general and did not set forth the grounds upon which they were made. The only grounds upon which such a motion can be made are that the declaration does not state a cause of action, or that the evidence, with all reasonable inferences to be drawn therefrom, taken most strongly against the maker of the motion, does not fairly tend to support a verdict for the plaintiff; and it is not necessary to set out in such motion the particular defect of proof claimed to exist. The party making the motion may rely upon the failure of proof in any respect necessary to sustain a verdict. The question presented by such a motion is not necessarily, as insisted upon by defendant in error, whether the evidence tends to support the allegations of the declaration, but is whether there is evidence legally tending to sustain a verdict against the party making the motion. (*Wolf v. Chicago Sign Printing Co.*, 233 Ill. 501.) The question therefore depends upon the character of the issue. Where evidence of an affirmative defense is offered, as in this case, it is proper to direct a verdict for the defendant, even though all the averments of the declaration are proved, if the evidence of the affirmative defense is not contradicted or explained.

* * *

"It is insisted that the defense arising out of the release of a joint *tort feisor* was not made or argued in the trial court on the motion to direct the verdict. *On this question we can look only to the record. Such defense was within the scope of the motion. The defendant had a right to rely upon it, and we must presume that it did so in the absence of a showing in the bill of exceptions to the contrary.*" (The italics are ours.)

Further comment on this point, in view of the language above quoted, seems to us unnecessary.

Appellant's argument, on pages 22-23, is not based on anything in the record. If there were anything in the record showing any such concession on the part of appellant, as claimed in appellee's argument, the industry of counsel would certainly have found it. The question whether or not appellee had made out a case under his declaration, or "whether there is evidence legally tending to sustain the verdict," was a question of law for the court and not one of fact for the jury, and the question having been decided by the court adversely to appellant, there was no obligation on the part of appellant to present that question to the jury by instructions. (*I. C. R. R. Co. v. Swift*, 213 Ill. 307, 313.) The giving of the instructions complained of in our original brief was excepted to at the time, were complained of in the motion for new trial, and assigned as error in this court, and hence are before this court for consideration. Under these conditions the authorities cited by appellee on page 24 of his brief are not in point.

The argument of appellee on page 25 that his resignation was conditional, etc., has already been answered by us in discussing this same point where it is made on pages 6 and 7 of appellant's brief. Appellee's whole argument is based on the assumption that this was a conditional resignation, and one which did not take effect until accepted by the university, without notification. President Judson did not, as stated by appellant (Brief, 25), "give him to understand that there was no objection to the resignation as tendered, and that it would not prejudice his right to his vacation credits." The president (Abst., 14) simply told him that, having

resigned, it made no difference what he did with his time; his connection with the university was at an end, and the question of the payment of his extra vacation credits was in the hands of the university's counsel and the Committee on Faculty and Equipment. Assuming that Professor Capps was under no obligation to resign, nevertheless his employment being an indeterminate one, the university could not compel him to remain if he did not see fit so to do; and on the same theory the university could dispense with his services at any time it saw fit so to do without any concurring act on the part of Professor Capps. There was no "lulling him into security" or giving him any false hopes as to what would be done with his request for full payment for his extra vacation credit. Capps in the spring of 1907 considered leaving the university, and in the second week in June, 1907, allowed his name to be voted on for membership in the Princeton faculty. (Abst., 22, 23.) When notified of his election he sent an unqualified resignation to President Judson, coupled with a request in effect that he be allowed full pay for his outstanding vacation credit, and *after* this letter was written supplemented his appeal by a personal interview with President Judson. President Judson refused to recommend the payment of that credit in full, came to no agreement with him about it (Abst., 68), wrote him two and a half months before he left the university that the matter was out of his hands in the hands of the counsel and one of the committees (Abst., 14), and yet Professor Capps took no steps to withdraw his resignation (assuming he could have done so) or notify

the university that it was conditional upon his being paid in full.

He would not (as stated on page 26) have had the right to teach at Princeton during the college year of 1907 and '08 had he not resigned, *unless*, as we have shown before, *he had received the approval of the president*. As before shown, this approval was withheld. He represented to Professor Shorey that he wished to go on a "vacation" during that period, and had the president believed him and consented to his taking such vacation he undoubtedly would have been paid full pay during that period. This, however, it is submitted would have been with the understanding that he was to return to the university at the end of that period, and if, as suggested by counsel, he took that vacation under those circumstances, and then resigned at the termination thereof, he would have obtained this full pay under false pretenses and would have been guilty of extremely unconscionable conduct.

As to what Professor Capps thought would be the result of his resignation on June 19, and what action he thought the trustees might take on his resignation, we are not concerned with in this proceeding. He did resign, and by that act placed himself in a position where he was only entitled at the most, under his own evidence, to receive pay for extra credits on the two-thirds cash basis.

Regarding appellant's argument (page 27 *et seq.*) that the amendment to Statute 19 was not binding upon him, we shall add but little to what we said in our original brief and argument (see point III., page 38). Counsel state the amendment was

made months after Capps became professor, and that it could not, therefore, have entered into his contract at all; but we showed in our original brief under point V. (at page 51 *et seq.*) that appellee, in his own testimony, does not show a course of dealing with him different from that provided for by said amendments. As a matter of fact, as stated in our original brief (Abst., 56, 57), appellee has not shown that under the terms of his contract he was entitled to *any pay* for unused extra vacation standing to his credit in case he died or resigned.

As an example of inaccuracies in appellee's brief, we call attention to his statement (p. 28) that the annual register was a closely printed volume of 592 or 593 pages, *in the midst* of which was printed Statute 19. This statement is repeated twice on page 29, once on page 31 and once on page 52. The fact is that the statutes occupied only a very few pages at the very commencement of the book. (Abst., 55; Rec., 295.) Capps knew that the board of trustees was a governing body; that it passed statutes and regulations for the government of the university, and that these were incorporated in the annual registers, and we submit it was not unreasonable for the university authorities to expect that the professor would once a year read over the few pages containing the regulations governing the university, especially when copies of these registers were sent to the faculty as soon as published, and, as Capps himself says, they were published, "I should presume * * * for the benefit of the faculty." (Abst., 18; Rec., 131.)

Counsel (page 29) say: "The question is what was the contract made by Professor Capps with respect to his salary. Did he agree that if he resigned he would thereby forfeit one-third of the amount he had already earned? That there was no express agreement to that effect is clear beyond a doubt." We, in turn, ask again, "Has Professor Capps proved that in case he resigned, having extra vacation to his credit, that he should be paid for the same at the rate of his full *pro rata* salary without obtaining the consent of the president?" To this we most earnestly assert the answer must be "No."

Assuming (as counsel on page 30 state) that Capps had the right to assume the same rules that originally governed his taking vacation credits would prevail until he received actual notice of a change, we again ask, "Where is there any evidence produced by him which proves what he would be entitled to in case he resigned or died?" The amendment to Statute 19 does not, as assumed by counsel in their statement at the bottom of page 30, affect *any* vacation credit in the case of death or resignation; it refers only to extra vacation credit. Pay for the regular vacation period was in no wise affected. (Abst., 45, 46.)

We, therefore, again confidently assert in this connection that there is no evidence in the record (exclusive of the amendment to statute 19) which proves, or fairly tends to prove, that appellee was entitled to recover other than on the two-thirds cash basis for his extra vacation credit in case of his resignation or death, and that the determination of this case, under the repeated decisions of this court and the Supreme Court, is one of law and not of fact.

On pages 31, 32, 33 and 34, counsel for appellee again assert the proposition which we have already answered, that Capps' resignation was a conditional one and that an acceptance by the University authorities of the conditions named was necessary before the resignation could be effective. We shall not repeat or answer to this proposition. A mere casual inspection of the authorities cited is sufficient to show that they are not in point.

The case of *Savannah Cotton Mills v. Cunningham*, 100 Ga. 468, involved the right of a treasurer of a corporation, whose office had expired in September, to make his resignation, when called for in October, conditional on his receiving pay until the following January. The court held that if he were entitled to hold office until the following January he might make such a condition a part of his resignation, and under such circumstances the resignation could not be accepted without agreeing to the condition expressed therein. After reviewing the evidence, the court held that the appellee had no right to hold office until January, and therefore he had no right to claim pay until that time, and his resignation was held to be effective from the time given, without the right to the additional pay. That case is really an authority in favor of appellant, as there is no evidence in this case that appellee could have compelled appellant to have kept him in its employ or to have granted him a vacation on full pay for the ensuing year.

Joseph v. Raff, 82 N. Y. App. Div. 47, has no bearing on the principle involved in this case at all. In that case the president of a corporation, who was under no obligation to resign until the expiration of

a certain stated period, agreed to resign earlier, provided his stock was taken off his hands and he was paid a certain amount of money. The concern was then believed to be solvent, the arrangement was made in good faith and for the best interests of the company, and in no way acted as a fraud upon the creditors. Under those circumstances, some months after the concern had gone into bankruptcy, the court held that the trustee in bankruptcy could not set aside the arrangement between the president and the directors, and compel the president to pay to the trustee the money he had received as a condition to his resigning.

Cuttright v. Independent School District, 111 Ia. 20, was a case where a school teacher was employed for a year at a certain salary. Before the expiration of the year he sent in his resignation, to take effect at a certain time. Obviously, before the resignation could take effect, acceptance by the board of trustees was necessary, inasmuch as they had the right to and might have desired to compel plaintiff in that case to complete his contract. Before any such action had been taken, however, the plaintiff withdrew his resignation, and the court held that the resignation could be withdrawn at any time before it was accepted.

Under the authorities cited by us in discussing this point (when made on pages 6 and 7 of appellant's original brief), appellee had the right to resign at any time without any concurring action on the part of appellant. But however that may be, appellee's resignation was not conditional; it was not withdrawn; but appellee in fact left the employment of

the University at the end of the school year, and by actually entering into the employment of another school put it beyond his power to continue his services at the University of Chicago.

The letter of President Judson on the subject of appellee's resignation we have also already considered (*supra*, p. —) and we desire to repeat that there is no evidence of any waiver in it or in any conversation between President Judson and appellee. As appellee himself said, the only conversation had with the president on that subject was in late July or August, more than a month after the resignation was written. (Abst., 12.) Whatever he may have insisted upon as his rights *after* his resignation was sent in, cannot in any way be construed to act as an estoppel. Furthermore, there is no evidence that in any of those conversations President Judson made any promises to Professor Capps or misled him in any way whatsoever. On the contrary, appellee characterized it as, "Just a discussion of my claim, then, for the ten months that had been already agreed upon as the amount due me." (Abst., 12.) President Judson stated (Abst., 68): "The matter was discussed without any conclusion being reached," and Professor Capps, when called in rebuttal, did not attempt to deny the correctness of that statement.

It is contended (Brief, 36) that the University is estopped to claim that the resignation operated to impair the rights of Professor Capps to his full vacation credit, because, it is claimed, Capps informed President Judson "that he insisted on payment in full for his vacation credit and intended his resignation to be without prejudice to his rights," and that

President Judson attempted to modify the *resignation*, and then did accept the same as so modified, and assured Professor Capps that the *resignation* would not prejudice his rights. The correspondence between President Judson and Professor Capps does not bear the construction sought to be placed upon it by counsel. On the contrary, it clearly supports the contention of the University. Plaintiff's letter to President Judson (Abst., 13) begins: "Since I have just been notified of my election at Princeton I place in your hands my resignation as professor of Greek, to be presented to the trustee at your convenience." This is an absolute and unqualified resignation, nor is there anything in the remainder of the letter which limits it in any respect.

The letter then continues:

"In order not to prejudice my case as regard my outstanding vacation credit *may* I ask that this resignation take effect constructively at the end of the period covered by this vacation, especially since it was arranged in connection with next year's budget I should be absent on vacation during the year 1907-8. The facts regarding this vacation are briefly presented in the accompanying memorandum, and I trust that they will receive a favorable interpretation at your hands."

This language cannot be construed to operate to make his resignation conditional. It recognizes the fact that the resignation might be accepted by the University as of the close of the school year, namely, September 30, 1907, and merely asks, the very request, its form and the manner in which it is made, involving a recognition of the University's right to refuse, without impairing the effect of the absolute

and unqualified resignation contained in the preceding paragraph of the letter. It is true that Professor Capps testified (Abst., 11) that, "In the fall of 1906, Professor Shorey, as head of the department, asked me what arrangement I liked for the academic year following, and I told him I should like to go on a vacation for the whole year," and that he said "that it was satisfactory to the department, or something to that effect," yet, as we have pointed out elsewhere, Professor Capps knew that this arrangement was subject to approval by the president, and he does not show that the president ever approved it. Furthermore, presumably this tentative arrangement with Professor Shorey was made in contemplation at that time of his continued connection with the University, and not of his resignation and employment at the end of the school year by the Princeton University. In any event, he does not say that he told Professor Shorey at the time of this conversation that he had in contemplation resignation from the University and employment by Princeton. If he had in mind such resignation and employment, and did not disclose it to Professor Shorey, then he was not acting in good faith, since it is preposterous to say that under any possible construction of the word "vacation" he would be taking a vacation after his resignation and the total termination of his relationship with the University, and in addition, his actual engagement and employment by another institution. If, on the other hand, he subsequently concluded to resign and enter the employ of Princeton, then his arrangement with Professor Shorey, whatever its original effect may have been, became inoperative, since in the nature of things he could not take a vacation, after his

resignation and employment by Princeton. His letter to President Judson shows that he recognizes the fact that he was not contemplating the taking of a real vacation, and that therefore the University had an absolute right to refuse to indulge him in the fiction of giving him a vacation by accepting his resignation constructively as of at the end of ten months.

Now, does the letter of President Judson in reply bear the construction sought to be placed upon it by counsel? President Judson said:

"So far as the question of your taking up your work at Princeton in the winter or postponing it until fall is concerned, I cannot see that that is material to the question."

What was evidently meant here was that, having resigned and terminated his relationship with the University, he could not in the very nature of things take a "vacation," and, therefore, whether he taught at Princeton or not, could not affect the question in any respect. The letter, continuing, said:

"It would be a mere technicality at best, and of course we should not wish to avail ourselves of *that*. In short, I should not regard *that* as having any bearing on the case, so that you can make what arrangements may seem desirable to yourself with President Wilson."

In other words, again, having resigned, and having entered the employ of Princeton, "it," that is, the taking up of his work at Princeton, would be a mere technicality, and he should not regard "*that*," that is, taking up his work at Princeton, "as having any bearing on the case, so that you can make what arrangements may seem desirable to yourself with President Wilson," with reference to taking up your

work since you have resigned and quit the employ of the University of Chicago and have entered into the employ of Princeton, the fact of your resignation and your employment by Princeton being the material considerations and the question whether you begin your work or not at Princeton being immaterial. If this is not what President Judson intended, but, on the other hand, intended what is claimed by counsel, then the remainder of the letter is meaningless, since there remained no questions to be determined and settled by Mr. Heckman, the counsel, and the committee on faculty and equipment, referred to in the letter. Counsel is wrong, therefore, in saying that President Judson "positively assured Professor Capps that the *resignation* would not prejudice his rights." All that he assured him was that the University would determine, as it had the absolute right to do, whether it would accede to his request to give him a fictitious vacation, by constructively postponing the acceptance of his resignation for ten months, or require him, as it had the right to do, to accept two-thirds in cash, and that having resigned and entered the employ at Princeton University, *the taking up of his work* with Princeton would not prejudice his rights, and not that his *resignation* did not and would not prejudice his rights.

Again, it is said (Brief, 25): "If either the president or trustees had notified him that his resignation as tendered was unsatisfactory and would not be accepted, he could, and doubtless would, have withdrawn the same."

As we have previously pointed out, his employment ceased on September 30, 1907, and it was not

necessary, in order to make his resignation effective, that it be accepted by the University, the University having the correlative right to notify him, without acceptance on his part, of its determination that he should not continue in the employ of the University after September 30, 1907. Hence, the very moment that he handed in his resignation, it became *ipso facto* effective, and this without the prerequisite of its acceptance by the University. Without the consent of the University he could not withdraw his resignation thereafter. It was not like a resignation tendered and to become effective during the school year, for the entire term of which he was under contract with the University to teach. A tender of such a resignation requires acceptance, because the University has a right to insist that he live up to his contract and teach during the year. Hence, before its acceptance, he would have had a right to withdraw the resignation. Not so in the case at bar, as we have stated. Furthermore, he could not in the very nature of things have withdrawn his resignation, because he had accepted employment with Princeton. Even if he had been able to arrange with Princeton to postpone the commencement of the active duties under his new employment until the expiration of ten months after September 30, 1907, nevertheless at the end of this time he would have been bound to have begun the discharge of his duties under his new employment, and could not come back to the University of Chicago, and hence could not have taken "a vacation." To have so arranged with Princeton, and thus have taken a fictitious vacation, with no intention of returning to the University of Chicago, would have been a fraud and imposition upon the latter.

Counsel, on page 38, liken Professor Capps' case to the case of a judge who in June tendered his resignation to take effect the first of the next January, and then ask: "Would that deprive him of his summer vacation? Or could the governor, without his consent, accept his resignation to take effect at once, notwithstanding the resignation expressly stipulated that it should not take effect until the first of the following January?" Such a case is entirely at variance with the facts in the case at bar. In the first place, a judge is elected for a certain stated period. He has a right to hold office until the end of that period, and no one can compel him to resign or oust him from the emoluments of that office (except by impeachment proceedings) until the expiration of that stated term. Capps, on the contrary, was hired for an indeterminate, indefinite time, and his employment could have been terminated either by himself or the University at will, or at least at the end of each school year, to wit: September 30th. Professor Capps took advantage of this situation and did resign at the end of the school year, and the University could not have prevented it (see authorities cited on page —, *supra*). He, therefore, had no right (assuming for the sake of argument that the resignation can be construed to be a conditional one) to attach any conditions to his resignation and certainly no right to abandon his services at the University, and yet claim pay after the termination of his employment. No one, we take it, would for a moment admit that a judge could tender his resignation in June to take effect in January, and then be at liberty at the close of his *regular* vacation period to abandon his judicial duties, move into a far distant state, and

take up an employment inconsistent with the idea of his continuing to be a judge of the State of Illinois. Such acts, especially when coupled with an announcement that he would abandon judgeship at the close of a summer vacation, would, we apprehend, be construed as an abandonment and resignation of his judicial duties at the close of his summer vacation.

With reference to the further argument of appellee (p. 39) that the amendment of statute 19 was not, as a matter of law, binding on Professor Capps, we have nothing to add to what is contained in our original brief of Point III. We earnestly reassert that the evidence shows conclusively that Professor Capps did have actual notice of the statutes in question, and if it be considered that the jury found against appellant upon this phase of the case, nevertheless such verdict is contrary to the great preponderance of the evidence, and we respectfully urge this court to so find and reverse this case with a finding of fact to that effect. In this view of the case, the authorities cited by appellee are not in point.

President Judson's letter of July 17th (Abst., 14), to which reference is again made (Brief, 49), has already been discussed by us, and shown to contain no waiver of any kind.

Assuming, for the sake of argument, that the court might properly have excluded all reference to the statutes (as suggested by counsel on page 50 of their brief), appellee's position is not bettered any. The case would then consist simply and solely of his evidence to the effect that upon certain occasions, *by arrangement with the president*, he was allowed to

take certain *extra* vacation credit on actual vacation at full pay, and that at other times he was paid for such credit in cash on the basis of two-thirds *pro rata* salary. In this state of the evidence, what can he claim he has proved he is entitled to in case of his resignation or death? He has proved absolutely nothing along this line, and careful search of his own testimony fails to reveal the slightest evidence that he had any arrangement with President Judson as to how the extra vacation credit sued for should be paid. His own testimony, therefore, was lacking in the particulars necessary for him to substantiate his claim in this suit.

On counsel's discussion of the cases cited by appellant on the question of notice, we shall not burden the court with a reiteration of what they hold. The cases speak for themselves, and appellee's criticisms of them do not in any way lessen their effect. They were cited for the purpose of showing to what lengths courts have gone in charging employees as a matter of law with notice of rules and regulations promulgated for their information, and we submit that the facts in the case at bar are far stronger than in those cited in our brief. It seems to us to be not only the law but what must appeal to every one as common sense as well, that where an employee knows there are certain rules and regulations concerning his duties and his employment published in an official document, which is furnished to him regularly "for his own benefit," that his consistent failure to read the same for the whole fifteen years of his term of employment will not excuse him from being charged with notice of what

such rules and regulations are, and the changes that may be made in them from time to time. As was said in the LaCroy case referred to by counsel for appellee (Brief, 54): Where a book of instructions has been given to an employee, even though such employee testified he had never read them, "the evidence permitted of no other inference than that the rules had actually come to the plaintiff's knowledge."

Concerning the refusal of the court to allow questions regarding the common knowledge that the professors at the university had of the registers containing the rules and regulations, counsel for appellee, on page 58, attempt to minimize that error by stating that there was no dispute on that issue. "That Professor Capps knew that the registers were published, and that as a general proposition they contained the rules and regulations—that fact was clearly established." On this point, as on several others, Professor Capps was not quite consistent in his testimony. In spite of counsel's admissions, Professor Capps stated at one time (Abst., 18) that up until the summer of 1905 he did not know that the statutes were published in the registers, but that he found it out some time later. At another time he admitted to having read a part of one of the statutes when it appeared in the annual register. (Abst., 4.) That was the register of 1892-1893. (Abst., 41; Rec., 234.)

Professor Capps was allowed to state what the custom had been regarding the way he was paid in certain instances, the purpose being to show a custom or course of dealing from which a contract

could be inferred. Under this state of facts appellant should have been allowed to show whether or not there was any custom or interpretation of the terms "vacation" and "extra vacation credit."

INSTRUCTIONS.

In defense of appellee's modified instruction No. 4, counsel for appellee again make the statement that appellant conceded that appellee had the right to receive \$250 a month for ten months if he had not resigned. They state that there was no error in the failure to draw a distinction between extra and regular vacation because there was no distinction material to the controversy. We submit these statements are not true and reaffirm that under the undisputed evidence it *was* optional with the University to pay on the two-thirds cash basis. The only answer that is made to the charge that the instruction left to the jury to determine the meaning of "imputed knowledge" is that the term "imputed knowledge" is not used. We fail to see the difference between the terms "imputed knowledge" and "knowledge reasonably to be imputed." The other points raised under the instructions and the cross errors are fully covered in other parts of the brief.

CONCLUSION.

Appellee argues that substantial justice has been done. He has caused the University to expend nearly as much to defend this suit as it would to have paid Capps his claim. This seems to us to be peculiar justice. There is no evidence and can be none, that appellant is actuated by any improper motives, or that it is endeavoring to work a hardship or injustice on appellee. It claimed and maintained at the trial, and claims now, that it is an eleemosynary institution; that it relies for its support largely upon the proceeds of trust funds. It had established for its government a set of rules and regulations; these had been in force in the main over fifteen years, during all of which time appellee was in its employ. It claims that under those rules and regulations, and under the facts as testified to by appellee, it had a right to pay appellee as it had paid others under similar circumstances on the two-thirds cash basis for any unexpired extra vacation which he had to his credit when he resigned his position at the University. There is no doubt as to the reasonableness or the propriety of such a regulation, but appellee claims there should be an exception made in his case, because he took so little interest in the institution and his employment that although he knew there were certain regulations published each year, and although he received his copy regularly, nevertheless, during the whole of his fifteen years' service at the University he never took the trouble to look into them, but put them unopened on his shelf. (Abst., 33.) Under

these circumstances he says in effect: "I have not been sufficiently notified, I did not know what they provided, and hence I am not bound by them."

If the University is right in its position, it is a peculiar kind of "substantial justice" that compels it to expend the large sum of money that has been expended in this case in establishing its rights, and counsel's argument along this line smacks more of an appeal to the passions and prejudices of a jury in a personal injury case than an appeal to the sound judgment of this court. We earnestly submit that the argument of our original brief has not been answered; that it is only by virtue of the amended statute 19 that appellee is entitled to recover anything for untaken extra vacation credit under the circumstances shown in the evidence, and that this court should reverse the judgment of the Municipal Court with a finding of fact, that under appellee's own evidence he is not entitled to a recovery, and enter judgment for costs in this court against appellee.

Respectfully submitted,

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