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EVIDENCE — AVAILABILITY OF EVIDENCE FOR CONSIDERATION BY THE JURY — EFFECT OF LACK OF MOTION TO STRIKE — The plaintiff sued a city for personal injuries sustained as a result of a fall in the street while she was using due care, the fall being caused by a defect in the street. Plaintiff testified on cross-examination that the defect was two and one-half inches from the street car rails, which fact would relieve defendant of liability under sections 3752 and 3755 [1] of the Connecticut General Statutes. The plaintiff, on re-

[1] Conn. Gen. Stat. (1930), § 3752: "and such street railway company shall be liable for, and pay to the official or municipality entitled to receive the same, the cost of . . . repairing and maintaining so much of any such highway . . . as is contained within eight inches on each side of each rail of such tracks. . . ." Sec. 3755: "The

buttal, testified that the defect was twenty-eight inches from the rail. Defendant's counsel objected to this after the answer was given, and the objection was sustained. The verdict of the jury in favor of the plaintiff was set aside by the court on the defendant's motion. Plaintiff appealed on the ground that as there was no motion to strike the evidence objected to, it was part of the record, could be considered by the jury, and was sufficient to warrant the jury's verdict. *Held*, even in the absence of a motion to strike, the testimony that the defect was not within eight inches of the rail was not available to support the jury's verdict. *Hackenson v. City of Waterbury*, 124 Conn. 679, 2 A. (2d) 215 (1938).

In general, in order to exclude improper testimony, the objection thereto must be made as soon as the question is asked, and before the answer is given.[2] This rule does not apply if the inadmissibility is due to the answer and not the subject of the question,[3] or if the answer was given before the objection could be made.[4] The courts also hold that this general rule must be reasonably interpreted, and if the reason for the objection being tardy is not to allow the objecting counsel to gamble on the answer of the witness, the court will not overrule the objection solely on the grounds of tardiness.[5] Thus the court in the principal case was justified in allowing the objection to be made either under one of the two exceptions to the general rule, or under the reasonable interpretation doctrine. Once the evidence is in, however, it is generally held that an objection thereto is unavailing, although it might have been excluded if the motion had been timely made, the proper remedy being a motion to strike.[6] It is the duty of the party dissatisfied with the evidence to move to have it stricken.[7] In the absence of a motion to strike the evidence, the party to whom it is unsatisfactory will be deemed to have acquiesced in the reception of it,[8] or his objection will have been deemed waived.[9] Nor is it error for the court to overrule an objection to the evidence and permit the evidence to stand.[10] Also, the trial court is not bound to strike testimony where the objection is made solely to the answer, and there is no motion to strike.[11] A motion to strike is necessary

state or any municipality shall not be liable for any injury or damage to any person or property by reason of any defect in that portion of any such highway or bridge roadway of which any street railway company is made chargeable with the cost of . . . repair or maintenance."

[2] 1 WIGMORE, EVIDENCE, 2d ed., § 18 (1923).

[3] Ibid.

[4] 9 ENCYCLOPEDIA OF EVIDENCE 48 (1906).

[5] Marsh v. Hand, 35 Md. 123 (1871).

[6] 9 ENCYCLOPEDIA OF EVIDENCE 47 (1906).

[7] Salt River Valley Water Users' Assn. v. Berry, 31 Ariz. 39, 250 P. 356 (1926).

[8] Novak v. Melnyk, 224 App. Div. 492, 231 N. Y. S. 417 (1928), affd. 252 N. Y. 558, 170 N. E. 142 (1930).

[9] Fraher v. Eisenman, 94 Cal. App. 48, 270 P. 704 (1928); Ballos v. Natural, 93 Cal. App. 601, 269 P. 972 (1928).

[10] Seeber v. City of Hannibal, (Mo. 1926) 288 S. W. 974; Bullock v. Aetna Life Ins. Co., 229 Mo. App. 499, 76 S. W. (2d) 726 (1935); Johnson v. Hattrem, 129 Ore. 32, 275 P. 913 (1929).

[11] 64 C. J. 203, § 217 (1920).

where the question is answered before the objection to it is made.[12] It has been held, however, that even in the absence of a motion to strike, a nonresponsive answer should be excluded.[13] Also, evidence that is inadmissible under the hearsay rule is not given probative value because of the failure to make a motion to strike.[14] A number of cases hold that a court is not bound to determine a cause on improper evidence, but may of its own motion exclude or strike out inadmissible evidence even though counsel does not object thereto or make a motion to strike.[15] The court in the principal case recognizes that the weight of authority puts the burden of keeping out, or removing from the record, inadmissible evidence, upon the party against whom it is offered, and cites cases to that effect.[16] If the result of the rule in this case is that any verdict that is rendered after improper evidence has been allowed to remain in the record may be set aside or reversed, the rule would work more harm than good. It would mean that even though there was sufficient competent evidence to support a verdict on the record, the verdict could be set aside because improper evidence on the same point was admitted. If, however, the result of the case is that the verdict may be set aside only if it must necessarily have been based on this improper evidence, the results will be beneficial on the whole. In the cases where this rule is applied, there will be less chance for the oversight of the lawyer to play a material part in the ultimate determination of the case, thus making it more possible to decide lawsuits on the merits alone. The burden of removing improper evidence will be put upon him who offered it on the pain of having a verdict in his favor reversed or set aside because it is based on improper evidence. Thus the burden on the opposing attorney and the trial judge, where under the majority rule it now rests, will be reduced. The chief disadvantages of the rule are that it may increase the burden on the appellate courts, and may tend to foster carelessness on the part of the attorney against whom the evidence is offered. The former disadvantage is not too imposing as the rule is confined to rather narrow limits, being applicable only when the objectionable evidence is the sole evidence, and only when the evidence is objected to but no motion to strike is made. The latter disadvantage will be slight in that the attorney against whom the evidence is offered will not be sure that will be the only evidence against him, and what carelessness is present will be offset by the increased vigilance of the offering attorney. It is submitted that on the whole the rule is commendable in that it reduces the possibility of a lawsuit being decided by the failure to make a proper motion.

[12] Ibid., 205.
[13] Long v. Galveston Electric Co., (Tex. 1933) 59 S. W. (2d) 228.
[14] Eastlick v. Southern R. R., 116 Ga. 48, 42 S. E. 499 (1902).
[15] 64 C. J. 231, § 245 (1933).
[16] See also 26 R. C. L. 1047, § 55 (1920).