upon a policy of life insurance. The policy was issued November 17, 1894, on the life of the deceased, and contained, among others, a provision that "if, within three years from the date hereof, the insured shall die in consequence of his own criminal action, the liability of the company shall not exceed the amount of the premiums paid on this policy." On March 26, 1896, in the evening, the insured, with an accomplice, held up and robbed one William Britton on Clark street, in the city of Chicago. The robbers were immediately arrested, and in an attempt to escape from the custody of the officer who had made the arrest the insured was shot and severely wounded, from the effects of which he died. Upon the refusal of the insurance company to pay the face of the policy, this action was brought. To the declaration on the policy the company filed two principal pleas; the first being the general issue, and the second non assumpsit, except as to the sum of $318. As to that sum it is averred that "the policy was issued and accepted subject to certain conditions and agreements, one of which was, that if George M. Haley should, within three years from date of policy, die in consequence of his own criminal action, the liability of the defendant should not exceed the amount of premiums paid on the policy; that the said George M. Haley did die within three years from date of policy, in consequence of his own criminal action; and that the premiums paid on policy amounted to $318," which defendant tendered and offered to pay to plaintiff. Other pleas were filed, but later withdrawn, under a stipulation that all defenses might be made under the first and second. Upon a trial by the court without a jury a judgment was rendered for the plaintiff for $2,500, the full face of the policy, and an appeal was taken by the defendant to the appellate court for the First district. That court reversed the judgment below, specifically finding that the insured died in consequence of his own criminal action, and rendering a judgment in favor of the administrator for the sum of $318, the amount of the premiums paid. To reverse that judgment the administrator prosecutes this appeal. Cross errors are assigned by the insurance company, seeking to avoid the judgment for the sum of money paid to the company as premiums, on the ground that the policy, by reason of misrepresentations made by the insured at the time of his medical examination, was void.

M. W. Robinson and Herbert B. Robinson, for appellant. Hoyne, O'Connor & Hoyne, for appellee.

WILKIN, J. (after stating the facts). The appellate court, in pursuance of the statute in such case, has found and recited in its final judgment as follows: "That George M. Haley died within three years from the date of the policy sued upon, and that his death resulted in consequence of his own criminal action." This is a finding of the ultimate fact put in issue by the defendant's second plea, setting up the foregoing condition in the policy, and is conclusive upon this court. It is not a question of law, as contended by appellant's counsel, but at most but a mixed question of law and fact, and therefore not subject to review by this court. Hunter v. Clarke, 184 Ill. 158, 56 N. E. 297; Cheney v. Cross, 181 Ill. 31, 54 N. E. 564; Meyer v. Butterbrodt, 146 Ill. 151, 34 N. E. 152, and cases cited. Upon this finding, nothing remains for us to do but to affirm the judgment of the appellate court.

There is nothing in the finding of the appellate court, nor, as we understand, in the record, upon which to base the contention of the insurance company that it was not liable for the amount of the premiums paid, and for which that court gave judgment. The condition in the policy says, in effect, that, even though the assured may die in consequence of his own criminal action, the company shall be liable for the amount of the premiums paid on the policy; and the second plea not only recognizes that right of recovery, but avers that defendant is willing and has offered to pay that amount, namely, $318. The cross error assigned by appellee is therefore without merit.

It is lastly insisted by the appellant that, if only the amount of the premiums paid can be recovered, error was committed by the appellate court in not allowing interest on the moneys paid from time to time, constituting this sum. This question was not presented to the appellate court, and cannot be raised in this court in the first instance. Case v. Phillips, 182 Ill. 187, 55 N. E. 66. As there is nothing in the record to show that the appellate court passed on the right of the plaintiff below to recover interest, or that it was even asked to do so, it is impossible for us to say it committed error in that regard. The judgment of the appellate court will be affirmed.

Judgment affirmed.

CROSBY v. PEOPLE.

(Supreme Court of Illinois. Feb. 20, 1901.)

AIDING AND ABETTING MANSLAUGHTER—EVIDENCE—SUFFICIENCY.

Defendant was the owner of property sold on mortgage foreclosure, the certificate of purchase of which was sold shortly after the expiration of the time for redemption. Defendant, under advice of her attorneys, resisted all efforts of the purchaser to take possession, nailing up the gates and boarding up the windows; and he obtained a writ of assistance, which was placed in the hands of a deputy sheriff, who with several men went to the house and demanded admission, showing his badge, which being refused, he proceeded to break off the boards over the windows with an iron bar. Defendant's adopted son, a boy of 13, going from the basement on the approach of the officer, picked up a revolver which had belonged to defendant's husband, and went to the window, presented the revolver when they had torn off a board, and ordered the men to leave, or he would shoot, snapping the revolver. They

broke off another board, and he fired, killing the deputy sheriff. Defendant was in the next room, separated by a curtain, but not in sight of the boy, and had never told him to use the revolver, but had only talked over in his presence her attorney's advice that she could defend her home against the purchaser, even with firearms. She did not have anything to do, directly or indirectly, with the shooting, or say or do anything at the time, nor even know that the boy had the revolver, but heard him threaten. Her attorney had told her that the issuance of the writ altered her rights as to resistance, but it had not been served. When arrested and greately excited, she said that, if any one was to be punished, it ought to be her. The boy was acquitted of any crime in the killing. *Held*, that the evidence was insufficient to sustain a conviction of defendant of manslaughter, as having aided, abetted, or assisted in the killing.

Magruder, J., dissenting.

Error to criminal court, Cook county; A. N. Waterman, Judge.

Marjorie H. Crosby was convicted of manslaughter, and brings error. Reversed.

Clarence S. Darrow and William Prentiss, for plaintiff in error. E. C. Akin, Atty Gen. (C. S. Deneen and Ben M. Smith, of counsel), for the People.

CARTWRIGHT, J. In December, 1898, Marjorie Helen Crosby, plaintiff in error, occupied as her home the premises at 1529 Wilson avenue, in Chicago. She was a widow, 65 years old, and lived there with her mother, who was 89 years old, her foster sister, Nellie Strong, and her adopted child, Thomas G. Crosby, a boy 13 years of age. She had owned in her own right the premises, which consisted of a tract fronting 382½ feet on Wilson avenue and 194 feet on Clarendon avenue, with the dwelling house fronting north on Wilson avenue, and about 75 feet distant therefrom. She had mortgaged the premises in 1894 to the Lehman estate for $20,000, payable in five years; and the mortgage had been foreclosed for a default in the payment of interest, and the property had been sold August 6, 1897, to Augusta Lehman, conservatrix. The time for redemption expired November 6, 1898, and a few days afterwards the certificate of purchase was sold to Christian Kurz, and the assignment was dated back to November 5, 1898. Kurz obtained a master's deed of the premises, and tried in different ways and by various devices to get possession. About the time he got the deed he visited the place with a real-estate dealer, who said to Mrs. Crosby that Kurz had bought the property. She disputed the statement, and claimed that the time of redemption had been extended two months by the attorney for the Lehman estate to enable her to raise the money and redeem her home. She was counseling with two attorneys at the time, and had been directed by them to keep possession. The doors were locked and the windows fastened. The fence was nailed up, and a barbed wire fastened across the gate. One of the attorneys provided her with a chain, which was put on the front door, and every precaution was taken to protect the possession against Kurz, while every effort was being put forth on his part to get into possession. Men tried to get in under such pretext as inspecting the gas meter, although gas was not used in the house, and men were seen sneaking through the shrubbery after dark. The tenants of the house were greatly wrought up by this condition of affairs, and were constantly on the watch to see that no one got in, and on one occasion they called the police to protect the property. Mrs. Crosby was going down to the city frequently, counseling about the matter and endeavoring to get a new loan. Finally, on December 7, 1898, Kurz obtained an order from the circuit court of Cook county for a writ of assistance to put him in possession, which was issued the next day. Some time after that, Frank E. Nye, a deputy sheriff of that county, who had the writ, came to the house and tried to gain admission. Nellie Strong answered him, and he said he wanted to see Mrs. Crosby, and that he had an order from the court. He did not show an order, or say what it was, or that he was an officer, but said that his name was Nye. He told Nellie Strong that the next time he came he was going to get in, if he had to break through the side of the house. On the morning of December 22, 1898, said deputy sheriff, Frank E. Nye, got six men to aid him in executing the writ of assistance. They went to a blacksmith's shop and got a bar of iron about three feet long and went to the place. Mr. Nye jumped over the fence and went to a door on the west side of the house and rapped and shook the door. He then went around on the east side, where there was a door and a bay window looking out on the porch, and tried the door. The boy, Thomas G. Crosby, who was down in the basement fixing the fire, went upstairs, and, as he went, took a revolver from the top of the refrigerator. This revolver had been about the house, had belonged to Mrs. Crosby's husband, and had been kept mainly by Nellie Strong. The boy had never used it, and had never fired a pistol in his life. Nye demanded admittance, and the boy told him that his mother was not at home, and refused to let him in. Nye replied that he had a gang of men there, and that he had better let him in, or he would break in. The boy answered that Nye had not got anybody there, and Nye said he would show him, and called to the others to come on. While Nye was talking he opened his coat and showed his star, with the word "Sheriff" on it. When the men were called some of them jumped over the fence, and others pushed the gate open, and they all came around the window with the bar of iron. Part of the glass in the lower sash had been broken out, and the lower part of the window was boarded up with five or six boards. Nye again rattled the door and demanded of the boy to open it, or he would break in. The boy told

him if he did he would shoot. Nye then told the men that had the iron bar to break off the boards from the window. One of them began breaking off the boards with the bar, and when one board was torn off the boy presented the revolver between the boards and told them to get away from there, or he would shoot. The men recognized the voice as that of a child or woman, and it had the characteristics of a child's voice. The boy attempted to fire, but the revolver merely clicked and did not go off. It was then withdrawn, and when the next board was knocked off it was again presented and fired, and Nye was killed. Mrs. Crosby was in the house at the time, in a room separated from the room where the boy was by a curtain. They were jointly indicted for the murder of said Frank E. Nye, and were tried in the criminal court of Cook county. The jury returned a verdict that the defendant Thomas G. Crosby, who fired the shot, was not guilty, and that the defendant Marjorie Helen Crosby was guilty of manslaughter, and her punishment was fixed at one year in the penitentiary. She was sentenced in pursuance of the verdict. Plaintiff in error has assigned as error various rulings of the court upon the admission of evidence and in giving and refusing instructions, but we will confine ourselves to the question whether the evidence was sufficient to justify the verdict and judgment.

The only ground upon which Mrs. Crosby was charged with the alleged crime was that she aided, abetted, or assisted Thomas G. Crosby in its perpetration; and the jury were instructed, as to her, upon that theory alone. The verdict of the jury was that the shooting of Deputy Sheriff Nye was not a criminal act on the part of Thomas G. Crosby, but that Mrs. Crosby was guilty of manslaughter, as having aided, abetted, or assisted in such shooting. Thomas G. Crosby, who fired the shot, was shown by the evidence to be an unusually bright and intelligent boy of his age. He worked as an errand boy, and studied at home, where his aunt, Nellie Strong, was his teacher. He attended Sunday school, where he had been librarian for more than a year. There was no controversy but that he knew good from evil and right from wrong, and that, if the circumstances of the shooting constituted a crime, he was guilty. There was no claim or defense that he was merely an innocent or irresponsible agent of his mother, and not amenable to the law. There was no ground for such a defense, and he was not acquitted for such a reason. The evidence showed that he and his mother, Mrs. Crosby, were each of blameless life and reputation; and there was no valid ground for a distinction between them, if the evidence had shown that they both participated in the act. Assuming, however, for the purpose of this decision, that the evidence would have justified the jury in finding the shooting to be a criminal act, Mrs. Crosby could only be held responsible for it upon evidence proving beyond a reasonable doubt that she aided, abetted, or assisted in it. There was no evidence tending to prove that she had anything to do with the shooting, directly or indirectly, except certain alleged admissions when she was under arrest. The facts above detailed were proved at the trial, and were not controverted. Mrs. Crosby was in the adjoining room, but was where she could not see the boy. She was keeping out of sight, as she had done before, and as she says she had been told to do,—not to let any one serve a writ on her. Both she and Thomas denied, in their testimony, that she had anything to do, directly or indirectly, with the shooting, or that she even knew that Thomas had the revolver. She certainly did not say or do anything at the time. Thomas and the men were on opposite sides of an open window, within a few feet of each other, where the men could have heard, as well as Thomas, if Mrs. Crosby had said anything, and there is no evidence from any of them that she spoke or took any part in the affair.

The facts relating to Mrs. Crosby's connection with the transaction, as presented to the jury in her behalf, were substantially as follows: She had owned this place, and her husband had been in the marine insurance business, as one of the firm of McDonald, Crosby & Rardon. The firm was involved, and in 1891 her husband appealed to her for help to raise money to be put into the firm. She mortgaged this home for $14,000, and raised the money required. The following year her husband died. She could not pay the interest on the mortgage, and it grew in size, and was replaced by the mortgage for $20,000 to the Lehman estate. She had sued McDonald and Rardon for the amount originally borrowed under the mortgage, and obtained judgment against them for about $18,000; but they appealed from the judgment, and her only hope for immediate relief was to get another loan. She was making every effort to do that, and a very clear preponderance of the evidence shows that the attorney of the Lehman estate had made an arrangement with her and her attorney for two months' extension of the time to redeem, and with notice to her if he should find a prospective purchaser. After he sold the certificate to Kurz, he notified Mrs. Crosby and her attorney of the fact. Mrs. Crosby's attorneys then gave her directions to hold the possession, and one of them gave her the chain, and she was advised that if she could raise the money within the time she could enforce the agreement. On the day before the shooting one of her attorneys wrote her a letter, saying that a deputy sheriff had come to him and showed the writ of assistance; that he had always told her no one could take possession unless they had a writ from the court;

that this put a different phase on the situation; and that she had better come down to see him right away, or else they would take steps to get possession by force under the writ. She went to see the attorney in response to the letter, and he told her that the writ altered the situation. She told him that she had not been served with any writ, and went to see her other attorney. An appointment was made by them to see the attorney who wrote her the letter, the next morning at half-past 9 or 10 o'clock. The next morning, when Nye and his men came to the house, she was preparing to go down to the city to keep that appointment. She insists that her attorney had told her before that time, during the troubles, that she had a right to protect her possession of the premises by every means, even to the use of firearms. The attorney qualifies the statement somewhat, but it is very clear from the evidence and his letter of the 21st that he had given her to understand before the writ was issued that she must retain possession by resistance. She and Nellie Strong talked over at the table, in the presence of Thomas, the direction and advice which they say they received from the attorney,—that they had a right to resist to the extent of using firearms. Thomas undoubtedly got the idea, from their talk, that it would be right to defend the property by the means finally employed; but they were only talking about their rights, and no advice, order, or direction whatever was given to him, and this was all before any writ was issued. He had never fired a pistol, and had never had this revolver but once, when he was told to put it down. At the time of the shooting Mrs. Crosby was in a desperate situation, and was trying to retain possession of her home, hoping to have the money to redeem it before the extension would expire, which would be in about 15 days. She undoubtedly heard what the boy said when he was threatening to shoot, but the evidence does not justify a belief that she regarded it as anything but a threat. It is unreasonable to suppose that, if she had any intention to have somebody shot, she would have intrusted the execution of her purpose to a little boy who had never fired a pistol in his life. Immediately after the shooting the boy got out of the house, by her direction, to telephone for the police, telling them that men were trying to break into the house.

The only evidence which it is claimed charges Mrs. Crosby with aiding, abetting, or assisting in the killing of Nye rests upon her statements when under arrest, immediately after the shooting. When she and the boy were arrested she was greatly excited, and her talk was mainly about her right to protect the possession of her home. She told of her troubles and her distress and need, and the advice of her lawyers, and said, in substance, that the boy was not to blame; that he was as innocent as a babe; and that, if any one was to blame, she was. She was naturally frightened at what might be the punishment of the child, and told the officers that she had had him since he was two months old; that he was a good boy and an obedient boy; that the lawyers had told her not to open the door for any one, and to shoot the first one that came in; and that, if any one was to blame, she was. She had talked over this advice and their rights before the boy, and, with her motherly feeling for him, she was ready to take the blame upon herself, and said, in substance, that, if any one was to be punished, she ought to be, instead of him. One witness puts it a little stronger, and says that, when the officers were putting Mrs. Crosby and the boy into the patrol wagon, he heard her say: "Yes; it was the boy fired the shot. He done just as I told him." This man did not hear the remark to which she replied, and others, who were in a better position to hear her, say that she said the boy did the shooting, but she was responsible for it. Again, the witness in question testified at the coroner's inquest, where he says he related all that was done and all that was said at the time; and counsel for the people admit that he did not relate any such statement as made by her. He evidently did not correctly understand or does not recollect what was said. The evidence goes no further than to show that Mrs. Crosby and Nellie Strong had talked over in the presence of the boy the advice they said they had received from their attorneys, and that at the time of the shooting Mrs. Crosby heard the threats made by the boy. There was no evidence that she directed, incited, aided, abetted, or assisted in any manner in the shooting. Her mere presence in the adjoining room, out of sight of the boy, where she neither said nor did anything, was not sufficient to constitute her a principal. The aiding or abetting contemplated by the statute consists in something affirmative in its nature, and even if it can be said that Mrs. Crosby knew, from the threats of the boy, that he was likely to shoot, and did not try to stop him, that would not have been sufficient to make her guilty as a principal. White v. People, 81 Ill. 333; Id., 139 Ill. 143, 28 N. E. 1083. We think the evidence fails to connect Mrs. Crosby with the killing by the degree of proof which the law demands, and at best shows no more than a negative acquiescence or silence on her part, which would not justify her conviction as a principal. The judgment of the criminal court is reversed, and the cause is remanded. Reversed and remanded.

MAGRUDER, J., dissenting.