

"Sec. 2817. Legal Rate of Interest. Legal interest shall continue to be at the rate of six dollars upon one hundred dollars for a year, and proportionately for a greater or less sum, or for a longer or shorter time; and no person upon any contract shall take for the loan or forbearance of money or other thing above the value of such rate.

"Sec. 2818. Contracts, &c., for More, Illegal. All contracts and assurances made, directly or indirectly, for the loan or forbearance of money or other thing, at a greater rate of interest than is allowed by the preceding section, shall be deemed to be an illegal consideration as to the excess beyond the principal amount so loaned or forborne."

It appears from what has been said that, under this contract of loan, the defendant, the Life Insurance Company of Virginia, reaps a larger profit on the loan of its money than at the rate of 6 per cent. per annum, and that the transaction is usurious.

The complainant also seeks damages because the defendant did not lend the last \$2,000 of the \$5,000 asked for. The report of the standing master on this point is confirmed. He saw no evidence to sustain the claim. It seems somewhat an inconsistent position on the part of the complainant to attack the loan because it is usurious, and then to seek damages because it was not made. Considering the whole case, it is ordered that the account between the parties be restated on these principles. Let the plaintiff be charged with the loan of \$3,000, which has been made, with interest thereon at the rate of 6 per cent. per annum payable monthly, and be credited with all sums paid for this interest, and also with all sums paid on the endowment policies, interest on these last-named sums to be allowed at the rate of 6 per cent. per annum from the several days of payment. For the balance thus ascertained, the complainant must make payment to the defendant, and, failing therein, the lands covered by the deeds of trust must be sold by the standing master for the purpose of satisfying the same. The case will be recommended to the standing master, to restate the account; or, if the parties can agree upon a proper statement, so much of this reference can be dispensed with, and a decretal order can be prepared providing for the time and place and terms of sale; costs to be paid by defendant.

CITY OF CHICAGO v. BAKER.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1898.)

No. 458.

1. MUNICIPAL CORPORATIONS—POLICE POWER—CLOSING STREETS.

An ordinance closing a street in Chicago at the place where it was crossed by a railroad track was not an exercise of the police power of the city, and, if property is injured by such closing of a street, the owner is entitled to damages.

2. SAME—ILLINOIS STATUTE.

Rev. St. Ill. c. 145, § 1, provides compensation for damage caused to property by the vacation of a street or alley; and if, before that enactment, the vacation of a street was an exercise of police power, for which there was no right of compensation, the statute abolished that doctrine.

3. SAME—DAMAGES.

In Illinois it is not essential to a right of action against a city for damages sustained by closing a street that the property alleged to be injured should abut the closed portion of the street.

4. SAME—EVIDENCE.

In an action for damages to property by the closing of a street, proof of decrease in rental value of neighboring property is not admissible.

Error to the Circuit Court of the United States, Northern District of Illinois, Northern Division.

T. J. Sutherland, for plaintiff in error.

Clarence S. Darrow, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The defendant in error was given judgment against the city of Chicago, in the sum of \$5,000, for damages caused to property on the southwest corner of Clark street and Twenty-First street by the vacation of the latter street where crossed by the tracks of the Lake Shore & Michigan Southern and the Chicago, Rock Island & Pacific Railway Companies. Besides the city, those companies were made defendants to the action, and damage attributed to the elevation of their tracks, as well as to the vacation of the street, was claimed; but, under the peremptory instruction of the court, those companies were found not guilty.

The radical proposition of the plaintiff in error, that "the ordinance, under which Twenty-First street, near the plaintiff's premises, was closed, was passed by the city in the exercise of its police powers, and hence no right of action accrued to the plaintiff by reason of the same, or of any acts done in pursuance thereof," we do not deem tenable. The right to regulate the use of streets is recognized to be a police power, but no decision has been cited, and we know of none, in which it has been held or said that the power to vacate streets is of that character; and, as we conceive, it could not be regarded as of that quality in a particular instance because exercised in connection with the exercise of another power conceded to be of that kind, like the power to compel the elevation of railroad tracks. When in this instance the city determined that the railroad tracks adjacent to the property of the defendant in error should be elevated, it was a matter of choice on the part of the city, and was made a matter of agreement between the city and the railroad companies, what streets should have subways, and what should be closed; and, when it was determined that Twenty-First street should be closed where crossed by the railroad tracks, if there resulted to the property of the defendant in error a special injury, for which he was otherwise entitled to compensation, it would be an exceedingly harsh and unjust conclusion to say that the harm resulted from the exercise of a police power, and was therefore *damnum absque injuria*, or remediless. If there could have been doubt on the question, it was removed by an act of the legislature of Illinois (section 1, c. 145, Rev. St. Ill.), which, after defining the "power to vacate or close any street or alley, or portion of the same," provides that, "when property is damaged by the vacation or closing of any street or alley, the same shall be ascertained and paid as provided by law." In, instead of this meaning no more than the constitutional provision that "private property shall not be taken or damaged for public use without just compensation," etc., it is a specific provision that there shall

be compensation for damage caused to property by the vacation of a street or alley, or a portion thereof; and if before that enactment the vacation of a street could have been regarded as an exercise of police power, for the injurious results of which there could be no right of compensation, the statute to that extent abolished the doctrine, and established the rule for such cases that the individual, when sacrificed for the benefit of the public, shall not go unrecompensed.

The second proposition advanced is that the plaintiff had no cause of action because the closed portion of the street was not adjacent to his property; but, while it is conceded that no one can recover for an injury suffered in common with the public, it is not essential to the right of action, under the decisions in Illinois, that the property alleged to have been injured should abut upon the vacated portion of the street. See *Rigney v. City of Chicago*, 102 Ill. 64; *City of Chicago v. Union Building Ass'n*, Id. 379; *Littler v. City of Lincoln*, 106 Ill. 353; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395; *Chicago Anderson Pressed-Brick Co. v. City of Chicago*, 138 Ill. 628, 28 N. E. 756; *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473; *City of Chicago v. Burcky*, 158 Ill. 103, 42 N. E. 178. While no part of Twenty-First street within a rod of the property of defendant in error was closed, yet egress and ingress which had existed to and from the west were cut off, leaving no immediate communication with the next cross street in that direction; and in that respect, at least, he suffered a special inconvenience in the use and enjoyment of his property, for which he should receive compensation. Whether there were other elements of special injury, we do not decide. The mere cutting off of travel along the street would seem to be a common injury, for which individual relief is not allowed.

It remains to consider whether the court erred in the admission of testimony. Witnesses were permitted to testify that the rents paid for neighboring properties were less after than before the vacation of the street. Under decisions in New York, directly in point, this testimony was incompetent. *Jamieson v. Railway Co.*, 147 N. Y. 322, 41 N. E. 693; *Witmark v. Railroad Co.*, 149 N. Y. 393, 44 N. E. 78. But it is argued that in Illinois the evidence was competent, because "it is the well-settled rule in Illinois that the proof of sales of property similarly located is competent evidence, as bearing on the question of the value of property sought to be taken or damaged." The cases referred to are *Culbertson & Blair Packing & Provision Co. v. City of Chicago*, 111 Ill. 551; *Elmore v. Johnson*, 143 Ill. 530, 32 N. E. 413; *Peoria Gaslight & Coke Co. v. Peoria Terminal Ry. Co.*, 146 Ill. 372, 34 N. E. 550; *Railroad Co. v. Haller*, 82 Ill. 208, and cases there cited. When the question is of the value of a particular property the rule seems to be general, though not universal, that proof may be received of sales of other like properties similarly situated. *Lewis, Em. Dom.* § 443. When there has been an actual taking of property, and the value thereof is directly and necessarily in issue, the pertinency and force of such evidence are so apparent that the propriety of admitting it has been generally recognized; and it has been held in some instances to be proper for the purpose of showing the value of property damaged and not taken, though in such cases the value of

the property injured is not in direct issue, and can be of incidental importance only. The issue in that class of cases is the amount of damage done to the property,—the depreciation in its value attributable to the cause complained of; and the light thrown on that question by the sales of other property, though competent, it is clear must be uncertain. In *Hohmann v. City of Chicago*, 140 Ill. 226, 230, 29 N. E. 671, it was said:

“To make the evidence of any value, it would be necessary to show a substantial identity of conditions in all respects; but no offer was made to do that, if, indeed, proof of that character would have been possible.”

In *Railroad Co. v. Haller*, *supra*, it was said:

“What the property would sell for before and after the road was constructed would be one of the modes of ascertaining the damages, if the price was shown to be reduced by reason of the building of the road. But it would not be the only means of determining the question. So would its rental value be another, where the property was held for rent, but the latter mode would not be a proper criterion where it was not held for that purpose. If there was no other property of the same value or description in the place, which had been sold, then other modes would have to be resorted to than the proof of the sale of such property before and after the damage done.”

The plain implication here is that the evidence of rental values of the property injured, only, is admissible. That being so, there can, of course, be no evidence of that character when the property is not held for the purpose of rent. It is to be observed, in passing, that the declaration in this case does not show the existence of buildings on the premises of the defendant in error, nor for what purposes the lots had been used. In *Railroad Co. v. White*, 166 Ill. 375, 46 N. E. 978, the court, after stating the character of evidence which is admissible in such cases, said, “It is not proper, however, to show how other property was specifically injured.” No case in Illinois or elsewhere has been cited wherein it was held that proof of rental values of other properties than that in direct issue was competent. We cannot believe that evidence of that character can, in general, be promotive of just conclusions, and it is beyond doubt that the evidence offered in this case was deceptive and misleading in its tendency. It was doubly so because the reductions in rents which were shown were attributed by the witnesses largely to an increase of dust, cinders, smoke, and steam, credited to the elevation of the railroad tracks, and not solely to the vacation of the street; and neither by the evidence, nor by the instructions of the court, was the jury furnished a basis for determining to what extent the rental values proved were affected by the vacation of the street alone. It is therefore impossible to say that the evidence was harmless. Our holding is that it was incompetent. The judgment below is reversed, with instruction to grant a new trial.

WALDRON et al. v. JOHNSTON.

(Circuit Court, S. D. Georgia, E. D. March 2, 1893.)

GAMING CONTRACTS—DEALING IN FUTURES.

A contract for the future delivery of cotton, made merely to speculate in differences on the rise and fall of the price without any intention to deliver or receive cotton, is void as a gaming contract, not only under Code Ga. § 3671. but also under the general law as announced by the supreme court of the United States.

This was an action of assumpsit by Waldron & Taintor against James H. Johnston.

Garrard, Meldrim & Newman, for plaintiffs.

Erwin, Du Bignon, Chisholm & Clay and Saussy & Saussy, for defendant.

SPEER, District Judge. The case presented for decision is this: An auditor finds that the defendant is indebted to the plaintiffs on their demand in the sum of \$3,035.37. The defendant has filed exceptions to the report upon the material ground that the conclusions of law which the auditor draws from his findings of fact are erroneous. The finding of fact not excepted to, and therefore admitted to be true, upon which I think the decision must depend, is as follows:

"I find that the defendant during the same period resided in Savannah, Georgia, and was there engaged in mercantile pursuits, and that he employed the plaintiffs to make contracts for the future delivery of cotton in New York, with the intention of realizing upon the differences in values arising under said contracts in the New York market before the time for the delivery of said cotton arrived. I further find that he never intended to deliver or receive cotton under said contracts, but relied on his agents to avoid this contingency. I find that the defendant's intention not to deliver or receive cotton, but simply to realize upon the differences in values, was known to the plaintiffs, and that they so managed his business as to carry out this intention, and did, so far as he was concerned, avoid the delivery of cotton."

It is insisted by the defendant that this finding affords an instance of a gaming contract which the courts will not lend their aid to enforce. Code Ga. § 3671, provides as follows:

"Gaming contracts are void, and all evidences of debt or encumbrances or liens on property executed upon a gaming consideration are void in the hands of any person."

The statute is not enacted to favor a defendant who has engaged in transactions of this character, but as an expression of a definite and fixed policy to discourage and prevent transactions which the law-making power has determined to be *contra bonos mores*. The topic has been repeatedly discussed by the supreme court of the state. In *Cunningham v. Bank*, 71 Ga. 400, transactions in "futures," similar to those now before the court, were declared to be "wagering," "gambling," "immoral," and "illegal contracts." The transactions thus stigmatized by the supreme court of the state, to quote its description, was "the purchase of certain cotton with the intention and understanding of both parties that the cotton was not to be delivered to or received by the defendant; that there was to be a settlement at a future day, when the defendant was to receive or pay the differences between the