

was sufficient. If false imprisonment had also been charged, the rule would, of course, be different. The test is whether a suit for false imprisonment could be maintained for the arrest made in the clerk's office in this case before the issuance of the warrant. Manifestly it could. Such arrest was extrajudicial, without legal process, and it is false imprisonment, as distinguished from malicious prosecution. *How. Mal. Pros.* 8; *Murphy v. Martin*, 58 Wis. 278, 16 N. W. 603; *Colter v. Lower*, 35 Ind. 285; *Lewin v. Uzuber*, 65 Md. 341, 344, 4 Atl. 285.

Another of the assignments of error relates to the admission of evidence during the trial, as set forth in the bill of exceptions No. 2; the question being whether defendant in error, Goshorn, could prove by a witness the statements made by Goshorn to the witness on Sunday or Monday preceding the Tuesday on which the papers were taken, with regard to what was his (Goshorn's) object and purpose in procuring the papers. This evidence was admitted, and we think improperly, against the objection of the plaintiffs in error. Whether such evidence might possibly have been introduced in a criminal prosecution it is unnecessary to decide, but manifestly in this case, upon a plea of not guilty, it had no place. The issue joined was not whether defendant in error was guilty of the crime alleged against him, but whether plaintiffs in error had probable cause to believe at the time, and under the circumstances that they acted, that he was guilty. So far as they were concerned, if for no other reason, it should have been excluded as hearsay evidence. There is no pretense that the plaintiffs in error, or either of them, heard or knew anything of the statements claimed to have been made by Goshorn to the witness, and, at best, it was a self-subservient statement, made by the defendant in error, and which could not be used in his own behalf. *Whart. Ev.* (2d Ed.) § 1101; *Tayl. Ev.* § 523; *Whitney v. Houghten*, 127 Mass. 527; *Duvall's Ex'r v. Darby*, 38 Pa. St. 56; *Scott v. Shelor*, 28 Grat. 891, 895.

For these reasons, and without further discussing the assignments of error, the decision of the lower court is reversed, and the case remanded, with instructions to award a new trial therein. Reversed.

JUTTE & FOLEY CO. v. CITY OF ALTOONA.

(Circuit Court of Appeals, Third Circuit. May 9, 1899.)

No. 19, March Term.

MUNICIPAL CORPORATIONS — LIMITATION OF LIABILITY ON CONTRACTS — PENNSYLVANIA STATUTES.

The Pennsylvania act of May 23, 1889 (P. L. 277), provides that no municipal department of a city of the third class shall create any debt or make any contract, except in pursuance of previous authority of law or ordinance; that every contract which involves an appropriation of money shall designate the item of appropriation on which it is founded, and the estimated amount of appropriation thereunder shall be charged against such item, and so certified by the controller on the contract, before it shall take effect; and that, if the controller shall certify any contract in excess of the appropriation made therefor, the city shall not

be liable for such excess, but the controller may be held liable therefor on his bond. The act also authorizes the creation of a water and lighting department, the board of commissioners of which shall make all contracts relating to the department, but only as authorized thereto by the previous consent and direction of the councils. The councils of the city of Altoona, which is a city of the third class, passed an ordinance providing for the construction of certain improvements to the city's water plant, and directed the board of water commissioners to contract therefor. It appropriated for the purpose an unexpended balance of a fund previously created amounting to \$35,000, and expressly limited the cost of the improvements to that sum. The board entered into a contract with plaintiffs for the construction of the improvements for a sum slightly under \$35,000, but providing for an increase or diminution in the estimated quantities of work or materials. The controller certified the contract, in general terms, as "subject to the appropriation made" by the ordinance, but stated no amount in his certificate. *Held*, that the plaintiffs could not recover against the city on such contract any sum in excess of the \$35,000 appropriated by the ordinance, being chargeable with notice of the limitations placed upon the powers of the board by the statute and the ordinance.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Henry A. Davis, for plaintiff in error.

W. M. Hall, Jr., and Geo. B. Bowers, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

ACHESON, Circuit Judge. In Pennsylvania, cities of the third class, of which the city of Altoona is one, are governed by the act of May 23, 1889 (P. L. 277). Article 4, § 7, of this act provides:

"And no municipal department shall create any debt or make any contract, except in pursuance of previous authority of law or ordinance."

Article 9, § 5, of this act, provides as follows:

"Sec. 5. Every contract involving an appropriation of money shall designate the item of appropriation on which it is founded, and the estimated amount of the expenditure thereunder shall be charged against such item and so certified by the controller on the contract before it shall take effect as a contract, and the payments required by such contract shall be made from the fund appropriated therefor. If the controller shall certify any contract in excess of the appropriation made therefor, the city shall not be liable for such excess, but the controller and his sureties shall be liable for the same; which may be recovered in an action at law by the contracting party aggrieved. It shall be the duty of the controller to certify contracts for the payment of which sufficient appropriations have been made."

By article 12 of the same act the city is authorized to create a water and lighting department. The duties of the board of commissioners of such department are defined by sections 5 and 6 of that article as follows:

"Sec. 5. It shall be the duty of the board to take charge of the water and lighting department so created as aforesaid, and by their sole authority to employ and dismiss at pleasure a superintendent and a clerk, who shall be secretary of the board, whose compensation shall be fixed by councils, and to employ such laborers, mechanics and workmen as they may deem necessary for the economical and efficient administration of said department. They shall purchase such materials and supplies as may be required for keeping the works in good repair, and have charge and control of all constructions,

repairs, enlargements and extensions of the works, and shall conduct and manage the affairs and business of the department in accordance with law and the directions of the city councils.

"Sec. 6. The said board of commissioners so created shall, whenever called upon by councils, make and submit to them full estimates of the cost, charges and expenses of any new work, enlargement, extension of water or lighting supply, or alteration which councils may contemplate making relative to said works; and said board may at any time submit to councils any suggestions and estimates they may see proper to make touching the improvement, extension or enlargement of said works, but no new construction, reconstruction, extension, supply of water or light, or enlargement of said works shall be undertaken by said commissioners so created, or materials or supplies be purchased therefor, without the previous consent and direction of councils."

On July 6, 1894, the councils of the city of Altoona, in conformity with the previous consent of the electors of the city duly expressed, passed an ordinance (No. 545) increasing the indebtedness of the city \$220,000, authorizing the issue of bonds of the city therefor, and appropriating the entire amount to the purpose of "securing and furnishing an additional ample supply of pure water to the citizens and institutions of the city of Altoona," and specifically appropriating and applying \$185,000 thereof to the construction of a large impounding dam or reservoir. Subsequently the contract for this reservoir was let, and the reservoir was constructed at an expenditure of \$185,000, leaving \$35,000 of the entire above-mentioned appropriation unused. On March 29, 1895, an ordinance (No. 593) was passed by the councils of the city of Altoona and approved by the mayor, providing for the construction of a flood channel and settling basin in connection with said reservoir. The first section ordained that the flood channel should be constructed, and the second section directed the board of water commissioners to have plans and specifications therefor prepared by their engineer. The third section ordained that a settling basin should be constructed, and the fourth section directed the board of water commissioners to have plans and specifications therefor made by their engineer. The fifth section of this ordinance is as follows:

"Sec. 5. Whatever funds are necessary to pay for the construction of said flood channel and settling basin, are hereby appropriated from the unappropriated part of the funds to be raised from the loan of two hundred and twenty thousand (\$220,000) dollars, authorized by Ordinance No. 545, approved the sixth day of July, A. D. 1894, providing the construction of such flood channel and settling basin shall not exceed the sum of \$35,000."

And the sixth section directed the board of water commissioners to advertise for bids for the construction of said flood channel and settling basin "in accordance with said plans and specifications and this ordinance," and to award the contract to the lowest responsible bidder; and further directed that the contract, on the part of the city, "shall be executed by the mayor and board of water commissioners, and shall be certified by the city controller according to law."

The water commissioners, professing to act "in compliance with an ordinance of councils under date of March 29, 1895," advertised for proposals for the construction of the flood channel and settling basin. The Jutte & Foley Company, the plaintiff below and in error, proposed to furnish the materials and do the work for the sum of thirty-

four thousand five hundred and eighty dollars (\$34,580), with a provision, however, for increase or diminution in the estimated quantities of work and materials. The board of water commissioners awarded the contract to the plaintiff on its bid, and a contract in writing was executed without any report to councils or further action on the part of councils. The contract bears date May 22, 1895, and purports to be "between the city of Altoona, Pa., by its board of water commissioners, of the first part, and Jutte & Foley Company," of the second part, and it is signed by the mayor of the city and the members of the board of water commissioners, but without any official designation accompanying their signatures. The city controller indorsed upon the contract the following certificate:

"The within contract is hereby certified, subject to the appropriation made therefor in Ordinance No. 593, approved the 29th day of March, 1895.

"Altoona, Pa., June 10, 1895.

George Harpham,

"City Controller."

Before the bringing of this suit, the city had paid the plaintiff on this contract a sum of money considerably in excess of \$35,000, yet the plaintiff claimed to recover in this action upon the contract the further sum of about \$40,000. Under the rulings and pursuant to the peremptory instruction of the circuit court, the jury rendered a verdict for the city of Altoona, the defendant, and judgment thereon was entered in its favor. We are now to determine whether there was error in these rulings and instruction.

From the above-quoted provisions of the act of May 23, 1889, it is plain that in the matter of the contract here in question the board of water commissioners had no lawful authority to bind the city of Altoona other than was conferred by the ordinance of March 29, 1895. We entirely agree with the court below that the authority given to the board of water commissioners by that ordinance was restricted to an expenditure not exceeding \$35,000. A public fund of \$220,000 had been raised and set apart to procure for the city a supply of water, and \$185,000 of that fund had been appropriated and applied to the construction of an impounding dam or reservoir. There was thus left of this water fund an unexpended balance of \$35,000. In this condition of affairs the ordinance of March 29, 1895, was passed, authorizing the construction of a flood channel and a settling basin. For this purpose the fifth section of the ordinance appropriated the "unappropriated part" of the water fund of \$220,000. And then, to make it the clearer that no expenditure in excess of that unappropriated balance was contemplated or sanctioned, there was added the proviso, "providing the construction of said flood channel and settling basin shall not exceed the sum of \$35,000." Manifestly this was a limitation upon the cost of the work. This limitation bound the board of water commissioners and the contractor dealing with the board. The ordinance did not empower the board of water commissioners to enter into a contract involving the city in a liability in excess of \$35,000. If authority is needed to sustain the conclusion that the city is not liable to the contractor beyond the limited cost specified in the ordinance, it is to be found in the decisions of the supreme court of Pennsylvania in the cases of Lehigh

Co. v. Kleckner, 5 Watts & S. 181, and Hague v. City of Philadelphia, 48 Pa. St. 527.

Again, the certificate of the city controller prescribed by section 5 of article 9 of the act of May 23, 1889, was requisite to the validity of the contract in suit. *City of Erie v. A Piece of Land on Eighteenth Street*, 176 Pa. St. 478, 484, 35 Atl. 136. This section provides:

"Every contract involving an appropriation of money shall designate the item of appropriation on which it is founded, and the estimated amount of the expenditure thereunder shall be charged against such item and so certified by the controller on the contract before it shall take effect as a contract, and the payments required by such contract shall be made from the fund appropriated therefor."

This certificate by the controller is a condition precedent to the taking effect of the contract. This was so adjudged in *City of Erie v. A Piece of Land on Eighteenth Street*, supra. In the present case the certificate by the controller does not conform to the requirements of the act. Certainly, if it can be sustained at all, it is only good to the extent of the appropriation made by the ordinance. The language of the certificate is:

"The within contract is hereby certified, subject to the appropriation made therefor in Ordinance No. 593, approved the 29th day of March, 1895."

Now, the appropriation made was the unappropriated part of the water fund, namely, the sum of \$35,000. It is to be noted that section 5 of article 9 provides:

"If the controller shall certify any contract in excess of the appropriation made therefor the city shall not be liable for such excess, but the controller and his sureties shall be liable for the same."

Possibly the certificate of the controller may be regarded as good to the extent of the unexpended balance of \$35,000 of the water fund. We are clear, however, that beyond that sum there was no proper certification, and therefore no valid contract with the city.

From the views we have expressed above, it follows that the obstacles to the plaintiff's recovery were insuperable, and therefore that there was no error in the rulings of the court upon the plaintiff's offers of evidence. The court was right in instructing the jury to return a verdict for the defendant. The judgment of the circuit court is affirmed.

CITY OF PONTIAC v. TALBOT PAV. CO.

(Circuit Court of Appeals, Seventh Circuit. May 19, 1899.)

No. 563.

1. REVIEW—CASES TRIED TO COURT—EFFECT OF GENERAL FINDING.

The sufficiency of a declaration is reviewable on error by the circuit court of appeals, and, if it fails to state a cause of action, the defect is not cured by a general finding for plaintiff by the circuit court, where a jury is waived, nor is it waived by the defendant by answering and proceeding to trial after his demurrer has been overruled.

2. MUNICIPAL CORPORATIONS—LIABILITY ON CONTRACT FOR PUBLIC IMPROVEMENTS—ILLINOIS STATUTE.

A contractor for the making of public improvements in an Illinois city, governed by the city and village act (1 Starr & C. Ann. St. [2d Ed.] 777 et seq.), which provides (article 9, § 49) that all persons taking such contracts, who agree to be paid from special assessments, "shall have no claim or lien upon the city or village in any event, except from the collection of the special assessment made for the work contracted for," and whose contract provided that he should make no claim against the city in any event, except from collections, and should take all risk of the invalidity of the special tax, cannot maintain an action against the city for a general judgment on the ground that its officers failed or refused to levy a second assessment after the first had been held invalid by the supreme court of the state, but is confined to his remedy to compel the officers to perform their duty.

In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.

Judgment is entered against the city of Pontiac, plaintiff in error and defendant below, in an action on the case, upon a general finding by the court that the defendant is guilty, and that plaintiff's damages are assessed at the sum of \$12,343; a trial by jury being waived. The alleged cause of action, as set out in the several counts of the declaration, is failure and neglect on the part of the municipal authorities to provide "for a new special tax assessment" against contiguous property, to pay amounts earned under a contract for the paving and improvement of certain streets under the following state of facts: On June 27, 1895, an ordinance was adopted by the city of Pontiac for the improvement of certain streets, whereby the expense of street intersections was to be paid by general taxation, and "the remainder of cost of said improvement should be paid for by special taxation, to be assessed, levied, and collected against real estate abutting on the lines of said streets so ordered to be improved," in accordance with the provisions of article 9 of chapter 24 of the statute of the state of Illinois entitled "An act to provide for the incorporation of cities and villages." The general act so referred to declares, by section 49 of article 9 (1 Starr & C. Ann. St. Ill. [2d Ed.] p. 777 et seq.), that "all persons taking any contract with the city or village, and who agree to be paid from special assessments, shall have no claim or lien upon the city or village in any event, except from the collection of the special assessment made for the work contracted for." Section 64 of the same article provides that vouchers issued for the work shall be subject to like condition, whether the holders are the original contractors or their assigns. Proceedings were taken under the ordinance, the special tax assessments were made and confirmed, and thereupon a contract was entered into between Talbot Paving Company, the plaintiff below, and the city of Pontiac, whereby that company, as the lowest bidder, undertook to "furnish all labor and material for the construction of said local improvement" for the aggregate sum of \$15,168.90, to be paid when completed and accepted,— "and when the special tax levied under said ordinance, or any special tax which shall thereafter be levied by said city, upon the property contiguous to said improvement, should be collected," and also when the general tax provided for the cost of street intersections was collected; and the contract further provides, in express terms, that "they shall make no claims against said city, in any event, except from the collections" so referred to, and that the contractors "take all risk of the invalidity of any such special tax." The work was performed by the contractor and accepted by the city, but payment was not made, except for the cost of the intersections, raised by general tax, and portions of the special assessments which were paid in by certain property owners. The balance thus left unpaid was \$10,567.33, for which "local-improvement vouchers" were issued, reciting that they were to be paid out of the special assessments when collected, and that the city was exempt from other liability. The declaration states that the failure to collect the special taxes in the first instance arose out of the prosecution by lot owners of an appeal to the supreme court of the state, which resulted in a judgment "holding the said ordinance providing for said special

tax assessment invalid, thereby rendering it impossible, under said ordinance, to collect said special tax from said property to pay the balance due the plaintiff." *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794, is cited in the briefs as the case so referred to. After this decision, the Talbot Paving Company presented its petition to the city council for the adoption of a supplemental ordinance "for the assessment of a special tax upon the property contiguous to said improvement" to pay the balance due, but the city council failed to make provision to that end, and the action rests upon the allegation of negligence and willful refusal on that behalf. The defendant demurred to the declaration, stating several grounds, but the demurrer was overruled, and the defendant, being required to plead instantly, filed its plea of not guilty, and trial before the court proceeded upon the merits.

F. W. Winkler and A. C. Norton, for plaintiff in error.

W. T. Whiting, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after making the foregoing statement, delivered the opinion of the court.

The general finding by the court clearly determines all issues of fact. *Fourth Nat. Bank of St. Louis v. City of Belleville*, 53 U. S. App. 628, 27 C. C. A. 674, 83 Fed. 675, and cases cited. But it is not conclusive on all the questions involved, as contended on behalf of the defendant in error. Its utmost effect is to limit the inquiry on review "to the sufficiency of the declaration, and the rulings, if any be preserved, on questions of law arising during the trial." *Lehnen v. Dickson*, 148 U. S. 71, 72, 13 Sup. Ct. 481. In the case of general verdict on a trial by jury, the finding establishes all the material facts which are alleged in the declaration. If, however, the declaration on which either verdict or finding must rest "fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover," the error is not cured by verdict, and is not waived by answering and proceeding to trial after the demurrer is overruled. *Teal v. Walker*, 111 U. S. 242, 246, 4 Sup. Ct. 420. In such case, there is no foundation for the judgment, and that inquiry is clearly presented for review on this record. Whether considered as raised by the demurrer, or upon the objections and exceptions covering all the testimony to support the declaration, or upon the facts stated and found, is not material.

The defendant in error entered upon the performance of its contract for the street improvement under the express statutory provision that payment could be made solely out of special assessments against property abutting on the improvement, and that the contractor should "have no lien or claim upon the city * * * in any event, except from the collection of the special assessments made for the work contracted for." The ordinance by which the paving in question was authorized and let expressly referred to this statute; this condition of payment was clearly stipulated both in the contract and in the vouchers, which were finally issued and accepted for the unpaid installments in controversy; and the contract further provided that the contractor "shall take all risk of the invalidity of any such special tax, the said city not to be liable in any event by reason of the invalidity of said special tax assessment, or any of them, or of

the proceedings thereon, but only for failure to collect the same, the same being collectible in law." Proceedings were taken, and the special assessments were made, but on appeal by lot owners it was held by the supreme court that the ordinance was invalid by reason of provisions which committed to the city engineer an unauthorized discretion relative to the improvement, and the assessments were set aside. As the necessary result of this adjudication, which involved the entire amount unpaid on the contract, the assessments were not collected and the vouchers were not paid. The city council has since refused to take action for a new special assessment to charge the deficiency against the abutting property; and it is urged, in defense of such nonaction, that its power is exhausted, and that no such assessment can be made, under the decision referred to. Whether the power subsisted in the city council to provide for a reassessment notwithstanding the defect in the original ordinance appears to have been the main subject of controversy in the trial court; and, for the purposes of the present inquiry, it is assumed that the decision there in favor of the power is not only in accord with justice, but is sustained as well by interpretations placed upon the statute by the supreme court. On that assumption, the duty of the city is manifest to proceed promptly in the exercise of its power to assess and collect the unpaid amounts, and such duty can be enforced by mandamus, if remedies at law are not adequate for the adjustment of all rights.

The statute which confers authority for making the improvement in question imperatively requires that the expense, aside from street intersections, shall be borne by the abutting property, through special assessment, and shall not become a public charge "in any event." The provision is of general application to cities and villages in the state of Illinois, and is in accord with a rule of public policy which is common in municipal charters and is upheld by judicial authority. If, however, the contractor who performs work so authorized, has the right to recover the contract price against the municipality, by way of damages, in the event of neglect or refusal on the part of the public officers to perform their duty in enforcing the special assessments, the way is clearly open to evade and nullify the legislative purpose. By their conduct,—either through negligence, ignorance, or collusion,—the city council or officers may impose upon the public the expense of the improvement, in despite of the statute which declares it a special benefit, to be paid exclusively by abutting lot owners. Indeed, if this judgment is sustainable, it so operates in the present case, as no provision appears for collecting the amount of such recovery by a supplemental special assessment against the lot owners. On the other hand, a complete remedy is clearly open to the contractor, by a proceeding in the proper forum, to ascertain the power, and thereupon enforce the ministerial duty to make the new assessment in obedience to the statute and violating none of its provisions.

The contention, however, on behalf of the defendant in error, is predicated on the duty which is imposed by law upon the municipality to make provision for the special assessment, and on the gen-

eral doctrine, held in a line of authorities and well recognized in Illinois, of municipal liability for failure or neglect on the part of its officers to discharge the public duty. The question whether this doctrine applies to any case "where the expense of making a local improvement is not to be raised by a general tax, but solely upon the property benefited," to the extent of furnishing the contractor a right to recover his compensation in an action against the corporation founded on its failure to make the necessary assessment, has given rise to decisions which are not in accord in the various jurisdictions. In 1 Dill. Mun. Corp. (4th Ed.) § 482, numerous cases are collated in a note, and the learned author well remarks in the text: "The right to a general judgment should, in our opinion, be limited, in any event, to cases where the corporation can afterwards reimburse itself by an assessment; for why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by mandamus, to compel the council to make the necessary assessment, and proceed in the collection thereof with the requisite diligence." But examination of the cases there noted as favoring the general recovery, and as well those cited in the brief of counsel in support of this judgment, reveals no instance of such allowance in the face of a statute expressly prohibiting the payment or collection as a public charge in any event, and the extreme view of liability held in the two leading citations (*Reilly v. City of Albany*, 112 N. Y. 30, 42, 19 N. E. 508, and *Commercial Nat. Bank v. City of Portland*, 24 Or. 188, 33 Pac. 532) would merely disregard the contract stipulations, and not affect a case so limited by statute. In *People v. City of Syracuse*, 144 N. Y. 63, 66, 38 N. E. 1006, the New York court of appeals appears to disapprove the doctrine of *Reilly v. City of Albany*, supra, holding that no action is maintainable against the city, even in such case, for the failure to make an assessment, but the "proper remedy was to compel, by mandamus, the officers of the city having the matter in charge to proceed with their duties as required by law."

However the concensus or weight of authority shall ultimately determine the remedy of the contractor for local improvements, where the statute authorizes payment by special assessment, but is merely directory in its terms to that end, or where the collection is limited by ordinance or contract to such assessments, and the authorities fail to provide for or to carry out the assessment, we are clearly of opinion that no general doctrine of municipal liability for mere nonfeasance in the failure or neglect of council or officers to perform a duty of the municipality can be extended to override per se the inhibitions expressed in this statute, and that the contractor must proceed by mandamus to enforce his claim. The decisions in support of this view are well considered, and apparently without conflict, and the following are leading and pertinent examples: *Fletcher v. City of Oshkosh*, 18 Wis. 228; *City of Greencastle v. Allen*, 43 Ind. 347; *Goodrich v. City of Detroit*, 12 Mich. 279; *Reock v. Mayor, etc., of Newark*, 33 N. J. Law, 129; *People v. City of Syracuse*, 144 N. Y. 63, 38 N. E. 1006. See, also, *Elliott, Roads & S.* 436, and note; *Beach, Mod. Cont.* § 1191. In *Fletcher v. City of Oshkosh*, supra, Mr. Justice

Paine, speaking for the court in reference to a case which is practically identical, says:

"Now, in the face of this provision, which says that the city shall in no event be liable, we are asked to hold that if the money is not collected in a reasonable time, in the mode which is provided, the city shall be liable. * * * We know of no rule of construction, and certainly the counsel cited no case, that could justify a court in thus overriding a plain provision of law. Whoever contracts for this kind of work, or deals in these certificates, under such a charter, takes the risk of collecting his money in the manner provided, with a right to resort to the appropriate remedy to compel the officers to whom it is intrusted to discharge their duties, and he cannot come into a court and ask to hold the city liable, in the teeth of a provision which informed him at the outset that the city should, in no event, be liable."

So considered, support cannot be found for the judgment under the general authorities, and no foundation remains unless the cases cited by counsel sustain the further contention that a rule of decision prevails in the state of Illinois which establishes the primary liability of the municipality in such contingency through the failure to make the special assessment. The decisions invoked in that view are *Clayburgh v. City of Chicago*, 25 Ill. 535, and *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76; but in the first-mentioned case no statute was involved which forbade liability in any event on the part of the city, and in neither case was any rule of liability adopted which can be brought into the present statute, by way of construction, to sanction an inhibited recovery. In *Clayburgh v. City of Chicago*, 25 Ill. 535, the question was of a different nature, and not within the statute. An action on the case was sustained in favor of a lot owner to recover of the city damages arising out of the taking of his property for public use in opening a street. The law provided for an assessment of benefits and damages to that end, the property was appropriated and the damages ascertained, but there was a refusal to enforce collection of the assessment. The terms of the statute are not stated, but, clearly, the remedy for compensation in such a case is not applicable, in any view, to a contractor, under the present statute. In *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76, however, the same statute and like conditions as in the case at bar were present, except that suit was commenced by the contractor after he had petitioned for a reassessment, and before an ordinance could be adopted for that purpose; the action being based on the ground that the city "had exhausted its power, and could not make a reassessment, as it had agreed to do, and that it was therefore liable for the balance, to be paid by general taxation or out of the general fund." The decision of the supreme court denies the right of action, and is based solely upon the ground that a reassessment could be made for the collection; and, so far as it furnishes light, the ruling is distinctly adverse to recovery here, and appears to have been misapprehended by counsel. It is cited in the argument submitted on behalf of the defendant in error as stating in the opinion of the court: "This action cannot be maintained except upon refusal or neglect of appellant to levy a reassessment, which is not claimed." This remark appears in the recital of facts only, and as a quotation from the findings of the appellate court of a reason for not remanding the cause.

It is neither approved in the opinion, nor referred to as influencing the decision; nor could the excerpt have the force of a binding decision, if it were approved. No ground appearing to authorize the recovery against the plaintiff in error, the judgment is reversed, with direction to sustain the demurrer to the declaration.

SPREEN v. DELSIGNORE et al.

(Circuit Court, D. Kentucky. April 24, 1899.)

No. 5,549.

1. APPEARANCE—FILING PETITION FOR REMOVAL.

The filing of a petition and bond for the removal of a cause from a state court, though the defendant's appearance is not, in terms, restricted to that purpose, does not constitute a general appearance to the suit.

2. ATTACHMENT—ISSUANCE BEFORE SUMMONS—KENTUCKY STATUTE.

Under Civ. Code Ky. § 39, providing that an action is commenced by filing a petition, and causing a summons to issue or a warning order to be made thereon, and section 194, providing that a plaintiff may obtain an attachment "at or after the commencement of the action," an attachment issued on the filing of the petition, but before a summons has been issued or a warning order made, is void.

3. SAME—SUCCESSIVE WRITS—AFFIDAVIT.

Under Civ. Code Ky. §§ 194, 201, authorizing attachments at or after the commencement of the action and the issuance of successive writs, an attachment may lawfully be issued at any time after an action is commenced, and before final judgment on an affidavit filed at the time the action is commenced.

4. SAME—AMENDMENT OF AFFIDAVIT.

Under Civ. Code Ky. § 268, subsec. 2, permitting the amendment of affidavits for attachment, an amendment stating a new ground for attachment may be allowed.

5. CONSTRUCTIVE SERVICE—WARNING ORDER—AFFIDAVIT.

A warning order against a defendant on the ground that he is a non-resident of Kentucky, and believed to be absent therefrom, cannot be made on an affidavit of such facts filed by plaintiff four months previously.

On Motion by Plaintiff for Judgment and by Defendants to Discharge an Attachment.

Augustus E. Willson, for plaintiff.

W. O. Harris, for defendants.

EVANS, District Judge. This ordinary action on a contract in writing was instituted in the Trimble circuit court. The petition was filed February 13, 1896, and embraced an affidavit stating grounds, which, under the Civil Code, authorized a warning order against the defendants, who were alleged to be nonresidents, and believed to be absent from the state of Kentucky, and also authorized, on the ground of the nonresidence, only, of the defendants, an order of attachment against defendants' property. On the same day, bond was duly executed by the plaintiff in the case, and an attachment was issued, directed to the sheriff of Trimble county, by whom it was levied upon 800 empty barrels belonging to the defendants. No summons, however, was issued in the action until March