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Filed May 16. 1863

STATE OF ILLLINOIS--THIRD DIVISION.

SUPREME COURT,

APRIL TERM, 1863.

WILLIAM R. SMITH, Appellant,
vs.
ALFRED SMITH, Appellee.
} *Brief for Appellant.*

This is an appeal by William R. Smith, one of the defendants in a suit in chancery in the Superior Court of Chicago, wherein Alfred Smith was complainant, and Thomas Dyer and others were defendants, instituted for the pupose of foreclosing a mortgage. The complainant obtained a decree, from which an appeal was taken to this Court.

The first question raised in this case is as to parties. I take it for granted as clear law, that it is erroneous to render a decree, in the absence of necessary parties, whenever such absence is apparent in the record and that the absence of necessary parties is an objection which any necessary party has a right to rely upon, either for the purpose of resisting a decree and having a dismissal of the bill for that cause, if the defect be not remedied or as a ground of reversal of a decree in the Supreme Court. This assumed, I assert that the appellant was and is a *necessary* party in this case, being a purchaser from Graves, the mortgagor, and holding his interest by conveyance (pages 4, 8, 6 of abstract) and as such

had and has the right to raise the objection of a want of necessary parties.

The next question is, were there any necessary parties not before the Court? I contend that judgment creditors of the mortgagor, having a lien on his interest, are necessary parties and for this I cite Adams *vs.* Paynter, Coll. 530. + 2 Story Eq S 1023

It seems to me that it results from the principles of a Court of Equity and of plain justice. Courts of Equity are opposed to doing things by halves, opposed to exposing to sale and inviting purchasers of uncertain interests or defective titles, or to merely laying the foundation for further litigation when all having a right or enforcible claim are known and can be brought before the Court. Judgment creditors of a mortgagor, having a lien if not necessary parties and therefore may be left out, must have the right to redeem the vendue under the foreclosure sale or else the judgment lien amounts to mere nothing. If they have, in such case, a right to redeem the vendue, then a sale under a proceeding by a mortgagee, where there are such creditors, amounts to nothing more substantially than a sale of the mortgage debt, accompanied with the right to have the mortgage property, unless some judgment creditor or other person not made a party but having a right to redeem, should pay the debt, and take the property; and this is all that the vendue would acquire under the foreclosure sale. Now the difference between buying the debt or the property, with rights of redemption out-standing, and buying the property itself clear of any such out-standing rights, is quite apparent. In the latter case, the purchaser would buy a certainty; in the former, an uncertainty, or rather almost a certainty that if his purchase was or should become a speculation, he would be redeemed; if it was not he would not be, but would be allowed to hold his perhaps undesirable purchase. This uncertainty as to what would be acquired by the purchase would deter ~~bitters~~ bidders and produce a sacrifice of the property and therefore is inequitable. I have argued this question upon the principles as I suppose them, of a Court of Equity, without reference to our statute allowing redemption after sale, because I do not understand that that statute makes any change of the rules of pleading in equity or authorizes

the dispensing with parties deemed necessary before its passage.

If I am correct in supposing that judgment creditors were necessary parties, then it becomes material to know whether there were any who were not brought before the Court. The bill states (p 3 of abstract) that Albert Crosby, John F. Miller, Gilbert Davis and Frank McKerwin, were judgment creditors of Rossitter, the mortgagor, and had liens upon his interest in this mortgage property. As to Crosby, the suit was dismissed 21st March, 1862 (p 8 of abstract). As to McKerwin, he was not made party defendant to the bill; unless under the name of Frank Kerwin (p 4 of abstract), who subsequently appears in the record alternately as Francis M. Kerwin and Frank Kerwin. Assuming that Frank McKerwin, Francis M. Kerwin and Frank Kerwin, were intended for the same person it appears from the record (p 5 of abstract) that complainant, on the 13th of October, 1859, and before process had been served on him discontinued as to Kerwin on the ground that he was dead and made Henry Stevens as his administrator, a defendant in his stead upon whom no process was ever served and of whom no notice was afterwards taken in the case. It is true that Mr. Towne, one of complainant's solicitors, nearly a year afterwards, made affidavit that Kerwin, as he was informed and believed was a non-resident of Illinois, so that process could not be served on him (p 7 of abstract) and after publication, the Court after due examination of the proof recited in an order that due notice, according to the statute, had been given to Kerwin, of the pendency of this suit, and that he was properly brought into Court, and that complainant was entitled to a default against him, and thereupon the Court ordered the bill and amended bill to be taken for confessed against Kerwin, and all this after it was shown by the record that Kerwin was dead. But notwithstanding, this it is established by the record, that Kerwin was a judgment creditor, having a lien, that he was dead on 13th October, 1859; that Henry Stevens was his administrator, and that neither Kerwin nor Stevens were ever brought before the Court. If judgment creditors were or are necessary parties in this case, then the decree is erroneous, because neither Ker-

win nor his administrator were before the Court. The decision as to Kerwin will virtually decide the question as to Crosby, Miller & Davis, and I shall therefore forego any remarks in reference to their position in the case. Again, there can be no doubt that the heirs of the deceased mortgagor, Rossitter, were necessary parties. One of them, George W. Rossitter, was named a defendant—was an infant (p. 3 of Abstract) and was never personally served with process, but was proceeded against as a non-resident. A guardian *ad litem* was however appointed for him and the guardian answered. I make two questions upon the proceedings as to Geoge W. Rossitter: One is, that he should have been brought before the Court by notice, actual or constructive; and the other is, that neither the appointment of a guardian *ad litem*, and the guardian's answering, brought him before the Court, nor was the affidavit of non-residence sufficient to authorize the publication notice and thus bring him before the Court. The first is clear upon general principles as well as from almost innumerable decisions. Jurisdiction of the person interested as well as of the subject matter is essential in such proceedings as this. The second depends upon the meaning and validity of the 47th section and the meaning of the 8th section of the Chancery Act, 1 vol. Statutes, pages 139 & 144. The 8th section provides that when any complainant shall file in the office an affidavit "showing that any defendant resides or hath gone out of this State," the Clerk shall cause publication to be made. The affidavit filed (p. 7 of Abstract,) stated simply that George W. Rossitter, among others, as the affiant was *informed* and *believed* resided out of the State of Illinois. The affiant did not state from whom or from what facts he derived his information, so that others might decide whether he was too credulous or not. The affidavit does not follow either the language or the substance of the statute. It does not *show* that George W. Rossitter was a non-resident. It was designed to effect constructive notice of the pendency of the suit, and such being its design, to be good for anything, it should have strictly complied with the requirements of the statute, nor can its defects be supplied or aided by recitals in orders or decrees of the Court. Boyland *vs.* Boyland, 18 Ills. 552. Besides its

insufficiency being shown by its non-compliance with the statute. I think the insufficiency of the affidavit is established by the case of Dyer *vs.* Flint, 21 Ills., 84. That case arose upon an affidavit made under our attachment law, which requires an affidavit setting forth an indebtedness exceeding twenty dollars, &c., and among other grounds of attachment that the debtor is not a resident of the State. The Court say the requirements of the statute must be fulfilled. The creditor, or his agent, making the affidavit, cannot rely upon hearsay as to either—he must positively allege both the non-residence and the indebtedness. The almost exact similarity of the two statutes in reference to the affidavit makes that case a direct authority in this; I maintain therefore that George W. Rossitter was never brought before the Court by constructive notice by publication, and, as I said before, he never had actual notice so far as this record shows. I know of but two ways of bringing a party before a Court—the one is by actual, the other by constructive notice. I can conceive of no other. But there may be and there are different modes of giving constructive notice, and the question which I will now proceed to consider is whether the 47th section, before quoted, was intended to provide for and does provide for one of them. That section provides that "In any cause in equity it shall be lawful for the Court in which the cause is pending, to appoint a guardian *ad litem*, to any infant or insane defendant in such cause, whether such infant or insane defendant shall have been served with process or not, and to compel the person so appointed to act." This is all of it that bears upon the question under consideration. It will be seen that it simply makes the appointment lawful whether the infant has been served with process or not—that is all. It does not declare its effect otherwise. It does not say that it shall dispense with notice or stand in the place of service of notice or be constructive notice to the infant. It does not repeal the law requiring notice expressly or by necessary implication; for a compliance with it is not at all incompatible with service of notice afterwards upon the infant. It simply legalizes the appointment whenever made during the progress of the cause. Notice should not be dispensed with where none is provided for in a statute.

A proceeding in a Probate Court by which a person was declared *non compos mentis* and his property put under the control of another without notice of the proceeding under a statute which did not require any notice, was declared void in Chase *vs.* Hathaway, 14th Mass. 223. The implication that notice was not necessary, was as strong under such a statute as under ours. But, if the legislature had declared that notice should not be necessary, or that the appointment of a guardian *ad litem* and his answering should amount to constructive notice, had they the power? In 9th Cranch, 126, 144, the court say that in all cases and by universal law, no one can be deprived of his property without notice, see 3 Vesey, Jr., 181. What would be the differance in substance between the legislature's declaring that the property in A's possession belonged to B, or that A's title to property which he claimed was invalid, and their authorizing a court to declare the same upon the exparte application of B without any notice whatever to A? It would not be a judicial proceeding, because there would be no parties to decide between. What is the difference between the legislature's saying that their need be no notice, and their saying that notice to anybody but A shall be constructive notice to A? Who shall be the guardian *ad litem*, is generally at the dictation of the complainant's attorney under the control of the court, and is generally the clerk, but may be any one, and if the appointment of a guardian *ad litem* and his answering, had been declared by the legislature as constructive notice, it would have amounted to a declaration by the legislature, that A's property or rights might be taken from him by notice to any one except him—a declaration which could not have the force of law, because it would authorize the depriving persons of their property and rights without judicial proceedings, or anything bearing the semblance of judicial proceedings. But, if it should be urged that such a legislative declaration would be law for those within the jurisdiction of the legislature, then I insist that it cannot be as to non-residents; or, if it be urged that the court by virtue of its general guardianship over infants, has the power to appoint a guardian *ad litem* and dispense with notice to them, then I answer that the court has no guardianship over non-resident in-

fants, and that power would not reach this case, and besides if that view be correct, this statute was useless. But it will hardly be contended that without this section, other notice to the infant than the appointment of a guardian *ad litem*, could be dispensed with. I therefore urge that George W. Rossitter was never brought before the court, and the decree erroneous for that cause.

Another objection is, that the Society for Savings were not made a party to the proceedings. The mortgage had, previously to the institution of this suit, been assigned and delivered to that Society (page 6 of abstract,) and the case does not show that it was ever re-assigned or re-delivered. The legal title was, and is yet in that Society.

I next come to the decree. ~~Having~~ Waiving the question whether in any case of a debt payable by instalments where some of them are not due, and the property indivisible, and it is not shown that the property is insufficient security for the whole debt, principal and interest when matured, such a decree is proper,—I contend that in this case the decree is wrong in declaring that in the event of a sale, the whole debt—that not due as well as that due, shall be paid out of the proceeds. The mortgage provides for a sale of the whole premises (pages 1 and 2 of abstract,) not a part in any event, by the mortgagee or his assignee if default should be made in the payment of said promissory notes, or any one of them, or any part thereof, and in the event of a sale, the mortgage provides that out of the money arising from such sale, the mortgagee or assignee may retain the principal and interest which shall then (at the time of the sale) *be due* on said notes or any of them, and also all costs,—rendering the overplus of the purchase-money (if there should be any) to the mortgagors and their assigns, &c. There is no allegation of mistake in drawing the mortgage, and therefore there can be no pretence of one. The parties knew the property was indivisible—that the debt was payable by instalments—that some of them would become due before others, and might remain unpaid after maturity—that selling the mortgage property was only one of three modes of enforcing payment, and, with this knowledge, they stipulate that in case of default in any part of the debt, the mortgagee, if he

chooses, may sell the whole property—not less—retain the amount *then due* and pay over the balance to mortgagors. Nothing can be clearer or more distinct than that this was the agreement, and from it, it is perfectly plain that in no event and out of no property did the mortgagors intend or agree to pay the debt faster than it should become due, nor did the mortgagee bargain for a right to collect it faster than it should become due; nor was there anything unreasonable in this. In case of default the mortgagee could sue upon his notes or take possession of the property and appropriate its profits to his unpaid debt. It was and is as equitable and just that the mortgage creditor should be delayed in the payment of what is due as that the mortgage debtor should be hastened in the payment of what is not due, and from the stipulations in the mortgage they seem to have so considered. The complainant now asks a Court of Equity to violate this equitable rule—the agreement contained in the mortgage—and to do for him by a sale what, if he had himself made the sale, the contract under which he claims would have prohibited him from doing. I understand that the object of Courts, and especially Courts of Equity, is to carry out, not to violate, clear, distinct fair contracts of parties—to cause to be done precisely what would have been done, if the contract had been complied with or carried out by the parties themselves. The decree in this case violates the understanding of the parties and is for that cause erroneous.

Another objection to the decree is that it does not give the master any other directions as to the sale of the property, than that it shall be according to the rules and practice of the Court. It does not specify how he shall advertise, or how long he shall advertise, where he shall sell or between what hours, but leaves all these matters to him, and makes him a mere ministerial officer, a judicial officer so far as to authorize him to decide what are the rules and practice of the Court as to sales of mortgage property. What are the rules and what the practice of the Court as to such sales? Are the rules and practice lawful? We can't tell. But it may be said that the question as to what the rules are and the practice is, and whether lawful or not, may be raised on a motion to set aside the sale,

or by objections to a conformation of the master's report of sale. To this I answer that the Court had no right to make a ministerial officer a judicial officer. That it subjects the purchaser to the hazard of the sales being in accordance with the rules and practice of the Court, and of those rules and that practice being lawful, and increases the chances of litigation and lessens the chances of the purchaser's obtaining the property, and therefore would deter bidders and tend to sacrifice the property at the sale.

Another objetion is that the decree allows no one to pay the mortgage debt but Graves and Pahlman. The record shows that Graves had conveyed to appellant his interest in the property, and that appellant had assumed to pay Graves' portion of the mortgage debt. By the decree appellant has no right to pay the debt and prevent the sale and stop further costs, nor had the master a right to receive it from him. This certainly was wrong. Had'nt he, as purchaser of mortgagor's interest, a right to redeem at any time before the decree, and at ane time before the equity of redemption should be foreclosed, which, under our practice, is not done till a sale or at least till the expiration of the 30 days after the decree within which payment was allowed. It makes no difference that appellant may have a year after the sale within which to redeem; for the right to redeem before the sale existed before and independent of our statute, and is not taken away by it, and is important and valuable because by its exercise costs and an increased interest could and would be avoided.

The decree is also erroneous in not directing to whom the surplus of proceeds of sale, after paying amount decreed, should be paid. 1 Monroe, 66.

The decree should provide for redemption. As it is, it would seem the Court intended an absolute sale.

Another objection is, the decree adjudges the costs against all of the defendants, when in a case such as this, where a Court of Equity would have no jurisdiction except for the mortgage, no decree for costs except out of the mortgage property could be made against any one. 5 Mon. 78; 6 J. J. Marshall, 28.

Appellant therefore asks for a reversal of the decree of the Court below.

W. R. SMITH, *pro. se.*

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Filed Apr 16. 1863
Leland

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I next come to the decree. ~~Having~~ waiving the question whether in any case of a debt payable by instalments where some of them are not due, and the property indivisible, and it is not shown that the property is insufficient security for the whole debt, principal and interest when matured, such a decree is proper,—I contend that in this case the decree is wrong in declaring that in the event of a sale, the whole debt—that not due as well as that due, shall be paid out of the proceeds. The mortgage provides for a sale of the whole premises (pages 1 and 2 of abstract,) not a part in any event, by the mortgagee or his assignee if default should be made in the payment of said promissory notes, or any one of them, or any part thereof, and in the event of a sale, the mortgage provides that out of the money arising from such sale, the mortgagee or assignee may retain the principal and interest which shall then (at the time of the sale) *be due* on said notes or any of them, and also all costs,—rendering the overplus of the purchase-money (if there should be any) to the mortgagors and their assigns, &c. There is no allegation of mistake in drawing the mortgage, and therefore there can be no pretence of one. The parties knew the property was indivisible—that the debt was payable by instalments—that some of them would become due before others, and might remain unpaid after maturity—that selling the mortgage property was only one of three modes of enforcing payment, and, with this knowledge, they stipulate that in case of default in any part of the debt, the mortgagee, if he

chooses, may sell the whole property—not less—retain the amount *then due* and pay over the balance to mortgagors. Nothing can be clearer or more distinct than that this was the agreement, and from it, it is perfectly plain that in no event and out of no property did the mortgagors intend or agree to pay the debt faster than it should become due, nor did the mortgagee bargain for a right to collect it faster than it should become due; nor was there anything unreasonable in this. In case of default the mortgagee could sue upon his notes or take possession of the property and appropriate its profits to his unpaid debt. It was and is as equitable and just that the mortgage creditor should be delayed in the payment of what is due as that the mortgage debtor should be hastened in the payment of what is not due, and from the stipulations in the mortgage they seem to have so considered. The complainant now asks a Court of Equity to violate this equitable rule—the agreement contained in the mortgage—and to do for him by a sale what, if he had himself made the sale, the contract under which he claims would have prohibited him from doing. I understand that the object of Courts, and especially Courts of Equity, is to carry out, not to violate, clear, distinct fair contracts of parties—to cause to be done precisely what would have been done, if the contract had been complied with or carried out by the parties themselves. The decree in this case violates the understanding of the parties and is for that cause erroneous.

Another objection to the decree is that it does not give the master any other directions as to the sale of the property, than that it shall be according to the rules and practice of the Court. It does not specify how he shall advertise, or how long he shall advertise, where he shall sell or between what hours, but leaves all these matters to him, and makes him a mere ministerial officer, a judicial officer so far as to authorize him to decide what are the rules and practice of the Court as to sales of mortgage property. What are the rules and what the practice of the Court as to such sales? Are the rules and practice lawful? We can't tell. But it may be said that the question as to what the rules are and the practice is, and whether lawful or not, may be raised on a motion to set aside the sale,

or by objections to a conformation of the master's report of sale. To this I answer that the Court had no right to make a ministerial officer a judicial officer. That it subjects the purchaser to the hazard of the sales being in accordance with the rules and practice of the Court, and of those rules and that practice being lawful. and increases the chances of litigation and lessens the chances of the purchaser's obtaining the property, and therefore would deter bidders and tend to sacrifice the property at the sale.

Another objetion is that the decree allows no one to pay the mortgage debt but Graves and Pahlman. The record shows that Graves had conveyed to appellant his interest in the property, and that appellant had assumed to pay Graves' portion of the mortgage debt. By the decree appellant has no right to pay the debt and prevent the sale and stop further costs, nor had the master a right to receive it from him. This certainly was wrong. Had'nt he, as purchaser of mortgagor's interest, a right to redeem at any time before the decree, and at ane time before the equity of redemption should be foreclosed, which, under our practice, is not done till a sale or at least till the expiration of the 30 days after the decree within which payment was allowed. It makes no difference that appellant may have a year after the sale within which to redeem; for the right to redeem before the sale existed before and independent of our statute, and is not taken away by it, and is important and valuable because by its exercise costs and an increased interest could and would be avoided.

The decree is also erroneous in not directing to whom the surplus of proceeds of sale, after paying amount decreed, should be paid. 1 Monroe, 66.

The decree should provide for redemption. As it is, it would seem the Court intended an absolute sale.

Another objection is, the decree adjudges the costs against all of the defendants, when in a case such as this, where a Court of Equity would have no jurisdiction except for the mortgage, no decree for costs except out of the mortgage property could be made against any one. 5 Mon. 78; 6 J. J. Marshall, 28.

Appellant therefore asks for a reversal of the decree of the Court below.

W. R. SMITH, *pro. se.*

had and has the right to raise the objection of a want of necessary parties.

The next question is, were there any necessary parties not before the Court? I contend that judgment creditors of the mortgagor, having a lien on his interest, are necessary parties and for this I cite Adams *vs.* Paynter, Coll. 530. + 2 Story Eq S 1028

It seems to me that it results from the principles of a Court of Equity and of plain justice. Courts of Equity are opposed to doing things by halves, opposed to exposing to sale and inviting purchasers of uncertain interests or defective titles, or to merely laying the foundation for further litigation when all having a right or enforcible claim are known and can be brought before the Court. Judgment creditors of a mortgagor, having a lien if not necessary parties and therefore may be left out, must have the right to redeem the vendee under the foreclosure sale or else the judgment lien amounts to mere nothing. If they have, in such case, a right to redeem the vendee, then a sale under a proceeding by a mortgagee, where there are such creditors, amounts to nothing more substantially than a sale of the mortgage debt, accompanied with the right to have the mortgage property, unless some judgment creditor or other person not made a party but having a right to redeem, should pay the debt, and take the property; and this is all that the vendee would acquire under the foreclosure sale. Now the difference between buying the debt or the property, with rights of redemption out-standing, and buying the property itself clear of any such out-standing rights, is quite apparent. In the latter case, the purchaser would buy a certainty; in the former, an uncertainty, or rather almost a certainty that if his purchase was or should become a speculation, he would be redeemed; if it was not he would not be, but would be allowed to hold his perhaps undesirable purchase. This uncertainty as to what would be acquired by the purchase would deter ~~bitters~~ bidders and produce a sacrifice of the property and therefore is inequitable. I have argued this question upon the principles as I suppose them, of a Court of Equity, without reference to our statute allowing redemption after sale, because I do not understand that that statute makes any change of the rules of pleading in equity or authorizes

the dispensing with parties deemed necessary before its passage.

If I am correct in supposing that judgment creditors were necessary parties, then it becomes material to know whether there were any who were not brought before the Court. The bill states (p 3 of abstract) that Albert Crosby, John F. Miller, Gilbert Davis and Frank McKerwin, were judgment creditors of Rossitter, the mortgagor; and had liens upon his interest in this mortgage property. As to Crosby, the suit was dismissed 21st March, 1862 (p 8 of abstract). As to McKerwin, he was not made party defendant to the bill, unless under the name of Frank Kerwin (p 4 of abstract), who subsequently appears in the record alternately as Francis M. Kerwin and Frank Kerwin. Assuming that Frank McKerwin, Francis M. Kerwin and Frank Kerwin, were intended for the same person it appears from the record (p 5 of abstract) that complainant, on the 13th of October, 1859, and before process had been served on him discontinued as to Kerwin on the ground that he was dead and made Henry Stevens as his administrator, a defendant in his stead upon whom no process was ever served and of whom no notice was afterwards taken in the case. It is true that Mr. Towne, one of complainant's solicitors, nearly a year afterwards, made affidavit that Kerwin, as he was informed and believed was a non-resident of Illinois, so that process could not be served on him (p 7 of abstract) and after publication, the Court after due examination of the proof recited in an order that due notice, according to the statute, had been given to Kerwin, of the pendency of this suit, and that he was properly brought into Court, and that complainant was entitled to a default against him, and thereupon the Court ordered the bill and amended bill to be taken for confessed against Kerwin, and all this after it was shown by the record that Kerwin was dead. But notwithstanding, this, it is established by the record, that Kerwin was a judgment creditor, having a lien, that he was dead on 13th October, 1859; that Henry Stevens was his administrator, and that neither Kerwin nor Stevens were ever brought before the Court. If judgment creditors were or are necessary parties in this case, then the decree is erroneous, because neither Ker-

win nor his administrator were before the Court. The decision as to Kerwin will virtually decide the question as to Crosby, Miller & Davis, and I shall therefore forego any remarks in reference to their position in the case. Again, there can be no doubt that the heirs of the deceased mortgagor, Rossitter, were necessary parties. One of them, George W. Rossitter, was named a defendant—was an infant (p. 3 of Abstract) and was never personally served with process, but was proceeded against as a non-resident. A guardian *ad litem* was however appointed for him and the guardian answered. I make two questions upon the proceedings as to Geoge W. Rossitter: One is, that he should have been brought before the Court by notice, actual or constructive; and the other is, that neither the appointment of a guardian *ad litem*, and the guardian's answering, brought him before the Court, nor was the affidavit of non-residence sufficient to authorize the publication notice and thus bring him before the Court. The first is clear upon general principles as well as from almost innumerable decisions. Jurisdiction of the person interested as well as of the subject matter is essential in such proceedings as this. The second depends upon the meaning and validity of the 47th section and the meaning of the 8th section of the Chancery Act, 1 vol. Statutes, pages 139 & 144. The 8th section provides that when any complainant shall file in the office an affidavit "showing that any defendant resides or hath gone out of this State," the Clerk shall cause publication to be made. The affidavit filed (p. 7 of Abstract,) stated simply that George W. Rossitter, among others, as the affiant was *informed* and *believed* resided out of the State of Illinois. The affiant did not state from whom or from what facts he derived his information, so that others might decide whether he was too credulous or not. The affidavit does not follow either the language or the substance of the statute. It does not *show* that George W. Rossitter was a non-resident. It was designed to effect constructive notice of the pendency of the suit, and such being its design, to be good for anything, it should have strictly complied with the requirements of the statute, nor can its defects be supplied or aided by recitals in orders or decrees of the Court. Boyland *vs.* Boyland, 18 Ills. 552. Besides its

insufficiency being shown by its non-compliance with the statute. I think the insufficiency of the affidavit is established by the case of Dyer *vs.* Flint, 21 Ills., 84. That case arose upon an affidavit made under our attachment law, which requires an affidavit setting forth an indebtedness exceeding twenty dollars, &c., and among other grounds of attachment that the debtor is not a resident of the State. The Court say the requirements of the statute must be fulfilled. The creditor, or his agent, making the affidavit, cannot rely upon hearsay as to either—he must positively allege both the non-residence and the indebtedness. The almost exact similarity of the two statutes in reference to the affidavit makes that case a direct authority in this; I maintain therefore that George W. Rossitter was never brought before the Court by constructive notice by publication, and, as I said before, he never had actual notice so far as this record shows. I know of but two ways of bringing a party before a Court—the one is by actual, the other by constructive notice. I can conceive of no other. But there may be and there are different modes of giving constructive notice, and the question which I will now proceed to consider is whether the 47th section, before quoted, was intended to provide for and does provide for one of them. That section provides that "In any cause in equity it shall be lawful for the Court in which the cause is pending, to appoint a guardian *ad litem*, to any infant or insane defendant in such cause, whether such infant or insane defendant shall have been served with process or not, and to compel the person so appointed to act." This is all of it that bears upon the question under consideration. It will be seen that it simply makes the appointment lawful whether the infant has been served with process or not—that is all. It does not declare its effect otherwise. It does not say that it shall dispense with notice or stand in the place of service of notice or be constructive notice to the infant. It does not repeal the law requiring notice expressly or by necessary implication; for a compliance with it is not at all incompatible with service of notice afterwards upon the infant. It simply legalizes the appointment whenever made during the progress of the cause. Notice should not be dispensed with where none is provided for in a statute.

A proceeding in a Probate Court by which a person was declared *non compos mentis* and his property put under the control of another without notice of the proceeding under a statute which did not require any notice, was declared void in Chase *vs.* Hathaway, 14th Mass. 223. The implication that notice was not necessary, was as strong under such a statute as under ours. But, if the legislature had declared that notice should not be necessary, or that the appointment of a guardian *ad litem* and his answering should amount to constructive notice, had they the power? In 9th Cranch, 126, 144, the court say that in all cases and by universal law, no one can be deprived of his property without notice, see 3 Vesey, Jr., 181. What would be the differance in substance between the legislature's declaring that the property in A's possession belonged to B, or that A's title to property which he claimed was invalid, and their authorizing a court to declare the same upon the ex-parte application of B without any notice whatever to A? It would not be a judicial proceeding, because there would be no parties to decide between. What is the difference between the legislature's saying that their need be no notice, and their saying that notice to anybody but A shall be constructive notice to A? Who shall be the guardian *ad litem*, is generally at the dictation of the complainant,s attorney under the control of the court, and is generally the clerk, but may be any one, and if the appointment of a guardian *ad litem* and his answering, had been declared by the legislature as constructive notice, it would have amounted to a declaration by the legislature, that A's property or rights might be taken from him by notice to any one except him—a declaration which could not have the force of law, because it would authorize the depriving persons of their property and rights without judicial proceedings, or anything bearing the semblance of judicial proceedings. But, if it should be urged that such a legislative declaration would be law for those within the jurisdiction of the legislature, then I insist that it cannot be as to non-residents; or, if it be urged that the court by virtue of its general guardianship over infants, has the power to appoint a guardian *ad litem* and dispense with notice to them, then I answer that the court has no guardianship over non-resident in-

fants, and that power would not reach this case, and besides if that view be correct, this statute was useless. But it will hardly be contended that without this section, other notice to the infant than the appointment of a guardian *ad litem*, could be dispensed with. I therefore urge that George W. Rossitter was never brought before the court, and the decree erroneous for that cause.

Another objection is, that the Society for Savings were not made a party to the proceedings. The mortgage had, previously to the institution of this suit, been assigned and delivered to that Society (page 6 of abstract,) and the case does not show that it was ever re-assigned or re-delivered. The legal title was, and is yet in that Society. Waiving

I next come to the decree. Having the question whether in any case of a debt payable by instalments where some of them are not due, and the property indivisible, and it is not shown that the property is insufficient security for the whole debt, principal and interest when matured, such a decree is proper,— I contend that in this case the decree is wrong in declaring that in the event of a sale, the whole debt—that not due as well as that due, shall be paid out of the proceeds. The mortgage provides for a sale of the whole premises (pages 1 and 2 of abstract,) not a part in any event, by the mortgagee or his assignee if default should be made in the payment of said promissory notes, or any one of them, or any part thereof, and in the event of a sale, the mortgage provides that out of the money arising from such sale, the mortgagee or assignee may retain the principal and interest which shall then (at the time of the sale) *be due* on said notes or any of them, and also all costs,—rendering the overplus of the purchase-money (if there should be any) to the mortgagors and their assigns, &c. There is no allegation of mistake in drawing the mortgage, and therefore there can be no pretence of one. The parties knew the property was indivisible—that the debt was payable by instalments—that some of them would become due before others, and might remain unpaid after maturity—that selling the mortgage property was only one of three modes of enforcing payment, and, with this knowledge, they stipulate that in case of default in any part of the debt, the mortgagee, if he

chooses, may sell the whole property—not less—retain the amount *then due* and pay over the balance to mortgagors. Nothing can be clearer or more distinct than that this was the agreement, and from it, it is perfectly plain that in no event and out of no property did the mortgagors intend or agree to pay the debt faster than it should become due, nor did the mortgagee bargain for a right to collect it faster than it should become due; nor was there anything unreasonable in this. In case of default the mortgagee could sue upon his notes or take possession of the property and appropriate its profits to his unpaid debt. It was and is as equitable and just that the mortgage creditor should be delayed in the payment of what is due as that the mortgage debtor should be hastened in the payment of what is not due, and from the stipulations in the mortgage they seem to have so considered. The complainant now asks a Court of Equity to violate this equitable rule—the agreement contained in the mortgage—and to do for him by a sale what, if he had himself made the sale, the contract under which he claims would have prohibited him from doing. I understand that the object of Courts, and especially Courts of Equity, is to carry out, not to violate, clear, distinct fair contracts of parties—to cause to be done precisely what would have been done, if the contract had been complied with or carried out by the parties themselves. The decree in this case violates the understanding of the parties and is for that cause erroneous.

Another objection to the decree is that it does not give the master any other directions as to the sale of the property, than that it shall be according to the rules and practice of the Court. It does not specify how he shall advertise, or how long he shall advertise, where he shall sell or between what hours, but leaves all these matters to him, and makes him a mere ministerial officer, a judicial officer so far as to authorize him to decide what are the rules and practice of the Court as to sales of mortgage property. What are the rules and what the practice of the Court as to such sales? Are the rules and practice lawful? We can't tell. But it may be said that the question as to what the rules are and the practice is, and whether lawful or not, may be raised on a motion to set aside the sale,

or by objections to a conformation of the master's report of sale. To this I answer that the Court had no right to make a ministerial officer a judicial officer. That it subjects the purchaser to the hazard of the sales being in accordance with the rules and practice of the Court, and of those rules and that practice being lawful. and increases the chances of litigation and lessens the chances of the purchaser's obtaining the property, and therefore would deter bidders and tend to sacrifice the property at the sale.

Another objetion is that the decree allows no one to pay the mortgage debt but Graves and Pahlman. The record shows that Graves had conveyed to appellant his interest in the property, and that appellant had assumed to pay Graves' portion of the mortgage debt. By the decree appellant has no right to pay the debt and prevent the sale and stop further costs, nor had the master a right to receive it from him. This certainly was wrong. Had'nt he, as purchaser of mortgagor's interest, a right to redeem at any time before the decree, and at ane time before the equity of redemption should be foreclosed, which, under our practice, is not done till a sale or at least till the expiration of the 30 days after the decree within which payment was allowed. It makes no difference that appellant may have a year after the sale within which to redeem; for the right to redeem before the sale existed before and independent of our statute, and is not taken away by it, and is important and valuable because by its exercise costs and an increased interest could and would be avoided.

The decree is also erroneous in not directing to whom the surplus of proceeds of sale, after paying amount decreed, should be paid. 1 Monroe, 66.

The decree should provide for redemption. As it is, it would seem the Court intended an absolute sale.

Another objection is, the decree adjudges the costs against all of the defendants, when in a case such as this, where a Court of Equity would have no jurisdiction except for the mortgage, no decree for costs except out of the mortgage property could be made against any one. 5 Mon. 78; 6 J. J. Marshall, 28.

Appellant therefore asks for a reversal of the decree of the Court below.

W. R. SMITH, *pro. se.*

Chicago Times print, 74 Randolph st.

STATE OF ILLINOIS---THIRD DIVISION.

SUPREME COURT, APRIL TERM, 1863.

ALFRED SMITH
vs.
THOS. DYER *et al.*
} *Appeal from Superior Court of Chicago.*

ABSTRACT.

Bill filed 20th September, 1859, in the Superior Court of Chicago by
Alfred Smith, of Connecticut. Alleges that on the 14th day of June, 1853,
1 Asher Rossitter and Frances B. Rossitter, his wife, and Sheldon Graves and
Mary Graves, his wife, executed a mortgage in fee simple on lots 5 and 6 in
block 6 in Kinzie's addition to Chicago, in order to secure to Thomas Dyer
$16,000, secured to be paid by six promissory notes of even date with said
2 mortgage, five of which were for the sum of $3,000, each, payable respectively
two, four, six, eight, and ten years after date, and the sixth note for $1,000,
payable eleven years after date—all payable to the order of said Thomas
Dyer, at Marine Bank, Chicago, with interest at 6 per cent., payable annually,
and which mortgage deed was executed in due form of law, and was duly
3 recorded in the Recorder's office of Cook county and State of Illinois.

3 A copy thereof, together with the deed of assignment of same from
Thomas Dyer to orator, is then given.

It is dated 14th June, 1853, Asher Rossitter and Frances Rossitter, his wife,
3 and Sheldon Graves and Mary Graves, his wife, grantors, and Thomas Dyer,
grantee, and recites that Asher Rossitter and Sheldon Graves are justly indebted to said Dyer in the sum of $16,000, secured to be paid by six promissory notes of even date with said mortgage, five of them in the sum of
$3,000 each, payable respectively two, four, six, eight, and ten years after
date, and the sixth for $1,000, 11 years after date, all payable to Thomas
Dyer, with 6 per cent. interest, payable annually, at Marine Bank. The
grantors, to secure said notes, convey to said Dyer lots 5 and 6 in block 6 in
3 Kinzie's addition to Chicago, with the condition that if said Asher Rossitter
and Sheldon Graves, their heirs, etc., shall well and truly pay, or cause to be
paid, to said Dyer, or his assigns, the said promissory notes, according to the
3 intent and meaning thereof, that then and thenceforth the mortgage and the
estate thereby granted shall cease, determine, and be void. The said mortgage further provides that if default shall be made in the payment of the

said promissory notes, or any of them, or any part thereof, according to their tenor and effect, or if the said Asher Rossitter and Sheldon Graves, or either of them, shall suffer or permit said premises, or any part thereof, to be sold for taxes, or do or permit anything to be done upon said premises, or any part thereof, that shall impair or injure the value thereof, or tend to impair or weaken the security intended to be hereby effected, that then and thenceforth it shall be lawful for the said party of the second part, his certain attorney, executors, administrators, or assigns, to enter into and upon all and singular the said premises hereby granted, or intended to be, and to sell and dispose of the same, either by himself, themselves, his or their attorney, for that purpose constituted irrevocable; and also, all benefit and equity of redemption
5 of the said parties ot the first part, their heirs or assigns, therein at public vendue, after having given sixty days' notice of the time and place of said sale (the sale to be made in the city of Chicago) by advertisement in any one of the daily newspapers that may at that time be published in the city of Chicago, personal notice to the said parties of the first part, their heirs, executors, administrators, or assigns, of the said sale being hereby expressly waived, and as the attorney of the said parties of the first part, for that purpose hereby duly authorized, constituted, and appointed to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of
5 conveyance in law for the same in fee simple, and out of the money arising from such sale to retain the principal and interest which shall then be due on said notes, or any of them, and also all taxes and redemption money paid by the party of the second part for the redemption from law sales of said premises, or any part thereof, together with the costs and charges of advertisement and sale of said premises, rendering the overplus of the purchase money (if any there should be) unto the said Asher Rossitter and Sheldon Graves, their heirs, executors, and administrators, or assigns, further providing that said sale should forever bar the parties of the first part of all claims to said
6 property. Said mortgage is signed by the grantors, and duly acknowledged by them before a Justice of the Peace of Cook county, Illinois.

7 Thomas Dyer's assignment of said mortgage to Alfred Smith, 11th March, 1854, in consideration of $12,000.

8 Thomas Dyer's acknowledgment of the assignment.

8 Bill alleges Dyer assigned said mortgage 11th March, 1854, by deed to complainant, and that said deed of assignment was duly recorded in the Recorder's office of Cook county, Illinois, in book 17 of mortgages, page 215, and at the same time indorsed in writing the several notes secured by said mortgage, and that complainant is now the holder of such of them as are unpaid, and that said Dyer has no interest in the mortgage or the debt thereby secured.

8 The bill then sets out the deed of assignment, assigning said mort-
9 gage.

9 Bill alleges that, on the 17th June, 1859, the note of $3,000, payable in six years, became due, and there also became, on the same date, due and
10 payable the annual interest on said note, and also on the note of $3,000 due

in eight years from its date, and also on the *$3,000 note due in 10 years from* its date, and also the annual interest on the note of *$1,000 due and payable* in eleven years, amounting to the sum of $600.

10 Bill further states that there is still due and unpaid on said mortgage the following additional sums to those before named, viz.: the note for $3,000 due and payable in eight years with annual interest, the note of $3,000 due and payable in ten years with annual interest, and the note of $1,000 due and payable in eleven years with annual interest, all of which are wholly due and unpaid, the principal of which has not yet matured, and alleges that the property is indivisible.

11 Bill states that Asher Rossitter on or about the 25th of February, 1858, died, leaving Martha A. Rossitter his widow, Mary S. Leavitt, child, and Frank A. Leavitt, her husband, George W. Rossitter, son, and Charles D. Rossitter, his heirs-at-law, the last two infants, and that letters testamentary were issued on the estate of said Asher Rossitter, deceased, by the County Court of Cook county, State of Illinois, to John D. Pahlman, on the 8th day of March, 1858, who is now acting as executor; that said Asher died, having made a will appointing said Pahlman and John B. King executors; tha Pahlman alone qualified.

11 The bill further states that since the execution and recording of said mortgage several judgments operating as liens upon said mortgaged property have been rendered against said Asher Rossitter in his life-time, viz.: a judgment in Circuit Court of Cook county for $6.80 costs in favor of N. Rikard;
11 judgment in favor of John F. Miller and Gilbert F. Davis, in same court, against said Rossitter and others, November 9th, 1857, for $1,027.83 and costs; that in the same court, on 19th November, 1857, Haines H. Magie, surviving partner of John High, Jr., recovered judgment against said Rossitter
12 and others for $1,210.66, besides costs; that on 27th November, 1857, in said court, said John B. King recovered judgment against said Rossitter and others for $1,210 and costs; and in the same court George E. Boardman, Sheldon Graves, Albert Crosby, James S. Beach, and James E. Hays recovered a judgment against said Rossitter for costs; and in the Cook County Court of Common Pleas, Cyrus H. McCormick recovered, about February 7th, 1857, a judgment against said Asher Rossitter and others for costs of suit; and that Frank McKerwin, in same court, about November 9th, 1857, recovered a judgment against said Rossitter and others for about $1,206 and costs;
12 and also, in same court, about the 6th day of November, Edwin Blackman, executor of John High, Jr., recovered judgment for about $1,000.83 and costs; and in the same court, said Edwin Blackman, executor of John High, recovered a judgment about January, 1858, for about $1,018 and costs against said Rossitter and others; and also, in a certain suit in said court, wherein
13 Asher Rossitter, John D. Pahlman, John Smith, and George Smith were plaintiffs, and the city of Chicago were defendants, a judgment, about June 15th, 1858, was rendered against plaintiffs for costs; and in the Superior Court of Chicago, George Richards, on or about the 15th of June, 1859, recovered judgment against Rossitter and others for the costs of suit, about $14.60; and in the same court, Frederick Young recovered judgment against Asher

Rossitter and others for $14.80; and in the same court, Charles Staats recovered, about June 15th, 1859, judgment against said Asher Rossitter for about $14.75.

13 Bill charges all said judgments are liens.

13 Bill further charges that about the 18th July, 1857, said Sheldon Graves conveyed the undivided half of said mortgaged premises to William R.
14 Smith by deed duly recorded. That one Francis A. McIntyre claims some sort of interest in said mortgaged property by deed of assignment from Rossitter, but that it is subsequent to complainant's right.

14 Bill further states that Martha A. Rossitter, wife of said Asher Rossitter has no claim for dower as against complainant, for the reason that she intermarried with said Rossitter subsequent to the making of said mortgage, and that said mortgage was given to secure the unpaid balance of the purchase money for said property.

14 Bill further states that Frances B. Rossitter, who signed the mortgage as wife of said Asher, is dead.

14 Bill further states that said A. Rossitter and S. Graves demised said premises to one James E. Hays by lease recorded in book 83, page 545, of records of Cook county, which lease said Hays assigned by deed of assign-
15 ment to George E. Boardman and John H. Sahler, and that it is subsequent to complainant's rights.

15 Bill alleges he called upon said S. Graves and John D. Pahlman, executor of Martha A. Rossitter, widow, Mary S. Leavitt and Frank Leavitt, her husband, George W. Rossitter, and Charles D. Rossitter, and requested payment, but they refused to pay.

15 Bill makes Thomas Dyer, Martha Rossitter, Mary S. Leavitt, Frank A. Leavitt, George A. Rossitter, Charles D. Rossitter, John D. Pahlman, executor of A. Rossitter, deceased, John B. King, N. Rikard, John F. Miller, Gilbert F. Davis, Haines H. Magie, surviving partner of John High, Jr., Geo. E. Boardman, Albert Crosby, James S. Beach, James E. Hays, Cyrus H. McCormick, Frank Kerwin, Edwin Blackman, executor of John High, Jr., deceased, John D. Pahlman, John Smith, George Smith, City of Chicago, Geo. Richards, Phillip Smith, Frederick Young, Charles Staats, Sheldon Graves, Mary
16 Graves, Wm. R. Smith, Mary J. Smith, Francis A. McIntyre, and James E. Hays, John H. Saylor, and John B. King, defendants, prays process, prays for an account of amount due and to become due upon said mortgage, and that amount due may be decreed to be paid within a day to be named by the court, and, in default, that the premises may be decreed to be sold and the amount due and to become due may be paid to complainant, and that Martha A. Rossitter and Mary A. Graves may be barred from all claim of dower, and that balance of proceeds may be applied according to the rights of defendants and for general relief.

17 Shumway, Waite, and Towne security for costs.

18 Præcipe for above defendants.

19 Summons, 23d September, 1859, against defendants to bill.

20 Return of Sheriff. Served on John D. Pahlman, Cyrus H. McCormick, Edwin Blackman, Francis A. McIntyre, John D. Pahlman, as executor of A. Rossitter, by delivering a copy to each of them 1st October, 1859, and on John Smith and George Smith by leaving a copy thereof at their usual place of abode with B. H. Skinner, he being a white person above the age of ten years, and also informing him of the contents thereof, the 1st day of October, 1859. The other defendants not found.

21 On 13th October, 1859, leave was given complainant to amend his bill by discontinuing as to Francis M. Kerwin, who is now deceased, and making Henry Stevens, his administrator, party defendant to the bill.

22 Summons against defendants, dated 2d November, 1859, but not inclu-
23 ding Henry Stevens, administrator of Kerwin.

23 Return of Sheriff. Served on Mary S. Leavitt, Frank A. Leavitt, C. D. Rossitter, and John B. King, both as to himself individually and as trustee named in the will of Asher Rossitter, and also on the City of Chicago, by delivering a copy thereof to each of the above named defendants (S. D. Ward, Comptroller, and John C. Haines, Mayor, of said city, being served as representing the City of Chicago,) the 25th day of November, 1859, and I also served this writ on the within named H. H. Magie by delivering a copy thereof to him, 28th November, 1859. The other defendants not found.

25 Alias summons, dated 19th November, 1859.

26 Return of officer. Served by delivering copies to S. Graves and Mary Graves, his wife.

27 Thomas Dyer enters his appearance on 7th March, 1860.

27 George Richards, Phillip Smith, Frederick K. Young, and Chas. Staats enter their appearance 9th March, 1860.

28 March 9th, 1860, bill taken for confessed against Haines H. Magie, Mary S. Leavitt, Frank Leavitt, John B. King, as trustee, and City of Chicago, George Richards, Phillip Smith, Frederick Young, and Charles Staats.

30 A pluries summons, dated 17th March, 1860.

31 Return of officer. Served on James S. Beach and Mary Jane Smith by delivering a copy thereof to each of them 28th March, 1860, and also on Wm. R. Smith by leaving a copy thereof at his usual place of abode with M. J. Smith, she being a white person over twelve years old and a member of his family, and also informing her of the contents thereof, this 28th day of March, 1860. Other defendants not found.

35 Pluries summons dated 14th June, 1860.

36 Return on last summons. The within named not found *30th June, 1860.*

39 The answer of Sheldon Graves and wife denies all the allegations and statements of complainant's bill, except their conveyance of the property to W. R. Smith, and his mortgage back, filed 2d November, 1860.

40 Answer of W. R. Smith and wife filed 2d November, 1856, admits the execution of mortgage to Dyer to secure notes for about $16,000 due on or abaut as specified, but have no personal knowledge or information sufficient to form a belief as to what are the precise facts or precise terms of note or
41 notes. Believe Dyer did assign the mortgage to complainant. Denies that any note became due 17th June, 1859. Don't admit that there are notes and interest secured by mortgage of Graves and Rossitter and their wives on the property mentioned to come due as alleged in complainant's bill. Admits conveyance alleged to defendant by Graves and wife and W. R. Smith to pay
42 one-half of the mortgage. Alleges that complainant has pledged and transferred to others the entire debt secured by said mortgage. Denies all the allegations not herein expressly admitted.

43 Cross-bill by W. R. Smith of discovery against complainant, alleging that
44 complainant had transferred the notes secured by the mortgage aforesaid.
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48 Complainant's replication to answer of W. R. Smith.

49 Complainant's replication to Graves and wife's answer.
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51 Second copy of W. R. Smith's cross-bill against complainant.
52
53
54
56 Complainant's supplemental bill, reciting the allegations of original bill,
57 represents that, since filing the original bill, on the 17th day of June, 1860,
58 there became due and payable the annual interest on the first note of $3,000
59 due in six years from its date, and on said note of $3,000 due in eight years
60 from its date, and on the said note of $3,000 due in ten years from its date,
61 and on the said note of $1,000 due in eleven years from its date, amounting
63 to $600. Prays process on said supplemental bill against parties to the orig-
64 inal bill.

65 Complainant filed his answer to cross-bill of W. R. Smith on the 28th March, 1861.

66 Answer denies that he was not the owner of notes and mortgage at institution of suit, unless the facts stated by him made it otherwise, which were
67 that, on 9th August, 1858, in consideration of $10,000 loaned to him by the Society for Savings, a corporation duly established in Hartford, on his credit, he delivered to said Society for Savings the said four unpaid notes of Rossitter and Graves, to hold as collateral, and to receive the proceeds if paid, and he (complainant) then engaged and guaranteed to said Society that said four notes should and would be paid to said Society at their maturity, and the interest thereon semi-annually, and that he also engaged and promised that

he could and would pay to said Society the *principal sums of the same* (amounting to $10,000) and accrued interest thereon on demand, and he then executed and delivered to said Society an assignment of said mortgage to
68 secure said notes; that he did not indorse the said notes to said Society, nor was the assignment placed upon record; that in August, 1859, he took back from said Society the said four notes, and in lieu gave his own note.

69 Does not say that the mortgage was redelivered or reassigned to him.
70

83 Deposition of E. H. Hadduck proves that property could not be sold in
84 parcels without great injury.
85

Pages 82, 86, 87 and 88, contain continuances, and are not necessary to be abstracted.

ALFRED SMITH,
vs.
THOMAS DYER, *et al.* } Superior Court.

89 Affidavit of non-residence, Edward P. Towne being duly sworn, says that he is one of the solicitors for the complainant in the above entitled suit; that all of the following named defendants, Geo. W. Rossitter, Martha A. Ros-
89 sitter, N. Pickard, John F. Miller, Gilbert F. Davis, George E. Bordman, James E. Hays, Frank Kerwin, John H. Sayler and George A. Rossitter, as he is informed and believes, all reside out of the State of Illinois, so that process cannot be served upon them.

91 On the 18th of March, 1862, complainant filed proof of publication for the
92 following named non-residents, viz.: George W. Rossitter, N. Pickard, John F. Miller, Gilbert F. Davis, George E. Boardman, James E. Hays, Frank Kerwin and Martha A. Rossitter, and the Court having inspected the proof of publication, find that due and legal notice had been given of the pendency of this suit according to the statute and that they are properly brought into Court and that Complainant is entitled to default against them. The order of
92 Court then recites that it appearing that Charles D. Rossitter has been served and that said George A. Rossitter are infant defendants. T. B. Carter was
93 appointed guardian *ad litem*, who filed their answer. The bill and supplemental bill were then taken for confessed against Thomas Dyer, Martha A. Rossitter, Mary S. Leavitt, Frank A. Leavitt, John D. Pahlman, executor of Asher Rossitter, John B. King, N. Pickard, John F. Miller, Gilbert F. Davis, Haines H. Magie, George E. Bordman, Albert Crosby, James S. Beach, James E. Hays, Cyrus H. McCormick, Frank Kerwin, Edwin Blackman, executor of John High, J. D. Pahlman, John Smith, George Smith, City of Chicago, George Richards, Phillip Smith, Frederick Young, Carles Staats, Frances A. McIntyre, John H. Sayler and John King.

94 T. B. Carter's answer as guardian *ad litem.*

95 Certificate of publication of notice to non-residence by publisher, from 7th August, 1860, to 4th September, 1860, inclusive.

96 The ordinary publication of notice of the pendency of the suit to *Martha A.* Rossitter, George W. Rossitter, N. Pickard, John F. Miller, Gilbert F. Davis, George E. Boardman, James E. Hays, Frank Kerwin, John H. Sayler, as non-residents.

101 Bill dismissed by Compainant as to John Smith, George Smith and Albert Crosby, and leave given to amend bill on 21st of March, 1862.

102 On 29th March, 1862, an agreement between Complainant and defendant, W. R. Smith, as to bond not necessary to be abstracted.

103 Complainant's amendment of his bill filed 22d March, 1862. Amends as
follows: On last page, the prayer after the words to be by the Court fixed
and they may be decreed to pay within a time to be fixed by your Honors, the
amount due and in default of doing so, if said premises are indivisible that
103 they may be ordered to be sold for the sum due as well as the sum to grow
due, and the proceeds of said sale may be applied to pay the amount due
and to grow due on said mortgage debt, or that said defendants may be decreed to pay within a time to be fixed the amount due and in default of their doing so, the whole of said debt may be declared to be due and payable, and said mortgaged premises may be decreed and ordered to be sold to pay the same.

104 Decree reciting that the cause came on for hearing upon the bill, answer of
104 the infants Geo. M. Rossitter and Charles Rossitter by their guardian *ad litem*,
and the answer of Sheldon Graves and wife and W. R. Smith and wife. The
other defendants having failed to plead, answer, or demur, it is ordered that
as to them the bill and supplemental bill be taken for confessed, and the cross
105 bill of Wm. R. Smith, and the answer of Alfred Smith thereto, and the proof
introduced at the hearing, and the depositions, and the court being fully
advised, finds that Asher Rossiter and Sheldon Graves and their wives, on
the 14th June, 1853, made to Thomas Dyer the mortgage in the bill described
upon lots 5 and 6, in Block 6, in Kinzie's Addition to Chicago, in Cook
County, State of Illinois, and that there is unpaid on said indebtedness
secured by said mortgage the following described notes, viz.: the note of
$3,000, due in six years after date, with interest since June 14th, 1858; the
note of $3,000, due in eight years, with interest since June 14th, 1858; and
the note of $3,000, due in ten years, with interest since June 14th, 1858; and
the note for 1,000, due in eleven years from the date thereof, with annual
interest thereon since June 14th, 1858; and the court further finds that
105 there is now due and payable and in default on said notes secured by said
mortgage, the principal of the two first described notes, and the annual
interest thereon since June 14th, 1858, together with the annual interest on
the two notes due in ten and eleven years, since June 14th, 1858, to June 14th,
1861, and that there will be due on said indebtedness secured by said mortgage the further sum of the principal of the two notes due in ten and eleven years from date, and the interest thereon since June 14th, 1861; and they further find that the property constitutes a hotel, occupying both of said lots 5 and 6, and is indivisible and cannot be sold in parcels; that said Asher Rossiter departed this life, and that John D. Pahlman has been appointed his

executor, and that there is now due and unpaid and in default upon said notes
106 secured by said mortgage, $8,084, besides the notes due in ten and eleven years, the interest hereafter to become due thereon. Thereupon it is ordered, adjudged and decreed, that unless the said Sheldon Graves and John D. Pahlman executor upon the estate of Asher Rossiter, deceased, pay to the said complainant the sum of $8,084, overdue and unpaid and in default, with interest thereon from the date of this decree, within thirty days from the date of the same, together with all the costs of this suit, and in default thereof said mortgaged premises be sold entire and undivided by Ira Scott, the Master in Chancery of this court, according to the rules and practice of this
106 court, and out of the proceeds of said sale he pay the costs of this suit, and pay the complainant said sum so overdue and unpaid as aforesaid, viz., $8,084, and interest thereon from the date of this decree, and the principal due on said two notes due in ten and eleven years, viz., one note of $3,000 and one note of $1,000, with interest from 14th June, 1861, up to date of sale; and it is further ordered, adjudged and decreed that if default be made in the payment
107 in the time above specified of said sum of $8084, now overdue and unpaid, and said premises be sold, the complainant may become purchaser at said sale and may bid the whole sum decreed; and the Master in Chancery shall issue a certificate of sale to the purchaser; that the defendants pay the costs of these proceedings, that thereupon W. R. Smith appealed upon bond in twenty days,
108 in penalty of $200. Bond not necessary to be abstracted. Notes and mortgage not on file or copied, and not necessary to be abstracted, as no question is made involving them.

In the Supreme Court of Illinois—Third Division:

William R. Smith, *Appellant*,
ag't
Alfred Smith, *Appellee*. } Appeal.

The appellant, William R. Smith, says that there are errors in the decree and proceedings of the court below, as shown in the foregoing record, to his prejudice, and he assigns the following as grounds for reversing said decree and proceedings, viz:

1st. The said inferior court erred in rendering a final decree therein before Frank McKerwin, a necessary party to said bill and named defendant therein, was brought before the court.

2nd. The said inferior court erred in not dismissing complainant's bill, and rendering the decree in behalf of complainant before Henry Stevens administrator of Francis M. Kerwin, dec'd alias Frank Kerwin, dec'd, who was a necessary party, and named as such in said proceeding, was brought before the court.

3rd. The said inferior court erred in rendering the decree herein without Albert Crosby, a necessary party, being brought before the court.

4th. The said inferior court erred in rendering the decree herein till John F. Miller and Gilbert Davis, alleged and shown in complainant's bill to be necessary parties, were brought before the court.

5th. The said inferior court acquired no jurisdiction over said John F. Miller, Gilbert F. Davis, or George W. Rositter, necessary parties, because the affidavit of non-residence was insufficient and not a compliance with the law.

6th. The said inferior court erred in the decree rendered herein, in directing that in the event of a sale of the property the whole debt should become due and be paid—in not giving more specific directions to the Master as to the sale than that it should be "according to the rules and practice of this court."

7th. Said decree is erroneous in directing a sale in default of Sheldon Graves and John D. Pahlman failing to pay in thirty days the amount decreed as due, and not giving the right to any other one interested thus to pay and stop the sale.

8th. The decree is for too much.

9th. The decree is erroneous in decreeing all the costs against all the defendants, they not being jointly liable in any event.

10th. The decree is erroneous in not directing to whom the surplus of proceeds of sale, after paying amount decreed, if any, should be paid.

11th. The decree is erroneous in not providing for the right of redeeming said property from said sale but making the same absolute.

12th. The decree is erroneous in directing a payment of the whole debt out of the sale directed in any of the events provided for in said decree.

13th. The court erred in not dismissing the bill.

Wherefore, for the errors aforesaid, the appellant, William R. Smith, prays this court to reverse the decree and proceedings of the court below.

W. R. SMITH, *pro se.*

235

Wm R Smith
vs
Alfred Smith

Abstract

Filed May 7. 1863
S Leland Clk

Chicago Times print, 74 Randolph st.

STATE OF ILLINOIS---THIRD DIVISION.

SUPREME COURT, APRIL TERM, 1863.

ALFRED SMITH
vs. } *Appeal from Superior Court of Chicago.*
THOS. DYER *et al.*

ABSTRACT.

Bill filed 20th September, 1859, in the Superior Court of Chicago by
Alfred Smith, of Connecticut. Alleges that on the 14th day of June, 1853,
1 Asher Rossitter and Frances B. Rossitter, his wife, and Sheldon Graves and
Mary Graves, his wife, executed a mortgage in fee simple on lots 5 and 6 in
block 6 in Kinzie's addition to Chicago, in order to secure to Thomas Dyer
\$16,000, secured to be paid by six promissory notes of even date with said
2 mortgage, five of which were for the sum of \$3,000, each, payable respectively
two, four, six, eight, and ten years after date, and the sixth note for \$1,000,
payable eleven years after date—all payable to the order of said Thomas
Dyer, at Marine Bank, Chicago, with interest at 6 per cent., payable annually,
and which mortgage deed was executed in due form of law, and was duly
3 recorded in the Recorder's office of Cook county and State of Illinois.

3 A copy thereof, together with the deed of assignment of same from
Thomas Dyer to orator, is then given.

It is dated 14th June, 1853, Asher Rossitter and Frances Rossitter, his wife,
3 and Sheldon Graves and Mary Graves, his wife, grantors, and Thomas Dyer,
grantee, and recites that Asher Rossitter and Sheldon Graves are justly in-
debted to said Dyer in the sum of \$16,000, secured to be paid by six prom-
issory notes of even date with said mortgage, five of them in the sum of
\$3,000 each, payable respectively two, four, six, eight, and ten years after
date, and the sixth for \$1,000, 11 years after date, all payable to Thomas
Dyer, with 6 per cent. interest, payable annually, at Marine Bank. The
grantors, to secure said notes, convey to said Dyer lots 5 and 6 in block 6 in
3 Kinzie's addition to Chicago, with the condition that if said Asher Rossitter
and Sheldon Graves, their heirs, etc., shall well and truly pay, or cause to be
paid, to said Dyer, or his assigns, the said promissory notes, according to the
3 intent and meaning thereof, that then and thenceforth the mortgage and the
estate thereby granted shall cease, determine, and be void. The said mort-
4 gage further provides that if default shall be made in the payment of the

said promissory notes, or any of them, or any part thereof, according to their
tenor and effect, or if the said Asher Rossitter and Sheldon Graves, or either
of them, shall suffer or permit said premises, or any part thereof, to be sold
for taxes, or do or permit anything to be done upon said premises, or any part
thereof, that shall impair or injure the value thereof, or tend to impair or
weaken the security intended to be hereby effected, that then and thenceforth
it shall be lawful for the said party of the second part, his certain attorney,
executors, administrators, or assigns, to enter into and upon all and singular
the said premises hereby granted, or intended to be, and to sell and dispose
of the same, either by himself, themselves, his or their attorney, for that pur-
pose constituted irrevocable; and also, all benefit and equity of redemption
5 of the said parties ot the first part, their heirs or assigns, therein at public
vendue, after having given sixty days' notice of the time and place of said
sale (the sale to be made in the city of Chicago) by advertisement in any one
of the daily newspapers that may at that time be published in the city of
Chicago, personal notice to the said parties of the first part, their heirs, exec-
utors, administrators, or assigns, of the said sale being hereby expressly
waived, and as the attorney of the said parties of the first part, for that pur-
pose hereby duly authorized, constituted, and appointed to make and deliver
to the purchaser or purchasers thereof a good and sufficient deed or deeds of
5 conveyance in law for the same in fee simple, and out of the money arising
from such sale to retain the principal and interest which shall then be due on
said notes, or any of them, and also all taxes and redemption money paid by
the party of the second part for the redemption from law sales of said prem-
ises, or any part thereof, together with the costs and charges of advertise-
ment and sale of said premises, rendering the overplus of the purchase money
(if any there should be) unto the said Asher Rossitter and Sheldon Graves,
their heirs, executors, and administrators, or assigns, further providing that
said sale should forever bar the parties of the first part of all claims to said
6 property. Said mortgage is signed by the grantors, and duly acknowledged
by them before a Justice of the Peace of Cook county, Illinois.

7 Thomas Dyer's assignment of said mortgage to Alfred Smith, 11th
March, 1854, in consideration of $12,000.

8 Thomas Dyer's acknowledgment of the assignment.

8 Bill alleges Dyer assigned said mortgage 11th March, 1854, by deed to
complainant, and that said deed of assignment was duly recorded in the Re-
corder's office of Cook county, Illinois, in book 17 of mortgages, page 215,
and at the same time indorsed in writing the several notes secured by said
mortgage, and that complainant is now the holder of such of them as are un-
paid, and that said Dyer has no interest in the mortgage or the debt thereby
secured.

8 The bill then sets out the deed of assignment, assigning said mort-
9 gage.

9 Bill alleges that, on the 17th June, 1859, the note of $3,000, payable in
six years, became due, and there also became, on the same date, due and
10 payable the annual interest on said note, and also on the note of $3,000 due

in eight years from its date, and also on the $3,000 note due in 10 years from its date, and also the annual interest on the note of $1,000 due and payable in eleven years, amounting to the sum of $600.

10 Bill further states that there is still due and unpaid on said mortgage the following additional sums to those before named, viz.: the note for $3,000 due and payable in eight years with annual interest, the note of $3,000 due and payable in ten years with annual interest, and the note of $1,000 due and payable in eleven years with annual interest, all of which are wholly due and unpaid, the principal of which has not yet matured, and alleges that the property is indivisible.

11 Bill states that Asher Rossitter on or about the 25th of February, 1858, died, leaving Martha A. Rossitter his widow, Mary S. Leavitt, child, and Frank A. Leavitt, her husband, George W. Rossitter, son, and Charles D. Rossitter, his heirs-at-law, the last two infants, and that letters testamentary were issued on the estate of said Asher Rossitter, deceased, by the County Court of Cook county, State of Illinois, to John D. Pahlman, on the 8th day of March, 1858, who is now acting as executor; that said Asher died, having made a will appointing said Pahlman and John B. King executors; tha Pahlman alone qualified.

11 The bill further states that since the execution and recording of said mortgage several judgments operating as liens upon said mortgaged property have been rendered against said Asher Rossitter in his life-time, viz.: a judgment in Circuit Court of Cook county for $6.80 costs in favor of N. Rikard;
11 judgment in favor of John F. Miller and Gilbert F. Davis, in same court, against said Rossitter and others, November 9th, 1857, for $1,027.83 and costs; that in the same court, on 19th November, 1857, Haines H. Magie, surviving partner of John High, Jr., recovered judgment against said Rossitter
12 and others for $1,210.66, besides costs; that on 27th November, 1857, in said court, said John B. King recovered judgment against said Rossitter and others for $1,210 and costs; and in the same court George E. Boardman, Sheldon Graves, Albert Crosby, James S. Beach, and James E. Hays recovered a judgment against said Rossitter for costs; and in the Cook County Court of Common Pleas, Cyrus H. McCormick recovered, about February 7th, 1857, a judgment against said Asher Rossitter and others for costs of suit; and that Frank McKerwin, in same court, about November 9th, 1857, recovered a judgment against said Rossitter and others for about $1,206 and costs;
12 and also, in same court, about the 6th day of November, Edwin Blackman, executor of John High, Jr., recovered judgment for about $1,000.83 and costs; and in the same court, said Edwin Blackman, executor of John High, recovered a judgment about January, 1858, for about $1,018 and costs against said Rossitter and others; and also, in a certain suit in said court, wherein
13 Asher Rossitter, John D. Pahlman, John Smith, and George Smith were plaintiffs, and the city of Chicago were defendants, a judgment, about June 15th, 1858, was rendered against plaintiffs for costs; and in the Superior Court of Chicago, George Richards, on or about the 15th of June, 1859, recovered judgment against Rossitter and others for the costs of suit, about $14.60; and in the same court, Frederick Young recovered judgment against Asher

Rossitter and others for $14.80; and in the same court, Charles Staats recovered, about June 15th, 1859, judgment against said Asher Rossitter for about $14.75.

13 Bill charges all said judgments are liens.

13 Bill further charges that about the 18th July, 1857, said Sheldon Graves conveyed the undivided half of said mortgaged premises to William R.
14 Smith by deed duly recorded. That one Francis A. McIntyre claims some sort of interest in said mortgaged property by deed of assignment from Rossitter, but that it is subsequent to complainant's right.

14 Bill further states that Martha A. Rossitter, wife of said Asher Rossitter has no claim for dower as against complainant, for the reason that she intermarried with said Rossitter subsequent to the making of said mortgage, and that said mortgage was given to secure the unpaid balance of the purchase money for said property.

14 Bill further states that Frances B. Rossitter, who signed the mortgage as wife of said Asher, is dead.

14 Bill further states that said A. Rossitter and S. Graves demised said premises to one James E. Hays by lease recorded in book 83, page 545, of records of Cook county, which lease said Hays assigned by deed of assign-
15 ment to George E. Boardman and John H. Sahler, and that it is subsequent to complainant's rights.

15 Bill alleges he called upon said S. Graves and John D. Pahlman, executor of Martha A. Rossitter, widow, Mary S. Leavitt and Frank Leavitt, her husband, George W. Rossitter, and Charles D. Rossitter, and requested payment, but they refused to pay.

15 Bill makes Thomas Dyer, Martha Rossitter, Mary S. Leavitt, Frank A. Leavitt, George A. Rossitter, Charles D. Rossitter, John D. Pahlman, executor of A. Rossitter, deceased, John B. King, N. Rikard, John F. Miller, Gilbert F. Davis, Haines H. Magie, surviving partner of John High, Jr., Geo. E. Boardman, Albert Crosby, James S. Beach, James E. Hays, Cyrus H. McCormick, Frank Kerwin, Edwin Blackman, executor of John High, Jr., deceased, John D. Pahlman, John Smith, George Smith, City of Chicago, Geo. Richards, Phillip Smith, Frederick Young, Charles Staats, Sheldon Graves, Mary
16 Graves, Wm. R. Smith, Mary J. Smith, Francis A. McIntyre, and James E. Hays, John H. Saylor, and John B. King, defendants, prays process, prays for an account of amount due and to become due upon said mortgage, and that amount due may be decreed to be paid within a day to be named by the court, and, in default, that the premises may be decreed to be sold and the amount due and to become due may be paid to complainant, and that Martha A. Rossitter and Mary A. Graves may be barred from all claim of dower, and that balance of proceeds may be applied according to the rights of defendants and for general relief.

17 Shumway, Waite, and Towne security for costs.

18 Præcipe for above defendants.

19 Summons, 23d September, 1859, against defendants to bill.

20 Return of Sheriff. Served on John D. Pahlman, Cyrus H. McCormick, Edwin Blackman, Francis A. McIntyre, John D. Pahlman, as executor of A. Rossitter, by delivering a copy to each of them 1st October, 1859, and on John Smith and George Smith by leaving a copy thereof at their usual place of abode with B. H. Skinner, he being a white person above the age of ten years, and also informing him of the contents thereof, the 1st day of October, 1859. The other defendants not found.

21 On 13th October, 1859, leave was given complainant to amend his bill by discontinuing as to Francis M. Kerwin, who is now deceased, and making Henry Stevens, his administrator, party defendant to the bill.

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56 Complainant's supplemental bill, reciting the allegations of original bill,
57 represents that, since filing the original bill, on the 17th day of June, 1860,
58 there became due and payable the annual interest on the first note of $3,000
59 due in six years from its date, and on said note of $3,000 due in eight years
60 from its date, and on the said note of $3,000 due in ten years from its date,
61 and on the said note of $1,000 due in eleven years from its date, amounting
63 to $600. Prays process on said supplemental bill against parties to the orig-
64 inal bill.

65 Complainant filed his answer to cross-bill of W. R. Smith on the 28th March, 1861.

66 Answer denies that he was not the owner of notes and mortgage at institution of suit, unless the facts stated by him made it otherwise, which were
67 that, on 9th August, 1858, in consideration of $10,000 loaned to him by the Society for Savings, a corporation duly established in Hartford, on his credit, he delivered to said Society for Savings the said four unpaid notes of Rossitter and Graves, to hold as collateral, and to receive the proceeds if paid, and he (complainant) then engaged and guaranteed to said Society that said four notes should and would be paid to said Society at their maturity, and the interest thereon semi-annually, and that he also engaged and promised that

he could and would pay to said Society the principal sums of the same (amounting to $10,000) and accrued interest thereon on demand, and he then executed and delivered to said Society an assignment of said mortgage to
68 secure said notes; that he did not indorse the said notes to said Society, nor was the assignment placed upon record; that in August, 1859, he took back from said Society the said four notes, and in lieu gave his own note.

69 Does not say that the mortgage was redelivered or reassigned to him.
70

83 Deposition of E. H. Hadduck proves that property could not be sold in
84 parcels without great injury.
85

Pages 82, 86, 87 and 88, contain continuances, and are not necessary to be abstracted.

ALFRED SMITH,
vs.
THOMAS DYER, *et al.* } Superior Court.

89 Affidavit of non-residence, Edward P. Towne being duly sworn, says that he is one of the solicitors for the complainant in the above entitled suit; that all of the following named defendants, Geo. W. Rossitter, Martha A. Ros-
89 sitter, N. Pickard, John F. Miller, Gilbert F. Davis, George E. Bordman, James E. Hays, Frank Kerwin, John H. Sayler and George A. Rossitter, as he is informed and believes, all reside out of the State of Illinois, so that process cannot be served upon them.

91 On the 18th of March, 1862, complainant filed proof of publication for the
92 following named non-residents, viz.: George W. Rossitter, N. Pickard, John F. Miller, Gilbert F. Davis, George E. Boardman, James E. Hays, Frank Kerwin and Martha A. Rossitter, and the Court having inspected the proof of publication, find that due and legal notice had been given of the pendency of this suit according to the statute and that they are properly brought into Court and that Complainant is entitled to default against them. The order of
92 Court then recites that it appearing that Charles D. Rossitter has been served and that said George A. Rossitter are infant defendants. T. B. Carter was
93 appointed guardian *ad litem*, who filed their answer. The bill and supplemental bill were then taken for confessed against Thomas Dyer, Martha A. Rossitter, Mary S. Leavitt, Frank A. Leavitt, John D. Pahlman, executor of Asher Rossitter, John B. King, N. Pickard, John F. Miller, Gilbert F. Davis, Haines H. Magie, George E. Bordman, Albert Crosby, James S. Beach, James E. Hays, Cyrus H. McCormick, Frank Kerwin, Edwin Blackman, executor of John High, J. D. Pahlman, John Smith, George Smith, City of Chicago, George Richards, Phillip Smith, Frederick Young, Carles Staats, Frances A. McIntyre, John H. Sayler and John King.

94 T. B. Carter's answer as guardian *ad litem.*

95 Certificate of publication of notice to non-residence by publisher, from 7th August, 1860, to 4th September, 1860, inclusive.

96 The ordinary publication of notice of the pendency of the suit to Martha A. Rossitter, George W. Rossitter, N. Pickard, John F. Miller, Gilbert F. Davis, George E. Boardman, James E. Hays, Frank Kerwin, John H. Sayler, as non-residents.

101 Bill dismissed by Compainant as to John Smith, George Smith and Albert Crosby, and leave given to amend bill on 21st of March, 1862.

102 On 29th March, 1862, an agreement between Complainant and defendant, W. R. Smith, as to bond not necessary to be abstracted.

103 Complainant's amendment of his bill filed 22d March, 1862. Amends as
follows: On last page, the prayer after the words to be by the Court fixed
and they may be decreed to pay within a time to be fixed by your Honors, the
amount due and in default of doing so, if said premises are indivisible that
103 they may be ordered to be sold for the sum due as well as the sum to grow
due, and the proceeds of said sale may be applied to pay the amount due
and to grow due on said mortgage debt, or that said defendants may be decreed
to pay within a time to be fixed the amount due and in default of their
doing so, the whole of said debt may be declared to be due and payable, and
said mortgaged premises may be decreed and ordered to be sold to pay the
same.

104 Decree reciting that the cause came on for hearing upon the bill, answer of
104 the infants Geo. M. Rossitter and Charles Rossitter by their guardian *ad litem*,
and the answer of Sheldon Graves and wife and W. R. Smith and wife. The
other defendants having failed to plead, answer, or demur, it is ordered that
as to them the bill and supplemental bill be taken for confessed, and the cross
105 bill of Wm. R. Smith, and the answer of Alfred Smith thereto, and the proof
introduced at the hearing, and the depositions, and the court being fully
advised, finds that Asher Rossiter and Sheldon Graves and their wives, on
the 14th June, 1853, made to Thomas Dyer the mortgage in the bill described
upon lots 5 and 6, in Block 6, in Kinzie's Addition to Chicago, in Cook
County, State of Illinois, and that there is unpaid on said indebtedness
secured by said mortgage the following described notes, viz.: the note of
$3,000, due in six years after date, with interest since June 14th, 1858; the
note of $3,000, due in eight years, with interest since June 14th, 1858; and
the note of $3,000, due in ten years, with interest since June 14th, 1858; and
the note for 1,000, due in eleven years from the date thereof, with annual
interest thereon since June 14th, 1858; and the court further finds that
105 there is now due and payable and in default on said notes secured by said
mortgage, the principal of the two first described notes, and the annual
interest thereon since June 14th, 1858, together with the annual interest on
the two notes due in ten and eleven years, since June 14th, 1858, to June 14th,
1861, and that there will be due on said indebtedness secured by said mortgage
the further sum of the principal of the two notes due in ten and eleven
years from date, and the interest thereon since June 14th, 1861; and they
further find that the property constitutes a hotel, occupying both of said lots
5 and 6, and is indivisible and cannot be sold in parcels; that said Asher
Rossiter departed this life, and that John D. Pahlman has been appointed his

executor, and that there is now due and unpaid and in default upon said notes
106 secured by said mortgage, $8,084, besides the notes due in ten and eleven years, the interest hereafter to become due thereon. Thereupon it is ordered, adjudged and decreed, that unless the said Sheldon Graves and John D. Pahlman executor upon the estate of Asher Rossiter, deceased, pay to the said complainant the sum of $8,084, overdue and unpaid and in default, with interest thereon from the date of this decree, within thirty days from the date of the same, together with all the costs of this suit, and in default thereof said mortgaged premises be sold entire and undivided by Ira Scott, the Master in Chancery of this court, according to the rules and practice of this
106 court, and out of the proceeds of said sale he pay the costs of this suit, and pay the complainant said sum so overdue and unpaid as aforesaid, viz., $8,084, and interest thereon from the date of this decree, and the principal due on said two notes due in ten and eleven years, viz., one note of $3,000 and one note of $1,000, with interest from 14th June, 1861, up to date of sale; and it is further ordered, adjudged and decreed that if default be made in the payment
107 in the time above specified of said sum of $8084, now overdue and unpaid, and said premises be sold, the complainant may become purchaser at said sale and may bid the whole sum decreed; and the Master in Chancery shall issue a certificate of sale to the purchaser; that the defendants pay the costs of these proceedings, that thereupon W. R. Smith appealed upon bond in twenty days,
108 in penalty of $200. Bond not necessary to be abstracted. Notes and mortgage not on file or copied, and not necessary to be abstracted, as no question is made involving them.

In the Supreme Court of Illinois—Third Division:

William R. Smith, *Appellant,*
ag't } Appeal.
Alfred Smith, *Appellee.*

The appellant, William R. Smith, says that there are errors in the decree and proceedings of the court below, as shown in the foregoing record, to his prejudice, and he assigns the following as grounds for reversing said decree and proceedings, viz:

1st. The said inferior court erred in rendering a final decree therein before Frank McKerwin, a necessary party to said bill and named defendant therein, was brought before the court.

2nd. The said inferior court erred in not dismissing complainant's bill, and rendering the decree in behalf of complainant before Henry Stevens administrator of Francis M. Kerwin, dec'd alias Frank Kerwin, dec'd, who was a necessary party, and named as such in said proceeding, was brought before the court.

3rd. The said inferior court erred in rendering the decree herein without Albert Crosby, a necessary party, being brought before the court.

4th. The said inferior court erred in rendering the decree herein till John F. Miller and Gilbert Davis, alleged and shown in complainant's bill to be necessary parties, were brought before the court.

5th. The said inferior court acquired no jurisdiction over said John F. Miller, Gilbert F. Davis, or George W. Rositter, necessary parties, because the affidavit of non-residence was insufficient and not a compliance with the law.

6th. The said inferior court erred in the decree rendered herein, in directing that in the event of a sale of the property the whole debt should become due and be paid—in not giving more specific directions to the Master as to the sale than that it should be "according to the rules and practice of this court."

7th. Said decree is erroneous in directing a sale in default of Sheldon Graves and John D. Pahlman failing to pay in thirty days the amount decreed as due, and not giving the right to any other one interested thus to pay and stop the sale.

8th. The decree is for too much.

9th. The decree is erroneous in decreeing all the costs against all the defendants, they not being jointly liable in any event.

10th. The decree is erroneous in not directing to whom the surplus of proceeds of sale, after paying amount decreed, if any, should be paid.

11th. The decree is erroneous in not providing for the right of redeeming said property from said sale but making the same absolute.

12th. The decree is erroneous in directing a payment of the whole debt out of the sale directed in any of the events provided for in said decree.

13th. The court erred in not dismissing the bill.

Wherefore, for the errors aforesaid, the appellant, William R. Smith, prays this court to reverse the decree and proceedings of the court below.

W. R. SMITH, *pro se.*

235

Wm R Smith
vs
Alfred Smith

Abstract

Filed May 7, 1863.
L Leland CMR