No. 12812

Supreme Court of Illinois

Hosmer

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vs.

City of Chicago, et al.

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Silas McBride
vs
City of Chicago
208.

Supreme Court,---Third Grand Division.

APRIL TERM, 1859.

CHARLES B. HOSMER, Appellant,
vs.
CITY OF CHICAGO and
WM. B. H. GRAY, Appellees.

WILLIAM H. ADAMS, Appellant,
vs.
CITY OF CHICAGO and
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Appeal from the Cook County Court of Common Pleas.

ARGUMENT OF E. ANTHONY.

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Statement of Case.

The above cases were two bills of Chancery and Injunctions commenced against the City of Chicago and William B. H. Gray, collector of special assessments, on the 6th day of November, 1854, enjoining the said defendants from selling certain lots belonging to the complainants, which had been assessed for opening Fenimore street, Halleck street, and Indiana avenue. The allegations in the bills are identical in their character, and recite all of the proceedings of the Common Council, the proceedings of the Commissioners of Estimate and Assessment, the final confirmation of the assessment by the Council, and the order of sale.

The bill alleges various irregularities—prays for an injunction, and that the assessment shall be declared null and void, and be set aside.

The complainants claim that the irregularities set forth make

the whole proceedings null and void, and that if a sale of their lots should take place, it would be a *cloud* upon their title.

The complainants never made any objections whatever to the proceedings of the Common Council from beginning to end, or to any of the proceedings on the part of the commissioners who levied the assessment, and did not oppose the *final confirmation* of the assessment by the Common Council—took no appeal to the Circuit Court or Cook County Court of Common Pleas, as they might have done, and as is especially provided for in sec. 17, p. 36, of Municipal Laws, providing for opening streets—but wait until all of the proceedings have been gone through with; until a warrant has been issued for the *collection* of the assessment, and finally, until an order had been passed authorizing and directing the sale of all lots upon which the assessment had been levied, and upon which the assessment remained uncollected; and then, on the morning of the sale by the collector, Gray, obtain an Injunction, and stop all of the proceedings, and ask that the whole amount and proceedings be set aside,

The complainants appeal to equity powers of the court for relief, and the principal question in the case is, whether the complainants are entitled to this species of relief at all or not. If that question shall be determined against them, it will be wholly unnecessary to examine the particular points of illegality and irregularity pointed out by the complainants in their bills.

I contend—

I.

That the Court of Chancery has no jurisdiction over the proceedings of a municipal corporation in the laying out and widening of streets for the purpose of reviewing or setting them aside. Such jurisdiction appertains exclusively to the law side of the court, and the only remedy which a party has is at law.

The Mayor of Brooklyn v. Meserole, 26 Wend., 130.
Patterson v. the Mayor of N. Y., 1 Paige, 113.
Wiggin v. " " 9 " 16.
Whiting v. " " 1 " 548.

2 Md Ch Decisions 78 6 Gill 391
5 Mich 341 2 California 590
5 Gill 384 19 Georgia 471

Bouton v. the City of Brooklyn, 15 Barb., 375, 389.
Le Roy v. the Corp. of N. Y., 4 Johns Ch., 352.
Merril v. the Mayor of Brooklyn, 3 Edw'd Ch., 421.
Mooers v. Smedley, 6 Johns Ch., 27.
Murray v. Graham, 6 Paige Ch., 622.
Champlin v. Mayor of N. Y., 3 Paige, 573.
Weldby v. Washburne, 16 Johns., 50.
Hartwell v. Armstrong, 19 Barb., 166.
Bruce v. Delaware and Hud. Can. Co., 19 Barb., 371.
Heywood v. the City of Buffalo, 4 Kernan, 534.
Van Rensselaer v. Kidd, 4 Barb., 17.
Matter of Mayor of N. Y., 6 Cowen, 571.
Fleetwood v. City of N. Y., 2 Sandf., 479.
Livingston v. Hollenback, 4 Barb., S. C., 16.
Atkins v. Brewer, 5 Cowen, 206.
Horton v. Auchmoody, 7 Wend., 200.
Parker v. Walrod, 16 Wend., 574.
Stafford v. Mayor of Albany, 6 Johns., 4.
" " " 7 " 542.
Matter of Canal Street, 11 Wend., 154.
Le Roy v. Mayor, &c., of N. Y., 20 Johns., 430.
In the Matter of Mount Morris Square, 2 Hill, 15-27.
People v. Mayor of N. Y., 2 Hill, 9.
Meserole v. the Mayor of Brooklyn, 8 Paige, 198.
Merrill v. Mayor, &c., of Brooklyn, 3 Edw'd Ch., 421
Champlin v. Mayor of N. Y., Paige, 573.
Haight v. Day, 1 Johns. Ch., 18.
Tompkins v. Sands, 8 Wend., 462.
Atkins v. Brewer, 5 Cowen, 206.
People v. Supervisors of St. Lawrence, 5 Cowen, 292.
Matter of Pearl Street, 19 Wend., 649.
" *William v. Anthony St.*, 19 Wend., 693.
Van Doren v. Mayor of N. Y., 9 Paige, 387.
Heywood v. City of Buffalo, 4 *Kernan*, 534, (14 N.Y.)
Note this case particularly.

Note Bene - 4 E. D. Smith Rep. 193,
" 30 Penn 231

Chancery has no authority to review, alter, or modify, or annul the proceedings of the defendants in opening, regulating and paving streets, where they act within the scope of the powers conferred on

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them by statute. It is only where they attempt to proceed illegally, contrary to law, and where their acts will be attended with *irreparable injury*, or tend to dispossess the owner of his property, or to pull down his dwelling house, that this court will interfere by injunction. This is not such a case. It is not pretended that the defendants were not authorized by law to regrade, and regulate, and pave the street in question. The objection is, that the complainants ought not to be assessed for the expense—that it is unjust and oppressive on them to be compelled to pay. But with this objection the Court of Chancery has no jurisdiction. It was for the common council of Brooklyn to determine this question, and, if they decided erroneously, or if the proceeding was voidable for irregularity, the parties have their redress by *certiorari* to the Supreme Court. It is not pretended in this bill that the proceeding was unauthorized, or such as the defendants had no right to set on foot, and therefore illegal and void. Hence this court has no jurisdiction.

Merrill et. al., vs. *Mayor &c., of Brooklyn*, 3 Edwards Ch., 421.
Mayor of Brooklyn v. Meserole, 26 Wend., 132.

The Court of Chancery is not authorized to interfere to correct an erroneous assessment which has been duly confirmed, where the commissioners have merely erred in judgment as to the value of the contemplated improvement to the owner of the lands assessed, although the amount so assessed for the supposed benefit is more than the lands will be actually worth after the contemplated improvement has been made.

Meserole v. Mayor &c., of Brooklyn, 8 Paige, 198.

The complainants allege in their bill, as one peculiar reason why Chancery should interfere to prevent a sale of their lots under the assessment levied, that (although the whole proceedings are illegal and void) it will cast a *cloud* over their title.

Cloud. That can never be considered a *legal cloud* which cannot for a moment obstruct the unaided rays of legal science when they are brought to bear upon the supposed obscurity. But when the claim of the adverse party to the land is valid upon the base of the instru-

ment, or the proceedings sought to be set aside, as where the defendant has procured and put upon record a deed obtained from the complainant by fraud, or upon a usurious consideration, which requires the establishment of extrinsic facts to show the supposed conveyance to be inoperative and void, a court of equity may interfere and set it aside as a cloud upon the real title to the land. *Simpson* v. *Lord Hawden*, 3 My. & Craig's Rep., 97. It was the overlooking of that distinction in the hurry of business, though I had recognized and acted upon it in other cases, which led me to affirm the decision of the vice chancellor in the case of *Meresole* v. *The Mayor and Common Council of Brooklyn*, (8 Paige's Rep., 199.) But my decision in that case was properly reversed by the court for the correction of error, at its last term, in December, 1841; although the chief justice, who delivered the opinion of that court, concurred with me in the conclusion that the proceedings of the corporation of Brooklyn were illegal and void.

The same difficulty exists in relation to the objections that the ayes and noes were not called and published upon the resolutions to make the improvements and to confirm those assessments which were confirmed by the common council, and that the resolutions and ordinances were not duly signed by the mayor, and to various other objections which are made to the legal validity of the assessments. All these objections, if valid, appear upon the face of the proceedings through which the corporation must justify the enforcement of the tax by execution, and through which the purchasers at sales of the lands of these complainants, for the assessments, must necessarily make title. If the complainants are right, therefore, in supposing the proceedings void on all or any of these grounds, upon which I express no opinion, there is no *cloud* upon their titles. And as their remedy at law is perfect, by an action of trespass, if their property is seized upon a distress warrant for the assessments, and as they have a perfect defense at law to any suit brought against them by purchasers, at the sales which have been made or may hereafter be made, if the proceedings are void this court has no jurisdiction to interfere for their relief. On the other hand, if the proceedings are not void, but merely voidable or irregular, the remedy of the complainants clearly is not in this court, which has no superintending jurisdiction over the regularity of the proceedings of the corporation of New York in these cases. Indeed, as I understand the prevailing opinion in the court for the correction of errors in the case of *Meserole* v. *The Mayor & Common Council of Brooklyn*, that court repudiated the idea that the

Court of Chancery had any power or right to interfere in such cases, in relation to any supposed error or irregularity in the assessment or in the proceedings of the corporation, or of the commissioners of estimate and assessment. And this court will not again subject itself to the rebuke of that tribunal by interfering in any cases of this kind, except where it is absolutely necessary for the preservation of the complainant's rights.

Van Doren v. *Mayor and Com. Coun. N. Y.*, 19 Paige, 389.
Van Renssaelaer v. *Ridd*, 4 Barb., 17.
Livingston v. *Hollenback*, 4 Barb., 9.
Morris v. *Smedley*, 6 Johns. Ch., 28.

The assessment of which the plaintiffs complain is not yet a lien on their lands or a *cloud on their title*, but their allegation is that the defendant's proceedings will or may finally terminate in such a result.

They apprehend that in attempting to enforce collection of the amount assessed, the defendants will make sales and execute conveyances which will be apparently valid, and yet, as they say, really void, for the illegal proceedings of the defendants and the invalidity of the assessment itself. The relief sought by the present suit, is a perpetual injunction against any proceeding to collect the assessment in question of any property of the plaintiffs.

This injunction must be dissolved, for the reason that a court of equity will not assume jurisdiction to review the proceedings of a municipal corporation in prosecuting a local improvement, or in assessing or collecting the means to complete it, if there be no other reason for invoking the interposition of the court, than the alleged illegality or invalidity of the proceedings.

A court of equity has no supervisory power over such proceedings of public officers or jurisdiction, and ought not to interpose by injunction to restrain their action merely upon an allegation that their proceedings are illegal or invalid. The common law writ of *certiorari* is the proper remedy in such cases, and unless the acts of the corporation which are done or threatened in the prosecution of the work or the like, are alleged to be productive of peculiar or *irreparable* injury to the lands of the plaintiffs, or can be shown to lead to a multiplicity of suits, we ought not to extend our equitable jurisdiction to assume control of the proceedings or examine their

regularity. *The case of The Mayor of Brooklyn against Meserole*, 26 Wend., 132, was decided in the court of errors, explicitly and emphatically upon this ground, and the Chancellor's order was reversed, because the case was not within any recognized head of equity jurisdiction.

The case of *Oakley* v. *The Trustees of Williamsburg*, 6 Paige, 362, was decided before the case of *Meserole* v. *The Mayor of Brooklyn*, and may, perhaps, also be distinguished as to its facts, both from that case and the present, by the allegation in the bill in the Williamsburg case, that the grading which the defendants were proceeding to do, would, if completed, work material injury to the complainant's lands. In *Van Doren* v. *The Mayor New York*, 9 Paige, 388, the Chancellor followed the rule given by the court of errors, though, as it seems to me, hardly recognizing the entire scope of their decisions. In the recent case of *Bouton* v. *The City of Brooklyn*, 15 Barb., 375, the principle, as I have stated it, is laid down, and acted upon in this court, both by Mr. Justice Story, at special term, and by Mr. Justice Brown, in delivering the opinion of the court, at general term, although I admit that latter opinion lays much stress upon other considerations. The reasoning of the cases to which I have referred, furnishes to my mind satisfactory reasons for refusing injunction in the class of cases to which the present action belongs —reasons which cannot be overcome by the hardships of particular cases. Nor am I loth to see any wholesome restriction upon the growing inclination to extend the use or I might say the abuse of this peculiar and extraordinary remedy of courts of equity. Of course I need not advert to the fact that, notwithstanding the blending of common law and equitable jurisdiction or proceeding, is apparently valid, though really defective, that the chief justice speaks, in his opinion, in the court of errors, in the *Mayor of Brooklyn* v. *Meserole*. If this element had not been found in that case, the suit must have been dismissed at once for that reason, and without adverting to the public character of the proceedings complained of.

Mace, et al. v. *The Trustees of the village of Newburg*, 15, Howard's Prac. Rep., 161.

Where the proceedings of the common council of New York, in relation to the opening of a street, are void in law, and such nullity appears upon the face of the proceedings themselves, a sale of the

complainant's property under such proceedings, will not cast such a cloud upon his title as to authorize the Court of Chancery to interfere by injunction to stay the sale. A proceeding which, upon its face, is not only illegal, but absolutely void, does not constitute a cloud upon real estate, against which a court of equity will relieve. *Wiggins* v. *The Mayor of New York* 9 Paige, 16.

In the case of Le Roy v. Corporation of N. Y., 4 Johns., 356, the court say:

"It is contended by the bill that the owners and occupiers of all the lots from whence, by the permanent regulation of the corporation, the waste water is carried off into Canal street, are, and were originally intended to be benefitted by the sewer, and that they ought to bear a rateable portion of its expense. There may be an error of judgment upon this point, both in the persons who made the estimate and assessment, and in the common council who heard the objections of the plaintiffs, and yet ratify the assessment; but the greater difficulty with me is as to the question of jurisdiction. I cannot find that the court interferes in cases of this kind, where the act complained of was done fairly and impartially, according to the best judgment and discretion of the assessors; and a precedent once set would become very embarrassing and extensive in its consequences. If the power under this statute had been exercised in bad faith, and against conscience, I might have attempted to control it; but a mere mistake of judgment, in a case depending so much upon sound discretion, cannot properly be brought into review, under the ordinary powers of this court. There must have been a thousand occasions and opportunities for the exercise of such an appellate jurisdiction, in the history of the jurisprudence and practice of the English Court of Chancery, if such a jurisdiction existed, and yet we find no precedents to direct us. A mistake of judgment in the assessors, upon the matter of fact, what portion or district of the city was intended to be, and actually was, benefitted by the common sewer, can hardly be brought within the reach of that head of equity jurisdiction which relates to breaches of trust. Here is not, strictly speaking, a violation of duty. No bad faith or partiality in the assessors is pretended. The aid of this court might as well be asked to review every assessment of a land tax or poor rate. I apprehend it would require a special statute to authorize Chancery to interfere

with these assessments. Instances are numerous in the English law in which jurisdiction is given to the Chancellor under local or private acts; and the cases imply that a statute was requisite to give the jurisdiction."

In the case of Mooers v. Smedley, 6 Johns., 30, which was a bill filed to restrain one Smedley, a town collector, from collecting an erroneous tax on wolves' scalps, levied by the board of supervisors, Chancellor Kent says: "I cannot find, by any statute, or precedent, or practice, that it belongs to the jurisdiction of Chancery, as a court of equity, to review or control the determination of the supervisors, on their examination and allowance of accounts, as chargeable against their county, or any of its towns, and in causing the moneys so allowed, to be raised and levied. There was no allegation of fraud or corruption in the case. The most that could be said was, that they made an erroneous determination. The act which has been cited (Laws of N. Y., vol. 2, p. 137,) gave the supervisors authority to examine, settle, and allow all accounts chargeable against the county, and to ascertain each town's proportion, and to add such further sum as any town should have voted to be raised for the destruction of noxious animals, and to cause all such sums to be levied. This power implied and required the exercise of sound judgment; and the review and correction of all errors, mistakes, and abuses in the exercise of the powers of subordinate public jurisdictions, and in the official acts of public officers, belongs to the Supreme Court. In *my opinion it belongs exclusively* to that court. It has always been a matter of legal and never a matter of equitable cognizance. This is not the case of a private trust, but the official act of a political body; and in the whole history of the English Court of Chancery there is no instance of the assertion of such a jurisdiction as is now contended for.

"The superintending control, in these cases, has always been exercised in the court of K. B., and nowhere else, and that court has proceeded by certiorari mandamus, prohibition, information, &c."

Sec. 17, page 36, of Municipal Laws of the City of Chicago, provides that "any person interested may appeal from any final order of

the Common Council, for opening or widening any street, alley, public ground or highway, to any Court of Record in Cook county, by notice in writing to the Mayor or Clerk, at any time before the expiration of thirty days after the passage of such final order. In case of appeal, the Common Council shall make a return within thirty days after notice thereof, and the court shall, at the next term after, return, filed in the office of the clerk thereof, hear and determine such appeal, and confirm or annul the proceedings, from which judgment no appeal or writ of error shall lie."

15 Pick, 243–254.

Where a party who is improperly assessed for the opening of a street in the city of New York has an adequate remedy at law against such assessment by *opposing the confirmation* of the report of the commissioners, if he neglects to avail himself of such remedy, the Court of Chancery has no jurisdiction to grant him relief.

Errors of the commissioners of estimate and assessment upon the opening of streets in the city of New York, cannot be corrected by a collateral suit in Chancery, except in cases where no adequate relief could be had in the mode pointed out and prescribed by the statute.

Murray v. Graham, 6 Paige, 622.

Upon a bill to enjoin the defendants from collecting a tax imposed by the street commissioners of the city of Baltimore, upon the property of the complainants for widening a street, the acts of Assembly and ordinances of the city having given the right of appeal, to all persons considering themselves thereby aggrieved, from the decisions of the commissioners to Baltimore City Court, which remedy the complainants failed to take, it was held that the Court of Chancery had no jurisdiction, and the injunction was dissolved.

Methodist Prot. Ch. v. the Mayor and City Coun. of Baltimore, 2 Md. Ch. Decis., 78.

Where land has been taken by the corporation of the city of New York for the purpose of opening a street, and the report of the commis-

sioners of estimate and assessment has *been confirmed* by the Supreme Court, the Court of Chancery has no jurisdiction to restrain the corporation from opening the street, unless the proceedings are void, or there has been fraud or corruption on the part of the corporation.

An injunction to restrain the corporation from opening the street will not be granted, unless it is shown by the complainant's bill that the proceedings are void, or that there is some particular act of fraud or prima facie evidence of corruption on the part of the corporation distinctly stated in the bill, and positively sworn to by the complainant.

Champlin v. Mayor of N. Y., 3 Paige, 573.

In deciding this case Chancellor Walworth says, "The only possible ground upon which the jurisdiction of this court could be sustained, is, that the individual members of the corporation who voted for this improvement have not exercised their honest judgment as to the necessity or expediency of the measure as a public improvement, but that they have been corrupted, and have violated their duty and their oaths of office, to benefit some individuals at the expense of others. Whenever such a case as that is shown by the pleadings and sustained by competent proof, I will not say that this court has not jurisdiction to interfere and protect the rights of an individual whose property is attempted to be taken from him by such a fraudulent and corrupt proceeding. But it would certainly be both unwise and inexpedient for this court to stop the proceedings of a body whose powers and duties are more important to the public than those of the Legislatures of some of our sister States, merely upon the suspicion, or even upon the honest belief, of a party who is interested in opposing the proceedings of the common council."

"To authorize the issuing of a preliminary injunction in such a case, the complainants should be able to point to some particular *act of fraud* or prima facie evidence of corruption on the part of the members of the corporation who voted for the ordinance."

Champlin v. Corp. of N. Y., 3 Paige, 575.

2. If there was any error it was a proper ground for opposing the confirmation of the report of the commissioners, and cannot be reviewed

in this collateral manner. The parties having had their day in court, and having utterly neglected to interpose any objections, they are absolutely estopped. "He that is silent when conscience requires him to speak, shall not be heard to speak when conscience requires him to be silent."

In re of extending Canal and widening Walker sts., 2 Kernan, 406.
In the matter of N. Y. Cent. R. R. Co. v. Marvin, 1 Kernan, 276.
Wiggin v. the Mayor of N. Y., 9 Paige, 16.
Murray v. Graham, 6 Paige, 625.
Champlin v. the Mayor of N. Y., 3 Paige, 573.
Le Roy v. the Mayor of N. Y., 20 Johns., 429.
The People v. Lawson, 17 Johns., 279.
Corp. of N. Y. v. Mapes, 2 Johns. Ch., 49.
Matter of application of the Mayor, &c., relative to Third street, 6 Cowen, 571.
Hawkins v. Trustees of Rochester, 1 Wend., 53.
The People v. Brooklyn, 1 Wend., 318.
Matter of Canal street, 11 Wend., 154.

15 Pick., 243–254.

3. *Certiorari.* An injunction ought not to be granted, to prevent a municipal corporation from enforcing an assessment for a public improvement. The appropriate remedy of a person whose property is taken for the use of the public is, to remove the proceedings into the Supreme Court by *certiorari*.

Betts v. the City of Williamsburg, 15 Barb., 255.
Heywood v. the City of Buffalo, 4 Kernan, 534. See this case particularly.
Patchin v. Brooklyn, 2 Wend., 377.
Benton v. Brooklyn, 2 Wend., 395.

In Le Roy v. Mayor of N.Y. 20 Johns., 437, Judge Woodworth said, "The general superintending power of the court to award a *certiorari*, not only to inferior courts, but to persons invested by the Legislature

with power to decide on the property or rights of the citizen, even in cases where they are authorized by statute finally to hear and determine, has been frequently exercised, is considered as well established by the *common law*, and can only be taken away by express words.

Patchin v. *the Mayor &c., of Brooklyn*, 13 Wend., 664.
Allyn v. *Commissioners of Highways, etc.*, 19 Wend.. 342.

At common law all final adjudications are examinable upon either a writ of error, a false judgment, or a certiorari. Writs of error lie to correct errors in the judgments of a court of record: writs of false judgment to amend errors in a court not of record, but which proceeds according to the course of the common law: a *certiorari* lies upon all final adjudications of an inferior court or officer, invested by the Legislature with power to decide on the property or rights of the citizen, and which court or officer acts in a *summary* way, or in a new course different from the common law.

Tidd's Pr., 1051, 1138. Coke Lit., 288, C. 2 Salk., 504. 1 Salk., 144–146. 3 Black. Com., 32 to 44. 2 Caine's Rept., 182. 20 Johns., 80.

The writ of *false judgment* is not applicable here, as we have in this State none of those inferior courts not of record existing in England, which proceed according to the course of the common law.

In this State, the judgments of all inferior courts of record, proceeding according to the course of the common law, are subject to review in the Supreme Court upon a writ of error; and all final adjudications of inferior courts not of record, and of persons invested with power to decide on the property or rights of the citizen who act in a summary way, or in a new course, different from the common law, are examinable by the Supreme Court upon a common law certiorari.

Stone v. Mayor and Aldermen of N. Y., 25 Wend., 158. Opinion by Page.

Chancellor Kent, in the case of *Le Roy* v. *Corporation of N. Y.*, 4 Johns., 356, says "that whenever the rights of an individual are infring-

ed by the acts of persons clothed with authority to act, and who exercise that jurisdiction illegally and to the injury of an individual, the person injured may have redress by certiorari." The same general jurisdiction of that court has been asserted and declared in other cases. *Kinderhook* v. *Claw*, 15 Johns., 538; *Lawton* v. *Cambridge*, 2 Caines, 179, and seems to be supported by the powers acknowledged to belong to the court of K. B.

A certiorari lies (1 Salk., 145 Holt Ch. J., in L. Royal, 469,) to that court to correct a mistake made by commissioners of sewers, and through the K. B. in the *King* v. *King* and others, (12 Term Rep., 234,) refused that writ to remove the assessment of the land tax, they placed the refusal on the ground of the great public inconvenience of the step, and for the same reason they have refused it in the case of a poor-rate. It is sufficient, upon the present motion to say, that the remedy, if any, is at law, and that it does not fall within the ordinary jurisdiction of this court.

Le Roy v. *Corporation of N. Y.*, 4 Johns. Ch. Rep., 356.

Common Law Certiorari. A certiorari is defined in Bacon's Abridgment, to be an original writ issuing out of chancery or the king's bench, directed in the king's name, to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him or such other justices as he shall assign to determine the cause. Bacon's Abridgment, vol. 2, page 162.

The courts of chancery and king's bench may award a certiorari to remove the proceedings from any inferior court, whether they be of an ancient or newly created jurisdiction, unless the statute or charter which creates them, exempts them from such jurisdiction. *Ibid.* 167.

Certiorari may therefore issue to justices in eyre, or of jail delivery or of a county palatine, and to the college of physicians having a special power by statute to impose fines, &c., and to justices of the peace, &c., even in those cases which they are empowered by statute finally to hear and determine, and to commissioners of sewers. *Ibid.*

The office of a writ of certiorari is to remove or bring up from an inferior jurisdiction, a matter of record, or something in the nature of a record. When it is brought up the court does not look into the merits of the case, but merely whether it appears on the face of the proceed-

ings that the inferior tribunal has exceeded its jurisdiction. They do not interfere with the exercise of any power within the acknowledged jurisdiction of the inferior court, but like the proceedings in writs of error, the errors in law only are reviewed.

Tidd's Practice, 397, Note "A."
Scott v. *Beatty*, 3 Zab., N. J., 201.
Starr v. *Trustees of Rochester*, 6 Wend., 564.
Independence v. *Pompton*, 4 Halst., 209.
Ex Parte Haywood, 10 Pick., 358.
Le Roy v. *The Mayor*, 20 Johns., 430.
Parks v. *Boston*, 8 Pick., 226.
Wildy v. *Washburn*, 16 Johns., 50.
State v. *Senft.*, 2 Hill, 369.
Baldwin v. *Simmons*, 4 Halst., 196.
Wood v. *Tallman*, Coxe, 153.
Ex Parte Nightengale, 11 Pick., 168.
Williamson v. *Carnan*, 1 Gill. & Johns., 196.
Clark v. *Vanlien*, 6 Halst., 78.
Farley v. *McIntire*, 1 Green. 190.
Graecen v. *Allen*, 2 " 74.
Andrews v. *Andrews*, 2 " 141.
Wildy v. *Washburn*, 16 Johns., 50.
2 Caines, 179.
2 Term Rep. 89.
The People v. *The Mayor, &c.*, 2 Hill 9.
In the matter of Mount Morris Square, 2 Hill, 14.
Birdsall v. *Phillips*, 17 Wend., 464.
Prindle v. *Anderson*, 19 " 391.
Simpson v. *Rhinelander*, 20 " 103.
Johnson v. *Moss*, 20 " 145.
Ex parte Mayor of Albany, 23 Wend., 277.
Bouton v. *President of Brooklyn*, 2 Wend., 396.
The Mayor of Brooklyn v. *Meserole*, 26 Wend., 139.
Anderson v. *Prindle*, 23 " 616.
Ex parte Mayor of Albany, 23 " 277.
Matter of Carlton street, 20 " 685.
Stone v. *The Mayor of N. Y.* 25 Wend., 157.
Heywood v. *City of Buffalo*, 4 Kernan. 534. (14 *N. Y.*)
Bradner v. *The superintendents of the poor of the county of Orange*, 9 Wend., 433.

Commissioners of Highways of Warwick v. *The Judges of Orange*, 9 Wend., 434.
Roach v. *Cosine*, 9 Wend., 227.
People ex rel Snow v. *Cayuga*, 10 Wend., 632.
Stryker v. *Kelly*, 7 Hill, 20.
Stryker v. *Mayor of N. Y.*, 19 Johns., 178-9.
Stafford v. *The Mayor of Albany*, 7 Johns.. 541.
Livingston v. *Mayor of N. Y.*, 8 Wend., 85.
Brooklyn v. *Patchin*, 8 Wend., 47.
The People ex rel. Onderdonk v. *Supervisors of Queen Co.* 1 Hill, 195.
The People ex rel. Woodward v. *Covert et al.*, 1 Hill, 674.
Patchin v. *The Trustees of Brooklyn*, 2 Wend., 377.
" v. *The Mayor* " " 13 Wend., 664.
Bogert v. *The Mayor of N. Y.*, 7 Cowen, 158.
Stone v. *Mayor and Aldermen of N. Y.*, 25 Wend., 165.
Dwight v. *City Council of Springfield*, 4 Gray, 107.
Moore v. *Smock*, 6 Ind., 392.
State v. *Vandevere*, 1 Dutch., N. J., 233, 669.
Baldwin v. *Calkins*, 10 Wend., 169.

Certiorari, and not a writ of error, is the proper process to remove the proceedings of the court of sessions, county commissioners, &c., in laying out highways, and other proceedings respecting highways and turnpike roads, and especially proceedings in assessment cases for opening, widening and grading streets in cities.

Commonwealth v. *Combs.*, 2 Mass., 489.
" v. *Chase*, 2 " 170.
" v. *Hall*, 8 Pick., 440.
" v. *Peters*, 3 Mass, 229.
" v. *West Boston Bridge*, 13 Pick., 195.
" v. *Cambridge*, 7 Mass., 158.
" v. " 4 " 627.
White's Case, 2 *Overt*, 109.
Lawton v. *Commissioners*, 2 Caines, 179.
Matter of Highway, 2 Penn., 1038.
Burrows v. *Vandevier*, 3 Harn., 383.

Adams v. *Newfane*, 8 Verm., 271.
Commonwealth v. *Ellis*, 11 Mass., 462.
Spring v. *Lowell*, 6 Mass., 399.
Fonda v. *Canal Appraisers*, 1 Wend., 288.
Brooklyn v. *Patchin*, 8 Wend., 47.
Parks v. *City of Boston*, 8 Pick., 218.
Patchin v. *Brooklyn*, 2 Wend., 377.
Benton v. " 2 " 395.
Prosser v. *Secor*, 4 Barb., 608.
Vail v. *Owen*, 19 " 22.
Brown v. *Smith*, 24 " 419.
Hill & Aldrich v. *The Mohawk & Hudson R. R. Co.*, 3 Selden 152.
Matter of Third street, 6 Cowen, 571.
Huggins v. *King*, 3 Barb., 616.

The supreme court of this State in the case of *The People ex rel. Loomis* v. *Wilkinson*, 13 Ill., 663, (Judge Caton, delivering the opinion of the court,) say :

"We hold, then, that the circuit courts have power to award a writ "of certiorari at common law, to all inferior tribunals and jurisdictions, "wherever it is shown, either that they have exceeded the limits of their "jurisdiction, or in cases where they have proceeded illegally, and no "appeal is allowed, and no other mode of directly reviewing their pro- "ceedings is provided."

See also *Doolittle* v. *Galena and Chicago Union R. R. Co.*, 14 Ill., 383.

Wherever the rights of an individual are infringed by the acts of the persons clothed with authority to act, and who exercise that authority illegally and to the injury of an individual, the party injured may have redress by certiorari.

Wildy v. *Spencer*, 16 Johns., 49 ; *Commissioners of Kinderhook* v. *Caw et al.* 15 Johns., 537.

In general, a common law certiorari will not be granted where a right of appeal exists.

Wood et al. v. *Randall*, 5 Hill, 264.

On certiorari from the final adjudication of an inferior tribunal, this court simply affirm or reverse, leaving the parties in the latter case to begin de noro. *Luff* v. *Pope*, 5 Hill, 413.

"The office of a common law certiorari is to bring up for review the proceedings of subordinate tribunals; that this court may see that such tribunals keep within the limits of their acknowledged jurisdiction. Since the decision of *Birdsall* v. *Phillips*, (17 Wend., 464,) the court has been accustomed, in examining the return to these writs, to confine its decisions to mere *jurisdictional facts*, although in respect to proceedings between landlord and tenant, and under the insolvent acts, and other cases where the statute gives the writ, it has been since repeatedly held that the return properly brings up for review the subsequent legal decisions and the final adjudication. Such is now jthe settled law, by the decision of the court of appeals in *Morewood* v. *Hollister*, (2 Seld., 309.) To exercise a supervisory power over the proceedings of all inferior magistrates and tribunals, to restrain them from the exercise of authority not conferred by law, and to reverse their proceedings when their jurisdiction has been transcended, is one of the most important duties of this court. The power to review the proceedings of municipal corporations in this court is undoubted. (20 Johns., 430; 2 Wend., 395, 230, 277.) How far and in what cases the court will exercise this power, are questions addressed to its sound judicial discretion. The writ is not one of right, like the writ of error at common law, but should always be, and generally is, allowed for good cause, and granted with great care and circumspection. While I maintain the power to issue the writ to review all jurisdictional facts where private rights are to be affected and burdens imposed by the corporate act complained of, I agree with Judge Cowen, in 2 Hill. 28, in the matter of Mount Morris Square, that, in general we ought not to allow the writ when assessments of taxes or awards of damages are in question which affect any considerable number of persons. If there be a want of jurisdiction even in the

judicial act sought to be reviewed, or in other words, if there be excess of legal power by which any person's rights may be injuriously affected, an action lies; and it is much better that he should be put to this remedy than that the whole proceedings should be arrested and perhaps finally reversed, for such a cause. In the case of *The People* v. *Supervisors of Alleghany*, 15 Wend, 198, the certiorari was quashed upon a very able opinion of Judge Bronson, showing that the writ ought not to be issued to review the acts and proceedings of a board of supervisors in levying taxes. That it was not a writ *ex debito justitia;* that it ought not to issue without good cause shown, and that great public detriment or inconvenience might result from interfering with the proceedings of special bodies like supervisors, commissioners of highways, and the like, considerations which should always be taken into account by the court in allowing these writs. In *The People* v. *The Mayor of N. Y.*, (2 Hill 11,) the same learned judge says: 'If it were not for a few modern cases, I should be of opinion that we have no authority to supervise in this way, the acts, ordinances and proceedings of the corporation of New York, or indeed of any other corporation, public or private.' In the same case the same judge says: 'The allowance of the writ rests in the sound discretion of the court, and it has been often denied, when the power to issue it was unquestionable, and where there was apparent error in the proceedings to be reviewed; and if it has been improperly awarded, it is not too late to correct the error after a return and hearing on the merits. (15 Wend., 198; 1 Hill, 195, 200.)

In accordance with these views, I should be inclined to quash or supersede the writ in this case, without examining the merits. Certain I am that the writ should not issue to a municipal corporation, as in this case, without notice and without a full opportunity for the respondents to show cause against it, and bring to the consideration of the court, such facts as may exist in each case calculated and proper to influence its discretion in allowing the writ."

The People v. *City of Rochester*, 21 Barb., 665; *Stone* v. *Mayor, &c., of N. Y.*, 25 Wend., 167. (See this case particularly.) *The People, ex rel. Dan Marvin et al.* v. *The City of Brooklyn*, &c., 23 Barb., 166; *The People* v. *City of Brooklyn*, 23 Barb., 180; *Conover* v. *Devlin*, 24 Barb., 636; *Starr* v. *The Trustees of Rochester*, 6 Wend., 565. In the case of *The People* v. *The Mayor of N. Y.*, 5 Barb., 45, which was a case similar to this, brought up on certiorari, Judge Strong says: "There can be no doubt that a certiorari will lie to

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review the *judicial* acts of municipal corporations. That was admitted in the case of Mount Morris Square, 2 Hill, 14, and is in conformity with the decisions of the late supreme court in several antecedent cases. The authorities are equally clear that if the act complained of is simply *ministerial*, it cannot ordinarily be reviewed on certiorari. Such was the ordinance of the common council for the construction of the sewer in question. That was a simple exercise of ministerial, or, if I may use the expression, legislative power. That, if authorized by their charter, which it clearly was, resolved itself into a question of expediency, solely for their consideration, and which cannot be reviewed here. But although the ordinance itself cannot, I think, be annulled this court, yet it is competent for us, in a proper case, to vacate the estimate and assessment of the common council in affirming those proceedings; as they then acted in a *judicial* capacity. That may be, although they do not constitute an ordinary judicial tribunal. It is sufficient if they are invested by the legislature with power to decide on the property or rights of the citizen.

In making their decision they act *judicially*, whatever may be their ordinary character. The defendants are authorized by statute to *ratify* the estimate and assessment when made and reported to them by the commissioners, and then the same became binding and conclusive upon the owners and occupants of, and constitute a lien upon, the lots upon which the assessments are made. In ratifying these proceedings of the commissioners, the defendants unquestionably act judicially. It is not simply the performance of an act of their own, but it is *reviewing* and deciding upon the conduct of others. The justices of this court, in passing upon the proceedings of the commissioners, in street cases, exercise a similar power; and it has frequently been decided that their acts in such cases may be reviewed on *certiorari*. And if in this case the defendants have committed a mistake in confirming acts not authorized by the statute whereby the rights of the citizen are prejudiced, their error may be corrected by this court."

The People v. *Mayor of N. Y.*, 5 Barb., 45-6; *Elmendorf* v. *The Mayor of N. Y.*, 25 Wend., 693; *Le Roy* v. *The Mayor of N. Y.*, 20 Johns., 430; *Van Renselaer* v. *Witbeck*, 7 Barb., 133; *Van Renselaer* v. *Cottrell*, 7 Barb., 127; *Bouton* v. *The City of Brooklyn*, 15 Barb., 385. *Ex Parte the Mayor of Albany*, 23 Wend., 277. (See this case particularly.)

A common law certiorari is not a writ of right, but may be granted or refused at the discretion of the court. Bofore allowing or acting upon the writ, the court should be satisfied that it is essential to prevent some substantial injury to the applicant; and that the object aimed at by him, would not, if accomplished, be productive of great inconvenience or injustice.

It should seldom, if ever, be allowed, to enable a party to take advantage of mere technical objections.

The People v. *The Mayor of N. Y.*, 5 Barb., 44.
The People v. *Supervisors of Alleghany*, 15 Wend., 198.
2 Hill, 14.
Ex parte Western, 11 Mass., 417.
4 Pick., 25.
The People v. *The City of Rochester*, 21 Barb., 657.,
Rathbun v. *Sawyer*, 15 Wend, 451.
The People v. *The Superv. of the Co. of Alleghany*, 15 Wend., 148.
Birdsall v. *Phillips*, 17 Wend, 464.
In the matter of Livingston st., 18 Wend, 556.

Certiorari. The power of the supreme court to review the proceedings of municipal corporations upon certiorari, is undoubted.

The People v. *The City of Rochester*, 21, Barb. 6., 57.
Le Roy v. *Mayor of N. Y.*, 20 Johns., 320.
2 Wend., 395.