No. 14470

Supreme Court of Illinois

Heatherwick

vs.

Heatherwick

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 114

Heatherwick

vs

Heatherwick

1863

14470

1 The People of the State of Illinois
By the Grace of God, Free and Independant
To all whom these presents
may come, Greeting;
Know Ye that we having
caused to be inspected the Records and
proceedings now remaining in the Office
of our Clerk of Our County Court in and
for our County of Grundy do find therein
certain papers and Records in the words
and figures following, That is to Say
Be it remembered that on the
25th day of April in the year of our Lord one
thousand Eight hundred and Sixty one come
Newport and Grant and filed a pracipe
in the words and figures following to wit;

State of Illinois } Grundy County Court
Grundy County } ss June Term AD 1861

James Heatherwick
vs Bill for Divorce
Margaret Heatherwick

Clerk will please issue
Chancery Summons in the above case returnable
according to law directed to Sheff of said County
& much oblige Yours Newport & Grant
Compltt Sols

To P A Armstrong
Morris April 25 1861

2 and afterwards on the same day last before mentioned the Clerk of our said Court issued a Summons in the words and figures following to wit;

State of Illinois }
Grundy County } ss

The People of the State of Illinois to the Sheriff of said County Greeting;

We command you that you summon Margaret Heatherwick if she shall be found in your County personally to be and appear before the County Court of said County on the first day of the next Term thereof, to be holden at the Court House in Morris in said Grundy County on the first Monday of June next to answer unto James Heatherwick in his certain bill of complaint for Divorce filed in the said Court on the Chancery Side thereof,

and have you then and there this Writ, with an Endorsement thereon in what manner you shall have executed the same.

Witness P A Armstrong Clerk of our said Court and the Seal thereof, at Morris this 25th day of April A D 1861

Perry A Armstrong
Clerk

SS

And on the back of the same are now the words

and figures following to-wit;

Chancery Summons Co County Court

In the matter of James Heatherwick

vs

Margaret Heatherwick

Summons June Term 1861

State of Illinois } ss
Grundy County } Margaret Heatherwick
not found in my County May 24th 1861

S Tupper Sheriff

Fees — Service — Mileage — Return 10

Filed in the County Court this 24th day of
May 1861 P A Armstrong Clerk

Newport & Grant Attorney.

And afterwards to-wit; on the 25th day of April 1861 there was filed by said Newport & Grant in the Office of the Clerk of said Court a Bill for Divorce in the words and figures following to-wit;

State of Illinois } Grundy County Court
Grundy County } ss To the June Term A D 1861

James Heatherwick
vs } Bill for Divorce
Margaret Heatherwick

To the Hon Colquhoun Grant
Judge of the County Court within and for

4 Said County in the State aforesaid in Chancery Sitting

Humbly Complaining Sheweth unto your Honor your Orator James Heatherwick of said County and State that on the 10th of December year of 1851 in the City of Palos in the County of Cook in the State of Illinois your Orator and one Margaret McMonniger then a Widow whom your Orators prays made be made defendant to this his bill of Complaint were lawfully joined in wedlock by a certain Catholic Priest named Dennis Rogan That your Orator and the said Defendant, his wife, lived and Cohabited together as man & wife from the time of her said marriage untill about the last of February AD 1856 your Orator further represents that there have been No Children born as the issue of said Marriage, your Orator further represents unto your Honor that at the time of his said marriage he was the owner and possed of a good farm worth from $1600 to $2000; That said farm was under improvement & situated in Cook County Illinois, That it had upon it a dwellinghouse and out buildings, And your Orator further represents that from the time of his said Marriage with said defendant, he continued to reside with the said defendant his wife untill about the last day of February A D 1856 during which time he provided in abundance all the necessaries of life

5 for his family in a manner suitable to his condition in life. Your Orator further represents that the said defendant had at the time of her said Marriage with him two sons and a Daughter, Children by her former husband whom she took with her into the house of your Orator who continued to support and educate them as his own children untill 1856 aforesaid,

Your Orator further represents unto your Honor that he has always treated the said defendant his wife most affectionately & considerately & in all things performed the duties of a husband so that your Orator well believed that said defendant had no just cause of complaint against him but that on the contrary the said defendant had reason to be thankful for the many comforts of life which your orator provided for her yet notwithstanding the happiness of her lot, disregarding her marital duties and obligations and contrary to the will of your Orator the said defendant about the last of February A D 1856 wilfully deserted and absented herself from your Orator & her home, in the County of Cook and State of Illinois without any reasonable or just cause and still does continue to absent herself without any excuse or pretext whatever. And your orator represents that he hath frequently

sought an interview with said defendant since
her said desertion in order to induce her to
return to him as his wife, yet your orator
hath not been able to find her or discover
her whereabouts nor hath he seen her since
her said desertion and your orator verily
believes that said defendant is not within
the State of Illinois

And your orator further
represents that when said defendant absconded
as aforesaid she together with said children
carried away with her all the household fur=
niture belonging to him, he being absent from
home at the time, as well as a large amount
of other personal property, and sought in various
ways to otherwise deprive your orator of his
property the earnings of his industry, to the
effect that the said defendant caused it
to be represented unto your orator that
she was willing to return to him and
would return to him if your orator
would execute his note for $1000 and secure
the same by Mortgage on his said farm
for the use of the said children of the defendant
and your orator saith that he being
desirous of the return of the defendant
did make and execute his note for $1000 payable
to the order of Louis Bush and Fergus Dixon and

7 secured the same by a Mortgage on his said farm which said Note your orator saith was made for the benefit of the said children of said defendant as your orator supposed and believed in pursuance of the above arrangement and yet after said Note and Mortgage was delivered to said Bush & Dickson defendant did not nor would return to your orator, and your orator represents that when said Note became due he being unable to meet the same his said farm was sold under said Mortgage to one Ward a brotherinlaw of said defendant for the sum of $1144 to satisfy said Note whereby your orator has been defrauded of a large amount of property all of which together with many other wrongs your Orator hath suffered most unjustly.

In consideration whereof, and for so much as your orator can only have adequate relief in a Court of Equity;

To the end therefore that the said Margaret Heatherwick may full true and perfect answer make to all and singular the matters aforesaid and that as fully and particularly as if the same were here repeated and he directly interrogated thereto; may it please your Honor to grant unto your orator a Summons

8 in Chancery to be directed to the said defendant Margaret Heatherwick commanding her at a certain day and under a certain penalty therein named personally to be and appear before this Honorable Court, and then and there full true and perfect answer make as aforesaid; and that in the final hearing of this cause this Honorable Court may decree a Divorce a Vinculo Matrimonii and that the Marriage Contract heretofore existing between your Orator and the said Margaret Heatherwick may be annulled and held for naught; and that your Orator may have such other and further relief as to your Honor may seem meet & proper, and your Orator will ever pray &c

Newport & Grant
Complts Sols

James Heatherwick

State of Illinois
Grundy County } ss James Heatherwick being duly sworn on oath says that the matters and things set forth in the above Bill of Complaint are true to the best of his knowledge recollection and belief

James Heatherwick

Subscribed and sworn to before me this 4th day of April 1861
Thomas Alford
Justice of the Peace

9

On the back of said Bill for divorce appears the following words and figures viz
Filed April 25th 1861 P A Armstrong Clerk

and afterwards on the 25th day of February 1861 the said James Heatherwick by his attorneys aforesaid filed in said Court his affidavit in the words and figures following to-wit

State of Illinois
Grundy County } James Heatherwick being duly sworn saith that he believes Margaret Heatherwick does not reside in the State of Illinois and that she is not now within said State

James Heatherwick

Sworn & Subscribed to before me this 4th day of April 1861
Thomas Alford
Justice of the Peace

And afterwards to wit: on the sixth day of June 1861 it being one of the regular days of the June Term of said Court for said year and the Court being then judicially sitting for the adjudication of business the following among other proceedings were had and entered of Record by said Court in words and figures to-wit

10 State of Illinois }
Grundy County } ss

Pleas Pleadings motions orders Judgments and Decrees had held made ordered taken and entered of Record in and before the Grundy County Court at the regular June Term thereof begun and held at the Court House in the City of Morris on the first Monday of June A D 1861 and being the 3rd day of said month and being on the Chancery Side thereof

Present Colquhoun Grant County Judge
Perry A Armstrong " Clerk
Seneca Tupper Sheriff

James Heatherwick }
vs } Divorce
Margaret Heatherwick }

Now on this 3rd day of the Term this Cause is Continued

and afterwards come Newport & Grant Solts. as aforesaid and file Proof of Publication in the words and figures following to wit:

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State of Illinois }
Grundy County } ss Grundy County Court

June Term AD 1861

James Heatherwick vs Margaret Heatherwick

Bill of Divorce

Affidavit of the non-Residence of Margaret Heatherwick the above named defendant having been filed in the Office of the Clerk of said Court Notice is hereby given to the said Margaret Heatherwick that the said Complainant filed his bill of Complaint in said County Court on the Chancery side thereof on the 25th day of April AD 1861 and that a Summons thereupon issued out of said Court against the said Defendant returnable on the first Monday of June AD 1861. Now unless you the said Margaret Heatherwick shall personally be and appear before the said County Court on the first day of the next Term thereof to be holden at the Court House in Morris in said County on the 1st Monday of June AD 1861 and plead answer or demur to said bill of Complaint the same and the Matters and things therein Contained and stated will be taken as Confessed and a Decree entered against you according to the prayer of said bill

Perry A Armstrong Clerk

Morris May 8. 1861

4t

Newport & Grant Sol's.

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State of Illinois
Grundy County } ss I, Charles E Southard Editor and proprietor of the Grundy County Weekly Herald a Weekly Newspaper of General Circulation in said County do hereby Certify that a Notice a printed Copy of which is hereto annexed was published in said paper four weeks successively, the first insertion having been made on the 8th day of May 1861 in Number 36 of said paper and the last on the 29th of May 1861 in Number 40 of the same

Morris June 4 AD 1861 C E Southard

on the back of which appears the following words and figures To Wit:
Filed Sept 2 1861 P A Armstrong Clk
Newport v Grant Bots

The following are true Copies in words and figures of two affidavits on file among the papers of said Cause Viz:

John Heathenwick of the County of Cook and State of Illinois deposes and says that he is well acquainted with James Heathenwick & Margaret Heathenwick his Wife of the said

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County & State aforesaid and has been very intimately acquainted with both said James & Margaret for some time or ten years, and further deposes & says that the Character of said James is good & that he is a sober industrious man & that the Character of said Margaret is bad & that she left her husband the said James without just Cause or provocation about five years ago on or near the last of March AD 1856 and that the said James & Margaret have not lived together since or has the said James been the said Margaret since she left him, and further that she took with her valuable property, such as bed & beding & many other things & procured from said James the sum of One Thousand Dollars under false pretences which she has appropriated in a manner unknown to me

Subscribed & Sworn to before me this 29th April AD 1861

W A Gooding
Notary Public

John Heatherwick (Seal)

14 William Heatherwick of the County of Cook and State of Illinois being duly sworn on oath deposes and says that he is well acquain=ted with James Heatherwick and has been for over forty years and that he bears a good Character, and also well acquainted with Margaret his wife and has been for over six years and that the general reputation of said Margaret is bad, a very quarelsome ill tempered woman, The said Margaret and James was Married on or about December 10th 1851 and Continued to live together at times, till March 31st 1856 when the said Margaret left his house taking with her bedding, Clothes, and many Other articles leaving said James to take Care of himself and from March 31 1856 - to the present date hereof the said James has not seen said Margaret or does not know of her whereabouts; and I truly believe that the said Margaret married the said James for no other purpose than to obtain his property

Subscribed & Sworn to before me this 16th day of April 1861

W A Goodwin
Notary Public

(Ss)

William Heatherwick (Seal)

15 on the back of Each of the two last affidavits appears the Words and figures following to wit.
Filed Sept 4 1861
T A Armstrong Clk

And afterwards to wit: at the September Term 1861 of said Court and the Court being there Judicially sitting for the adjudication of business the following among other proceedings were had & Entered of Record by said Court in words and figures to wit:

State of Illinois }
Grundy County } ss

Pleas pleadings Motions orders Judgments and Decrees had held made ordered taken and Entered of Record in and before the Grundy County Court at the regular September Term thereof begun and held at the Court House in the City of Morris on the first Monday of September A D 1861 and being the 2nd day of said Month and being on the Chancery Side thereof

Present Hon Colgn Grant County Judge
Perry A Armstrong Co Clk
Seneca C Tupper Sheriff

16.

State of Illinois } ss
Grundy County } County Court

James Heatherwick } In Chancery
vs
Margaret Heatherwick } Decree

On this the second day of September AD 1861 this cause came on to be heard in the presence of Messrs. Newport & Grant Solicitors for the Complainant and it appearing to the Court that the Complainant filed his Bill of Complaint in said cause on the twenty fifth day of April AD 1861 and that thereupon a summons issued out of and under the seal of said Court to the said Defendant which said summons having been returned by the Sheriff of said County "not found" and it further appearing by the certificate of Charles E Southard Editor and proprietor of the Grundy County Weekly Herald" that service had been made upon the said Margaret Heatherwick by notice published in said paper according to law it was ordered by the Court on motion of said Complainants Solicitors that the said Defendant do plead answer or demur to said Complainants Bill of Complaint by the third day of September AD 1861. And now on this the fourth day of September AD 1861 No Plea answer or demurrer appearing on the files in said cause it was ordered by the Court that the said Defendant be three times called; and the said Defendant although

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three times solemnly called in open court appeared not but made defaut, and thereupon it was decreed ordered and adjudged that a default be entered in said cause against the said defendant and that the said complainants Bill be taken as confessed by the said defendant as to the matters and things therein contained

Whereupon on inspection of the papers and proofs filed in the cause, it appeared to the Court that the said James Heatherwick and Margaret Heatherwick were united in the bonds of Matrimony in the County of Cook State of Illinois by one Dennis Rogan a Catholic Priest on the Tenth day of December A D 1851 and that they lived together as man and Wife from the time of their said Marriage untill about the last of February A D 1856 during which time they resided in said County of Cook and it further appeared from the proofs exibited the said Complain=ant made ample and sufficient provisions for the support of the said Margaret Heatherwick his said Wife up to February A D 1856 and treated her kindly and affectionately during this time but that some time about the last of February A D 1856 the said Margaret Heatherwick left the house of the said complainant her husband aforesaid without just cause & wilfully deserted and ab=sented herself from the house of the said Complain=ant in said County of Cook & State of Illinois

without any reasonable or just Cause and up to the time of the filing of said Complainants Bill Still Continued to absent herself as aforesaid without any Excuse or pretext whatever and it further appearing to the Court by the proofs Exibited in said Cause that the said Margaret Heatherwick was a quarrelsome and ill tempered woman and Continued in every way to Embitter the life of the Complainant & defraud him of his property and that at the time of her desertion aforesaid She took with her a large amount of personal property and also after her said desertion through agents and other means pro= =cured of said Complainant $1000 in money by means of lying and fraudulent rep= =resentations to the great injury of the Complainant,

And it further appearing to the Court from the proofs that there have been no Children born to the said James and Margaret Heatherwick as the issue of said Marriage

It is therefore Ordered adjudged and decreed by the Court that the bonds of Matrimony here= =tofore existing between the said James Heatherwick and Margaret Heatherwick be declared Null and void and of no further binding Effect or force and both of the said parties be forever hereafter free to

19 Contract marriage Each for themselves

Colgr Grant

County Judge

State of Illinois }
Grundy County } ss I Saml B Thomas Clerk of the County Court of Said Grundy County & State of Illinois do hereby certify that the above and fore=going is a full true and perfect copy of the Records of the proceedings had in Said Grundy County Court in the cause therein entitled and do further certify that the foregoing are full true and perfect copies of the praeciepe summons Bill for Divorce Notice of publication and affidavits filed in said cause and now re=maining in my said office and which is a full and complete copy of the Records and all the papers on file belonging to said Suit

In Witness whereof I have hereunto set my hand and affixed my official Seal at Morris in the County & State aforesaid this 16th day of March A D 1863

Saml B Thomas

Clerk

Assignment of Errors

And the said Margret Heathcoat

appellant by Irwin and Snowhook her Solicitors assigns for Error

1st. That the said Grundy County Court is not by law given Jurisdiction in Causes of divorce

2nd. That the affidavit of the non-residence of the appellant is upon belief and is not positive and that said Grundy County Court did not obtain Jurisdiction thereby

3rd. That the bill of Complaint does not aver that the Complainant resided in Grundy County when the Bill was filed

4th. That the first insertion of the publication notice was not sixty days before the return day of the Summons

5th. That no depositions were taken in said cause to prove the allegations of the bill nor were any witnesses examined in open Court to prove the same

6th. That there was no proof of marriage

7th. That there was no proof of desertion

8th. That the decree does not recite nor does the proof show that appellee resided

21 no Grundy County at time of filing bill or at any other time

David & Snowhook
Sols. for Appellant

And now comes Appellee by Leland & Blanchard his Sols. and says that in said record and proceedings there is no error

Leland & Blanchard
Sols for Appellee

59 114

M. Heathcoach
v
Jas. Heathcoach
Record & others

Filed March 20.
1863.
L. Leland Clk.

Alexander Leo Jan
Chancery } Ills

TRIBUNE BOOK AND JOB OFFICE, 51 Clark Street, Chicago.

IN THE

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1863.

MARGARET HEATHERWICK,
Appellant,
versus
JAMES HEATHERWICK,
Appellee.

BRIEF AND POINTS.

This is a suit for divorce, commenced in the Grundy County Court, by filing bill on the 25th of April, 1861. Summons was issued to the sheriff of Grundy county, same day, and returned by him May 24, 1861, "Not found."

On April 25, 1861, appellee filed an affidavit, sworn to on April 4, 1861 setting forth, that "he believes appellant does not reside in the State of Illinois, and that she is not now (then) within said State."

Notice of publication was made in the Grundy County "Weekly Herald," commencing on the 8th of May, 1861, and ending May 27, 1861, which was filed September 2, 1861.

At June term 1861, cause was continued.

At September term 1861, and on September 2, 1861, a rule was entered requiring appellant to answer, etc., by September 3, inst.

On September 4, 1861, default of appellant was entered, and bill taken as confessed, and decree of divorce entered.

Decree based on desertion for a period of over two years.

At a subsequent period we shall refer more particularly to the allegations of the bill, the evidence and the decree.

The first ground of error assigned, is, that the Grundy County Court is not by law given jurisdiction in causes of divorce.

By the New Constitution, in force April 1, 1848, County Courts were established by Sec. 18 of Art. 5. The Legislature is empowered to confer such jurisdiction in civil cases as it may deem proper.

The Act of 1849, establishing County Courts, did not confer any power on said courts to grant divorces, or exercise any chancery powers.

By the Act of February 15, 1855, (see Sess. Laws of 1855, p. 160,) it is enacted that "the County Court of Grundy county" "shall have, and they hereby receive the same powers in jurisdiction in all civil cases, suits and actions and proceedings, which are conferred upon and are now in force in the County Courts of La Salle," etc.

By the Act of February 27, 1854, (see Sess. Laws 1854, p. 239,) special jurisdiction was conferred on the County Court of La Salle, etc., "in all civil cases, suits and actions and proceedings, when the amount due and claimed, or the value of the property shall not exceed the sum of $1,000." This is the act by which it is claimed the Grundy County Court had power to grant the divorce in this case.

Does this act confer any such jurisdiction? We say, clearly not. By the law of March 3, 1845, (see Rev. Stat., p. 197,) jurisdiction in all cases of divorce and alimony, are specially conferred on the Circuit Courts setting as courts of chancery. The act enlarging the jurisdiction in all cases, etc., in the County Courts of La Salle, etc., is applicable only to that class of cases where the *amount* due and claimed, or the *value* of the property does not exceed $1,000. It does not give jurisdiction co-extensive with that of the Circuit Courts. No power is given in cases of *partition*, *divorce*, or to grant writs of *ne exeat* or injunction.

The Grundy County Court, therefore, is not a court of general but of *limited* chancery jurisdiction. It is a creature of the statute, and must derive all its powers therefrom; none is given it by any statute in cases of divorce, nor is there any law, on the statute book, which by implication confers it.

The second ground of error is, that the affidavit of the non-residence of the appellant, states that the appellee "believes Margaret Heatherwick does not reside in the State of Illinois, and that she is not now (then) within said State."

This was sworn to April 4, 1861. The bill was filed April 25, 1861. *That* was the commencement of the suit. For all that appears therefore, in the record, appellant might have been (in fact was) a resident of Cook county, Illinois, when the bill was filed.

And the truth is, that during the autumn preceding the filing of the bill, appellee commenced a suit for divorce in the Cook County Circuit Court, and service was duly had on appellant, and that she filed a demurrer to said bill, and that appellee dismissed the suit, and that appellant has resided in Cook county, Illinois, ever since their marriage, and within three or four miles of their old home.

The Court will notice that the affidavit studiously avoids stating that appellee made the same on information, or that he made or caused to be made, any inquiry as to the residence of appellant.

We contend and maintain that no jurisdiction was conferred on the Grundy County Court, because the affidavit was made on belief only. Such affidavits must be positive, and state non-residence unequivocally.

In the case of *Dyer* v. *Flint*, reported in 21 Ill. p. 80, this court held "that an affidavit for a writ of attachment must allege positively and unequivocally the requirements of the statute. It is not sufficient for such allegations to be made on the information and belief of the attaching creditor or his agent."

We can see no reason for making any distinction between the allegations of the affidavit of non-residence in attachment suits, and in chancery cases.

We shall not insist on the 4th, 5th, 6th and 7th assignments of error.

The 8th assignment of error is, that neither the decree nor the bill avers, nor does the proof show, that appellee resided in Grundy county at the time of filing the bill, or at any other time.

The 2nd section of the statute on divorces requires that the proceedings shall be had in the county where the complainant resides.

The Court will see from what purports to be the evidence taken in the cause, that both parties resided in Cook county, that nothing appears indicating that appellee *ever* changed his residence; his farm and property were and are *there;* the returns of the sheriff of Cook county on the *sci. fa.* in this case show that he resides in Cook county *now.* Those claimed to have been witnesses in this cause also resided and now reside in Cook county. What purports to be the affidavits filed in the cause on which the decree is founded, were sworn to before W. A. Gooding, a Notary Public, residing at Lockport, Will county, about five miles from where both parties actually reside.

The whole proceedings manifestly show that the suit was commenced in Grundy county, clandestinely, with a view to prevent the appellant from knowing anything about it, and was in fact a stupendous fraud on the Court, on justice, and the defendant. He had tried to get a divorce in Cook county and failed, and then perpetrated this base fraud upon the Court.

Further comment or argument, it seems to us, is unnecessary.

IRVIN & SNOWHOOK,
Solicitors for Appellant

59 20

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Heathcock
vs
Heathcock

Brief of P/K.

Filed April
1843
L Sloane
clk

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

[redacted] } ERROR TO GRUNDY COUNTY COURT.

The first error assigned is, that the Grundy County Court had no jurisdiction to render a decree of divorce. By an act of the Legislature, found on page 298 of Purple's Statutes, the same jurisdiction was conferred upon the County Court of Grundy as LaSalle and other County Courts had, by virtue of the Act of February, 1854, found on page 353 of the same book. This Act conferred jurisdiction in "all civil cases, suits, actions, and proceedings, the only limitation being that, when the amount due and claimed, or the value of the property, should exceed the sum of one thousand dollars, there should not be jurisdiction. Of course, when there is no amount claimed as due, or when there is no property involved, there is not the excess as to amount or value which limits or restrains the general words—all civil causes, suits, actions, and proceedings, or to state it more succinctly, no dollars does not exceed one thousand dollars; no value does not exceed that of $1000.00; when the controversy is about money or property, there is a limit. There is no limit in relation to cases, suits, actions, and proceedings, except that they must be civil, not criminal. Complainant could claim no more than $1000 alimony on a suit for divorce, in the County Court, and there could not be a decree for more; but when there is no question of amounts and values, it seems quite clear that there is jurisdiction to decree a divorce. There have been, in the Grundy County Court, and in the other County Courts which have the same jurisdiction, many divorces granted, and there are many of the cases where one or both of the parties have since married and have new families. This Complainant has also taken a new wife; to him and to his brothers and sisters in distress, if this and similar decrees should be reversed on this point, the consequences will be very serious. We hope this will cause your Honors to give us the benefit

of the doubts, if any exist in your mind; and that your Honors will refrain from, if possible, generating the large number of bastards which will be produced by a reversal of this and other kindred decrees.

Brigham vs Miller, 7 Ohio 445 —

The next of the supposed errors is, that the affidavit of non-residence is upon belief, and does not contain a positive statement of the Deponent that the Defendant is a non-resident. The 8th section of the Chancery Act does not certainly require a more positive statement than that contained in the affidavit, because it is impossible for any person to make, conscientiously, such positive statement. The affidavit should show, with reasonable certainty, a state of case when personal service by summons cannot be made. A man whose wife has left him, cannot tell positively that she is out of the State at the time he makes it. He can only give his best judgment and belief. The language of the affidavit is, that he believes Margaret Heatherwick does not reside in the State of Illinois; that she is not now within said State. It may be doubted whether the statement that she is not now in this State is one stated as of belief, or a positive one that the fact is so. It would be a fair construction to say that he meant that she was not then within the State, and that he believed her residence was not in it. There was the usual search by the sheriff, and the summons was returned not found; and this, with the affidavit of a husband in relation to an absent wife, shows satisfactorily enough that she had gone out of the State, so that process could not be served upon her.

The third assignment is not true in point of fact. The expression "your Orator, James Heatherwick, of said County and State," conveys the same idea as the words "James Heatherwick, a resident of said County and State" would. We always convey this idea, in deeds and the like, by saying A. B., of the County of, &c., without using the word residents.

The fourth assignment of error is untenable. The decree was not taken, at the term in June, to which the process was returnable, but the case was continued till the September term, at which the decree was entered up, as it properly might be under the provisions of the 8th, 9th and 10th Sections of the Chancery Act.

The 5th, 6th, 7th and 8th errors may be disposed of together. It does not follow, because two affidavits are copied in this record, that therefore there was no other proof in the case. There is nothing in the record from which it may be fairly inferred that this was all the evidence upon which the Court acted. Indeed, there are facts recited in the decree as proven, not mentioned in either of these affidavits. In the case in the 14 Ill., 147, it affirmatively appears that the report of the Master in Chancery was all the evidence upon which the Court based the decree. Not so here. It does not even appear, except by inference, that it was probably so, that these affidavits which the Clerk found on file, and copied into this record, were used as evidence at all. It has several times been held that, in cases of this kind, it is not necessary that the evidence should be preserved: 18 Ill., 39, and 22 Ill., 187. And it may be said gener-

ally that it is enough that, after the default, the Court heard proof on the subject of the allegations in the bill, and that it is not necessary that there should be a minute recital in the decree of all the evidence. The Complainant had sworn to the bill containing an allegation that he was of Grundy County. If more is necessary, it should be presumed that the Court heard proofs of this fact, though not expressly recited in the decree, when it appears that proofs were adduced in the case. The reason of the requirement of proof, when a bill is taken for confessed is, to prevent a divorce by collusion, and an admission by the Defendant of the truth of the allegations in relation to the cause of divorce. If the Complainant's bill contains the necessary allegations to give the Court jurisdiction, and it appears that the Court heard proofs in the case, and if it be not necessary to preserve the evidence, the Appellate Court surely cannot say that the Court below did not have the necessary facts proved to give it jurisdiction of the cause, because the evidence that the Complainant resided in Grundy County is not preserved by recitals in the decree, though alleged in the bill.

There does not seem to us to be any assignment of error in support of which even a plausible argument can be made, unless it be the first one; and it would be rather a nice and captious construction of the Statute to say that jurisdiction was only conferred in case where money was due and claimed, or property was in dispute.

LELAND & BLANCHARD,

Solicitors for Appellee.

69 114

Heathwick
vs
Heathwick

Defts. Brief

Filed Ap. 20. 1863
L Leland Clk

Tribune Book and Job Office, 51 Clark Street, Chicago.

IN THE

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1863.

MARGARET HEATHERWICK,
Appellant,
versus
JAMES HEATHERWICK,
Appellee.

ABSTRACT OF RECORD.

RECORD PAGE.	
1	Præcipe filed April 25, 1861.
2	Summons issued April 25, 1861.
2 3	Summons returned May 24, 1861—"Not found"; and filed May 24, 1861.
3	Bill of complaint filed April 25, 1861.
3 4	Bill for divorce addressed to the Hon. Colquhoun Grant, Judge of the County Court of Grundy county.
4	Bill avers the marriage of James Heatherwick and Margret Heatherwick, on the 10th day of December, A. D. 1851, at Palos, Cook county, Illinois, by the Rev. Dennis Rogan, and that they cohabited together as man and wife from said date until the last of February, 1856.

That there was no issue, and at the marriage appellee owned an improved farm, worth from $1,600 to $2,000, situated in the county of Cook and State of Illinois.

5 That appellant resided with appellee from his marriage, until about the last of February, 1856, and that he provided abundance, etc.

That appellant had two sons and a daughter by her former husband, who resided with appellee during the time aforesaid, and whom he supported and educated as his own children.

That he treated his wife kindly, and that she had no just cause of complaint against him, but disregarding her marital obligations, she absented herself about the last of February, 1856, and willfully deserted the appellee and her home in Cook county, Illinois, without any reasonable or just cause, and continued absent without any excuse or pretext,
6 until filing of bill, and that appellee sought an interview with her, to induce her to return, but failed, and that he hath not been able to find her or see her since her desertion, and that he believes she is not in the State of Illinois.

And then when appellant absconded, she with her children carried away all the household furniture belonging to him, together with a large amount of other personal property, and sought to deprive him of his earnings, and caused it to be represented that she was willing to return if he would execute his note for $1,000, and secure the same by mortgage on his farm for the use of her children.

That being desirous for her return, he did execute his note for $1,000,
7 payable to the order of Louis Bush and Fergus Dixon, and secured the same by mortgage on his farm.

That after doing so she refused to return, and when said note became due, said appellee being unable to meet the same, his farm was sold under said mortgage to one Ward, her brother-in-law, for $1,144, whereby appellee has been defrauded of a large amount of property.

That appellee can only have relief in a court of equity.

8 Prays that appellant may answer said bill, and that a summons may issue to her, commanding her, etc., and for a divorce.

Bill sworn to be true by appellee, to the best of his knowledge, recollection and belief, on the 4th day of April, 1861.

9 Appellee filed in said Grundy county, February 25, 1861, an affidavit stating that he believes appellant does not reside in the State of Illinois, and that she is not now within said State.

That on the 6th of June, 1861, it being one of the regular days of the June term of the Grundy County Court, for the said year, the following among other proceedings were had:

10 JAMES HEATHERWICK *vs.* MARGARET HEATHERWICK,—*Divorce.*
Now on this third day of the term this cause is continued.

That afterwards, Newport & Grant, Solicitors for appellee, filed proof of publication.

11 STATE OF ILLINOIS, } ss. Grundy County Court,
GRUNDY COUNTY, June Term, A. D. 1861.

JAMES HEATHERWICK *vs.* MARGARET HEATHERWICK.

BILL OF DIVORCE.

Sets forth, affidavit of non-residence of appellant has been filed in the office of the clerk of said court; notifies said appellant that appellee filed his bill of complaint on the 25th of April, 1861, that a summons issued thereupon, against said appellant, returnable on the 1st Monday of June, 1861.

Notifies appellant, that unless she appears on the first Monday of the next term of said court, to be holden at the Court House, in Morris, Grundy county, on the day aforesaid, and plead, answer or demur to the said bill of complaint, the same will be taken as confessed, and decree entered against her according to the prayer of the bill. Signed, Perry Armstrong, Clerk. Morris, May 8, 1861.

12 Then follows the certificate of C. A. Southerd, proprietor of the Grundy County weekly Herald, in due form, dated Morris, June 4, A. D. 1861. On the back of which appears the filing, dated September 2, 1861.

12 13 Then follows what purports to be the affidavit of John Heatherwick, which has no venue. It sets out that he knows the parties intimately for nine or ten years, and that he resides in Cook county, Illinois, and that the parties resided therein; states appellee bears a good character, etc., etc., that appellant's is bad, etc.; that appellant left appellee without just cause or provocation, near the last of March, 1856; that they have not lived together since; that appellee has not seen appellant since; that appellant took from appellee valuable articles of property, such as beds, bedding, etc.; that by false and fraudulent pretenses she succeeded in getting from appellee $1,000; and which purports to be sworn to before W. A. Gooding, Notary Public, April 29, 1861, and which was filed September 4, 1861.

Then follows what purports to be the affidavit of *Wm. Heatherwick*, which has no venue, and which was sworn to before W. A. Gooding, a
13 Notary Public, April 16, 1861, and filed September 4, 1861, and which is substantially as follows:

Deponent says he is well acquainted with James Heatherwick for over forty years, and that he bears a good character; that he is also well acquainted with Margaret, his wife, and has been for over six years; that the general reputation of said Margaret is bad, that she is very quarrelsome, ill-tempered, etc. That James was married to her on or about December 10, 1851, and continued to live together at times till March 31, 1856, when she left, taking bedding, etc., and from that time to the present date, said James has not seen her, and does not know of her whereabouts. Believes she married to obtain James' property, etc.

WILLIAM HEATHERWICK. [SEAL.]

Sworn and subscribed, April 16, A. D. 1861.
W. A. GOODING,
Notary Public.

Indorsed,
Filed September 4, 1861.
P. A. ARMSTRONG, Clerk.

DECREE.

JAMES HEATHERWICK
vs.
MARGARET HEATHERWICK.

In Grundy County Court.
In Chancery.
Decree.

Monday, September 2, 1861.

On this day this cause comes on, etc. Recites filing of bill, issuing of summons, sheriff's return, proof of publication, etc.

Ordered, that defendant answer, etc., by 3rd of September, inst.

And now, on this 4th day of September, it appearing that no answer, etc., is filed, defendant called, comes not. Default entered. Bill taken as confessed.

Whereupon, on inspection of papers and proofs filed in the cause, it appears to the court that complainant and defendant were married on the 10th day of December, 1851, at Cook county, Illinois, by the Rev. Dennis Rogan, and they cohabited as man and wife from said date until last of February, 1856; that there was no issue by said marriage; that said James owned an improved farm in Cook county, Illinois, worth from $1,600 to $2,000; that complainant, during cohabitation, provided in

abundance; that defendant had two sons and a daughter, whom com-
15 plainant, during the time aforesaid, supported and educated as his own children.

That he treated his wife kindly; that she had no just cause of complaint against him, but disregarding her marital obligations, absented herself from him about the last of February, 1856, and willfully deserted him and her home in Cook county, Illinois, without any reasonable or just cause, and continued absent, without any excuse or pretext, until filing of bill, and that said James sought an interview with her, to induce her to return, but failed; that he hath not been able to find or see her since her desertion.

That when she absconded, she and her children carried away all his household furniture, and other personal property, and sought to deprive him of his earnings, and caused it to be represented that she was willing to return if he would execute his note for $1,000, and secure the same by mortgage on his farm for the use of her children.

That desiring her return, he did so in good faith, but having done so,
16 she refused to return. That he, said complainant, being unable when the mortgage became due, to pay it, she caused the farm to be sold under it to her brother-in-law, etc., whereby he has been defrauded of a large amount of property.

That it further appearing, by the proofs exhibited, that said Margaret was quarrelsome, ill-tempered, etc., and that she endeavored to defraud him.

Therefore, it is ordered by the court, that the marriage contract be dissolved, etc.

ASSIGNMENT OF ERRORS.

1st That the said Grundy County Court is not by law given jurisdiction in cases of Divorce

2nd That the affidavit of non residence of defendant is upon belief and is not positive and the said Grundy County Court does not obtain jurisdiction thereby

3rd That the Bill of Complaint does not aver that the Complainant resided in Grundy County where the Bill was filed

4th That the first insertion of the Publication notice was not sixty days before the return day of the summons

5th. That no depositions were taken in said Cause to prove the allegations of the Bill nor were any witnesses examined in open Court to prove the same

6th. That there was no proof of marriage

7th That there was no proof of desertion

8th. That Decree does not recite nor does the proof show that the appellee resided in Grundy County at the time of filing Bill or at any other time

Irwin & Buckstaff Solrs.

114

Heathcwick
vs
Heathcwick

Abstract

Filed april 23-1863
L L Land
Clerk

Tribune Book and Job Office, 51 Clark Street, Chicago.

IN THE

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1863.

MARGARET HEATHERWICK,
Appellant,
versus
JAMES HEATHERWICK,
Appellee.

BRIEF AND POINTS.

This is a suit for divorce, commenced in the Grundy County Court, by filing bill on the 25th of April, 1861. Summons was issued to the sheriff of Grundy county, same day, and returned by him May 24, 1861, "Not found."

On April 25, 1861, appellee filed an affidavit, sworn to on April 4, 1861 setting forth, that "he believes appellant does not reside in the State of Illinois, and that she is not now (then) within said State."

Notice of publication was made in the Grundy County "Weekly Herald," commencing on the 8th of May, 1861, and ending May 27, 1861, which was filed September 2, 1861.

At June term 1861, cause was continued.

At September term 1861, and on September 2, 1861, a rule was entered requiring appellant to answer, etc., by September 3, inst.

On September 4, 1861, default of appellant was entered, and bill taken as confessed, and decree of divorce entered.

Decree based on desertion for a period of over two years.

At a subsequent period we shall refer more particularly to the allegations of the bill, the evidence and the decree.

The first ground of error assigned, is, that the Grundy County Court is not by law given jurisdiction in causes of divorce.

By the New Constitution, in force April 1, 1848, County Courts were established by Sec. 18 of Art. 5. The Legislature is empowered to confer such jurisdiction in civil cases as it may deem proper.

The Act of 1849, establishing County Courts, did not confer any power on said courts to grant divorces, or exercise any chancery powers.

By the Act of February 15, 1855, (see Sess. Laws of 1855, p. 160,) it is enacted that "the County Court of Grundy county" "shall have, and they hereby receive the same powers in jurisdiction in all civil cases, suits and actions and proceedings, which are conferred upon and are now in force in the County Courts of La Salle," etc.

By the Act of February 27, 1854, (see Sess. Laws 1854, p. 239,) special jurisdiction was conferred on the County Court of La Salle, etc., "in all civil cases, suits and actions and proceedings, when the amount due and claimed, or the value of the property shall not exceed the sum of $1,000." This is the act by which it is claimed the Grundy County Court had power to grant the divorce in this case.

Does this act confer any such jurisdiction? We say, clearly not. By the law of March 3, 1845, (see Rev. Stat., p. 197,) jurisdiction in all cases of divorce and alimony, are specially conferred on the Circuit Courts setting as courts of chancery. The act enlarging the jurisdiction in all cases, etc., in the County Courts of La Salle, etc., is applicable only to that class of cases where the *amount* due and claimed, or the *value* of the property does not exceed $1,000. It does not give jurisdiction co-extensive with that of the Circuit Courts. No power is given in cases of *partition*, *divorce*, or to grant writs of *ne exeat* or injunction.

The Grundy County Court, therefore, is not a court of general but of *limited* chancery jurisdiction. It is a creature of the statute, and must derive all its powers therefrom; none is given it by any statute in cases of divorce, nor is there any law, on the statute book, which by implication confers it.

The second ground of error is, that the affidavit of the non-residence of the appellant, states that the appellee "believes Margaret Heatherwick does not reside in the State of Illinois, and that she is not now (then) within said State."

This was sworn to April 4, 1861. The bill was filed April 25, 1861. *That* was the commencement of the suit. For all that appears therefore, in the record, appellant might have been (in fact was) a resident of Cook county, Illinois, when the bill was filed.

And the truth is, that during the autumn preceding the filing of the bill, appellee commenced a suit for divorce in the Cook County Circuit Court, and service was duly had on appellant, and that she filed a demurrer to said bill, and that appellee dismissed the suit, and that appellant has resided in Cook county, Illinois, ever since their marriage, and within three or four miles of their old home.

The Court will notice that the affidavit studiously avoids stating that appellee made the same on information, or that he made or caused to be made, any inquiry as to the residence of appellant.

We contend and maintain that no jurisdiction was conferred on the Grundy County Court, because the affidavit was made on belief only. Such affidavits must be positive, and state non-residence unequivocally.

In the case of *Dyer* v. *Flint*, reported in 21 Ill. p. 80, this court held "that an affidavit for a writ of attachment must allege positively and unequivocally the requirements of the statute. It is not sufficient for such allegations to be made on the information and belief of the attaching creditor or his agent."

We can see no reason for making any distinction between the allegations of the affidavit of non-residence in attachment suits, and in chancery cases.

We shall not insist on the 4th, 5th, 6th and 7th assignments of error.

The 8th assignment of error is, that neither the decree nor the bill avers, nor does the proof show, that appellee resided in Grundy county at the time of filing the bill, or at any other time.

The 2nd section of the statute on divorces requires that the proceedings shall be had in the county where the complainant resides.

The Court will see from what purports to be the evidence taken in the cause, that both parties resided in Cook county, that nothing appears indicating that appellee *ever* changed his residence; his farm and property were and are *there;* the returns of the sheriff of Cook county on the *sci. fa.* in this case show that he resides in Cook county *now.* Those claimed to have been witnesses in this cause also resided and now reside in Cook county. What purports to be the affidavits filed in the cause on which the decree is founded, were sworn to before W. A. Gooding, a Notary Public, residing at Lockport, Will county, about five miles from where both parties actually reside.

The whole proceedings manifestly show that the suit was commenced in Grundy county, clandestinely, with a view to prevent the appellant from knowing anything about it, and was in fact a stupendous fraud on the Court, on justice, and the defendant. He had tried to get a divorce in Cook county and failed, and then perpetrated this base fraud upon the Court.

Further comment or argument, it seems to us, is unnecessary.

IRVIN & SNOWHOOK,
Solicitors for Appellant

59

1114

Weatherwick
vs
Weatherwick

Briefs

Filed Apr 24
1863
S Selmer
Clk

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

MARGARET HEATHERWICK
vs.
JAMES HEATHERWICK.

ERROR TO GRUNDY COUNTY COURT.

The first error assigned is, that the Grundy County Court had no jurisdiction to render a decree of divorce. By an act of the Legislature, found on page 298 of Purple's Statutes, the same jurisdiction was conferred upon the County Court of Grundy as LaSalle and other County Courts had, by virtue of the Act of February, 1854, found on page 353 of the same book. This Act conferred jurisdiction in "all civil cases, suits, actions, and proceedings, the only limitation being that, when the amount due and claimed, or the value of the property, should exceed the sum of one thousand dollars, there should not be jurisdiction. Of course, when there is no amount claimed as due, or when there is no property involved, there is not the excess as to amount or value which limits or restrains the general words—all civil causes, suits, actions, and proceedings, or to state it more succinctly, no dollars does not exceed one thousand dollars; no value does not exceed that of $1000.00; when the controversy is about money or property, there is a limit. There is no limit in relation to cases, suits, actions, and proceedings, except that they must be civil, not criminal. Complainant could claim no more than $1000 alimony on a suit for divorce, in the County Court, and there could not be a decree for more; but when there is no question of amounts and values, it seems quite clear that there is jurisdiction to decree a divorce. There have been, in the Grundy County Court, and in the other County Courts which have the same jurisdiction, many divorces granted, and there are many of the cases where one or both of the parties have since married and have new families. This Complainant has also taken a new wife; to him and to his brothers and sisters in distress, if this and similar decrees should be reversed on this point, the consequences will be very serious. We hope this will cause your Honors to give us the benefit

of the doubts, if any exist in your mind; and that your Honors will refrain from, if possible, generating the large number of bastards which will be produced by a reversal of this and other kindred decrees.

Bingham vs Miller 17 Ohio 445

The next of the supposed errors is, that the affidavit of non-residence is upon belief, and does not contain a positive statement of the Deponent that the Defendant is a non-resident. The 8th section of the Chancery Act does not certainly require a more positive statement than that contained in the affidavit, because it is impossible for any person to make, conscientiously, such positive statement. The affidavit should show, with reasonable certainty, a state of case when personal service by summons cannot be made. A man whose wife has left him, cannot tell positively that she is out of the State at the time he makes it. He can only give his best judgment and belief. The language of the affidavit is, that he believes Margaret Heatherwick does not reside in the State of Illinois; that she is not now within said State. It may be doubted whether the statement that she is not now in this State is one stated as of belief, or a positive one that the fact is so. It would be a fair construction to say that he meant that she was not then within the State, and that he believed her residence was not in it. There was the usual search by the sheriff, and the summons was returned not found; and this, with the affidavit of a husband in relation to an absent wife, shows satisfactorily enough that she had gone out of the State, so that process could not be served upon her.

The third assignment is not true in point of fact. The expression "your Orator, James Heatherwick, of said County and State," conveys the same idea as the words "James Heatherwick, a resident of said County and State" would. We always convey this idea, in deeds and the like, by saying A. B., of the County of, &c., without using the word residents.

The fourth assignment of error is untenable. The decree was not taken at the term in June, to which the process was returnable, but the case was continued till the September term, at which the decree was entered up, as it properly might be under the provisions of the 8th, 9th and 10th Sections of the Chancery Act.

The 5th, 6th, 7th and 8th errors may be disposed of together. It does not follow, because two affidavits are copied in this record, that therefore there was no other proof in the case. There is nothing in the record from which it may be fairly inferred that this was all the evidence upon which the Court acted. Indeed, there are facts recited in the decree as proven, not mentioned in either of these affidavits. In the case in the 14 Ill., 147, it affirmatively appears that the report of the Master in Chancery was all the evidence upon which the Court based the decree. Not so here. It does not even appear, except by inference, that it was probably so, that these affidavits which the Clerk found on file, and copied into this record, were used as evidence at all. It has several times been held that, in cases of this kind, it is not necessary that the evidence should be preserved: 18 Ill., 39, and 22 Ill., 187. And it may be said gener-

ally that it is enough that, after the default, the Court heard proof on the subject of the allegations in the bill, and that it is not necessary that there should be a minute recital in the decree of all the evidence. The Complainant had sworn to the bill containing an allegation that he was of Grundy County. If more is necessary, it should be presumed that the Court heard proofs of this fact, though not expressly recited in the decree, when it appears that proofs were adduced in the case. The reason of the requirement of proof, when a bill is taken for confessed is, to prevent a divorce by collusion, and an admission by the Defendant of the truth of the allegations in relation to the cause of divorce. If the Complainant's bill contains the necessary allegations to give the Court jurisdiction, and it appears that the Court heard proofs in the case, and if it be not necessary to preserve the evidence, the Appellate Court surely cannot say that the Court below did not have the necessary facts proved to give it jurisdiction of the cause, because the evidence that the Complainant resided in Grundy County is not preserved by recitals in the decree, though alleged in the bill.

There does not seem to us to be any assignment of error in support of which even a plausible argument can be made, unless it be the first one; and it would be rather a nice and captious construction of the Statute to say that jurisdiction was only conferred in case where money was due and claimed, or property was in dispute.

LELAND & BLANCHARD,

Solicitors for Appellee.

59 114

Heatherwick

vs

Heatherwick

Defts. Brief

Filed April 25. 1843

G Leland

Clk

Tribune Book and Job Office, 51 Clark Street, Chicago.

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APRIL TERM, A. D. 1863.

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versus
JAMES HEATHERWICK,
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At September term 1861, and on September 2, 1861, a rule was entered requiring appellant to answer, etc., by September 3, inst.

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Decree based on desertion for a period of over two years.

At a subsequent period we shall refer more particularly to the allegations of the bill, the evidence and the decree.

The first ground of error assigned, is, that the Grundy County Court is not by law given jurisdiction in causes of divorce.

By the New Constitution, in force April 1, 1848, County Courts were established by Sec. 18 of Art. 5. The Legislature is empowered to confer such jurisdiction in civil cases as it may deem proper.

The Act of 1849, establishing County Courts, did not confer any power on said courts to grant divorces, or exercise any chancery powers.

By the Act of February 15, 1855, (see Sess. Laws of 1855, p. 160,) it is enacted that "the County Court of Grundy county" "shall have, and they hereby receive the same powers in jurisdiction in all civil cases, suits and actions and proceedings, which are conferred upon and are now in force in the County Courts of La Salle," etc.

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Does this act confer any such jurisdiction? We say, clearly not. By the law of March 3, 1845, (see Rev. Stat., p. 197,) jurisdiction in all cases of divorce and alimony, are specially conferred on the Circuit Courts setting as courts of chancery. The act enlarging the jurisdiction in all cases, etc., in the County Courts of La Salle, etc., is applicable only to that class of cases where the *amount* due and claimed, or the *value* of the property does not exceed $1,000. It does not give jurisdiction co-extensive with that of the Circuit Courts. No power is given in cases of *partition*, *divorce*, or to grant writs of *ne exeat* or injunction.

The Grundy County Court, therefore, is not a court of general but of *limited* chancery jurisdiction. It is a creature of the statute, and must derive all its powers therefrom; none is given it by any statute in cases of divorce, nor is there any law, on the statute book, which by implication confers it.

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And the truth is, that during the autumn preceding the filing of the bill, appellee commenced a suit for divorce in the Cook County Circuit Court, and service was duly had on appellant, and that she filed a demurrer to said bill, and that appellee dismissed the suit, and that appellant has resided in Cook county, Illinois, ever since their marriage, and within three or four miles of their old home.

The Court will notice that the affidavit studiously avoids stating that appellee made the same on information, or that he made or caused to be made, any inquiry as to the residence of appellant.

We contend and maintain that no jurisdiction was conferred on the Grundy County Court, because the affidavit was made on belief only. Such affidavits must be positive, and state non-residence unequivocally.

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The Court will see from what purports to be the evidence taken in the cause, that both parties resided in Cook county, that nothing appears indicating that appellee *ever* changed his residence; his farm and property were and are *there;* the returns of the sheriff of Cook county on the *sci. fa.* in this case show that he resides in Cook county *now.* Those claimed to have been witnesses in this cause also resided and now reside in Cook county. What purports to be the affidavits filed in the cause on which the decree is founded, were sworn to before W. A. Gooding, a Notary Public, residing at Lockport, Will county, about five miles from where both parties actually reside.

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Further comment or argument, it seems to us, is unnecessary.

IRVIN & SNOWHOOK,
Solicitors for Appellant

1114

Heathcock
vs
Heathcoate

Brief

Filed Apr 24. 1863
L Leland
Clk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT

To the Sheriff of Cook County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the County Court of Grundy County, before the Judge thereof, between

James Heathcock Complainant

plaintiff, and

Margaret Heathcock

defendant, it is said that manifest error hath intervened, to the injury of the said

Margaret

as we are informed by her complaint the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

James Heathcock

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

James Heathcock

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 20th day of March in the year of our Lord One Thousand Eight Hundred and Sixty-Three.

L. Leland
Clerk of the Supreme Court.

114

Mc. Heathenwick

No. vs.

Jas. Heathenwick

SCIRE FACIAS.

FILED... April 25 A. D. 1863

L. Leland Clerk.

Served by reading to the within named Jas Heathenwick this 1st day of April 1863.

David S. Hazzard
Sheriff
By J. Hardling
Deputy

Fees
Serv .50
Mileage 2.00
Return .10
$2.60

Chicago Illinois
March 18. 1863,

L Leland Esq.,
Clerk of Supreme Court,

Sir,

Enclosed find Record in case of Heathcoat vs Heathcoat. Please enclose to us by Friday's mail or express at furthest a Scire facias in said cause We hope you will be prompt in this matter as we desire to get service in time for next Term and we may have some difficulty in so doing Your attention to this matter we will esteem a great favor

Enclosed please find $16.00 which we believe is the requisite amount to be advanced at this time if more notify us at once and we will send it to you

Yrs. &c &c
David & Swarbook
Sols &c

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

MARGARET HEATHERWICK
vs.
JAMES HEATHERWICK.

ERROR TO GRUNDY COUNTY COURT.

The first error assigned is, that the Grundy County Court had no jurisdiction to render a decree of divorce. By an act of the Legislature, found on page 298 of Purple's Statutes, the same jurisdiction was conferred upon the County Court of Grundy as LaSalle and other County Courts had, by virtue of the Act of February, 1854, found on page 853 of the same book. This Act conferred jurisdiction in "all civil cases, suits, actions, and proceedings, the only limitation being that, when the amount due and claimed, or the value of the property, should exceed the sum of one thousand dollars, there should not be jurisdiction. Of course, when there is no amount claimed as due, or when there is no property involved, there is not the excess as to amount or value which limits or restrains; the general words—all civil causes, suits, actions, and proceedings, or to state it more succinctly, no dollars does not exceed one thousand dollars; no value does not exceed that of $1000.00; when the controversy is about money or property, there is a limit. There is no limit in relation to cases, suits, actions, and proceedings, except that they must be civil, not criminal. Complainant could claim no more than $1000 alimony on a suit for divorce, in the County Court, and there could not be a decree for more; but when there is no question of amounts and values, it seems quite clear that there is jurisdiction to decree a divorce. There have been, in the Grundy County Court, and in the other County Courts which have the same jurisdiction, many divorces granted, and there are many of the cases where one or both of the parties have since married and have new families. This Complainant has also taken a new wife; to him and to his brothers and sisters in distress, if this and similar decrees should be reversed on this point, the consequences will be very serious. We hope this will cause your Honors to give us the benefit

of the doubts, if any exist in your mind; and that your Honors will refrain from, if possible, generating the large number of bastards which will be produced by a reversal of this and other kindred decrees.

Brigham vs Miller 17 Ohio 445

The next of the supposed errors is, that the affidavit of non-residence is upon belief, and does not contain a positive statement of the Deponent that the Defendant is a non-resident. The 8th section of the Chancery Act does not certainly require a more positive statement than that contained in the affidavit, because it is impossible for any person to make, conscientiously, such positive statement. The affidavit should show, with reasonable certainty, a state of case when personal service by summons cannot be made. A man whose wife has left him, cannot tell positively that she is out of the State at the time he makes it. He can only give his best judgment and belief. The language of the affidavit is, that he believes Margaret Heatherwick does not reside in the State of Illinois; that she is not now within said State. It may be doubted whether the statement that she is not now in this State is one stated as of belief, or a positive one that the fact is so. It would be a fair construction to say that he meant that she was not then within the State, and that he believed her residence was not in it. There was the usual search by the sheriff, and the summons was returned not found; and this, with the affidavit of a husband in relation to an absent wife, shows satisfactorily enough that she had gone out of the State, so that process could not be served upon her.

The third assignment is not true in point of fact. The expression "your Orator, James Heatherwick, of said County and State," conveys the same idea as the words "James Heatherwick, a resident of said County and State" would. We always convey this idea, in deeds and the like, by saying A. B., of the County of, &c., without using the word residents.

The fourth assignment of error is untenable. The decree was not taken at the term in June, to which the process was returnable, but the case was continued till the September term, at which the decree was entered up, as it properly might be under the provisions of the 8th, 9th and 10th Sections of the Chancery Act.

The 5th, 6th, 7th and 8th errors may be disposed of together. It does not follow, because two affidavits are copied in this record, that therefore there was no other proof in the case. There is nothing in the record from which it may be fairly inferred that this was all the evidence upon which the Court acted. Indeed, there are facts recited in the decree as proven, not mentioned in either of these affidavits. In the case in the 14 Ill., 147, it affirmatively appears that the report of the Master in Chancery was all the evidence upon which the Court based the decree. Not so here. It does not even appear, except by inference, that it was probably so, that these affidavits which the Clerk found on file, and copied into this record, were used as evidence at all. It has several times been held that, in cases of this kind, it is not necessary that the evidence should be preserved: 18 Ill., 39, and 22 Ill., 187. And it may be said gener-

ally that it is enough that, after the default, the Court heard proof on the subject of the allegations in the bill, and that it is not necessary that there should be a minute recital in the decree of all the evidence. The Complainant had sworn to the bill containing an allegation that he was of Grundy County. If more is necessary, it should be presumed that the Court heard proofs of this fact, though not expressly recited in the decree, when it appears that proofs were adduced in the case. The reason of the requirement of proof, when a bill is taken for confessed is, to prevent a divorce by collusion, and an admission by the Defendant of the truth of the allegations in relation to the cause of divorce. If the Complainant's bill contains the necessary allegations to give the Court jurisdiction, and it appears that the Court heard proofs in the case, and if it be not necessary to preserve the evidence, the Appellate Court surely cannot say that the Court below did not have the necessary facts proved to give it jurisdiction of the cause, because the evidence that the Complainant resided in Grundy County is not preserved by recitals in the decree, though alleged in the bill.

There does not seem to us to be any assignment of error in support of which even a plausible argument can be made, unless it be the first one; and it would be rather a nice and captious construction of the Statute to say that jurisdiction was only conferred in case where money was due and claimed, or property was in dispute.

LELAND & BLANCHARD,

Solicitors for Appellee.

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Heathcoat
vs
Heathcoat

Defts. Brief

Filed Apr 25. 1863
J. Scland Clk

Tribune Book and Job Office, 51 Clark Street, Chicago.

IN THE

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1863.

MARGARET HEATHERWICK,
Appellant,
versus
JAMES HEATHERWICK,
Appellee.

ABSTRACT OF RECORD.

RECORD PAGE.	
1	Præcipe filed April 25, 1861.
2	Summons issued April 25, 1861.
2 3	Summons returned May 24, 1861—"Not found"; and filed May 24, 1861.
3	Bill of complaint filed April 25, 1861.
3 4	Bill for divorce addressed to the Hon. Colquhoun Grant, Judge of the County Court of Grundy county.
4	Bill avers the marriage of James Heatherwick and Margret Heatherwick, on the 10th day of December, A. D. 1851, at Palos, Cook county, Illinois, by the Rev. Dennis Rogan, and that they cohabited together as man and wife from said date until the last of February, 1856.

That there was no issue, and at the marriage appellee owned an improved farm, worth from $1,600 to $2,000, situated in the county of Cook and State of Illinois.

5 That appellant resided with appellee from his marriage, until about the last of February, 1856, and that he provided abundance, etc.

That appellant had two sons and a daughter by her former husband, who resided with appellee during the time aforesaid, and whom he supported and educated as his own children.

That he treated his wife kindly, and that she had no just cause of complaint against him, but disregarding her marital obligations, she absented herself about the last of February, 1856, and willfully deserted the appellee and her home in Cook county, Illinois, without any reasonable or just cause, and continued absent without any excuse or pretext,
6 until filing of bill, and that appellee sought an interview with her, to induce her to return, but failed, and that he hath not been able to find her or see her since her desertion, and that he believes she is not in the State of Illinois.

And then when appellant absconded, she with her children carried away all the household furniture belonging to him, together with a large amount of other personal property, and sought to deprive him of his earnings, and caused it to be represented that she was willing to return if he would execute his note for $1,000, and secure the same by mortgage on his farm for the use of her children.

That being desirous for her return, he did execute his note for $1,000,
7 payable to the order of Louis Bush and Fergus Dixon, and secured the same by mortgage on his farm.

That after doing so she refused to return, and when said note became due, said appellee being unable to meet the same, his farm was sold under said mortgage to one Ward, her brother-in-law, for $1,144, whereby appellee has been defrauded of a large amount of property.

That appellee can only have relief in a court of equity.

8 Prays that appellant may answer said bill, and that a summons may issue to her, commanding her, etc., and for a divorce.

Bill sworn to be true by appellee, to the best of his knowledge, recollection and belief, on the 4th day of April, 1861.

9 Appellee filed in said Grundy county, February 25, 1861, an affidavit stating that he believes appellant does not reside in the State of Illinois, and that she is not now within said State.

That on the 6th of June, 1861, it being one of the regular days of the June term of the Grundy County Court, for the said year, the following among other proceedings were had:

10 JAMES HEATHERWICK *vs.* MARGARET HEATHERWICK,—*Divorce.*
Now on this third day of the term this cause is continued.

That afterwards, Newport & Grant, Solicitors for appellee, filed proof of publication.

11 STATE OF ILLINOIS, } ss. Grundy County Court,
GRUNDY COUNTY, } June Term, A. D. 1861.

JAMES HEATHERWICK *vs.* MARGARET HEATHERWICK.

BILL OF DIVORCE.

Sets forth, affidavit of non-residence of appellant has been filed in the office of the clerk of said court; notifies said appellant that appellee filed his bill of complaint on the 25th of April, 1861, that a summons issued thereupon, against said appellant, returnable on the 1st Monday of June, 1861.

Notifies appellant, that unless she appears on the first Monday of the next term of said court, to be holden at the Court House, in Morris, Grundy county, on the day aforesaid, and plead, answer or demur to the said bill of complaint, the same will be taken as confessed, and decree entered against her according to the prayer of the bill. Signed, Perry Armstrong, Clerk. Morris, May 8, 1861.

12 Then follows the certificate of C. A. Southerd, proprietor of the Grundy County weekly Herald, in due form, dated Morris, June 4, A. D. 1861. On the back of which appears the filing, dated September 2, 1861.

12 13 Then follows what purports to be the affidavit of John Heatherwick, which has no venue. It sets out that he knows the parties intimately for nine or ten years, and that he resides in Cook county, Illinois, and that the parties resided therein; states appellee bears a good character, etc., etc., that appellant's is bad, etc.; that appellant'left appellee without just cause or provocation, near the last of March, 1856; that they have not lived together since; that appellee has not seen appellant since; that appellant took from appellee valuable articles of property, such as beds, bedding, etc.; that by false and fraudulent pretenses she succeeded in getting from appellee $1,000; and which purports to be sworn to before W. A. Gooding, Notary Public, April 29, 1861, and which was filed September 4, 1861.

Then follows what purports to be the affidavit of Wm. Heatherwick, which has no venue, and which was sworn to before W. A. Gooding, a
13 Notary Public, April 16, 1861, and filed September 4, 1861, and which is substantially as follows:

Deponent says he is well acquainted with James Heatherwick for over forty years, and that he bears a good character; that he is also well acquainted with Margaret, his wife, and has been for over six years; that the general reputation of said Margaret is bad, that she is very quarrelsome, ill-tempered, etc. That James was married to her on or about December 10, 1851, and continued to live together at times till March 31, 1856, when she left, taking bedding, etc., and from that time to the present date, said James has not seen her, and does not know of her whereabouts. Believes she married to obtain James' property, etc.

WILLIAM HEATHERWICK. [SEAL.]

Sworn and subscribed, April 16, A. D. 1861.
W. A. GOODING,
Notary Public.

Indorsed,
Filed September 4, 1861.
P. A. ARMSTRONG, Clerk.

DECREE.

JAMES HEATHERWICK
vs.
MARGARET HEATHERWICK.

In Grundy County Court.
In Chancery.
Decree.

Monday, September 2, 1861.

On this day this cause comes on, etc. Recites filing of bill, issuing of summons, sheriff's return, proof of publication, etc.

Ordered, that defendant answer, etc., by 3rd of September, inst.

And now, on this 4th day of September, it appearing that no answer, etc., is filed, defendant called, comes not. Default entered. Bill taken as confessed.

Whereupon, on inspection of papers and proofs filed in the cause, it appears to the court that complainant and defendant were married on the 10th day of December, 1851, at Cook county, Illinois, by the Rev. Dennis Rogan, and they cohabited as man and wife from said date until last of February, 1856; that there was no issue by said marriage; that said James owned an improved farm in Cook county, Illinois, worth from $1,600 to $2,000; that complainant, during cohabitation, provided in

abundance; that defendant had two sons and a daughter, whom com-
15 plainant, during the time aforesaid, supported and educated as his own children.

That he treated his wife kindly; that she had no just cause of complaint against him, but disregarding her marital obligations, absented herself from him about the last of February, 1856, and willfully deserted him and her home in Cook county, Illinois, without any reasonable or just cause, and continued absent, without any excuse or pretext, until filing of bill, and that said James sought an interview with her, to induce her to return, but failed; that he hath not been able to find or see her since her desertion.

That when she absconded, she and her children carried away all his household furniture, and other personal property, and sought to deprive him of his earnings, and caused it to be represented that she was willing to return if he would execute his note for $1,000, and secure the same by mortgage on his farm for the use of her children.

That desiring her return, he did so in good faith, but having done so,
16 she refused to return. That he, said complainant, being unable when the mortgage became due, to pay it, she caused the farm to be sold under it to her brother-in-law, etc., whereby he has been defrauded of a large amount of property.

That it further appearing, by the proofs exhibited, that said Margaret was quarrelsome, ill-tempered, etc., and that she endeavored to defraud him.

Therefore, it is ordered by the court, that the marriage contract be dissolved, etc.

ASSIGNMENT OF ERRORS.

1st — That the said Grundy County Court is not by law given jurisdiction in cases of Divorce

2nd. — That the affidavit of non residence of defendant is upon belief and is not positive and that said Grundy County Court did not obtain jurisdiction thereby

3rd. — That the Bill of Complaint does not aver that the Complainant resided in Grundy County where the Bill was filed

4th. — That the first insertion of the Publication notice was not sixty days before the return day of the Summons

5th. — That no depositions were taken in said Cause to prove the allegations of the Bill nor were any witnesses examined in open Court to prove the same

6th. — That there was no proof of Marriage

7th. — That there was no proof of desertion

8th — That Decree does not recite nor does the proof show that appellee resided in Grundy County at the time of filing Bill or at any other time

Morris J. Smoothood & Sols.

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Heathmwick
vs
Heathmwick

Abstract

Filed april 23-1863.
L L Leland
Clerk