

In re Schumaker and others. In re Town of Rantoul.

had been had before a committee of the council, passed a resolution declaring that certain of said charges were sustained by the evidence, and that the said *Kempster* be dismissed from office. Thereupon the relator sued out a writ of *certiorari* from the circuit court for Milwaukee county, directed to the common council of the city and the city clerk, to review said proceedings and reverse the same for alleged errors. The common council appeared in the circuit court, and moved to supersede and vacate the writ, which motion was, upon hearing, denied, and the common council appealed to this court. Motion is now made by the relator to dismiss the appeal on the ground that the common council has no legal right to appeal. The motion is well founded and must be granted. The common council is not a party to the proceedings for removal, nor to the action of *certiorari*, and cannot therefore appeal. *McCarty v. Ashland Co.* 61 Wis. 1.

*By the Court.*— Appeal dismissed.

IN RE SCHUMAKER and others.

IN RE TOWN OF RANTOUL.

May 21 — June 20, 1895.

*Special proceeding to incorporate village: Appealable order: Prohibition.*

1. An order of reference in a proceeding in the circuit court to incorporate a village, being a mere interlocutory order, is not appealable.
2. A writ of prohibition will not be granted against proceedings in the circuit court to incorporate a village, on the ground that the statutes authorizing such proceedings are unconstitutional. The ordinary remedies at law are ample.

APPLICATIONS for a stay of proceedings and for a writ of prohibition against proceedings in the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Denied.*

*J. C. Kleist and Rublee A. Cole, for the Town of Rantoul.*

*J. L. O'Connor, contra.*

In re Schumaker and others. In re Town of Rantoul.

WINSLOW, J. *Schumaker* and others made petition to the circuit court for Calumet county, under the provisions of secs. 854 *et seq.*, R. S., for the incorporation of certain territory as a village. Three fourths of the territory of the proposed village was situated in the town of *Rantoul*, and this town appeared and filed an answer to the petition, raising certain issues thereon, which issues were, by order of the court, referred to Joseph B. Reynolds, Esq., for examination and report thereon. The referee proceeded to take testimony, but before he had concluded his hearing or made his report, and on the 9th of May, 1895, the town of *Rantoul* served notice of appeal from the order of reference; and it now makes a motion in this court for an order staying all proceedings in the circuit court and before the referee, pending the appeal, and requiring the transmission to this court of all of the original papers in the proceeding. There is one sufficient reason why this motion will not be granted, and that reason is that the order of reference is not an appealable order. The proceeding to incorporate a village is a special proceeding, and not an action. The order of reference is simply an interlocutory order, and the statute governing appeals from orders in special proceedings grants an appeal only from a final order. R. S. sec. 3069, as amended by ch. 212, Laws of 1895.

A motion is also made by the town of *Rantoul* for a writ of prohibition, directed to the circuit judge and to the referee aforesaid, prohibiting them from taking any further proceedings in the matter of the application for incorporation, on the ground that the statutes authorizing the incorporation of villages by the circuit court are unconstitutional because they attempt to confer on the court legislative power. The writ of prohibition is issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity. *State ex rel. De Puy v. Evans*, 88 Wis. 255. We perceive no ex-

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treme necessity in this case, and no reason why the remedies at law are not ample in case an order of incorporation is made by the court below.

*By the Court.*—Motions denied.

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SEAMANS VS. THE MILLERS' MUTUAL INSURANCE COMPANY OF WISCONSIN (BUELL, Receiver, Respondent: KENDALL and others, Appellants).

May 22 — June 20, 1895.

*Mutual insurance companies: Assessments: Release of member from liability: Withdrawal: Annulment of policy: Measure of liability: What assessment may include: Receivers.*

1. The directors of a millers' mutual insurance company, organized under secs. 1941a-1941g, S. & B. Ann. Stats., who had decided to wind up its affairs, could not release a policy holder from liability for further assessments upon the surrender of his policy and the payment by him of an assessment insufficient to meet the expenses of the company and the losses which had then been sustained.
2. The surrender of the policy and payment of such insufficient assessment by the policy holder, and the return to him of his deposit note, with the understanding that he should not be called upon for any further assessment, did not constitute a withdrawal by him from the company under sec. 1941f, nor an annulment of his policy.
3. The amount of their deposit notes being, under the by-laws of the company and by the terms of the notes themselves, the measure of the liability of policy holders, those who had paid such notes in full were properly not included in an assessment.
4. An assessment made by the receiver of an insolvent mutual insurance company may include a reasonable amount for the expenses of the receivership, and also an allowance for shrinkage and uncollectible assessments.
5. The right of a receiver to make an assessment cannot be questioned on an appeal from orders directing him to make and collect it but not from the order appointing him.

Seamans vs. The Millers' Mutual Ins. Co. of Wisconsin.

APPEAL from orders of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an appeal by a policy holder in the Millers' Mutual Insurance Company of Wisconsin from three orders made by the superior court of Milwaukee county. The Millers' Mutual Insurance Company was organized in 1882 under the provisions of ch. 255, Laws of 1878, which chapter is embodied in secs. 1941a-1941g, S. & B. Ann. Stats. It continued its business until July, 1892. On the 30th day of January, 1891, the appellants, *J. O. Kendall & Co.*, insured three mills at Hartford, by a policy issued by said company, for the sum of \$5,000, for the term of five years. On the issuance of the policy the appellants paid a cash premium of \$43.75, and gave a premium or deposit note by which they promised to pay to the company \$437.50, by instalments, at such times as the directors might order and assess for the losses and expenses of said company pursuant to its charter and by-laws, which provided that in no event should there be any liability beyond the face amount of the note.

The articles of incorporation of the company provided that all persons insured should give their obligations binding themselves, their heirs and assigns, to pay their *pro rata* to the company of all the necessary expenses and losses by fire which might be sustained by any member thereof during the time for which their respective policies were written. Article 8 of the by-laws of the company also provided that policy holders should give their obligations to pay their *pro rata* of the losses and expenses of the company, as provided in the articles of incorporation, and should also pay a cash premium equal in amount to ten per cent. of said obligation, which cash premium should constitute a reserve fund, and should also pay semi-annual premiums, not exceeding for any six months ten per cent. of the deposit note, during the continuance of the said policy in force. Article 9 of said by-laws further provided for an assessment against the de-