

8753

No. _____

Supreme Court of Illinois

Sampson Cowen

vs.

J. B. Underwood, et al,

71641  7

State of Illinois } ss

Marion County } In the Circuit Court within and
for the County of Marion and
State of Illinois, in Chancery

Be it remembered that at the September Term
of the said Circuit Court in the year of our
Lord one thousand eight hundred and fifty
two, the following Record of proceedings, bill, sub-
poena in chancery and answer, were filed
in the office of the Clerk of the Circuit Court
within and for said County to wit

"State of Illinois }

County of St Clair } "In the Circuit Court within
and for the County of St
Clair & State of Illinois in
Chancery"

"Be it remembered that on the 27th day of
July A D 1853 Sampson Cowen, filed in the office
of the Clerk of the Circuit Court within & for the
County of St Clair and State of Illinois his
Bill of Complaint against Joseph B Underwood
& George Cowen in words and figures following
to wit: Said Bill is marked Exhibit A. as
part of this Record

"Upon the filing of which said Bill of Com-
plaint, a writ of subpoena issued to the Sheriff
of St Clair County, which with the Sheriffs re-
turn endorsed thereon is marked Exhibit B
as part of this record

"That afterwards at the August term of said Court
A D 1853 on the first Tuesday thereof, comes the
Complainant by A Miles his atty and on

"his motion a rule is granted on the defend-
"ant J. B. Underwood who is served with
"process to answer Complainants bill by next
"Saturday

"The defendant in compliance with the
"rule files his answer in words &c which said
"answer is marked exhibit C as part of this
"record; and by consent of parties the venue
"in this cause is changed to the County of Marion

"I Theodore Engelman clerk of the Circuit
"Court within & for the County of St Clair

"State of Illinois, hereby certify the fore-
"going to be a correct and complete

"transcript of the proceedings had in the
"above entitled cause as they appear

"of record in my office and that

"the papers marked respectively, exhibits

"A, B & C are the original papers on
"file. In testimony whereof I have hereunto

"signed my name & affixed the seal

"of said Court this 11th day of September

"A D 1852 "Theod Engelman"

Seal

Which said original bill of Complaint referred
to in the foregoing record as exhibit A. and
filed in the office of the clerk of the Circuit
Court within and for said County of Marion
is in the words and figures following, that
is to say

"To the Hon Wm. A Underwood Circuit
"Judge of the St Clair Circuit Court in
"Chancery sitting"

Respectfully sheweth your Orator Complaining
Jampson Cowen, that George Cowen recovered
a judgement against him in the said
Court at the April term thereof in the year
1850, for the sum of one hundred Dollars, with
costs of suit, and that a writ of Execution
was issued by the clerk of said Court on the
said judgement, which writ was issued and
dated on the 13th day of May in said year
Commanding the Sheriff to make the said
sum of \$100, with interest thereon from
the 10th day of April 1850 and costs \$15 ⁴⁰/₁₀₀

And further your Orator shews that the said
writ duly came into the hands of David W
Hopkins who was Sheriff of St Clair County
and was by him Executed by levying on and
selling the lands of your Orator, particularly
described in the said Sheriffs Return on the
said writ, in the words and figures following
to wit "By virtue of the within writ to me di-
"rected, I did this 24th day of August 1850
"levy on the following described tract of land
"to wit: The N¹/₂ of S W¹/₄ of Sect. 10, Containing
"80 acres. And the N W¹/₄ of Sect. 10 Con-
"taining 100 acres, all in S D N. R. 7 W
"and that I caused the same to be duly
"advertised according to law, and in per-
"suance of the notice given I did on
"the 23rd day of November 1850 Expose the
"same to sale, and the same was struck
"off to Joseph D Underwood at and for
"the sum of one hundred and thirty four

"~~two~~ Dollars, which satisfied this Execution
"interest and costs in full"

Signed "D. W. Hopkins"

"Shff St C C"

"Your orator further shews and charges the
"fact to be that both the said tracts described
"above, one of 80 acres and one of 160 acres
"were put up and offered together and
"were sold together and not separately by
"the said Sheriff to the said Underwood
"who bid the above named sum of \$134⁰⁰/₁₀₀
"for the same in one bid. And further your
"orator shews that the said Underwood was
"attorney for the plaintiff in said judgement
"who recovered the same, and paid the amount
"so bid by him by accepting as such attorney to
"the said Sheriff for the amount of the said
"judgement and did not pay any money
"except for the costs to be made by said Execution
"And your orator also shows and charges the
"fact to be that either one of ^{the} said tracts of
"land was worth much more than the amount
"of the said judgement interest and costs
"and that all the lands of your Orator are
"unmercifully and Wrongfully sacrificed
"and swept away by the Execution of said
"judgement in the manner above set forth
"while the said eighty acres tract was sufficient
"to satisfy the said judgement, and if it
"had been exposed to sale, would probably
"have satisfied the said judgement without
"the sale of the tract of 160 acres, the homestead

"of your Orator. The less of these two tracts
"is worth several times the amount of said
"judgement, and your Orator charges that the
"sale of both the said tracts together without
"offering or attempting to sell either separately
"and the purchase thereof by said Underwood
"was, ^{an} extortionate and oppressive act of injustice
"to your Orator, prompted by avarice and
"want of principle.

"Your Orator therefore prays that the sale
"may be set aside and held for nought
"and that the said Underwood and the
"said plaintiff in said judgement, may be
"made defendants to this bill of complaint
"and required to answer all the material allega-
"tions thereof, and that a writ of subpoena
"may issue requiring and commanding the
"said defendants to appear and answer &c
"and for such other and further relief as
"to your Honor may seem meet"

"It Niles" } "Sampson Corwin"
"Sol" } }

Said subpoena in Chancery referred to
in said foregoing Record as exhibit B and filed
in the office of the said Clerk of Marion County
is in the words and figures following; that
is to say

"State of Illinois" } set
"County of St Clair" }
"The People of the State of Illinois to the Sheriff
"of St Clair County Greeting
"We Command you to Summon Joseph W.

"Underwood, George Corwin if they can be
"found in your County, to be and appear in
"the St Clair Circuit Court, on the first day
"of the next term thereof, to be holden at the
"Court House in the Town of Belleville in
"said County on the second Monday of August
"next, then and there in said Court in chancery
"sitting to answer the bill of Complaint
"exhibited against them by Sampson Corwin
"and not to fail under penalty of what the
"law directs. And this writ you shall have
"at our said Court with your return
"indorsed thereon."



"Witness Theodore Engleman Clerk of said
"Court and the seal thereof hereto affixed
"this twenty seventh day of July A.D.
"One thousand eight hundred and
"fifty-two" "Theodore Engleman"

Upon the reverse of which said writ is the following
return and return to writ

"Executed by delivering a true copy of the within Sum-
"mons to the within named Joseph B Underwood
"July 27th 1832, the within named George Corwin
"not found in my County
(Signed) "J Irwin", Shff St Clair Co"

Said Answer referred to in the foregoing record
of the St Clair Circuit Court, and filed in the
office of the Clerk of the Circuit Court of this
County of Marion with said Record, is in
the words and figures following to wit

"Sampson Bowen }
 at } Answers of Underwood to
"J B Underwood & } Complainants bill of Com-
"George Bowen } plaint

"This defendant reserving to himself all
"manner of exceptions to the manifold errors
"inconsistencies and iniquities contained
"in Complainants bill of Complaint for answer
"admits that George Bowen recovered a judge-
"ment for the amount, at the time and place
"and against Sampson Bowen as alleged
"in said bill. This respondent also admits
"that he was the attorney of said George in
"obtaining the said judgement, and that
"upon said judgement a writ of Execution
"issued to the Sheriff stated in bill and that
"he levied the same on the lands described
"in said bill, and sold the same at the time
"and to the person therein stated, for the amount
"stated therein. This respondent further admits
"that the statement of the return on said
"Execution as copied in said bill is correct
"except the words "and sold" appear in the
"original return after the words "struck off"

"This respondent alleges that said lands
"were advertised twice for sale under said
"Execution - that no sale took place on the
"day of sale as first advertised, because
"there was no bidder - that previous to the
"day of the sale took place, the Sheriff afore-
"said suggested to this respondent and this
"respondent to his client said George, that he

"said George, had better attend the next
"sale and become a bidder himself as
"there would probably be no other bidders
"there; said George declined on the ground
"that he was unable to advance the Costs
"and advised this respondent to bid in
"said land in his (this respondent's) individ-
"ual capacity. This respondent then author-
"ized said Sheriff that in case there were
"no bidders on the next day advertised for the
"sale of said lands as alledged, then he might
"strike off the same to this respondent, for the
"amount of the judgement interest and Costs
"and apportion the amount between the two
"tracts as he saw fit. This respondent denies
"having bid off both tracts in one bid, further
"than above stated. This respondent denies hav-
"ing accepted to the Sheriff the amount bid, but alled-
"ges that in his capacity as attorney he entered
"said judgement satisfied as is Customary in
"practice and immediately afterwards ac-
"counted with his said client and settled
"with him in full for said judgement

"This respondent knows not whether either
"of said tracts was worth more, than the
"amount of said judgement interest and Costs
"This respondent denies, that said Eighty one
"tract if exposed for sale, would have satisfied
"said judgement, as there were no bidders
"for any part of said lands except this re-
"spondent, and he would not have taken it for
"that amount. This respondent does not know

"of his own knowledge whether said tracts
"were offered or sold separately or together
"This respondent is however willing to admit
"that both tracts were sold together for the
"sum stated. This respondent denies that
"said sale and purchase were acts of oppres-
"sion and extortionate, and alleges that
"said defendant in execution had an abun-
"dance of means and this respondent expec-
"ted without doubt that said lands would
"be redeemed. This respondent further avers
"that he repeatedly solicited said defendant
"in execution to redeem before the time of
"redemption expired but said defendant
"wholly neglected to do the same. This respondent
"further denies that said lands were sold
"contrary to law, according to the best of his knowl-
"edge information and belief. This respond-
"ent further alleges, that A. Mills the solicitor
"in this suit, was the attorney for said
"Sampson Corwin, before the justice of the Peace
"and on appeal in the Circuit Court in the
"Case in which said judgment was ren-
"dered and that he used his best exertions
"to defeat and defraud the said George
"of his just demand, for which said judge-
"ment was rendered. This respondent fur-
"ther avers that said Mills in behalf of a
"step son of said Sampson, has filed a
"bill in chancery which is now pending and
"enjoins the sheriff from making a deed
"and this respondent from spegning the

"Certificate of purchase, for the purpose of
"depriving this respondent out of said
"lands and the money advanced in the pur-
"chase of the same. This respondent further
"avens that said Niles at the last term of
"this Court entered a motion in behalf of
"said Sampson in said Case of George Corwin
"vs Sampson Corwin to set aside said Sale
"on the ground that the two tracts were sold
"together, which motion was overruled
"by the Marion County Circuit Court, to which
"County said Case was sent for adjudication
"This respondent charges that the course per-
"sued to wards this respondent by the said
"Niles and his clients above referred to is
"oppressive, iniquitous and tends to produce
"indefinite litigation without any reasonable
"or equitable Cause

"In Consideration of the premises this respond-
"ent prays to be dismissed with his costs &c
"Sworn to in Court this 14th

"Aug 1852

Joseph B Underwood

"West Mead Engleman"
"Club"

And said Cause having been entered
on the Docket of said Circuit Court of
Marion County at its said September
Term AD 1852, No order whatever was
made therein

And afterwards to wit at the May Term
AD 1853 of said Court, Exceptions were
filed to the answer aforesaid of said

Underwood, which Exceptions are in
the words and figures following to wit

"Marion Circuit Court"

"Sampson Cowen

vs

"Joseph B Underwood

"impleadate

"And the said plain-

"tiff comes and excepts to the said answer

"of the said debts Underwood on the ground

"1st That it is irrelevant and 2nd That it is

"Argumentative and not responsive to

"the bill in failing to admit or deny directly

"That the said lands were offered and sold

"together in one body and not separately

"as set out in the bill of Complaint, there-

"fore he prays that the said bill may be

"taken as confessed for want of a suf-

"ficient answer" (Signed) "S Cowen"

(Signed) "N Niles Sol"

The answer of George Cowen which is in the
words and figures following to wit

"Marion Circuit Court

"Sampson Cowen

vs

"Joseph B Underwood & George Cowen"

"I George Cowen, hereby authorize N Niles

"or any other solicitor of said Court to enter

"my appearance to the bill of Complaint filed

"herein and for answer thereto say I cannot

"deny the truth thereof and consent that

"The Sheriffs sale therein mentioned should
"be set aside as prayed for by said Com-
"plainant. Sampson Corwen

"In testimony whereof I have hereunto set

"My hand & Seal this 1 April 1853

(Signed) "George Corwen Seal"

Whereupon said Court at said last mentioned
term made and entered the following order
and decree to wit

"Sampson Corwen

vs

"Joseph B Underwood

"George Corwen

"And now at this day

"Comes the said parties by their attorneys, and

"the said Complainant having filed their ex-

"ceptions to the answer of said defendants

"and the Court being sufficiently advised

"Concerning the same, it is ordered that the

"second Exception be sustained with leave

"to defendants to amend their answer

"Whereupon afterwards came the said parties

"and the said Cause having been set for

"hearing, the same was submitted upon

"bill and amended answer of said

"defendants."

And afterwards to wit at the September

Term AD 1853 the final order and decree

was made herein which is in the

words and figures following, viz:

"Sampson Corwen

vs } Record from St Clair
Joseph B Underwood }
"This cause having been submitted at last
"term of Court upon bill and answer
"and the Court being now sufficiently
"advised in the premises, the bill is
"dismissed, and Complainant to pay
"the Costs herein &c

State of Illinois
Marion County of J B F Marshall Clerk of
the Circuit Court within and for said County
do hereby Certify that the foregoing is a correct
and complete transcript of the proceedings had
in the above entitled cause as they appear of
Record in my office and that the papers referred to
as marked A B & C (as having been transmitted
from the St Clair Circuit Court) are now on file in
my office

In testimony whereof I have hereunto set
my hand and affixed the Seal of said
Court at Salem this 10th Day of January
A D 1854

J B F Marshall Clerk

Assignment of Errors

- The said plaintiff Sampson Bowen assigns
for error in the foregoing record that the
1st " decision and decree of said court in
dismissing the bill of complaint at the
cost of complainant was contrary to
law
2nd " That said decision was contrary to
the evidence
3rd " That it was contrary to both law and
evidence
4th " That the court erred in not sustain-
ing the first exception of complainant to
the bill of answer of the defendant Un-
-derwood -

N. Niles

Atty. Gen.
City of Wash. D.C.

And the said dept. J. B. Underwood
that in the record & proceedings aforesaid
there is no error & this he is ready
to verify &c.

J. B. Underwood
Solicitor for said Dept.

No 11

Simpson Cowen

vs

Joseph By Linwood

George Cowen



Record

N. Niles
Atty

Filed August 16th
1854 - Paid \$5.00

J. J. Preston C.M.

By A. Johnston Deputy

7153-8

THE PEOPLE OF THE STATE OF ILLINOIS,

To the Sheriff of *McClain* County,

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in the Circuit Court of *Marion* County, before the judge thereof, between *Sampson Bowen, Plaintiff,* and *Joseph B Underwood and George Bowen*

defendant, it is said that manifest error hath intervened to the injury of said *Sampson Bowen* as we are informed by *his* 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 Mt. Vernon, 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 *Joseph B Underwood and George Bowen*

that *they* be and appear before the Justices of our said Supreme Court, on the first day of the next term of said Court, to be holden at Mount Vernon, in said State, on the Second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if *they* shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said *Joseph B Underwood and George Bowen* notice, together with this writ.

Witness, the Hon. SAMUEL H. TREAT, Chief Justice of our said Court, and the seal thereof, at Mount Vernon, this *16th* day *August* in the year of our Lord, one thousand eight hundred and fifty-*four*

A D Preston Clerk of Supreme Court.
by N Johnston Deputy

Supreme Court

Cowan

vs

Underwood

Executed August 31. 1854th
by reading to the within
named J. B. Underwood

Thos Challenor Supt. Sec.

For Sew & Ret	60
16 miles travel	80
	<hr/>
	140



Vertical handwritten text or scribbles on the right side of the page.

Sampson Cowan

vs

Underwood and
George Cowan

In the Supreme Court

Bill filed in the Marion county
Circuit Court to set aside Sheriff's
sale to Underwood of 240 acres all laying
together for about \$140

Bill dismissed in Court below

Compt in Bill avers that Sheriff sold to Underwood (lith
for George Cowan in the judgment) 2 tracts of land en mass for about
\$140, the amt of judgment costs, (when either tract (would have
been sufficient to have satisfied the judgment costs) I am not
certain as to the preceding allegation U) is worth (at the
time of filing the bill—and not at the time of the sale)
more than the amt of the judgment costs—charges
frand—and calls for answer on oath—No other
irregularity in sale averred—

Answer (I believe) admits the sale en mass
denies it would have sold to better advantage
in separate parcels, and (possibly) admits the
real worth of either tract (at time of filing bill)
to be worth more than amt bid—Denies
frand—Avers that Sheriff postponed sale
twice for want of bidders—prays to be dis-
missed and is sworn to—No replication
nor proof—Answer taken as true.

Now to set aside sale of things must be
alleged and proved under the decisions of
5 Gil 171, 442 & 12 Ills R 24 to wit

1st The land must be sold en mass, and

2^d At a sacrifice, when

3^d Susceptible of advantageous division,

4th And that some one was prejudiced thereby.

} 12 Ills
} 24.
} 5 Gil
} 171
} 442

The 1st point, we of course admit, but the

2^d That the same was sold at a sacrifice is neither sufficiently averred nor proved

It cannot be averred generally, but the facts that constitute it must be alledged—because it is a conclusion of law—to be determined by the extent of the difference, between the value of the thing alledged to be sacrificed (the land) and the consideration thereof—Now the value of the land at the time of the sale, and the amount it sold for are the two facts,—from which a court can determine whether there was a sacrifice,—the conclusion being dependent upon the extent of the difference—which is the matter to be averred and proved—If it be sufficient to aver it generally then it might be proved generally—and how many witnesses would would agree upon the meaning of such an indefinite word, as to justify a court in giving full weight to their testimony—hence it is a conclusion of law and the facts should be alledged—to wit the value of the land at the time of the sale as required in 5 Gil 442.—as well as the price paid for the land at the sale.—If for instance land worth \$100 was sold for \$90 no court would determine that the land had been sacrificed because the extent of the difference between the ^{actual} value and the consideration for which it sold is not sufficiently great, hence the necessity for the bill's showing the difference.

I conclude therefore that the general allegation of sacrifice is not sufficient, and that the complainant must alledge the value of the land at the time of the sale, as well as the price it sold for. This the Bill does not do. The allegation that the tract is worth enough to pay the judgment and costs is not sufficient, nor will it be presumed from that. - 5 Gilb 444.

But admitting (for argument) that the bill alleges that at the time of the sale the land was ^{actually} worth three or four times as much as the consideration paid, still the Court cannot regard it ^{such} as a sacrifice as comes within the meaning and intent of the law for setting aside sales en masse - for seldom land sells for half its value under execution - and very often for not one fourth its value - nor is it expected to - for it may be encumbered with old judgments, tax titles, - debts title may be uncertain itself - purchaser can place no reliance on it for a long time, on account of right of redemption, and if not redeemed the purchaser ^{generally} ~~often~~ is compelled to go through his yearly ejectment suits at great expense and uncertainty to dispossess debt. Hence the worth of property on execution is not expected. - Again The term sacrifice does not mean merely the loss of a thing for an inadequate compensation - It means (strictly) a total and unqualified loss, destruction, or privation of a thing. In law it means

so near a total loss, that the consideration or compensation therefor can be regarded as merely nominal. — It is used when the remuneration for a thing is so disproportioned to its true value that it will be considered as nothing compared to it, as per 4 Gil 389 & 1 Gil 435; where 720 acres worth \$4000 were sold for \$50, or 80 times less than value (commented upon in 5 Gil 112) and also 5 Gil 442, where \$1000 worth of land sold for \$33, or 30 times less than value — also 12 Ala 24 where 160 acres worth from \$300 to \$800 were sold for \$10 or from 30 to 80 times less than value. These are cases which the law pronounces a sacrifice, where the consideration is not merely inadequate, but so grossly disproportioned that the court will at first glance presume fraud — regarding the sale as being without any ^{noticeable} ~~worth~~ consideration and therefore a sacrifice. — The courts will not tolerate a valuation law to save people from paying their debts. — Nor can it be said that the sheriff should have adjourned the sale for want of bidders, as he had done so twice before — and is there no limit to adjourning sales — or must the judgment creditor wait till as good terms are offered as would be at private sale to exhibit favor to a debtor who has failed to pay a small debt in these prosperous times, till after the last day of execution, ~~time~~ sale and redemption have expired.

The next point is, that the land was
3 Susceptible of advantageous division

This is not sufficiently averred and not proved at all. It will not be presumed in any case 12 Ill R 24.

This averment has no reference to the value of the land or what it sold for. It refers entirely to its condition, ^{and} situation: For instance - If the 80 acre tract had been part timber and part prairie with a house on it, and the 160 acre tract had been also part timber and part prairie with a house on it then it no doubt would have been susceptible of advantageous division, But on the contrary, if the 160 acre tract had been prairie and the 80 timber then it might not have been susceptible of advantageous division - for many persons might who wished the whole place, might have ^{refused} feared to have bid for the timber for fear of being out bid for the prairie, and thereby prevented from buying it & converso.

Hence whether the two tracts were susceptible of advantageous division depends entirely upon their condition and situation, which is not in the least referred to in the bill; nor is there any evidence upon it except that the only purchaser (as stated in the answer) would not have given more for the two tracts if sold separately than was given en mass.

Where is the evidence then required in 12th Ill 24. - that this land would have sold more advantageously in separate parcels than it did sell for en mass - It must be ^{proved} ~~shown~~ by the case 12 Ill 24.

The next point to be averred and proved is 4th That some one was prejudiced thereby. What does this mean? Prejudiced thereby evidently means, prejudiced by the irregularity of the sale - that is, prejudiced by the land being sold en mass, instead of in separate parcels. - For surely no party could complain in equity, on account of an irregularity at law unless he could show that he was prejudiced by such irregularity - That would be the only equity in his bill - Now, to show that he was prejudiced on account of the land being sold en mass, the evidence must be such as convinces the Court that more would have ^{been} given for the land if it had been offered in separate parcels than was given for it en mass - and this will not be presumed 12 Ill 24, although where large quantities of land were sold together the Court will not require very strong testimony - Now how is it in the case at bar - No evidence whatever is introduced, or otherwise appears, tending to show that would actually or probably

have sold, for more than it did, in separate parcels. On the contrary the answer expressly states that it would not. Again it occurs to me that while Courts may lean in sitting aside such sales in favor of creditors and bona fide purchasers, for valuable consideration, yet they will not thus lean in favor of the judgment Debtor himself, who has neglected to pay his debt when due - neglected to pay the judgment when rendered and neglected to redeem when his land has been sold under the execution. This seems to me to be too much negligence to ask for favor in Equity - unless he can clearly show that he has been prejudiced by the irregularity - If he has been prejudiced in this case, it has not been in consequence of the irregularity, but in consequence of his own negligence.

12 Jcts 2d speaks of injudicious sales - It does seem to me, that after a Sheriff has first proved the sale twice to procure a judicious sale, that the Court ought not to complain if he strikes it off the 3^d time for $\frac{1}{4}$ value - which is worse than they have shown against us.

The points I have assumed, are all reasonable and I think clearly law as settled.

The bill ~~nowhere~~ alleges that the lands
would ^{probably} have sold for more in separate
parcels. The answer denies this & there was
no replication or evidence taken.

4127 Woods v. Moonell & John C. R. 534, 12 Ill. R. 24.
33 Ill. R. 383.
The bill only prays that the sale may
be set aside and held for naught.

The complainant does not offer in his
bill to pay the purchase money and in-
terest

Such sales are only voidable where Atty. of
plff. in execution purchases 1 Gil. R.

Not less than six years acquiescence will cure
the defective title to an office. A & A on Cor.
704.

Our statute is only directory 5 Gil. R.
6 Wend. R. 523.

No 11

November 1854.

Simpson Green

v

J B Underwood
& George Green

Error to Marine

Opinion by

Catm. J.

8753

Deum reversed &

Cause remanded

Ad.

Opinion not filed but
taken away by the court