No. 14468

# Supreme Court of Illinois

Foy

vs.

Blackstone

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

52½

No. ~~229~~.

Reported 31 Ill.

Foy
v.
Blackstone

63 1468

# STATE OF ILLINOIS,

## SUPREME COURT AT OTTAWA, APRIL TERM, A. D., 1862.

### Appeal from Whiteside County.

George Foy, Appellant--vs--Timothy B Blackstone, Appellee.

Record. This suit was commenced to recover the amount due upon P. 3 Coupon note before A. J. Matteson a Justice of the Peace.— Judgment rendered against said George Foy for the amount due upon said note. Said George Foy appealed to the Circuit Court P. 5 of said county, and a trial was had therein. The jury returned their verdict for *one hundred and thirteen and* 40-100 *dollars.* P. 8 The said George Foy filed his motion for arrest of judgment and P. 9 new trial, and to dismiss the suit for want of jurisdiction, which was all overruled by the court, and the plaintiff below filed his motion to remit thirteen and 40-100 dollars, (the interest on said note) on the verdict, which was sustained by the court and that amount was remitted. To all of which holdings and rulings of said court the said George Foy excepted and filed his exceptions thereto and prayed one appeal to the Supreme Court, which was allowed, and the requisite bond was given to the said George Foy.

P 11 The defendant below objected to the introduction of the note in evidence to the jury. Court overruled objection and allowed it to go to the jury.

The Plaintiff asked leave to amend endorsement which leave was objected to by Defendant below, but was permitted by the Court, and was accorningly made by the Plaintiff below (See Record P. 20,) it being admitted that said Coupon Note was P 12 given for one year's interest due upon a Bond given by said George Foy to the Camanche Albany and Mendota Railroad Company in payment of ten shares of the Capital Stock of one hundred dollars each, Said bond was dated February 10th 1857 and due ten years after its date.

P 13 The defendant below introduced Rufus Sheldon who said he lived five miles from said contemplated road and was acquainted with the officers of said company. A. J. Mattson, and E. B. Warner were directors, Dr. Cottle was Vice President of said company. The defendant below asked witness to state what inducements were held out by the officers and agents of said Railroad Company to induce the defendant to subscribe for the said ten shares of the capital stock of said company, to which the plaintiff below objected. Court sustains objection. Defendant below excepted. E. B. Warner was introduced by the defendant below as a witness. Said he was a director of said company in 1857, that Mr. Blackstone was one of the original directors of the company and has been ever since, and was Pres-

ident of said company in 1857 and 1858. Knew nothing about the transfer of this note. A. J. Mattson was one of the active members of said company. Mr. Blackstone did not attend all the meetings of the board. The defendant below offered to prove that the Coupon note sued upon was attached to a bond calling for a thousand dollars payable ten years after its date, made by the said George Foy, that said bond and all the said Coupon notes attached thereto was by an agreement between the said Camanche Albany and Mendota Railroad Company and the said George Foy and the said A. J. Mattson one of the directors of said company, and a Banker in Prophetstown deposited with A. J. Mattson, to be held by him until all the capital stock had been subscribed for. The defendant below also offered to prove that the said company and the said Mattson agreed with the defendant below that said bond and Coupon notes should not be negotiated, or used in any manner to make the defendant below liable thereon until said road should be built and fully completed, and if not built and completed within two years from the date of said bond and Coupen notes, the bond and Coupen notes were to be returned to the said George Foy, and that the said road is not built and the work is and has been suspended thereon, and that the plaintiff below received said Coupen note, on a pre-existing debt, and on no other consideration, and the defendant below offered also to prove by competent evidence that the amount of the capital stock had not been subscribed for and taken. And that the bond and Coupen notes had been given in payment of ten shares of the capital stock of the Camanche Albany and Mendota Railroad Company, which the said George Foy had previously subscribed for. The plaintiff below objected to any and all of the above testimony going to the jury and the court sustained the objection, and the testimony was not admitted, to all of which rulings and holdings, the defendant below excepted.

IP 14

IP 15

Page 22, 23, 24 "Articles of Association" of said company.

# ERRORS.

Ist,. The Court erred in permitting the note to go to the jury until it was proved by competent evidence that Happer, the Treasurer had authority to transfer said note

2nd. The Court erred in permitting The plaintiff below to fill up the assignment on said note,

3d. The Court erred in permitting the note to be given in evidence to the Jury until it was proved that the direcors had made a demand on defendant below, for his capital stock,

4th. The Court erred in letting the note go to the jury without proof that the Directors. authorise the taking of it

5th. The Company had no power to take said note.

6th. There was no consideration for said note,

7th. The evidence offered by the defendant below ought to have been admitted.

8th. The case ought to have been dismissed on the defendant's motion below

9th. The verdict is against the law and the evidence,

10, A new trial ought to have been granted on Foy's motion,

The first question is, what powers are given to the Company under the *charter*? The company organized under the general Railroad act. Cook's statutes, page 937, sec. 1st, says: "Any number of persons not less than twenty-five, being subscribers to the stock to any contemplated Railroad, may be formed into a corporation for the purpose of constructing and building said Railroad, by *complying* with the following requirements: when stock to the amount of at least one thousand dollars per mile of said road, shall be in good faith subscribed, and ten per cent paid therein, then said subscribers may commence forming a permanent organization to build said Railroad, and not before. They shall severally subscribe articles of association, in which shall be set forth the name of the *corporation*, the number of years it shall continue, which shall not exceed fifty.

The amount of the capital stock of the company which shall be the actual cost of constructing the road together with the cost of right of way, motive power, and every other appurtenance for completing and running said road as nearly as can be estimated by competent engineers, the number of shares of which said stock shall consist, the number of directors and their names, the place from and to which the proposed road is to be constructed and the counties through which said road is to pass, and its length as near as may be. and the names of five commissioners to open books of subscription to the capital stock; each subscriber shall subscribe his name to said articles of association, his place of residence, the number of shares of stock take by him in said company.

Section 2nd states that such articles of association shall not be filed in the office of the Secretary of State until ten per cent on the amount of the stock subscribed shall actually and in good faith be paid in, in *cash*, to the directors named in the articles of association,

Section 5th states that the commissioners for opening books of subscription shall from time to time after the company shall be incorporated, open books of subscription to the capital stock of said company, which shall be kept open until *all the Capital Stock shall be subscribed*, if the company shall so long exist, and in case a greater amount of stock shall be subscribed than the whole capital required by said estimate, then the commissioner shall distribute said capital stock among the subscribers equally, said commissioners to

open books of subscription to the capital stock of said company. The word *capital stock*, is used for the first time in the fifth section,and "when the capital stock shall all be subscribed for and distributed" &c., then the sixth section says, as *soon as practicable* after such capital stock shall have been subscribed and distributed as aforesaid, the commissioners (not the directors) shall appoint a time and place for the meeting of the stockholders to elect directors, and shall give notice thereof at least twenty days, of the time and place of such election; thirteen directors shall be elected.

Section 7th says that the commissioners shall be inspectors of the *first election of directors*, and shall declare the result thereof, and shall file a certificate of said election in the office of the Secretary of State, and with the Clerks of the different counties through which said road is to run, and shall also deliver to the Treasurer all the moneys by them received on subscriptions to the capital stock of said company, and shall deliver over all books and papers belonging to said company, and all subsequent elections shall be governed by the by-laws of the company. Now the commissioners leave. The permanent organization of the company is completed. 15th Ill. Report, page 400; Smith—vs.—Bangs.

Section 11th says that it shall be lawful for the directors to call in and demand from the stockholders respectively, all sums of money by them subscribed, at such time and in such instalments as the directors may deem proper, giving the necessary notice thereof.

The directors authorized to call in and collect the capital stock could not be elected until after capital stock was all subscribed for, that is a condition *precedent*, for the 6th sec. says, as soon as *practicable after such Capital Stock shall have been subscribed and distributed, &c.*, the commissioner shall appoint the time and place of election at which said directors shall be elected.

Section 7th says the commissioners shall be inspectors of the first election of the directors which are authorized to demand and collect in the capital stock of said company, are not the same directors mentioned in the first section of the charter, because the directors mentioned in the first section were appointed by those who subscribed stock to the amount of one thousand dollars per mile; in the first instance the

thousand dollars per mile; in the first instance the commissioners were at the same time appointed, and after which the articles of association were drawn up and the names of the directors and commissioners were included in said articles of association, which clearly shows that the Legislature when it passed the charter only intended to give to such preliminary organization such powers as were necessary to get the necessary amount of capital stock subscribed to build and equip said road.

The commissioners had no power to call an election to elect directors until *all* the capital stock had been subscribed for, therefore no directors, possessing the power to collect the capital stock can legally exist until after the capital stock is all taken; consequently no person had the authority to demand the money and receive the notes in payment thereof, by virtue of the charter. The commissioners have the control of the Books and Stock until after all the capital stock is subscribed for and the directors elected, and they had no power to take notes in payment of stock from the subscribers; for, the taking of all the *Capital Stock* is a condition precedent, expressly so made in the 6th section of the charter. Also see Redfield on Railways Page 77, Sec. 1, and page 79, and notes. In the case of Atlantic Cotton Mills—vs—Abbott, 9th Cush. Reports, 423, where it was inserted in a subscription for stock, that the capital stock of the company should be not less than $1,500,000 it was held to be a condition precedent to making calls.

There is a good reason for it. Suppose a project to cost three millions of dollars and the parties got one fourth subscribed that would be all lost if the balance could no be subscribed—it would be a great fraud on those who subscribed if their subscriptions could be collected when they supposed and had a right to suppose they would not be caled upon to pay, unless the balance of the *capital stock* was subscribed for to complete the work, and thereby give value to the Stock.

The 1st section of the charter says: "That any number of person not less than *twenty-five* who being subscribers of and contemplated Railroad, may be formed into a corporation, &c." Suppose that the persons only who being subscribers to the stock of a contemplated Railroad, should sub-

scribe stock to the amount of a thousand dollars per mile should make the necessary esiimate of its cost, appoint directors, also commissioners to open Books and solicit capital stock, and pay ten per cent in *cash* and file the articles of association in the office of the Secretary of State and get the same recorded; and the commissioners should get a small portion of the capital stock subscribed and should call an election and directors should be elected and the commissioners certify to their election and should then hand over to the Treasurer of said company the books, money and papers. Could the company collect the amount of *capital stock* thus subscribed for? We think not. No legal corporation would exist in such a case, the charter requiring at least twenty-five members before they could become incorporated, when in fact, they had but ten, and by the same parity of reasoning under the 6th section of the charter the whole amount of capital stock must be subscribed for, before the commissioners can call an election to elect the first directors of said company; such directors are the only persons under the charter that have the authority or power to make an assessment or collect the amount of capital stock subscribed from said stockholders. The charter is a part of the contract, and the the party having the right to and in fact does examine it, and upon such examination concludes to become a party to it, and subscribes for stock in it. Now what is the contract if all written out in full at the time the defendant signed it? It is this: "I, George Foy, do hereby agree to take ten shares of the capital stock of the Sterling and Rock Island Railroad Company, at one hundred dollars each, which I hereby agree to pay therefor to said company one thousand dollars, at such times and in such instalments as the directors that have been elected by all the stockholders shall direct, they giving the required notice—provided all of the capital stock required to build and equip said Railroad shall be subscribed for according to the estimate made." If the contract had been thus written out could the money be collected on the subscription until the whole of the capital stock had been taken? I think not; it is a condition *precedent*. We must take the charter, the books of subscription, and the articles of association, and the estimates of the cost of building said road, and put them together, in order to ascertain what the contract really was.

When the organization of the company is perfected for the purpose of building said Road, the company owns no stock, it cannot have any; it must have been all subscribed and taken and owned by its members in their individual right, before the commissioners can call an election to elect directors to build said Road, and when all the capital stock is subscribed for, it may be and should be and would be represented at the first election of directors, which was clearly the design of the Legislature. In the case of Walker—vs—De Vereaux *et al.*, 4 Pagie's Report, page 229. 2 Vol. Rail Road cases page 529.

The act as set forth in that case, creating the Utica & Schenectady Railroad requires the capital stock to be all subscribed for and that the commissioners appointed to open the books for stock subscriptions should in case of an excess of stock subscriptions apportion the stock among the subscribers, the Court says no person can be a stockholder of the corporation, neither does any corporation exist, nor has any person any interest in stock as the legal owner thereof so as to authorize him to vote upon it or transfer it as stock nor can an election be held until the commissioners apportion the stock, In the case of Crocker & Williams—vs—Crane, 23 Wendall's Reports page 211. 2 Vol. Railroad cases page 184, the Court says that when the charter provides for a distribution of the stock among the stockholders no corporation exists before the distribution is made; the Court says it is a *condition precedent*. The 6th section of the charter in this case, requires the commissions to apportion the stock among the subscribers after it is all taken, and before they call an election, for it could not be distributed if it had not been subscribed. Therefore, the subscribing for all the *capital stock* is a *condition precedent.* It seems to us that it was the intention of the legislature in making the subscription for all capital stock of said company a *condition precedent* to prevent fraud from being practiced upon those who might first subscribe for capital stock on said books. There is not the twentieth part of the stock taken of said company and the presumption is it will never be taken; the road is not built and in all human probability never will be built. Where the charter prescribes the particular mode in which a corporation shall make and execute its contracts, that mode must be followed. Angel & Ames on Corporations, page 268, sec. 253.

The charter in this case provides that the directors shall make estimates, give notice when the estimate must be paid, and a fair construction of the charter is, that the estimate shall be made at such times and in such amounts as will be required to pay for the work as it progresses, and no faster.

A corporation is a mere creature of law, and has no powers nor rights except such as are expressly given it by the charter. Trustees, &c.,—vs.—McConnel, 12th Ill. report, page 138 to 140. Angel & Ames on Corporation, page 276, sec. 257, same, page 279, sec. 260, same, page 103 sec. 111. It was undoubtly the intention of the Legislature in passing the act under which this company claims to be incorporated, to permit any number of persons not less than twenty-five, who were desirous to build a Railroad between given points, to be incorporated for that purpose. The Road could only be built by a solid capital of a large amount, to be created by voluntary subscription of individuals in the form of stock, and to be paid from time to time as the work progressed, and in order to protect the stockholders from frauds and impositions, as well as the public, the Statute points out the method how the amount of capital stock required to build and equip said Road should be ascertained. The 11th section requires the directors to collect the amount of stock subscribed at such time and in such instalments as they may deem proper.

The company has not the power to take a *note* in payment of subscription to the capital stock, due five, ten, or twenty years after its date, with or without interest. Such a note is not the capital intended by the Legislature that the company should raise to build the road with. If the interest should be collected as it becomes due and expended on the work, it would rot down before the money became due on the note, so as to complete the road. It may be said that the company may throw the note into the market and sell it. If the company has the power to do so, it can sell it for what it can get for it. Suppose it sold for eight hundred dollars; the party who gave the note would own a thousand dollars of the capital stock, and draw his dividends on it, and the party who actually paid in his thousand dollars would own but a thousand dollars. It would be a fraud upon the other stockholders, and one that the Legislature intended to prevent by prescribing the manner by

The Bank of Chillicothe vs Swayne 8 Ohio R P 257 1 Ohio State R P 233 Bank of Wooster vs Stevens 22 Illinois R 147

which the capital stock should be raised and collected. As well might the company take the pay for the stock thus subscribed for in a *flock of sheep* or in *patent rights.* * The company has undertaken to do a species of banking, using the stock as the capital, taking notes in payment of its stock, payable in five, ten and twenty years after their date with interest at ten per cent, payable semi-annually and annually. The road cannot be built with such a capital, it is impossible. It never was intended by the Legislature that it should be. Such trading and trafficking is foreign to the object for which the company was incorporated, and the *note* is therefore *void.* There is a difference between an incorporation organized to trade, and one to build and run a Railroad. Angel & Ames on Corportions, page 292 and 293, sec. 271; 5th Conn. Reports, page 560, N. Y. Fire Insurance Co.,—vs.—Ely. The case of Hood and Armory,—vs.—The Providence Insurance Co.; 2d Cranch Reports, page 127, Condensed, page 371. The court says it is a general rule that a corporation can only act in the manner prescribed by law, in its corporate capacity, it is the mere creature of the act to which it owes its existence. It may be said to be precisely what the incorporating act has made it—to derive all its powers from that act and to be capable of exerting its faculties only in the manner which that act authorizes. In the case of Crocker & Williams–vs–Crane 23 Wendell's Rep.; 2 Vol. Railroad cases page 485. The defendant Crane subscribed for 143 shares of stock to the Buffalo & Erie Railroad Company, the shares being fifty dollars each, and the act of corporation required the payment of two dollars on each share at the time of subscribing. A check was given and received in payment of and for aid instalments. The court said that the check was void, it being contrary to the policy of the charter or statute. The New York Fire Insurance Co.—vs.—Ely, before referred to; McCullough—vs.—Moss, 5 Denio reports page 567, same page 579.

The case of the Vermont Central Railroad company—vs—George Coyes, 21 Vermont Reports page 30; 1 Vol. Railroad cases page 226, In this case the defendant subscribed for fifty shares of the stock of said company, the *note* in suit was given for the first five dollars payable on each share, which was required to be paid by the charter

at the time of subscribing. The note was payable on demand. It was claimed that there was no consideration for the note, but the Court held it raised a mutuality in the contract and gave efficiency to the subscription. This case differs very materially from the one at bar. The party gave his contract to pay when they required it as if they ascertained the amount by computation and the party gave his due bill to be paid when called for, and the money was really then to be used as a part of capital to build the road; in effect the relation of the parties was not different from the one contemplated by the charter. Not so in the case at bar; a credit has been given to the defendant for more than five years to pay his stock; there is no authority for such a contract given by the charter.

The general Railroad Law, passed November 5th, 1849, and an amendatory act thereto passed November 6th, 1849. The 3d section of the Amendatory act authorized the Railroad Company to receive in payment for stock subscriptions the bonds of any county or city. If the general law authorized the Company to take notes in payment of stock, payable on time, why pass the amendatory act. Cook's Statutes page 950; Sec. 3.

Our Government is divided into three different and independant departments—the Executive, Legislative, and Judiciary, and in no case must the one infringe upon the rights and duties of the other. Therefore, the preamble to the act of the legislature approved, January 30th, 1857, Laws of Illinois, page 108–109, which declares that the Camanche, Albany & Mendota Railroad Company became a body corporate under the act to provide for a general system of railroad incorporations. approved Nov. 5th, 1849, is not binding. That is a question of fact, to be ascertained by the Court in accordance with the known and admitted rules of evidence, and the construction to be given to said act by the Court; the legislature has not the power to construe laws, its duty is to make laws; but it is the duty of the judiciary to construe and enforce them.

The amendatory act gives the company authority to change the location of the road, and confers on it all the powers of the general railroad act, therefore it is bound by the general railroad law of the State. The 2nd section gives the company authority to give and take bonds and notes at a rate of interest not exceeding ten per cent. This does

not effect the conditions and limitations imposed on the company by the general railroad law under which said company is organized, as to the manner of raising the capital stock and collecting the same to build the railroad with; neither was it the intention of the legislature to do so, as is clear upon the examination of the act itself.

The Supreme Court of the state has decided that a railroad company may in the ordinary course of business take and give notes, as, for instance, it may sell a car or warehouse, and take a note in payment, or any such transaction; but that does not authorize taking promissory notes payable ten and twenty years from date in payment of the capital stock, which should be cash in order to build the road. The act is not retrospective, if it was it would not be binding. If the contract as made by the parties was not binding at the time, the Legislature could not make it binding; Lessee of Good,—vs.—Zercher,12th Ohio Reports, page 364. Silliman,—vs.—Cummins & Cummins, 13th Ohio Reports, page 116.

The Court below ought to have dismissed the case on the motion of the defendant below. A justice has not jurisdiction where the amount claimed and the amount due is more than One Hundred Dollars. If the note was valid then, one hundred dollars, and the interest from March 1st to April 21st was due on it. The interest under the general statute is a legal claim against the maker of a note after it becomes due, and the court is bound to allow it. The plaintiff below might have remitted the interest on the note, but he did not before submitting his case to the justice. His legal claim as presented by himself on the trial before the Justice was more than one hundred dollars. If he recovered anything he ought to recover the amount due him.

A remitter may be entered when the verdict is more than it should be, but when the jury have found correctly, and the amount thus found ousts the jurisdiction of the Court, the party after having thus submitted his claim, and the jury having passed upon it, cannot remit a portion of it and thereby give jurisdiction to the Court; he should have remitted first.

The Circuit Court as an Appelate Court has no jurisdiction of the subject matter where the Court in which the cause originated had none. The parties cannot by consent give it any. But the cause ought to be dismissed at any

stage of the proceedings when the want of jurisdiction is ascertained. Nichols--vs.—Pallison, 4 Ohio Reports page 200; Condensed Ohio Reports page 75; 2 O. State Reports or 220 Ohio *Reports* page 223. Gilliman—vs.—Administrators of Sellers.

There was no evidence given or offered, to show the original bond or note was by the directors of said Company received as payment of such capital stock. The directors must have received it in payment as a Board of Directors when duly assembled. All parties are bound by the contract, or neither is bound. McCullough—vs—Moss, 5 *Denio* page 577. The fact that some of the directors received the note is not evidence that the board of directors received as a Board, (same), page 577. Livingston---vs.---Lynch, 4 John. chancery Reports page 596, 597.

The plaintiff below had no authority under the charter and laws to fill up the endorsement on the trial in the manner he did, without first showing by testimony that the said Happer, the treasurer had authority by the board of directors as a board to do so. There was no evidence showing that Happer was treasurer of said Co. There is nothing in the office of treasurer showing his authority to receive and transfer notes of the company. 5 Denio same case page 575. The Plaintiff below no right to add to the name of Samuel Happer, treasurer, the words "of the Camanche; Albany & Mendota Railroad Company," the amendment and addition to the assignment was not the mere filling up of a blank assignment. The company who claimed to have owned the note had not assigned it until the name of the Company was attached to the assignment, therefore, there was plainly no blank asssignment to fill up; it was a material alteration, and the plaintiff below had no right to make it, at least, without proof that the company authorized it. The record of the company would be the best, if not the only proof allowable to show the treasurer was authorized to receive and transfer said note. 2 Vol. Cowens & Hill's notes to Phillip's Evidence, page 1156, 1157.

*A* party that receives a note on a pre-existing debt, must prove that he received the note in payment of such debt, and that the original debtor is discharged therefrom, otherwise he holds it in trust to apply the money when collected on said debt, and without such proof he holds the notes subject to all equities. *A*fter the maker of the note proves that the holder took the note on a pre-existing debt, the

*onus* is on the holder to prove that he took the note in payment of such debt, and that the debtor was discharged from the original liability. Arming—vs.—Johnson *et al.*; 8 O. Reports, P. 526; 20 John. Reports 637. Coddington *et al.* —vs. Berry—but see 11 O. Reports page 172. Carlisle—vs. —Wishart, where the authority is reviewed and the result is as above claimed.

The plaintiff below was not and is not an innocent purchaser of said note for a valuable consideration in that sense. He was a director of said Company when this note was given, and for nearly two years afterward, and was and is bound to know by what authority the note was taken and upon what terms and by what authority it was transferred; for such acts must have been authorized by the board of directors as a board, and a record made of it, and he as the president, and a member of said board, is bound to take notice of all such acts, and therefore holds the note subject to all equities. All persons who deal with a Corporation are bound to take notice of the powers given by the powers given by the act of Incorporation. Angel & Ames on Corporations, page 284; 3 McLean's Circuit Court Reports, page 102. Root—vs.—Goddard, Story on Promissory Notes. page 229, Sec. 197. Hall—vs.—Hall 8 Conn. Reports 336. Notice to Matteson, one of the directors, was notice to the company that the note was taken to be kept safe and not disposed of, or the defendant below in any way to be liable thereon until all the capital stock had been subscribed for.

The defendant below offered a witness to prove that when the bond and coupon notes were given to the said company that the agreement between the Company and A. J. Mattson who was at that time and has ever since been a director of said Company, and the defendant below, was that said note was to be kept by said company in the possession of said Mattson as the director and agent of said company, and that the defendant was in no wise to be made liable thereon until the whole amount of the capital stock required to build said road should be subscribed for and taken, and if the Road was not built and completed within two years from the date of the bonds and coupons then the bonds and coupons were to be given up to the defendant below, and that that capital stock has not been subscribed for and the road is not built, and that the work is suspended. The

Court below erred in refusing to let said testimony be given to the jury.

The notice to Mattson, one of the directors, was notice to Company ofthe contract, and also to the plaintiff below, he being one of the Directors and the President of the Boad. Angel & Ames on Corporations, page 358 Sec. 306 page 357, Sec. 305.

A railroad company that receives a promissory note under a special contract made by one of its directors imposing certain conditions upon the company, the non-performance of which would make the note void, cannot transfer and assign said note to one of its directors he being the President of said company and thereby give it another and different circulation and direction than the one agreed upon by the parties at the time the note was given, and hold that such director and President was an innocent purchaser of said note for a valuable consideration, and thereby deprive the party from introducing his defence. Such a rule would lead to endless frauds; such is not the law. Such a party receiving such a note is bound from his relation to the Company to know the terms upon which such notes were received and takes it subject to all equities.

In the case of Rodes vs. Ayres 16, O, R. Page 283, it was held that a circulation given to a note contrary to the purposes for which it was delivered and such as the parties never designed rendered the note void. 16, of Pick P. 574 hold same doctrine. Cooks Statute P. 292, Sec. 11, says if any frauds or circumvention is used in obtaining the making or executing a note, such fraud becomes attached to the note and follows it into whosoever's hands it may go and it is liable to all equities. A note has no legal value until it is delivered, it is the delivery that gives it legal life. Gardner vs. Walch 32 Vol. Law and Equity, R. P. 162. The Portage County Branch Bank vs. Gustaves Lane, 8 Ohio State R. or 28 Vol. of O. R. P, 405. This note was not delivered in the sense that would make the party liable thereon it was to lay lifeless in the safe, until the capital stock was all subscribed for and the maker was in no way to be liable theron and if the road was not built in two years the note was to be returned, neither of the events has happened therefore the note never had legal life and is void.

A corporation must of necessity act through and by its officers and agents and it is bound by the acts and declarations of its officers and agents. Story on Agency, Section 127-135-137-452 17 Texas R. 560, Frauds oviates a contract *ab mitio* Chitty on contracts P. 678, 679, 680 and notes.

If these notes and mortgages are held to be valid the directors and officers of this pretended company can divide said notes and mortgages among themselves, as this case evidence at a nominal value. If they have such power it is not restricted, and the result will be the people along the line where said road was to run will be bankrupt. Now the road is abandoned there is no power to call the officers to account for the money, and if there was the notes being sold to each other for a nominal sum say ten or twenty per cent, which amount would be all be consumed in incidental expences in one way and another. So the people would be defrauded out of the amount, and the officers the only gainers. A court is said to be the place where justice is judicially administered and all transactions there are stripped of all frauds that may surround them and justice is meted out to all parties. If so these notes and mortgages will be declared fraudulent and void.

**SAMUEL STRAWDER,**
Attorney for George Foy.

~~230~~ ~~327~~ 32
52½

Foy
vs
Blackstone

Abstracts

Filed April 25. 1861
L. Delano
Clk.

Fox
v
Blackstone

Appeal from Whiteside

Now Comes the said Appellee by Glover, Cook & Campbell his Attornies & enters his motion herein to dismiss the said appeal for want of an Appeal Bond

And makes the following suggestions

The Appeal was granted upon the Defendant below filing a bond in the Sum of three Hundred Dollars with Aaron S. Miller as Security within 20. days from the last day of the term

Record page 9 –

No Bond at all ever appears by the Record to have been filed upon page 31 – of Record there appears what was perhaps intended as a bond though without date, & not under seal, but there is nothing to show that it has ever been filed

Glover Cook & Campbell
for Appellee

32 Foy 52 1/2

~~829~~

v

Blackstone

Motion to dismiss appeal &c

mo ovr ruled

Filed May 2, 1862
L Leland
Clerk

The State of Illinois
Supreme Court at Ottawa

George Fay Appellant
vs
Timothy B Blackstone appellee

It is a well settled princi
pal that the date is no part
of the instrument - in a deed
or any other obligation

The Bond is obligatory with
out a date - The law presumes
that the Court and its officers
did their duty - That the Bond
was taken at the proper time
If the Bond was not taken
within the time given by the court
the Motion should ~~[illegible]~~ state
that fact and then proof by
affidavits would settle the
question

I know personally the Bond
was taken within the proper time
as it was taken during the term
in which the judgment was
rendered

S Strawn Atty for Fay

52½ ~~229~~ 32

George Foy
v
T. B. Blackstone

Plffs. Suggestions

Filed May 6. 1862
L. Leland
Clk.

Rule to file answers by the 14th "

George Foy
229 vs
Timothy B. Blackstone

Appeal from Whitesides

I move for a rule upon appellant to file an amended bond

Because the bond filed is without date

We are entitled to have a bond upon which a suit can be maintained without resorting to proof outside the bond & the record

We could not sue on this bond without proving aliunde when it was given

B. C. Cook

32 52 1/2 ~~229~~

George Hoy
vs
Timothy B Blackstone

Motion

Filed May 6, 1862
L Leland
Clk

Know all men by these Presents that we George Foy and Aaron S Miller of the county of Whiteside and State of Illinois are held and firmly bound unto Timothy B. Blackstone of the county of Cook in the State of Illinois in the penal sum of three hundred dollars lawfull money of the United States. to be paid unto the said Timothy B Blackstone his heirs Executors and administrators or assigns. to which payment well and truly to be made we hereby bind ourselves our heirs executors and administrators and every of them firmly by these presents.

Sealed with our Seals ~~and dated~~ this ninth day of May A.D. 1862

The Condition of the above obligation is such that whereas the said Timothy B Blackstone did at the may term A.D. 1861 of the circuit court in and for the county of Whiteside and State of Illinois before the Hon John V Eustace Judge of the twenty second Judicial circuit in said State of Illinois recover a Judgment against the said above bounden George Foy for the sum of one hundred dollars and costs of suit from which said Judgment the said George Foy has taken an appeal to the Supreme court of the State of Illinois. And the said George Foy and Aaron S Miller do further bind themselves their heirs executors & administrators ~~and assigns~~ Jointly and severally to pay to the said Timothy B Blackstone his heirs executors administrators and assigns the

amount of the said judgment in this case and all costs herein and the interest and damages that may be awarded against them in this case should the said judgment be affirmed by the supreme court of this state in this case. And the said George Foy shall prosecute his said appeal.
Now if the said George Foy shall prosecute his said appeal with effect and shall pay whatever judgment the said plaintiff shall recover against him and all costs interest and damages in the said cause then this obligation shall be null and void otherwise to be and remain in full force and effect in law

George Foy (Seal)
Aaron S Miller (Seal)

State of Illinois }
Whiteside County } I Addison Farrington clerk of the circuit court in and for the County of Whiteside and State of Illinois hereby certify the above and foregoing to be a true and perfect copy of a bond filed in my office on the 12" day of May A.D. 1862 in a cause lately pending in said court wherein Timothy B Blackstone was plaintiff and George Foy defendant. and which said cause was appealed by the said Foy to the Supreme court of the State of Illinois

Witness A Farrington clerk of said court and the seal thereof at Morrison this 12" day A.D. 1862
A Farrington clerk

CIRCUIT COURT WHITESIDE COUNTY ILL.

Copy of Bond

32 52½ ~~229~~

J B Blackstone

vs

George Ivey

Amended Appeal bond

Filed May 12 1862
L. Leland Clerk

# STATE OF ILLINOIS,

## SUPREME COURT AT OTTAWA, APRIL TERM, A. D., 1862.

### Appeal from Whiteside County.

George Foy, Appellant--vs--Timothy B Blackstone, Appellee.

Record. P. 3 This suit was commenced to recover the amount due upon Coupon note before A. J. Matteson a Justice of the Peace.—Judgment rendered against said George Foy for the amount due upon said note. Said George Foy appealed to the Circuit Court P. 5 of said county, and a trial was had therein. The jury returned their verdict for *one hundred and thirteen and* 40-100 *dollars.* P. 8 The said George Foy filed his motion for arrest of judgment and P. 9 new trial, and to dismiss the suit for want of jurisdiction, which was all overruled by the court, and the plaintiff below filed his motion to remit thirteen and 40-100 dollars, (the interest on said note) on the verdict, which was sustained by the court and that amount was remitted. To all of which holdings and rulings of said court the said George Foy excepted and filed his exceptions thereto and prayed one appeal to the Supreme Court, which was allowed, and the requisite bond was given to the said George Foy.

P 11 The defendant below objected to the introduction of the note in evidence to the jury. Court overruled objection and allowed it to go to the jury.

The Plaintiff asked leave to amend endorsement which leave was objected to by Defendant below, but was permitted by the Court, and was accorningly made by the Plaintiff below (See Record P. 20,) it being admitted that said Coupon Note was given for one year's interest due upon a Bond given by said P 12 George Foy to the Camanche Albany and Mendota Railroad Company in payment of ten shares of the Capital Stock of one hundred dollars each. Said bond was dated February 10th 1857 and due ten years after its date.

P 12 & 13 The defendant below introduced Rufus Sheldon who said he lived five miles from said contemplated road and was acquainted with the officers of said company. A. J. Mattson, and E. B. Warner were directors, Dr. Cottle was Vice President of said company. The defendant below asked witness to state what inducements were held out by the officers and agents of said Railroad Company to induce the defendant to subscribe for the said ten shares of the capital stock of said company, to which the plaintiff below objected. Court sustains objection. Defendant below excepted. E. B. Warner was introduced by the defendant below as a witness. Said he was a director of said company in 1857, that Mr. Blackstone was one of the original directors of the company and has been ever since, and was Pres-

ident of said company in 1857 and 1858. Knew nothing about the transfer of this note. A. J. Mattson was one of the active members of said company. Mr. Blackstone did not attend all the meetings of the board. The defendant below offered to prove that the Coupon note sued upon was attached to a bond calling for a thousand dollars payable ten years after its date, made by the said George Foy, that said bond and all the said Coupon notes attached thereto was by an agreement between the said Camanche Albany and Mendota Railroad Company and the said George Foy and the said A. J. Mattson one of the directors of said company, and a Banker in Prophetstown deposited with A. J. Mattson, to be held by him until all the capital stock had been subscribed for. The defendant below also offered to prove that the said company and the said Mattson agreed with the defendant below that said bond and Coupon notes should not be negotiated, or used in any manner to make the defendant below liable thereon until said road should be built and fully completed, and if not built and completed within two years from the date of said bond and Coupen notes, the bond and Coupen notes were to be returned to the said George Foy, and that the said road is not built and the work is and has been suspended thereon, and that the plaintiff below received said Coupen note, on a pre-existing debt, and on no other consideration, and the defendant below offered also to prove by competent evidence that the amount of the capital stock had not been subscribed for and taken. And that the bond and Coupen notes had been given in payment of ten shares of the capital stock of the Camanche Albany and Mendota Railroad Company, which the said George Foy had previously subscribed for. The plaintiff below objected to any and all of the above testimony going to the jury and the court sustained the objection, and the testimony was not admitted, to all of which rulings and holdings, the defendant below excepted.

IP 14

IP 15

Page 22, 23, 24 "Articles of Association" of said company.

# ERRORS.

The first question is, what powers are given to the Company under the *charter*? The company organized under the general Railroad act. Cook's statutes, page 937, sec. 1st, says: "Any number of persons not less than twenty-five, being subscribers to the stock to any contemplated Railroad, may be formed into a corporation for the purpose of constructing and building said Railroad, by *complying* with the following requirements: when stock to the amount of at least one thousand dollars per mile of said road, shall be in good faith subscribed, and ten per cent paid therein, then said subscribers may commence forming a permanent organization to build said Railroad, and not before. They shall severally subscribe articles of association, in which shall be set forth the name of the *corporation*, the number of years it shall continue, which shall not exceed fifty.

The amount of the capital stock of the company which shall be the actual cost of constructing the road together with the cost of right of way, motive power, and every other appurtenance for completing and running said road as nearly as can be estimated by competent engineers, the number of shares of which said stock shall consist, the number of directors and their names, the place from and to which the proposed road is to be constructed and the counties through which said road is to pass, and its length as near as may be. and the names of five commissioners to open books of subscription to the capital stock; each subscriber shall subscribe his name to said articles of association, his place of residence, the number of shares of stock take by him in said company.

Section 2nd states that such articles of association shall not be filed in the office of the Secretary of State until ten per cent on the amount of the stock subscribed shall actually and in good faith be paid in, in *cash*, to the directors named in the articles of association.

Section 5th states that the commissioners for opening books of subscription shall from time to time after the company shall be incorporated, open books of subscription to the capital stock of said company, which shall be kept open until *all the Capital Stock shall be subscribed*, if the company shall so long exist, and in case a greater amount of stock shall be subscribed than the whole capital required by said estimate, then the commissioner shall distribute said capital stock among the subscribers equally, said commissioners to

open books of subscription to the capital stock of said company. The word *capital stock*, is used for the first time in the fifth section, and "when the capital stock shall all be subscribed for and distributed" &c., then the sixth section says, as *soon as practicable* after such capital stock shall have been subscribed and distributed as aforesaid, the commissioners (not the directors) shall appoint a time and place for the meeting of the stockholders to elect directors, and shall give notice thereof at least twenty days, of the time and place of such election; thirteen directors shall be elected.

Section 7th says that the commissioners shall be inspectors of the *first election of directors*, and shall declare the result thereof, and shall file a certificate of said election in the office of the Secretary of State, and with the Clerks of the different counties through which said road is to run, and shall also deliver to the Treasurer all the moneys by them received on subscriptions to the capital stock of said company, and shall deliver over all books and papers belonging to said company, and all subsequent elections shall be governed by the by-laws of the company. Now the commissioners leave. The permanent organization of the company is completed, 15th Ill, Report, page 400; Smith—vs.—Bangs.

Section 11th says that it shall be lawful for the directors to call in and demand from the stockholders respectively, all sums of money by them subscribed, at such time and in such instalments as the directors may deem proper, giving the necessary notice thereof.

The directors authorized to call in and collect the capital stock could not be elected until after capital stock was all subscribed for, that is a condition *precedent*, for the 6th sec. says, as soon as *practicable after such Capital Stock shall have been subscribed and distributed*, &c., the commissioner shall appoint the time and place of election at which said directors shall be elected.

Section 7th says the commissioners shall be inspectors of the first election of the directors which are authorized to demand and collect in the capital stock of said company, are not the same directors mentioned in the first section of the charter, because the directors mentioned in the first section were appointed by those who subscribed stock to the amount of one thousand dollars per mile; in the first instance the

thousand dollars per mile; in the first instance the commissioners were at the same time appointed, and after which the articles of association were drawn up and the names of the directors and commissioners were included in said articles of association, which clearly shows that the Legislature when it passed the charter only intended to give to such preliminary organization such powers as were necessary to get the necessary amount of capital stock subscribed to build and equip said road.

The commissioners had no power to call an election to elect directors until *all* the capital st ock had been subscribed for, therefore no directors, possessing the power to collect the capital stock can legally exist until after the capital stock is all taken; consequently no person had the authority to demand the money and receive the notes in payment thereof, by virtue of the charter. The commissioners have the control of the Books and Stock until after all the capital stock is subscribed for and the directors elected, and they had no power to take notes in payment of stock from the subscribers; for, the taking of all the *Capital Stock* is a condition precedent, expressly so made in the 6th section of the charter. Also see Redfield on Railways Page 77, Sec. 1, and page 79, and notes. In the case of Atlantic Cotton Mills—vs—Abbott, 9th Cush. Reports, 423, where it was inserted in a subscription for stock, that the capital stock of the company should be not less than $1,500,000 it was held to be a condition precedent to making calls.

There is a good reason for it. Suppose a project to cost three millions of dollars and the parties got one fourth subscribed that would be all lost if the balance could no be subscribed—it would be a great fraud on those who subscribed if their subscriptions could be collected when they supposed and had a right to suppose they would not be caled upon to pay, unless the balance of the *capital stock* was subscribed for to complete the work, and thereby give value to the Stock.

The 1st section of the charter says: "That any number of person not less than *twenty-five* who being subscribers of and contemplated Railroad, may be formed into a corporation, &c." Suppose that the persons only who being subscribers to the stock of a contemplated Railroad, should sub-

scribe stock to the amount of a thousand dollars per mile should make the necessary esiimate of its cost, appoint directors, also commissioners to open Books and solicit capital stock, and pay ten per cent in *cash* and file the articles of association in the office of the Secretary of State and get the same recorded; and the commissioners should get a small portion of the capital stock subscribed and should call an election and directors should be elected and the commissioners certify to their election and should then hand over to the Treasurer of said company the books, money and papers. Could the company collect the amount of *capital stock* thus subscribed for? We think not. No legal corporation would exist in such a case, the charter requiring at least twenty-five members before they could become incorporated, when in fact, they had but ten, and by the same parity of reasoning under the 6th section of the charter the whole amount of capital stock must be subscribed for, before the commissioners can call an election to elect the first directors of said company; such directors are the only persons under the charter that have the authority or power to make an assessment or collect the amount of capital stock subscribed from said stockholders. The charter is a part of the contract, and the the party having the right to and in fact does examine it, and upon such examination concludes to become a party to it, and subscribes for stock in it. Now what is the contract if all written out in full at the time the defendant signed it? It is this: "I, George Foy, do hereby agree to take ten shares of the capital stock of the Sterling and Rock Island Railroad Company, at one hundred dollars each, which I hereby agree to pay therefor to said company one thousand dollars, at such times and in such instalments as the directors that have been elected by all the stockholders shall direct, they giving the required notice— provided all of the capital stock required to build and equip said Railroad shall be subscribed for according to the estimate made." If the contract had been thus written out could the money be collected on the subscription until the whole of the capital stock had been taken? I think not; it is a condition *precedent*. We must take the charter, the books of subscription, and the articles of association, and the estimates of the cost of building said road, and put them together, in order to ascertain what the contract really was.

When the organization of the company is perfected for the purpose of building said Road, the company owns no stock, it cannot have any; it must have been all subscribed and taken and owned by its members in their individual right, before the commissioners can call an election to elect directors to build said Road, and when all the capital stock is subscribed for, it may be and should be and would be represented at the first election of directors, which was clearly the design of the Legislature. In the case of Walker—vs—De Vereaux *et al.*, 4 Pagie's Report, page 229. 2 Vol. Rail Road cases page 529.

The act as set forth in that case, creating the Utica & Schenectady Railroad requires the capital stock to be all subscribed for and that the commissioners appointed to open the books for stock subscriptions should in case of an excess of stock subscriptions apportion the stock among the subscribers, the Court says no person can be a stockholder of the corporation, neither does any corporation exist, nor has any person any interest in stock as the legal owner thereof so as to authorize him to vote upon it or transfer it as stock nor can an election be held until the commissioners apportion the stock, In the case of Crocker & Williams—vs—Crane, 23 Wendall's Reports page 211. 2 Vol. Railroad cases page 184, the Court says that when the charter provides for a distribution of the stock among the stockholders no corporation exists before the distribution is made; the Court says it is a *condition precedent.*. The 6th section of the charter in this case, requires the commissions to apportion the stock among the subscribers after it is all taken, and before they call an election, for it could not be distributed if it had not been subscribed. Therefore, the subscribing for all the *capital stock* is a *condition precedent.* It seems to us that it was the intention of the legislature in making the subscription for all capital stock of said company a *condition precedent* to prevent fraud from being practiced upon those who might first subscribe for capital stock on said books. There is not the twentieth part of the stock taken of said company and the presumption is it will never be taken; the road is not built and in all human probability never will be built. Where the charter prescribes the particular mode in which a corporation shall make and execute its contracts, that mode must be followed. Angel & Ames on Corporations, page 268, sec 253.

The charter in this case provides that the directors shall make estimates, give notice when the estimate must be paid, and a fair construction of the charter is, that the estimate shall be made at such times and in such amounts as will be required to pay for the work as it progresses, and no faster.

A corporation is a mere creature of law, and has no powers nor rights except such as are expressly given it by the charter. Trustees, &c.,—vs.—McConnel, 12th Ill. report, page 138 to 140. Angel & Ames on Corporation, page 276, sec. 257, same, page 279, sec. 260, same, page 103 sec. 111. It was undoubtly the intention of the Legislature in passing the act under which this company claims to be incorporated, to permit any number of persons not less than twenty-five, who were desirous to build a Railroad between given points, to be incorporated for that purpose. The Road could only be built by a solid capital of a large amount, to be created by voluntary subscription of individuals in the form of stock, and to be paid from time to time as the work progressed, and in order to protect the stockholders from frauds and impositions, as well as the public, the Statute points out the method how the amount of capital stock required to build and equip said Road should be ascertained. The 11th section requires the directors to collect the amount of stock subscribed at such time and in such instalments as they may deem proper.

The company has not the power to take a *note* in payment of subscription to the capital stock, due five, ten, or twenty years after its date, with or without interest. Such a note is not the capital intended by the Legislature that the company should raise to build the road with. If the interest should be collected as it becomes due and expended on the work, it would rot down before the money became due on the note, so as to complete the road. It may be said that the company may throw the note into the market and sell it. If the company has the power to do so, it can sell it for what it can get for it. Suppose it sold for eight hundred dollars; the party who gave the note would own a thousand dollars of the capital stock, and draw his dividends on it, and the party who actually paid in his thousand dollars would own but a thousand dollars. It would be a fraud upon the other stockholders, and one that the Legislature intended to prevent by prescribing the manner by

which the capital stock should be raised and collected. As well might the company take the pay for the stock thus subscribed for in a *flock of sheep* or in *patent rights.* The company has undertaken to do a species of banking, using the stock as the capital, taking notes in payment of its stock, payable in five, ten and twenty years after their date with interest at ten per cent, payable semi-annually and annually. The road cannot be built with such a capital, it is impossible. It never was intended by the Legislature that it should be. Such trading and trafficking is foreign to the object for which the company was incorporated, and the *note* is therefore *void.* There is a difference between an incorporation organized to trade, and one to build and run a Railroad. Angel & Ames on Corportions, page 292 and 293, sec. 271; 5th Conn. Reports, page 560, N. Y. Fire Insurance Co.,—vs.—Ely. The case of Hood and Armory,—vs.—The Providence Insurance Co.; 2d Cranch Reports, page 127, Condensed, page 371. The court says it is a general rule that a corporation can only act in the manner prescribed by law, in its corporate capacity, it is the mere creature of the act to which it owes its existence. It may be said to be precisely what the incorporating act has made it—to derive all its powers from that act and to be capable of exerting its faculties only in the manner which that act authorizes. In the case of Crocker & Williams–vs–Crane 23 Wendell's Rep.; 2 Vol. Railroad cases page 485. The defendant Crane subscribed for 143 shares of stock to the Buffalo & Erie Railroad Company, the shares being fifty dollars each, and the act of corporation required the payment of two dollars on each share at the time of subscribing. A check was given and received in payment of and for aid instalments. The court said that the check was void, it being contrary to the policy of the charter or statute. The New York Fire Insurance Co.—vs.—Ely, before referred to; McCullough.—vs.—Moss, 5 Denio reports page 567, same page 579.

The Bank of Chillicothe vs Swayne 8 Ohio R P 257 1 Ohio State R page 233 - The Bank of Wooster vs Stevens 22 Illinois R 147

The case of the Vermont Central Railroad company—vs—George Coyes, 21 Vermont Reports page 30; 1 Vol. Railroad cases page 226, In this case the defendant subscribed for fifty shares of the stock of said company, the *note* in suit was given for the first five dollars payable on each share, which was required to be paid by the charter

at the time of subscribing. The note was payable on demand. It was claimed that there was no consideration for the note, but the Court held it raised a mutuality in the contract and gave efficiency to the subscription. This case differs very materially from the one at bar. The party gave his contract to pay when they required it as if they ascertained the amount by computation and the party gave his due bill to be paid when called for, and the money was really then to be used as a part of capital to build the road; in effect the relation of the parties was not different from the one contemplated by the charter. Not so in the case at bar; a credit has been given to the defendant for more than five years to pay his stock; there is no authority for such a contract given by the charter.

The general Railroad Law, passed November 5th, 1849, and an amendatory act thereto passed November 6th, 1849. The 3d section of the Amendatory act authorized the Railroad Company to receive in payment for stock subscriptions the bonds of any county or city. If the general law authorized the Company to take notes in payment of stock, payable on time, why pass the amendatory act. Cook's Statutes page 950; Sec. 3.

Our Government is divided into three different and independant departments—the Executive, Legislative, and Judiciary, and in no case must the one infringe upon the rights and duties of the other. Therefore, the preamble to the act of the legislature approved, January 30th, 1857, Laws of Illinois, page 108–109, which declares that the Camanche, Albany & Mendota Railroad Company became a body corporate under the act to provide for a general system of railroad incorporations. approved Nov. 5th, 1849, is not binding. That is a question of fact, to be ascertained by the Court in accordance with the known and admitted rules of evidence, and the construction to be given to said act by the Court; the legislature has not the power to construe laws, its duty is to make laws; but it is the duty of the judiciary to construe and enforce them.

The amendatory act gives the company authority to change the location of the road, and confers on it all the powers of the general railroad act, therefore it is bound by the general railroad law of the State. The 2nd section gives the company authority to give and take bonds and notes at a rate of interest not exceeding ten per cent. This does

not effect the conditions and limitations imposed on the company by the general railroad law under which said company is organized, as to the manner of raising the capital stock and collecting the same to build the railroad with; neither was it the intention of the legislature to do so, as is clear upon the examination of the act itself.

The Supreme Court of the state has decided that a railroad company may in the ordinary course of business take and give notes, as, for instance, it may sell a car or warehouse, and take a note in payment, or any such transaction; but that does not authorize taking promissory notes payable ten and twenty years from date in payment of the capital stock, which should be cash in order to build the road. The act is not retrospective, if it was it would not be binding. If the contract as made by the parties was not binding at the time, the Legislature could not make it binding; Lessee of Good,—vs.—Zercher, 12th Ohio Reports, page 364. Silliman,—vs.—Cummins & Cummins, 13th Ohio Reports, page 116.

The Court below ought to have dismissed the case on the motion of the defendant below. A justice has not jurisdiction where the amount claimed and the amount due is more than One Hundred Dollars. If the note was valid then, one hundred dollars, and the interest from March 1st to April 21st was due on it. The interest under the general statute is a legal claim against the maker of a note after it becomes due, and the court is bound to allow it. The plaintiff below might have remitted the interest on the note, but he did not before submitting his case to the justice. His legal claim as presented by himself on the trial before the Justice was more than one hundred dollars. If he recovered anything he ought to recover the amount due him.

A remitter may be entered when the verdict is more than it should be, but when the jury have found correctly, and the amount thus found ousts the jurisdiction of the Court, the party after having thus submitted his claim, and the jury having passed upon it, cannot remit a portion of it and thereby give jurisdiction to the Court; he should have remitted first.

The Circuit Court as an Appelate Court has no jurisdiction of the subject matter where the Court in which the cause originated had none. The parties cannot by consent give it any. But the cause ought to be dismissed at any

stage of the proceedings when the want of jurisdiction is ascertained. Nichols—vs.—Pallison, 4 Ohio Reports page 200; Condensed Ohio Reports page 775; 2 O. State Reports or 220 Ohio Reports page 223. Gilliman—vs.—Administrators of Sellers.

There was no evidence given or offered, to show the original bond or note was by the directors of said Company received as payment of such capital stock. The directors must have received it in payment as a Board of Directors when duly assembled. All parties are bound by the contract, or neither is bound. McCullough—vs—Moss, 5 Denio page 577. The fact that some of the directors received the note is not evidence that the board of directors received as a Board, (same), page 577. Livingston—vs.—Lynch, 4 John. chancery Reports page 596, 597.

The plaintiff below had no authority under the charter and laws to fill up the endorsement on the trial in the manner he did, without first showing by testimony that the said Happer, the treasurer had authority by the board of directors as a board to do so. There was no evidence showing that Happer was treasurer of said Co. There is nothing in the office of treasurer showing his authority to receive and transfer notes of the company. 5 Denio same case page 575. The Plaintiff below no right to add to the name of Samuel Happer, treasurer, the words "of the Camanche; Albany & Mendota Railroad Company," the amendment and addition to the assignment was not the mere filling up of a blank assignment. The company who claimed to have owned the note had not assigned it until the name of the Company was attached to the assignment, therefore, there was plainly no blank asssignment to fill up; it was a material alteration, and the plaintiff below had no right to make it, at least, without proof that the company authorized it. The record of the company would be the best, if not the only proof allowable to show the treasurer was authorized to receive and transfer said note. 2 Vol. Cowens & Hill's notes to Phillip's Evidence, page 1156, 1157.

A party that receives a note on a pre-existing debt, must prove that he received the note in payment of such debt, and that the original debtor is discharged therefrom, otherwise he holds it in trust to apply the money when collected on said debt, and without such proof he holds the notes subject to all equities. After the maker of the note proves that the holder took the note on a pre-existing debt, the

*onus* is on the holder to prove that he took the note in payment of such debt, and that the debtor was discharged from the original liability. Arming—vs.—Johnson *et al.*; 8 O. Reports, P, 526; 20 John. Reports 637. Coddington *et al.* —vs. Berry—but see 11 O. Reports page 172. Carlisle—vs. —Wishart, where the authority is reviewed and the result is as above claimed.

The plaintiff below was not and is not an innocent purchaser of said note for a valuable consideration in that sense. He was a director of said Company when this note was given, and for nearly two years afterward, and was and is bound to know by what authority the note was taken and upon what terms and by what authority it was transferred; for such acts must have been authorized by the board of directors as a board, and a record made of it, and he as the president, and a member of said board, is bound to take notice of all such acts, and therefore holds the note subject to all equities. All persons who deal with a Corporation are bound to take notice of the powers given by the powers given by the act of Incorporation. Angel & Ames on Corporations, page 284; 3 McLean's Circuit Court Reports, page 102. Root—vs.—Goddard, Story on Promissory Notes. page 229, Sec. 197. Hall—vs.—Hall 8 Conn. Reports 336. Notice to Matteson, one of the directors, was notice to the company that the note was taken to be kept safe and not disposed of, or the defendant below in any way to be liable thereon until all the capital stock had been subscribed for.

The defendant below offered a witness to prove that when the bond and coupon notes were given to the said company that the agreement between the Company and A. J, Mattson who was at that time and has ever since been a director of said Company, and the defendant below, was that said note was to be kept by said company in the possession of said Mattson as the director and agent of said company, and that the defendant was in no wise to be made liable thereon until the whole amount of the capital stock required to build said road should be subscribed for and taken, and if the Road was not built and completed within two years from the date of the bonds and coupons then the bonds and coupons were to be given up to the defendant below, and that that capital stock has not been subscribed for and the road is not built, and that the work is suspended. The

Court below erred in refusing to let said testimony be given to the jury.

The notice to Mattson, one of the directors, was notice to Company ofthe contract, and also to the plaintiff below, he being one of the Directors and the President of the Boad. Angel & Ames on Corporations, page 358 Sec. 306 page 357, Sec. 305.

A railroad company that receives a promissory note under a special contract made by one of its directors imposing certain conditions upon the company, the non-performance of which would make the note void, cannot transfer and assign said note to one of its directors he being the President of said company and thereby give it another and different circulation and direction than the one agreed upon by the parties at the time the note was given, and hold that such director and President was an innocent purchaser of said note for a valuable consideration, and thereby deprive the party from introducing his defence. Such a rule would lead to endless frauds; such is not the law. Such a party receiving such a note is bound from his relation to the Company to know the terms upon which such notes were received and takes it subject to all equities.

In the case of Rodes vs. Ayres 16, O, R. Page 283, it was held that a circulation given to a note contrary to the purposes for which it was delivered and such as the parties never designed rendered the note void. 16, of Pick P. 574 hold same doctrine. Cooks Statute P. 292, Sec. 11, says if any frauds or circumvention is used in obtaining the making or executing a note, such fraud becomes attached to the note and follows it into whosoever's hands it may go and it is liable to all equities. A note has no legal value until it is delivered, it is the delivery that gives it legal life. Gardner vs. Walch 32 Vol. Law and Equity, R. P. 162. The Portage County Branch Bank vs. Gustaves Lane, 8 Ohio State R. or 28 Vol. of O. R. P, 405. This note was not delivered in the sense that would make the party liable thereon it was to lay lifeless in the safe, until the capital stock was all subscribed for and the maker was in no way to be liable theron and if the road was not built in two years the note was to be returned, neither of the events has happened therefore the note never had legal life and is void.

A corporation must of necessity act through and by its officers and agents and it is bound by the acts and declarations of its officers and agents. Story on Agency, Section 127-135-137-452 17 Texas R. 560, Frauds oviates a contract *ab mitio* Chitty on contracts P. 678, 679, 680 and notes.

If these notes and mortgages are held to be valid the directors aud officers of this pretended company can divide said notes and mortgages among themselves, as this case evidence at a nominal value. If they have such power it is not restricted, and the result will be the people along the line where said road was to run will be bankrupt. Now the road is abandoned there is no power to call the officers to account for the money, and if there was the notes being sold to each other for a nominal sum say ten or twenty per cent, which amount would be all be consumed in incidental expences in one way and another. So the people would be defrauded out of the amount, and the officers the only gainers. A court is said to be the place where justice is judicially administered and all transactions there are stripped of all frauds that may surround them and justice is meted out to all parties. If so these notes and mortgages will be declared frauduient and void.

**SAMUEL STRAWDER,**
Attorney for George Foy.

32 ~~229~~ 82½

Fory
vs
Blackstone

Abstracts

Filed Apl. 23. 1862
L. Leland
Clk.

due him by the company, can make no difference in his rights to a recovery upon it. He is the assignee for a valuable consideration and entitled to all the rights of such.

Story on Promissory Notes §195. 2 Parsons on Notes and Bills 218.

As to the point made on the assignment, that was not in issue. It was not denied in the mode prescribed by law, and Archer vs. Bogue, 3. Scam. 527; McIntyre vs. Preston 5 Gilm. 64; Hudson vs. Dickinson, 12 Ill. 408. Perceiving no error in the record the judgment is affirmed.

Judgment affirmed.

~~The clerk will change the entry of the judgment in this case from a judgment of ~~affirmance~~ reversal to one of affirmance~~

J D Caton
P. H. Walker
Sidney Breese

52/2 — 32

Foy
vs
Blackstone

———

Opinion by
Pearson J.

863

Recorded
Page 718

Compared

(Costs changed)

The first question is, what powers are given to the Company under the *charter?* The company organized under the general Railroad act. Cook's statutes, page 937, sec. 1st, says: "Any number of persons not less than twenty-five, being subscribers to the stock to any contemplated Railroad, may be formed into a corporation for the purpose of constructing and building said Railroad, by *complying* with the following requiremets: when stock to the amount of at least one thousand dollars per mile of said road, shall be in good faith subscribed, and ten per cent paid therein, then said subscribers may commence forming a permanent organization to build said Railroad, and not before.—They shall severally subscribe articles of association, in which shall be set forth the name of the *corporation*, the number of years it shall continue, which shall not exceed fifty.

The amount of the capital stock of the company which shall be the actual cost of constructing the road together with the cost of right of way, motive power, and every other appurtenance for completing and running said road as nearly as can be estimated by competent engineers, the number of shares of which said stock shall consist, the number of directors and their names, the place from and to which the proposed road is to be constructed and the counties through which said road is to pass, and its length as near as may be, and the names of five commissioners to open books of subscription to the capital stock; each subscriber shall subscribe his name to said articles of association, his place of residence, the number of shares of stock taken by him in said company.

Section 2d states that such articles of association shall not be filed in the office of the Secretary of State until ten per cent. on the amount of the stock subscribed shall actually and in good faith be paid in, in *cash*, to the directors named in the articles of association.

Section 5th states that the commissioners for opening books of subscription shall from time to time after the company shall be incorporated, open books of subscription to the capital stock of said company, which shall be kept open until *all the Capital Stock shall be subscribed*, if the company shall so long exist, and in case a greater amount of stock shall be subscribed than the whole capital required by said estimate, then the commissioner shall distribute said capital stock among the subscribers equally, said commissioners to open books of subscription to the the capital stock of said company. The words *capital stock*, are used for the first time in the fifth section, and "when the capital stock shall all be subscribed for and distributed" &c., then the sixth section says, as *soon as practicable* after such capital stock shall have been subscribed and distributed as aforesaid, the commissioners (not the directors) shall appoint a time and place for the meeting of the stockholders to elect directors, and shall give notice thereof at least twenty days, of the time and place of such election; thirteen directors shall be elected.

Section 7th says that the commissioners shall be inspectors of the *first election of directors*, and shall declare the result thereof, and shall file a certificate of said election in the office of the Secretary of State, and with the Clerks of the different counties through which said road

is to run, and shall also deliver to the Treasurer all the moneys by them received on subscriptions to the capital stock of said company, and shall deliver over all books and papers belonging to said company, and all subsequent elections shall be governed by the by-laws of the company. Now the commissioners leave. The permanent organization of the company is completed. 15th Ill. Report, page 400; Smith —vs.—Bangs.

Section 11th says that it shall be lawful for the directors to call in and demand from the stockholders respectively, all sums of money by them subscribed, at such time and in such instalments as the directors may deem proper, giving the necessary notice thereof.

The directors authorized to call in and collect the capital stock could not be elected until after the capital stock was all subscribed for, that is a condition *precedent*, for the 6th sec. says,as soon as *practicable after such Capital Stock shall have been subscribed and distributed*, &c., the commissioner shall appoint the time and place of election at which said directors shall be elected.

Section 7th says the commissioners shall be inspectors of the first election of the directors which are authorized to demand and collect in the capital stock of said company, are not the same directors mentioned in the first section of the charter, because the directors mentioned in the first section were appointed by those who subscribed stock to the amount of one thousand dollars per mile; in the first instance the commissioners were at the same time appointed, and after which the articles of association were drawn up and the names of the directors and commissioners were included in said articles of association, which clearly shows that the Legislature when it passed the charter only intended to give to such preliminary organizations such powers as were necessary to get the necessary amount of capital stock subscribed to build and equip said road.

The commissioners had no power call an election to elect directors until *all* the capital had been subscribed for, therefore no directors, possessing the power to collect the capital stock can legally exist until after the capital stock is all taken; consequently no person had the authority to demand the money and receive the notes in payment thereof, by virtue of the charter. The commissioners have the control of the Books and Stock until after all the capital stock is subscribed for and the directors elected,and they had no power to take notes in payment of stock from the subscribers; for, the taking of all the *Capital Stock* is a condition precedent, expressly so made in the 6th section of the charter. Also see Redfield on Railways, page 77, sec. 1, and page 79, and notes. In the case of Atlantic Cotton Mills—vs.—Abbott, 9th Cush. Reports, 423, where it was inserted in a subscription for stock, that the capital stock of the company should be not less than $1,500,000, it was held to be a condition precedent to making calls.

There is a good reason for it. Suppose a project to cost three millions of dollars and the parties got one fourth subscribed, that would be all lost if the balance could not be subscribed—it would be a great fraud on those who subscribed if their subscriptions could be collected when they supposed and had a right to suppose they would not be cal-

ed upon to pay, unless the balance of the *capital stock* was subscribed for to complete the work, and thereby give value to the Stock.

The 1st section of the charter says: "That any number of persons not less than *twenty-five* who being subscribers of any contemplated Railroad, may be formed into a corporation, &c." Suppose that ten persons only who being subscribers to the stock of a contemplated Railroad, should subscribe stock to the amount of a thousand dollars per mile should make the necessary estimate of its cost, appoint directors, also commissioners to open Books and solicit capital stock, and pay ten per cent in *cash* and file the articles of association in the office of the Secretary of State and get the same recorded; and the commissioners should get a small portion of the capital stock subscribed and should call an election and directors should be elected and the commissioners certify to their election and should then hand over to the Treasurer of said company the books, money and papers. Could the company collect the amount of *capital stock* thus subscribed for? We think not. No legal corporation would exist in such a case, the charter requiring at least twenty-five members before they could become incorporated, when in fact they had but ten, and by the same parity of reasoning under the 6th section of the charter the whole amount of capital stock must be subscribed for, before the commissioners can call an election to elect the first directors of said company; such directors are the only persons under the charter that have the authority or power to make an assessment or collect the amount of capital stock subscribed from said stockholders. The charter is a part of the contract, and the party having the right to and in fact does examine it, and upon such examination concludes to become a party to it, and subscribes for stock in it. Now what is the contract if all written out in full at the time the defendant signed it? It is this: "I, Calvin Goodrich, do hereby agree to take five shares of the capital stock of the Sterling & Rock Island Rail Road Company, at one hundred dollars each, which I hereby agree to pay therefor to said company five hundred dollars, at such times and in such instalments as the directors that have been elected by all the stockholders shall direct, they giving the required notice—provided all the capital stock required to build and equip said Railroad shall be subscribed for according to the estimate made." If the contract had been thus written out could the money be collected on the subscription until the whole of the capital stock had been taken? I think not; it is a condition *precedent*. We must take the charter, the books of subscription, articles of Association, and the estimates of the cost of building said road, and put them together, in order to ascertain what the contract really was.

When the organization of the company is perfected for the purpose of building said Road, the company owns no stock, it cannot have any; it must have been all subscribed and taken and owned by its members in their individual right, before the commissioners can call an election to elect directors to build said Road, and when all the capital stock is subscribed for, it may be and would be and should be represented at the first election of directors, which was clearly the design of the Legislature. In the case of Walker—vs.—DeVereaux, *et. al.*, 4th Paige's Report, page 228. 2d Vol. Rail Road cases, page 529.

The act as set forth in that case, creating the [illegible] & Schenectady Railroad requires the capital stock to be all subscribed for and that the commissioners appointed to open the books for stock subscriptions should in case of an excess of stock subscriptions apportion the stock among the subscribers; the Court says no person can be a stockholder of the corporation, neither does any corporation exist, nor has any person any interest in stock as the legal owner thereof so as to authorize him to vote upon it or transfer it as stock, nor can an election be held until the commissioners apportion the stock. In the case of Crocker & Williams—vs.—Crane, 23 Wendall's Reports, page 211. 2 Vol. Railroad cases, page 184, the Court says that when the charter provides for a distribution of the stock among the stockholdors no corporation exists before the distribution is made: the Court says it is a *condition precedent.* The 6th section of the charter in this case, requires the commissioners to apportion the stock among the subscribers after it is all taken, and before they call an election, for it could not be distributed if it had not been subscribed. Therefore, the subscribing for all the *capital stock* is a *condition precedent.* It seems to us that it was the intention of the legislature in making the subscription for all capital stock of said company a *condition precedent* to prevent fraud from being practiced upon those who might first subscribe for capital stock on said books. There is not the twentieth part of the stock taken of said company, and the presumption is, it never will be taken; the road is not built, and in all human probability never will be built. Where the charter prescribes the particular mode in which a corporation shall make and execute its contracts, that mode must be followed. Angel & Ames on Corporations, page 268, sec. 253. In the case of Head and Amony—vs.—The Providence Insurance Company, 2 Cranch, page 127, Condensed reports, 371, the Court say, that a corporation can *only act in the manner prescribed by its charter.*

The charter in this case provides that the directors shall make estimates, give notice when the estimate must be paid,and a fair construction of the charter is, that the estimate shall be made at such times and in such amounts as will be required to pay for the work as it progresses, and no faster.

A corporation is a mere creature of law, and has no power nor rights except such as are expressly given it by the charter. Trustees, &c.—vs.—McConnel, 12th Ill. report, page 138 to 140. Angel & Ames on Corporation, page 276, sec. 257, same, page 279, sec. 260, same, page 103, sec. 111. It was undoubtedly the intention of the Legislature in passing the act under which this company claims to be incorporated,to permit any number of persons not less than twenty-five, who were desirous to build a Railroad between given points, to be incorporated for that purpose. The Road could only be built by a solid capital of a large amount, to be created by voluntary subscription of individuals in the form of stock, and to be paid from time to time as the work progressed, and in order to protect the stockholders from frauds and impositions as well as the public, the Statute points out the method how the amount of capital stock required to build and equip said Road should be ascertained. In the case of Newel—vs.—The Galena &

Chicago Union Railroad Co., 14 Ill. reports, page [illegible] the Court says that they fully recognize the propriety and even necessity of applying the rule of strict construction to the powers granted in these Railroad charters. But the rule can only be applied in cases of ambiguity, or when a power is claimed by inference or implication, and is not expressly given by the charter.

Apply the above well to the charter in this case, and the notes and bonds are void for the want of power in the Company to make the contract by which it received them. There is no ambiguity in the charter; it provides how the capital stock to build and equip the Road shall be raised, and how and by whom it should be collected. The 11th section requires the directors to collect the amount of stock subscribed at such time and in such instalments as they may deem proper.

The company has not the power to take a *note* in payment of subscription to the capital stock, due five, ten, or twenty years after its date, with or without interest. Such a note is not the capital intended by the Legislature that the company should raise to build the road with. If the interest should be collected as it becomes due and expended on the work, it would rot down before the money became due on the note, so as to complete the road. It may be said that the company may throw the note into the market and sell it. If the company has the power to do so, it can sell it for what it can get for it. Suppose it sold for four hundred dollars; the party who gave the note would own five hundred dollars of the capital stock, and draw his dividends on it, and the party who actually paid in his five hundred dollars would own but five hundred dollars. It would be a fraud upon the other stockholders, and one that the Legislature intended to prevent by prescribing the manner by which the capital stock should be raised and collected. As well might the company take the pay for the stock thus subscribed for in a *flock of sheep* or in *patent rights.* The company has undertaken to do a species of banking, using the stock as the capital, taking notes in payment of its stock, payable in five, ten and twenty years after their date, with interest at ten per cent., payable semi-annually and annually. The road cannot be built with such a capital, it is impossible. It never was intended by the Legislature that it should be. Such trading and trafficing is foreign to the object for which the company was incorporated, and the *note* is therefore *void.*— There is a difference between an incorporation organized to trade, and one to build and run a Railroad. Angel & Ames on Corporations,page 292 and 293, sec. 271; 5th Conn. Reports, page 560, New York Fire Insurance Co.—vs.—Ely. The case of Hood and Armory—vs.—The Providence Insurance Co.; 2d Cranch Reports, page 127, Condensed, page 371. The court says it is the rule that a corporation can only act in the manner prescribed by law,in its corporate capacity,it is the mere creature of the act to which its owes its existence. It may be said to be precisely what the incorporating act has made it—to derive all its powers from that act and to be capable of exerting its faculties only in the manner which that act authorizes. In the case of Head—vs.—The Providence Ins. Co., 2d Cranch reports, page 127, in delivering the opinions of the Court, Chief Justice Marshall said: "The act of incorporation is to them an enabling act; it gives them all the power they

possess; it enables them to contract, and when it [illegible]ribes *to them a mode of contracting they must observe that mode*, [illegible]e instrument no more creates a contract than if the body had never b[illegible]n incorporated." So in this case the charter prescribes how the stock shall be subscribed for and how it shall be paid and collected. In the case of Stearns and Brother—vs.—The Eagle Insurance Company of Cincinnati, 5th Ohio State Reports, page 59, was an action brought by the plaintiffs against the Company, to recover the amount due them on a policy issued by the Company to them, insuring them against a loss by fire on a stock of goods; the company bought some notes and attempted to file them as an offset, and the real question was, whether the company had the power to buy the notes to file as an offset. The 6th section of the charter was the one relied upon for such authority, which reads as follows: "It shall be lawful for such company to invest all or any part of their capital stock, money, funds or other property in such a way as the directors may deem best for the safety of capital and interest of the stockholders, and may therefore sell and dispose of all interest which the company may have acquired by such investment." The Court says "the contract of indorsement, like every other, must have parties. Without two parties competent to contract, there can be no agreement by which the one can loose and the other acquire the title to negotiable paper. The powers and capacities of a corporation must be derived from the law of its creation, or they do not exist. If a fair construction of its charter does not confer the power, it is incompetent to become a party to the contract of endorsement, and without capacity to take or hold the title. As well might a dead man by the mere act of the endorser be invested with the legal interest, as a corporation, which only lives for the purposes and objects intended by the Legislature. Beyond these limits it has no existence, and its acts are neither more nor less than a nullity," held that the company had no power to buy the notes; therefore, they could not offset them against the plaintiff's claim. The People upon the Rel. of the Peoria & Aquaka Railroad Co.—vs.—The County of Tazewell; 22 Ill. reports, page 147; 8 Ohio reports, page 285; Chillicothe Bank—vs.—Noah H. Swayne; 2 Peters' reports, page 527; U. S. Bank—vs.—Owen, *et. al.* 6 Wheaton's Con. reports, Bank of U. S.—vs.—Dandridge, page 443; J. R. page 1.

In the case of Crocker & Williams–vs–Crane, 23 Wendell's Rep. 2d Vol. Railroad cases, page 485. The defendant, Crane, subscribed for 143 shares of stock to the Buffalo & Erie Railroad Company, the shares being fifty dollars each, and the act of corporation required the payment of two dollars on each share at the time of subscribing. A check was given and received in payment of and for said instalments. The court said that the check was void, it being contrary to the policy of the charter or statute. The New York Fire Insurance Co.—vs.—Ely, before referred to; McCullough—vs.—Moss, 5th Denio reports, page 567; same, page 579.

The case of the Vermont Central Railroad Co.—vs.—George Coyes, 21 Vermont Reports, page 30; 1st Vol. Railroad cases, page 226. In this case the defendant subscribed for fifty shares of the stock of said company, the *note* in suit was given for the first five dollars payable on

each share, which was required to be paid by the [illegible] at the time of subscribing. The note was payable on demand. It was claimed that there was no consideration for the note, but the Court held it raised a mutuality in the contract and gave efficiency to the subscription. This case differs very materially from the one at bar. The party gave his contract to pay when they required it as if they ascertained the amount by computation, and the party gave his due bill, to be paid when called for, and the money was really then to be used as a part of capital to build the road; in effect the relation of the parties was not different from the one contemplated by the charter. Not so in the case at bar; a credit has been given to the defendant for more than five years to pay his stock; there is no authority for such a contract given by the charter.

The general Railroad Law, passed November 5th, 1849, and an amendatory act thereto, passed November 6th, 1849. The 3d section of the Amendatory act authorized the Railroad Company to receive in payment for stock subscriptions the bonds of any county or city. If the general law authorizes the Company to take notes in payment of stock, payable on time, why pass the amendatory act. Cook's Statutes, page 950, Sec. 3.

The special act for the more perfect organization of the Sterling & Rock Island Railroad Company, passed Feb. 19, 1859. Laws of Illinois, page 512, does not affect the question made in this case. That act only declares that said Company is a subsisting corporation, duly organized under the act to provide for a general system of Railroads, passed Nov. 5th, 1849. The company having filed their certificates in the office of the Secretary of State, they were incorporated for certain purposes and authorized to do certain acts before this special act was passed, and the act has given them no additional powers with reference to any question raised. The 3d section says, that capital stock shall be $256,000, with power to increase the capital stock, which increased stock may hereafter be subsribed for, but has no reference to the original stock.

The Legislature, if it had attempted to do so, has now power to make a contract that was valid in its inception, void; nor has it power to make a void one valid. The note in question was given Aug. 27th, 1857, if it was void then, the Legislature had not the power to make it binding in 1859. Lessee Y. Good.—vs,—Zercher, 12th Ohio Reports page 364. Sillimans,—vs.—Cummins & Cummins, 13th Ohio Reports, page 116. Redfield on Railways, page 80, and notes. The Legislature has no right to pass a Law impairing the right of contract. Article 3d, State Consitution Sec. 17; Section 10 of first article of Federal constitution; Story on Constitutions, page 502–3–4.

The parties may contract that ten per cent per annum, or a less sum of interest may be paid; if more is agreed to be pard, it is usury, and the interest is forfeited; Cook's Statute, page 600. The statute has made each year the period for rests in the computation of interest, it is the natural division of time, and any contract entered into by parties or any method of computing interest adopted by parties which shall give a greater profit or rate of interest for the use of one dollar for the whole period of one year, than 10 per cent., is usury. So a mistake in construing a statute, if it gave a party a greater interest, is usurious.

It is the substance and effect of the contract that [illegible] courts look at, and not the words; Blydenburgh on usury, page 32, 59, 60, [illegible], 69, 70 and 71. To take a note for $1000, payable in five years, calling [illegible] ten per cent interest, to be paid semiannually, is a species of compound interest not authorized by the statutes. For instance, the party desires to loan one thousand dollars for a year, and agrees to pay for the use of it ten per cent, or *one hundred* dollars semi annually: therefore fifty dollars must be paid in six months, and the remaining fifty dollars at the end of the year. Now, in fact, the party had the use of only nine hundred and fifty dollars for six months of the year, yet the lender received his hundred dollars interest. Such a contract in fact gives the lender the use of fifty dollars of the money for six months of that year, and the longer such a contract has to run the greater will be the amount of the usury. The Statute contemplates that the borrower should have the use of the thousand dollars for the whole year. Contracts that have a less time to run than one year, are not analogous, for the reason that the interest is but an incident to the principal, and when the principal is due and paid, the interest being an incident to the principa must cease. Not so with a contract that has a term of years to run. It is not usury to take interest in advance, if the paper is payable in a short time; but it would be if the paper had to run five or ten years; Blydenburgh, page 232, and 233. New York Fire Insurance Company,—vs.—Ely and Parsons, 2d Cowens' Reports, page 678; 8th Cowens' Reports, page 398. In Blydenburgh on Usury, page 128, is a case where five hundred pounds were lent to the borrower for five years, at the rate of five per cent ber annum; fifty pounds were returned at the time of the loan, yet the party paid the interest on the sum of five hundred pounds. The Court said it was usurious—that in fact the party had the use of only four hundred and fifty pounds, the other being returned. So in this case the party pays interest on fifty dollars in each year the note has to run, that he does not have the use of if the note had been given for money loaned. It makes no difference what the consideration of the note was, the party would have the use of the fifty dollars for six months in each year, the interest on the note was payablesemi-annually.

There is no good reason why each fifty dollars when it becomes due, at the end of every six months, should not draw interest under the general Statute. Many of the States hold that interest payable annually, if not paid when due, will draw interest, and by the same parity ity of reasoning the amount of interest due each six months would draw interest if not paid. If the contract be a binding one, the party could sue and recover his judgment for the interest, each six months the judgment would draw interest.

The contract being an executory one, the Court will not interpose to enforce it. The note upon which this suit is brought, called for one thousand dollars, and is payable to the Sterling & Rock Island Railroad Company five years after date, with interest at ten per cent, the interest payable semi-annually. This note conveys to the world upon its face its extraordinary character; therefore every person who purchased and received it, was put upon his inquiry as to the power of the Company to take, receive and dispose of it. It was given to a Railroad Company whose business it is to build and equip it. move

and transport passengers and freight upon it. The very name shows it was not incorporated for trading purposes like that of a banking institution. A note payable five years after date, to a Railroad Company, with interest payable semi-annually, is sufficient to put any prudent man on his inquiry, not only as to the powers of the company under its charter to take, and receive, and dispose of such notes, but would put him on inquiry as to the manner in which the company received it, the consideration and every other circumstance that attended it; Story on Promisory notes, page 229, Sec. 179. Crane—vs—Baldwin, 12 Pickering Reports 545; Hall—vs—Hall 8 Conn. Rep. 336.

All persons who deal with a Corporation are bound to take notice of the powers given by the act of Incorporation. Angel—vs.—Ames on Incorporations, page 284; Root—vs.—Goddord, 3 McLean's Circuit Court Report, page 102.

The case of the Illinois River Railroad Co.—vs.—Zimmer, 20th Ill. Reports, page 654, does not conflict with the principles urged in the defence in this case. We claim that the subscription to the whole capital stock is made a condition precedent, by the 6th section of the charter. The statute is imperative. It is said that fraud contaminates everything it comes in contact with. A perfect system of frauds was practiced upon the people along the line where this imaginary road was to run, in order to obtain these notes and mortgages, which is averred in the pleas and admitted by the demurrer. The road is not built and never will be in all human probability. If these notes are held valid and collectable, it will substantially bankrupt all that portion of the country through which said road was to run.

The general issue puts in issue the existence of the corporation, and the corporation is bound to prove that they are incorporatod. Bell—vs.—Great Western Turnpike Company, 14th Johnson's Reports, page 415. General plea avers the fact that the instrument was obtained by fraud, and circumvention is sufficient; 2d vol. Swan's Practice and Precedents, page 742; Ohio Forms & Practice, by Wilcox, page 136, and 241; 1 Chitty's Pleadings, page 136; Marginal, 536, and 538, also 581; Marginal, 582.

The agreement entered into by the parties as appears on the record "stating that the note was the only cause of action," has the effect to nolle all other counts in the declaration, except such as the notes may be given in evidence under, and the counts so abandoned are considered as stricken out of the declaration: 2 Swan's Practice, page 900, and authorities there cited. The pleas profess to answer any and all counts under which the note may be given in evidence at the commencement and in the body and conclusion, and no more. It makes no difference under what plea the note is introduced, the plea meets it by showing that the plaintiff ought not to recover on the note; and the plaintiff says he has no other cause of action, therefore the pleas fully answer the declarntion. The other counts being abandoned, are so far as this trial is concerned, as if they had never existed. Again, the plaintiff should have demurred specially, if the pleas do not anwer the whole declaration, when they assume to do so; 2 vol. Swan's Practice. page 630, and authorities there cited. The demurrer in this case is a special demurrer and ought to be overruled.

SAMUEL STRAWDER, Deft's. Atty.

52 1/2

Foy
vs
Blackstone

Pltff's ~~Brief~~
Additional Briefs

52 1/2

Filed April 23 1863
L. Leland
Clerk

1863

The first question is, what powers are given to the Company under the *charter?* The company organized under the general Railroad act. Cook's statutes, page 937, sec. 1st, says: "Any numb[illegible] not less than twenty-five, being subscribers to the stock to any con templated Railroad, may be formed into a corporation for the purpose of constructing and building said Railroad, by *complying* with the following requiremets: when stock to the amount of at least one thousand dollars per mile of said road, shall be in good faith subscribed, and ten per cent paid therein, then said subscribers may commence forming a permanent organization to build said Railroad, and not before.— They shall severally subscribe articles of association, in which shall be set forth the name of the *corporation*, the number of years it shall continue, which shall not exceed fifty.

The amount of the capital stock of the company which shall be the actual cost of constructing the road together with the cost of right of way, motive power, and every other appurtenance for completing and running said road as nearly as can be estimated by competent engineers, the number of shares of which said stock shall consist, the number of directors and their names, the place from and to which the proposed road is to be constructed and the counties through which said road is to pass, and its length as near as may be, and the names of five commissioners to open books of subscription to the capital stock; each subscriber shall subscribe his name to said articles of association, his place of residence, the number of shares of stock taken by him in said company.

Section 2d states that such articles of association shall not be filed in the office of the Secretary of State until ten per cent. on the amoun- of the stock subscribed shall actually and in good faith be paid in, in *cash*, to the directors named in the articles of association.

Section 5th states that the commissioners for opening books of subscription shall from time to time after the company shall be incorporated, open books of subscription to the capital stock of said company, which shall be kept open until *all the Capital Stock shall be subscribed*, if the company shall so long exist, and in case a greater amount of stock shall be subscribed than the whole capital required by said estimate, then the commissioner shall distribute said capital stock among the subscribers equally, said commissioners to open books of subscription to the the capital stock of said company. The words *capital stock*, are used for the first time in the fifth section, and "when the capital stock shall all be subscribed for and distributed" &c., then the sixth section says, as *soon as practicable* after such capital stock shall have been subscribed and distributed as aforesaid, the commissioners (not the directors) shall appoint a time and place for the meeting of the stockholders to elect directors, and shall give no[illegible] at least twenty days, of the time and place of such election[illegible] three [illegible]a directors shall be elected.

Section 7th says that the commissioners shall be inspectors of the *first election of directors*, and shall declare the result thereof, and shall file a certificate of said election in the office of the Secretary of State, and with the Clerks of the different counties through which said road

is to run, and shall also deliver to the Treasurer all the moneys by them received on subscriptions to the capital stock of said company, and shall deliver over all books and papers belonging to said company, and all subsequent elections shall be governed by the [illegible] company. Now the commissioners leave. The permanent organization of the company is completed. 15th Ill. Report, page 400; Smith —vs.—Bangs.

Section 11th says that it shall be lawful for the directors to call in and demand from the stockholders respectively, all sums of money by them subscribed, at such time and in such instalments as the directors may deem proper, giving the necessary notice thereof.

The directors authorized to call in and collect the capital stock could not be elected until after the capital stock was all subscribed for, that is a condition *precedent*, for the 6th sec. says, as soon as *practicable after such Capital Stock shall have been subscribed and distributed, &c.*, the commissioner shall appoint the time and place of election at which said directors shall be elected.

Section 7th says the commissioners shall be inspectors of the first election of the directors which are authorized to demand and collect in the capital stock of said company, are not the same directors mentioned in the first section of the charter, because the directors mentioned in the first section were appointed by those who subscribed stock to the amount of one thousand dollars per mile; in the first instance the commissioners were at the same time appointed, and after which the articles of association were drawn up and the names of the directors and commissioners were included in said articles of association, which clearly shows that the Legislature when it passed the charter only intended to give to such preliminary organizations such powers as were necessary to get the necessary amount of capital stock subscribed to build and equip said road.

The commissioners had no power call an election to elect directors until *all* the capital had been subscribed for, therefore no directors, possessing the power to collect the capital stock can legally exist until after the capital stock is all taken; consequently no person had the authority to demand the money and receive the notes in payment thereof, by virtue of the charter. The commissioners have the control of the Books and Stock until after all the capital stock is subscribed for and the directors elected, and they had no power to take notes in payment of stock from the subscribers; for, the taking of all the *Capital Stock* is a condition precedent, expressly so made in the 6th section of the charter. Also see Redfield on Railways, page 77, sec. 1, and page 79, and notes. In the case of Atlantic Cotton Mills—vs.—Abbott, 9th Cush. Reports, 423, where it was inserted in a subscription for stock, that the capital stock of the company should be not less than $1,500,000, it was held to be a condition precedent to making calls.

There is a good reason for it. Suppose a project to cost three millions of dollars and the parties got one fourth subscribed, that would be all lost if the balance could not be subscribed—it would be a great fraud on those who subscribed if their subscriptions could be collected when they supposed and had a right to suppose they would not be cal-

ed upon to pay, unless the balance of the *capital stock* was subscribed for to complete the work, and thereby give value to the Stock.

The 1st section of the charter says: "That any number of persons not less than *twenty-five* who being subscribers of any contemplated Railroad, may be formed into a corporation, &c." Suppose that ten persons only who being subscribers to the stock of a contemplated Railroad, should subscribe stock to the amount of a thousand dollars per mile should make the necessary estimate of its cost, appoint directors, also commissioners to open Books and solicit capital stock, and pay ten per cent in *cash* and file the articles of association in the office of the Secretary of State and get the same recorded; and the commissioners should get a small portion of the capital stock subscribed and should call an election and directors should be elected and the commissioners certify to their election and should then hand over to the Treasurer of said company the books, money and papers. Could the company collect the amount of *capital stock* thus subscribed for? We think not. No legal corporation would exist in such a case, the charter requiring at least twenty-five members before they could become incorporated, when in fact they had but ten, and by the same parity of reasoning under the 6th section of the charter the whole amount of capital stock must be subscribed for, before the commissioners can call an election to elect the first directors of said company; such directors are the only persons under the charter that have the authority or power to make an assessment or collect the amount of capital stock subscribed from said stockholders. The charter is a part of the contract, and the party having the right to and in fact does examine it, and upon such examination concludes to become a party to it, and subscribes for stock in it. Now what is the contract if all written out in full at the time the defendant signed it? It is this: "I, Calvin Goodrich, do hereby agree to take five shares of the capital stock of the Sterling & Rock Island Rail Road Company, at one hundred dollars each, which I hereby agree to pay therefor to said company five hundred dollars, at such times and in such instalments as the directors that have been elected by all the stockholders shall direct, they giving the required notice—provided all the capital stock required to build and equip said Railroad shall be subscribed for according to the estimate made." If the contract had been thus written out could the money be collected on the subscription until the whole of the capital stock had been taken? I think not; it is a condition *precedent*. We must take the charter, the books of subscription, articles of Association, and the estimates of the cost of building said road, and put them together, in order to ascertain what the contract really was.

When the organization of the company is perfected for the purpose of building said Road, the company owns no stock, it cannot have any; it must have been all subscribed and taken and owned by its members in their individual right, before the commissioners can call an election to elect directors to build said Road, and when all the capital stock is subscribed for, it may be and would be and should be represented at the first election of directors, which was clearly the design of the Legislature. In the case of Walker—vs.—DeVereaux, *et. al.*, 4th Paige's Report, page 228. 2d Vol. Rail Road cases, page 529.

The act as set forth in that case, creating the Utica & Schenectady Railroad requires the capital stock to be all subscribed for and that the commissioners appointed to open the books for stock subscriptions should in case of an excess of stock subscriptions apportion the stock among the subscribers; the Court says no person can be a stockholder of the corporation, neither does any corporation exist, nor has any person any interest in stock as the legal owner thereof so as to authorize him to vote upon it or transfer it as stock, nor can an election be held until the commissioners apportion the stock. In the case of Crocker & Williams—vs.—Crane, 23 Wendall's Reports, page 211. 2 Vol. Railroad cases, page 184, the Court says that when the charter provides for a distribution of the stock among the stockholders no corporation exists before the distribution is made: the Court says it is a *condition precedent.* The 6th section of the charter, in this case, requires the commissioners to apportion the stock among the subscribers after it is all taken, and before they call an election, for it could not be distributed if it had not been subscribed. Therefore, the subscribing for all the *capital stock* is a *condition precedent.* It seems to us that it was the intention of the legislature in making the subscription for all capital stock of said company a *condition precedent* to prevent fraud from being practiced upon those who might first subscribe for capital stock on said books. There is not the twentieth part of the stock taken of said company, and the presumption is, it never will be taken; the road is not built, and in all human probability never will be built. Where the charter prescribes the particular mode in which a corporation shall make and execute its contracts, that mode must be followed. Angel & Ames on Corporations, page 268, sec. 253. In the case of Head and Amony—vs.—The Providence Insurance Company, 2 Cranch, page 127, Condensed reports, 371, the Court say, that a corporation can *only act in the manner prescribed by its charter.*

The charter in this case provides that the directors shall make estimates, give notice when the estimate must be paid, and a fair construction of the charter is, that the estimate shall be made at such times and in such amounts as will be required to pay for the work as it progresses, and no faster.

A corporation is a mere creature of law, and has no power nor rights except such as are expressly given it by the charter. Trustees, &c.—vs.—McConnel, 12th Ill. report, page 138 to 140. Angel & Ames on Corporation, page 276, sec. 257, same, page 279, sec. 260, same, page 103, sec. 111. It was undoubtedly the intention of the Legislature in passing the act under which this company claims to be incorporated, to permit any number of persons not less than twenty-five, who were desirous to build a Railroad between given points, to be incorporated for that purpose. The Road could only be built by a solid capital of a large amount, to be created by voluntary subscription of individuals in the form of stock, and to be paid from time to time as the work progressed, and in order to protect the stockholders from frauds and impositions as well as the public, the Statute points out the method how the amount of capital stock required to build and equip said Road should be ascertained. In the case of Newel—vs.—The Galena &

Chicago Union Railroad Co., 14 Ill. reports, page 273, [illegible] Court says that they fully recognize the propriety and eve[illegible]essity of applying the rule of strict construction to the powers gra[illegible]d in these Railroad charters. But the rule can only be applied [illegible] ambiguity, or when a power is claimed by inference or implication, and is not expressly given by the charter.

Apply the above well to the charter in this case, and the notes and bonds are void for the want of power in the Company to make the contract by which it received them. There is no ambiguity in the charter; it provides how the capital stock to build and equip the Road shall be raised, and how and by whom it should be collected. The 11th section requires the directors to collect the amount of stock subscribed at such time and in such instalments as they may deem proper.

The company has not the power to take a *note* in payment of subscription to the capital stock, due five, ten, or twenty years after its date, with or without interest. Such a note is not the capital intended by the Legislature that the company should raise to build the road with. If the interest should be collected as it becomes due and expended on the work, it would rot down before the money became due on the note, so as to complete the road. It may be said that the company may throw the note into the market and sell it. If the company has the power to do so, it can sell it for what it can get for it. Suppose it sold for four hundred dollars; the party who gave the note would own five hundred dollars of the capital stock, and draw his dividends on it, and the party who actually paid in his five hundred dollars would own but five hundred dollars. It would be a fraud upon the other stockholders, and one that the Legislature intended to prevent by prescribing the manner by which the capital stock should be raised and collected. As well might the company take the pay for the stock thus subscribed for in a *flock of sheep* or in *patent rights.* The company has undertaken to do a species of banking, using the stock as the capital, taking notes in payment of its stock, payable in five, ten and twenty years after their date, with interest at ten per cent., payable semi-annually and annually. The road cannot be built with such a capital, it is impossible. It never was intended by the Legislature that it should be. Such trading and trafficing is foreign to the object for which the company was incorporated, and the *note* is therefore *void.*—There is a difference between an incorporation organized to trade, and one to build and run a Railroad. Angel & Ames on Corporations, page 292 and 293, sec. 271; 5th Conn. Reports, page 560, New York Fire Insurance Co.—vs.—Ely. The case of Hood and Armory—vs.—The Providence Insurance Co.; 2d Cranch Reports, page 127, Condensed, page 371. The court says it is the rule that a corporation can only act in the manner prescribed by law, in its corporate capacity, it is the mere creature of the act to which its owes its existence. It may be said to be precisely what the incorporating act has made it—to derive all its powers from that act and to be capable of exerting its faculties only in the manner which that act authorizes. In the case of Head—vs.—The Providence Ins. Co., 2d Cranch reports, page 127, in delivering the opinions of the Court, Chief Justice Marshall said: "The act of incorporation is to them an enabling act; it gives them all the power they

possess; it enables them to contract, and when it *prescribes to them a mode of contracting they must observe that mode*, or the instrument no more creates a contract than if the body had never been incorporated." So in this case the charter prescribes how the stock shall be subscribed for and how it shall be paid and collected. In the case of Stearns and Brother—vs.—The Eagle Insurance Company of Cincinnati, 5th Ohio State Reports, page 59, was an action brought by the plaintiffs against the Company, to recover the amount due them on a policy issued by the Company to them, insuring them against a loss by fire on a stock of goods; the company bought some notes and attempted to file them as an offset, and the real question was, whether the company had the power to buy the notes to file as an offset. The 6th section of the charter was the one relied upon for such authority, which reads as follows: "It shall be lawful for such company to invest all or any part of their capital stock, money, funds or other property in such a way as the directors may deem best for the safety of capital and interest of the stockholders, and may therefore sell and dispose of all interest which the company may have acquired by such investment." The Court says "the contract of indorsement, like every other, must have parties. Without two parties competent to contract, there can be no agreement by which the one can loose and the other acquire the title to negotiable paper. The powers and capacities of a corporation must be derived from the law of its creation, or they do not exist. If a fair construction of its charter does not confer the power, it is incompetent to become a party to the contract of endorsement, and without capacity to take or hold the title. As well might a dead man by the mere act of the endorser be invested with the legal interest, as a corporation, which only lives for the purposes and objects intended by the Legislature. Beyond these limits it has no existence, and its acts are neither more nor less than a nullity," held that the company had no power to buy the notes; therefore, they could not offset them against the plaintiff's claim. The People upon the Rel. of the Peoria & Aquaka Railroad Co.—vs.—The County of Tazewell; 22 Ill. reports, page 147; 8 Ohio reports, page 285; Chillicothe Bank—vs.—Noah H. Swayne; 2 Peters' reports, page 527; U. S. Bank—vs.—Owen, *et. al.* 6 Wheaton's Con. reports, Bank of U. S.—vs.—Dandridge, page 443; J. R. page 1.

In the case of Crocker & Williams–vs–Crane, 23 Wendell's Rep. 2d Vol. Railroad cases, page 485. The defendant, Crane, subscribed for 143 shares of stock to the Buffalo & Erie Railroad Company, the shares being fifty dollars each, and the act of corporation required the payment of two dollars on each share at the time of subscribing. A check was given and received in payment of and for said instalments. The court said that the check was void, it being contrary to the policy of the charter or statute. The New York Fire Insurance Co.—vs.—Ely, before referred to; McCullough—vs.—Moss, 5th Denio reports, page 567; same, page 579.

The case of the Vermont Central Railroad Co.—vs.—George Coyes, 21 Vermont Reports, page 30; 1st Vol. Railroad cases, page 226. In this case the defendant subscribed for fifty shares of the stock of said company, the *note* in suit was given for the first five dollars payable on

each share, which was required to be paid by the charter [illegible] he time of subscribing. The note was payable on demand. It was [illegible]imed that there was no consideration for the note, but the Court he[illegible] raised a mutuality in the contract and gave efficiency to the subscri[illegible]on. This case differs very materially from the one at bar. The party gave his contract to pay when they required it as if they ascertained the amount by computation, and the party gave his due bill, to be paid when called for, and the money was really then to be used as a part of capital to build the road; in effect the relation of the parties was not different from the one contemplated by the charter. Not so in the case at bar; a credit has been given to the defendant for more than five years to pay his stock; there is no authority for such a contract given by the charter.

The general Railroad Law, passed November 5th, 1849, and an amendatory act thereto, passed November 6th, 1849. The 3d section of the Amendatory act authorized the Railroad Company to receive in payment for stock subscriptions the bonds of any county or city. If the general law authorizes the Company to take notes in payment of stock, payable on time, why pass the amendatory act. Cook's Statutes, page 950, Sec. 3.

The special act for the more perfect organization of the Sterling & Rock Island Railroad Company, passed Feb. 19, 1859. Laws of Illinois, page 512, does not affect the question made in this case. That act only declares that said Company is a subsisting corporation, duly organized under the act to provide for a general system of Railroads, passed Nov. 5th, 1849. The company having filed their certificates in the office of the Secretary of State, they were incorporated for certain purposes and authorized to do certain acts before this special act was passed, and the act has given them no additional powers with reference to any question raised. The 3d section says, that capital stock shall be $256,000, with power to increase the capital stock, which increased stock may hereafter be subsribed for, but has no reference to the original stock.

The Legislature, if it had attempted to do so, has now power to make a contract that was valid in its inception, void; nor has it power to make a void one valid. The note in question was given Aug. 27th, 1857, if it was void then, the Legislature had not the power to make it binding in 1859. Lessee Y. Good.—vs,—Zercher, 12th Ohio Reports page 364. Sillimans,—vs.—Cummins & Cummins, 13th Ohio Reports, page 116. Redfield on Railways, page 80, and notes. The Legislature has no right to pass a Law impairing the right of contract. Article 3d, State Consitution Sec. 17; Section 10 of first article of Federal constitution; Story on Constitutions, page 502-3-4.

The parties may contract that ten per cent per annum, or a less sum of interest may be paid; if more is agreed to be pard, it is usury, and the interest is forfeited; Cook's Statute, page 600. The statute has made each year the period for rests in the computation of interest, it is the natural division of time, and any contract entered into by parties or any method of computing interest adopted by parties which shall give a greater profit or rate of interest for the use of one dollar for the whole period of one year, than 10 per cent., is usury. So a mistake in construing a statute, if it gave a party a greater interest, is usurious.

It is the substance and effect of the contract that the courts look at, and not the words; Blydenburgh on usury, page 32, 59, 60, 68, 69, 70 and 71. To take a note for $1000, payable in five years, calling for ten per cent interest, to be paid semiannually, is a species of compound interest not authorized by the statutes. For instance, the party desires to loan one thousand dollars for a year, and agrees to pay for the use of it ten per cent, or *one hundred* dollars semi annually: therefore fifty dollars must be paid in six months, and the remaining fifty dollars at the end of the year. Now, in fact, the party had the use of only nine hundred and fifty dollars for six months of the year, yet the lender received his hundred dollars interest. Such a contract in fact gives the lender the use of fifty dollars of the money for six months of that year, and the longer such a contract has to run the greater will be the amount of the usury. The Statute contemplates that the borrower should have the use of the thousand dollars for the whole year. Contracts that have a less time to run than one year, are not analogous, for the reason that the interest is but an incident to the principal, and when the principal is due and paid, the interest being an incident to the principa must cease. Not so with a contract that has a term of years to run. It is not usury to take interest in advance, if the paper is payable in a short time; but it would be if the paper had to run five or ten years; Blydenburgh, page 232, and 233. New York Fire Insurance Company,—vs.—Ely and Parsons, 2d Cowens' Reports, page 678; 8th Cowens' Reports, page 398. In Blydenburgh on Usury, page 128, is a case where five hundred pounds were lent to the borrower for five years, at the rate of five per cent ber annum; fifty pounds were returned at the time of the loan, yet the party paid the interest on the sum of five hundred pounds. The Court said it was usurious—that in fact the party had the use of only four hundred and fifty pounds, the other being returned. So in this case the party pays interest on fifty dollars in each year the note has to run, that he does not have the use of if the note had been given for money loaned. It makes no difference what the consideration of the note was, the party would have the use of the fifty dollars for six months in each year, the interest on the note was payablesemi-annually.

There is no good reason why each fifty dollars when it becomes due, at the end of every six months, should not draw interest under the general Statute. Many of the States hold that interest payable annually, if not paid when due, will draw interest, and by the same parity ity of reasoning the amount of interest due each six months would draw interest if not paid. If the contract be a binding one, the party could sue and recover his judgment for the interest, each six months the judgment would draw interest.

The contract being an executory one, the Court will not interpose to enforce it. The note upon which this suit is brought, called for one thousand dollars, and is payable to the Sterling & Rock Island Railroad Company five years after date, with interest at ten per cent, the interest payable semi-annually. This note conveys to the world upon its face its extraordinary character; therefore every person who purchased and received it, was put upon his inquiry as to the power of the Company to take, receive and dispose of it. It was given to a Railroad Company whose business it is to build and equip it. move

and transport passengers and freight upon it. The very name shows it was not incorporated for trading purposes like that of a ban[illegible] institution. A note payable five years after date, to a Railroad [illegible]mpany, with interest payable semi-annually, is sufficient to put any prudent man on his inquiry, not only as to the powers of the company under its charter to take, and receive, and dispose of such notes, but would put him on inquiry as to the manner in which the company received it, the consideration and every other circumstance that attended it; Story on Promisory notes, page 229, Sec. 179. Crane—vs—Baldwin, 12 Pickering Reports 545; Hall—vs—Hall 8 Conn. Rep. 336.

All persons who deal with a Corporation are bound to take notice of the powers given by the act of Incorporation. Angel—vs.—Ames on Incorporations, page 284; Root—vs.—Goddord, 3 McLean's Circuit Court Report, page 102.

The case of the Illinois River Railroad Co.—vs.—Zimmer, 20th Ill. Reports, page 654, does not conflict with the principles urged in the defence in this case. We claim that the subscription to the whole capital stock is made a condition precedent, by the 6th section of the charter. The statute is imperative. It is said that fraud contaminates everything it comes in contact with. A perfect system of frauds was practiced upon the people along the line where this imaginary road was to run, in order to obtain these notes and mortgages, which is averred in the pleas and admitted by the demurrer. The road is not built and never will be in all human probability. It these notes are held valid and collectable, it will substantially bankrupt all that portion of the country through which said road was to run.

The general issue puts in issue the existence of the corporation, and the corporation is bound to prove that they are incorporatod. Bell—vs.—Great Western Turnpike Company, 14th Johnson's Reports, page 415. General plea avers the fact that the instrument was obtained by fraud, and circumvention is sufficient; 2d vol. Swan's Practice and Precedents, page 742; Ohio Forms & Practice, by Wilcox, page 136, and 241; 1 Chitty's Pleadings, page 136; Marginal, 536, and 538, also 581; Marginal, 582.

The agreement entered into by the parties as appears on the record "stating that the note was the only cause of action," has the effect to nolle all other counts in the declaration, except such as the notes may be given in evidence under, and the counts so abandoned are considered as stricken out of the declaration: 2 Swan's Practice, page 900, and authorities there cited. The pleas profess to answer any and all counts under which the note may be given in evidence at the commencement and in the body and conclusion, and no more. It makes no difference under what plea the note is introduced, the plea meets it by showing that the plaintiff ought not to recover on the note; and the plaintiff says he has no other cause of action, therefore the pleas fully answer the declarntion. The other counts being abandoned, are so far as this trial is concerned, as if they had never existed. Again, the plaintiff should have demurred specially, if the pleas do not anwer the whole declaration, when they assume to do so; 2 vol. Swan's Practice. page 630, and authorities there cited. The demurrer in this case is a special demurrer and ought to be overruled.

SAMUEL STRAWDER, Deft's. Atty.

5 2½ - 32

Foy
v
Blackstone

Pltff's additional
Brief.

Filed April 23 1863
L. Leland
Clerk

The first question is, what powers are given to the Company under the *charter?* The company organized under the general Railroad act. Cook's statutes, page 937, sec. 1st, says: "Any number of persons not less than twenty-five, being subscribers to the stock to any contemplated Railroad, may be formed into a corporation for the purpose of constructing and building said Railroad, by *complying* with the following requiremets: when stock to the amount of at least one thousand dollars per mile of said road, shall be in good faith subscribed, and ten per cent paid therein, then said subscribers may commence forming a permanent organization to build said Railroad, and not before.— They shall severally subscribe articles of association, in which shall be set forth the name of the *corporation*, the number of years it shall continue, which shall not exceed fifty.

The amount of the capital stock of the company which shall be the actual cost of constructing the road together with the cost of right of way, motive power, and every other appurtenance for completing and running said road as nearly as can be estimated by competent engineers, the number of shares of which said stock shall consist, the number of directors and their names, the place from and to which the proposed road is to be constructed and the counties through which said road is to pass, and its length as near as may be, and the names of five commissioners to open books of subscription to the capital stock; each subscriber shall subscribe his name to said articles of association, his place of residence, the number of shares of stock taken by him in said company.

Section 2d states that such articles of association shall not be filed in the office of the Secretary of State until ten per cent. on the amoun of the stock subscribed shall actually and in good faith be paid in, in *cash*, to the directors named in the articles of association.

Section 5th states that the commissioners for opening books of subscription shall from time to time after the company shall be incorporated, open books of subscription to the capital stock of said company, which shall be kept open until *all the Capital Stock shall be subscribed*, if the company shall so long exist, and in case a greater amount of stock shall be subscribed than the whole capital required by said estimate, then the commissioner shall distribute said capital stock among the subscribers equally, said commissioners to open books of subscription to the the capital stock of said company. The words *capital stock*, are used for the first time in the fifth section, and "when the capital stock shall all be subscribed for and distributed" &c., then the sixth section says, as *soon as practicable* after such capital stock shall have been subscribed and distributed as aforesaid, the commissioners (not the directors) shall appoint a time and place for the meeting of the stockholders to elect directors, and shall give notice thereof at least twenty days, of the time and place of such election; thirteen directors shall be elected.

Section 7th says that the commissioners shall be inspectors of the *first election of directors*, and shall declare the result thereof, and shall file a certificate of said election in the office of the Secretary of State, and with the Clerks of the different counties through which said road

is to run, and shall also deliver to the Treasurer all the moneys by them received on subscriptions to the capital stock of said company, and shall deliver over all books and papers belonging to said company, and all subsequent elections shall be governed by the by-laws of the company. Now the commissioners leave. The permanent organization of the company is completed. 15th Ill. Report, page 400; Smith —vs.—Bangs.

Section 11th says that it shall be lawful for the directors to call in and demand from the stockholders respectively, all sums of money by them subscribed, at such time and in such instalments as the directors may deem proper, giving the necessary notice thereof.

The directors authorized to call in and collect the capital stock could not be elected until after the capital stock was all subscribed for, that is a condition *precedent*, for the 6th sec. says, as soon as *practicable after such Capital Stock shall have been subscribed and distributed, &c.*, the commissioner shall appoint the time and place of election at which said directors shall be elected.

Section 7th says the commissioners shall be inspectors of the first election of the directors which are authorized to demand and collect in the capital stock of said company, are not the same directors mentioned in the first section of the charter, because the directors mentioned in the first section were appointed by those who subscribed stock to the amount of one thousand dollars per mile; in the first instance the commissioners were at the same time appointed, and after which the articles of association were drawn up and the names of the directors and commissioners were included in said articles of association, which clearly shows that the Legislature when it passed the charter only intended to give to such preliminary organizations such powers as were necessary to get the necessary amount of capital stock subscribed to build and equip said road.

The commissioners had no power call an election to elect directors until *all* the capital had been subscribed for, therefore no directors, possessing the power to collect the capital stock can legally exist until after the capital stock is all taken; consequently no person had the authority to demand the money and receive the notes in payment thereof, by virtue of the charter. The commissioners' have the control of the Books and Stock until after all the capital stock is subscribed for and the directors elected, and they had no power to take notes in payment of stock from the subscribers; for, the taking of all the *Capital Stock* is a condition precedent, expressly so made in the 6th section of the charter. Also see Redfield on Railways, page 77, sec. 1, and page 79, and notes. In the case of Atlantic Cotton Mills—vs.—Abbott, 9th Cush. Reports, 423, where it was inserted in a subscription for stock, that the capital stock of the company should be not less than $1,500,000, it was held to be a condition precedent to making calls.

There is a good reason for it. Suppose a project to cost three millions of dollars and the parties got one fourth subscribed, that would be all lost if the balance could not be subscribed—it would be a great fraud on those who subscribed if their subscriptions could be collected when they supposed and had a right to suppose they would not be cal-

ed upon to pay, unless the balance of the *capital stock* was subscribed for to complete the work, and thereby give value to the Stock.

The 1st section of the charter says: "That any number of persons not less than *twenty-five* who being subscribers of any contemplated Railroad, may be formed into a corporation, &c." Suppose that ten persons only who being subscribers to the stock of a contemplated Railroad, should subscribe stock to the amount of a thousand dollars per mile should make the necessary estimate of its cost, appoint directors, also commissioners to open Books and solicit capital stock, and pay ten per cent in *cash* and file the articles of association in the office of the Secretary of State and get the same recorded; and the commissioners should get a small portion of the capital stock subscribed and should call an election and directors should be elected and the commissioners certify to their election and should then hand over to the Treasurer of said company the books, money and papers. Could the company collect the amount of *capital stock* thus subscribed for? We think not. No legal corporation would exist in such a case, the charter requiring at least twenty-five members before they could become incorporated, when in fact they had but ten, and by the same parity of reasoning under the 6th section of the charter the whole amount of capital stock must be subscribed for, before the commissioners can call an election to elect the first directors of said company; such directors are the only persons under the charter that have the authority or power to make an assessment or collect the amount of capital stock subscribed from said stockholders. The charter is a part of the contract, and the party having the right to and in fact does examine it, and upon such examination concludes to become a party to it, and subscribes for stock in it. Now what is the contract if all written out in full at the time the defendant signed it? It is this: "I, Calvin Goodrich, do hereby agree to take five shares of the capital stock of the Sterling & Rock Island Rail Road Company, at one hundred dollars each, which I hereby agree to pay therefor to said company five hundred dollars, at such times and in such instalments as the directors that have been elected by all the stockholders shall direct, they giving the required notice—provided all the capital stock required to build and equip said Railroad shall be subscribed for according to the estimate made." If the contract had been thus written out could the money be collected on the subscription until the whole of the capital stock had been taken? I think not; it is a condition *precedent.* We must take the charter, the books of subscription, articles of Association, and the estimates of the cost of building said road, and put them together, in order to ascertain what the contract really was.

When the organization of the company is perfected for the purpose of building said Road, the company owns no stock, it cannot have any; it must have been all subscribed and taken and owned by its members in their individual right, before the commissioners can call an election to elect directors to build said Road, and when all the capital stock is subscribed for, it may be and would be and should be represented at the first election of directors, which was clearly the design of the Legislature. In the case of Walker—vs.—DeVereaux, *et. al.*, 4th Paige's Report, page 228. 2d Vol. Rail Road cases, page 529.

The act as set forth in that case, creating the Utica & Schenectady Railroad requires the capital stock to be all subscribed for and that the commissioners appointed to open the books for stock subscriptions should in case of an excess of stock subscriptions apportion the stock among the subscribers; the Court says no person can be a stockholder of the corporation, neither does any corporation exist, nor has any person any interest in stock as the legal owner thereof so as to authorize him to vote upon it or transfer it as stock, nor can an election be held until the commissioners apportion the stock. In the case of Crocker & Williams—vs.—Crane, 23 Wendall's Reports, page 211. 2 Vol. Railroad cases, page 184, the Court says that when the charter provides for a distribution of the stock among the stockholdors no corporation exists before the distribution is made: the Court says it is a *condition precedent*. The 6th section of the charter in this case, requires the commissioners to apportion the stock among the subscribers after it is all taken, and before they call an election, for it could not be distributed if it had not been subscribed. Therefore, the subscribing for all the *capital stock* is a *condition precedent*. It seems to us that it was the intention of the legislature in making the subscription for all capital stock of said company a *condition precedent* to prevent fraud from being practiced upon those who might first subscribe for capital stock on said books. There is not the twentieth part of the stock taken of said company, and the presumption is, it never will be taken; the road is not built, and in all human probability never will be built. Where the charter prescribes the particular mode in which a corporation shall make and execute its contracts, that mode must be followed. Angel & Ames on Corporations, page 268, sec. 253. In the case of Head and Amony—vs.—The Providence Insurance Company, 2 Cranch, page 127, Condensed reports, 371, the Court say, that a corporation can *only act in the manner prescribed by its charter*.

The charter in this case provides that the directors shall make estimates, give notice when the estimate must be paid,and a fair construction ot the charter is, that the estimate shall be made at such times and in such amounts as will be required to pay for the work as it progresses, and no faster.

A corporation is a mere creature of law, and has no power nor rights except such as are expressly given it by the charter. Trustees, &c.—vs.—McConnel, 12th Ill. report, page 138 to 140. Angel & Ames on Corporation, page 276, sec. 257, same, page 279, sec. 260, same, page 103, sec. 111. It was undoubtedly the intention of the Legislature in passing the act under which this company claims to be incorporated,to permit any number of persons not less than twenty-five, who were desirous to build a Railroad between given points, to be incorporated for that purpose. The Road could only be built by a solid capital of a large amount, to be created by voluntary subscription of individuals in the form of stock, and to be paid from time to time as the work progressed, and in order to protect the stockholders from frauds and impositions as well as the public, the Statute points out the method how the amount of capital stock required to build and equip said Road should be ascertained. In the case of Newel—vs.—The Galena &

Chicago Union Railroad Co., 14 Ill. reports, page 273, the Court says that they fully recognize the propriety and even necessity of applying the rule of strict construction to the powers granted in these Railroad charters. But the rule can only be applied in cases of ambiguity, or when a power is claimed by inference or implication, and is not expressly given by the charter.

Apply the above well to the charter in this case, and the notes and bonds are void for the want of power in the Company to make the contract by which it received them. There is no ambiguity in the charter: it provides how the capital stock to build and equip the Road shall be raised, and how and by whom it should be collected. The 11th section requires the directors to collect the amount of stock subscribed at such time and in such instalments as they may deem proper.

The company has not the power to take a *note* in payment of subscription to the capital stock, due five, ten, or twenty years after its date, with or without interest. Such a note is not the capital intended by the Legislature that the company should raise to build the road with. If the interest should be collected as it becomes due and expended on the work, it would rot down before the money became due on the note, so as to complete the road. It may be said that the company may throw the note into the market and sell it. If the company has the power to do so, it can sell it for what it can get for it. Suppose it sold for four hundred dollars; the party who gave the note would own five hundred dollars of the capital stock, and draw his dividends on it, and the party who actually paid in his five hundred dollars would own but five hundred dollars. It would be a fraud upon the other stockholders, and one that the Legislature intended to prevent by prescribing the manner by which the capital stock should be raised and collected. As well might the company take the pay for the stock thus subscribed for in a *flock of sheep* or in *patent rights.* The company has undertaken to do a species of banking, using the stock as the capital, taking notes in payment of its stock, payable in five, ten and twenty years after their date, with interest at ten per cent., payable semi-annually and annually. The road cannot be built with such a capital, it is impossible. It never was intended by the Legislature that it should be. Such trading and trafficing is foreign to the object for which the company was incorporated, and the *note* is therefore *void.*— There is a difference between an incorporation organized to trade, and one to build and run a Railroad. Angel & Ames on Corporations,page 292 and 293, sec. 271; 5th Conn. Reports, page 560, New York Fire Insurance Co.—vs.—Ely. The case of Hood and Armory—vs.—The Providence Insurance Co.; 2d Cranch Reports, page 127, Condensed, page 371. The court says it is the rule that a corporation can only act in the manner prescribed by law,in its corporate capacity,it is the mere creature of the act to which its owes its existence. It may be said to be precisely what the incorporating act has made it—to derive all its powers from that act and to be capable of exerting its faculties only in the manner which that act authorizes. In the case of Head—vs.—The Providence Ins. Co., 2d Cranch reports, page 127, in delivering the opinions of the Court, Chief Justice Marshall said: "The act of incorporation is to them an enabling act; it gives them all the power they

1 Vol Condensed of Cranch P371

possess; it enables them to contract, and when it *prescribes to them a mode of contracting they must observe that mode*, or the instrument no more creates a contract than if the body had never been incorporated." So in this case the charter prescribes how the stock shall be subscribed for and how it shall be paid and collected. In the case of Stearns and Brother—vs.—The Eagle Insurance Company of Cincinnati, 5th Ohio State Reports, page 59, was an action brought by the plaintiffs against the Company, to recover the amount due them on a policy issued by the Company to them, insuring them against a loss by fire on a stock of goods; the company bought some notes and attempted to file them as an offset, and the real question was, whether the company had the power to buy the notes to file as an offset. The 6th section of the charter was the one relied upon for such authority, which reads as follows: "It shall be lawful for such company to invest all or any part of their capital stock, money, funds or other property in such a way as the directors may deem best for the safety of capital and interest of the stockholders, and may therefore sell and dispose of all interest which the company may have acquired by such investment." The Court says "the contract of indorsement, like every other, must have parties. Without two parties competent to contract, there can be no agreement by which the one can loose and the other acquire the title to negotiable paper. The powers and capacities of a corporation must be derived from the law of its creation, or they do not exist. If a fair construction of its charter does not confer the power, it is incompetent to become a party to the contract of endorsement, and without capacity to take or hold the title. As well might a dead man by the mere act of the endorser be invested with the legal interest, as a corporation, which only lives for the purposes and objects intended by the Legislature. Beyond these limits it has no existence, and its acts are neither more nor less than a nullity," held that the company had no power to buy the notes; therefore, they could not offset them against the plaintiff's claim. The People upon the Rel. of the Peoria & Aquaka Railroad Co.—vs.—The County of Tazewell; 22 Ill. reports, page 147; 8 Ohio reports, page 285; Chillicothe Bank—vs.—Noah H. Swayne; 2 Peters' reports, page 527; U. S. Bank—vs.—Owen, *et. al.* 6 Wheaton's Con. reports, Bank of U. S.—vs.—Dandridge, page 443; J. R. page 1.

In the case of Crocker & Williams–vs–Crane, 23 Wendell's Rep. 2d Vol. Railroad cases, page 485. The defendant, Crane, subscribed for 143 shares of stock to the Buffalo & Erie Railroad Company, the shares being fifty dollars each, and the act of corporation required the payment of two dollars on each share at the time of subscribing. A check was given and received in payment of and for said instalments. The court said that the check was void, it being contrary to the policy of the charter or statute. The New York Fire Insurance Co.—vs.—Ely, before referred to; McCullough—vs.—Moss, 5th Denio reports, page 567; same, page 579.

The case of the Vermont Central Railroad Co.—vs.—George Coyes, 21 Vermont Reports, page 30; 1st Vol. Railroad cases, page 226. In this case the defendant subscribed for fifty shares of the stock of said company, the *note* in suit was given for the first five dollars payable on

each share, which was required to be paid by the charter at the time of subscribing. The note was payable on demand. It was claimed that there was no consideration for the note, but the Court held it raised a mutuality in the contract and gave efficiency to the subscription. This case differs very materially from the one at bar. The party gave his contract to pay when they required it as if they ascertained the amount by computation, and the party gave his due bill, to be paid when called for, and the money was really then to be used as a part of capital to build the road; in effect the relation of the parties was not different from the one contemplated by the charter. Not so in the case at bar; a credit has been given to the defendant for more than five years to pay his stock; there is no authority for such a contract given by the charter.

The general Railroad Law, passed November 5th, 1849, and an amendatory act thereto, passed November 6th, 1849. The 3d section of the Amendatory act authorized the Railroad Company to receive in payment for stock subscriptions the bonds of any county or city. If the general law authorizes the Company to take notes in payment of stock, payable on time, why pass the amendatory act. Cook's Statutes, page 950, Sec. 3.

The special act for the more perfect organization of the Sterling & Rock Island Railroad Company, passed Feb. 19, 1859. Laws of Illinois, page 512, does not affect the question made in this case. That act only declares that said Company is a subsisting corporation, duly organized under the act to provide for a general system of Railroads, passed Nov. 5th, 1849. The company having filed their certificates in the office of the Secretary of State, they were incorporated for certain purposes and authorized to do certain acts before this special act was passed, and the act has given them no additional powers with reference to any question raised. The 3d section says, that capital stock shall be $256,000, with power to increase the capital stock, which increased stock may hereafter be subsribed for, but has no reference to the original stock.

The Legislature, if it had attempted to do so, has now power to make a contract that was valid in its inception, void; nor has it power to make a void one valid. The note in question was given Aug. 27th, 1857, if it was void then, the Legislature had not the power to make it binding in 1859. Lessee Y. Good.—vs,—Zercher, 12th Ohio Reports page 364. Sillimans,—vs.—Cummins & Cummins, 13th Ohio Reports, page 116. Redfield on Railways, page 80, and notes. The Legislature has no right to pass a Law impairing the right of contract. Article 3d, State Consitution Sec. 17; Section 10 of first article of Federal constitution; Story on Constitutions, page 502–3–4.

The parties may contract that ten per cent per annum, or a less sum of interest may be paid; if more is agreed to be pard, it is usury, and the interest is forfeited; Cook's Statute, page 600. The statute has made each year the period for rests in the computation of interest, it is the natural division of time, and any contract entered into by parties or any method of computing interest adopted by parties which shall give a greater profit or rate of interest for the use of one dollar for the whole period of one year, than 10 per cent., is usury. So a mistake in construing a statute, if it gave a party a greater interest, is usurious.

It is the substance and effect of the contract that the courts look at, and not the words; Blydenburgh on usury, page 32, 59, 60, 68, 69, 70 and 71. To take a note for $1000, payable in five years, calling for ten per cent interest, to be paid semiannually, is a species of compound interest not authorized by the statutes. For instance, the party desires to loan one thousand dollars for a year, and agrees to pay for the use of it ten per cent, or *one hundred* dollars semi annually: therefore fifty dollars must be paid in six months, and the remaining fifty dollars at the end of the year. Now, in fact, the party had the use of only nine hundred and fifty dollars for six months of the year, yet the lender received his hundred dollars interest. Such a contract in fact gives the lender the use of fifty dollars of the money for six months of that year, and the longer such a contract has to run the greater will be the amount of the usury. The Statute contemplates that the borrower should have the use of the thousand dollars for the whole year. Contracts that have a less time to run than one year, are not analogous, for the reason that the interest is but an incident to the principal, and when the principal is due and paid, the interest being an incident to the principa must cease. Not so with a contract that has a term of years to run. It is not usury to take interest in advance, if the paper is payable in a short time; but it would be if the paper had to run five or ten years; Blydenburgh, page 232, and 233. New York Fire Insurance Company,—vs.—Ely and Parsons, 2d Cowens' Reports, page 678; 8th Cowens' Reports, page 398. In Blydenburgh on Usury, page 128, is a case where five hundred pounds were lent to the borrower for five years, at the rate of five per cent ber annum; fifty pounds were returned at the time of the loan, yet the party paid the interest on the sum of five hundred pounds. The Court said it was usurious—that in fact the party had the use of only four hundred and fifty pounds, the other being returned. So in this case the party pays interest on fifty dollars in each year the note has to run, that he does not have the use of if the note had been given for money loaned. It makes no difference what the consideration of the note was, the party would have the use of the fifty dollars for six months in each year, the interest on the note was payablesemi-annually.

There is no good reason why each fifty dollars when it becomes due, at the end of every six months, should not draw interest under the general Statute. Many of the States hold that interest payable annually, if not paid when due, will draw interest, and by the same parity ity of reasoning the amount of interest due each six months would draw interest if not paid. If the contract be a binding one, the party could sue and recover his judgment for the interest, each six months the judgment would draw interest.

The contract being an executory one, the Court will not interpose to enforce it. The note upon which this suit is brought, called for one thousand dollars, and is payable to the Sterling & Rock Island Railroad Company five years after date, with interest at ten per cent, the interest payable semi-annually. This note conveys to the world upon its face its extraordinary character; therefore every person who purchased and received it, was put upon his inquiry as to the power of the Company to take, receive and dispose of it. It was given to a Railroad Company whose business it is to build and equip it, move

and transport passengers and freight upon it. The very name shows it was not incorporated for trading purposes like that of a banking institution. A note payable five years after date, to a Railroad Company, with interest payable semi-annually, is sufficient to put any prudent man on his inquiry, not only as to the powers of the company under its charter to take, and receive, and dispose of such notes, but would put him on inquiry as to the manner in which the company received it, the consideration and every other circumstance that attended it; Story on Promisory notes, page 229, Sec. 179. Crane—vs—Baldwin, 12 Pickering Reports 545; Hall—vs—Hall 8 Conn. Rep. 336.

All persons who deal with a Corporation are bound to take notice of the powers given by the act of Incorporation. Angel—vs.—Ames on Incorporations, page 284; Root—vs.—Goddord, 3 McLean's Circuit Court Report, page 102.

The case of the Illinois River Railroad Co.—vs.—Zimmer, 20th Ill. Reports, page 654, does not conflict with the principles urged in the defence in this case. We claim that the subscription to the whole capital stock is made a condition precedent, by the 6th section of the charter. The statute is imperative. It is said that fraud contaminates everything it comes in contact with. A perfect system of frauds was practiced upon the people along the line where this imaginary road was to run, in order to obtain these notes and mortgages, which is averred in the pleas and admitted by the demurrer. The road is not built and never will be in all human probability. It these notes are held valid and collectable, it will substantially bankrupt all that portion of the country through which said road was to run.

The general issue puts in issue the existence of the corporation, and the corporation is bound to prove that they are incorporatod. Bell—vs.—Great Western Turnpike Company, 14th Johnson's Reports, page 415. General plea avers the fact that the instrument was obtained by fraud, and circumvention is sufficient; 2d vol. Swan's Practice and Precedents, page 742; Ohio Forms & Practice, by Wilcox, page 136, and 241; 1 Chitty's Pleadings, page 136; Marginal, 536, and 538, also 581; Marginal, 582.

The agreement entered into by the parties as appears on the record "stating that the note was the only cause of action," has the effect to nolle all other counts in the declaration, except such as the notes may be given in evidence under, and the counts so abandoned are considered as stricken out of the declaration: 2 Swan's Practice, page 900, and authorities there cited. The pleas profess to answer any and all counts under which the note may be given in evidence at the commencement and in the body and conclusion, and no more. It makes no difference under what plea the note is introduced, the plea meets it by showing that the plaintiff ought not to recover on the note; and the plaintiff says he has no other cause of action, therefore the pleas fully answer the declaration. The other counts being abandoned, are so far as this trial is concerned, as it they had never existed. Again, the plaintiff should have demurred specially, if the pleas do not anwer the whole declaration, when they assume to do so; 2 vol. Swan's Practice. page 630, and authorities there cited. The demurrer in this case is a special demurrer and ought to be overruled.

SAMUEL STRAWDER, Deft's. Atty.

32 — 5-2½

Foy
vs
Blackstone

~~Abstract~~

Filed Apr 23. 1863
L Leland
Clk

The first question is, what powers are given to the Company under the *charter?* The company organized under the general Railroad act. Cook's statutes, page 937, sec. 1st, says: "Any number of persons not less than twenty-five, being subscribers to the stock to any contemplated Railroad, may be formed into a corporation for the purpose of constructing and building said Railroad, by *complying* with the following requiremets: when stock to the amount of at least one thousand dollars per mile of said road, shall be in good faith subscribed, and ten per cent paid therein, then said subscribers may commence forming a permanent organization to build said Railroad, and not before.—They shall severally subscribe articles of association, in which shall be set forth the name of the *corporation*, the number of years it shall continue, which shall not exceed fifty.

The amount of the capital stock of the company which shall be the actual cost of constructing the road together with the cost of right of way, motive power, and every other appurtenance for completing and running said road as nearly as can be estimated by competent engineers, the number of shares of which said stock shall consist, the number of directors and their names, the place from and to which the proposed road is to be constructed and the counties through which said road is to pass, and its length as near as may be, and the names of five commissioners to open books of subscription to the capital stock; each subscriber shall subscribe his name to said articles of association, his place of residence, the number of shares of stock taken by him in said company.

Section 2d states that such articles of association shall not be filed in the office of the Secretary of State until ten per cent. on the amoun-of the stock subscribed shall actually and in good faith be paid in, in *cash*, to the directors named in the articles of association.

Section 5th states that the commissioners for opening books of subscription shall from time to time after the company shall be incorporated, open books of subscription to the capital stock of said company, which shall be kept open until *all the Capital Stock shall be subscribed*, if the company shall so long exist, and in case a greater amount of stock shall be subscribed than the whole capital required by said estimate, then the commissioner shall distribute said capital stock among the subscribers equally, said commissioners to open books of subscription to the the capital stock of said company. The words *capital stock*, are used for the first time in the fifth section, and "when the capital stock shall all be subscribed for and distributed" &c., then the sixth section says, as *soon as practicable* after such capital stock shall have been subscribed and distributed as aforesaid, the commissioners (not the directors) shall appoint a time and place for the meeting of the stockholders to elect directors, and shall give notice thereof at least twenty days, of the time and place of such election; thirteen directors shall be elected.

Section 7th says that the commissioners shall be inspectors of the *first election of directors*, and shall declare the result thereof, and shall file a certificate of said election in the office of the Secretary of State, and with the Clerks of the different counties through which said road

is to run, and shall also deliver to the Treasurer all the moneys by them received on subscriptions to the capital stock of said company, and shall deliver over all books and papers belonging to said company, and all subsequent elections shall be governed by the by-laws of the company. Now the commissioners leave. The permanent organization of the company is completed. 15th Ill. Report, page 400; Smith —vs.—Bangs.

Section 11th says that it shall be lawful for the directors to call in and demand from the stockholders respectively, all sums of money by them subscribed, at such time and in such instalments as the directors may deem proper, giving the necessary notice thereof.

The directors authorized to call in and collect the capital stock could not be elected until after the capital stock was all subscribed for, that is a condition *precedent*, for the 6th sec. says, as soon as *practicable after such Capital Stock shall have been subscribed and distributed, &c.*, the commissioner shall appoint the time and place of election at which said directors shall be elected.

Section 7th says the commissioners shall be inspectors of the first election of the directors which are authorized to demand and collect in the capital stock of said company, are not the same directors mentioned in the first section of the charter, because the directors mentioned in the first section were appointed by those who subscribed stock to the amount of one thousand dollars per mile; in the first instance the commissioners were at the same time appointed, and after which the articles of association were drawn up and the names of the directors and commissioners were included in said articles of association, which clearly shows that the Legislature when it passed the charter only intended to give to such preliminary organizations such powers as were necessary to get the necessary amount of capital stock subscribed to build and equip said road.

The commissioners had no power call an election to elect directors until *all* the capital had been subscribed for, therefore no directors, possessing the power to collect the capital stock can legally exist until after the capital stock is all taken; consequently no person had the authority to demand the money and receive the notes in payment thereof, by virtue of the charter. The commissioners have the control of the Books and Stock until after all the capital stock is subscribed for and the directors elected, and they had no power to take notes in payment of stock from the subscribers; for, the taking of all the *Capital Stock* is a condition precedent, expressly so made in the 6th section of the charter. Also see Redfield on Railways, page 77, sec. 1, and page 79, and notes. In the case of Atlantic Cotton Mills—vs.—Abbott, 9th Cush. Reports, 423, where it was inserted in a subscription for stock, that the capital stock of the company should be not less than $1,500,000, it was held to be a condition precedent to making calls.

There is a good reason for it. Suppose a project to cost three millions of dollars and the parties got one fourth subscribed, that would be all lost if the balance could not be subscribed—it would be a great fraud on those who subscribed if their subscriptions could be collected when they supposed and had a right to suppose they would not be cal-

ed upon to pay, unless the balance of the *capital stock* was subscribed for to complete the work, and thereby give value to the Stock.

The 1st section of the charter says: "That any number of persons not less than *twenty-five* who being subscribers of any contemplated Railroad, may be formed into a corporation, &c." Suppose that ten persons only who being subscribers to the stock of a contemplated Railroad, should subscribe stock to the amount of a thousand dollars per mile should make the necessary estimate of its cost, appoint directors, also commissioners to open Books and solicit capital stock, and pay ten per cent in *cash* and file the articles of association in the office of the Secretary of State and get the same recorded; and the commissioners should get a small portion of the capital stock subscribed and should call an election and directors should be elected and the commissioners certify to their election and should then hand over to the Treasurer of said company the books, money and papers. Could the company collect the amount of *capital stock* thus subscribed for? We think not. No legal corporation would exist in such a case, the charter requiring at least twenty-five members before they could become incorporated, when in fact they had but ten, and by the same parity of reasoning under the 6th section of the charter the whole amount of capital stock must be subscribed for, before the commissioners can call an election to elect the first directors of said company; such directors are the only persons under the charter that have the authority or power to make an assessment or collect the amount of capital stock subscribed from said stockholders. The charter is a part of the contract, and the party having the right to and in fact does examine it, and upon such examination concludes to become a party to it, and subscribes for stock in it. Now what is the contract if all written out in full at the time the defendant signed it? It is this: "I, Calvin Goodrich, do hereby agree to take five shares of the capital stock of the Sterling & Rock Island Rail Road Company, at one hundred dollars each, which I hereby agree to pay therefor to said company five hundred dollars, at such times and in such instalments as the directors that have been elected by all the stockholders shall direct, they giving the required notice—provided all the capital stock required to build and equip said Railroad shall be subscribed for according to the estimate made." If the contract had been thus written out could the money be collected on the subscription until the whole of the capital stock had been taken? I think not; it is a condition *precedent*. We must take the charter, the books of subscription, articles of Association, and the estimates of the cost of building said road, and put them together, in order to ascertain what the contract really was.

When the organization of the company is perfected for the purpose of building said Road, the company owns no stock, it cannot have any; it must have been all subscribed and taken and owned by its members in their individual right, before the commissioners can call an election to elect directors to build said Road, and when all the capital stock is subscribed for, it may be and would be and should be represented at the first election of directors, which was clearly the design of the Legislature. In the case of Walker—vs.—DeVereaux, *et. al.*, 4th Paige's Report, page 228. 2d Vol. Rail Road cases, page 529.

The act as set forth in that case, creating the Utica & Schenectady Railroad requires the capital stock to be all subscribed for and that the commissioners appointed to open the books for stock subscriptions should in case of an excess of stock subscriptions apportion the stock among the subscribers; the Court says no person can be a stockholder of the corporation, neither does any corporation exist, nor has any person any interest in stock as the legal owner thereof so as to authorize him to vote upon it or transfer it as stock, nor can an election be held until the commissioners apportion the stock. In the case of Crocker & Williams—vs.—Crane, 23 Wendall's Reports, page 211. 2 Vol. Railroad cases, page 184, the Court says that when the charter provides for a distribution of the stock among the stockholdors no corporation exists before the distribution is made: the Court says it is a *condition precedent.* The 6th section of the charter, in this case, requires the commissioners to apportion the stock among the subscribers after it is all taken, and before they call an election, for it could not be distributed if it had not been subscribed. Therefore, the subscribing for all the *capital stock* is a *condition precedent.* It seems to us that it was the intention of the legislature in making the subscription for all capital stock of said company a *condition precedent* to prevent fraud from being practiced upon those who might first subscribe for capital stock on said books. There is not the twentieth part of the stock taken of said company, and the presumption is, it never will be taken; the road is not built, and in all human probability never will be built. Where the charter prescribes the particular mode in which a corporation shall make and execute its contracts, that mode must be followed. Angel & Ames on Corporations, page 268, sec. 253. In the case of Head and Amony—vs.—The Providence Insurance Company, 2 Cranch, page 127, Condensed reports, 371, the Court say, that a corporation can *only act in the manner prescribed by its charter.*

The charter in this case provides that the directors shall make estimates, give notice when the estimate must be paid,and a fair construction of the charter is, that the estimate shall be made at such times and in such amounts as will be required to pay for the work as it progresses, and no faster.

A corporation is a mere creature of law, and has no power nor rights except such as are expressly given it by the charter. Trustees, &c.—vs.—McConnel, 12th Ill. report, page 138 to 140. Angel & Ames on Corporation, page 276, sec. 257, same, page 279, sec. 260, same, page 103, sec. 111. It was undoubtedly the intention of the Legislature in passing the act under which this company claims to be incorporated,to permit any number of persons not less than twenty-five, who were desirous to build a Railroad between given points, to be incorporated for that purpose. The Road could only be built by a solid capital of a large amount, to be created by voluntary subscription of individuals in the form of stock, and to be paid from time to time as the work progressed, and in order to protect the stockholders from frauds and impositions as well as the public, the Statute points out the method how the amount of capital stock required to build and equip said Road should be ascertained. In the case of Newel—vs.—The Galena &

Chicago Union Railroad Co., 14 Ill. reports, page 273, the Court says that they fully recognize the propriety and even necessity of applying the rule of strict construction to the powers granted in these Railroad charters. But the rule can only be applied in cases of ambiguity, or when a power is claimed by inference or implication, and is not expressly given by the charter.

Apply the above well to the charter in this case, and the notes and bonds are void for the want of power in the Company to make the contract by which it received them. There is no ambiguity in the charter; it provides how the capital stock to build and equip the Road shall be raised, and how and by whom it should be collected. The 11th section requires the directors to collect the amount of stock subscribed at such time and in such instalments as they may deem proper.

The company has not the power to take a *note* in payment of subscription to the capital stock, due five, ten, or twenty years after its date, with or without interest. Such a note is not the capital intended by the Legislature that the company should raise to build the road with. If the interest should be collected as it becomes due and expended on the work, it would rot down before the money became due on the note, so as to complete the road. It may be said that the company may throw the note into the market and sell it. If the company has the power to do so, it can sell it for what it can get for it. Suppose it sold for four hundred dollars; the party who gave the note would own five hundred dollars of the capital stock, and draw his dividends on it, and the party who actually paid in his five hundred dollars would own but five hundred dollars. It would be a fraud upon the other stockholders, and one that the Legislature intended to prevent by prescribing the manner by which the capital stock should be raised and collected. As well might the company take the pay for the stock thus subscribed for in a *flock of sheep* or in *patent rights*. The company has undertaken to do a species of banking, using the stock as the capital, taking notes in payment of its stock, payable in five, ten and twenty years after their date, with interest at ten per cent., payable semi-annually and annually. The road cannot be built with such a capital, it is impossible. It never was intended by the Legislature that it should be. Such trading and trafficing is foreign to the object for which the company was incorporated, and the *note* is therefore *void.*— There is a difference between an incorporation organized to trade, and one to build and run a Railroad. Angel & Ames on Corporations,page 292 and 293, sec. 271; 5th Conn. Reports, page 560, New York Fire Insurance Co.—vs.—Ely. The case of Hood and Armory—vs.—The Providence Insurance Co.; 2d Cranch Reports, page 127, Condensed, page 371. The court says it is the rule that a corporation can only act in the manner prescribed by law,in its corporate capacity,it is the mere creature of the act to which its owes its existence. It may be said to be precisely what the incorporating act has made it—to derive all its powers from that act and to be capable of exerting its faculties only in the manner which that act authorizes. In the case of Head—vs.—The Providence Ins. Co., 2d Cranch reports, page 127, in delivering the opinions of the Court, Chief Justice Marshall said: "The act of incorporation is to them an enabling act; it gives them all the power they

possess; it enables them to contract, and when it *prescribes to them a mode of contracting they must observe that mode*, or the instrument no more creates a contract than if the body had never been incorporated." So in this case the charter prescribes how the stock shall be subscribed for and how it shall be paid and collected. In the case of Stearns and Brother—vs.—The Eagle Insurance Company of Cincinnati, 5th Ohio State Reports, page 59, was an action brought by the plaintiffs against the Company, to recover the amount due them on a policy issued by the Company to them, insuring them against a loss by fire on a stock of goods; the company bought some notes and attempted to file them as an offset, and the real question was, whether the company had the power to buy the notes to file as an offset. The 6th section of the charter was the one relied upon for such authority, which reads as follows: "It shall be lawful for such company to invest all or any part of their capital stock, money, funds or other property in such a way as the directors may deem best for the safety of capital and interest of the stockholders, and may therefore sell and dispose of all interest which the company may have acquired by such investment." The Court says "the contract of indorsement, like every other, must have parties. Without two parties competent to contract, there can be no agreement by which the one can loose and the other acquire the title to negotiable paper. The powers and capacities of a corporation must be derived from the law of its creation, or they do not exist. If a fair construction of its charter does not confer the power, it is incompetent to become a party to the contract of endorsement, and without capacity to take or hold the title. As well might a dead man by the mere act of the endorser be invested with the legal interest, as a corporation, which only lives for the purposes and objects intended by the Legislature. Beyond these limits it has no existence, and its acts are neither more nor less than a nullity," held that the company had no power to buy the notes; therefore, they could not offset them against the plaintiff's claim. The People upon the Rel. of the Peoria & Aquaka Railroad Co.—vs.—The County of Tazewell; 22 Ill. reports, page 147; 8 Ohio reports, page 285; Chillicothe Bank—vs.—Noah H. Swayne; 2 Peters' reports, page 527; U. S. Bank—vs.—Owen, *et. al.* 6 Wheaton's Con. reports, Bank of U. S.—vs.—Dandridge, page 443; J. R. page 1.

In the case of Crocker & Williams–vs–Crane, 23 Wendell's Rep. 2d Vol. Railroad cases, page 485. The defendant, Crane, subscribed for 143 shares of stock to the Buffalo & Erie Railroad Company, the shares being fifty dollars each, and the act of corporation required the payment of two dollars on each share at the time of subscribing. A check was given and received in payment of and for said instalments. The court said that the check was void, it being contrary to the policy of the charter or statute. The New York Fire Insurance Co.—vs.—Ely, before referred to; McCullough—vs.—Moss, 5th Denio reports, page 567; same, page 579.

The case of the Vermont Central Railroad Co.—vs.—George Coyes, 21 Vermont Reports, page 30; 1st Vol. Railroad cases, page 226. In this case the defendant subscribed for fifty shares of the stock of said company, the *note* in suit was given for the first five dollars payable on

each share, which was required to be paid by the charter at the time of subscribing. The note was payable on demand. It was claimed that there was no consideration for the note, but the Court held it raised a mutuality in the contract and gave efficiency to the subscription. This case differs very materially from the one at bar. The party gave his contract to pay when they required it as if they ascertained the amount by computation, and the party gave his due bill, to be paid when called for, and the money was really then to be used as a part of capital to build the road; in effect the relation of the parties was not different from the one contemplated by the charter. Not so in the case at bar; a credit has been given to the defendant for more than five years to pay his stock; there is no authority for such a contract given by the charter.

The general Railroad Law, passed November 5th, 1849, and an amendatory act thereto, passed November 6th, 1849. The 3d section of the Amendatory act authorized the Railroad Company to receive in payment for stock subscriptions the bonds of any county or city. If the general law authorizes the Company to take notes in payment of stock, payable on time, why pass the amendatory act. Cook's Statutes, page 950, Sec. 3.

The special act for the more perfect organization of the Sterling & Rock Island Railroad Company, passed Feb. 19, 1859. Laws of Illinois, page 512, does not affect the question made in this case. That act only declares that said Company is a subsisting corporation, duly organized under the act to provide for a general system of Railroads, passed Nov. 5th, 1849. The company having filed their certificates in the office of the Secretary of State, they were incorporated for certain purposes and authorized to do certain acts before this special act was passed, and the act has given them no additional powers with reference to any question raised. The 3d section says, that capital stock shall be $256,000, with power to increase the capital stock, which increased stock may hereafter be subsribed for, but has no reference to the original stock.

The Legislature, if it had attempted to do so, has now power to make a contract that was valid in its inception, void; nor has it power to make a void one valid. The note in question was given Aug. 27th, 1857, if it was void then, the Legislature had not the power to make it binding in 1859. Lessee Y. Good.—vs,—Zercher, 12th Ohio Reports page 364. Sillimans,—vs.—Cummins & Cummins, 13th Ohio Reports, page 116. Redfield on Railways, page 80, and notes. The Legislature has no right to pass a Law impairing the right of contract. Article 3d, State Consitution Sec. 17; Section 10 of first article of Federal constitution; Story on Constitutions, page 502–3–4.

The parties may contract that ten per cent per annum, or a less sum of interest may be paid; if more is agreed to be pard, it is usury, and the interest is forfeited; Cook's Statute, page 600. The statute has made each year the period for rests in the computation of interest, it is the natural division of time, and any contract entered into by parties or any method of computing interest adopted by parties which shall give a greater profit or rate of interest for the use of one dollar for the whole period of one year, than 10 per cent., is usury. So a mistake in construing a statute, if it gave a party a greater interest, is usurious.

It is the substance and effect of the contract that the courts look at, and not the words; Blydenburgh on usury, page 32, 59, 60, 68, 69, 70 and 71. To take a note for $1000, payable in five years, calling for ten per cent interest, to be paid semiannually, is a species of compound interest not authorized by the statutes. For instance, the party desires to loan one thousand dollars for a year, and agrees to pay for the use of it ten per cent, or *one hundred* dollars semi annually: therefore fifty dollars must be paid in six months, and the remaining fifty dollars at the end of the year. Now, in fact, the party had the use of only nine hundred and fifty dollars for six months of the year, yet the lender received his hundred dollars interest. Such a contract in fact gives the lender the use of fifty dollars of the money for six months of that year, and the longer such a contract has to run the greater will be the amount of the usury. The Statute contemplates that the borrower should have the use of the thousand dollars for the whole year. Contracts that have a less time to run than one year, are not analogous, for the reason that the interest is but an incident to the principal, and when the principal is due and paid, the interest being an incident to the principa must cease. Not so with a contract that has a term of years to run. It is not usury to take interest in advance, if the paper is payable in a short time; but it would be if the paper had to run five or ten years; Blydenburgh, page 232, and 233. New York Fire Insurance Company,—vs.—Ely and Parsons, 2d Cowens' Reports, page 678; 8th Cowens' Reports, page 398. In Blydenburgh on Usury, page 128, is a case where five hundred pounds were lent to the borrower for five years, at the rate of five per cent ber annum; fifty pounds were returned at the time of the loan, yet the party paid the interest on the sum of five hundred pounds. The Court said it was usurious—that in fact the party had the use of onty four hundred and fifty pounds, the other being returned. So in this case the party pays interest on fifty dollars in each year the note has to run, that he does not have the use of if the note had been given for money loaned. It makes no difference what the consideration of the note was, the party would have the use of the fifty dollars for six months in each year, the interest on the note was payablesemi-annually.

There is no good reason why each fifty dollars when it becomes due, at the end of every six months, should not draw interest under the general Statute. Many of the States hold that interest payable annually, if not paid when due, will draw interest, and by the same parity ity of reasoning the amount of interest due each six months would draw interest if not paid. If the contract be a binding one, the party could sue and recover his judgment for the interest, each six months the judgment would draw interest.

The contract being an executory one, the Court will not interpose to enforce it. The note upon which this suit is brought, called for one thousand dollars, and is payable to the Sterling & Rock Island Railroad Company five years after date, with interest at ten per cent, the interest payable semi-annually. This note conveys to the world upon its face its extraordinary character; therefore every person who purchased and received it, was put upon his inquiry as to the power of the Company to take, receive and dispose of it. It was given to a Railroad Company whose business it is to build and equip it. move

and transport passengers and freight upon it. The very name shows it was not incorporated for trading purposes like that of a banking institution. A note payable five years after date, to a Railroad Company, with interest payable semi-annually, is sufficient to put any prudent man on his inquiry, not only as to the powers of the company under its charter to take, and receive, and dispose of such notes, but would put him on inquiry as to the manner in which the company received it, the consideration and every other circumstance that attended it; Story on Promisory notes, page 229, Sec. 179. Crane—vs—Baldwin, 12 Pickering Reports 545; Hall—vs—Hall 8 Conn. Rep. 336.

All persons who deal with a Corporation are bound to take notice of the powers given by the act of Incorporation. Angel—vs.—Ames on Incorporations, page 284; Root—vs.—Goddord, 3 McLean's Circuit Court Report, page 102.

The case of the Illinois River Railroad Co.—vs.—Zimmer, 20th Ill. Reports, page 654, does not conflict with the principles urged in the defence in this case. We claim that the subscription to the whole capital stock is made a condition precedent, by the 6th section of the charter. The statute is imperative. It is said that fraud contaminates everything it comes in contact with. A perfect system of frauds was practiced upon the people along the line where this imaginary road was to run, in order to obtain these notes and mortgages, which is averred in the pleas and admitted by the demurrer. The road is not built and never will be in all human probability. If these notes are held valid and collectable, it will substantially bankrupt all that portion of the country through which said road was to run.

The general issue puts in issue the existence of the corporation, and the corporation is bound to prove that they are incorporatod. Bell—vs.—Great Western Turnpike Company, 14th Johnson's Reports, page 415. General plea avers the fact that the instrument was obtained by fraud, and circumvention is sufficient; 2d vol. Swan's Practice and Precedents, page 742; Ohio Forms & Practice, by Wilcox, page 136, and 241; 1 Chitty's Pleadings, page 136; Marginal, 536, and 538, also 581; Marginal, 582.

The agreement entered into by the parties as appears on the record "stating that the note was the only cause of action," has the effect to nolle all other counts in the declaration, except such as the notes may be given in evidence under, and the counts so abandoned are considered as stricken out of the declaration: 2 Swan's Practice, page 900, and authorities there cited. The pleas profess to answer any and all counts under which the note may be given in evidence at the commencement and in the body and conclusion, and no more. It makes no difference under what plea the note is introduced, the plea meets it by showing that the plaintiff ought not to recover on the note; and the plaintiff says he has no other cause of action, therefore the pleas fully answer the declaration. The other counts being abandoned, are so far as this trial is concerned, as if they had never existed. Again, the plaintiff should have demurred specially, if the pleas do not anwer the whole declaration, when they assume to do so; 2 vol. Swan's Practice. page 630, and authorities there cited. The demurrer in this case is a special demurrer and ought to be overruled.

SAMUEL STRAWDER, Deft's. Atty.

32 — 52 1/2

Foy
vs
Blackstone

Pltffs additional Briefs

Filed April 23. 1863
L. Lalaniel
Clerk

John A Brunnemeyer
Fridrich Fickensher
William Fickensher
Christian Bauman &
Henry Brunnemeyer

vs

Ernst H Buhre
Michael Habermeyer
Stephen Funk John
Brigge & Carl Hübner
for themselves & on be-
half &c.

Plaintiffs in Error.

Defendants in Error.

Supreme Court of the
State of Illinois April term
AD 1862.

Charles J Meizner being first duly sworn upon oath says that he was one of the attorneys for the plaintiffs in Error who conducted said cause in the Court below, that the record herein filed in said ~~court~~ does not contain all the evidence introduced in the Court below and as contained in the bill of Exceptions filed in the Court below, that the book introduced in evidence containing the by laws of said Church and also the names of the members contains the respective sums which each member of said society paid as a yearly contribution for the support of the Church, which sum is placed at the end of the respective names, been which said sums said clerk omitted to insert in the copy of the record that as this affiant verily believ

said evidence will be material upon the hearing of this cause. That the question will be presented who of said persons are legal members of said society, as according to the bye laws of said society no one can be a legal member unless he pays something towards the support of the said Church and that said list of names & the respective sums set opposite some of the names will show who are legal members of said society and who are not. This affiant therefore prays that a writ of certiorari may issue to said Clerk to send up a true record.

Sworn & subscribed to before me this 23rd day of April AD 1862
L. Leland Clk.

C J Wagner

228 52

Affdt.

Filed Apl. 28 1862
L. Leland
Clk.

State of Illinois } Supreme Court
At Ottawa } April Term 1862

Appeal from Whiteside County

George Foy } Appelant
vs
Timothy B. Blackstone } Appellee.

And the said George Foy defendant comes and says that in the records made and proceedings aforesaid there is manifest error in this, to wit.

1st The Court erred in permitting the said Coupon Note to be given in evidence to the jury until the Plaintiffs had proved that said Samuel Happer, (Treasurer) had power and authority to sell and transfer and assign said note,

2nd The Court erred in permitting the said Coupon Note to be given in evidence to the jury without the Plaintiff first proving that an order had been

made or a resolution passed by the said Camanche Albany & Mendota Railroad Company or the Directors thereof authorizing the sale and transfer of said Note.

3rd. The Court erred in permitting the said Note to be given in evidence to the jury without the same being legally transferred and assigned by the said Camanche Albany and Mendota Railroad Company

4th. The Court erred in permitting the Plaintiff to amend and fill up the assignment of said Note on the trial.

5th The Court erred in permitting the Note to be given in evidence to the jury until after the Plaintiff proved that the Directors of the said Railroad Company had made a call or demand that the said Defendants George Foy should pay as an installment on the capital Stock by him subscribed for on the books of said Railroad Company, the money mentioned in said Note.

6th The Court erred in permitting the Note to be given in evidence to the jury until after the Plaintiff proved that the directors of the said Camanche Albany & Mendota Railroad Company had authorised the taking of said Note.

7th The Court erred in permitting the said Note to be given in evidence to the jury. The said Camanche Albany and Mendota Railroad Company had no power or authority under or by its Charter to take and receive said note.

8th The Court erred in permitting the said Note to be given to the jury, in evidence. There was no legal or valid Consideration given for said Note.

9th The Court erred in not permitting the Defendant George Foy to give the evidence he proposed to give to the jury

10th The verdict is manifestly against the law and the evidence in the Case

11th The Court erred in not dismissing this case on the motion of the Defendant below

12th The Court erred in overruling the Defendants Foys motion for a new trial,

13th The said judgment was given in favor of the said Timothy B Blackstone whereas by the laws of the Land it ought to have been given in favor of the said George Foy.

Wherefore the said George Foy prays that the said judgment may be reversed, annulled and held for nothing and that he may be restored to all things he has lost by reason thereof.

Saml. Strawder Atty
for George Foy

52½

32

October Term of the Whiteside County Circuit Court A.D. 1860

At a regular Term of the circuit court in and for the county of Whiteside and State of Illinois begun and holden at the Court House in the Town of Morrison in said County and State on the second Monday of October in the year of our Lord one thousand eight hundred and sixty (AD 1860) it being the eighth day of said month and the Judge not arriving on this day the Court convened and organized on Tuesday Morning October Ninth (9th) A.D. 1860

Present Hon John V Eustace Judge of the twenty second Judicial circuit in the State of Illinois

Present Robert L Wilson Clerk of the circuit court in and for the County of Whiteside and State of Illinois

Present John Dippell Sheriff of Whiteside County and State of Illinois

Present Robert C Burchell States Attorney for the twenty second Judicial circuit in the State of Illinois

Be it remembered that heretofore to wit on the 26th day of July in the year of our Lord one thousand eight hundred and sixty there was filed in the Clerks office of said Whiteside County circuit Court a certain transcript from the docket of A J Mattson one of the Justices of the Peace of said county. Which said transcript was in the words and figures following to wit:

State of Illinois }
Whiteside County } ss In Justices Court before the undersigned

2

Timothy B Blackstone }
vs } Assumpsit demand $100
George Foy }

Summons issued this 14" day of April 1860 returnable on the 21" day of April A D 1860 at (10) Oclock A.M. & handed to S L Comer Const to serve — Summons returned endorsed, served by reading to the within named defendant this 16" day April 1860 Fees 65¢ S L Comer Const —

Now on this 21" day of April 1860 defendant appears after Suit being Called and asks for Continuance The court heard the remarks of defence and refused Continuance. It appearing that this suit is brought on a promisory note left for Collection dated February 10" 1857 & payable to the order of the Camanche Albany And Mendota Rail Road Company. It is considered by the Court that the plaintiff have Judgement against the said defendant for the sum of one hundred dollars debt. and the further sum of one 21/100 dollars cost of suit

Justices fees
Summons ,18 3/4
Docketing 12 1/2
Judgment 25

Const cost
Summons ,25
mileage ,40

Additional Cost. 1,25 - making $2,46 A J Mattson P, J. P.

State of Illinois }
Whiteside County } ss I A J Mattson a P Justice of the Peace in and for the said County. do hereby certify that the foregoing is a true copy of the proceedings in the cause therein entitled had before me. And that herewith enclosed are all the papers and documents belonging to the said suit

Witness my hand this 20th day of July A.D. 1860

A J Mattson Police Justice of the Peace

3

And also at the same time and place was filed one Certain Coupon note. which said Coupon note is in the words and figures following to wit;

No 2 Prophetstown Feb 10" 1857—

On the first day of March 1859 I promise to pay to the order of the Camanche Albany & Mendota Railroad Company One hundred Dollars at their office in State of Illinois for value received. being one years interest falling due on that day on my bond of even date herewith payable to the order of the said Company at their office as aforesaid

(Signed) George Foy

And afterwards to wit on the same day and year aforesaid there was issued out of the office of the clerk of said Court and under the seal thereof the Peoples writ of summons directed to the Sheriff of Whiteside County to execute. Clothed in the words and figures following to wit

State of Illinois }
Whiteside County } ss

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

Whereas in a certain Cause lately pending before A J Mattson esquire one of the Justices of the Peace within and for said County wherein Timothy B Blackstone is plaintiff and George Foy is defendant Judgement was rendered by said Justice against said George Foy from which Judgement the said George Foy has appealed to the circuit court of said county; We therefore command you that you summon the said Timothy B Blackstone to be and appear before said circuit Court on the first day

of the next term thereof to be held at the court House in Morrison on the second Monday in October next at ten O clock in the fore noon, and abide by and perform the Judgement of said court in the premises

(Seal) Witness R L Wilson Clerk of said court and the seal thereof at Morrison in said County this 26" day of July A.D. 1860

R L Wilson Clerk
per S R Wilson dep

And afterwards to wit on the 8" day of October in the year last aforesaid said writ of summons was returned into said court by said Sheriff endorsed as follows to wit; State of Illinois }
Whiteside County } ss

Timothy B Blackstone not found in my County this 8" day of Oct A.D. 1860

John Dipple Sheriff

January Term of the Whiteside County circuit court A.D. 1861

At a regular term of the Circuit court in and for the County of Whiteside and State of Illinois begun and holden at the Court House in the Town of Morrison in said County and State on the third Monday of January in the year of our Lord one thousand eight hundred and sixty one. it being the 21" day of the month and the Judge not arriving on this day the Court convened and organized on tuesday morning January twenty second (22d). 1861

Present Hon John V Eustace Judge of the twenty second Judicial circuit in the State of Illinois

5

Present Addison Farrington Clerk of the circuit court in and for said County and State

Present, David McCartney States attorney for the twenty second Judicial circuit in the State of Illinois

Present Robert G Clendenin Sheriff in and for the County of Whiteside in the State aforesaid

And afterwards to wit on the twenty second day of January In the year of our Lord one thousand eight hundred and sixty one it being one of the Judicial days of the aforesaid January term of said Court the following among other proceedings were had and entered of record to wit

75

Timothy B Blackstone
vs
George Foy
} Appeal

This day came the said plaintiff by Ware his attorney and the said defendant by Sacketts & Strawder his attorneys. and the said defendant enters his motion herein for a continuance of this cause to the next term of this Court

And afterwards to wit on the twenty third day of January in the year last aforesaid and yet of said January term of said court. the following among other proceedings were had and entered of record to wit

75

Timothy B Blackstone
vs
George Foy
} Appeal

This day came the said plaintiff

by J Ware his attorney and the said defendant by Sackett &
Strawn his attorneys. and the motion entered herein by the
defendant at a former day of this term of this court for a cont-
-inuance of this cause to the next term of this court is this day
sustained at the cost of the said defendant whereupon it is
ordered by the court that the said plaintiff have and recover of
the said defendant all the costs and charges in and about this
continuance expended and that he have execution therefor

May Term of the Whiteside County Circuit Court A.D. 1861
At a regular term of the Circuit court in and for the county of
Whiteside and State of Illinois begun and holden at the court House
in the Town of Morrison in said County and State on the third Monday
of May in the year of our Lord one thousand eight hundred and
sixty one. it being the twentieth day of said month and the
Judge not arriving on this day the court convened and or-
ganized on Tuesday morning May twenty first A.D. Eighteen
hundred and sixty one

Present Hon John V Eustace Judge of the twenty second Judici-
al circuit in the State of Illinois

Present Addison Farrington Clerk of the circuit court in and for
the County of Whiteside and State of Illinois

Present David McCartney States attorney for the twenty second
Judicial circuit in the State of Illinois

Present Robert G Clendenin Sheriff in and for the County of
Whiteside in State of Illinois

Attest A Farrington Clerk

7

And afterwards to wit on the twenty third day of May in the year of our Lord one thousand eight hundred and sixty one, it being of the judicial days of said May term of said Court. the following among other proceedings were had and entered of record to wit:

" Timothy B Blackstone
54 " vs } appeal
" George Foy

" This day came the said plain
" tiff by Ware & Kirk his attorneys and the said defendants
" by Sackett Strawder and Bristol his attorneys. And issue being
" joined it is ordered by the court that a Jury come to try this Cause
" whereupon came James Wood Robert Woodside Samuel Dumont
" Milo Jones, George Mohler. William Taylor. R B Myres. John P
" Sands, Mitchell Ustick John A Flagg. James K Robertson.
" Robert M Kennady, and after being duly elected tried and
" Sworn the trial of this Cause Continues,

And afterwards to wit on the twenty first day of May in the year last aforesaid and yet of said May term of said court the following among other proceedings were had and entered of record to wit

Timothy B Blackstone
54 vs } Appeal
George Foy

This day Came the said plaintiff by Ware & Kirk his attorneys and the said defendant by Sackett and Strawder his attorneys. and the Jury empanelled and Sworn on a former day of this term of this court after hearing the evidence and argument of Counsel retire to

to consider of their verdict. And afterwards to wit on the same day return into Court and say "We the Jury find the issues for the plaintiff and assess his damages at the sum of one hundred and thirteen dollars & $\frac{40}{100}$".

Verdict of Jury 8

John A Flagg. James Wood, Robert M Kennady, George Mohler, William Taylor. Robert Woodside. Milo Jones J P Sands R B Myers S K Dumont James K Robertson. A M Y Ustick. And the said defendant enters his motion herein in arrest of Judgement and for a new trial in this Cause. And also to dismiss this suit for want of Jurisdiction

And afterwards to wit on the twenty eighth day of May in the year last aforesaid and yet of said May Term of said Court. the following among other proceedings were had and entered of record to wit;

84

Timothy B Blackstone vs George Foy } Appeal

This day came the said plaintiff by Ware & Kirk his attorneys and the said defendant by Sackett & Strawder his attorneys, And the said plaintiff enters his motion herein for leave to remit thirteen & $\frac{40}{100}$ dollars as amount of interest on the note in suit herein

And afterwards to wit on the thirty first day of May in the year last aforesaid and yet of said May Term of said Court. The following among other proceedings were had and entered of record to wit;

57

9

Timothy B Blackstone
vs
George Foy

Appeal

This day came the said plaintiff by Ware and Kirk his attorneys and the said defendant by Sackett and Strawder his attorneys. And the motion entered herein by the said plaintiff at a former day of this term of this court ~~is this~~ for leave to remit the amount of interest on the note in this suit is this day sustained by the Court. Whereupon the plaintiff remits thirteen dollars and forty cents. to all of which the said defendant excepts, And the said defendants ~~enters~~ his motions ~~herein~~ in arrest of judgement in this cause for a new trial and to dismiss this suit entered herein at a former day of this term of this court is this day overruled by the court. to all of which rulings the said defendant by his attorneys excepts. Whereupon it is ordered by the Court that the said plaintiff have and recover of the said defendant the sum of one hundred dollars for his damages herein together with all the costs and charges in and about this suit expended and that he have execution therefor. And the said defendant by his attorneys pray an appeal in this Cause to the supreme court of this State, which is allowed by the Court on his filing a bond herein in the sum of three hundred dollars with Aaron S. Miller as security within twenty days from the last day of this term of this court

11

Timothy B Blackstone
vs
George Foy

In circuit court of Whiteside County Illinois

This Case was appealed from a Justice of the Peace
Be it remembered that on the trial of this Cause at the May term of the said circuit Court A.D. 1861 that the Plaintiff in order to maintain the issue on his part offered the coupon note on which this suit is brought in evidence to the Jury. A copy of said note is hereto attached and marked "A" and made a part of this Bill of Exceptions, to which the defendant objected on diverse grounds one of which was that the notes had not been properly and legally transferred and assigned. the assignment that appeared on the note was as follows to wit. Samuel Hopper Treasurer and nothing more. the Plaintiff then asked the Court for leave to amend and fill up said endorsement, to which the defendant objected. the Court overruled the objection and permitted the amendment to be made by the plaintiff in the assignment and transfer of said note which amendment is as follows". Pay Timothy B. Blackstone or order Camanche Albany and Mendota Rail road Company by" To all of said rulings and holdings of the court the defendant then & there excepted. The plaintiff again offered said note to the Jury in evidence and the defendant objected - on the ground that the said Camanche Albany and Mendota Rail road Company

had no power to take and transfer said note in
the manner this note had been taken and transferred
it being admitted that this said note had been taken
for one years interest on a certain other note or bond
calling for one thousand dollars payable ten years
after its date which said one thousand dollar bond
or note was given and dated on the tenth day of Feb-
ruary A.D. 1857. And which one thousand dollar
note or bond was given by the defendant to the said Camanche
the Albany and Mendota Rail Road Company in
payment of ten shares. one hundred dollars each share
of the capital stock that the defendant had subscri-
bed for and taken in & to said Camanche Albany
and Mendota Rail Road Company. and that was all
and the only consideration for said note. and the court
overruled the objection and permitted the plaintiff to give
the note in evidence to the Jury to which rulings and
holdings of the court the defendant then and there
excepted The plaintiff then gave the note in eviden-
ce to the Jury and rested his case.
The defendant in order to maintain & Proove the
issue on his part called Rufus Sheldon a witness
who testified that he resided in Bureau County
about five miles from the line of said Rail road
says that he was acquainted with the officers of the said
Rail Road Company. Edward B Warner and A. J.
Mattson were directors in and of said Rail Road
Company and Dr Cottle was vice president of

13

of said Company. defendants asked witness to State what inducements were held out by the officers and agents of the said Company to induce the defendant to subscribe for and take Stock in said Company The plaintiff objected and the court sustained the objection. to which rulings and holdings of the Court the defendant then and there excepted. The defendant offered E B Warner as a witness who testified that he had resided at Prophetstown, now in Morrison - Says that he was a director in said Rail Road Company in the year A.D. 1857. was not a director when this note was taken. Think the directors of said rail road Company were Dr Cottle Samuel Happer. Timothy B Blackstone. Blackstone was one of the original directors of said company. and has been ever since and was president of the said Company for a time ~~was~~ is not now but was in 1857 & 1858. Charles B Stewart was president of said Company A.D. 1859. do not know that I ever saw Blackstone at a meeting of the citizens of Prophetstown. I do not know ~~that~~ I ever saw Blackstone and defendant Fey together Cannot say that I know any thing about the transfer of this note to Blackstone. there has been resolutions passed the board for the transfer of notes - never saw said notes transferred - Dr Cottle was Director and vice president of said Company. Samuel Happer of albany was Treasurer of said Company. A J Mattson was one of the active men in said Company. and Mr Blackstone did not attend all the meetings of the board. about

half of I should think. The defendant then offered to prove ~~that~~ the coupon note sued upon in this case was attached to a bond made by defendant placed in the hands of A J Mattson a banker in Prophetstown and one of the directors of the said Camanche Albany and Mendota rail road Company under an agreement between the said defendant — Mattson — and the rail road Company — that the same should be held by him untill all the capital stock required by the articles of association of said rail road company towit one million five hundred thousand dollars should be subscribed for and taken of for & to the capital stock of said rail road Company and that if the said rail road company should fail to obtain a subscription to the capital stock in the amount aforesaid. said bond and coupon notes should be returned by the said Mattson to this defendant. Said defendant further offered to prove that the said coupon notes upon which this suit is brought was attached to a bond for one thousand dollars as an interest coupon note which, bond and coupon together with the other ten coupon notes attached to said bond were delivered to A J Mattson one of the directors of said rail road company as aforesaid under an agreement made between the said defendant and the said Mattson and the said rail road company. that the said Bond and Coupon notes should not be negotiated or used in any manner to make the defendant liable thereon untill

15

the said proposed rail road of the said Comanche Albany and Mendota Rail Road Company should be built and fully completed. And that if the said Rail road was not completed within two years from the date of said bond and Coupon note. the said bond and Coupon notes should be delivered up to the said defendant. And that the said Rail Road has not been built nor has it been completed. And that the work ~~has been~~ is suspended thereon The defendant offered to prove by parol that the said plaintiff took and received said Coupon note on which this suit is brought on a preexisting debt that the said Rail Road Company owed the plaintiff. And that was all and the only Consideration on which he took and received said note The defendant further offered to prove by Competent evidence that one Million five hundred thousand dollars of the Capital Stock of said Rail Road Company has not been subscribed for nor has it been taken The defendant also offered to prove by Competent evidence to wit by a Certified Copy of the articles of association with the report of the engineer. the amount of the Capital Stock required to build and equip said Rail Road. which articles of association together with the report of said engineer was by said Company filed in the office of the secretary of State at Springfield Illinois and the Copy of said articles of association aforesaid was certified to under the hand of the secretary of State with the seal of the said State affixed thereto a Copy of said articles of association and report of

said engineer and the subscribers thereto of the said Capital Stock is hereto attached and marked exhibit C and made a part of this bill of exceptions A Copy of the said bond and coupon note and the transcript of the Justice is hereto attached and made a part of this Bill of exceptions. The Plaintiff objected to the introduction of any of the above testimony and the Court sustained the objection & the said testimony was not admitted to go to the Jury. to all of which rulings & holdings of the court the defendant excepted then and there. And that being all the evidence given or offered to be given, the Case was submitted to the Jury The Jury returned their verdict into court wherein they find the issues for the plaintiff and assess the damages at one hundred and thirteen dollars and forty cents And when the verdict was returned into court and before a Judgement was rendered therein the defendant filed his motion in arrest of Judgement and also filed his motion before his Judgement was rendered on the verdict for a new trial, and also filed his motion to dismiss this Case for want of Jurisdiction in this Court & for want of Jurisdiction in the Justice of the Peace before whom this suit was tried the amount being over one hundred dollars ~~and forty cents~~. Thereupon the plaintiff asked leave to remit thirteen dollars and forty cents as the amount of interest computed upon said coupon to which the defendant objected. The Court overruled the objection and permitted the plaintiff to remit said

Sum of 13 40/100 to which rulings and holdings the defendant excepted, And the Court overruled all of the defendants said motions, to which rulings and holdings of said Court the defendant then and there excepted. Whereupon the Counsel for the said defendant made their exceptions to the said opinions of the said Court; And in as much as the matters aforesaid do not appear upon the record And of the verdict aforesaid, The Counsel on behalf of the said defendant George Foy prayed that the said Judge would set his hand and seal to this bill of exceptions Containing the several matters proved and offered to be proved & given in evidence as aforesaid, And that this bill of exceptions may be made a part of the record in this case; Which was accordingly then and there so done

John Eustace (Seal)
Judge 22nd J C

~~Timothy B Blackstone~~

vs

~~George Foy~~

20

# Exhibit "A"

No 2. Prophetstown Feb-10" 1857-

On the first day of March 1859 I promise to pay to the order of the Camanche Albany and Mendota Rail Road company one hundred dollars at their office in State of Illinois for value received being one years interest falling due on that on my bond of even date herewith payable to the order of said Company at their office as aforesaid.

(Signed) George Foy

Endorsed before amendment.

"Samuel Happer Treasurer"

Endorsed after amendment-

"Pay Timothy B Blackstone or order, Camanche"

"Albany and Mendota Rail Road company by"

"Samuel Happer Treasurer".

**No. 1.** Prophetstown Feb. 10" 1857

*On the first day of ~~September~~ March, 1858, I promise to pay to the order of the* Camanche, Albany & Mendota Railroad Company, One hundred Dollars, at their office in State of Illinois, for value received, being ~~six months'~~ one years interest falling due on that day on my Bond of even date herewith, payable to the order of the said Company, at their office as aforesaid.

Signed,, George Foy

**No 2.** Prophetstown Feb. 10 1857

*On the first day of March, 1859, I promise to pay to the order of the* Camanche, Albany & Mendota Railroad Company, One hundred Dollars, at their office in State of Illinois, for value received, being ~~six months'~~ one years interest falling due on that day on my Bond of even date herewith, payable to the order of the said Company, at their office as aforesaid.

(Signed) George Foy

**No. 3.** Prophetstown Feb. 10" 1857

*On the first day of ~~September~~ March, 1860, I promise to pay to the order of the* Camanche, Albany & Mendota Railroad Company, One hundred Dollars, at their office in State of Illinois, for value received, being ~~six months'~~ one years interest falling due on that day on my Bond of even date herewith, payable to the order of the said Company, at their office as aforesaid.

(Signed) George Foy

**No. 4.** Prophetstown Feb. 10 1857

On the first day of March, 1861, I promise to pay to the order of the Camanche, Albany & Mendota Railroad Company, One hundred Dollars, at their office in State of Illinois, for value received, being ~~six months'~~ one years interest falling due on that day on my Bond of even date herewith, payable to the order of the said Company, at their office as aforesaid.

Signed George Foy

**No. 5.** Prophetstown Feb. 10" 1857

On the first day of ~~September~~ March, 1862, I promise to pay to the order of the Camanche, Albany & Mendota Railroad Company, One hundred Dollars, at their office in State of Illinois, for value received, being ~~six months'~~ one years interest falling due on that day on my Bond of even date herewith, payable to the order of the said Company, at their office as aforesaid.

Signed George Foy

**No. 6.** Prophetstown Feb. 10" 1857

On the first day of March, 1863, I promise to pay to the order of the Camanche, Albany & Mendota Railroad Company, One hundred Dollars, at their office in State of Illinois, for value received, being ~~six months'~~ one years interest falling due on that day on my Bond of even date herewith, payable to the order of the said Company, at their office as aforesaid.

Signed George Foy

**No. 7.** Prophetstown Feb. 10 1857

On the first day of ~~September~~ March, 1864, I promise to pay to the order of the Camanche, Albany & Mendota Railroad Company, One hundred Dollars, at their office in State of Illinois, for value received, being ~~six months'~~ one years interest falling due on that day on my Bond of even date herewith, payable to the order of the said Company, at their office as aforesaid.

Signed George Foy

**No. 8.** Prophetstown Feb. 10 1857

On the first day of March 1865, I promise to pay to the order of the Camanche, Albany & Mendota Railroad Company, One hundred Dollars, at their office in State of Illinois, for value received, being ~~six months'~~ one years interest falling due on that day on my Bond of even date herewith, payable to the order of the said Company, at their office as aforesaid

Signed George Foy

**No. 9.** Prophetstown Feb. 10" 1857

On the first day of ~~September~~ March, 1866, I promise to pay to the order of the Camanche, Albany & Mendota Railroad Company, One hundred Dollars, at their office in State of Illinois, for value received, being ~~six months'~~ one years interest falling due on that day on my Bond of even date herewith, payable to the order of the said Company, at their office as aforesaid.

Signed George Foy

**No. 10.** Prophetstown Feb. 10" 1857

On the first day of March, 1867, I promise to pay to the order of the Camanche, Albany & Mendota Railroad Company, One hundred Dollars, at their office in State of Illinois, for value received, being ~~six months'~~ one years interest falling due on that day on my Bond of even date herewith, payable to the order of the said Company, at their office as aforesaid.

Signed George Foy

Exhibit "B"

*For Value Received, I* George Foy of the County of Whiteside State of Illinois hereby bind myself to pay to the order of the **CAMANCHE, ALBANY, AND MENDOTA RAILROAD COMPANY,** at their Office in ______ State aforesaid, the principal sum of One Thousand ______ Dollars, Ten Years from the first day of March, A. D., 1857, which will be on the First day of March, One Thousand Eight Hundred and Sixty-seven, with interest thereon at the rate of ten per centum per annum from said First day of March, One Thousand Eight Hundred and Fifty-seven—payable semi-annually on the First day of March and September in each year after said interest begins to run—which interest is specified in, and secured by ten several interest notes (called Coupons) of even date herewith, signed by me, and numbered in succession, from one to ten inclusive, and all made payable to the order of the said Company at their Office aforesaid, and each of said Coupons is for One hundred ______ Dollars.

The payment of this Bond is secured by a certain Mortgage of even date herewith made by me, upon One hundred and Sixty acres of land, being ______ and lying in the ______ County of Whiteside in the State aforesaid, and described as follows: The South East quarter of the South west quarter and the South west quarter of the South east quarter of Section thirty four (34) Township nineteen North Range four east of the fourth P. M.

in which Mortgage this Bond and said interest notes or Coupons are described; and which Mortgage will appear of record in the Recorder's Office of the ______ County of Whiteside according to the laws of the State aforesaid.

**WITNESS** my hand and seal, this tenth day of February A. D. 1857.

EXECUTED IN PRESENCE OF

(Signed) George Foy

Exhibit "G"

Articles of association of

22 The Camanche Albany & Mendotta Rail Road Company

Whereas in and by an act of the Legislature of the State of Illinois approved November 5th A.D. 1849 Entitled an act to provide for a general system of rail road incorporations" it is provided that for the purpose of constructing, owning and maintaining a a rail road: any number of persons not less than twenty-five in number may be formed into a corporation in the manner therein specified; and that they shall severally subscribe articles of association or incorporation as set forth in said act - and whereas the undersigned have subscribed to the stock of a Company to the amount in the aggregate of sixty thousand dollars ($60,000) for the purpose of constructing a rail road from Mendota in the County of La Salle to Albany in the county of Whiteside State of Illinois a distance of about sixty (60) miles, and have paid in (10) ten per cent upon such subscriptions And whereas the undersigned have Elected the following named directors to wit

Barzillai Cottle of Albany Illinois William W Durant of Albany Illinois Samuel Happer of Albany Illinois. J B Blackstone of Mendota Illinois. Daniel D Guiles of Mendota Illinois Boughton Rosier of Camanche Iowa

22 Isaac Hess of Camanche Iowa

23 Now be it Known that we do hereby subscribe these articles of association as authorised by the act aforesaid, and we do hereby set forth and declare as follows

Article 1st The name of the Company hereby intended to be formed is the Camanche Albany and Mendota Rail Road Company

Article 2d The said Corporation shall continue for fifty years

Article 3d The capital Stock of said Corporation shall be one Million five hundred thousand dollars ($1,500,000) divided into fifteen thousand shares of one hundred dollars (100$) each share

Article 4" The number of directors shall be seven (7) and shall consist of the following named persons viz Barzilla Cottle William W Durant Samuel Happer J.B. Blackstone Daniel D Guiles Boughton Roscoe and Isaac Hess

Article 5" The said Rail Road is to be constructed from Mendota in La Salle County to Albany County of Whiteside in the State of Illinois by the most eligable route for the same in the Counties of La Salle Bureau Lee and Whiteside which road will be about sixty 60 miles in length

Article 6" The following persons are hereby named as Commissioners to open Books of subscription to the Capital Stock of said Company to wit R.C. Niblack Wm W Durant George Wells Boughton Roscoe and William P Bother

And we do further agree to and do hereby take and

and subscribe the number of shares of the said Capital Stock of one hundred dollars ($100) each Share, set opposite our respective names as follows

| Names | Residence | No of Shares | Amount | |
|---|---|---|---|---|
| T. B. Blackstone | La Salle co | 15 | 1500 | 00 |
| D. D. Guile | Mendota | 10 | 1000, | 00 |
| Samuel Hopper | Albany Ill | 40 | 4000 | 00 |
| Barzilla Cottle | " " | 50 | 5000 | 00 |
| W W Durant | " " | 10 | 1000, | 00 |
| Isaac Hess | Camanche | 3 | 300, | 00 |
| Alpert Haines | Albany | 20 | 2000 | 00 |
| W S Barnes | Albany Ills | 5 | 500, | 00 |
| Henry Pease | " " | 20 | 2000, | 00 |
| E G Boice | " " | 20 | 2000, | 00 |
| E A Nevitt | " " | 10 | 1000, | 00 |
| Mitchell & McMahon | Albany | 30 | 3000 | 00 |
| Buck & Olds | " " | 5 | 500, | 00 |
| John Robertson | Albany | 20 | 2000, | 00 |
| Ezekil Olds | " " | 3 | 300 | 00 |
| C G Nevitt | Albany | 3 | 300 | 00 |
| P B Van Nest | Albany | 10 | 1000 | 00 |
| Isaac Park | Camanchee | 10 | 1000 | 00 |
| W Nuyitt | | 2 | 200 | 00 |
| Charles F Lusk | Albany | 15 | 1500 | 00 |
| John S McIlvaine | Albany | 40 | 4000 | 00 |
| Boughton Roscoe | Camanche | 5 | 500 | 00 |
| C R Root | Albany | 5 | 500 | 00 |

24

25

| Name | Residence | Shares | Amount |
|---|---|---|---|
| Chester Lusk | Albany | 15 | 1500 00 |
| Samuel Searles | Albany | 5 | 500 00 |
| G Buckingham | " | 15 | 1500 00 |
| David Wray | Albany | 5 | 500 00 |
| B S Quick | Albany | 4 | 400 00 |
| Wm Prothrow | | 10 | 1000 00 |
| R C Niblack | " | 15 | 1500 00 |
| Walker Olds | " | 2 | 200 00 |
| Warren Olds | Albany | 10 | 1000 00 |
| J J Bolls | Albany | 10 | 1000 00 |
| Barzilla Cottle | | 60 | 6000 00 |
| W W Durant | | 55 | 5500 00 |
| E G Butcher | Camanche | 5 | 500 00 |
| J W Waldorf | Camanche | 5 | 500 00 |
| H Anthony & Co | Camanche | 10 | 1000 00 |
| Charles Kistner | Camanche | 5 | 500 00 |
| Wm Lawton | Camanche | | |
| G C Westphal | " | 5 | 500 00 |
| A J Castle | " | 2 | 200 00 |
| Delevan McNeil | " | 1 | 100 00 |
| P Rodocker | | 1 | 100 00 |
| Joseph Willcoxen | | 10 | 1000 00 |
| Benj Tallman | | 3 | 300 00 |
| Robert Millard Junr | Camanche | 3 | 300 00 |
| A Sittig | Camanche | 5 | 500 00 |

Timothy B Blackstone
vs
George Foy

Whiteside County Circuit Court May Term 1861

And now on this 31st day of May 1861 the said defendant by his said attorneys and moves the court in arrest of the judgement in this cause and for a new trial on the following grounds

First that there is not sufficient evidence in this Cause to warrant a verdict for Plaintiff

Second that the Court erred in permitting the plaintiff to make the amendment on the endorsement and assignment of said note. and in permitting the same to go to the jury

Third that the Court erred in not permitting the defendant to introduce the evidence offered by him

Fourth that the verdict is against the law and evidence in the case

Sackett Strander & Bristol
Deff atty

State of Illinois }
Whiteside County } In justices Court before the undersigned

Timothy B Blackstone } Assumpsit demand $100
vs } - Summons issued this 14" day April 1860
George Foy } Returnable on the 21" day of April 1860 at 10" O'Clock a. m, and handed to S L Conner to serve — Summons returned endorsed. Served by reading to the within named defendant this 16th day of April 1860 fees 65¢ S L Conner Const — Now on this 21" day of April 1860 defendant appeared after suit being called and askes for continuance. The court heard the remarks of defence and refused continuance it appearing that this suit is brought on a promissory note left for collection. dated Feby 10" 1857 & payable to the order of the Camanche Albany & Mendota Rail Road Company, it is considered by the court that the plaintiff have Judgment against the said defendant for the sum of one hundred dollars Debt, and the further sum of one 20/100 dollars cost of suit

Justices fees
Summons ,18¾
Docketing ,12½
Judgment ,25

Const cost
Summons ,25
mileage ,40

additional cost 1,25 making $2,46

A J Mattson P. J. P.

State of Illinois }
Whiteside County } ss I A J Mattson a P Justice of the Peace in and for said county. do hereby certify that the foregoing is a true copy of the proceedings in the cause therein entitled had before me. and that herewith enclosed are all the papers and documents belonging to the said suit
Witness my hand. this 20" day of July 1860
A J Mattson
Police Justice of the Peace

Timothy B Blackstone
vs
George Foy

Circuit Court
Whiteside County
Motion for new trial

And now comes the Defendant George Foy and moves the Court to set aside the verdict, and grant a new trial, for the following reasons to wit.

1st The Court erred in permitting the note to be given in evidence to the jury

2nd The Court erred in permitting the Amendment to be made in the assignment of the Note

3d There is no Consideration for said Note,

4th " The Court erred in excluding the evidence offered by the Defendant,

5th That the said Rail Road Company had no authority ~~to receive~~ and transfer said note in the manner in which it was done.

29

6th The court erred in not dismissing the
30 Case on Defendants Motion,

7th The verdict is manifestly against the law and the evidence

8th That the note was obtained through fraud and circumvention,

Samuel Strawder
Fred Sackett
Attorneys for Defendant

Bond

Know all men by these presents that we George Foy and Aaron S Miller of the County of Whiteside and State of Illinois are held and firmly bound unto Timothy B Blackstone of the County of Cook in the State of Illinois in the penal sum of three hundred dollars lawfull money of the united States to be paid unto the said Timothy B Blackstone his heirs Executors and administrators or assigns - to which payment well and truly to be made we bind ourselves our heirs executors and administrators and every of them firmly by these presents

Sealed with our seals this day of

A.D. 1861

The condition of the above obligation is such that whereas the said Timothy B Blackstone did at the May Term A.D. 1861 of the Circuit court in and for the county of Whiteside and State of Illinois before the Hon John V Eustace Judge of the twenty second Judicial Circuit in said State of Illinois recover a Judgement against the said above bounden George Foy for the sum of one hundred dollars and costs of suit from which said Judgement the said George Foy has taken an appeal to the Supreme Court of the State of Illinois. And the said George Foy and Aaron S Miller do further bind themselves their heirs executers and administrators Jointly and Severally to pay to the said Timothy B Blackstone his heirs executers administraters and assigns the

amount of the said Judgement in this case and all costs herein and the interest and damages that may be awarded against them in this Case, Should the said Judgement be affirmed by the supreme court of this State in this case. And the said George Foy shall prosecute his said appeal

Now if the said George Foy shall prosecute his said appeal with effect and shall pay whatever Judgement the said plaintiff shall recover against him and all costs interest and damages in this said case then this obligation shall be null and void otherwise to be and remain in full force and effect in Law

(Signed) George Foy (Seal)
Aaron S Miller

State of Illinois }
Whiteside County } ss

I Addison Farrington Clerk of the Circuit court within and for said County hereby certify the above and foregoing to be a true full and complete Copy of all the original papers and proceedings entered of record, and of the record in a certain Cause lately pending in said Court on the common law side thereof wherein Timothy B Blackstone was plaintiff, and George Foy Defendant

In witness whereof I have hereunto set my hand and affixed the seal of said Court at Morrison in said County this 10" day of April A.D. 1862

A Farrington Clerk

32 ~~309~~ 32

Timothy B Blackstone

vs

George Foy

Transcript

& Errors.

Filed Apl. 23rd 1862
L. Leland
Clk.

Fees $5.50 Paid
by George Foy