No. 13496

Supreme Court of Illinois

Smith.

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vs.

Racine & Miss. R. R. Co. et al.

71641 7

Hon. [illegible] Walker.

Ottawa

Ill

IN THE SUPREME COURT OF ILLINOIS.

APRIL TERM OF THE THIRD GRAND DIVISION, 1861.

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ELIZABETH SMITH, ET AL., PLAINTIFFS IN ERROR.

VS.

RACINE AND MISSISSIPPI RAILROAD COMPANY, ET AL., DEFENDANTS IN ERROR.

APPEAL FROM JO DAVIESS.

ARGUMENT FOR COMPLAINANTS.

CASE STATED.

A bill was filed in the Jo Daviess Circuit Court, by the widow and heirs of Joseph H. Smith deceased, against the Racine and Mississippi Railroad Company and Alonzo Taylor, to set aside a note and mortgage for fraud and failure of consideration.

A judgment was entered in that Court pro forma for the defendant; but under stipulations between the parties which appears by the record. In pursuance of these stipulations the case is brought by appeal to reverse that judgment. It is one of a class of a somewhat novel character, more familiarly known as the "Wisconsin Farm Mortgages."

The principles involved in it, are such as will probably affect one half of the real estate in Carroll County, and a large portion in Jo Daviess, Stephenson and Winnebago.

I am therefore extremely anxious that no omission or neglect of mine shall visit upon these men the consequences of an adverse decision.

The case briefly stated is this:

In 1856 H. S. Durand as President, and Marshall M. Strong and others were building a Railroad in the direction of the Mississippi River, under the style and title of the Racine and Mississppi Railroad Company.

The charter was granted in 1852, incorporating a Company by the name of the "Racine, Janesville and Mississippi Railroad Company." The road to run to the Mississippi, entirely in Wisconsin. When however, it came in the range of the Chicago roads, the route and the name of the Company was changed. Whether the Chicago roads and those from Milwaukee deranged the "Farm Mortgage" business was the cause of this change or not is not known.

Be this as it may, the line of the road was changed from Janesville to Beloit, the name was also changed. In 1853, a charter was obtained in this State for a road from Rockton, opposite Beloit to Free-

port, (Act 1853, Page 69) In 1855 this company was consolidated with the Racine and Mississippi, whether legally or not I shall not stop to inquire?

About the first of January 1856, the subject of extending this road to Savanna was canvassed.

There was no charter for building this road, but in 1851 the Chicago and Galena Union, and the Illinois Central roads were in progress of construction, and an attempt was made to form a Company by articles of association, under the General Railroad Law of 1849. (See Abstract pages 8, 9 and 10; Record page 17, 18 and 19.) This attempt failed, and the matter of building the road was allowed to sleep for five years longer. About the first of January, A. D. 1856, this defunct company was suddenly roused from its slumbers, or exhumed from its grave by H. S. Durand, President of the Racine and Mississippi Railroad Company, and a new life was breathed into its breathless form by the creation of eighty or one hundred thousand dollars of fictitious stock, by men outside of the company (if any such existed;) and on the 23d of January, A. D. 1856, witnessed the novel proceeding of electing officers and consolidating this road with the Racine and Mississippi Railroad Company, by these outside men, by means of fictitious stock. The company without further preliminaries, after consolidation, and as soon as blanks could be furnished, ushered into Illinois the "Wisconsin Farm Mortgage Scheme."

The scheme was intended for the purpose of obtaining means which could not be obtained by stock subscriptions as required by the charter, briefly stated it was as follows:

The company made a coupon bond, bearing interest at ten per cent to be paid semi-annually, and a note and mortgage was then to be given to the company by the party for the same amount, payable in five years from the 10th of May A. D. 1856, with interest at ten per cent per annum, payable annually. This bond of the company and the note and mortgage were to be attached together, and the bond of the company was to be the principal debt, and the note and mortgage to be pledged as collateral security for the payment of the bond, and the bond thus secured was created for the purpose of sale in market for what it would bring. (See testimony of J. Rinewalt, page 12 and 13 of Abstract, and 25 to 28 of Record. See also testimony of P. Seymour, page 10 and 11 of Abstract, and 21 and 23 of Record.) And the bond in addition to the usual provisions of this class of instruments was to contain, and did contain a clause assigning the note and mortgage. It also provided that the note and mortgage should not be otherwise assignable to any parties or purchasers whatsoever. In addition to this, the mortgagor at the time of executing the mortgage, assigned over his share of the dividends to the company, they agreed in consideration thereof, to pay the interest accruing on the mortgage annually, in semi-annual payments, and for the term of five years. It was under this scheme that the roads in Wisconsin were attempted to be built. There is however, this difference, it was an experiment in Wisconsin, and did not involve any moral turpitude; but when the scheme had fully ripened in bankruptcy, as it is shown by

the evidence it had when it reached Illinois, it was no longer an experiment, but a base swindle deliberately engaged in by the Railroad men, probably for the purpose of extricating themselves from the difficulties into which they had been plunged by their mad scheme at home.

This company had been in operation when the officers came here about four years, had accumulated a large debt, were about mortgaging, and on the first of April 1856, did mortgage the east end of the road for $10,000 per mile, and before the middle of July the West end for the same amount per mile.

There being, besides a heavy indebtedness, the precise amount of which we have not been able to show very clearly.

But the mortgages were obtained, as is also shown, under the representation that the road was not in debt, having been built for cash, and entirely from the sale of mortgages sold at par; that they wanted none of these funds on their end of the route, and that none of them should be used east of Freeport. Now these statements were wholly untrue, as is shown by the testimony of Mr. Rinewalt. The company were in debt, and no sooner were these notes and mortgages obtained, than four fifths of them were immediately applied to pay debts previously contracted and to furnish materials east of Freeport.

It may be as well to observe here too, that the estimated cost of the road as shown, was $3,400,000 with full equipments. See page 14 of Abstract, page 31, 41 of Record, Strong's Review. They were building the road far inside of this estimate, had saved on Col. Mason's estimate in the purchase of iron $100,000, and had a surplus capital above the whole cost of the road at the East end of $133,000. The road is only about two-thirds built. Nothing has been done upon it for over three years; and the company in not exceeding eighteen month after making these representations, were in debt $4,992,472,87, and it required over three hundred thousand dollars above this sum to finish the road to Freeport. See Abstract, page 13, Records, pages 25, 28. And the road West of Freeport, being only 36 miles, would have cost at $20,000 per mile, according to the estimate $720,000, and they have procured $800,000, notes and mortgages to build this portion of the road.

The false representation therefore, that the road was not in debt, but entirely free from all incumbrance was not the casual remark of inferior agents, but the oral and published annual, and other statements of the President and other officers at the head of the company, deliberately and purposely made to procure the execution of these notes and mortgages; and it was under such false and fraudulent representations on the part of the company that the note and mortgage in this case was obtained as is shown by the testimoney of Philander Seymour, and by the Pamphlets thereto attached, marked (A. and B.) pages 21, 23, 40, 41 of Record.

It was also alleged that these mortgages had all been sold at par, and their character thereby established in market as first class securities. Whereas, the truth was as is shown by the annual report of the Directors by Mr. Durand at their annual meeting, that these securities

were without any defined value at home or abroad. See Annual Report 1858, pages 7, 8 and 9, and between pages 40 and 41 of Record.

The condition of this road as shown by the testimony of Mr. Rinewalt by the mortgages, and by the annual reports, shows that the misapplication of funds was no sudden freak of the officers, and accruing after they had obtained these notes and mortgages. But the whole transaction clearly exhibits the "ear marks" of a well concocted and well executed scheme of fraud from the commencement, and there is no escape legitimately from this conclusion. This presents then, I believe a brief but correct outline of the facts to which I desire particularly to call the attention of the Court.

The serious and important question presented by these facts, therefore is, whether a court of law and of equity can or ought to enforce the collection of a claim so evidently unconscionable as are these securities. I believe not, and I propose to discuss the questions here raised in the following order:

First—was the Savanna Branch a corporation; was it legally consolidated; and was there therefore, a party in being, capable in law, of building this road, or of making a binding contract respecting it. Besides, the contract being made with the consolidated Company, and the notes and mortgagesbayable to its order. Could the Racine and Mississippi Railroad Company of Wisconsin make a legal title to said paper!

Secondly—Admitting the Savanna Branch to be a corporation, its consolidation legal; could the Company take any such note and mortgage and issue its certificate of stock therefore.

Thirdly—Admitting the paper to be legal; it was fraudulently obtained. The proceeds have been misapplied, and the purchaser had both constructive and actual notice of these facts before purchasing Is he not subject to all of the equities of the complainants. Upon this first point, the testimony shows that the association never took any action evincing a bona fide intention of complying with the act. No termini was fixed at the Eastern end. The amount of the capital stock was not determined—a sufficient amount was not raised to comply with the first section of the act; the road being 36 miles and only $27,000 raised; the ten per cent was not paid, and the certificate and affidavit was not made and filed with the Secretary of State; and the stock was not taken by the commissioners appointed for that purpose The testimony to which I refer in support of this, is that of Porter Sargent, Elias Woodruff, John A. Melendy and Medard Dupuis—pages 16, 17, 18 and 24 of Record; pages 8, 9 and 10, also 12 and 13 of Abstract.

These witnesses I believe fully sustain all that I here claim. The several sections of the statute which were violated by these several proceedings, are the 1st, 2nd, 3rd, 4th, 5th and 6th of the act of 1849 Pamphlet Laws 1849 and '51, page 18; consolidation act 1854, second session, page 9, sections 1st and 7th. These sections require Articles of Association to be drawn setting forth the point of commencement, the course of the road, its termini and length. Also ten per cent to be paid in good faith, and a certificate and affidavit thereof, signed by

three of the Commissioners and filed with the Secretary of State, before the Company had a right to become a body politic and corporate.

These provisions of the statute not having been complied with, no legal act could be done, for until these essential requisites were performed, the corporation could not be considered in esse.

The necessity of complying with these pre-requisites are, it seems to me, much stronger in the case of an attempt to organize under a general law than it would be under a special statute or charter; for this reason, that under a general statute there is no grant of power to any one. A compliance with its terms is therefore required, not only by the letter; but how can the parties connect themselves therewith in any other manner. There should be at least enough done to show a bona fide intention to become a corporation under the act which is not the case here. If this be correct, the point is therefore well taken, that there was no party in esse capable of taking the note and mortgage, or of making a binding contract for the building of said road or in relation thereto.

The authorities in support of this position are numerous, among which are

Volk vs. Crandall, 1 Sandford R. 179.
Pierce on Railways, page 64.
1 Caines Cases, page 80.
1 Caines Report, page 38.
8 Serg. and R. page 319.
18 Barbour, 301, 2, 3, 4, 5 and 6.
21st Wendell, 141, 2.
1st Hill, 518.

These authorities show if indeed any authority is needed, that an association cannot become a legal body when guilty of such a gross violation of the fundamental law of its being, and until it has complied with these essential pre-requisites, it cannot make a binding contract because not in esse.

If then, the attempt to organize the Savanna Branch was so defective as to render the act illegal and void?

What shall we say of its consolidation? For whatever might be the difference of opinion as to the objects really intended to be done in attempting to organize this association. No doubts can arise as to its fraudulent and illegal consolidation with the Racine and Mississippi Railroad Company. No rights could be acquired by an individual by such fraudulent means. Does a corporation stand in any more favorable position—is not honesty and fair dealing essential to their welfare? Is there any question of public policy requiring such transactions to be upheld, I think not.

The consolidation was therefore intended to effect a useful purpose, to confer a public benefit by concentrating capital. It could only be accomplished by an honest compliance with the provisions of the act by those who were really stockholders.

If then, a corporation could acquire no more rights by this fraudulent contract than an individual, then the consolidation cannot be sustained.

Besides, these rights and franchises being granted as a public benefit in derogation of natural rights ought to be used to promote that end, and not as a mere stool pigeon by which to entrap the unwary and unsuspecting. Nor indeed, ought mere apparent rights acquired in defiance of law, of honesty and of fair dealing to be sustained without some absolute and controlling necessity. But no such necessity exists, because the public are in no one thing so much benefited as in the establishment of the principle that fair dealing is an essential requisite of healthy corporate existence. There are therefore no strong equities requiring a departure from the plain and simple rule of right and the organization of the Savanna Branch was too defective, its consolidation too fraudulent, to enable the Racine and Mississipi Railroad Company to acquire any right to build said road, to acquire the right of way or to make any other binding contract in relation to said object.

For these reasons then, I conclude that the pretended stock proposed to be issued by said Company was illegal and void, and it furnished no consideration for the making of said note.

There is also another reason for this conclusion, and that is, that at the time of the consolidation, H. S. Durand was President of the Racine and Mississippi Railroad Company as well as of the Savanna Branch Railroad Company, and no binding act could be done with a President pro tem, or with any pretended or so called Vice-President, which would bind the Racine and Mississippi Railroad Company for the want of the head designated by law. Mr. Durand was present and acting as the President of the Savanna Branch Company, as well as of the Racine Company. He could not bind both by the same act.

The stock therefore, being illegal and void, there was no consideration for making said note and mortgage. This view is fully sustained in the cases in

22, Eng. Law and Equity, page 45.
6. Ohio State Rep., page 119.

These notes and mortgages, and indeed the whole contract was made as we have shown with the consolidated company, and for the purpose of building a certain portion of the road which it had no right to build.

If then, the consolidated company was a non-entity, and the notes being given originally to that company and payable by its order, it could only be legally transferred by that company.

The Racine and Mississippi Railroad Company of Wisconsin never had a legal right to these securities, and could not transfer or convey to its purchaser such a title, for the reason that it was not the payee and mortgage mentioned in said note and mortgage; and it could only convey a title as against itself, and not the legal title; the authorities are clear upon this point. In support of this doctrine I cite

Bayley on Bills, pages 111, 115.
Mead vs. Young, 4 Term Rep., page 28.
Graves vs. The American Exchange Bank, 17, N. Y. R., p. 205.
Carrol Bank vs. Bank Albany, 1, Hill, page 287.
Tallot vs. Bank Rochester, 1, Hill, page 295.
Story on Bills, Sec. 457, and cases cited.

If these securities passed by mere delivery, it would be otherwise.

The questions we have been considering so far, arise out of the attempt to organize the Savanna Branch Railroad Company and its illegal attempt to consolidate with the Racine and Mississippi Railroad Company, and it seems to me sufficient has been shown to set aside these securities upon these grounds alone. And here I might rest the case, but feeling perfectly assured as I do, that the whole contract made by this company is intrinsically viscious, and cannot for that reason be sustained. I proceed therefore, to consider the next question to be discussed, which is the right of the company to make these agreements to exchange its stock for notes and mortgages in connection with the accompanying agreement on the part of the company to pay the interest out of a fund which did not exist. And in connection also with the fact, that the bond of the company was created to be made the principal debt. The note and mortgage as collateral, and the whole to be sold in market for what it would bring as an article of merchandize, and I do most unhesitatingly contend, that the company had no such power, and that as between the company and the mortgagor, this transaction was illegal and void on this account also.

The sections of the statute which relate to the subscription of stock are the 1st, 5th, 11th and 14th Sec. Pamphlet Law 1849 '51, 2d Session, page 18.

There is no pretence on the part of the defendants that there is any statute authorizing the taking of these notes and mortgages for stock, or that these salutary provisions of the statute have been complied with.

The effect which these provisions should have is very fully illustrated and set forth in the case of Troy and Boston Railroad Company vs. Tibbetts 18, Barbour 267.

The true rule applicable to this case, as shown by this authority, is that in disposing of stock, the statutary provisions must be complied with, the statute having pointed out the mode of acquiring stock necessarily excludes all others.

This statute contemplates building a railroad by stock subscription to be paid to the company in cash. The first section points out the mode and provides that ten per cent in cash shall be paid in good faith. The eleventh section provides "that the directors shall call in and demand from the stockholders all sums of money by them subscribed at such time and in such payments or instalments as the directors shall deem proper." What right then had the company either alone or in connection with others, to turn manufactures of obligations or securities for sale, and to become the brokers thereof in the markets of the world, and thus substitute this for a subscription to stock. What authority, or what lawful necessity even, was there for such a transaction.

They were a corporation to build a railroad, not bankers or brokers; but simply a railroad corporation, and their mode of action pointed out and clearly defined.

The object of its creation is the polar star to guide its pathway, circumscribed in the law of its being, its path was a straight and narrow way, and it should travel in it.

But it may be said the note and mortgage is only another mode of paying for stock; that it was a substantial compliance with the charter, and therefore lawful.

This assumption is not however, warranted by the facts.

A decision based upon it would be a gross perversion of justice, for the reason, the facts are otherwise.

What were the objects of this "Farm Mortgage scheme?" The Supreme Court of Wisconsin say that "there was not enough cash capital in the state to build her roads, or even to pay the per centage usually paid in older communities.

The Racine company said, "the mortgages have been given from an enlightened self interest to secure the construction of the road. It was better for the farmers and the company to give these mortgages than cash subscriptions. Better for the farmers, because they could use their cash more profitably otherwise. Better for the company because thereby they get their cash means at once." See John Rinewalt's testimony, Schedule (A.,) between pages 40 and 41 Record, and 1st page of Pamphlet.

A noble reason that for sanctioning this proceeding in a court of justice. First, there was not a cash capital in the community which the charter required nor even a tithe of it.

Second, the farmers by this arrangement could speculate upon the cash required to be paid upon their stock more advantageously otherwise.

But is this all; I think a close examination of the papers, contracts, &c, with a slight knowledge of the facts, will reveal other objects, not more in accordance with the charter than these, and not more in accordance with an honest purpose.

What were these objects? It gave the company an opportunity to repudiate the very thing they now claim, and upon which their right of recovery is based. It was only loaning credit to the company, for five years the company were bound for the debt and would eventually pay it out of the earnings of the road; and the company were bound to pay the interest semi-annually.

Now I ask again what was the object of this arrangement? I answer, to obtain means that could not be acquired under the charter. A man could be induced to loan his credit to a great and powerful corporation, and to stake his home and the support of himself and family, when he could not be induced to risk one quarter of this amount by a direct subscription which he knew by its terms would have to be paid.

What I ask, was the object of this agreement to pay interest out of the funds not yet earned? Was it intended to be performed? I say nay. The object was to lull the victim to sleep; to bind him hand and foot for the slaughter. A man with a large amount of uncultivated and unproductive lands estimated to be worth say, twenty thousand dollars, but furnishing an income barely sufficient to pay taxes, if called upon to subscribe twenty thousand dollars to be paid, or to pay interest at ten per cent on that amount under a contract which he fully understood, would refuse to subscribe at once. But when attacked by this systematic and well arranged system of notes and mort-

gages; the product of corporate villany, plied by skilful hands, and armed with this magic agreement to pay interest out of funds which never had, nor could have an existence, (save in the broken promises of a soulless corporation,) the man is bewildered, lost in the mazes of corporate lying, and he surrenders at discretion. His note and mortgage are given, and his property is sunk in this vast charnel-house of corruption. These I affirm were some of the objects intended by this "Farm Mortgage Scheme," and appearing upon the face of this transaction, and what I have put here hypothetically both as to manner and amount will yet appear in this court as a reality.

We may be told that although this transaction was a gross fraud, and as between the company and the parties ought to be set aside. Yet that the mysterious personage called a "bona fide" holder may in some way be affected and his rights must be looked after. We will look into that question presently. Thus far we have shown that the object of this transaction was to obtain funds which did not exist, and which could not be procured under the provisions of the charter. Let us examine this question a little further, and see what was the character of these securities, what they were created for, and how they were to be used. Mr. Seymour says, (page 21, 22, 23 of Record,) that when he accepted the agency he was informed this paper was created for sale in market for what it would bring; that it would sell at par by being attached to the bond of the company, and that the bond of the company was to be the principal, and the note and mortgage collateral. Mr. Rinewalt states the same thing, and that these securities were to be coupled together and sold as merchandise in the market in the manner above described and not otherwise, and that they were thus sold. He further states that the pamphlet (C.) was published by the company, and furnished by them to agents to explain the character of these securities to purchasers. This pamphlet states; the company have for sale $500,000 Farm Mortgage bonds guaranteed by the company. These mortgages are for various amounts, from $500 to $5,000 each, they run for five years from May 10, 1856, upon interest at ten per cent per annum payable by the bond of the company semi-annually at their office in New York City.

They constitute a three fold security.

First, the note of the mortgagor. Second, the mortgage, and Third, the bond of the company which is the principal debt and the note and mortgage are merely collateral.

This evidence shows clearly the character of this transaction and that these securities were to be thus coupled together and sold in the market as a chose in action or any other article of merchandise for what they would bring, and that they were so sold and that too, for every conceivable thing which the company or its directors might desire, is abundantly shown by the evidence; or at least the purchase of farms is shown in this case. I apprehend this is not strictly speaking constructing a railroad. Yet it was a legitimate use of the funds if the object for which these securities were taken is legal.

If the directors had the right to dispose of their stock for notes and mortgages to be sold with the bond of the company; and then to turn broker for the sale of these wares in the market of the world, then any

conceivable trade, exchange or speculation which an individual could make, they could make, and the whole field of barter is open before them. It has been well said by a former judge of the Supreme Court of Wisconsin, "if the company can take mortgages in payment for stock it must also have the power to dispose of them, and it is not restricted to a cash sale either, when it does dispose of them, it may therefore exchange them for other securities, or for any article of personal property or for such parcels of real estate as it may desire. If it may in the first instance exchange for mortgages, it may purchase them with the money paid on stock subscription. The money received for stock cannot be more sacred, than, or less subject to disposal at its will than the stock itself, every conceivable trade which it could make must be traced back to the stock. It is the primary fund or fountain from which springs all its exchanges. If it have the power to dispose of stock for mortgages, the power to take exists, and it is not restricted by the charter to the taking of them directly, and only when stock is directly exchanged therefore. Could any corporation, or set of men, desire a more extensive field for traffic, speculation, or exciting risks." Did the legislature in passing this charter intend to confer these varied and important business powers?

The answer must be in the negative, their exercise was a violation of the charter, a violation of law.

The exercise of these powers on the part of the company was not necessary for the purposes of carrying on the business of the company, nor was it within the scope of any business they could legitimately pursue.

In the case of a banking company 3d. Selden N. Y. Rep. page 328, 342; it was decided it had no power to purchase State stocks to sell at a profit, or as a security for a loan, or taken in payment of a loan or debt—the court in that case say.

The arrangement was a purchase of stock by the bank upon their notes or certificates payable at a future day, the stock to be sold by the State of Ohio on account and at the risk of the company, the proceeds to be applied to the payment of other certificates of the same character held by the vendor as creditor of the bank. In the most favorable view for complainants, the transaction can only be sustained upon the broad ground that this assignee and all other banking incorporations, have the right as incident to their business, to trade in stock and all other personal property for cash or, upon credit, unless specially forbidden by their charters, and that their contracts whether in form of post notes or otherwise are binding upon the association and its creditors.

In considering this proposition, it may be conceded, that this association could purchase stocks to deposit with the comptroller as security for their circulating notes—they might invest their surplus funds in them or loan money upon them by way of discount.

But all this is very different from an unlimited authority to traffic in stocks for any purpose which the directors might deem advantageous to the corporation. This association at the time of this transaction, was not seeking to invest their surplus capital for they had none, but were purchasing as a means of raising money to suply a present

exigency. They did not discount the bonds of Ohio as intimated, for this in banking is only a mode of loaning money. They purchased them as the whole arrangement shows as indirect means of borrowing.

Nor did they obtain the bonds as a basis of an exchange account under the power to buy and sell bills of exchange. In a word they purchased these bonds as they might have purchased a cargo of cotton to be sent to market, to be sold at the risk of the vendor for the highest price that could be obtained. No authority to traffic in either commodity is expressly given by the law, held, that this bank had no authority to traffic in stocks as an article of merchandize, or purchase them as a means of obtaining money to discharge existing liabilities; and that the assignment of the bonds and mortgages which had been deposited as collateral security for the payment of the bank certificates of deposit must stand or fall with the principal agreement.

A large number of cases to the same point are cited in the brief but I will not trouble the court with any further qnotations. It seems to me that the violation of the charter on this point is too palpable to admit of doubt or argument either. There is another objection against the legality of these securities equally fatal, it is this, the notes and mortgages were taken as full payment for stock. Suppose the land not worth a tenth part of the stock sold, and the purchaser not worth a dollar, one man would thus acquire stock for a tenth of that paid by others, which is not lawful Redfield page 99 says; it is well settled that a railway or other joint-stock company cannot receive subscriptions to their stock in less sums or in other commodites than that which is demanded of other subscribers. So too, where the agents of the company agreed to receive subscriptions at a discount below the par value of the shares, it will be regarded as a fraud upon the other share holders and not binding upon the company.

Again, the directors of this company have received these notes and mortgages in payment for stock under an agreement to issue the coupon bond of the company to pay the interest semi-annualy at ten per cent per annum for the period of five years. There was three millions of dollars worth of these securities received, and it will not require a very close estimate to show that no company which started on this basis could stand longer than four or five years. Accordingly it will be found that none of these companies have lasted five years. The following extract from the Report of 1858, though not half of the truth well portrays the practical working of this scheme. It says "we have retailed our securities in eleven different States, besides in several parts of Europe, which has required heavy disbursements in the way of salaries, commissions, and travelling expenses, besides terrible discounts to obtain money. A fearful interest account has been constantly accumulating upon us to be provided for in good part by the same operation, out of our capital stock."

In every aspect therefore in which this case can be viewed there is not only a lack of the grant of power to do the act, but the power exercised is intrinsically viscious and entirely, subversive of the objects and aims set forth and provided for by the charter.

Will the law imply a power not expressly granted, which will de-

fraud and ruin not only both parties, but which in fact directly abstracts and squanders the entire sum of money paid in by the stockholders to the directors for a particular and other purpose.

If it will, the law is a humbug and a trial in court of justice a farce. Nay more it is solemn mockery.

But the law is not so iniquitous, it will not require the farmers to perform their part of the agreement, and not require of the company the performance of theirs, and the company cannot as we have seen perform theirs, it was not within the scope of their authority to make it.

I therfore claim that there was no consideration for the making of this class of notes and mortgages upon this ground alone, then as between the original parties these securties should be set aside.

I have now done with this portion of the case, the question discussed is an important one, as it applies to all corporations if this power to deal in motgages can be sustained, there is an end to all rules of construction as applied to charters; but I pass this to consider the question of fraud. The then present condition and future prospects of the company were alike the subject of gross misrepresentation, fraud, deceit and lying in all of its worst forms. It was alleged it had paid for all as it went along in cash. Other companies had issued fictitious stock but this had issued none but for full value. A floating debt was the blighting curse of corporations generally, but this had none and could have none as it had all been done on the cash principle. Yet this same company was then about mortgaging the road for ten thousand dollars per mile and was largely indebted otherwise.

Who will say these representations were not material and were not false?

Who is bold enough to claim that these farmers would have mortgaged their homes for all they were worth, had they known or had any reason to suspect these statements were not true?

The bankers, the brokers and the money shavers generally were the willing instruments used to accomplish this infernal work.

But when the day of payment has arrived these business men have no mortgages to pay, they are all "innocent purchasers" all the avenues of trade are filled with their clamour, the public press teems with homilies upon the terrible "sin of repudiation" and they come to the very halls of justice and would fain be heard if they were permitted for the benefit of the cause whether interested or not, the farmers had ought perhaps to render a full propitiation for their sin of getting cheated by being robbed for the benefit of these "innocent holders"

By way of compromise let it first be determined whether the original transaction was legal or not, when that is done it will be time enough to look after consequences then. If the original transaction was illegal for any or all of the reasons assigned these homeless wanderers and othes like them are entitled to all the benefits arising therefrom. In 6 Gill & Joh. 54, it was decided that when a mortgage is obtained by misrepresentation of the mortgagee, it is immaterial as to its legal effect upon the instrument whether the mortgagee at the time he made the misrepresentation knew it to be false or not. If he made a statement of facts knowing it to be false it would be an actual

fraud if he did not know it to be false and it operated to decieve the other party it would be a legal fraud—it would avoid the mortgage.

In 17 Texas Rep. page 560 is a still stronger case in point. the fol- is a synopsis of the case. The individual members of an incorporated company are deemed strangers to the artificial body created by the act of incorporation, and may maintain their right of action of whatever nature against the company in the same manner as those who are not members.

2. The representations, declarations and admissions of the agent of a corporation stand upon the same footing with those of the agent of an individual.

3. As natural persons are liable for wrongful acts and neglects of their servants and agents done in the course and within scope of their employment so are corporations upon the same ground, in the same manner and to the same extent.

4. Nothing is better settled than that the fraud of an authorized agent will invalidate a contract entered into by him on behalf of his principal although the agent in perpetrating the fraud acted without the knowledge of his principal.

5. Even though the agent has transcended his authority in making the contract, yet if the principal ratify it and make the contract his own by availing himself of the benefits of it he is liable in like manner as if he had personally made the contract, he cannot ratify the contract and avoid the responsibility of the representations which formed its basis, but he must ratify the contract in toto.

These authorities reccommend themselves to our favorable notice by that strong sense of equity and justice which they present as contradistinguished from mere technicalities which too frequently excludes real justice in the case of corporations.

I will now bestow some attention to the question respecting bona fide purchasers without notice. Unless I am grossly mistaken however, in the facts of this case Taylor was a purchaser with notice beyond cavil. Although I am fully persuaded that in fact the question of actual notice is not more clearly proved in this case than it will be in all the others, yet as it is the fortress behind, and by means of which is attempted to be and will be carried out, if at all, the greatest fraud ever perpetrated upon the farmers and industrial classes in this country.

This question demands more attention than I can bestow at this time.

I will therefore confine myself to the facts here proved. First, the execution of the note and mortgage was procured under a representation that the mortgage was only a common mortgage—that it could only be foreclosed by scire facias when due, and the party would have a year to redeem; See testimony of P. Seymour, p. 12, abstract 41, 42, Record. Whereas it is a trust deed got up to suit sharpers who deal in securities—the property may be sold without even the publication of a notice. This was a fraud in procuring the execution of the instrument and not in matters outside the instrument, if this statute has any force it affects parties with notice; this is not all, Taylor had full notice of all the equities of these parties—has taken this note and mortgage in payment for his farm, but is still in possession and can protect him-

self if the security is set aside. Mr. Holt too, being a director can fully indemnify himself. Admitting however that these parties had no notice, I cannot see how it can be claimed, they are entitled to hold these securities discharged of the equities of these complainants, for they are mere assignees by a separate instrument in writing.

Indeed all these securities were assigned in this manner. The note is payable to the order of the company and only assigned by the bond of the company without endorsement, the holders are therfore mere equitable owners of these securities and subject thereby to all the equities between the original parties arising out of the original transaction.

Where there is an assignment without endorsement the holder acquires thereby the same right only as he would acquire upon the assignment of a note not negotiable.

Bayley on Bills, 101, 102, 2nd Ed. Chap. 5, Sec. 1st, p. 120, 15 Ed.
Story on Bills, Sec. 199, 201.
Story on Prom. Notes 135, Sec. 120.
Chitty on Bills, Chapter 6, p. 259, 12 Edition, 1854.
Gibson vs. Mint, 1 H. Blackstone, 605.
Clark vs. Signourney, 17 Conn. 561.
2 Bibb., p. 83; 2nd Brock., p. 20, 15 Ill., 364.
Ryan vs. May, 14 Ill., 49.
6 Bacon, Ab. 792.

No scheme of villany ever invented in any age or country was better calculated to effect this purpose than this one.

Even the "Mississippi Bubble act of John Law," though a delusion and a swindle; lacked the cold-blooded and deliberate malignity of this "Farm Mortgage Scheme."

In this respect it finds no parallel any where; fortunately however, for these complainants and those situated like them, for once in the history of "corporate swindles," the holders of these notes and mortgages are check-mated by the terms contained in the bond. If they will have their "pound of flesh," it must be without a drop of blood, for is it not thus written in the bond that the note and mortgage are assigned by that bond and not otherwise.

I need not quote authorities again to show that these holders are assignees by a separate instrument in writing, and not assignees by indorsement.

They are not legal holders, and therefore are subject to all the equities arising out of the original transaction.

It is well that it is so; the rules of law in relation to negotiable paper, although they would otherwise apply, were made for the benefit of trade; but they are nevertheless arbitrary, and should be carefully and cautiously applied.

For these reasons it is that a slender thread of evidence clearly proved, which casts suspicion on the bona fides of title or the consideration, subjects the holder to the inconvenience of removing these suspicions by competent proof, or else the admission of the equities and defences existing and arising out of the original transaction.

If there had been, therefore, a legal assignment of this paper without actual notice of the fraud and want of consideration proved out-

side of the instrument, as in this case, it would well be worth our serious attention to enquire how much information would be required outside of the equities and rights appearing on the face of these papers, to make a party a purchaser with notice.

Can this commercial paper carry all this load upon its back, and the holder not responsible for, nor bound to look into the character of this load.

If it is law it is a gross perversion of Justice, as well as of reason and of common sense.

In the case of Overton vs. Tyler, 3 Barr., it is decided that a negotiable note is a courier without luggage. It has also been decided that any note or memorandum written upon the back or attached to a note by proper authority, varying or adding to its terms or conditions is a notice which the purchaser cannot disregard.

Clear and emphatic is the notice of a contract, of equities and of rights appearing upon the face of these papers. No such case is found in the books. To say that the assignment of the note carries the mortgage with it, is no answer to this objection.

The question is, whether commercial paper attached to and made part of the securities, contracts and agreements, showing upon their face that the securities are only to be assigned in a special manner, can be taken, discharged of the knowledge thereby proclaimed. In other words, whether a purchaser of such securities can be permitted to say I am a bona fide purchaser for value, and can see nothing but the note.

If such is the view of the facts here disclosed it must be by glasses through which honest men could not see.

The distinction between that and robbery by violence are so nice they cannot be apprehended by common minds.

But the law is not so iniquitous, and those who make it so, stick to the bark.

A decision which ignores the facts appearing upon the face of these securities is not a decision of the case, but a small part of it.

By what rule of law is a court compelled to shorten its arm of justice so that it cannot reach the frauds which come welling up from the bottom of this transaction.

I know of no such rule. Commercial paper has been put afloat, but so inseparately connected with a bond and mortgage as to give notice of the character of the paper.

No business man could purchase it without knowing the character of the paper, what it had been given for and all about it.

The rules of law applicable to the transfer of negotiable paper standing by itself, does not reach this case.

To make it do so, would require the application of a principle more elastic than gutta percha, and when applied it would answer no good purpose.

But on the other hand cut this case down to the iron bed of mere commercial paper, and the door is effectually opened for sanctioning any contract which a corporation may make, however fraudulent it may be, if it is attached to commercial paper, I know not how this matter

may appear to the court but it seems to me that the note and mortgage taken together tell their own tale, and he who would disregard it must do so at his peril, they cannot be separated any more in law than in fact a decision upon any other theory than that of giving all these facts full weight would be monstrous. To assume that these purchasers did not know what they were purchasing is a libel upon their character for shrewdness which is not to be tolerated for one moment.

They knew what they were purchasing and they counted the cost before they made the purchase. To suppose otherwise is a mere fiction—opposed by all the facts of the case—all that is published in this pamphlet of the company or declared by its agents—and by all the knowledge and experience we have of the transactions of monied men.

I cannot therefore bring my mind to believe for one moment that a wrong so patent as this, can by any possibility be enforced in a court of law.

Whatever may be the situation of these purchasers, they were not in this whirlpool of railroad excitement—were better acquainted with business, better capable of judging of the character of this enterprise than were the farmers.

I know too, full well, that I could not have been an innocent purchaser of this paper, the best claim I could set up in truth would have been that although the farmers were cheated to the full amount of the claim, I had the mortgages and could collect them out of their farms.

Such I am charitable enough to believe is the true condition of these purchasers generally. If they have been so unfortunate as not to be able for once, to fleece the farmers, I do not know that it ought to be so much deplored. Better so, than to rob a whole community of their means of support, when their only crime has been that of supposing that railroad officers and agents were to be trusted like other men.

But I need not pursue this investigation farther. I have shown this transaction was illegal and fraudulent in its inception, that gross fraud marked its subsequent pathway, and that in every avenue through which we have been enabled to trace it, the same misfortune attends it.

And although these people have been severely harrassed by it; I hope and trust they may be relieved. That this widow, and these orphans, and all others situated like them may yet be saved from this blighting curse, the "Farm Mortgage."

That the time will come and that speedily, when they one and all shall know that in law as well as in morals, the maxim "that honesty is the best policy," is no visionary theory but a sober reality.

LYMAN E. DeWOLF,
Solicitor for plaintiffs.

No. 197

Smith
vs
Racine Miss. R.R. Co

argt. for Complainants

Filed May 29-1861
L. Leland
Clerk

Clerk Supreme Court

Ottawa

IN THE SUPREME COURT OF ILLINOIS.

APRIL TERM OF THE THIRD GRAND DIVISION, 1861.

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ELIZABETH SMITH, ET AL., PLAINTIFFS IN ERROR.

VS.

RACINE AND MISSISSIPPI RAILROAD COMPANY, ET AL., DEFENDANTS IN ERROR.

APPEAL FROM JO DAVIESS.

ARGUMENT FOR COMPLAINANTS.

CASE STATED.

A bill was filed in the Jo Daviess Circuit Court, by the widow and heirs of Joseph H. Smith deceased, against the Racine and Mississippi Railroad Company and Alonzo Taylor, to set aside a note and mortgage for fraud and failure of consideration.

A judgment was entered in that Court pro forma for the defendant; but under stipulations between the parties which appears by the record. In pursuance of these stipulations the case is brought by appeal to reverse that judgment. It is one of a class of a somewhat novel character, more familiarly known as the "Wisconsin Farm Mortgages."

The principles involved in it, are such as will probably affect one half of the real estate in Carroll County, and a large portion in Jo Daviess, Stephenson and Winnebago.

I am therefore extremely anxious that no omission or neglect of mine shall visit upon these men the consequences of an adverse decision.

The case briefly stated is this:

In 1856 H. S. Durand as President, and Marshall M. Strong and others were building a Railroad in the direction of the Mississippi River, under the style and title of the Racine and Mississppi Railroad Company.

The charter was granted in 1852, incorporating a Company by the name of the "Racine, Janesville and Mississippi Railroad Company." The road to run to the Mississippi, entirely in Wisconsin. When however, it came in the range of the Chicago roads, the route and the name of the Company was changed. Whether the Chicago roads and those from Milwaukee deranged the "Farm Mortgage" business was the cause of this change or not is not known.

Be this as it may, the line of the road was changed from Janesville to Beloit, the name was also changed. In 1853, a charter was obtained in this State for a road from Rockton, opposite Beloit to Free-

port, (Act 1853, Page 60) In 1855 this company was consolidated with the Racine and Mississippi, whether legally or not I shall not stop to inquire?

About the first of January 1856, the subject of extending this road to Savanna was canvassed.

There was no charter for building this road, but in 1851 the Chicago and Galena Union, and the Illinois Central roads were in progress of construction, and an attempt was made to form a Company by articles of association, under the General Railroad Law of 1849. (See Abstract pages 8, 9 and 10; Record page 17, 18 and 19.) This attempt failed, and the matter of building the road was allowed to sleep for five years longer. About the first of January, A. D. 1856, this defunct company was suddenly roused from its slumbers, or exhumed from its grave by H. S. Durand, President of the Racine and Mississippi Railroad Company, and a new life was breathed into its breathless form by the creation of eighty or one hundred thousand dollars of fictitious stock, by men outside of the company (if any such existed;) and on the 23d of January, A. D. 1856, witnessed the novel proceeding of electing officers and consolidating this road with the Racine and Mississippi Railroad Company, by these outside men, by means of fictitious stock. The company without further preliminaries, after consolidation, and as soon as blanks could be furnished, ushered into Illinois the "Wisconsin Farm Mortgage Scheme."

The scheme was intended for the purpose of obtaining means which could not be obtained by stock subscriptions as required by the charter, briefly stated it was as follows:

The company made a coupon bond, bearing interest at ten per cent to be paid semi-annually, and a note and mortgage was then to be given to the company by the party for the same amount, payable in five years from the 10th of May A. D. 1856, with interest at ten per cent per annum, payable annually. This bond of the company and the note and mortgage were to be attached together, and the bond of the company was to be the principal debt, and the note and mortgage to be pledged as collateral security for the payment of the bond, and the bond thus secured was created for the purpose of sale in market for what it would bring. (See testimony of J. Rinewalt, page 12 and 13 of Abstract, and 25 to 28 of Record. See also testimony of P. Seymour, page 10 and 11 of Abstract, and 21 and 23 of Record.) And the bond in addition to the usual provisions of this class of instruments was to contain, and did contain a clause assigning the note and mortgage. It also provided that the note and mortgage should not be otherwise assignable to any parties or purchasers whatsoever. In addition to this, the mortgagor at the time of executing the mortgage, assigned over his share of the dividends to the company, they agreed in consideration thereof, to pay the interest accruing on the mortgage annually, in semi-annual payments, and for the term of five years. It was under this scheme that the roads in Wisconsin were attempted to be built. There is however, this difference, it was an experiment in Wisconsin, and did not involve any moral turpitude; but when the scheme had fully ripened in bankruptcy, as it is shown by

the evidence it had when it reached Illinois, it was no longer an experiment, but a base swindle deliberately engaged in by the Railroad men, probably for the purpose of extricating themselves from the difficulties into which they had been plunged by their mad scheme at home.

This company had been in operation when the officers came here about four years, had accumulated a large debt, were about mortgaging, and on the first of April 1856, did mortgage the east end of the road for $10,000 per mile, and before the middle of July the West end for the same amount per mile.

There being, besides a heavy indebtedness, the precise amount of which we have not been able to show very clearly.

But the mortgages were obtained, as is also shown, under the representation that the road was not in debt, having been built for cash, and entirely from the sale of mortgages sold at par; that they wanted none of these funds on their end of the route, and that none of them should be used east of Freeport. Now these statements were wholly untrue, as is shown by the testimony of Mr. Rinewalt. The company were in debt, and no sooner were these notes and mortgages obtained, than four fifths of them were immediately applied to pay debts previously contracted and to furnish materials east of Freeport.

It may be as well to observe here too, that the estimated cost of the road as shown, was $3,400,000 with full equipments. See page 14 of Abstract, page 31, 41 of Record, Strong's Review. They were building the road far inside of this estimate, had saved on Col. Mason's estimate in the purchase of iron $100,000, and had a surplus capital above the whole cost of the road at the East end of $133,000. The road is only about two-thirds built. Nothing has been done upon it for over three years; and the company in not exceeding eighteen month after making these representations, were in debt $4,992,472,87, and it required over three hundred thousand dollars above this sum to finish the road to Freeport. See Abstract, page 13, Records, pages 25, 28. And the road West of Freeport, being only 36 miles, would have cost at $20,000 per mile, according to the estimate $720,000, and they have procured $800,000, notes and mortgages to build this portion of the road.

The false representation therefore, that the road was not in debt, but entirely free from all incumbrance was not the casual remark of inferior agents, but the oral and published annual, and other statements of the President and other officers at the head of the company, deliberately and purposely made to procure the execution of these notes and mortgages; and it was under such false and fraudulent representations on the part of the company that the note and mortgage in this case was obtained as is shown by the testimoney of Philander Seymour, and by the Pamphlets thereto attached, marked (A. and B.) pages 21, 23, 40, 41 of Record.

It was also alleged that these mortgages had all been sold at par, and their character thereby established in market as first class securities. Whereas, the truth was as is shown by the annual report of the Directors by Mr. Durand at their annual meeting, that these securities

were without any defined value at home or abroad. See Annual Report 1858, pages 7, 8 and 9, and between pages 40 and 41 of Record.

The condition of this road as shown by the testimony of Mr. Rinewalt by the mortgages, and by the annual reports, shows that the misapplication of funds was no sudden freak of the officers, and accruing after they had obtained these notes and mortgages. But the whole transaction clearly exhibits the "ear marks" of a well concocted and well executed scheme of fraud from the commencement, and there is no escape legitimately from this conclusion. This presents then, I believe a brief but correct outline of the facts to which I desire particularly to call the attention of the Court.

The serious and important question presented by these facts, therefore is, whether a court of law and of equity can or ought to enforce the collection of a claim so evidently unconscionable as are these securities. I believe not, and I propose to discuss the questions here raised in the following order:

First—was the Savanna Branch a corporation; was it legally consolidated; and was there therefore, a party in being, capable in law, of building this road, or of making a binding contract respecting it. Besides, the contract being made with the consolidated Company, and the notes and mortgages bayable to its order. Could the Racine and Mississippi Railroad Company of Wisconsin make a legal title to said paper?

Secondly—Admitting the Savanna Branch to be a corporation, its consolidation legal; could the Company take any such note and mortgage and issue its certificate of stock therefore.

Thirdly—Admitting the paper to be legal; it was fraudulently obtained. The proceeds have been misapplied, and the purchaser had both constructive and actual notice of these facts before purchasing Is he not subject to all of the equities of the complainants. Upon this first point, the testimony shows that the association never took any action evincing a bona fide intention of complying with the act. No termini was fixed at the Eastern end. The amount of the capital stock was not determined—a sufficient amount was not raised to comply with the first section of the act; the road being 36 miles and only $27,000 raised; the ten per cent was not paid, and the certificate and affidavit was not made and filed with the Secretary of State; and the stock was not taken by the commissioners appointed for that purpose The testimony to which I refer in support of this, is that of Porter Sargent, Elias Woodruff, John A. Melendy and Medard Dupuis—pages 16, 17, 18 and 24 of Record; pages 8, 9 and 10, also 12 and 13 of Abstract.

These witnesses I believe fully sustain all that I here claim. The several sections of the statute which were violated by these several proceedings, are the 1st, 2nd, 3rd, 4th, 5th and 6th of the act of 1849 Pamphlet Laws 1849 and '51, page 18; consolidation act 1854, second session, page 9, sections 1st and 7th. These sections require Articles of Association to be drawn setting forth the point of commencement, the course of the road, its termini and length. Also ten per cent to be paid in good faith, and a certificate and affidavit thereof, signed by

three of the Commissioners and filed with the Secretary of State, before the Company had a right to become a body politic and corporate.

These provisions of the statute not having been complied with, no legal act could be done, for until these essential requisites were performed, the corporation could not be considered in esse.

The necessity of complying with these pre-requisites are, it seems to me, much stronger in the case of an attempt to organize under a general law than it would be under a special statute or charter; for this reason, that under a general statute there is no grant of power to any one. A compliance with its terms is therefore required, not only by the letter; but how can the parties connect themselves therewith in any other manner. There should be at least enough done to show a bona fide intention to become a corporation under the act which is not the case here. If this be correct, the point is therefore well taken, that there was no party in esse capable of taking the note and mortgage, or of making a binding contract for the building of said road or in relation thereto.

The authorities in support of this position are numerous, among which are

Volk vs. Crandall, 1 Sandford R. 179.
Pierce on Railways, page 64.
1 Caines Cases, page 80.
1 Caines Report, page 38.
8 Serg. and R. page 319.
18 Barbour, 301, 2, 3, 4, 5 and 6.
21st Wendell, 141, 2.
1st Hill, 518.

These authorities show if indeed any authority is needed, that an association cannot become a legal body when guilty of such a gross violation of the fundamental law of its being, and until it has complied with these essential pre-requisites, it cannot make a binding contract because not in esse.

If then, the attempt to organize the Savanna Branch was so defective as to render the act illegal and void?

What shall we say of its consolidation? For whatever might be the difference of opinion as to the objects really intended to be done in attempting to organize this association. No doubts can arise as to its fraudulent and illegal consolidation with the Racine and Mississippi Railroad Company. No rights could be acquired by an individual by such fraudulent means. Does a corporation stand in any more favorable position—is not honesty and fair dealing essential to their welfare? Is there any question of public policy requiring such transactions to be upheld, I think not.

The consolidation was therefore intended to effect a useful purpose, to confer a public benefit by concentrating capital. It could only be accomplished by an honest compliance with the provisions of the act by those who were really stockholders.

If then, a corporation could acquire no more rights by this fraudulent contract than an individual, then the consolidation cannot be sustained.

Besides, these rights and franchises being granted as a public benefit in derogation of natural rights ought to be used to promote that end, and not as a mere stool pigeon by which to entrap the unwary and unsuspecting. Nor indeed, ought mere apparent rights acquired in defiance of law, of honesty and of fair dealing to be sustained without some absolute and controlling necessity. But no such neceessity exists, because the public are in no one thing so much benefited as in the establishment of the principle that fair dealing is an essential requisite of healthy corporate existence. There are therefore no strong equities requiring a departure from the plain and simple rule of right and the organization of the Savanna Branch was too defective, its consolidation too fraudulent, to enable the Racine and Mississipi Railroad Company to acquire any right to build said road, to acquire the right of way or to make any other binding contract in relation to said object.

For these reasons then, I conclude that the pretended stock proposed to be issued by said Company was illegal and void, and it furnished no consideration for the making of said note.

There is also another reason for this conclusion, and that is, that at the time of the consolidation, H. S. Durand was President of the Racine and Mississippi Railroad Company as well as of the Savanna Branch Railroad Company, and no binding act could be done with a President pro tem, or with any pretended or so called Vice-President, which would bind the Racine and Mississippi Railroad Company for the want of the head designated by law. Mr. Durand was present and acting as the President of the Savanna Branch Company, as well as of the Racine Company. He could not bind both by the same act.

The stock therefore, being illegal and void, there was no consideration for making said note and mortgage. This view is fully sustained in the cases in

22, Eng. Law and Equity, page 45.
6, Ohio State Rep., page 119.

These notes and mortgages, and indeed the whole contract was made as we have shown with the consolidated company, and for the purpose of building a certain portion of the road which it had no right to build.

If then, the consolidated company was a non-entity, and the notes being given originally to that company and payable by its order, it could only be legally transferred by that company.

The Racine and Mississippi Railroad Company of Wisconsin never had a legal right to these securities, and could not transfer or convey to its purchaser such a title, for the reason that it was not the payee and mortgage mentioned in said note and mortgage; and it could only convey a title as against itself, and not the legal title; the authorities are clear upon this point. In support of this doctrine I cite

Bayley on Bills, pages 111, 115.
Mead vs. Young, 4 Term Rep., page 28.
Graves vs. The American Exchange Bank, 17, N. Y. R., p. 205.
Carrol Bank vs. Bank Albany, 1, Hill, page 287.
Tallot vs. Bank Rochester, 1, Hill, page 295.
Story on Bills, Sec. 457, and cases cited.

If these securities passed by mere delivery, it would be otherwise.

The questions we have been considering so far, arise out of the attempt to organize the Savanna Branch Railroad Company and its illegal attempt to consolidate with the Racine and Mississippi Railroad Company, and it seems to me sufficient has been shown to set aside these securities upon these grounds alone. And here I might rest the case, but feeling perfectly assured as I do, that the whole contract made by this company is intrinsically vicious, and cannot for that reason be sustained. I proceed therefore, to consider the next question to be discussed, which is the right of the company to make these agreements to exchange its stock for notes and mortgages in connection with the accompanying agreement on the part of the company to pay the interest out of a fund which did not exist. And in connection also with the fact, that the bond of the company was created to be made the principal debt. The note and mortgage as collateral, and the whole to be sold in market for what it would bring as an article of merchandize, and I do most unhesitatingly contend, that the company had no such power, and that as between the company and the mortgagor, this transaction was illegal and void on this account also.

The sections of the statute which relate to the subscription of stock are the 1st, 5th, 11th and 14th Sec. Pamphlet Law 1849 '51, 2d Session, page 18.

There is no pretence on the part of the defendants that there is any statute authorizing the taking of these notes and mortgages for stock, or that these salutary provisions of the statute have been complied with.

The effect which these provisions should have is very fully illustrated and set forth in the case of Troy and Boston Railroad Company vs. Tibbetts 18, Barbour 267.

The true rule applicable to this case, as shown by this authority, is that in disposing of stock, the statutary provisions must be complied with, the statute having pointed out the mode of acquiring stock necessarily excludes all others.

This statute contemplates building a railroad by stock subscription to be paid to the company in cash. The first section points out the mode and provides that ten per cent in cash shall be paid in good faith. The eleventh section provides "that the directors shall call in and demand from the stockholders all sums of money by them subscribed at such time and in such payments or instalments as the directors shall deem proper." What right then had the company either alone or in connection with others, to turn manufactures of obligations or securities for sale, and to become the brokers thereof in the markets of the world, and thus substitute this for a subscription to stock. What authority, or what lawful necessity even, was there for such a transaction.

They were a corporation to build a railroad, not bankers or brokers; but simply a railroad corporation, and their mode of action pointed out and clearly defined.

The object of its creation is the polar star to guide its pathway, circumscribed in the law of its being, its path was a straight and narrow way, and it should travel in it.

But it may be said the note and mortgage is only another mode of paying for stock; that it was a substantial compliance with the charter, and therefore lawful.

This assumption is not however, warranted by the facts.

A decision based upon it would be a gross perversion of justice, for the reason, the facts are otherwise.

What were the objects of this "Farm Mortgage scheme?" The Supreme Court of Wisconsin say that "there was not enough cash capital in the state to build her roads, or even to pay the per centage usually paid in older communities.

The Racine company said, "the mortgages have been given from an enlightened self interest to secure the construction of the road. It was better for the farmers and the company to give these mortgages than cash subscriptions. Better for the farmers, because they could use their cash more profitably otherwise. Better for the company because thereby they get their cash means at once." See John Rinewalt's testimony, Schedule (A.,) between pages 40 and 41 Record, and 1st page of Pamphlet.

A noble reason that for sanctioning this proceeding in a court of justice. First, there was not a cash capital in the community which the charter required nor even a tithe of it.

Second, the farmers by this arrangement could speculate upon the cash required to be paid upon their stock more advantageously otherwise.

But is this all; I think a close examination of the papers, contracts, &c., with a slight knowledge of the facts, will reveal other objects, not more in accordance with the charter than these, and not more in accordance with an honest purpose.

What were these objects? It gave the company an opportunity to repudiate the very thing they now claim, and upon which their right of recovery is based. It was only loaning credit to the company, for five years the company were bound for the debt and would eventually pay it out of the earnings of the road; and the company were bound to pay the interest semi-annually.

Now I ask again what was the object of this arrangement? I answer, to obtain means that could not be acquired under the charter. A man could be induced to loan his credit to a great and powerful corporation, and to stake his home and the support of himself and family, when he could not be induced to risk one quarter of this amount by a direct subscription which he knew by its terms would have to be paid.

What I ask, was the object of this agreement to pay interest out of the funds not yet earned? Was it intended to be performed? I say nay. The object was to lull the victim to sleep; to bind him hand and foot for the slaughter. A man with a large amount of uncultivated and unproductive lands estimated to be worth say, twenty thousand dollars, but furnishing an income barely sufficient to pay taxes, if called upon to subscribe twenty thousand dollars to be paid, or to pay interest at ten per cent on that amount under a contract which he fully understood, would refuse to subscribe at once. But when attacked by this systematic and well arranged system of notes and mort-

gages; the product of corporate villany, plied by skilful hands, and armed with this magic agreement to pay interest out of funds which never had, nor colud have an existence, (save in the broken promises of a soulless corporation,) the man is bewildered, lost in the mazes of corporate lying, and he surrenders at discretion. His note and mortgage are given, and his property is sunk in this vast charnel-house of corruption. These I affirm were some of the objects intended by this "Farm Mortgage Scheme," and appearing upon the face of this transaction, and what I have put here hypothetically both as to manner and amount will yet appear in this court as a reality.

We may be told that although this transaction was a gross fraud, and as between the company and the parties ought to be set aside. Yet that the mysterious personage called a "bona fide" holder may in some way be affected and his rights must be looked after. We will look into that question presently. Thus far we have shown that the object of this transaction was to obtain funds which did not exist, and which could not be procured under the provisions of the charter. Let us examine this question a little further, and see what was the character of these securities, what they were created for, and how they were to be used. Mr. Seymour says, (page 21, 22, 23 of Record,) that when he accepted the agency he was informed this paper was created for sale in market for what it would bring; that it would sell at par by being attached to the bond of the company, and that the bond of the company was to be the principal, and the note and mortgage collateral. Mr. Rinewalt states the same thing, and that these securities were to be coupled together and sold as merchandise in the market in the manner above described and not otherwise, and that they were thus sold. He further states that the pamphlet (C.) was published by the company, and furnished by them to agents to explain the character of these securities to purchasers. This pamphlet states; the company have for sale $500,000 Farm Mortgage bonds guaranteed by the company. These mortgages are for various amounts, from $500 to $5,000 each, they run for five years from May 10, 1856, upon interest at ten per cent per annum payable by the bond of the company semi-annually at their office in New York City.

They constitute a three fold security.

First, the note of the mortgagor. Second, the mortgage, and Third, the bond of the company which is the principal debt and the note and mortgage are merely collateral.

This evidence shows clearly the character of this transaction and that these securities were to be thus coupled together and sold in the market as a chose in action or any other article of merchandise for what they would bring, and that they were so sold and that too, for every conceivable thing which the company or its directors might desire, is abundantly shown by the evidence; or at least the purchase of farms is shown in this case. I apprehend this is not strictly speaking constructing a railroad. Yet it was a legitimate use of the funds if the object for which these securities were taken is legal.

If the directors had the right to dispose of their stock for notes and mortgages to be sold with the bond of the company; and then to turn broker for the sale of these wares in the market of the world, then any

conceivable trade, exchange or speculation which an individual could make, they could make, and the whole field of barter is open before them. It has been well said by a former judge of the Supreme Court of Wisconsin, "if the company can take mortgages in payment for stock it must also have the power to dispose of them, and it is not restricted to a cash sale either, when it does dispose of them, it may therefore exchange them for other securities, or for any article of personal property or for such parcels of real estate as it may desire. If it may in the first instance exchange for mortgages, it may purchase them with the money paid on stock subscription. The money received for stock cannot be more sacred, than, or less subject to disposal at its will than the stock itself, every conceivable trade which it could make must be traced back to the stock. It is the primary fund or fountain from which springs all its exchanges. If it have the power to dispose of stock for mortgages, the power to take exists, and it is not restricted by the charter to the taking of them directly, and only when stock is directly exchanged therefore. Could any corporation, or set of men, desire a more extensive field for traffic, speculation, or exciting risks." Did the legislature in passing this charter intend to confer these varied and important business powers?

The answer must be in the negative, their exercise was a violation of the charter, a violation of law.

The exercise of these powers on the part of the company was not necessary for the purposes of carrying on the business of the company, nor was it within the scope of any business they could legitimately pursue.

In the case of a banking company 3d. Selden N. Y. Rep. page 328, 342; it was decided it had no power to purchase State stocks to sell at a profit, or as a security for a loan, or taken in payment of a loan or debt—the court in that case say.

The arrangement was a purchase of stock by the bank upon their notes or certificates payable at a future day, the stock to be sold by the State of Ohio on account and at the risk of the company, the proceeds to be applied to the payment of other certificates of the same character held by the vendor as creditor of the bank. In the most favorable view for complainants, the transaction can only be sustained upon the broad ground that this assignee and all other banking incorporations, have the right as incident to their business, to trade in stock and all other personal property for cash or, upon credit, unless specially forbidden by their charters, and that their contracts whether in form of post notes or otherwise are binding upon the association and its creditors.

In considering this proposition, it may be conceded, that this association could purchase stocks to deposit with the comptroller as security for their circulating notes—they might invest their surplus funds in them or loan money upon them by way of discount.

But all this is very different from an unlimited authority to traffic in stocks for any purpose which the directors might deem advantageous to the corporation. This association at the time of this transaction, was not seeking to invest their surplus capital for they had none, but were purchasing as a means of raising money to suply a present

exigency. They did not discount the bonds of Ohio as intimated, for this in banking is only a mode of loaning money. They purchased them as the whole arrangement shows as indirect means of borrowing.

Nor did they obtain the bonds as a basis of an exchange account under the power to buy and sell bills of exchange. In a word they purchased these bonds as they might have purchased a cargo of cotton to be sent to market, to be sold at the risk of the vendor for the highest price that could be obtained. No authority to traffic in either commodity is expressly given by the law, held, that this bank had no authority to traffic in stocks as an article of merchandize, or purchase them as a means of obtaining money to discharge existing liabilities; and that the assignment of the bonds and mortgages which had been deposited as collateral security for the payment of the bank certificates of deposit must stand or fall with the principal agreement.

A large number of cases to the same point are cited in the brief but I will not trouble the court with any further quotations. It seems to me that the violation of the charter on this point is too palpable to admit of doubt or argument either. There is another objection against the legality of these securities equally fatal, it is this, the notes and mortgages were taken as full payment for stock. Suppose the land not worth a tenth part of the stock sold, and the purchaser not worth a dollar, one man would thus acquire stock for a tenth of that paid by others, which is not lawful Redfield page 99 says; it is well settled that a railway or other joint-stock company cannot receive subscriptions to their stock in less sums or in other commodites than that which is demanded of other subscribers. So too, where the agents of the company agreed to receive subscriptions at a discount below the par value of the shares, it will be regarded as a fraud upon the other share holders and not binding upon the company.

Again, the directors of this company have received these notes and mortgages in payment for stock under an agreement to issue the coupon bond of the company to pay the interest semi-annualy at ten per cent per annum for the period of five years. There was three millions of dollars worth of these securities received, and it will not require a very close estimate to show that no company which started on this basis could stand longer than four or five years. Accordingly it will be found that none of these companies have lasted five years. The following extract from the Report of 1858, though not half of the truth well portrays the practical working of this scheme. It says " we have retailed our securities in eleven different States, besides in several parts of Europe, which has required heavy disbursements in the way of salaries, commissions, and travelling expenses, besides terrible discounts to obtain money. A fearful interest account has been constantly accumulating upon us to be provided for in good part by the same operation, out of our capital stock."

In every aspect therefore in which this case can be viewed there is not only a lack of the grant of power to do the act, but the power exercised is intrinsically viscious and entirely, subversive of the objects and aims set forth and provided for by the charter.

Will the law imply a power not expressly granted, which will de-

fraud and ruin not only both parties, but which in fact directly abstracts and squanders the entire sum of money paid in by the stockholders to the directors for a particular and other purpose.

If it will, the law is a humbug and a trial in court of justice a farce. Nay more it is solemn mockery.

But the law is not so iniquitous, it will not require the farmers to perform their part of the agreement, and not require of the company the performance of theirs, and the company cannot as we have seen perform theirs, it was not within the scope of their authority to make it.

I therfore claim that there was no consideration for the making of this class of notes and mortgages upon this ground alone, then as between the original parties these securties should be set aside.

I have now done with this portion of the case, the question discussed is an important one, as it applies to all corporations if this power to deal in motgages can be sustained, there is an end to all rules of construction as applied to charters; but I pass this to consider the question of fraud. The then present condition and future prospects of the company were alike the subject of gross misrepresentation, fraud, deceit and lying in all of its worst forms. It was alleged it had paid for all as it went along in cash. Other companies had issued fictitious stock but this had issued none but for full value. A floating debt was the blighting curse of corporations generally, but this had none and could have none as it had all been done on the cash principle. Yet this same company was then about mortgaging the road for ten thousand dollars per mile and was largely indebted otherwise.

Who will say these representations were not material and were not false?

Who is bold enough to claim that these farmers would have mortgaged their homes for all they were worth, had they known or had any reason to suspect these statements were not true?

The bankers, the brokers and the money shavers generally were the willing instruments used to accomplish this infernal work.

But when the day of payment has arrived these business men have no mortgages to pay, they are all "innocent purchasers" all the avenues of trade are filled with their clamour, the public press teems with homilies upon the terrible "sin of repudiation" and they come to the very halls of justice and would fain be heard if they were permitted for the benefit of the cause whether interested or not, the farmers had ought perhaps to render a full propitiation for their sin of getting cheated by being robbed for the benefit of these "innocent holders"

By way of compromise let it first be determined whether the original transaction was legal or not, when that is done it will be time enough to look after consequences then. If the original transaction was illegal for any or all of the reasons assigned these homeless wanderers and othes like them are entitled to all the benefits arising therefrom. In 6 Gill & Joh. 54, it was decided that when a mortgage is obtained by misrepresentation of the mortgagee, it is immaterial as to its legal effect upon the instrument whether the mortgagee at the time he made the misrepresentation knew it to be false or not. If he made a statement of facts knowing it to be false it would be an actual

fraud if he did not know it to be false and it operated to decieve the other party it would be a legal fraud—it would avoid the mortgage.

In 17 Texas Rep. page 560 is a still stronger case in point. the foli is a synopsis of the case. The individual members of an incorporated company are deemed strangers to the artificial body created by the act of incorporation, and may maintain their right of action of whatever nature against the company in the same manner as those who are not members.

2. The representations, declarations and admissions of the agent of a corporation stand upon the same footing with those of the agent of an individual.

3. As natural persons are liable for wrongful acts and neglects of their servants and agents done in the course and within scope of their employment so are corporations upon the same ground, in the same manner and to the same extent.

4. Nothing is better settled than that the fraud of an authorized agent will invalidate a contract entered into by him on behalf of his principal although the agent in perpetrating the fraud acted without the knowledge of his principal.

5. Even though the agent has transcended his authority in making the contract, yet if the principal ratify it and make the contract his own by availing himself of the benefits of it he is liable in like manner as if he had personally made the contract, he cannot ratify the contract and avoid the responsibility of the representations which formed its basis, but he must ratify the contract in toto.

These authorities reccommend themselves to our favorable notice by that strong sense of equity and justice which they present as contradistinguished from mere technicalities which too frequently excludes real justice in the case of corporations.

I will now bestow some attention to the question respecting bona fide purchasers without notice. Unless I am grossly mistaken however, in the facts of this case Taylor was a purchaser with notice beyond cavil. Although I am fully persuaded that in fact the question of actual notice is not more clearly proved in this case than it will be in all the others, yet as it is the fortress behind, and by means of which is attempted to be and will be carried out, if at all, the greatest fraud ever perpetrated upon the farmers and industrial classes in this country.

This question demands more attention than I can bestow at this time.

I will therefore confine myself to the facts here proved. First, the execution of the note and mortgage was procured under a representation that the mortgage was only a common mortgage—that it could only be foreclosed by scire facias when due, and the party would have a year to redeem; See testimony of P. Seymour, p. 12, abstract 41, 42, Record. Whereas it is a trust deed got up to suit sharpers who deal in securities—the property may be sold without even the publication of a notice. This was a fraud in procuring the execution of the instrument and not in matters outside the instrument, if this statute has any force it affects parties with notice; this is not all, Taylor had full notice of all the equities of these parties—has taken this note and mortgage in payment for his farm, but is still in possession and can protect him-

self if the security is set aside. Mr. Holt too, being a director can fully indemnify himself. Admitting however that these parties had no notice, I cannot see how it can be claimed, they are entitled to hold these securities discharged of the equities of these complainants, for they are mere assignees by a separate instrument in writing.

Indeed all these securities were assigned in this manner. The note is payable to the order of the company and only assigned by the bond of the company without endorsement, the holders are therfore mere equitable owners of these securities and subject thereby to all the equities between the original parties arising out of the original transaction.

Where there is an assignment without endorsement the holder acquires thereby the same right only as he would acquire upon the assignment of a note not negotiable.

Bayley on Bills, 101, 102, 2nd Ed. Chap. 5, Sec. 1st, p. 120, 15 Ed.
Story on Bills, Sec. 199, 201.
Story on Prom. Notes 135, Sec. 120.
Chitty on Bills, Chapter 6, p. 259, 12 Edition, 1854.
Gibson vs. Mint, 1 H. Blackstone, 605.
Clark vs. Signourney, 17 Conn. 561.
2 Bibb., p. 83; 2nd Brock., p. 20, 15 Ill., 364.
Ryan vs. May, 14 Ill., 49.
6 Bacon, Ab. 792.

No scheme of villany ever invented in any age or country was better calculated to effect this purpose than this one.

Even the "Mississippi Bubble att of John Law," though a delusion and a swindle; lacked the cold-blooded and deliberate malignity of this "Farm Mortgage Scheme."

In this respect it finds no parallel any where; fortunately however, for these complainants and those situated like them, for once in the history of "corporate swindles," the holders of these notes and mortgages are check-mated by the terms contained in the bond. If they will have their "pound of flesh," it must be without a drop of blood, for is it not thus written in the bond that the note and mortgage are assigned by that bond and not otherwise.

I need not quote authorities again to show that these holders are assignees by a separate instrument in writing, and not assignees by indorsement.

They are not legal holders, and therefore are subject to all the equities arising out of the original transaction.

It is well that it is so; the rules of law in relation to negotiable paper, although they would otherwise apply, were made for the benefit of trade; but they are nevertheless arbitrary, and should be carefully and cautiously applied.

For these reasons it is that a slender thread of evidence clearly proved, which casts suspicion on the bona fides of title or the consideration, subjects the holder to the inconvenience of removing these suspicions by competent proof, or else the admission of the equities and defences existing and arising out of the original transaction.

If there had been, therefore, a legal assignment of this paper without actual notice of the fraud and want of consideration proved out.

side of the instrument, as in this case, it would well be worth our serious attention to enquire how much information would be required outside of the equities and rights appearing on the face of these papers, to make a party a purchaser with notice.

Can this commercial paper carry all this load upon its back, and the holder not responsible for, nor bound to look into the character of this load.

If it is law it is a gross perversion of Justice, as well as of reason and of common sense.

In the case of Overton vs. Tyler, 3 Barr., it is decided that a negotiable note is a courier without luggage. It has also been decided that any note or memorandum written upon the back or attached to a note by proper authority, varying or adding to its terms or conditions is a notice which the purchaser cannot disregard.

Clear and emphatic is the notice of a contract, of equities and of rights appearing upon the face of these papers. No such case is found in the books. To say that the assignment of the note carries the mortgage with it, is no answer to this objection.

The question is, whether commercial paper attached to and made part of the securities, contracts and agreements, showing upon their face that the securities are only to be assigned in a special manner, can be taken, discharged of the knowledge thereby proclaimed. In other words, whether a purchaser of such securities can be permitted to say I am a bona fide purchaser for value, and can see nothing but the note.

If such is the view of the facts here disclosed it must be by glasses through which honest men could not see.

The distinction between that and robbery by violence are so nice they cannot be apprehended by common minds.

But the law is not so iniquitous, and those who make it so, stick to the bark.

A decision which ignores the facts appearing upon the face of these securities is not a decision of the case, but a small part of it.

By what rule of law is a court compelled to shorten its arm of justice so that it cannot reach the frauds which come welling up from the bottom of this transaction.

I know of no such rule. Commercial paper has been put afloat, but so inseparately connected with a bond and mortgage as to give notice of the character of the paper.

No business man could purchase it without knowing the character of the paper, what it had been given for and all about it.

The rules of law applicable to the transfer of negotiable paper standing by itself, does not reach this case.

To make it do so, would require the application of a principle more elastic than gutta percha, and when applied it would answer no good purpose.

But on the other hand cut this case down to the iron bed of mere commercial paper, and the door is effectually opened for sanctioning any contract which a corporation may make, however fraudulent it may be, if it is attached to commercial paper, I know not how this matter

may appear to the court but it seems to me that the note and mortgage taken together tell their own tale, and he who would disregard it must do so at his peril, they cannot be separated any more in law than in fact a decision upon any other theory than that of giving all these facts full weight would be monstrous. To assume that these purchasers did not know what they were purchasing is a libel upon their character for shrewdness which is not to be tolerated for one moment.

They knew what they were purchasing and they counted the cost before they made the purchase. To suppose otherwise is a mere fiction—opposed by all the facts of the case—all that is published in this pamphlet of the company or declared by its agents—and by all the knowledge and experience we have of the transactions of monied men.

I cannot therefore bring my mind to believe for one moment that a wrong so patent as this, can by any possibility be enforced in a court of law.

Whatever may be the situation of these purchasers, they were not in this whirlpool of railroad excitement—were better acquainted with business, better capable of judging of the character of this enterprise than were the farmers.

I know too, full well, that I could not have been an innocent purchaser of this paper, the best claim I could set up in truth would have been that although the farmers were cheated to the full amount of the claim, I had the mortgages and could collect them out of their farms.

Such I am charitable enough to believe is the true condition of these purchasers generally. If they have been so unfortunate as not to be able for once, to fleece the farmers, I do not know that it ought to be so much deplored. Better so, than to rob a whole community of their means of support, when their only crime has been that of supposing that railroad officers and agents were to be trusted like other men.

But I need not pursue this investigation farther. I have shown this transaction was illegal and fraudulent in its inception, that gross fraud marked its subsequent pathway, and that in every avenue through which we have been enabled to trace it, the same misfortune attends it.

And although these people have been severely harrassed by it; I hope and trust they may be relieved. That this widow, and these orphans, and all others situated like them may yet be saved from this blighting curse, the "Farm Mortgage."

That the time will come and that speedily, when they one and all shall know that in law as well as in morals, the maxim "that honesty is the best policy," is no visionary theory but a sober reality.

LYMAN E. DeWOLF,
Solicitor for plaintiffs.

Cl.o 197.

Smith
vs
~~Chicago~~ Rock Island
& Miss-RR Co

Argt for Complt

Filed May 29 1861
L. Leland
Clerk

IN THE SUPREME COURT OF ILLINOIS.

April Term of the Third Grand Division, 1861.

ELIZABETH SMITH, WIDOW AND RELICT OF JOSEPH H. SMITH DECEASED, MARY C. SMITH, AUGUSTUS SMITH, SUSAN SMITH AND ALBERT SMITH, CHILDREN AND HEIRS AT LAW BY THEIR PROCHEIN, AMY JACOB BOYER PLAINTIFFS IN ERROR,

vs.

RACINE & MISSISSIPPI RAILROAD COMPANY AND ALONZO TAYLOR, DEFENDANTS IN ERROR.

Error to Jo Daviess County.

ABSTRACT.

Bill to set aside a note and mortgage given by Joseph H. Smith in his lifetime, to the said Racine & Mississippi Railroad Company, one of the defendants in error.

Pg.3 Bill filed and summons issued July 21st, 1860—sets forth, that on or about the first day of March, A. D., 1856, a certain company, then and previously known as the Racine & Mississippi Railroad Company, pretended to be a corporation by virtue of a charter from the Legislature of the State of Wisconsin, and to be building a Railroad from the city of Racine, in said State, to the Mississippi
3 River, in Illinois, and pretended to act as a corporation. and to have the right to build a road in Illinois under articles of Association entered into by certain citizens of the State of Illinois, and under and by virtue of an act of the Legislature of said State, entitled "An Act to provide for a general system of Railroad incorporation approved November 5th, 1849," by the name of the "*Savanna Branch Railroad Company*," for the purpose of building a Railroad from a point on the Galena and Chicago Union Railroad, not 15 miles from Freeport, in Stephenson County, Illinois, to Savanna in Carroll County.

3 That the Capital Stock of said Company was fixed at two hundred thousand dollars, with privilege of increasing same to six hundred thousand dollars, and that the same was increased the 23d day of January, A. D., 1853, to the sum of four hundred thousand dollars; that said act required the sum of ten per cent. in cash, to be paid into said Company in good faith and certificate thereof, to be filed with the Secretary of State, and affidavit thereto attached, signed and attested by three of said Commissioners to take stock in said Company; that said ten per cent. was not paid, and said certificate and affidavit not made and filed.

3 That a minority of said pretended Stockholders of said Savanna Branch, on and after the 1st of January, A. D., 1856, went on and procured a fraudulent subscription of stock to the said Company to the amount of one hundred thousand dollars or more, and by means of fraudulent stock, and against the wishes of the majority of said stock holders, consolidated the said Savanna Branch with the Racine and Mississippi Railroad Company, and that no part of said one hundred thousand dollars of said stock was ever used after said consolidation.

3 That by means of this fraudulent stock, H. S. Durand, President of the Racine & Mississippi Railroad Company, was elected director of the Savanna Branch Railroad Company, on the 23d day of January, A. D., 1856, and on the same day was elected President, and was also President of the Racine & Mississppi Railroad, and claiming to act under an act of the Legislature of the State of Illinois, approved February 28th, 1854, and of Wisconsin, approved July 9th, 1853, authorizing consolidation with one John Dickson, pretending to be the Vice President of the Racine & Mississippi Railroad Company; consolidated the stock of said Companies; that a majority of the stockholders of the said Savanna Branch Railroad Company never consented to said consolidation.

3 That on the 10th of February, A. D., 1853, the Legislature of the State of Illinois, passed an act to incorporate the Rockton & Freeport Railroad Company for constructing a Railroad from Rockton to Freeport, and that prior to the year 1855, certain persons pretending to act as said corporation under authority of said act, consolidated said Company with the Racine & Mississippi Railroad Company and changed the name of said Company to that of the Racine and Mississippi Railroad Company; that by virtue of any act creating the Racine & Mississippi Railroad by the State of Wisconsin as falsely pretended, the said notes and mortgages were obtained.

3 That said corporation if a corporation at all, and authorized to take any such stock notes and mortgages, was created such by the Laws of the State of Illinois by virtue of said several acts of con-

solidation; but that said Savanna Branch Railroad Company was never legally organized as a corporation under the laws of Illinois, and that said company was never legally consolidated, nor had such consolidated company ever been invested with the authority or authorized and empowered to take subscriptions of stocks or notes or mortgages to secure the same

That said Racine & Mississippi Railroad Company never had a
3 legal organization as a corporation, and as such a corporation never had any lawful power or authority to do and to take the said acts and proceedings herein complained of, and that the same are null and void.

4 That said Savanna Branch Company never did by a majority in interest of its stockholders accept, adopt or confirm said articles of consolidation so made if any such company existed, and that said articles of consolidation were wholly without authority and void and that there was no such grantee in being capable of entering into and receiving said bond, note and mortgage so made by said Joseph H. Smith.

4 That the said supposed Racine and Mississippi Railroad Company party of the second part in said articles of consolidation, if any such ever existed, did not join, intersect or terminate their Railroad line, road or route, at or near with the line, road or route of the Savanna Branch, and that said articles of consolidation were wholly void on that account, and that said obligation, note and mortgage was entered into with said consolidated company and none other.

4 That on or about the 20th March, 1856, certain officers and agents of said Railroad Company, solicited the owners of property on the line of the road to take stock in said Company, ostensibly for building said road in said counties; and to induce said owners to subscribe to said stock, represented and pretended said road was in a sound financial condition, that it had not made and had no power to make any bond or mortgage of its road. Whereas complainants charge that said company had at same time executed and issued its bond and mortgage of its road and property for $600,000 or more, and was otherwise in a very embarrassed condition and owed large sums of money.

4 That said Company resorted to and used such false and fraudulent representations so much so as to entirely conceal from said Joseph II. Smith and others the real condition of said road: knowing that said Joseph II. Smith could not have been induced to become a subscriber but by means of said fraudulent influences.

4 That being deceived by said fraudulent representations, said Joseph H. Smith, on the 22d March, A. D. 1856, subscribed for six shares of stock, six hundred dollars, in said company, upon condition it should be paid in full by executing and delivering to said Company his note and mortgage in said amount, secured on unincumbered real estate, payable in five years from date, with interest annually at ten per cent per annum; and that said Company would protect and indemnify him against payment of interest thereon for five years.

4 That whole amount subscribed in said section should be pledged and appropriated to the construction of said road, westward from
4.5 Freeport to Savanna. That said Joseph H. Smith would not have made said subscription without said condition; that as one of the fraudulent pretences resorted to was a pamphlet, purporting to be an annual report of said Company, was extensively circulated in said section wherein it was represented that said Company had on hand available means to the amount of $900,000, when said Company was indebted, above all its means, about $700,000, and as proof said fraud, refers to the obtaining subscriptions of stock to the amount of $1300,000, and have only expended about $100,000 west of Freeport, and have discontinued the construction of said road, and is now bankrupt.

5 That said agents and officers at the time of making said notes and mortgages represented said Company was a corporation having right to build said road by virtue of some law or laws of Illinois.

5 That said officers and agents in procuring stock to induce subscriptions, circulated said pamphlets and represented the statements in said pamphlets were true, that said Company had means to build said road from Racine to Savanna, that after building said road; depots, station houses and furnishing rolling stock, would have means enough to furnish rolling stock on the road between Freeport and Savanna; they owed no debt; issued no bonds; executed no mortgages, and did not intend to incur any debt or incumber the road or its property, and had no power to do so; had paid for all as they went; had only forty miles of the road built, and that the earnings of the road was paying over ten per cent above cost, that when completed to Beloit will pay twenty per cent, and out of their earnings the Company would pay the interest on the notes and mortgages, and eventually pay them off. That the avails thus raised should be spent only in building road from Freeport to Savanna.

5 That believing said representations, that said Company was not in debt, their property not incumbered, that they were able to aid in building and equipping said road from Freeport to Savanna, and

that they would pay the interest, and eventually the notes and mortgages, the said Joseph H. Smith, on the 22d day of March, A. D. 1856, did make and execute, and deliver to said Company, said note for six hundred dollars, bearing interest at ten per cent per annum, and a mortgage of the same date for same amount, to
11,12 secure the payment thereof. See schedule B. and G.

Pg 5 That said officers and agents represented said note and mortgage were a simple note and a common mortgage, in the old and common form. And the said Joseph H. Smith was induced by believing said representations to execute said note and mortgage without examining their contents. Whereas the statements so made were untrue; the Company did not possess the means shown by the pamphlet.

6 That the note and mortgage were not a common, usual and ordinary note and mortgage, but on the contrary contained clauses authorizing a sale of the premises without foreclosure, and without right of redemption, and that the execution of said note and mortgage was procured by fraud and circumvention, and for the purpose of building the road east of Freeport, contrary to the agreement and against equity and good conscience.

6 That the representation of the said Company that it had abundant means, and could and would protect said Joseph H. Smith from payment of any interest and from all loss by reason of giving said note and mortgage was untrue. And charges that said persons had much skill in said business of railroads, and well knew said Company had no right or authority to receive said note and mortgage on payment for State, and that said Joseph H. Smith was ignorant of the legal nature and effect of such transactions, and supposed the same was done in good faith according to law, and was in all particulars as represented.

6 That the said Company at the time the said Joseph H. Smith executed said note and mortgage, pretended it would issue a certificate of Stock, a copy whereof is attached to said bill marked (D.), but no such certificate was in fact ever issued, and complainants charges that said Company had no legal right or authority to take or receive such note and mortgage for stock subscription, or to issue such certificates of stock, and that those who have stock issued in a legal manner, claim that said Joseph H. Smith and others are not legal stockholders, and that said note and mortgage given for stock is illegal and void.

6,11 That schedule marked (B.) is a copy of said note, and that it has been the uniform practice of said Company in transferring notes and mortgages, to execute and attach to the same a writing or bond of the Company, called a coupon bond, guarranteeing to said holder the

payment of said interest semi-annually, instead of annually accord-
1,6 ing to note and mortgage; and that schedule (F.) is substantially a correct copy thereof, and claims that thereby such assignees or holders would derive and be chargeable with full notice of the nature of the transaction between said Joseph H. Smith, and said Company, and that said assignee, if any such, had notice of said frauds.

6 That said Company at the time of making said note and mortgage, and as part and parcel of the agreement to make the same, agreed to make and attach its bond to the said note and mortgage, and that said bond should be the principal debt, and the note and and mortgage merely pledged as collateral security for the payment of said bond, and that said note and mortgage could not and should not be transferred in any other manner, and that the same would only be sold in market in manner aforesaid, at par.

6 That said company obtained from said subscribers said notes and mortgages for the avowed purpose of aiding in building said road in Carroll, and to a very limited extent have done so, but in a large majority of cases have used said funds for other purposes, and that said company has not transferred said note and mortgage by any actual legal assignment; charges that if said note and mortgage are in possession of any other person, said person received and holds the same without any assignment thereof and merely as collateral security to the bond of said company and with full knowledge of all the equities of complainants.

6 That this note and mortgage was not for money loaned and bears interest at 10 per cent. per annum. Claims the benefit of laws relating to unlawful interest.

6&7 That said company pretends to act as a corporation by virtue of divers acts of the Legislature of the State of Wisconsin or the State of Illinois or both, but what particular acts complainants not advised, and also has had divers acts of consolidation with other railroad corporations, but whether authorized or not is not informed, except as hereinbefore stated. But since April, 1855, said company has assumed to act under the name of Racine & Mississippi Railroad, and has succeeded to the rights and incurred the liabilities, and has carried on the business and purposes of whatever company has been concerned in said road, and prays that said Racine & Mississippi Railroad Company may be made a party to said complaint.

7 Charges that at time of making said subscription and delivering said note and mortgage, and when transferred, if transferred said company under whatever name had no legal existence as a corpora-

tion, had not complied with the laws of the acts or laws under which it claimed to act, to authorize it to prefer the acts and proceedings aforesaid, and that said note and mortgage for this reason, are null and void in the hands of said company and of every other person.

7 That there was no such legal corporation having any right to take such notes and mortgages for the purposes aforesoid.

7 That the premises mortgaged are worth at least six hundred dollars, and the stock to be received was and is valueless.

7 That the stock will never be of any value on account of the frauds in obtaining said stock and the bad management of said company, and complainants are willing to surrender up any agreements or contracts for said stock or any certificates of stock that may have been issued.

7 Charges said company with combining with divers other persons, to defraud complainants, and that they decline restoring said note and mortgage or to cancel the same, and prays they, when discovered, may be made parties.

8 Prays that the said Racine & Mississisippi Railroad company and Alonzo Taylor be made defendants and that said note and mortgage may be cancelled, and that in the meantime this said company may be restrained from selling or assigning said note and mortgage or said bond or from collecting any interest on said securities.

9 Prays for a writ of summons and injunction, and that the said company and Alonzo Taylor may full answer make, answer under oath waived and that such decree may be entered in said case as prayed for.

Pg.1 Summons and writ of injunction issued on the 21st day of July, A. D., 1860. Returned served on both defendants by copy, July 23d, 1860.

SCHEDULES ATTACHED TO SAID BILL.

Exhibit C

1 Copy of agreement to pay interest by the company, and assignment of dividends by mortgages for that purpose.

Exhibit D

2 Copy of certificate of stock proposed to be issued by company.

Schedule A

31-41 Exhibits an annual report for the year 1855, and shows the company were not in debt; had made no bonds or mortgages, and had a surplus of funds amounting to $133,000.

SCHEDULE No. 1

Exhibits the articles of association of the Savanna Branch Railroad Company. By-law and resolution of the Board of Directors to consolidate with the Racine & Mississippi Railroad Company.

SCHEDULE No. 2

Articles of consolidation dated January 23d, 1856, between Savanna Branch & Racine & Mississippi Railroad Company.

11 Abstract of Title.

SCHEDULE B

11 Exhibits copy of note for $600, dated March 22d, 1856.

SCHEDULE G

12 Copy of mortgage dated March 22d, 1856.

SCHEDULE F

12 Form of bond and coupon.

EVIDENCE.

TESTIMONY OF PORTER SARGENT.

16 Has resided at Savanna the last twenty years; is acquainted with the history of the company known as the Savanna Branch Railroad Company mentioned in plaintiff's bill of complaint; says he drew up the original Articles of Association. The schedule attached, marked (A) is a full and correct copy of said Articles; says he assisted and obtained a large portion of the subscribers to the stock and was President; that schedule (B) is a correct and full copy of the list of original subsc.ibers of stock together with amount subscribed and the payment made thereon; that no copy of the Articles of Association with the affidavit of payment of the ten per cent. was filed in the office of the Secretary of State and that the ten per cent. was not paid.

16 In taking stock, affiant took with him a sufficient amount to enable him to nominally lend each subscriber the required amount to enable him to pay the ten per cent. This amount was then paid into affiant and was reloaned and returned as often as required.

16 Affiant further states, that there was actually paid in to him some four or five hundred dollars. and that one per cent. was intended to be paid and was generally paid.

SCHEDULE (A)

17-18 Exhibits original Articles of Association of the Savanna Branch Railroad Company, under an act of the State of Illinois, passed Nov. 5th, 1849, and entitled An Act to provide for a general sys-

tem of Railroad Incorporation, and a supplemental Act Approved Nov. 16th, 1849, and provides that when said articles of Association, when adopted and filed as provided in said several Acts, to be permanent and binding Articles of Association; said Articles dated 21st January, 1851.

Sec. 1st. The subscribers agree to pay one hundred dollars for each share subscribed to the Treasurer at Savanna, in such time and manner as the directors shall direct; provided that not more than thirty-three and one third per cent., including the ten per cent, shall be called for before 1st January, A. D., 1852 and sixty-two and two-thirds before 1st January, A. D., 1853, including previous instalments and the remaining thirty-three and a third per cent. during the year A. D., 1854.

Sec. 2d. Agree to become incorporated under said Acts, by the name of the "name of the" Savanna Branch *Railroad Company*, to construct a branch railroad from the town of Savanna, County of Carroll and State aforesaid, to intersect the Chicago & Galena Union Railroad in the vicinity of Freeport, Stephenson County Ill.

Sec. 3d. To be from 30 to 40 miles in length, and the cost of construction from three hundred to six hundred thousand dollars.

Sec. 4th. The western terminus to be at Savanna, Carroll County, Illinois, thence eastwardly through the Counties of Carroll and Stephenson, to intersect the Chicago & Galena Union Railroad at some point in Stephenson County, not exceeding fifteen miles from Freeport, at a point as shall be deemed by directors most advisable, after said company shall have permanently located their road.

Sec. 5th. The corporate existence to be fifty years from 1st January, A. D. 1851; capital stock to be three hundred thousand dollars, with privilege of increasing same to six hundred thousand dollars.

Sec. 6th. The directors to manage the company until the first named amount of capital stock shall be obtained or until others are chosen, shall be nine, and are Luther H. Bowen, John B. Rhodes, Porter Sargeant, Nathaniel Halderman, David Emmert, Henry Smith, Monroe Bailey, Norman D. French and Enoch A. Wood.

Sec. 7th. Commissioners for receiving subscriptions to stock, are Elias Woodruff, Cyrus Kellogg John L. Hostetter, John A. Melendy and Reuben W. Brush.

Sec. 8th. The company when organized to have all the power and privileges named in aforesaid Acts and subject to all the liabilities and conditions enumerated therein.

Sec. 9th. The company to have the privilege to intersect with the Galena Branch of the Illinois Central, between Freeport and Savanna if deemed advisable, and the Savanna Branch may terminate at point of intersection, with the privilege of building such portion of the Illinois Central, if not built before, reserving the right to permit the State or Company which may build said road between Savanna and Dixon to purchase the portion built by the Savanna Branch by adding ten per cent. per annum interest.

Sec. 10th. The Savanna Branch not to build any portion of their road until the Chicago and Galena Union Railroad Company shall have permanently located their road; or connect the same with the Illinois Central, or select some other route or the time has expired for the said company to complete their road.

SCHEDULE (B.)

19 Shows the names of the subscribers to the Savanna Branch; the number of members is ninety three; No. of shares taken (273); Amount of stock taken $27,300; Amount of notes taken for the nine per cent. $2457,00; Amount actually paid in, amounts to $395,00

TESTIMONY OF PHILANDER SEYMOUR.

21,23 Is well acquainted with plaintiffs and defendants; was the agent of the Company, and with George W. Harris took the note and mortgage set forth in complainants bill; that in the latter part of January or fore part of February, 1856, witness attended a railroad meeting at Mt. Carroll, which had been called at the instance of H. S. Durand, the President, and Marshall M. Strong, one of the Directors of the Racine & Mississippi Railroad Company, to take such steps as might be deemed most advisable for the building of the road from Freeport to Savanna. A large number of the citizens of Carroll county were present at that meeting, and Marshall M. Strong, William C. Allen and Thomas Turner, and some others of the directors and agents of said Company, made speeches; they stated they were building a railroad from Racine to Beloit; had or were about to make an arrangement to come to Freeport, and wanted to extend the road to Savanna; had built their road twenty-five per cent. cheaper than any other road in the West, and for one-third of the cost of building in the East; the reason they were able to build so much cheaper was, they had paid cash for everything; others had built on credit; had some thirty or forty miles built, and the road was paying over ten per cent.; this road was a much nearer road between the Mississippi and the Lakes than the Chicago & Galena or any other road which had been built between the Mississippi and the Lakes, and much nearer and better route to the Atlantic cities, and run through a better country and would pay more than the Chicago & Galena. He said it was not generally known how much or what enor-

mous profits the Galena road had paid; that the stockholders were realizing over sixty per cent. per annum; that the Racine road was not only a nearer route east, but five miles nearer Chicago by this route than by the Galena road; they had paid cash for all as they went along; did not want a dollar of our money, but would show us how to build our road and not cost us a dollar; that people were dubious about mere calculations.

But the Racine Company had ample opportunity to test their correctness. The people along the line loaned their credit by giving notes and mortgages; these would not answer the purpose to raise money upon, as the people were not known abroad, but with the bond of the Company, could be sold in market at a premium and enable the Company to pay cash for everything, and the people on the line owned the entire road free of incumbrances. The reasons there had been such large defalcations on roads was, they were built by foreign capital, which was not the case here; because each stockholder lived on the line, could see his money fairly applied and the road properly managed. There were no mortgages upon the road, and no occasion for any, as it was all paid for; there could be no trouble arising out of these notes and mortgages, as the road so far paid the interest from its earnings, and that our mortgages if speedily obtained would enable them to build the road in from twelve to eighteen months; we should assign over our share of dividends and the company would take care of these securities. He referred to and read a considerable portion of the pamphlet hereto attached, marked (A) being an annual report showing condition of road; also a pamphlet published by himself and hereto attached, marked (B.) After attending this meeting and conversing with the directors and agents of the company, witness become an agent of the company to procure notes and mortgages, and in company with Mr. Harris and Judge Wilson, procured large numbers. The statements above made were reiterated to the people—and that such men as bankers and merchants and business men generally had gone into this business. Mr. Harris and witness took the note and mortgage in question in this suit; cannot state all that was said to Mr. Smith, explained to him the way the business was done, only loaning his credit for a short time, the earnings would pay the interest, and road when completed would pay much more; the risk was trifling; iron alone would pay considerable, worth more than half; the road was not in debt, had been built and paid for; not a dollar of our money would be used east of Freeport; company would pay interest; he assigning to them his dividend; company would look after mortgage and eventually take it up, and he would be the owner of stock paying twenty-five or thirty per cent. per annum; the company abundantly able to fulfil its agreement. The Racine had consolidated with the Savanna Branch, and this consolidated company would build the road within eighteen months and his land would be worth twice its present value; was only loaning his credit,

so many business men would not go into it if there was any risk, convinced him of the correctness of our statements and he took six hundred dollars of stock and gave his note and mortgage; assured him it was only a common mortgage; would take a long time to foreclose and the company would take care of it; took a large number of these securities, and the above was the substance of what was told the parties; no exceptions unless where the parties had attended meetings and heard for themselves; witness and others engaged pursued this matter so vigorously as to obtain between seven and eight hundred thousand dollars of these securities in about eight weeks; the reason assigned for this hurry was to enable the company to complete the road to the Mississippi in time to take the crop of the ensuing year to market.

TESTIMONY OF MEDARD DUPUIS, TREASURER.

24 Was Treasurer of the so called "*Savanna Branch.*" The whole amount of percentage paid in on said stock, amounted to the sum of four hundred and eighteen dollars.

TESTIMONY OF ELIAS WOODRUFF.

24 Witness with Cyrus Kellogg, John L. Hostetter, John A. Melendy and Reuben W. Brush, were commissioners to take stock in "Savanna Branch" Railroad Company; said board never met as a board or took any action upon the subject in any form or shape, and that any stock by any person or persons was without the knowledge or consent of said board—never any one authorized to take stock for them in said company or to do any other act in the premises.

TESTIMONY OF JOHN A. MELENDY.

25 Was one of the commissioners to take stock in the Savanna Branch Railroad Company; said board never organized; never took any stock nor authorized any one else to do so or to do any other act in the premises.

TESTIMONY OF JOHN KINEWALT.

25,28 Was director in Racine & Mississippi Railroad Company three years, and until company ceased to elect, elected in 1857, notes and mortgages by farmers, created expressly for sale in the market in connection of bond of company and as collateral security thereto; and that they could not and would not be sold in any other manner; pamphlet marked (A) published and supplied to agents to aid them in sale of these securities by explaining their true character to purchasers; pamphlet (B) is an annual export, shows the true condition of the road for that year; was acquainted with the facts in the sale of securities to Daniel P. Holt, a director in said consolidated company; cannot state amount; thinks some thirty or forty thousand dollars; after it became impossible to sell them, Holt procured an

order of the board to permit him to settle debts of company with these securities at seventy cents on the dollar, he then disposed of them at a much larger price, and obtained the credit for this increased price; made no other purchase that witness is aware of; by this means became the owner of several thousand dollars of these securities. When Durand and others came to induce the farmers to go into this arrangement, only wanted to loan their credit, and for a short time; road would pay them up in five years, beyond a doubt one half of it; were building for cash and much cheaper than any other road, and no incumbrances upon it; best and most reliable basis to build upon; after larger share of mortgages had been obtained; witness learnt the company had or were about to mortgage the road for ten thousand dollars per mile; was surprised; enquired the cause; told that it was only temporary expedient until mortgages could be sold; no intimation ever given to farmers the road would be mortgaged; on contrary were assured over and over again; they would be the owners of the road free from incumbrance; not a dollar to be used east of Freeport; but soon as obtained, these notes and mortgages were disposed of to pay for chairs, spikes, and locomotives and other materials in construction and use east of Beloit, much the larger share was used to pay indebtedness previously accrued east of Freeport. Not far from four-fifths road has been delivered over to first bond holders, under an agreement to finish to Freeport; earnings to be applied in extinguishing that indebtedness; cost something over three hundred thousand dollars; this money and that from bonds and mortgages was all expended east of Freeport; not only has this company applied the greater share of the notes and mortgages in building road east of Freeport; but the road from Freeport to Savanna is not built and is mortgaged for the sum of seven hundred thousand dollars. The indebtedness of company for construction of road is over five millions of dollars; portion of which has been paid by notes and mortgages and other ways; has done nothing towards building road for three years; has no funds, and the stock is not and was not at the time of taking notes and mortgages of any value as the bond and mortgages on the road was for a greater amount than the value of the road; farmers were assured at and before the time of giving mortgages, company did not owe a dollar; that the iron and equipage of the road were things of so much value that it would, if necessary, pay a considerable portion of the indebtedness; could be no possible chance of loss from entering into desired arrangement.

TESTIMONY OF JACOB P. EMMERT.

28 Is acquainted with the company called the Savanna Branch Railroad Company, and with its attempted consolidation with the Racine & Mississippi Railroad Company. About the first of January, A. D., 1856, a subscription to stock of Savnuna Branch was got up to the amount of from seventy-five to one hundred thousand dol-

lars, by persons outside of the company. The avowed object of this subscription was to outvote those who were supposed to be favorable to the Chicago & Galena Railroad Company and opposed to consolidation with the Racine & Mississippi Railroad Company. Witness voted on three thousand dollars of this fictitious stock; cast thirty votes for Mr. Durand as director, and who was at the time of election, President of the said Racine & Mississippi Railroad Company; that this election and the consolidation was effected by means of this fictitious stock.

TESTIMONY OF RICHARD J. TOMPKINS.

29 Is acquainted with the so-called Savanna Branch Railroad Company and its consolidation with the Racine & Mississippi Railroad Company; on or about January 1st, 1856, witness at solicitation of John Wilson, procured stock subscriptions to this company, and told the people it was for the purpose of "*out-voting*" those in the Savanna Branch supposed to be favorable to the Galena Company and opposed to the proposed consolidation, and that it was for this purpose alone, and should not be used afterwards; cannot state amounts; raised somewhere between seventy-five and one hundred thousand dollars; Mr. Durand was elected Director of the Savanna Branch Co., and afterwards President by means of this fictitious stock, and the consolidation was effected and carried by said means.

TESTIMONY OF GEORGE COLE.

30 Was present at the sale of the note and mortgage in question by Mr. Holt to Mr. Taylor, one of the defendants in this case; it was in the fall of 1858; Mr. Taylor knew this was one of the notes and mortgages given to the Company to be sold with its bond; Mr. Taylor had previously given a note and mortgage of the same kind of one thousand dollars on his own farm, and took the note and mortgage in question in payment for the balance due on sale of his farm to Holt; Mr. Holt told Taylor his mortgage would have to be paid, and persuaded him to give a deed of his farm to pay his own mortgage, and to take this of Smith's in payment, leaving a balance due Taylor of about sixty dollars; Taylor still lives on the farm.

SCHEDULE (A) OF PHILANDER SEYMOUR'S DEPOSITION.

31,41 A review of the Racine & Mississippi Railroad project by Marshall M. Strong, a director, gives the length of the road, its probable cost, amount of earnings; that it had been built for cash; the stock represented cash actually paid in; that there were no incumbrances upon the road, and that it would be a stock paying twenty-five per cent., and would not cost exceeding $3,400,000.

SCHEDULE (B) OF PHILANDER SEYMOUR'S DEPOSITION.

40,41 An annual report for 1855 —shows the company paid in cash for all as they went along; that the total estimated cost of the road from Racine to Beloit, 68 miles, was twelve hundred and ninety-two thousand dollars, and the subscribed capital stock *bona fide*, amounted to $1,425,000, and that no mortgage or other liens exist upon any portion of the property of the company, and no bonds had been issued.

SCHEDULE (C) OF JOHN RINEWALT'S DEPOSITION.

40,41 Is a pamphlet showing the form and nature of these securities, the amount of capital stock, and what it consisted of; these pamphlets were furnished by the Company to agents to aid them in making sales and to *explain the character of these securities to purchasers.*

SCHEDULE (B) OF JOHN RINEWALT'S DEPOSITION.

40,41 Is an annual report for 1858, showing the operations of the Company, and that the indebtedness of the Company was then $4.992,472.87, and not over two-thirds of the road built; that not over forty thousand dollars of capital had ever been paid in, and that these securities which were to bring a premium, were without any defined value at home or abroad, and as means relied upon to build the road were entirely inadequate for that purpose.

MORTGAGE OF ROAD—COPY OF.

41,45 The road west of Freeport mortgaged, June 2d, 1856, for $700,000—filed for record, July 2d, 1856.

COPY OF STIPULATIONS FILED.

STATE OF ILLINOIS } ss. CIRCUIT COURT OF JO DAVIESS COUNTY,
JO DAVIESS COUNTY. } MARCH T., 1861.

Elizabeth Smith, widow and relict, and Mary Smith, Augustus Smith, Susan Smith and Albert Smith, children and heirs-at-law of Joseph H. Smith, dec'd, by their next friend, Jacob Boyn, *vs.* Racine & Mississippi Railroad Company and Alonzo Taylor.

46 It is hereby stipulated and agreed, by and between the respective counsel in this case, that a judgment may be entered *pro forma* for the defendants, as upon bill, and answer, denying every material fact alleged therein and replication thereto; that the evidence herewith filed is all that either party desired to take, and is the full and entire evidence in said cause, and upon which the cause is to be decided in this court, and in the Supreme Court of the State of Illinois, upon an appeal or writ of error, as the plaintiff's solicitors shall elect to take, and if an appeal is taken, Lyman E. D'Wolf is approved of as security.

It is further stipulated that the bill, or answer, or replication, or either or all, shall be considered as drawn out in proper form, and either of said instruments may be drawn or amended at any time, either in the Circuit Court or in the Supreme Court of the State, so as to conform to the facts proved in this case, and thus to enable either or both parties to present to the said court on the final hearing the true issues between the parties, either in law or upon the facts, and without unnecessary costs or trouble to the parties so amending.

D'WOLF & SCATES, Complt's Sols.

MARCH 13, 1861.

WILSON & FLETCHER, Def'ts Sols.

STATE OF ILLINOIS, JO DAVIESS COUNTY, } ss. CIRCUIT COURT OF JO DAVIESS COUNTY, MARCH T., 1861.

Elizabeth Smith, et al., *vs.* Racine & Mississippi Railroad Company, and Alonzo Taylor.

BILL TO SET ASIDE NOTE AND MORTGAGE.

13 MARCH 13, 1861. It is hereby further stipulated that the pamphlet marked (A,) and attached to Philander Seymour's deposition, is the same marked (A) in the original bill, and may be used and referred to and considered as attached to the original bill; also, that the pamphlets, in a bundle, published by the Racine & Mississippi Railroad Company, purporting to contain the Savanna Branch charter, or articles of association, the statutes and by-laws and other proceedings of the Savanna Branch and of the Racine & Mississippi Railroad Companies, are genuine, and contain the articles of association, laws and by-laws and other acts and proceedings of the said respective companies, and also the charter of the Racine & Mississippi Railroad Company, and the amendments and other acts and proceedings relating to said company, and that both of said pamphlets may be used and referred to as authorities, without further proof, either in the in the Circuit Court or in the Supreme Court, no objection to be made to the same or any part thereof by either party.

DEWOLF & SCATES, Sols. for Compl'ts.
WILSON & FLETCHER, Sols. for Deft's.

13 It is agreed that no dividends have ever been paid on certificates of stock; it is also agreed that the note and mortgage (No. 1301) and dated March 22d, 1856, given by Joseph H. Smith and wife to the Racine & Mississippi Railroad Company, and that the note has not been endorsed by the company, and that the same may be used without further authentication.

DEWOLF & SCATES, Sols. for Compl'ts.
WILSON & FLETCHER, Sols. for Def'ts.

MARCH 13, 1861.

13 It is also stipulated and agreed that there was a summons issued in the foregoing case of Smith et al vs. Racine & Mississippi Railroad Company and Alonzo Taylor, in the Jo Daviess Circuit Court, and that the same was duly served upon defendants, but that summons has been mislaid by counsel, but the attaching the copy of the same to the record to be certified to the Supreme Court of this State is hereby waived; the appearance of the Attorneys on both sides is hereby authorized, and the issuing a *scire facias* or other process for compelling attendance of the said defendants in the Supreme Court on this appeal, is hereby waived also.

DEWOLF & SCATES, Sols. for Compl'ts.
WILSON & FLETCHER, Sols. for Def'ts.

MARCH 9th, 1861.

DECREE.

14 On the 14th day of March, A. D., 1861, under the stipulations herein before filed, cause came up for *pro forma* hearing, and it is ordered by the Court that the bill herein be dismissed in accordance with stipulations on file, and that the complainants pay the costs herein, and that execution issue against them therefor, and the complainants by their solicitors, pray an appeal to the Supreme Court, which is granted conditioned that they enter into, and file with the clerk of this Court within forty days from this date, a good and sufficient appeal bond with Lyman E. D'Wolf as surety in the sum of four hundred dollars.

15 Bond filed April 11th 1861—and

14 Appeal taken.

ERRORS ASSIGNED.

And the complainants by their solicitors assign the following errors, to-wit:

The Court erred in dismissing the complainants bill, and in rendering a decree for the defendants, and against the plaintiffs.

1st. There was no incorporation of the Savanna Branch Railroad Company, and no power in said Company to take said notes and mortgages and to transfer the same.

2d. The said Savanna Branch Company was not legally consolidated with the Racine & Mississippi Railroad Company.

3d. The execution of the note & mortgage was procured by circumvention and fraud.

4th. The notes and mortgages were obtained by means of fraudulent representations on the part of said Company as to having abundant means and not owing any indebtedness, when the said Company were insolvent and about mortgaging the road to its full value.

5th. There has been an entire failure of consideration and the purchaser had notice of the character of said notes, and the want of consideration at the time of making his said purchase.

6th. For the reasons above assigned, the Court should have rendered a decree in favor of the complainants to cancel the note and mortgage.

7th. Errors appearing upon the face of the proceedings and not hereinbefore particularly mentioned.

DEWOLF & SCATES, Sols. for Complainants.

147 Abstract - 197

Supreme Court of Illinois

Third Grand Division

April Term 1861

Elizabeth Smith et al. Plaintiffs in error

vs.

Racine & Mississippi Railroad Company and Alonzo Taylor Defts in error

Filed Apr. 25 - 1861

L. Leland

Clerk

1861

12 5

IN THE SUPREME COURT OF ILLINOIS.

April Term of the Third Grand Division, 1861.

ELIZABETH SMITH, ET AL., PLAINTIFFS IN ERROR,
vs.
RACINE & MISSISSIPPI RAILROAD COMPANY, ET AL., DEFENDANTS IN ERROR.

BRIEF.

POINTS AND AUTHORITIES FOR COMPLAINANTS.

1st. The right to build the Racine & Mississippi R. R. through Carroll County depended upon the consolidation with the Savanna Branch Railroad. That Company never paid the ten per cent. required by the act; did not fix the terminus of the road; were never legally incorporated, and had no right to build the road, to acquire the right of way or to make any binding contract connected therewith. 1st, 2, 3 and 4 Sect., Act 1849-and 5[illegible], Page 18, Pamph. L. 1849-51

Also Sec. 21st, Art. 7.
1 Sandfords N. Y. Ch. Rep. P. 179.
Pierce on Railways, 64.
1 Caines Cases, 86,
1 Caines Rep. 381.
8 Serg. and R. Rep. 219.
Angel & Ames, 75.
10 Wendell Rep. 266.

2d. The consolidation was not legal, for the reason, that no line of road was determinad upon or set forth in the Articles of Association and the attempted consolidation was effected by fraud. 1st Shelf R. 159, 160.

3d. The note and mortgage was given to the consolidated company, and not to the Racine & Mississippi Railroad Company of Wisconsin. This Company not being the party by whose order said note and Mortgage were payable, could confer upon the purchaser

a title only as against themselves, but not the legal title for the reason that said Company was not the payee and grantee in said note and mortgage.

Bailey on Bills, P. 111, 115.
Mead vs. Young, 4 T. Rep., P. 28.
Talbot vs. The Bank of Rochester.
Canal Bank vs. Bank Albany, 1 Hill, 287.
Story on Bills, Sec. 457 and cases cited.
N. Y. Rep., Vol. 17, Page 208, Smith 3 Vol. P.

4th. The note and mortgage of the party, and the bond and agreement of the Company are one entire transaction, and the Company being only authorized to build a road by stock subscriptions must in substance at least pursue that mode, they could not under cover of this grant of power become brokers and dispose of their stock for any commodity other than money, nor could they enter into any contract which would divert the funds subscribed for stock to build the road by one class of subscribers to the payment of interest grown due on obligations given for stock by another portion; such a contract is not in substance nor effect a subscription to stock, but was an usurpation on the part of the directors, and a gross fraud upon the cash subscribing and cash paying subscribers. The contract being illegal, the certificate of stock, note, mortgage and other contracts were illegal and void.

Redfield on Railways, Page 7, Sec. 18.
Hodges on Railways, Page 71, 72.
5 Barbour N. Y. 613.
4 Peters 152.
1 Cowen 686.
Angel & A. 97, Chap. 8.

The note is not of such a character, and the defendant not such a holder as to prevent complainants setting up any defence which could be set up against the Railroad Company, besides the note being payable to order and not endorsed, the defendant Taylor is not entitled to hold the same discharged of the equities between original parties. He could acquire the legal title only by endorsement.

Bailey on Bills, 101, 102, 2 Ed.
" " " Chap. 5, Sec. 1st, P. 120, 15 Ed.
Story on Bills, Sec. 199, 201.
Story on Prom. Notes 135, Sec. 120.
Chitty on Bills, Ch. 6, P. 259, 12 Ed. 1854.
Byles on Bills.
Gibson vs. Mint, 1 H. Blacks. 605.
Clark vs. Sigourney, 17 Com. 511.

2 Bibb, 83, 2 Brock-20.
7 Moss, 479, 6 do 386, 16th do 314.
15 Ill. 364, Ryon vs. May 14 do 49.
6 Bacon Ab. P.-792.
Douglass (Eng.) 613.

Where there is an assignment without endorsement the holder thereof acquires the same right, only as he would acquire upon the assignment of a note not negotiable.

A promissory note is a courier without luggage, 3 Barr Pa. R. P

Could not carry the out giving notice of the equities appearing on the face of the whole of the papers.

Mortgage and bond of the company attached with=

2. The unusual form of the note and its attachment to the bond of the Company, with the mortgage, was sufficient to put the purchaser on enquiry. It is not in the form of commercial paper, but somewhat that of a bond payable to a railroad corporation, not endorsed and having five years to run. The rule is that he who ought to suspect is bound to enquire.

3 Kent Com., 6 Ed., Page 79, Story on Prom. N. 470, see notes, also 81 and 81.
3 Kent Com. 9 Ed., P. 101, 2, 3, 4, Page 80, Mamp and cases cited.
Pringle vs. Philips, 5 Sandf. 157 and cases there cited.
Hall vs. Hale, 8 Com. R. 336.
Cone vs. Baldwin 12, P. 452.
Ayer vs. Hutchens 4, Moss 273.
Holmes vs Shoupas 5, Brim 469.
Sandford vs. Morton 14, Ver. 228.
Tappan vs. Ely, 15 Wend. 363.

The purchaser had actual notice of the equities of the complainants.

When a mortgage is obtained by the misrepresentation of the mortgagee, and it is immaterial as to its legal effect upon the instrument whether the mortgagee at the time he made the misrepresentation knew it to be false. If he made a statement of facts knowing it to be false it would be a legal fraud, if he did not know it to be false it operated to deceive the other party, it would avoid the mortgage.
6 Gill and John. 54.

An act incorporating a Railroad Company is a public act, affecting as it does public, rights and a purchaser knowing how these notes had been acquired or the objects for which they had been given, could not be a purchaser without notice.
Sedgwick on Statute and Constitutional Law.

East Anglian R. R. Co. vs. Eastern Counties.
7 Eng. L. & Equity R. 505.

The act under which the Savanna Branch Railroad Company was formed is a public act. See Pamphlet Laws 1849. 57 Page 18.

The said Joseph H. Smith under whom complainants claim title, never became a member of the corporation because he never subscribed for stock in the manner required by the charter, hence, never incurred any liability to the corporation or become entitled to any of its benefits.

Pierce on American R. R. Law, p. 58.
Charlotte & South Carolina R. R. Co. vs. Blakely, 3 Strob. 245.
Troy & Boston R. R. Co. vs. Tibbells 18 Barbour, 297.

The act contemplates only one kind of Stockholders and only one kind of capital stock. The rights, interests and liabilities of the stockholders are the same, and therefore the stock must be the same; the certificates of stock should be uniform. The stock agreed to be delivered to Joseph H. Smith was not under the contract with the company, the stock as contemplated by the charter, and was therefore void, and did not constitute any consideration; the company were not authorized to sell their stock, nor were they authorized to create bonds to be attached to the notes and mortgages of other parties, and to become brokers for the sale thereof. Its stock could only be acquired from them by subscription. The company were expressly prohibited from dealing in its own or any other company's stock. (Sec. 13.) Act 1849. 57 Page 18.

5th. The agreement between the Racine & Mississippi consolidated R. R. Company and the said Joseph Smith, by which said company were to deliver to said Smith, six shares of its stock in exchange for his note and mortgage; was in contravention of the provisions of their charter and of the law of this State, and was therefore wholly inoperative, illegal and void.

See 1st & 5th sec's of General Act, Page.
See Jenkins vs. Union Turnpike Co., Caine's Cases 86.
Crocker vs. Crane, 21 Wendell, 211
Ogle vs. Somerset & Mt. Pleasant Turnpike Co. 13 Serg. & R. 156.
Leighty vs. the President, Managers & Co. of the Susq. and Waterford T. Co., 14 Serg. & R. 434.
Maybin et al vs. Coulon, 4 Dall. 295.

6th. A corporation being the creature of positive law can only make such contracts as are expressly authorized by its charter or are directly or indirectly necessary to carry the purposes of the charter into effect.

3 Kent Comm. 9 Ed. 298. 364.
1 Story on Contracts Sec. 317, 4th Ed.
Parsons on Contracts 120, 3d Ed. (Dd.)
Angell & Ames on Corp. 5 Ed. Sec. 256, 375.
Jenkins vs. Union Turnpike Co. 1 Caines in Error 85.
The people vs. Utica Ins. Co. 15 John. Rep. 357.
North River Ins. Co. vs. Lawrence, 3 Wend. 483.
Beach vs. Fulton, 3 Wend. 583.
The Life & F. Ins. Co. vs. the Mech's Ins. Co. of N. Y. 7 Wend 31.
Hodges vs. the City of Buffalo, 2 Denio 110.
W. Cullough vs. Mass. 5 Dan. 567.
The Auburn & Coto P. Road Co. vs. Douglass, 5 Seld. 444.
Thompson vs. Schemmerhorn, 2 Selden 92.
Halstead vs. Mayor New York, 3 Carns 430.
Sutton vs. Cole, 3 Pick. 232.
Salem Mill Dam Co. vs. Ropes, 6 Pick. R. 32.
Stetson vs. Kempton, 13 Mass. 272, 278.
N. Y. Fire In. Co. vs. Ely 5 Conn. 558.
Hood vs. the N. Y. & N. Haven R R Co. 22 Conn. 501.
Leggett vs. the N Y Manf. & Bank Co. & Saxton Ch. Rep. N Y 369.
Fisher vs. Coyle, 3 Watts 407.
The Pa. & Del. & Md. St. Nav. Comp. vs. Doud 8 Gill & John. 248.
The City Council of Montg. vs Montg. & Wetumpka P. R. Co., 31st Ala. R. New Ser. 76.
State of Ohio vs. Wash. Lib. 11th Ohio 96, 1 McLean 43.
Dartmouth College vs. Woodward, 4th Weat. 636.
Bank of the U. S. vs Dandridge, 12 Wheaton 64.
Head & Amory vs Provd. Ins. Co. 2 C ranch 127.
Bank Augusta vs Earl, 13 Peters 518. (277 condensed.)
Perine vs Ches. & Del. Can. Co. 177, (condensed 82)
Beatty vs Knouler, 4 Peters 164 (36 cond.)
Charles River Bridge vs Warren Bridge, 11 Peters 496, (536 condensed.)
The Gov. & Comp Copper Mines vs Fox et al, 3 Eq. L. & Eq. R. 420.

7 Eng. L. & Eq. R. 505.
8 " " " " " 487.
12 " " " " " 224.
13 " " " " " 506.
16 " " " " " 180.
29 " " " " " 585.
30 " " " " " 120–143.

Again, a corporation deriving its existence and capacities from the express grant of the Legislature, it can assert no other than

those conferred and such as were not given it is to be presumed the Legislature intended to withhold.

Pierce on R., p 9.
2 Kent, 298.
Watertown P. R. Co. vs Madison P. R. Co., 5 Wis.

Again, the company has no power to traffic in real estate except for the necessary use of the company, such as for the line of its road, station grounds, &c.

Pierce American R R law, 13.
Overmeyer vs Williams 15 Ohio R. 26.
State vs Newark, 1 Dutcher 315.
Norfolk R. R. Co. vs Mayor of Norwich, 30 Eng. L. & E. 120.

If the taking of real estate in exchange for stock was authorized, the company might acquire real estate to an enormous and wholly unnecessary amount, and instead of being a Railroad Company they would became dealers in real estate. That the company intended this, for ~~one reason~~ Assessors of the law is apparent upon the face of the transaction; that it cannot do indirectly what it is prohibited doing directly is too well established to require the citation of authorities. The provisions of the charter are contained in Sec. 4th, Sec. 21st, Art. 2d & 3d, Sec. 22d. Pamphlet 1849-57 Page 15.

The certificate of stock agreed to be delivered to the said Joseph H. Smith, had no legal value and he received and could not legally receive any value for the making of said note and mortgage.

He could not enforce the collection of any dividends from the company, on the stock, for any stockholder could enjoin the company from paying any demands upon it; the issuing of the stock for mortgages and the accompanying contract being a fraud upon the cash stockholder's rights, and destruction of the objects set forth in the charter.

13 Eng. L. & E. 506.

The proposed certificate of stock on its face shows that it is not a certificate for stock paid for, and is not assignable except subject as expressed by the contract to the reservation therein mentioned, and although it says that he is entitled to six shares of the capital stock, it at the same time shows on its face that no such stock was to be delivered to him, and while the note and mortgage if legal would have to be paid, the holder of this stock could not transfer it for the reason of the notice appearing on its face.

7th. The said Joseph H. Smith and those claiming under him have received no consideration whatever for the note and mortgage given, and if there is any value in the proposed certificate which was to have been issued, the complainants propose to surrender it or to have it cancelled as well before as on the last.

No dividends have ever been paid by the company or received by the said Smith, or these complainants and the certificate if issued is worthless in their hands.

The complainants are not precluded from setting up the defence of the illegality of the transaction.

4 Kernan 191 Tracy vs. Talmadge.

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In the Supreme Court
Third Grand Division
of Illinois
April T 1861

Elizabeth Smethurst
Plff in Error
vs
Racine & Mississippi
Railroad Company &
Alonzo Taylor
Defts in Error

1496

Brief for
Complt

1

Smith et al Plaintiffs in Error,
vs
Racine & Mississippi Railroad Company
et al, Defendants in Error

In the Supreme Court
of the Third Grand
division at Ottawa
April Term — 1861

Arguments for Defendants

May it pleas the Court

I do not desire to say much in the present case, nothing more than a brief Statement of the facts and references to a few leading authorities. The Racine and Mississippi Railroad Company were building a railroad from Racine to Freeport and by a consolidation with the Savanna Branch Railroad Company undertook to build the balance of the road from Freeport to Savanna, as is shown by the articles of Consolidation attached to plaintiffs bill of complaint Joseph H Smith under whom Complainants claim, after that Consolidation subscribed or paid for six Shares of Stock in said Company by giving the note and Mortgage Mentioned in this suit

Now this suit was brought to set aside said Note and Mortgage as we understand for the following reasons

First, It is Claimed there was no incorporation of the Savanna Branch Railroad Company

Second— The attempted Consolidation was effected by fraud.

First— The said Railroad Company have no power to take any such notes and Mortgages and to issue Stock therefor.

Fourth— The notes and Mortgages were procured by fraud.

Eighth— The execution of the note and mortgage was procured by Circumvention and fraud

Sixth— There has been an entire failure of Consideration

As to the first and second we reply that the said Joseph H Smith was one of the Stockholders in said Corporation and now the one that is to blame, if the allegations are true there was at least an usurpation on the part of those claiming to be a corporation and the said Joseph H. Smith recognized the existence of said Corporation by giving his note and Mortgage and entering into said Contract with said Corporation Those who claim under him ought to be permitted to set aside these obligations on that ground. But against it is said the Railroad Company had no power to take any such note or Mortgage or to enter into a contract to pay the interest on these obligations and to issue

certificates of Stock for the same I see nothing in the Charter to prevent it, and there are authorities certainly which will sustain the position that the Company could receive a note and Mortgage in payment for Stock. In the Railroad Case vs Hickman 28 Penn St. Reports 318 it is expressly decided that provisions of the Statute concerning the powers of the Commissioner to take Stocks are not applicable to the acts of the company after it is organized and that under the general power to prescribe the manner of Paying for Stock and to make Contracts &c. It may take payment in labor Materials or anything necessary for the building of the road. In the Case of Case vs Le Fever 27th Penn St. Reports 415 it was held that a transfer of Bond to be delivered for the purposes of the corporation was a good payment for Stock In Brown and Brothers vs Illinois Co. 24 Ill. the entire Stock of the corporation had been paid for in Real and Personal Estate necessary for the use of the company the Court below charged that it was a valid payment and though the Supreme Court did find it necessary to decide the point they say they are strongly inclined to think there was no error in the point and in the case of Peaslee and another

Salisbury Manufacturing Company and others
4 Gray 406. It was held that where the
circumstances of an existing corporation
justifies the sale of an entire property its
taking payment in the stocks of a new corpo-
ration did not render the transaction illegal
the Court said the new stock is taken in
lieu of money to be distributed among those
stockholders who are willing to receive it or
to be converted into money by those who do
not desire to retain it and in Madison & Lake
Road Company vs Watertown & Plank Road
Company 5 Wisconsin R, 173, it was held
that a Corporation is not restricted to the
means either used or granted but may
select those convenient adapted to the
end though unusual and not absolutely
necessary. It was a Plank Road Company and
its Charter gave it no power to loan money but
the Court say that it had been fit to make a
loan to one of its Contractors to enable him to
complete his contract though unusual it would
have been a legitimate means of exercising the
to build the road Now these authorities show that
a company may not only transact its business
in the usual way of transacting business but
it may adopt those convenient and adapted
to the end though unusual and not absolutely

necessary and that property or labor or anything which answers the objects and aims of the Charter in aiding the construction of the road may be taken in payment for Stock and is legal and if the transaction does not amount to an entirely independant branch of business it would be an authorized transaction under the Charter

The notes and Mortgages were a direct payment to the Company and enabled it to realize its means much sooner than it could by Subscription Payments This objection in taking notes and mortgage for payment is not therefore valid

As to the objection that the notes & Mortgages were procured by fraud we can only answer that the Company was probably like most other Companies extremely importunate and made some bad calculations but Mr Smith was one of the parties in fact one of the Company who put this paper off and Mr Taylor has bought it in good faith and paid full value for it and before it was due he had no such notice of the character of the paper or of the condition of the Company at the time of taking this paper as would preclude him from a recovery on the notes

these fairly purchased and Mr. [illegible]
=ed him as the agent of the company and
therefore the agent of Mr Smith that the
securities were good and would have to be
paid
As to the objection that the execution of
Note and Mortgage were procured by fraud
there is no proof that the representations
applied to anything but the Mortgage
This objection will not therefore avail
the Complainants
But it is said there is an entire failure of
the Consideration in not building the road
The Defendant Taylor was however a pur-
=chaser in good faith and before the Note
fell due, and although it was not endorsed
it was assigned by the Bond of the Com-
=pany and Taylor was in equity entitled
to have it endorsed he cannot therefore
be affected by a mere omission on the part
of the company to do what the Company
ought to have done at the time of sale
and which under the sale of of these secu=
=rities they could be compelled to do
In conclusion therefore it is claimed
that Taylor is a holder of this paper for
full value and before it was due and
that therefore the complainants shou

take nothing by Plaintiff and Consequently for the reasons above assigned the Judgment of the Circuit Court ought to be Confirmed

All of which is Respectfully Submitted

Wilson & Gilchrist

Solicitors for

Complainants

Racine & Mississippi
R. R. Co. et al. Defts. in Error
vs
Elizabeth Smith et al
Plaintiffs in Error

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Argument for
Defendants

1861

Filed May June 1st 61
L. Leland
Clerk

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