

No. 13177

Supreme Court of Illinois

Griswold

vs.

Bd. Trustees of Peoria University

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

69-
No. 205.

*Griswold
vs
Trustees*

1867

264

Ref. 111

*Page
Lead
Run*

STATE OF ILLINOIS,
IN THE
SUPREME COURT,

OTTAWA TERM, A. D. 1861.

JOHN L. GRISWOLD, <i>vs.</i> THE BOARD OF TRUSTEES OF PEORIA UNIVERSITY.	}	<i>Appeal from Peoria.</i>
--	---	----------------------------

ARGUMENT OF JOHN D. ROUSE,
FOR THE APPELLANT.

PEORIA, ILL.:
BENJ. FOSTER, PRINTER AND BOOKBINDER, MAIN ST.
1861.

STATE OF ILLINOIS, ss.

{ IN THE SUPREME COURT,
Ottawa Term, A.D. 1861.

JOHN L. GRISWOLD,
vs.
THE BOARD OF TRUSTEES } *Appeal from Peoria.*
OF
PEORIA UNIVERSITY. }

ARGUMENT OF JOHN D. ROUSE,
FOR THE APPELLANT.

This was an action brought upon an alleged subscription by the appellant, of six hundred dollars, "for the erection of buildings and defraying the expenses of putting in operation the College of the Synod of Illinois, at Peoria;"—for a balance of three hundred dollars claimed to be due thereon.

Several important questions arising in the case, meriting consideration, it is proposed briefly to examine.

Is there such a corporation as the plaintiff? No acceptance of the Charter by the corporators, was shown. The charter runs to the corporators named, only; and not to their associates and successors. The records offered to prove an organization under the charter, were not original. No loss of the original was shown, nor was their non-production accounted for. The witness testifying upon that point did not know whether those offered in evidence were even copies of the original record, or not. The first meeting was in March 1855. The suit was commenced in 1859, and the evidence shows that the records produced were not copied from

the original a year before the suit was brought. They were copied from, or more probably written from recollection of the original, three years or more after the original record of the first meeting was made. The evidence shows an appointment of a Secretary at said first meeting. His duty was to record the proceedings thereat, and in the absence of any proof to the contrary, it is reasonable to presume that he performed that duty. The appellees profess to produce a copy of the record so written by the said secretary, and the court below admitted, contrary to law, such alleged copy, without proof of the loss of the original, or that it was in fact a copy.

Such alleged copy, so admitted, against objections, shows that but *fourteen* charter members were present at the first meeting: and the adoption by them, of rules, regulations, &c. The number of corporators is *thirty*. An acceptance by a majority, in their associate capacity, was absolutely necessary; yet this was not shown. (*Angel & Ames on Corporations*, 67, 68.)

The instrument which is the foundation of this action is not the original subscription of the appellant. In the language of a witness, it is a copy of a copy. The name of the appellant is the second on this subscription paper. Dr. Rouse testifies that he copied the first eight names thereon, in order to show them and get subscriptions. The subscription paper produced should have been excluded from the jury. It was but secondary evidence. No rule is better settled than that the best evidence the nature of the case will admit of must always be produced. The best evidence of the terms of a written contract, is the writing itself. A foundation therefor must be laid, before secondary evidence can be admitted. No foundation was laid in this case.

Is it contended that because the appellant did not deny its execution, under oath, he could not object to the introduction of this paper, in evidence? The rule requiring such denial of the execution of an instrument, being the foundation of an action, does not apply in this case. The appellant does not deny a subscription for the purposes aforesaid, but insists he has paid such subscription. He had a right to demand the exclusion of an instrument, shown

to be a copy, not of the original, but of another copy, when the non-production of the original was not accounted for. Yet the Circuit Court admitted such copy, and instructed the jury that the appellant, not having denied its execution, under oath, was not entitled to dispute it, and refused to instruct them, that the best evidence of the contents of a written contract or subscription is the original writing or subscription itself: and that if they believed from the evidence that the subscription list offered in evidence was not the original, but a copy thereof, and that no loss or destruction of the original was shown, that the copy itself is not evidence of a subscription being made by the defendant below.

Mr. Smith, a witness for the plaintiff below, says there were several other papers that had the appellant's name copied on them. Under the ruling of the Court below, a recovery might be had against the appellant, on each of them.

The subscription was not payable to the appellees. The subscription was evidently for the benefit of the College of the Synod of Illinois, at Peoria. If there is a patent ambiguity in the description, it cannot be explained. (*Dougherty v. Purdy*, 18 Ills., 208.)

There was no proof showing a latent one. There is no ambiguity in the description. There was some evidence that the board of trustees of said University were under the care and supervision of the Synod, but we are not therefore to presume that it is the College of the Synod. If the subscription was ever valid, it will still be so, to whoever is the Synod, notwithstanding this suit. Yet the Court refused to instruct the jury that if they believed from the evidence, that the subscription sued on, was by its terms made payable to the Synod of Illinois, they should find for the defendant below.

But there is no payee whomsoever, and it is therefore void. It is analogous to a promissory note with no payee, upon which no action can be supported:—for who shall sue? The instrument must show upon its face to whom it is payable, or no action will lie thereon. (*Mayo v. Chenoweth*, Breese 153.) Yet the Court refused so to instruct the jury.

No consideration for the agreement appears upon the face of the instrument, neither was any proved. If the appellant was not benefitted, and the payee, if there is any, incurred no obligation, or suffered no inconvenience or prejudice, it is a *nudum pactum*. If the subscription is claimed as a gift, it could not take effect, because there was no delivery. A gift of personal property is incomplete without a delivery, or something equivalent thereto. Without such delivery no title passes, nor will an action lie therefor. (*People v. Johnson et al*, 14 Ills., 342.)

If a man *gratuitously* promises another to give him a sum of money on a future day, this is a *nudum pactum* and cannot be enforced at law. "The object of the law is rather to give effect to contracts founded upon mutual exigencies of society, than to compel the execution of a voluntary engagement or mere donation." (*Comyn on Contracts*, 3rd Am. ed., 12)

But admitting, for the sake of the argument, that the subscription is a valid subscription to the appellees, they have still failed to show a right to recover thereon. No assessment, or any authorized call was ever made upon the subscribers for their ratable portion of the amount subscribed. Where the power to require payment from subscribers is vested in a board of directors, an action will not lie to recover installments, until the board has directed the call to be made, and due notice of the amount, and time and place of payment, have been given. This is the language of the Supreme Court. (*Banet v. The Alton & Sangamon R. R. Co.*, 13 Ills., 513.—*Spangler v. Indiana & Illinois Central Railway Co.*, 21 Ills., 277.)

But they seek by law to compel the appellant to pay his subscription in full, while other subscribers have not been legally called upon for, nor paid any part of theirs. The evidence shows that through the mismanagement and neglect of the appellees, the building was partially destroyed, and the enterprise, for the time being, abandoned, probably never to be resumed. The building has been leased to the School Inspectors of the City of Peoria, for a term of years. By the terms of the subscription, the money was to be paid as re-

quired to meet the expenditures for the purposes therein named, one of which is the expenses of putting said College in operation. The appellees show that the buildings are not yet completed, and that there is no reasonable prospect of the College ever being put in operation. Yet they seek to recover the full amount of the appellant's subscription now.

The appellees show that the appellant originally subscribed three hundred dollars. It is in evidence that he has paid his original subscription. They allege that he made an additional subscription of three hundred dollars. The copy admitted as an evidence thereof, shows a subscription of *six* hundred dollars. Could this be a copy of the original? Where is his subsequent subscription of three hundred dollars? The appellees did not produce it. Yet the Circuit Court admitted this alleged copy of the original subscription, to prove a subsequent additional subscription.

The evidence shows, that if any such additional amount was so subscribed by the appellant, it was upon the conditions that he should be discharged from acting as a member of the board, and from his subscription for scholarships. Yet the appellees failed to show that these conditions have been complied with. On the contrary, it is in evidence that the appellant was regularly notified to attend each meeting of the board.

No evidence was given of an acceptance of the subscription upon the terms proposed. There was no mutuality, without which there is no contract. (*Chitty on Contracts*.)

There was no evidence of an agreement by the appellees to release the appellant from his subscription for scholarships, which he could enforce at law. The conditions were precedent, and it was incumbent upon the plaintiffs below to show their performance. Not having done so, they could not legally recover upon such additional subscription.

The errors committed by the Circuit Court are apparent. The admission of an alleged copy of the appellant's original subscription, when no loss of the latter was shown, to prove such subscription, was contrary to law, and manifestly injurious to the appellant.

The instruction given to the jury on behalf of the appellees, that the appellant not having denied the execution of the subscription paper, under oath, was not entitled to dispute, what was shown by themselves, to be only a copy, was clearly erroneous.

The refusal of the Court to instruct the jury, that if no payee was named in the instrument, or could be ascertained from the face thereof, they should find for the defendant below, was unauthorized by law. The jury should have been instructed, as prayed by the appellant, that a corporation cannot enforce a subscription made for its benefit, without consideration, unless a special power so to do is conferred upon them by their charter or by statute law. The jury should have been instructed, as prayed by the appellant, that there is no law authorizing the Board of Trustees of Peoria University to sue upon, and enforce subscriptions, made to them without consideration. The jury should have been instructed, as prayed by the appellant, that if they believed the subscription was intended as a donation to the appellees, such gift could not be enforced at law. Yet the Circuit Court refused these instructions which the appellant was entitled to have given to the jury, and therefore the judgment upon the verdict rendered by that jury, should be reversed. Because no assessments or any authorized call was ever made upon, nor any notice given of the time and place for payment thereof, to the subscribers, said judgment should be reversed. For that the instrument was neither payable to the plaintiffs below, nor the suit brought in the name of the payee, for their use, said judgment should be reversed. Because the plaintiffs below are not a corporate body, and have not authority to sue, said judgment should be reversed, annulled, and for nought held, and the appellant restored to all things he has lost by reason thereof.

JOHN D. ROUSE,

Of Counsel for Appellant.

205-69

Griswold

v -

University

Rousse's
argument.

STATE OF ILLINOIS,
IN THE
SUPREME COURT,

OTTAWA TERM, A. D. 1861.

JOHN L. GRISWOLD, vs. THE BOARD OF TRUSTEES OF PEORIA UNIVERSITY.	}	<i>Appeal from Peoria.</i>
---	---	----------------------------

ARGUMENT OF JOHN D. ROUSE,
FOR THE APPELLANT.

PEORIA, ILL.:
BENJ. FOSTER, PRINTER AND BOOKBINDER, MAIN ST.
1861.

STATE OF ILLINOIS, ss.

{ IN THE SUPREME COURT,
Ottawa Term, A.D. 1861.

JOHN L. GRISWOLD,
vs.
THE BOARD OF TRUSTEES } *Appeal from Peoria.*
OF
PEORIA UNIVERSITY. }

ARGUMENT OF JOHN D. ROUSE,
FOR THE APPELLANT.

This was an action brought upon an alleged subscription by the appellant, of six hundred dollars, "for the erection of buildings and defraying the expenses of putting in operation the College of the Synod of Illinois, at Peoria;"—for a balance of three hundred dollars claimed to be due thereon.

Several important questions arising in the case, meriting consideration, it is proposed briefly to examine.

Is there such a corporation as the plaintiff? No acceptance of the Charter by the corporators, was shown. The charter runs to the corporators named, only; and not to their associates and successors. The records offered to prove an organization under the charter, were not original. No loss of the original was shown, nor was their non-production accounted for. The witness testifying upon that point did not know whether those offered in evidence were even copies of the original record, or not. The first meeting was in March 1855. The suit was commenced in 1859, and the evidence shows that the records produced were not copied from

the original a year before the suit was brought. They were copied from, or more probably written from recollection of the original, three years or more after the original record of the first meeting was made. The evidence shows an appointment of a Secretary at said first meeting. His duty was to record the proceedings thereat, and in the absence of any proof to the contrary, it is reasonable to presume that he performed that duty. The appellees profess to produce a copy of the record so written by the said secretary, and the court below admitted, contrary to law, such alleged copy, without proof of the loss of the original, or that it was in fact a copy.

Such alleged copy, so admitted, against objections, shows that but *fourteen* charter members were present at the first meeting: and the adoption by them, of rules, regulations, &c. The number of corporators is *thirty*. An acceptance by a majority, in their associate capacity, was absolutely necessary; yet this was not shown. (*Angel & Ames on Corporations*, 67, 68.)

The instrument which is the foundation of this action is not the original subscription of the appellant. In the language of a witness, it is a copy of a copy. The name of the appellant is the second on this subscription paper. Dr. Rouse testifies that he copied the first eight names thereon, in order to show them and get subscriptions. The subscription paper produced should have been excluded from the jury. It was but secondary evidence. No rule is better settled than that the best evidence the nature of the case will admit of must always be produced. The best evidence of the terms of a written contract, is the writing itself. A foundation therefor must be laid, before secondary evidence can be admitted. No foundation was laid in this case.

Is it contended that because the appellant did not deny its execution, under oath, he could not object to the introduction of this paper, in evidence? The rule requiring such denial of the execution of an instrument, being the foundation of an action, does not apply in this case. The appellant does not deny a subscription for the purposes aforesaid, but insists he has paid such subscription. He had a right to demand the exclusion of an instrument, shown

to be a copy, not of the original, but of another copy, when the non-production of the original was not accounted for. Yet the Circuit Court admitted such copy, and instructed the jury that the appellant, not having denied its execution, under oath, was not entitled to dispute it, and refused to instruct them, that the best evidence of the contents of a written contract or subscription is the original writing or subscription itself: and that if they believed from the evidence that the subscription list offered in evidence was not the original, but a copy thereof, and that no loss or destruction of the original was shown, that the copy itself is not evidence of a subscription being made by the defendant below.

Mr. Smith, a witness for the plaintiff below, says there were several other papers that had the appellant's name copied on them. Under the ruling of the Court below, a recovery might be had against the appellant, on each of them.

The subscription was not payable to the appellees. The subscription was evidently for the benefit of the College of the Synod of Illinois, at Peoria. If there is a patent ambiguity in the description, it cannot be explained. (*Dougherty v. Purdy*, 18 Ills., 208.)

There was no proof showing a latent one. There is no ambiguity in the description. There was some evidence that the board of trustees of said University were under the care and supervision of the Synod, but we are not therefore to presume that it is the College of the Synod. If the subscription was ever valid, it will still be so, to whoever is the Synod, notwithstanding this suit. Yet the Court refused to instruct the jury that if they believed from the evidence, that the subscription sued on, was by its terms made payable to the Synod of Illinois, they should find for the defendant below.

But there is no payee whomsoever, and it is therefore void. It is analogous to a promissory note with no payee, upon which no action can be supported:—for who shall sue? The instrument must show upon its face to whom it is payable, or no action will lie thereon. (*Mayo v. Chenoweth*, Breese 153.) Yet the Court refused so to instruct the jury.

No consideration for the agreement appears upon the face of the instrument, neither was any proved. If the appellant was not benefited, and the payee, if there is any, incurred no obligation, or suffered no inconvenience or prejudice, it is a *nudum pactum*. If the subscription is claimed as a gift, it could not take effect, because there was no delivery. A gift of personal property is incomplete without a delivery, or something equivalent thereto. Without such delivery no title passes, nor will an action lie therefor. (*People v. Johnson et al*, 14 Ills., 342.)

If a man *gratuitously* promises another to give him a sum of money on a future day, this is a *nudum pactum* and cannot be enforced at law. "The object of the law is rather to give effect to contracts founded upon mutual exigencies of society, than to compel the execution of a voluntary engagement or mere donation." (*Comyn on Contracts*, 3rd Am. ed., 12)

But admitting, for the sake of the argument, that the subscription is a valid subscription to the appellees, they have still failed to show a right to recover thereon. No assessment, or any authorized call was ever made upon the subscribers for their ratable portion of the amount subscribed. Where the power to require payment from subscribers is vested in a board of directors, an action will not lie to recover installments, until the board has directed the call to be made, and due notice of the amount, and time and place of payment, have been given. This is the language of the Supreme Court. (*Banet v. The Alton & Sangamon R. R. Co.*, 13 Ills., 513.—*Spangler v. Indiana & Illinois Central Railway Co.*, 21 Ills., 277.)

But they seek by law to compel the appellant to pay his subscription in full, while other subscribers have not been legally called upon for, nor paid any part of theirs. The evidence shows that through the mismanagement and neglect of the appellees, the building was partially destroyed, and the enterprise, for the time being, abandoned, probably never to be resumed. The building has been leased to the School Inspectors of the City of Peoria, for a term of years. By the terms of the subscription, the money was to be paid as re-

quired to meet the expenditures for the purposes therein named, one of which is the expenses of putting said College in operation. The appellees show that the buildings are not yet completed, and that there is no reasonable prospect of the College ever being put in operation. Yet they seek to recover the full amount of the appellant's subscription now.

The appellees show that the appellant originally subscribed three hundred dollars. It is in evidence that he has paid his original subscription. They allege that he made an additional subscription of three hundred dollars. The copy admitted as an evidence thereof, shows a subscription of *six* hundred dollars. Could this be a copy of the original? Where is his subsequent subscription of three hundred dollars? The appellees did not produce it. Yet the Circuit Court admitted this alleged copy of the original subscription, to prove a subsequent additional subscription.

The evidence shows, that if any such additional amount was so subscribed by the appellant, it was upon the conditions that he should be discharged from acting as a member of the board, and from his subscription for scholarships. Yet the appellees failed to show that these conditions have been complied with. On the contrary, it is in evidence that the appellant was regularly notified to attend each meeting of the board.

No evidence was given of an acceptance of the subscription upon the terms proposed. There was no mutuality, without which there is no contract. (*Chitty on Contracts*.)

There was no evidence of an agreement by the appellees to release the appellant from his subscription for scholarships, which he could enforce at law. The conditions were precedent, and it was incumbent upon the plaintiffs below to show their performance. Not having done so, they could not legally recover upon such additional subscription.

The errors committed by the Circuit Court are apparent. The admission of an alleged copy of the appellant's original subscription, when no loss of the latter was shown, to prove such subscription, was contrary to law, and manifestly injurious to the appellant.

The instruction given to the jury on behalf of the appellees, that the appellant not having denied the execution of the subscription paper, under oath, was not entitled to dispute, what was shown by themselves, to be only a copy, was clearly erroneous.

The refusal of the Court to instruct the jury, that if no payee was named in the instrument, or could be ascertained from the face thereof, they should find for the defendant below, was unauthorized by law. The jury should have been instructed, as prayed by the appellant, that a corporation cannot enforce a subscription made for its benefit, without consideration, unless a special power so to do is conferred upon them by their charter or by statute law. The jury should have been instructed, as prayed by the appellant, that there is no law authorizing the Board of Trustees of Peoria University to sue upon, and enforce subscriptions, made to them without consideration. The jury should have been instructed, as prayed by the appellant, that if they believed the subscription was intended as a donation to the appellees, such gift could not be enforced at law. Yet the Circuit Court refused these instructions which the appellant was entitled to have given to the jury, and therefore the judgment upon the verdict rendered by that jury, should be reversed. Because no assessments or any authorized call was ever made upon, nor any notice given of the time and place for payment thereof, to the subscribers, said judgment should be reversed. For that the instrument was neither payable to the plaintiffs below, nor the suit brought in the name of the payee, for their use, said judgment should be reversed. Because the plaintiffs below are not a corporate body, and have not authority to sue, said judgment should be reversed, annulled, and for nought held, and the appellant restored to all things he has lost by reason thereof.

JOHN D. ROUSE,

Of Counsel for Appellant.

205 - 69

Grainold

v.

University

Reuses

Argument

STATE OF ILLINOIS,
IN THE
SUPREME COURT,

OTTAWA TERM, A. D. 1861.

JOHN L. GRISWOLD, vs. THE BOARD OF TRUSTEES OF PEORIA UNIVERSITY.	}	<i>Appeal from Peoria.</i>
---	---	----------------------------

ARGUMENT OF JOHN D. ROUSE,
FOR THE APPELLANT.

PEORIA, ILL.:
BENJ. FOSTER, PRINTER AND BOOKBINDER, MAIN ST.
1861.

STATE OF ILLINOIS, ss.

{ IN THE SUPREME COURT,
Ottawa Term, A.D. 1861.

JOHN L. GRISWOLD,
vs.
THE BOARD OF TRUSTEES } *Appeal from Peoria.*
OF
PEORIA UNIVERSITY. }

ARGUMENT OF JOHN D. ROUSE,
FOR THE APPELLANT.

This was an action brought upon an alleged subscription by the appellant, of six hundred dollars, "for the erection of buildings and defraying the expenses of putting in operation the College of the Synod of Illinois, at Peoria;"—for a balance of three hundred dollars claimed to be due thereon.

Several important questions arising in the case, meriting consideration, it is proposed briefly to examine.

Is there such a corporation as the plaintiff? No acceptance of the Charter by the corporators, was shown. The charter runs to the corporators named, only; and not to their associates and successors. The records offered to prove an organization under the charter, were not original. No loss of the original was shown, nor was their non-production accounted for. The witness testifying upon that point did not know whether those offered in evidence were even copies of the original record, or not. The first meeting was in March 1855. The suit was commenced in 1859, and the evidence shows that the records produced were not copied from

the original a year before the suit was brought. They were copied from, or more probably written from recollection of the original, three years or more after the original record of the first meeting was made. The evidence shows an appointment of a Secretary at said first meeting. His duty was to record the proceedings thereat, and in the absence of any proof to the contrary, it is reasonable to presume that he performed that duty. The appellees profess to produce a copy of the record so written by the said secretary, and the court below admitted, contrary to law, such alleged copy, without proof of the loss of the original, or that it was in fact a copy.

Such alleged copy, so admitted, against objections, shows that but *fourteen* charter members were present at the first meeting: and the adoption by them, of rules, regulations, &c. The number of corporators is *thirty*. An acceptance by a majority, in their associate capacity, was absolutely necessary; yet this was not shown. (*Angel & Ames on Corporations*, 67, 68.)

The instrument which is the foundation of this action is not the original subscription of the appellant. In the language of a witness, it is a copy of a copy. The name of the appellant is the second on this subscription paper. Dr. Rouse testifies that he copied the first eight names thereon, in order to show them and get subscriptions. The subscription paper produced should have been excluded from the jury. It was but secondary evidence. No rule is better settled than that the best evidence the nature of the case will admit of must always be produced. The best evidence of the terms of a written contract, is the writing itself. A foundation therefor must be laid, before secondary evidence can be admitted. No foundation was laid in this case.

Is it contended that because the appellant did not deny its execution, under oath, he could not object to the introduction of this paper, in evidence? The rule requiring such denial of the execution of an instrument, being the foundation of an action, does not apply in this case. The appellant does not deny a subscription for the purposes aforesaid, but insists he has paid such subscription. He had a right to demand the exclusion of an instrument, shown

to be a copy, not of the original, but of another copy, when the non-production of the original was not accounted for. Yet the Circuit Court admitted such copy, and instructed the jury that the appellant, not having denied its execution, under oath, was not entitled to dispute it, and refused to instruct them, that the best evidence of the contents of a written contract or subscription is the original writing or subscription itself: and that if they believed from the evidence that the subscription list offered in evidence was not the original, but a copy thereof, and that no loss or destruction of the original was shown, that the copy itself is not evidence of a subscription being made by the defendant below.

Mr. Smith, a witness for the plaintiff below, says there were several other papers that had the appellant's name copied on them. Under the ruling of the Court below, a recovery might be had against the appellant, on each of them.

The subscription was not payable to the appellees. The subscription was evidently for the benefit of the College of the Synod of Illinois, at Peoria. If there is a patent ambiguity in the description, it cannot be explained. (*Dougherty v. Purdy*, 18 Ills., 208.)

There was no proof showing a latent one. There is no ambiguity in the description. There was some evidence that the board of trustees of said University were under the care and supervision of the Synod, but we are not therefore to presume that it is the College of the Synod. If the subscription was ever valid, it will still be so, to whoever is the Synod, notwithstanding this suit. Yet the Court refused to instruct the jury that if they believed from the evidence, that the subscription sued on, was by its terms made payable to the Synod of Illinois, they should find for the defendant below.

But there is no payee whomsoever, and it is therefore void. It is analogous to a promissory note with no payee, upon which no action can be supported:—for who shall sue? The instrument must show upon its face to whom it is payable, or no action will lie thereon. (*Mayo v. Chenoweth*, Breese 153.) Yet the Court refused so to instruct the jury.

No consideration for the agreement appears upon the face of the instrument, neither was any proved. If the appellant was not benefited, and the payee, if there is any, incurred no obligation, or suffered no inconvenience or prejudice, it is a *nudum pactum*. If the subscription is claimed as a gift, it could not take effect, because there was no delivery. A gift of personal property is incomplete without a delivery, or something equivalent thereto. Without such delivery no title passes, nor will an action lie therefor. (*People v. Johnson et al*, 14 Ills., 342.)

If a man *gratuitously* promises another to give him a sum of money on a future day, this is a *nudum pactum* and cannot be enforced at law. "The object of the law is rather to give effect to contracts founded upon mutual exigencies of society, than to compel the execution of a voluntary engagement or mere donation." (*Comyn on Contracts*, 3rd Am. ed., 12)

But admitting, for the sake of the argument, that the subscription is a valid subscription to the appellees, they have still failed to show a right to recover thereon. No assessment, or any authorized call was ever made upon the subscribers for their ratable portion of the amount subscribed. Where the power to require payment from subscribers is vested in a board of directors, an action will not lie to recover installments, until the board has directed the call to be made, and due notice of the amount, and time and place of payment, have been given. This is the language of the Supreme Court. (*Banet v. The Alton & Sangamon R. R. Co.*, 13 Ills., 513.—*Spangler v. Indiana & Illinois Central Railway Co.*, 21 Ills., 277.)

But they seek by law to compel the appellant to pay his subscription in full, while other subscribers have not been legally called upon for, nor paid any part of theirs. The evidence shows that through the mismanagement and neglect of the appellees, the building was partially destroyed, and the enterprise, for the time being, abandoned, probably never to be resumed. The building has been leased to the School Inspectors of the City of Peoria, for a term of years. By the terms of the subscription, the money was to be paid as re-

quired to meet the expenditures for the purposes therein named, one of which is the expenses of putting said College in operation. The appellees show that the buildings are not yet completed, and that there is no reasonable prospect of the College ever being put in operation. Yet they seek to recover the full amount of the appellant's subscription now.

The appellees show that the appellant originally subscribed three hundred dollars. It is in evidence that he has paid his original subscription. They allege that he made an additional subscription of three hundred dollars. The copy admitted as an evidence thereof, shows a subscription of *six* hundred dollars. Could this be a copy of the original? Where is his subsequent subscription of three hundred dollars? The appellees did not produce it. Yet the Circuit Court admitted this alleged copy of the original subscription, to prove a subsequent additional subscription.

The evidence shows, that if any such additional amount was so subscribed by the appellant, it was upon the conditions that he should be discharged from acting as a member of the board, and from his subscription for scholarships. Yet the appellees failed to show that these conditions have been complied with. On the contrary, it is in evidence that the appellant was regularly notified to attend each meeting of the board.

No evidence was given of an acceptance of the subscription upon the terms proposed. There was no mutuality, without which there is no contract. (*Chitty on Contracts*.)

There was no evidence of an agreement by the appellees to release the appellant from his subscription for scholarships, which he could enforce at law. The conditions were precedent, and it was incumbent upon the plaintiffs below to show their performance. Not having done so, they could not legally recover upon such additional subscription.

The errors committed by the Circuit Court are apparent. The admission of an alleged copy of the appellant's original subscription, when no loss of the latter was shown, to prove such subscription, was contrary to law, and manifestly injurious to the appellant.

The instruction given to the jury on behalf of the appellees, that the appellant not having denied the execution of the subscription paper, under oath, was not entitled to dispute, what was shown by themselves, to be only a copy, was clearly erroneous.

The refusal of the Court to instruct the jury, that if no payee was named in the instrument, or could be ascertained from the face thereof, they should find for the defendant below, was unauthorized by law. The jury should have been instructed, as prayed by the appellant, that a corporation cannot enforce a subscription made for its benefit, without consideration, unless a special power so to do is conferred upon them by their charter or by statute law. The jury should have been instructed, as prayed by the appellant, that there is no law authorizing the Board of Trustees of Peoria University to sue upon, and enforce subscriptions, made to them without consideration. The jury should have been instructed, as prayed by the appellant, that if they believed the subscription was intended as a donation to the appellees, such gift could not be enforced at law. Yet the Circuit Court refused these instructions which the appellant was entitled to have given to the jury, and therefore the judgment upon the verdict rendered by that jury, should be reversed. Because no assessments or any authorized call was ever made upon, nor any notice given of the time and place for payment thereof, to the subscribers, said judgment should be reversed. For that the instrument was neither payable to the plaintiffs below, nor the suit brought in the name of the payee, for their use, said judgment should be reversed. Because the plaintiffs below are not a corporate body, and have not authority to sue, said judgment should be reversed, annulled, and for nought held, and the appellant restored to all things he has lost by reason thereof.

JOHN D. ROUSE,

Of Counsel for Appellant.

205-69

Griswold

↓

University

Rouses

agreement

IN THE SUPREME COURT, STATE OF ILLINOIS,
Third Grand Division, April Term, A. D. 1861.

JOHN L. GRISWOLD,
vs.
THE BOARD OF TRUSTEE OF PEORIA UNIVERSITY. }

PLAINTIFF'S BRIEF.

The plaintiff in the trial below, objected to the introduction of the subscription paper offered in evidence, because there was no consideration, because there was no payee—because if there was any payee in the agreement it was the synod of Illinois and not the plaintiff in the suit, and because it did not appear to be signed by the defendant below :

First—The corporation derives its power from the charter. The charter gives them the right to receive gifts and donations, but does not give them power and enforce subscriptions.

Laws of 1855, page.....

A mere promise to give money, or any other thing, does not invest the promisee with any right of action. It must be delivered to be of any validity in law, and can be revoked at any time before delivery.

14 Ill. Rep. 343,

2 Kent 438,

7 John. Rep. 26.

It was at most only a promise to give on condition that certain things were done in which the promisor had no interest but in common with the public. Such an agreement or promise is void and suit will not lie on it. Even if it were a promissory note given on such consideration, want of consideration might be pleaded to the note.

5 N. H. 558,

10 N. H. 281.

Second—It was a promise to pay for erecting buildings of the synod of Illinois. If then any payee was intended, it was the synod and not the Peoria University, and the synod should have brought suit. The right to sue is vested solely in the name of the party having the legal interest and not in the party having the equitable interest.

1 Chitty Gen. Prac., page 7.

A deed purporting to be made between two parties for the benefit of a third party, the third party can not sue thereon.

14 Ill. R., 260,
8 Conn. R., 286,
16 Sec. & R., 237.

There was no mutuality in this contract. The University was not bound by the terms of the contract. There must be a promisee named in the contract on whom is imposed a mutual obligation.

Breese, page 2; 103 and 155.

Third—The strong probability from the evidence was that the defendant never in person subscribed the original subscription. If another put down his name he might show the conditions on which the subscription was made without denying the execution thereof under oath.

21 Ill. 98.

Fourth—The testimony clearly showed that the instrument sued on and introduced in evidence was not the original. Before introducing secondary evidence the plaintiffs should have laid the proper foundation by proof of the loss and genuineness of the original, and that the utmost search possible had been made in good faith. The instrument sued on, which was a copy, was admitted in evidence against the objection of the defendant without any preliminary proof of the loss of the original, or of any search therefor, or any other proof whatever. The proof to establish the loss of a paper should be addressed to the Court and does not relate to the contents of the paper.

The rule of law is that the best evidence must be given of which the nature of the thing is capable. No evidence should be admitted which presupposes better evidence behind, in the party's possession or power. The withholding of the better evidence raises a presumption that if produced it would operate against the party offering the secondary evidence.

1 Peter's R., 591.

The proof in this case arises a strong presumption, at least, that there were conditions to the original, and made it peculiarly important that every possible search should have been made for the original before secondary evidence should be used.

If an instrument is lost the party must first prove its existence; secondly, that a bona fide search has been made for it in the place where it is most likely to be found; after which his own affidavit of loss is admissible.

1 Green Ev., Sec. 558.

If the instrument belonged to the custody of a certain person; or is proved or may be presumed to have been in another's possession, they must be called and sworn to account for it.

1 Green Ev. 558.

In all cases the search must have been in the utmost good faith, and as thorough and vigilant as if the paper were not found its benefit would be lost.

5 Gill R., 113.

A party offering a copy in evidence must show that he has made every reasonable effort to produce the original, and it is the duty of the party to state the facts and cir-

cumstances from which the Court can draw correct conclusions on the subject. He must show in detail what efforts he has made to produce the original that the Court may judge whether it is in his power or control or not.

20 Ill. R., 131,
22 Ill. R., 445.

"The bill of exceptions fails to show that any foundation by affidavit or otherwise was laid. There was no proof of the loss of the original, or search had been made or that the original was not in the possession or power of the party offering it. No foundation was laid making the copy admissible either at common law or under the statute."

20 Ill., 131,
5 Gill, 117,
20 Ill., 59.

Unless proof is adduced of the loss or destruction, satisfactory to the Court, the evidence as to the execution and contents cannot be submitted to the jury.

Phil. Ev., Cow. & Hill. notes, part 2, page 407.

Fifth—This is an instance of suit brought on a lost instrument—nothing appears, or was alleged any where, but that suit was brought on the original. If the proof shows merely that the instrument was mislaid, the plaintiff must produce it before he can recover.

4 Scam. 334.

Sixth—The plaintiff below offered evidence which was given to the jury against the objection of defendant to show that the contract was for the benefit of plaintiff and not for the benefit of the synod of Illinois.

There is no difference of principle in the rules of interpretation between wills and contracts with regard to ambiguities.

1 Green. Ev., Sec. 287.

If the ambiguity is patent then all the authorities are that it can not be helped by evidence. But there is a latent ambiguity it may be explained by extrinsic evidence. The intention can not be averred in support of a will except in special cases where the object of the testator's bounty or the subject of disposition (i.e. the person or thing intended) is described in terms applicable to more than one person or thing.

Green. Ev. Sec. 291, note 2.

Where the description in a will of the person or thing intended is applicable with legal certainty to two or more objects, extrinsic evidence is admissible to prove which of the subjects were intended.

Jarman on Wills, vol. 1, 361, n. 1.
13 Johnson, 518.

There were not any two objects proven to which the above rules would apply, consequently there was no ambiguity whatever. The subscription was made for the purpose for the erection of buildings of the synod of Illinois. To sustain their case they attempted to prove moneys were used for the erection of buildings of the Peoria University. It was not ambiguous for the reason that it was expressed to be for the building of the erection of buildings of the synod. Had the synod and University been one and the same corporation, a different question would arise—but they offered proof to show that the plaintiff constructed the buildings and were therefore entitled to the subscription, to sue in their own name. This was not offering proof to explain an ambiguity.

M. WILLIAMSON, Att'y for Plff.

2095
John L. Muswold.
vs
Board of trustees,
Plffs Brief

Filed Apr. 16th 1861

L. Ireland
Clerk

IN THE SUPREME COURT, STATE OF ILLINOIS,
Third Grand Division, April Term, A. D. 1861.

JOHN L. GRISWOLD,
vs.
THE BOARD OF TRUSTEE OF PEORIA UNIVERSITY. }

PLAINTIFF'S BRIEF.

The plaintiff in the trial below, objected to the introduction of the subscription paper offered in evidence, because there was no consideration, because there was no payee—because if there was any payee in the agreement it was the synod of Illinois and not the plaintiff in the suit, and because it did not appear to be signed by the defendant below :

First—The corporation derives its power from the charter. The charter gives them the right to receive gifts and donations, but does not give them power and enforce subscriptions.

Laws of 1855, page.....

A mere promise to give money, or any other thing, does not invest the promisee with any right of action. It must be delivered to be of any validity in law, and can be revoked at any time before delivery.

14 Ill. Rep. 343,
2 Kent 438,
7 John. Rep 26.

It was at most only a promise to give on condition that certain things were done in which the promisor had no interest but in common with the public. Such an agreement or promise is void and suit will not lie on it. Even if it were a promissory note given on such consideration, want of consideration might be pleaded to the note.

5 N. H. 558,
10 N. H. 281.

Second—It was a promise to pay for erecting buildings of the synod of Illinois. If then any payee was intended, it was the synod and not the Peoria University, and the synod should have brought suit. The right to sue is vested solely in the name of the party having the legal interest and not in the party having the equitable interest.

1 Chitty Gen. Prac., page 7.

A deed purporting to be made between two parties for the benefit of a third party, the third party can not sue thereon.

14 Ill. R., 260,
8 Conn. R., 286,
16 Sec. & R., 237.

There was no mutuality in this contract. The University was not bound by the terms of the contract. There must be a promisee named in the contract on whom is imposed a mutual obligation.

Breese, page 2; 103 and 155.

Third—The strong probability from the evidence was that the defendant never in person subscribed the original subscription. If another put down his name he might show the conditions on which the subscription was made without denying the execution thereof under oath.

21 Ill. 98.

Fourth—The testimony clearly showed that the instrument sued on and introduced in evidence was not the original. Before introducing secondary evidence the plaintiffs should have laid the proper foundation by proof of the loss and genuineness of the original, and that the utmost search possible had been made in good faith. The instrument sued on, which was a copy, was admitted in evidence against the objection of the defendant without any preliminary proof of the loss of the original, or of any search therefor, or any other proof whatever. The proof to establish the loss of a paper should be addressed to the Court and does not relate to the contents of the paper.

The rule of law is that the best evidence must be given of which the nature of the thing is capable. No evidence should be admitted which presupposes better evidence behind, in the party's possession or power. The withholding of the better evidence raises a presumption that if produced it would operate against the party offering the secondary evidence.

1 Peter's R., 591.

The proof in this case arises a strong presumption, at least, that there were conditions to the original, and made it peculiarly important that every possible search should have been made for the original before secondary evidence should be used.

If an instrument is lost the party must first prove its existence; secondly, that a bona fide search has been made for it in the place where it is most likely to be found; after which his own affidavit of loss is admissible.

1 Green Ev., Sec. 558.

If the instrument belonged to the custody of a certain person, or is proved or may be presumed to have been in another's possession, they must be called and sworn to account for it.

1 Green Ev. 558.

In all cases the search must have been in the utmost good faith, and as thorough and vigilant as if the paper were not found its benefit would be lost.

5 Gill R., 113.

A party offering a copy in evidence must show that he has made every reasonable effort to produce the original, and it is the duty of the party to state the facts and cir-

cumstances from which the Court can draw correct conclusions on the subject. He must show in detail what efforts he has made to produce the original that the Court may judge whether it is in his power or control or not.

20 Ill. R., 131,
22 Ill. R., 445.

"The bill of exceptions fails to show that any foundation by affidavit or otherwise was laid. There was no proof of the loss of the original, or search had been made or that the original was not in the possession or power of the party offering it. No foundation was laid making the copy admissible either at common law or under the statute."

20 Ill., 131,
5 Gill, 117,
20 Ill., 59.

Unless proof is adduced of the loss or destruction, satisfactory to the Court, the evidence as to the execution and contents cannot be submitted to the jury.

Phil. Ev., Cow. & Hill. notes, part 2, page 407.

Fifth—This is an instance of suit brought on a lost instrument—nothing appears, or was alleged any where, but that suit was brought on the original. If the proof shows merely that the instrument was mislaid, the plaintiff must produce it before he can recover.

4 Scam. 334.

Sixth—The plaintiff below offered evidence which was given to the jury against the objection of defendant to show that the contract was for the benefit of plaintiff and not for the benefit of the synod of Illinois.

There is no difference of principle in the rules of interpretation between wills and contracts with regard to ambiguities.

1 Green. Ev., Sec. 287.

If the ambiguity is patent then all the authorities are that it can not be helped by evidence. But there is a latent ambiguity it may be explained by extrinsic evidence. The intention can not be averred in support of a will except in special cases where the object of the testator's bounty or the subject of disposition (i.e. the person or thing intended) is described in terms applicable to more than one person or thing.

Green. Ev. Sec. 291, note 2.

Where the description in a will of the person or thing intended is applicable with legal certainty to two or more objects, extrinsic evidence is admissible to prove which of the subjects were-intended.

Jarman on Wills, vol. 1, 361, n. 1.
13 Johnson, 518.

There were not any two objects proven to which the above rules would apply, consequently there was no ambiguity whatever. The subscription was made for the purpose for the erection of buildings of the synod of Illinois. To sustain their case they attempted to prove moneys were used for the erection of buildings of the Peoria University. It was not ambiguous for the reason that it was expressed to be for the building of the erection of buildings of the synod. Had the synod and University been one and the same corporation, a different question would arise—but they offered proof to show that the plaintiff constructed the buildings and were therefore entitled to the subscription, to sue in their own name. This was not offering proof to explain an ambiguity.

M. WILLIAMSON, Att'y for Plff.

205.
John L Muswood
my
Board of trustees
Plys Brief

Filed Apr. 16th 1861

L. Leland
Clerk

IN THE SUPREME COURT, STATE OF ILLINOIS,
Third Grand Division, April Term, A. D. 1861.

JOHN L. GRISWOLD
vs.
THE BOARD OF TRUSTEES OF
THE PEORIA UNIVERSITY. } Appeal from Peoria.

PLAINTIFF'S BRIEF.

This suit was commenced before a justice of the peace of Peoria county, Illinois, and taken by appeal to the circuit court, where it was tried at the November term, 1860. A trial by jury was had, and verdict and judgment for plaintiffs for \$300.

Page 13 The suit was brought upon the following instrument: "We, the subscribers, agree to pay the sum set opposite our respective names, for the erection of buildings and in defraying the expenses of putting in operation the College of the Synod of Illinois at Peoria, to be paid as the money shall be required to meet the expenditures as incurred for the purpose aforesaid.

<i>Subscribers' Names.</i>	<i>Amount Subscribed.</i>
John Reynolds,	\$ 300
John L. Griswold,	600"

Here follow 74 other names as subscribers.

The defendant objected to the introduction of the same in evidence, because—
1st. There is no such corporation as plaintiff; 2d. There is no assessment proven; 3d. It is not payable to the plaintiff; 4th There is no payee mentioned in the instrument; 5th. There does not appear any consideration for the agreement; 6th. The instrument does not appear to be signed by the defendant, and appears on the face thereof to have been altered since signed.

The court overruled the objections and admitted the instrument in evidence.

16 The plaintiffs then offered in evidence the charter of the Peoria University, approved Feb. 4, 1855.

18 The plaintiffs then called J. McCLAY SMITH, who testified, after the books of the corporation had been produced and identified by him, as follows:—Am secretary of
19 board of trustees and one of executive committee of plaintiffs. The books are not the original records; did not see them written; a better book was obtained and records copied into these; don't know where the original is; these records were not

copied from the original a year before suit was brought; Mr. Farris, the original secretary of the board, wrote these records; suit was commenced in 1859; I am now clerk and treasurer of executive committee; I do not know that this is a copy of the original record; is recognized by plaintiff as a correct copy; I know nothing more about it but by hearsay. First saw this record in the hands of the executive committee; have seen Farris write; this record is in his hand writing. Plaintiffs organized under the charter in March, 1855. Am not interested in the suit; plaintiff owes me, and would receive the money as treasurer; it would go to pay workmen; I advanced money on the faith of the subscriptions. (Here the witness executed a release to the plaintiff for the money that would be recovered in this suit. Trustees mentioned in charter had a meeting to organize, and appointed an executive committee consisting in part of trustees in charter; we appointed president, secretary and treasurer; this was in March, '55; they took some steps to do the business for which they were organized. The board of trustees were under the care and supervision of the synod of Illinois; the synod consists of a certain number of presbyteries made up of churches of old school presbyterial church. (All of which evidence was objected to but overruled by the court.) Board bought land and commenced building; purchased brick and material, &c. Some contracts were in writing; contract for the land was in writing, and building com. made contracts in writing with men. The building committee were appointed by executive com.; I was one of them.

Plaintiff then offered in evidence the record alluded to by the witness, which was admitted in evidence against the objection of defendant.

The record of first meeting shows 14 charter members present out of 30; adopted rules and regulations, &c. See pages 22, 23, 24, &c., up to page 35 of record.

The witness further testified—The executive committee were chosen in March, 1855, and have continued ever since. Plaintiff laid out about \$6000; all their indebtedness yet unpaid is about \$1600 due and unpaid; is for laying brick, casting, iron, carpenters' work, &c. Defendant was a member of the board of trustees and attended the meetings for a time and was at the meeting called to organize. He was a member of the executive and financial committees but did not act much; for the last year not in the meeting at all. He was not present when site was selected; he was present when the citizens were called for subscriptions. The building was to be erected for an institution of learning; it was to be under the supervision of the synod of Illinois; I presume the defendant knew this. I am treasurer; the indebtedness is over \$1600. The site and improvements have since been leased or contracted by plaintiff to the board of school inspectors of this city; I have the contract between plaintiff and school inspectors.

The plaintiff then offered the contract in evidence and which was read to the jury against the objections of defendant.

The building was commenced in June, '57, was 60 feet one way, three stories high, and was left in that condition in fall of '57, and blew down in May, '58. Plaintiff had no means to rebuild. Defendant paid \$300 on subscription to the building. If building had been enclosed think it would not have blown down.

Cross examined—Synod was to raise \$5000, Peoria churches to raise \$5000; synod claims all outside of Peoria; Smith was agent of synod and plaintiff also, and got donations and raised some subscriptions; he was appointed by plaintiff to raise subscriptions. The assets of plaintiff were —

In Peoria,	-	-	-	-	-	\$4600
Springfield and Jacksonville,	-	-	-	-	-	750
Lands donated and sold,	-	-	-	-	-	2100
Subscriptions got by Smith,	-	-	-	-	-	700

The whole indebtedness, including everything, was about \$9000; of which \$6000 was for improvements. The school inspectors are to pay no rent. The school inspectors paid \$800, besides about \$400 which went to pay back interest on purchase of land; they are to hold the site and improvements three years. It was not leased for value but for protection. Defendant paid his subscription cheerfully until fall
 40 before it blew down; he then claimed that the work was not going on. I was told plaintiff said he would subscribe \$600 if they would release him from doing anything more as a member of the board. It was my business to notify the members of the meetings; I notified him to attend every meeting of the board. Plaintiff's design going on with the institution if they can get means. There is a probability that the institution and all property will go into the hands of the city. There has
 41 never been any assessments made against subscribers before suit brought, nor any estimate in any manner. At first the subscription of the defendant was \$300 and 6 or 7 scholarships. I think this is not the original subscription paper signed by the defendant; it is a copy.

Plaintiff then called J. K. COOPER, who testified as follows:—I was one of the original trustees; defendant was another. Think defendant was at the first meeting but don't recollect distinctly; think defendant performed some duties at first,
 42 after that he ceased to attend. There was an executive committee of 9; think defendant was on that committee. Lands donated to plaintiff was sold for \$1500; interest makes more now. The synod is connected with plaintiff and exercises supervision; they fill vacancies and elect professors with the board; the plaintiff made reports to the synod; synod had a meeting in Peoria in fall of '58 and confirmed action of plaintiff and determined to go on with the enterprise.

The plaintiff here rested the case.

43 The defendant then called JOHN A. MCCOY, who testified as follows:—I was present at the first meeting to organize. Defendant's subscription was originally \$300. I am acquainted with his hand writing; have often seen him write. (Witness was then shown the subscription paper offered in evidence by plaintiff.) This is not the defendant's hand writing. The conditions on which the defendant's subscription was raised from \$300 to \$600 were made and subscription increased in my office. Smith, Farris, Coffee and others of trustees were at my office at a meeting of board; defendant objected to being put on the committee; would pay money but refused to do the work. They then agreed that he should be exonerated from active duties. He was to be released from his scholarships. I don't recollect what was said about plaintiff running in debt; don't know whether it was a condition

that plaintiff should not run in debt or not. It was then said and agreed that he should be released from his scholarships; I don't know whether he was ever released or not. The subscription heading and defendant's signature thereto is in the handwriting of Dr. Rouse; this is not the original subscription.

44 DR. ROUSE, called by defendant, testified:—I wrote the heading of this subscription; the second name on it is defendant's; I wrote it also; is not the original subscription but is the second copy from the original and is a copy of a copy. There was a subscription paper previous to plaintiffs' organization, subject to conditions, to see what we could do. We then got the charter and drew up other subscription papers and got some copied off on this, and I took this to get signatures. It was first copied from the original and then I took a copy of that. The first eight names I copied in order to show and get subscriptions; I copied them from a paper on the table at a meeting held in the basement of the presbyterian church; defendant's subscription to the original was more than this in scholarships; he proposed to give in money and be released from active duties; his subscription on the building was on the first \$250 and two scholarships.

Cross examined —I was at a meeting that he proposed to change his subscription at the church; I was at the meeting at McCoy's office once; there were two or three meetings there.

45 SMITH recalled by defendant.—The value of scholarships was at first \$400, afterwards reduced to \$300. I don't know that defendant was ever discharged from any scholarships. I have been keeper of the records for about six months. I don't know how many scholarships defendant subscribed for. I think this subscription paper is not the original; I don't know that this was ever presented to defendant; it never was by me; I know there were several other papers that had defendant's name copied on. I looked for the original subscription but could not find it; the subscription was taken off and put on a book; that on the book was taken from this. I have one other paper on which defendant subscribed \$300.

Cross examined.—Farris was secretary before me; don't know whether Farris has the original or not; I don't know whether this was copied from a copy or not; don't know whether there was any difference in the heading or not; there were several subscription papers.

46 JOHN A. MCCOY recalled by defendant.—I know this subscription; we did not have this present at my office when the change was made, but there was a change made in the subscription. I cannot be certain that this is not the one; am not certain whether it was a list or subscription book; I think whatever it was that was present had a list of scholarships also on it. Dr. Smith said at the meeting they did not care for the scholarships, that when they got the building up they could get scholarships subscribed for by rich men. My belief is that this is not the paper present.

Here defendant rested.

H. W. REYNOLDS, called by plaintiff, testified:—This is the subscription paper we had on the trial before the justice of the peace in this case.

Cross examined by deff't.—Don't know that defendant was present at the trial before the justice; don't know that this paper was ever shown to him or that he ever saw it.

- 48 The defendant then moved to exclude the subscription paper read in evidence to the jury as secondary evidence, but the court overruled the motion and defendant excepted.

This was all the evidence.

The plaintiff then asked the following instruction among others which were given by the court to the jury, to the giving of which defendant excepted:

6. The defendant in this suit not having denied the execution of the instrument sued on under oath, he is not entitled to dispute the execution of said instrument by himself in this case.

The defendant then asked the court to instruct the jury as follows, but which he refused to do, and defendant excepted:

"The best evidence of the contents of a written contract or subscription is the original writing or subscription itself; and if the jury believe, from the evidence, that the subscription list offered in evidence on the trial of this cause is not the original subscription list but a copy thereof, and that the plaintiffs have not shown the loss or destruction of the original one, then and in that case the copy of itself is not evidence of a subscription being made by defendant."

"That before the copy of any obligation sued on can be properly introduced in evidence, the party offering the same must first prove the loss or destruction of the original, as the case may be; and by proof that such party has made all diligent search therefor in every place where the same could most likely be found; and if the plaintiff has not made such diligent search for the original, they will find for the defendant."

4. "The jury are instructed that if the jury believe, from the evidence, that this subscription sued on was, by its terms, made payable to the synod of Illinois, they will find for the defendant."

4. If there is no payee named in the subscription, and the payee cannot be ascertained from the face of the instrument sued on, you will find for the defendant.

7. In order to maintain an action on this subscription, it was necessary for the plaintiff to show that assessments have been made by the corporation on all the subscribers made for the same purpose, and each one would be bound to pay that assessment; nor could either one of the subscribers be compelled to pay all his subscription whilst others paid nothing, but each one would be bound to pay pro rata on his subscription upon assessments made for that purpose.

8. The jury are instructed that if they believe, from the evidence, that the subscription sued on was made by defendant to the plaintiff, and intended by the

parties as a gift to the plaintiff, such contract or gift cannot be enforced by the plaintiff against the defendant.

50 9. "A corporation cannot enforce a subscription made for its benefit without consideration, without their charter or some act of the legislature or statute law gives them the power to enforce the same."

51 The jury are instructed that there is no law authorizing the Board of Trustees of Peoria University to sue upon and enforce subscriptions made to them without consideration; and if the jury believe, from the evidence, that the instrument sued on is a mere subscription, made without any other consideration than the public good or welfare that may result from the project if completed, you will find for the defendant.

Verdict for plaintiff \$300.

53 Plaintiff moved for new trial because—

1. The verdict is contrary to law.
2. The verdict is contrary to evidence.
3. The court gave erroneous instructions asked by plaintiff.
4. The court refused to give proper instructions asked for defendant.
5. The court erroneously modified instructions asked for defendant.
6. The court admitted improper evidence for plaintiff.

The court overruled the motion and rendered judgment against defendant.

M. WILLIAMSON and

A. McCOY,

Attorneys for Plaintiff.

IN THE SUPREME COURT, STATE OF ILLINOIS,
Third Grand Division, April Term, A. D. 1861.

JOHN L. GRISWOLD
vs.
THE BOARD OF TRUSTEES OF
THE PEORIA UNIVERSITY. }

ASSIGNMENT OF ERROR.

And the said John L. Griswold now comes and says that in the record and proceedings aforesaid there is manifest error, to wit:

1. The verdict of the jury was contrary to law.
2. The verdict was contrary to evidence.
3. The court gave erroneous instructions asked for by plaintiff.
4. The court refused proper instructions asked by defendant.
5. The court erroneously modified instructions asked by defendant.
6. The court admitted improper evidence for plaintiff.
7. The said judgment was given in favor of the said Board of Trustees of the Peoria University, whereas, by the laws of the land, it ought to have been given in favor of the said John L. Griswold. Wherefore the said John L. Griswold prays that the said judgment may be reversed, annulled and for nought held, and that he be restored to all things he has lost by reason thereof.

M. WILLIAMSON and
A. McCOY,
Attorneys for Plaintiff.

205
Griswold
my
Board of Trustees
Abstract

Filed Apr. 16th 1861

L. Leland
Clerk

THE PEOPLE UNIVERSITY
THE BOARD OF TRUSTEES OF

ASSIGNMENT OF ERROR

that he be restored to all things he has lost by reason thereof;
hays that the said judgment may be reversed, annulled and for nought held, and
in favor of the said John L. Griswold. Wherefore the said John L. Griswold
prays that the said judgment be reversed, annulled and for nought held, and
in favor of the said John L. Griswold. The said judgment was given in favor of the said Board of Trustees of the
1. The court admitted improper evidence for plaintiff.
2. The court erroneously modified instructions asked by defendant.
3. The court refused proper instructions asked by defendant.
4. The court gave erroneous instructions asked for by plaintiff.
5. The verdict was contrary to evidence.
6. The verdict of the jury was contrary to law.
And the said John L. Griswold now comes and says that in the record and pro-
ceedings aforesaid there is manifest error to wit:

Attorneys for Plaintiff
J. McCOL,
M. WILLIAMSON and

IN THE SUPREME COURT, STATE OF ILLINOIS,
Third Grand Division, April Term, A. D. 1861.

JOHN L. GRISWOLD,
vs.
THE BOARD OF TRUSTEE OF PEORIA UNIVERSITY. }

PLAINTIFF'S BRIEF.

The plaintiff in the trial below, objected to the introduction of the subscription paper offered in evidence, because there was no consideration, because there was no payee—because if there was any payee in the agreement it was the synod of Illinois and not the plaintiff in the suit, and because it did not appear to be signed by the defendant below :

First—The corporation derives its power from the charter. The charter gives them the right to receive gifts and donations, but does not give them power and enforce subscriptions.

Laws of 1855, page.....

A mere promise to give money, or any other thing, does not invest the promisee with any right of action. It must be delivered to be of any validity in law, and can be revoked at any time before delivery.

14 Ill. Rep. 343,

2 Kent 438,

7 John. Rep. 26.

It was at most only a promise to give on condition that certain things were done in which the promisor had no interest but in common with the public. Such an agreement or promise is void and suit will not lie on it. Even if it were a promissory note given on such consideration, want of consideration might be pleaded to the note.

5 N. H. 558,

10 N. H. 281.

Second—It was a promise to pay for erecting buildings of the synod of Illinois. If then any payee was intended, it was the synod and not the Peoria University, and the synod should have brought suit. The right to sue is vested solely in the name of the party having the legal interest and not in the party having the equitable interest.

1 Chitty Gen. Prac., page 7.

A deed purporting to be made between two parties for the benefit of a third party, the third party can not sue thereon.

14 Ill. R., 260,
8 Conn. R., 286,
16 Sec. & R., 237.

There was no mutuality in this contract. The University was not bound by the terms of the contract. There must be a promisee named in the contract on whom is imposed a mutual obligation.

Breese, page 2; 103 and 155.

Third—The strong probability from the evidence was that the defendant never in person subscribed the original subscription. If another put down his name he might show the conditions on which the subscription was made without denying the execution thereof under oath.

21 Ill. 98.

Fourth—The testimony clearly showed that the instrument sued on and introduced in evidence was not the original. Before introducing secondary evidence the plaintiffs should have laid the proper foundation by proof of the loss and genuineness of the original, and that the utmost search possible had been made in good faith. The instrument sued on, which was a copy, was admitted in evidence against the objection of the defendant without any preliminary proof of the loss of the original, or of any search therefor, or any other proof whatever. The proof to establish the loss of a paper should be addressed to the Court and does not relate to the contents of the paper.

The rule of law is that the best evidence must be given of which the nature of the thing is capable. No evidence should be admitted which presupposes better evidence behind, in the party's possession or power. The withholding of the better evidence raises a presumption that if produced it would operate against the party offering the secondary evidence.

1 Peter's R., 591.

The proof in this case arises a strong presumption, at least, that there were conditions to the original, and made it peculiarly important that every possible search should have been made for the original before secondary evidence should be used.

If an instrument is lost the party must first prove its existence; secondly, that a bona fide search has been made for it in the place where it is most likely to be found; after which his own affidavit of loss is admissible.

1 Green Ev., Sec. 558.

If the instrument belonged to the custody of a certain person; or is proved or may be presumed to have been in another's possession, they must be called and sworn to account for it.

1 Green Ev. 558.

In all cases the search must have been in the utmost good faith, and as thorough and vigilant as if the paper were not found its benefit would be lost.

5 Gill R., 113.

A party offering a copy in evidence must show that he has made every reasonable effort to produce the original, and it is the duty of the party to state the facts and cir-

circumstances from which the Court can draw correct conclusions on the subject. He must show in detail what efforts he has made to produce the original that the Court may judge whether it is in his power or control or not.

20 Ill. R., 131,
22 Ill. R., 445.

"The bill of exceptions fails to show that any foundation by affidavit or otherwise was laid. There was no proof of the loss of the original, or search had been made or that the original was not in the possession or power of the party offering it. No foundation was laid making the copy admissible either at common law or under the statute."

20 Ill., 131,
5 Gill, 117,
20 Ill., 59.

Unless proof is adduced of the loss or destruction, satisfactory to the Court, the evidence as to the execution and contents cannot be submitted to the jury.

Phil. Ev., Cow. & Hill. notes, part 2, page 407.

Fifth—This is an instance of suit brought on a lost instrument—nothing appears, or was alleged any where, but that suit was brought on the original. If the proof shows merely that the instrument was mislaid, the plaintiff must produce it before he can recover.

4 Scam. 334.

Sixth—The plaintiff below offered evidence which was given to the jury against the objection of defendant to show that the contract was for the benefit of plaintiff and not for the benefit of the synod of Illinois.

There is no difference of principle in the rules of interpretation between wills and contracts with regard to ambiguities.

1 Green. Ev., Sec. 287.

If the ambiguity is patent then all the authorities are that it can not be helped by evidence. But there is a latent ambiguity it may be explained by extrinsic evidence. The intention can not be averred in support of a will except in special cases where the object of the testator's bounty or the subject of disposition (i.e. the person or thing intended) is described in terms applicable to more than one person or thing.

Green. Ev. Sec. 291, note 2.

Where the description in a will of the person or thing intended is applicable with legal certainty to two or more objects, extrinsic evidence is admissible to prove which of the subjects were intended.

Jarman on Wills, vol. 1, 361, n. 1.
13 Johnson, 518.

There were not any two objects proven to which the above rules would apply, consequently there was no ambiguity whatever. The subscription was made for the purpose for the erection of buildings of the synod of Illinois. To sustain their case they attempted to prove moneys were used for the erection of buildings of the Peoria University. It was not ambiguous for the reason that it was expressed to be for the building of the erection of buildings of the synod. Had the synod and University been one and the same corporation, a different question would arise—but they offered proof to show that the plaintiff constructed the buildings and were therefore entitled to the subscription, to sue in their own name. This was not offering proof to explain an ambiguity.

M. WILLIAMSON, Att'y for Plff.

John L. Guswiler.
2105
Board of Trustees
Ply. Brief

Filed Apr. 16th 1861

L. Leland
Clerk

Page 1

It is remembered that heretofore to wit; on the eleventh day of November in the year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the Clerk of the Circuit Court in and for the County of Peoria in the State of Illinois, a Statement, an application of the defendant, a Quomons, a Jury venire dated 28th June 1859 and a Jury venire dated 18th July 1859, a verdict, an appeal bond and transcript which are in the words and figures following, to wit;

Statement

Statement

John L. Griswold
To "The Board of Trustees of Peoria University Dr
To Subscription \$600.
By payment 300
Amount claimed \$300

The instrument sued on or subscribed by defendant is in the following words, to wit: "We the subscribers agree to pay the sum set against our respective names for the erection of buildings and in defraying the expenses of putting in operation the college of the Synod of Illinois at Peoria to be paid as the money shall be required to meet the expenditures as incurred for the purpose aforesaid.

Signed - John L. Griswold.

Application
&
Summons

"State of Illinois ss. The People of the State of Illinois
Peoria County, ss. To Any Constable of said County
Greeting: You are hereby commanded to summon the L.
Griswold to appear before me at my office in Peoria on the
28th day of June A.D. 1859 at two o'clock P.M. to
answer the Complaint of the Board of Trustees of Peoria

2
University for a failure to pay the same a certain
demand not exceeding 300 dollars and hereof
make due return as the law directs, Given under
my hand and seal this 23 day of June A.D. 1859

Charles Feinse (read J.P.)

(Endorsed)

"Served on John L. Griswold by reading to him
this writ. June 23rd 1859

A. R. Kidwell Const."

Application

"The Board of Trustees of Peoria University
vs John Griswold
Peoria Feinse
Justice of the Peace.

W. Williamson being duly
sworn deposes and says that the plaintiff in
this case is insolvent as he is informed and
believes &c &c He therefore asks that the said
plaintiff be required to give security for costs
in this cause, W. Williamson

"Sworn to & subscribed before me

this 28th day of June 1858

Charles Feinse read J.P."

June,
Peoria.

"State of Illinois
Peoria County
To Any Constable of said County, Greeting:
We Command you to summon (lawful men of your
County to appear before me at my office in Peoria on the
28 day of June 1859 at 2 o'clock P.M. who are not of
him to the Board of Trustees of Peoria University

3

Plaintiff or to John L. Griesed defendant
to make a jury between said parties, in a plea of
assumpsit because as well the said plaintiff
as the said defendant have put themselves
upon the County ~~for~~ for trial and have you
then there the names of the jury and this writ.
Witness my hand and seal, the 28 day of
June A.D., 1859.

Charles Tenney Seal P.P.

(Endorsed)

"By virtue of this writ to me directed I did the
28th day of June A.D., 1859 Summon C. P.
Wesot D. C. Green, James K. Murphy, George
Parker, A. Adams and H. H. Potter as
jurors as by said writ I am commanded."

A. R. Tidwell, Const.

"State of Illinois, 3rd ss.
Peoria County, 3rd The People of the State of Illinois
to any Constable of said County, Greeting,

We command you to Summon & lawful men of
your County, to appear before me at my office
in Peoria on the 22 day of July A.D., 1859
at 2 o'clock P.M., who are not of kin to the
Board of Trustees of Peoria Minority plaintiff
or to John L. Griesed defendant to make a
jury between said parties in a plea of assumpsit
because as well the said plaintiff, as the said de-
fendant have put themselves upon the County for
trial, and have you then there the names
of the jury and this writ, witness my hand and seal
this 15 day of July A.D., 1859. Charles Tenney Seal P.P."

Jury
venue

(Endorsed)

"By virtue of this writ to me directed I did
 this 22nd day of July A.D. 1859 summon
 Larkin B. Day, George W. Odell, William
 Currie, Lewis M. Douglass, William J. Arledge
 and Henry Jacobs as jurors as by said writ
 I am commanded. A. R. McDowell, Const."

Verdict

"We the Jury find for the plaintiff for three
 hundred dollars Larkin B. Day, Foreman."

180

The People of the State of Illinois

To the Sheriff of Peoria County greeting
 We command you to summon Adolphus House and
 J. M. Clay Smith to appear before our Circuit Court,
 now sitting at the court house in Peoria within 40
 for the said County of Peoria forthwith, then 40 there
 in our said Court to testify 40 give evidence on behalf
 of the Plaintiff in a certain cause to be heard 40 tried
 wherein the Board of Trustees of Peoria University is
 Plaintiff 40 John S. Griswold is defendant hereof fail
 not, 40 make due return of your doings hereon.

Witness Enoch P. Sloan, Clerk of our said Court,
 40 the seal thereof, at Peoria this 6th day of March
 in the year of our Lord one thousand eight hundred
 and Sixty

Enoch P. Sloan
 Clerk

Endorsed

Enoch P. Sloan Clerk

By J. Newton Dwyer

Served on the within named J. M. Clay Smith & Adolphus
 House, I reading to them this writ, March 6th 1860
 John Bryner Sff P. Murry Dwyer

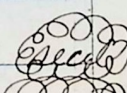
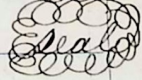
~~Two 20 cents~~

JAS. D. SMITH & CO.
No. 27 S. Seventh Street,
Philadelphia.

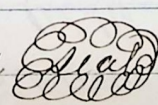
appeal
bond
5

Know all men by these presents that we John S. Griswold & Matthew Griswold are held & firmly bound unto the Board of Trustees of the Peoria University in the penal sum of Six hundred & fifty Dollars for the payment of which well & truly to be made we bind ourselves our heirs executors & Administrators jointly and severally by these presents. Witness our hands and seals this 25th day of July 1859.

The condition of the above obligation is such that whereas the said Board of Trustees of the Peoria University did on the 25th day of July 1859 before Carl Feinse a justice of the peace in & for the county of Peoria Illinois recover a judgment against the above bounden John S. Griswold for the sum of Three Hundred Dollars & cost of suit, from which said judgment the said John S. Griswold has prayed an appeal to the Circuit Court of Peoria County Illinois. Now if the said John S. Griswold shall prosecute his said appeal with effect & without delay & pay or cause to be paid whatever judgment may be rendered against him on the trial or dismissal of said appeal then the above obligation to be void otherwise to remain in full force & virtue.

John S. Griswold 
M. Griswold 

Approved by me this
25 day of July 1859

Charles Feinse  J. P.

Board of Trustees of
The Peoria University } Justices Court
as } Before Charles Feinse J.P.
John S. Grunwald }

Suits 18 3/4
Dak 12 1/2
Venus 25
scatts 48
Venus 25
Court 12 1/2
Venus 25
Court 12 1/2
2 Court 25
judg 25
ardict 25
Approv
Trans 125
\$ 3.79
Sum 30
2 Venus
in
Inlage 150
Attending
2 juries 30
2,30
jury
fee 3 00
9.04

Suit commenced on the 23^d day of June 1859
by Hugh W Reynolds, Attorney for Plaintiff
in Assumpsit on a Subscription for \$300.00 summons
issued same some day to A R Kidwell Constable re-
turnable on the 28th day of June AD 1859 at 2 O'clock
P.M. summons returned duly served on return day
on this last mentioned day ^{of} hour the parties by their
Attorneys appeared ^{of} plaintiff demanding a jury of six
men a venire is issued to R A Kidwell Constable
to summon a jury of six men said Venire is
returned by said Constable served by summoning the
following men as jurors L P Prescott, J C Green
James R Murphy, George B Parker, A Adams,
W W Potter ^{of} the jurors of the jury summoned as aforesaid
having been called tried ^{of} sworn did sit together
before me ^{of} hear the proofs ^{of} Allegations ^{of} of said
parties which were delivered publicly in their presence
^{at this hour the case is continued to 9 o'clock P.M.}
until 7 O'clock P.M. of the next day or of the 29th
day of June AD 1859 ^{of} now on this last mentioned
day ^{of} hear ^{hour} the parties again appear by their Attorneys
^{of} also the jurors aforesaid ^{of} after hearing the proofs
Allegations ^{of} Arguments of Counsels on both sides
the jury kept together in my Office by R A Kidwell
said Constable until 12 O'clock at noon when said
jury stated that they did not nor could agree on
a verdict whereupon said jury is discharged by the
Court, upon the Application of Attorney for Plaintiff
Another venire is issued ^{of} the case by the agreement

7 The Attorneys as well for the Plaintiff as for the defendant is continued to the 8th day of July ~~1859~~^{A.D. 1859} at 2 O'clock P.M. & now on the last mentioned day the case is by mutual agreement of the parties again continued untill 2 O'clock of Tuesday the 12th day of July A.D. 1859 the venire not having been served a new venire issues returnable at said day & hour. At last mentioned day this case is by agreement of parties again continued to the 23rd day of July A.D. 1859 at 2 O'clock P.M. venire issues July 18 1859 on return day and hour the parties appeared by their counsels the venire was returned by Constable Koiduree by summoning the following men as jurors Sarkin B Day George W. ~~Adams~~^{Adams} William Currie Louis Doup, William G. Arledge Henry Jacobs & the jurors of the jury summoned as aforesaid having been called tried & sworn did sit together before me & hear the proofs & allegations of said parties which were delivered publicly in their presence untill 6 O'clock P.M. at this hour the case continued untill 9 O'clock A.M. of the next day viz the 23rd day of July A.D. 1859 & was on this last mentioned day ~~now~~^{hour} the parties again appeared by their counsels also the jurors aforesaid & after hearing the proofs & allegations & the arguments of the counsels on both sides the jury were kept together in my office by A.K. Koiduree said Constable untill 12 O'clock ~~at~~^{on} noon when said jurors gave the following verdict We the jurors find for the plaintiff Three Hundred Dollars whereupon judgment is rendered on said verdict by the Court in favor of Plaintiffs & against the Defendants for the sum of Three Hundred

Dollars & Cents of suit Judg. \$ 300.00
Costs 8.84

On the 25th day of July AD 1859 an appeal was taken by said Defendant to the Circuit Court of Peoria County & bond filed and approved on the 11th Day of November AD 1859 the Transcript is sent up to the Circuit Court of Peoria County State of Illinois?

Peoria County } I, Charles Feinse one of the justices of the peace within & for said County do hereby certify the above Transcript & papers, annexed contain a full statement of the proceedings before me in the above case, Given under my hand & seal this 11th day of November AD 1859

Charles Feinse *Seal*

And on the same day to wit: on the eleventh day of November in the Year of our Lord one thousand eight hundred and fifty nine there was issued out of the office of the Clerk of said Court and under the Seal thereof ^{which with the return endorsed thereon are} a Summons in the words & figures following to wit:

The People of the State of Illinois, To the Sheriff of Peoria County - greeting
We command you to summon The Board of Trustees of the Peoria University if it may be found in your County, to appear before our Circuit Court on the first day of the term thereof to be held at Peoria, within & for the said County of Peoria, on the third Monday of November instant, then & there, in our said Court, to prosecute their suit against John S. Griswold lately appealed to our said Court from the judgment of Charles Feinse Esq justice of the peace of said County & make return of this writ, with an indorsement of the time & manner of serving the same, on or before the first day of the term of the said Court to be held as aforesaid. Witness Enoch P. Sloan, Clerk of our said Court & the seal thereof, at Peoria this 11th day of November in the Year of our Lord One thousand Eight hundred & fifty nine *Seal* Enoch P. Sloan Clerk *per* R. J. H.

"I have served the summons by reading to the Rev. Robert Johnston President of the Board of Trustees Peoria University this 11th Day of November AD 1859 John Bryner Sheriff"

9

Proceedings at a term of the Circuit Court of Peoria County began and held at the Court house in the City of Peoria, in said County and State of Illinois, on the third Monday in the month of November, in the year of our Lord one thousand eight hundred and fifty nine, it being the twenty first day of said month - Present the Honorable Elisha N. Powell Judge of the 16th Judicial Circuit in said State, John Bryner Sheriff and Enoch P. Sloan, Clerk, to wit:

Wednesday December 28th A.D. 1859

Board of Trustees
of the Peoria University

vs

Appeal from J. P.

John L. Griswold

On motion this Cause is continued
at Costs of defendant.

Proceedings at a term of the Circuit Court begun and held at the Court house in the City and County of Peoria, State of Illinois, on the nineteenth day of November in the year of our Lord one thousand eight hundred and sixty, it being the third Monday of said month - Present the Honorable Elisha N. Powell Judge of the 16th Judicial Circuit in said State, John Bryner Sheriff and Enoch P. Sloan, Clerk, to wit:

Thursday December 13th A.D. 1860.

Board of Trustees of Peoria University

vs

Appeal from J. P.

John L. Griswold

This day Came the plaintiffs

by Manning & Reynolds their attorneys and the defendant
by Williamson, McCoy & Donney his attorneys,
and it is ordered that a jury be impanelled to
try this Cause, whereupon Come a jury of twelve
good and lawful men, to wit: Oliver Hall,
Herman Blakeley, Valentine Schlink, J. N.
Cromwell, J. B. Alger, Wash. Brady, J. J. Harding,
Willis Triplett, J. D. Cutwright, D. M. Cummins,
A. C. Dean & James Miller, who were duly chosen,
tried and sworn to well and truly try the issues
joined in this Cause, and a true verdict give
according to the evidence. And the said Jury
having heard the evidence, the Argument of Counsel
and the instructions of the Court retired to consider
of their verdict.

Friday December 14th A. D. 1860
Board of Trustees
of Peoria University
vs Appeals from J. P.
John L. Griswold

This day Come the parties to this suit
and also Come the Jury sworn on yesterday to try this
Cause, and the jury upon their oaths aforesaid, do say
we the Jury find the issues for plaintiffs and
Assess its damages at the sum of three hundred dollars.
Therefore it is considered by the Court that the said
Board of Trustees of Peoria University have and recover
of the said John L. Griswold the said sum of three
hundred dollars its damages aforesaid and also its costs and
charges by it about its suit in this behalf expended, and that
execution issue therefor.

11
Monday December 31st A. D. 1860
Board of Trustees
of Peoria University
vs Appeal from J. P.
John L. Griswold

This day Come defendant and
prayed an appeal to the Supreme Court of this State,
which is allowed on his giving bond in the penal
sum of Seven Hundred dollars payable to said
Plaintiffs, Conditioned as the law directs, with
Matthew Griswold as security to be filed with the
Clerk of this Court in 30 days. It is agreed that
the bill of exceptions may be signed in vacation or
at the next term of this Court.

On the Eighteenth day of March in the Year of our Lord one thousand eight hundred and Sixty one there was filed in the office of the Clerk of said Court the in said Cause the Defendants Bill of Exceptions which is in the words and figures following

The Board of Trustees of the Peoria University	}	Circuit Court Nov Term 1860
vs John S. Griswold		

Be it remembered that on the trial of the cause before the Court & jury the plaintiff to maintain the issues on his part offered in evidence the following instrument in writing to the introduction of which the defendant then & there objected

"We the subscribers agree to pay the sum set against our respective names for the erection of buildings and in defraying the expenses of putting in operation the College of the Synod of Illinois at Peoria, to be paid as the money shall be required to meet the expenditures as incurred for the purpose aforesaid

Subscribers	Amount Subscribed
John Reynolds	\$ 300
John S. Griswold	600
Amos Peters	100
Rudolphus Rouse	100
Wm W Reynolds	100
W B Curtis	100
B L Burland	100
E M Powell	100
A P Bartlett	100
Wm W Haskell	100
S Worsley when Building	100

under Roof

J P Hatchkiss	1 00	
Jacob Gale	50	
Wm S Moss	1 00	
Isaac Underhill	1 00	
W Ballance	1 00	
P O Sucks	50	
Ans Hamlin	50	
V Druvin	2 5	
Isaac Walker	50	
J M'Clay Smith	2 5	
T B Moore	50 00	-50
H Grier	2 5 00	
John Dredge	50 00	
John A Keys	50 00	
J. Gurnie in all	50 00	
J Frink	1 00 00	
E Winchel	10 00	
A S Merriman	50 00	
W H Brugger	1 00 00	
N B Birkin	15 00	
J P Mulvey	5 00	
P B Bartlett	10 00	
D M Cummings	10 00	
W P Pratt	10 00	
E G Sanger	2 5 00	
A G Curdinius	1 00 00	
Wm Sucks	10 00	
Cooper	2 5 00	
Austin	50 00	
Parmely	10 00	
M D Orsagel	50 00	
Wm Reynolds		

3 15-

Subscription List

Wm Tedy	
John Anders-	
A G Tandy	50 00
W W Wheeler	1 00 00
Alex McCoy	25 00
W A Herron	1 00 00
H M Cole	10 00
Jacob Sargent	10 00
Wm A Willard	5 00
Jacob Wepperey	10 00
M Peltingill	50 00
E A Mear	25 00
S P Maclean	20 00
J W Kansel	60 00
Wm H Hamilton	50 00
David McKinney	20 00
Smith Smith	20 00
James H	50.00
Tobias Bradley	100 00
Perry, Fraser	50 00
C F Moulton	25 00
Benjamin Hasle	20.00
Wm Kellogg	100 00
Ira Smith	100 00
I Underhill	20 00
J Underhill	25 00
H G Anderson	25 00
A Hawthorne	25 00
A a Bickner	25.00
J. C. Proctor	25.00
W H Adams	10 00
Thomas Bryant	25 00
Henry Sander	25 00

- 1 Because there is no such corporation as the Plaintiff
- 2 There is no assessment proven in order to enable the Plaintiff to recover
- 3 It is not payable to Plaintiff
- 4 There is, no payee mentioned in the instrument
- 5 There does not appear any consideration for the agreement
- 6 The instrument does not appear to be signed by Defendant & appears on the face thereof to have been altered since signed but the Court overruled the objections & allowed the instrument to be read in evidence to the jury to which the Defendant then & there excepted & objected, the plaintiff then offered in evidence the Charter of incorporation in the words & figures following to wit

In force
Feb. 14
1855

Corporation

An Act to incorporate Peoria University

Section 1 Be it enacted by the people of the State of Illinois, represented in the General Assembly, That W. B. F. Spelman, S. W. Holmes, A. Kirkpatrick, James Smith, H. V. Dodge, J. F. Bergen, John Allen, S. E. Vaile, W. McHarder, J. C. Candler, A. Coffey, S. W. Ewing, — Proctor H. H. Richardson, J. F. Goodhue, H. M. Cornick, H. H. S. S. Wilson, M. B. Curtis, J. Reynolds, J. S. Griswold, P. R. R. Bratherson, J. Walker, S. S. Clark, J. H. Cooper, J. W. Hance, A. R. Bartlett, H. H. House, J. W. Clay Smith, & H. P. Harris, be & they are created a body corporate & politic, for the purpose of founding & maintaining at or near the City of Peoria, Illinois an institution of learning, to be known by the name of, The Peoria University.

name
and
style

§ 2 Said Corporation shall be known by the name & style of The Board of Trustees of Peoria University, and by that style & name shall remain & have perpetual succession, with power to sue & be sued; to plead & be impleaded; to acquire, hold & convey property, real

Personal or mixed, in all lawful ways; to have use
 & alter, at pleasure a common seal, to make alter & establish from
 time to time, such constitution, rules by-laws & regulations as they may
 deem necessary for the ^{good} government of said corporation & the proper
 management of the institution under their control; Provided, such con-
 stitution, rules by-laws or regulations be not inconsistent with the
 Constitution & laws of this State or of the United States.

Trustees divided into classes
 § 3 Said Trustees shall be divided into five classes, whose
 term of service shall be arranged in such a manner
 that one class shall go out of office in each successive year at the
 time of the regular annual meeting of the synod of Illinois of the Presbyterian
 Church in the United States of America & as such vacancies shall occur
 they shall be filled by appointment of said synod at said time of
 meeting

§ 4 The number of trustees constituting said board shall never exceed
 thirty, nine of whom shall constitute a quorum for the transaction of business
 at any regular or special meeting duly notified & assembled,

§ 5 Said Corporation may establish separate departments
 of the learned professions, the sciences & arts including
 the departments of theology, medicine & law & shall
 assign to each department a competent faculty
 of instructors; Provided the appointment of instructors or
 professors constituting each faculty shall be subject
 to the sanction of ^{the} synod

§ 6 Said Corporation may issue certificates of scholar-
 ship, limited or perpetual upon such terms as the
 corporation & the party contracting for the scholar-
 ship shall agree; & the benefit of such scholarship
 shall inure to the holder thereof or his or her assigns
 so long as the covenants therein agreed to by the
 person or persons contracting for or lawfully owning
 such Scholarship shall continue to be faithfully performed

and no longer except at the option of the corporation
 § 7 The Professors or a majority of them duly appointed
 in said University or provided for in section five
 (5) of this act shall constitute a faculty in the power
 to enforce the laws, rules & regulations enacted
 by the Board of Trustees for the government &
 discipline of the Students; to suspend or expel such
 of them as may in their judgment deserve it & to
 grant & confirm, by the consent of the board of
 Trustees, degrees in the liberal arts & sciences
 or any of the branches thereof to students or others
 when by their proficiency in learning & other meritorious
 distinctions they shall regard as entitled to them
 as it has been usual to grant in other Universities
 & colleges, & to grant to such graduates diplomas
 or certificates under their common seal to authenticate
 & perpetuate such graduation.

§ 8 No misnomer of said Corporation shall defeat
 or annul any gift, grant, bequest or devise to or for
 said Corporation for the use or benefit of the Peoria
 University or any department thereof: Provided, the
 intent of the party or parties making such gift
 grant, devise or bequest be sufficiently manifest

§ 9 This act shall be a public act, & shall
 be in force from & after its passage.

Approved Feb 14, 1855 "

The plaintiff then called John McClay Smith who
 being sworn testified as follows: { the books of the
 corporation were then produced & identified by
 the witness who further testified as follows.

I was secretary of the board of trustees of Peoria University
 & am now an officer of the Executive committee of plaintiff

of 19
Those are not original records - I did not see them written
a letter book was obtained by the corporation ^{Records} copied
into these - don't know where the original is - These
records I think were not copied from the original
minutes a year before the suit was commenced -
Mr Farris the original secy of the board of trustees of
Pena University wrote these records - This suit was
commenced in 1859 - I am now clerk ^{As} treasurer of
of the executive committee - I do not ^{know} that this is a copy
of the original - I believe it is a correct record -
It is recognized by the corporation as correct copy.
I know nothing more about it only by hearsay -
I only know that this is not the original record from
hearsay - I know there was a time when this copy of the
record did not exist - I first saw this record in the
hands of the executive committee - Farris was then clerk of
the board of trustees - I have seen him write: This record
is his writing - I don't know when this book for the record
was purchased only from hearsay was an order
of the board to have it bought - I think I paid
for it but don't know when - I know plain
liff organized under the Charter - It was about
March 1853 - I have no pecuniary interest in
this suit - If collected I would receive it as
Treasurer - The plff owes me - I would not get this
money in satisfaction of my debt - My debt
is to be paid from the sale of land - I intend
this money to pay the workmen - The plaintiff owes
me for money ^{that} overpaid as treasurer and I took
notes for sale of land as security - I would not
get any of this - I advanced the money on the faith of the subscriptions
supposing it would be paid - I don't know whether I hold the notes

8

spoken of or not - They are in the hands of the plff
 And I have possession of the records - I am to get
 my money out of the notes ^{for} of the sale of the land
 There was no positive agreement that I should do
 so but it was a general understanding - It is not in
 writing - I executed no release - I told them ^{they} must secure
 me they said they would turn out the notes -

{ Here witness executed a release to plff as to the money
 to be recovered in this suit } The trustees mentioned
 in the charter had a meeting ^{and} organized by appoint-
 ing an executive committee - I was present - It consisted
 of portion of the charter ~~members~~ trustees we appointed a
 President & Secretary & Treasurer this was in March
 /55 - They took some steps to do the business for which
 they were organized - The board of trustees were under
 the care ^{of} supervision of the Synod of Illinois -
 The Synod of Ills consists of a certain number of
 Presbyteries made up of churches of the old school
 Presbyterian Church { the foregoing evidence in
 relation to how the Synod was composed or constituted
 was objected to by deft, but overruled by the court ^{and}
 deft excepted } The board of trustees bought a piece of ground
 not quite 4 acres ^{and} commenced building a house & purchased
 brick ^{and} material & some of the ^{or} ~~the~~ contracts were in
 writing ^{and} some were not - The contract for the land
 was in writing ^{and} the building committee made contracts
 in writing with men - The building committee
 were appointed by the executive committee there is
 a record of the ^{or} ~~the~~ appointment of the executive
 committee - I was one of them & Here the plff
 offered in evidence the record alluded to by the
 witness but was objected to by the deft but the

21 Court overruled the objection and allowed the record to go to the jury to which the Defendant then and there, excepted and objected. (P)

Proceedings of the Board of trustees, The first meeting of the trustees named in the ^{forgoing} Charter was held at Peoria in the Lecture room of the 1st Presbyterian Church Wednesday March 7th 1855 8 O'clock P.M. members present, Rev. Messrs James Smith D.D., Addison Coffey, Fielding W. Ewing Richd W Dodge, Robert P Harris and Messrs R House M.D., John Reynolds & McClay Smith, John S. Groswood, Jonathan K Cooper Esq Isaac Walker & Dr Wansel W. Blunt & (R.R. Brotherson).

Dr Cooper Esq. was chosen President pro tem and Rev W Dodge Secretary

A committee consisting of Dr Smith Messrs Ewing, Coffey, Dodge and Harris was appointed to draft a constitution and by-laws for the government of this Board and to report to-morrow Evening.

Agency

Dr Smith was appointed agent of this Board to labor for three months, or as much time as he may be able to devote, with compensation at the rate of \$1500.00 per annum and expenses paid

Adjourned to meet to-morrow Evening at 7 O'clock

Peoria Thursday March 8, 55

Seven O'clock P.M.

Board met according to adjournment members present as on yesterday. The committee appointed to draft a constitution and by laws, made their report which after amendment was adopted: article by article and is as follows viz:

Constitution and by-laws of the Board of trustees of Peoria University

Article First The object & Power of the Board are defined in the act of incorporation recorded on page #

Article Second

Section 1st
22 Officer. The Officers of the Board shall consist of a President, Vice President, Secretary & Treasurer, who shall be elected by ballot at each Annual meeting, But in case of failure of such Annual meeting or of such election they shall continue in Office until their successors be appointed

Section 2^d

President. It shall be the duty of the President to preside at all meetings of the Board. & to call the Board together on the application of any Six members

Section 3^d

Vice President. The Vice President shall assume the duties of the President in case of his absence or inability to act.

Section 4th

Secretary. The Secretary shall keep a faithful record in books prepared for the purpose of all transactions of the Board & shall conduct its correspondence & shall keep on file copies of letters written & received & all documents & papers relative to the institution to be subject to the inspection of the Board at any time.

Section 5th

Treasurer. The Treasurer shall receive & by order of the Executive Committee shall disburse monies belonging to the University, shall give security in such amounts as the Executive Committee may direct, shall receipt for all monies paid to him by Agents or others & These receipts to be handed to said committee & - & he shall report Annually to the Board.

Article Third - Times of Meeting

This Board shall meet annually in Peria, on the first Tuesday of October also as provided in Article Second Section Second.

Article Fourth - Executive Committee

At each annual meeting the Board shall appoint from their own number an Executive ^{ive} Committee consisting of nine (9) whose duties shall be to order & ⁿsuperintend the erection & repairs of the University buildings, & appurtenances to audit the accounts of the Treasurer; to make an annual statement & report of the expenditures of the University & State of the Treasury & of the revenue & funds of the University to examine & adjust all accounts which any person or persons have with the University & shall lay before them & where balance shall be found due to any such person, to give orders on the Treasurer for the payment of them, to institute or cause to be instituted in the name of the Corporation suits for the recovery & preservation of the University property & interest whenever it shall be necessary to gether with Treasurer, to cause the funds of the University to be invested in the most advantageous mode, & to do & manage all other matters & things whereunto they are or shall be further authorized or required by law or by an special ⁿresolves of the Corporation. This Committee shall meet immediately after the adjournment of the Board & thereafter in their own adjournment.

Article Fifth

Scholarships.

The form of Scholarships ^{shall} be as follows viz: Either

- 1 The subscription of \$700.00 secured by note on the punctual payment of the interest - 6 per cent per annum, half (Yearly in advance, shall entitle the subscriber or his assignee, to send two (2) scholars perpetually to this institution, but should he at any time transfer one of these scholarships to another his assignee will be required to provide for the fifty Dollars which had been deducted in account of two Scholarships having been taken.
- 2 The subscription of \$400.00, secured by the interest paid as above specified shall entitle the subscriber or his assignee to send one scholar perpetually to said institution.

Or

- 1 Two perpetual Scholarships shall be granted on the payment in full of \$525.00 in six equal annual instalments with six per cent interest on the sum remaining unpaid, this interest to be paid half yearly in advance
- 2 One perpetual Scholarship shall be granted on the payment in full of \$300.00 in six equal annual instalments with interest on the payment thereof as specified above.

Article Sixth

Agents.

This Board may appoint an agent or agents for the purpose of obtaining funds or for such other purposes as the interests of the institution may require.

Term of Office of Trustees

The following classification of the present board of Trustees was adopted.

Class of 1856

B F Spilman

Thos Candor

Wm McCandlish

F W Ewing

R R Richardson

W S Cox

Class of 1857

J B Began

A Kirkpatrick

R V Dodge

G F Goodhue

J Allen M D

W B Curtis

Class of 1858

J W Hynes

J S Vail

W Proctor

Wm Reynolds

J W Hoar

A R Bartlett

Class of 1859

R P Farris

R Howe M D

S S Clarke

R R R Britherson

W McCormick

J M Clay Smith

Class of 1860

James Smith D D

A Coffey

J S Wilson

J R Cooper Esq

Isaac Walker

John S Griswold

Resolved that no compensation be allowed for the present year to any Officer of this Board with the exception of the Agent

On motion the Board proceeded to elect Officers by the ballot resulted as follows;

President

James Smith D D

Vice do

J R Cooper Esq

#4

Secretary R P Farris
Treasurer J P Hotchkiss

An executive committee was then appointed consisting of
 H House M D J J Groszold
 John Reynolds R R K Brotherson
 W B Curtis J W Kancel
 A R Bartlett J M Clay Smith
 J K Cooper Esq

Of whom six shall be a quorum & who are
 authorized to fill vacancies during the interim

Dr Smith & Messrs Ewing, Coffey, Dodge &
 Farris were appointed a committee to secure the
 services of an agent.

Adjourned till to-morrow at 7 1/2 O'clock P.M.

Pena Illinois Friday
 March 9th 1855 Seven O'clock P.M.

The Board met prayer was offered by Rev Dr Smith
 The minutes of the preceding meetings were read & approved.

Ordered that the executive committee meet at the
 call of the Vice President & that all contracts
 entered into by said committee be signed by its Chairman
 & Secretary

Resolved that the orders drawn
 by the executive committee on the Treasury be
 signed by the Chairman said committee and
 countersigned by their Secretary

27.

Resolved that the Annual meeting of this board be held in Peoria on the Tuesday before the 2nd Thursday of next October.

Adjourned to meet Tuesday before the second Thursday in October 1855

Prayer by Rev M Ewing
Robert P Farnis
Secretary

Peoria October 9th 1855

7 1/2 O'clock (P.M.)

The board met according to adjournment.
The meeting was opened with prayer.

Present James Smith D.D. Pres. (W. House
M.D., W. Bourgeois J. K. Linper Esq. Rev S. Wall
Rev H. V. Dodge Isaac Walker Thos. Candor
J. W. Mansel John S. Gussard John Reynolds
J. W. Mansel R. K. C. Bratherson J. M. Clay Smith
By Rev P Farnis.

The Executive committee reported that an eligible site for the University had been secured on favorable terms. Approved.

Dr Smith reported that he had operated as Agent during the summer & had obtained cash subscriptions to the amount of \$720.50. Also that he had received from Mrs Maria Waring & Miss Betsey Copp of N York City 320 acres of Land

Resolved - That the Citizens of Peoria be called on for \$5000.00 in cash & \$30000.00 in Scholarships

That an equal amount be raised in the Synod

The Executive committee were instructed to build as soon as practicable an edifice at a cost of not more than \$15000.

Adjourned
 Robt P Farris
 Sec. of

Peoria Illinois July 17. 1856

The board met pursuant to call.

Prayer was offered by Rev Bro Marquis

Members present

James Smith D D President. S Cooper Esqr Vice
 S Wamel, R H Bitherson, F W Ewing H V Dodge
 Bro Reynolds, S M Clay Smith, Robt P Farris Esqr
 Rev Robt Johnson & who had been appointed vice
 Rev A Coffey deceased.

The seal

A device for a seal, offered by Rev H. V. Dodge was adopted by the board.

Ordered that the Secretary procure a seal & that all official acts of the board be attested by such seal & signed by the President & Secretary.

Ordered that the lands donated by the heirs of Bro Copp Jr be sold & warranty deed given to the purchasers if required.

The following offered by S Cooper Esqr was adopted

Whereas Maria S Waring & Betsey Copp

29

as the heirs at law of Jas Cooper Jr deceased by their deed dated the Ninth day of July 1855 have donated to Peoria University the S.E. 24. W¹/₂ N.E. 15¹/₄ the S¹/₂ W. 10 all in S. 7. N. R. 5 E in Fulton County Illinois, for the use of said University but on conditions that said University shall create & fund two scholarships to stand in the name of Geo. Webster Waring & in token thereof that the said University shall on their part execute said deed under their seal & the signature of their President therefore Resolved - That this Board accept said donation on the condition in said deed named & that the President & Secretary of this Board execute said deed under the seal of this corporation & as soon as the same is procured & in conformity with the terms of said donation & the action of this Board: & that certificates of Scholarship be issued as required in said deed unless the same be waived by the donors therein named.

Resolved further. That one of said Scholarships be denominated the Cooper Scholarship.

Adjourned

Robt. P. Farnis
Secretary

Peoria Illinois Tuesday Oct 7. 1856

Annual meeting

Present, Jas Smith D.D. J. H. Cooper Esqs -
Rev Robt Johnston. Isaac Walker H. House M.D.
J. M. Samuel Rev J. N. Ewing. J. M. Clay Smith Rev J.
Will J. Reynolds Robt Farnis - The meeting was opened
with prayer by Rev Robt Johnston

18

The minutes of the preceding ~~evening~~ meeting were read ~~and~~ approved.

An Election was held for Officers of the Board by an Executive Committee with the following result:—

President	Isaac Smith D.D.
Vice "	J. K. Cooper Esqr
Treasurer	W. B. Luntiss
Secretary	Robert H. Harris

The executive committee of last year was re-elected.

J. M. Clay Smith	J. K. Cooper Esqr
Geo Reynolds	W. B. Luntiss

were appointed a committee to make out a report to Synod.

Professors

Rev Wm Bishop by Rev S M Newell were elected Professors with the expectation that their services would be required in May next.

The salary of the Professors Elect was fixed at \$1000.00 per annum

Adjourned

Robert H. Harris
Secretary

The Synod met in Springfield, Elected:—
J. H. Bergen D.D., Moderator; Rev. J. W. Ewing;
Rev Jas Stafford; Rev W B T Henry; Rev S M
Templeton; Trustees whose term of Office will expire
in 1861.

Peoria Illinois May 1. 1857
Pursuant to call the board held a special meeting
Present: J. K. Cooper Esq. W. B. Luntiss; W. B. House M.D.
Geo Reynolds Rev Robert Johnston Isaac Walker

Trustees
Class of 1861

49
31

J M Clay Smith; R R K Britherson; J W Hoames

Dr Smith offered his resignation as agent.
Said resignation was accepted & Rev R P Farris
was elected agent in place of Dr Smith

Adjourned

R P Farris
Secy

October 1857

The annual meeting was
regularly called but a quorum failed to attend.

The Synod met in Hillsboro in October of this
Year, re-elected the retiring trustees, viz;
J Bergen; A Kirkpatrick; Rev G F Goodhue
& Allen M D; W Bourton & J McBrown D
in place of Rev R W Dodge removed from the
State, also Wm McComb in place of W Porter
Class of 1858 resigned.

Penn Illinois Sunday Oct 12, 1858

Annual Meeting

A Quorum did not assemble
until the evening of the 13th when there were present
J Cooper Esqr; Rev R Johnston; Rev S M.
Templeton; Rev S S Vail; Rev J W Brown D
Rev J W Hoynes; R R K Britherson; Isaac Walker
Jno Reynolds; J M Clay Smith; W McComb
& R P Farris.

The Secretary & Treasurer made their reports
Messrs: Cooper & Britherson were appointed

Trustees
Class of 1862

20

a committee to make arrangements with W^m S Mofe in regard to the title to the University grounds.

Messrs: Kerper McElay Smith & Farris were appointed a committee to prepare a report to be presented to the Synod.

Rev Robert Johnston was chosen President & J McElay Smith Treasurer - the other Officers were re-elected.

Adjourned to meet at the call of the President
H P Farris Secy

The Synod met in Peoria, re-elected the retiring Trustees viz: - J W Hynes; J S Vaill; W McComb; Jno Reynolds; J W Hensel; A R Bartlett.

P O Lucks was elected to fill the vacancy in the class of 1860. occasioned by the removal of Rev Dr Smith into another State.

Monday Oct 18. 1858

Board met at the call of the President 7 Seven O'clock P M

Members present

Rev Robt Johnston - President; J K Kerper Esq; Rev J W Hynes; Rev J W Curing; Rev S M Sampson; Rev J W Brown D D; Jno Reynolds; P O Lucks; A R Bartlett; & H P Farris.

Prayer by Rev Dr Brown

The Secretary was authorized to procure a book in which to record the proceedings of this Board.

Minutes

Nov 1863

27
33

The action of Synod on the report from Peoria University was communicated to the Board,

Rev S H Sturgeson was elected ^{agent} at a salary of \$1000.00 & his expenses to be paid.

Messrs: Cooper: Bartlett & Mansel were appointed a committee under that portion of the Synod's action respecting the title to the site for the University.

The following were elected an executive committee.
John Reynolds: S H Cooper: Esq. Rev Robt Johnston: J W Mansel: A R Bartlett: P O Souck: J M Clay Smith: S S Clarke: & R H McArthurson.

Resolved:- That the Agent be authorized to take notes to run not longer than 10 Years & bearing 6 per cent interest payable semiannually for the Endowment fund

Adjourned

H P Harris
Secretary.

State of Illinois }
Peoria County }
I Robert P Harris
Secretary of the Board of Trustees of the Peoria University, do hereby certify that the foregoing is a true copy of the minutes of the proceedings of said Board of Trustees, as appears by the records of said Board in my possession: & that I am intrusted with the safe keeping of the original of which the above is a certified copy.

25

Subscribed by me this Twenty third day of June AD 1859.
 Seal
 Robert P Farris

I Robert P. Farris upon my solemn oath do depose & say - that the facts stated in the above certificate are true. Given under my hand & Seal this Twenty third day of June AD 1859

R P Farris

Subscribed & sworn to before

me this 23rd day of
 June AD 1859

J A Miley J.P.

State of Illinois }
 Peoria County } I Robert P Farris
 Secretary of the Board of Trustees of the Peoria
 University do hereby certify - That the foregoing
 from page One to page Sixteen inclusive, is a true
 copy of the minutes of the proceedings of said Board
 of Trustees, as appears by the records of said Board in
 my possession; & that I am entrusted with the safe keeping
 of the original of which the above is a certified copy.
 Given under my hand & the seal of said cor-
 poration this fifth day of October AD 1859

Robert P. Farris

I Robert P Farris upon my solemn oath do
 depose & say that the facts stated in the above certificate
 are true. Given under my hand this fifth day of October AD 1859

R P Farris

Subscribed & sworn to before me
 the 5th day of October AD 1859 J A Miley J.P.

23
35

The Executive committee were chosen in March 1853 & has been continued ever since.

The plaintiffs laid out about \$6000 & have not paid all their indebtedness. There is now about \$1600 due & unpaid. The indebtedness is for laying brick, casting iron - carpenter work, brick &c.

The building committee in part purchased materials. There is indebtedness for the real estate in addition to the above about \$3000 more - In all, the indebtedness of the plaintiff is about \$9000 - Last Spring the indebtedness for the improvements was about \$3400 -

Have paid 800 \$ rec^d for lease of property which reduced the indebtedness for material work &c to \$1600. Plff has paid nothing but the interest on the real estate purchased, - The price to be paid was \$3000 interest to be paid semi-annually.

Defendant was a member of the Board of trustees & attended the meetings for a time & was at the meeting called to organize. - He was a member of the Executive & financial committee - but did not act much for the last years, not in the meeting at all - I don't think he was present when the site was selected - He was present ^{at} a meeting when the citizens were called in for subscriptions.

The building was to be erected for an institution of learning - It was to be under the supervision of the Board of Illinois - I presume Gnewold (deft) knew this - I think it was so talked at the time.

I am Treasurer - The indebtedness is over \$1600.

The site & improvements have since been leased or contracted by plff to the board of school inspectors of this city - I have the contract between plff & School

~~27~~ inspectors - I know it was execute by the persons signing it.

This memorandum of agreement made this 6th day of June AD 1860 between "the board of Trustees of Peoria University of the first part & the "Board of School inspectors of the City of Peoria" of the second part, witnesseth that said party of the first part for the consideration herein after named, agree to surrender to to the said party of the second part the full & complete use, enjoyment & possession of the premises situate in the City of Peoria held by said party of the first part under contract or title bond from William S. Moss bearing date August 10th 1858 & recorded in the proper Office in Peoria County Ills, on the 5th October 1859 in book C13 page 430. & for description of which said premises reference is here made to said Moss contract which is also herewith & hereby assigned transferred & made over to said party of the second part together with all & singular the improvements buildings & materials of said party of the first part now on said premises upon the terms & conditions & for the purposes hereinafter named. That is to say that said party of the second part will make immediate payment to the said party of the first part of the sum of Eight hundred dollars, to be applied on the debts of said party of the first part, first paying those which are liens on said premises or the interest of the party of the first part therein, secondly that said party of the second part will pay up to Nathaniel B. Curtis or who ever may be entitled under said Moss contract to receive the same the back interest now due under said contract & shall hereafter faithfully comply with all the terms & conditions of said contract so as to prevent any forfeiture

37

thereof to the prejudice of the said party of the first part. Thirdly that said party of the second part will proceed without unreasonable delay by virtue due regard to economy to complete the college building commenced on said premises by the ~~said~~ party of the first part by remaining in a dilapidated state thereon, using the walls now standing so far as it may be deemed safe to do so by pursuing the general plan as to internal arrangements contemplated by the said party of the first part except in so far as it may be found necessary to alter the same to answer the purposes of common schools for which purpose the party of the second part designs by is ^{to} permitted to use the same: And provided that said party of the second part shall not be required to raise said building to the height of more than two stories in all. And lastly that said party of the second part will agree to reassign said contract by surrender said premises in good condition to the party of the first part, their successors in Office or assigns at any time after three & within five years from this date that said party of the second part shall be refunded the actual amount of all monies by said party of the second expended in the payment of said \$800 & interest under said Mass contract by in the completion of said College building And for necessary repairs with ten (10) per cent interest thereon from the date of such payments & expenditures respectively not including however anything for furniture which may be placed in said building by the party of the second part, which furniture said second party is to be permitted to remove ^{from} said premises without injury thereto on surrendering up said premises as aforesaid

28

And provided further that until payment made by said party of the first part or their assigns as aforesaid the party of the second part is to be permitted to use and occupy said premises free of rent or any charge therefor & that if said monies so expended as aforesaid ^{by said} party of the second part, shall not be fully repaid with interest as aforesaid, within five years then all the rights of said party of the first part in said premises & in & under said Moss Contract shall forever cease & the same shall become absolutely & forever vested in the said party of the second part: And said party of the second part hereby stipulates & agrees with said party of the first part to accept said premises & said Moss Contract upon the terms & conditions above mentioned, & in all respects faithfully to comply therewith & surrender said premises again to said party of the first part or their assigns upon repayment of all expenditures & interest as above named, within the period hereinbefore limited in witness of all which the said parties of the first part & second parts have severally executed these presents in the manner required of them respectively by law, at Provia the day & year first above written.

The Board of Trustees of Lewis University

J. M. Clay Smith Secy

By Robert Johnston President

Thomas S. Davis Pres. S. Imps

Jacob Gale Secy of board of School Inspectors,

I Pff here offered the contract in evidence which was objected to by deft but the Court overruled the objection & allowed it to be read to the jury to which deft then & there excepted.

The rafters by shingles because we could not collect money - to cover it

39

The building was commenced by plff in June 1857 it was 60 feet one way by three stories high - the upper story about 20 feet high - It was left in that condition in the fall of 1857 by in May 1858 the storm threw it down by it lay there until this sale the school inspectors except some material by brick was sold in fall of 1858.

The plaintiff had no means to rebuild.

The building might have been enclosed the same fall it was built if the subscription had been paid up. Plff appointed two collectors by wrote to foreign subscribers - I got paid \$300 on subscription. If it had been enclosed I think the building would not have blown down.

Cross Examination

The several churches compose the Synod

The Synod was to raise \$5000 - Peoria Churches were to raise \$5000 - The ^{Synod} claims all out of Peoria We were to raise all we could - Smith was Agent for the Synod by raised some. We got donations of land by was also Agent of the Plff. We was getting subscriptions in Peoria. The synod did not claim what he raised in Peoria - We was appointed by the plaintiff to get subscriptions

The assets of plff were - in Peoria	\$ 4600 -
Springfield by Jacksonville	750
Land donated sold	2100
Subscription got by Smith	700
The whole indebtedness including land by everything	9000 -

About
of which 6000 was for improvements
School inspectors are to pay no rent.

28

They paid ~~800~~ \$800 besides about 400\$ of which went to pay back interest on the purchase of land. They are to hold the site & improvements 3 Years.

It was not leased for its value but was for protection.

The defendant paid his subscription cheerfully until the fall before it blew down. — He then claimed that the work was not going on. — The plff for want of means resolved in the fall of '57 not to go on with the work any further that fall. — If all the Peoria subscriptions had been paid it would not have completed the building — Moss proposed to witness in the fall of '57 to find shingles to enclose the building for the plff if witness would pay for them in two months. — I don't know that Worris offered to furnish shingles to cover it. The Synod of Ill have a religious institution in Chicago — This was to be a literary institution — It was intended to give a preliminary education here & complete it in Chicago. The plff had nothing to start on. Griswold acted awhile with the board.

^{He was told} He said he would subscribe \$600 if they would release him from doing any thing more as a member of the board.

It was my business to notify the members of the meetings. I notified him to attend every meeting of the board.

The plff design going on with the institution if they can get money. — There is a probability the institution & all property will go in the hands of the City. — I know the board fears they will not be able to go on with it.

This depends on whether we can raise money.

When the contract was made with the school inspectors it was talked over whether it would prejudice the suits or not.

41

29

I did not hear any of the Officers say they would make the contract in that way so that it would not affect the suits ^{any} then finish the contract -

(We will sue the others if we recover this)

We do not propose to sue the synod - There has never been any assessment made against subscribers before suit brought - nor any estimate in any manner

The original design was to build a building at the cost of about \$15,000 - We designed Penna City the Synod ^{any} Churches to get up the building and subscription to complete it - The City proposed to buy the lot & improvements -

Deft paid \$300 don't know when. I asked him about the fall of '57 for the balance - At first the subscription of debt was \$300 and 6 or 7 scholar-ships. - I think this is not the original subscription paper signed by the defendant - It is a copy.

Deft then called J. H. Cooper who testified as follows:

I was one of the original Trustees debt was another - I think debt was at the first meeting but do not recollect distinctly - I think debt performed some duties at first, after that he

30

ceased to attend - I know nothing personally about his paying any thing - (I don't know whether he was on the finance committee or not) I was on the executive committee, John Reynolds, Hoandrell & Bartlett were on the building committee - There was an executive committee of nine - I think debt was on the executive committee - The contract of the plff with Mwp for the purchase of the site was in my hands a good while. As I passed it over to

Remuell Bills or some one of the School Inspectors I don't know the indebtedness of the plff - I made some exertions to raise money to pay the debts

There was two quarters of land donated to the board & which plff sold - The notes taken for one were discounted to raise money to go on with the building - The other notes I have in such shape now that I think they can be collected - they amounted ^{ed} originally to about \$1500 - Interest makes ^{the} amount more now - This now draws 10 per cent interest -

The Synod is connected with the plff & exercises supervision over the plff - They fill vacancies elect Professors [with the board] - Have appointed Agents The plff made reports to the Synod & acted in connection with Synod - The Synod had a meeting in Peoria in relation to this matter -

I have not a distinct recollection of the separate powers of the Synod & Board, but these the charter will show - There was a meeting of the Synod of Ills held in Peoria some time in the fall of 1858 at which I was present and at which the matter of the University came up and the whole subject was fully canvassed and the Synod

acted upon it and determined still to go on with the enterprise and recognized & confirmed the action of the board and directed that further steps be taken to secure the title to the lot. The jeff here rested.

The deft then called John A McCoy who testified I was present at the original meeting to organize Defts subscription was originally \$300 - I am acquainted with his hand writing have often seen him write - { Witness was here shown the subscription paper sued on } This is not his hand writing - The conditions on which his subscription was raised from 300 to 600 were made and subscription ~~made~~ increased in my office - Smith - Harris - Coffey & others of trustees were at my office at a meeting of the Board - Griswold Deft objected to bring put on committee - would pay money but refused to do the work - They then agreed that he should be exonerated from active duties - He was to be released from his scholarships I don't recollect what was said about Jeff running in debt Don't know whether it was a condition that Jeff should not run in debt or not - It was then said & agreed that he should be released from his scholarships - I don't know whether he has ever been released or not - (The subscription heading and defts signature there to is in the handwriting of Dr House.)

32

Camp Examined

Def't being an Elder in the Church & being a prominent citizen it was expected he would do some-thing by way of work. He was to be released from scholarships & exonerated from active duties. This is not the original subscription

Def't then called Dr House who testified -

I wrote the heading of this subscription. The second name on it is the Defendants. I wrote it also. It is not the original subscription but is the third copy from the original & is the copy of a copy. There was a subscription paper previous to Def's organization subject to conditions to see what we could do. We then got the charter & then drew up other subscription papers & got some copied off on this & I took this to get signatures. It was first copied from the original & then I took copy of that. The first eight names on this I copied in order to show & get subscriptions.

I copied them from a paper on the table at a meeting held in the basement of the Presbyterian Church. Def's subscription to the original was more than this in scholarships - he proposed to give my money & be released from active duties. His subscription ^{for building fund} on the first \$230 & two scholarships.

45

Cross examined

I was at a meeting that he proposed to change his subscription at the Church - I was at the meeting at McCays Office once - There were two or three meetings there - I ^{was} requested by the trustees to use my influence to raise subscriptions.

Smith recalled by the Deft

The value of Scholarships were at first 400 \$ & afterwards changed to \$300 - I dont recollect that the defendant was ever discharged from any Scholarships - I have been keeper of the records for about 6 months - I dont know how many Scholarships deft subscribed for - I think this subscription paper is not the original - I dont know that this was ever presented to the defendant - It never was by me - I know there were several other papers that had defendants name copied on - I have been Clerk since last year - I looked for the original subscription but could not find it - The subscription was taken off & put on a book - That on the book was taken from this - I have one other paper on which I said subscribed \$300

Cross Examined

Farris was secretary before me - I dont know whether Farris has the original or not - I dont know whether this was copied from a copy or not - I dont know whether was any difference in the heading or not - There are several subscription papers.

24

John W. McCary recalled by deft -

I know this subscription - We did not have this present at my Office when the change was made but there was a change made in the subscription I can not be certain that this is not the one.

I am not certain whether it was a list or subscription book - I think whatever it was that was present had a list of scholarships also on it

Smith said at the meeting they did not care for the scholarships - That when they got the building up they could get scholarships subscribed for by rich men - My belief is that this was not the paper present

W. O. Reynolds called by plff -

This is the subscription paper we had on the table before the justice of the peace in this case
was examined -

I do not know that he the defendant was present at the trial before the justice of the peace

I don't know that this paper was ever shown to him or that he ever saw it

The defendant then moved to exclude the paper read in evidence from the jury as secondary evidence but the court of ~~not~~ overruled the objection of the defendant then ^{as} there excepted - The foregoing was all the evidence in the cause -

The court then gave the following instructions asked by plaintiff to the jury -

" " Instructions for Plff

1 If the jury believe from the evidence that the subscription paper in writing read in evidence was executed by the defendants ^{as} delivered to the plaintiff for the purpose of enabling the plaintiff to collect such subscription; that the plaintiff went on ^{as} commenced erecting the buildings mentioned in said writing ^{as} incurred liabilities in account of expenses in erecting such buildings ^{as} that the subscription sued for is necessary to pay of such liabilities ^{as} expenses then the jury must find for the plaintiff the amount due on the said subscription if the jury believe from the evidence that the plaintiff organized ^{as} acted under their charter "

" " 2 If the jury believe from the evidence that the plaintiff organized ^{as} acted under its charter this is prima facie evidence, that they were legally organized under their said charter. "

3 If the Jury believe from the evidence that the Board of trustees of the Penna University the plaintiff in this suit. Defendant promised to pay a certain sum for the erection ^{as} putting in operation the college of the Synod of Illinois at Penna. ^{as} that the trustees of the same Institution intended ^{as} went in said promise proceeded to locate and erect ~~said~~ ^{the} college buildings for that purpose, relying upon such subscription ^{as} others to pay the expenses of erecting said buildings - this would constitute in law a good ^{as} sufficient consideration to support such promise. "

Given " 48

Open

Gov. "

As the giving of which the defendant then ^{and}
there excepted ^{and} objected -

The defendant then asked the court to give the following instructions to the jury:

Refused

49

Instrument introduced in evidence in this suit is a copy they will find for the defendant no such proof having been made to this Court."

"The best evidence of the Contents of a written Contract or Subscription is the original writing, or subscription itself, and if the jury believe from the evidence that the Subscription List offered in evidence on the trial of this Cause, is not the original subscription list; but a Copy thereof, and that the Plaintiffs have not shown the loss or destruction of the original one, then and in that case the Copy of itself is not evidence of a subscription being made by the defendant."

"That before the Copy of any obligation sued on can be properly introduced in evidence, the party offering the same should first prove the loss or destruction of the original as the Case may be, and by proof that such party has made all diligent search therefor in every place where the same could most likely be found and if the plaintiff has not made such diligent search for the original they will find for the defendant."

"4. The Jury are instructed that if the Jury believe from the evidence that the Subscription sued on was by its terms made payable to the Synod of Illinois they will find for the defendant."

"5 If there is no payee named in the Subscription and the payee cannot be ascertained from the facts

of the instrument sued on, you will find for the defendant."

"O If the Jury believe from the evidence that the purpose for which the subscription was obtained is impossible to be performed or has been abandoned by the plaintiff you will find for the defendant."

"T In order to maintain an action on this subscription it was necessary for the plaintiff to show that assessments have been made by the Corporation on all the subscribers made for the same purpose and each one would then be bound to pay that assessment nor could either one of the subscribers be compelled to pay all his subscription whilst others pay nothing but each one would be bound to pay pro rata on his subscription upon assessments made for that purpose."

"J The Jury are instructed that if they believe from the evidence that the subscription sued on was made by the defendant to the plaintiff and intended by the parties as a gift to the plaintiff such contract or gift can not be enforced by the plaintiff against the defendant."

"I A Corporation Can not enforce a subscription made for its benefit without consideration without their Charter or some act of the legislature or Statute law gives them the power to enforce the same."

"Refused."

"Refused, 'Refused'"

"Refused."

"Refused."

57

"Refused."

"10. The Jury are instructed that there is no law authorizing the Board of Trustees of the Peoria University to sue upon and enforce subscriptions made to them without Consideration and if the Jury believe from the evidence that the instrument sued on is a mere subscription made without any other Consideration than the public good or welfare that may result from the project if completed, you will find for the defendant. But the court refused to give the same to which the defendant then and there excepted and objected.

(The Court also Modified the following instructions asked by the defendant to which the defendant then and there excepted and objected.

"Instructions for the defendant

"If the Jury believe from the evidence that the defendant at the time he made his additional subscription of \$300 ought to be recovered in this suit, made the same upon the condition that he should be released from all further duty as a trustee for the erection of the buildings, and also from all liability upon his subscription for Scholarships and if they further believe from the evidence that the plaintiffs did not release the defendant from all duties as Trustee in and about erecting said buildings, and have not released him from his subscription for Scholarships, then and in that case the plaintiffs cannot recover. (The following is modification of the Court) but if the Jury further believe from the evidence that the additional subscription was accepted by the plaintiff this of itself would be a release."

"Given
" Given
" Given

The Jury then returned into Court the following verdict.

"Trustees of the
Pena University

vs
John L. Gierold

That the Jury find
the issues in this case for the plaintiffs
and assess damages and three
hundred dollars.

D. M. Cummings

John N. Cromwell

Thomas D. Alger

J. D. Cutright

Oliver Heile

A. C. Dean.

Willis Triplett

W. Brady

James Skiller

J. J. Harding

H. E. Blakeley

W. L. Schlink. "

55

And the defendant then ^{Ans} there moved for a new trial for the following reasons -

" The Board of Trustees
of the Penna University } Circuit Court
vs } Nov term 1860
John S. Insword }

And now comes the defendant by Williamson
& McCoy his Attorneys, ^{Ans} moves the Court to set
aside the verdict in this cause ^{Ans} grant a new
trial for the following reasons to wit:

- 1 The verdict is contrary to law
- 2 The verdict is contrary to the evidence
- 3 The Court gave erroneous instructions asked by plaintiff
- 4 The Court refused to give proper instructions asked
by defendant
- 5 The Court erroneously modified proper instructions
asked by defendant
- 6 The Court admitted improper evidence to the
jury on part of plaintiff

Williamson & McCoy
for Deft. "

But the Court overruled the motion for a
new trial & rendered judgment on the verdict
to which the defendant then ^{Ans} there objected
& excepted & prayed the Court to sign ^{Ans} seal
this bill of exceptions, which was done

J. W. Powell ^{Sealed}
ccccc

On the fourth day of January in the Year of our Lord one thousand eight hundred and Sixty one there was filed in the office of the Clerk of said court in said Cause an appeal bond in the words and figures following, to wit:

I now all men by these presents, That we John S Gnsword & M Gnsword are held & firmly bound unto the Board of trustees of the Peoria University in the penal sum of Seven hundred Dollars for the payment of which, well & truly to be made we bind ourselves our heirs executors & administrators jointly and severally by these presents.

Witness our hands and seals this 31 day of December 1866

The condition of the above obligation is such that whereas the said Board of trustees of the Peoria University did at the November Term A D 1866 of the Circuit Court in & for the County of Peoria State of Illinois record a judgment against the above bounden John S Gnsword for the sum of Three hundred Dollars & costs of suit from which said judgment the said John S Gnsword prayed an appeal to the Supreme Court - Now if the said John S Gnsword shall prosecute his said appeal with effect & without delay & shall well & truly pay all damages judgments interest & costs in case the said judgment shall be affirmed then the above obligation to be void otherwise to be & remain in full force & virtue.

John S Gnsword *[Signature]*
Mat Gnsword *[Signature]*

55

State of Illinois,
County of Peoria. J. I. Crock P. Sloan Clerk
of the Circuit Court in and for the County of Peoria
in the State of Illinois do hereby Certify that
the foregoing is a true and correct copy from
the files and Records of ^{of proceedings} my office, in a certain
Cause wherein the Board of Trustees of Peoria Uni-
versity are plaintiffs and John L. Griswold
is defendant as the same remain of Record
and on file in my office.

In witness whereof, I hereto set
my hand and affix the Seal
of said Court at office this
Ninth day of April A.D. 1861.
Enoch Sloan, Clerk

JOHN L. GRISWOLD
vs.
THE BOARD OF TRUSTEES OF
THE PEORIA UNIVERSITY.

ASSIGNMENT OF ERROR.

And the said John L. Griswold now comes and says that in the record and pro-
ceedings aforesaid there is manifest error, to wit:

1. The verdict of the jury was contrary to law.
2. The verdict was contrary to evidence.
3. The court gave erroneous instructions asked for by plaintiff.
4. The court refused proper instructions asked by defendant.
5. The court erroneously modified instructions asked by defendant.
6. The court admitted improper evidence for plaintiff.

7. The said judgment was given in favor of the said Board of Trustees of the
Peoria University, whereas, by the laws of the land, it ought to have been given
in favor of the said John L. Griswold. Wherefore the said John L. Griswold
prays that the said judgment may be reversed, annulled and for nought held, and
that he be restored to all things he has lost by reason thereof.

Charles B. Bourney
John D. Rouse
of counsel

M. WILLIAMSON and
A. McCOY, ~~Attorneys~~
Attorneys for Plaintiff.

And the said defendant by his attorney comes
and says that in the said record proceedings
there are no such errors as above alleged
nor any nor either of them, wherefore
said defendant prays that said judgment
may be in all things affirmed

Memorandum
for Sept

founder in error

Filed April 22, 1861

L. Leland
Clerk

John L. Gustav
205 m

Board of Trustees of
Brown University

Record

Filed April 16, 1861

L. Leland
Clerk