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No. \_\_\_\_\_

# Supreme Court of Illinois

Whiple<sup>P</sup>

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vs.

Chicago & Rock Island R.R.Co.

# In Supreme Court of Illinois.

**APRIL TERM 1858.**

WARREN W. WHIPPLE,  
vs.  
THE CHICAGO AND ROCK ISLAND,  
RAIL ROAD COMPANY.

## APPEAL FROM PEORIA COUNTY.

This suit was commenced before a Justice of the Peace in La Salle County on the 19th day of September, A. D. 1854. The summons was served by leaving a copy with George H. Buck, and designating him as agent of the defendants. The parties appeared.

The plaintiff claimed to recover the amount of a judgment, which had previously been rendered in favor of the plaintiff against the defendant, by N. Duncan, a Justice of Peace of said county, on the 12th November, 1853.

The Justice gave judgment for the plaintiff against the defendant for \$71.20 and costs, on the 30th September, 1854.

Defendants appealed to the Circuit Court of La Salle county, from which a change of venue was taken to Peoria county.

Upon the trial of the appeal in the Circuit Court of Peoria county, the plaintiff, as shown by the bill of exceptions, gave in evidence the transcript of the judgment rendered by N. Duncan, J. P. on the 12th Nov. 1853.

He next offered in evidence the following petition for a certiorari:

State of Illinois, }  
La Salle county. } Circuit Court thereof to November Term, A. D. 1854.

To the Hon. Edwin S. Leland, Judge of the 9th Judicial Circuit:

Your petitioner, the Chicago and Rock Island Rail Road Company respectfully represents:

The petition states, in substance, that the company was duly incorporated under an act of the 27th February, 1847, and an act of February 7, 1851, and were constructing their road by contracts from Rock Island to Chicago in 1853.

On the 4th November, 1853, Warren W. Whipple sued the defendant before N. Duncan, a Justice of the Peace of La Salle county; the summons being dated on that day and returnable on the 12th November, 1853, which was served on the 7th of November, 1853, "by leaving a true copy of the same with George H. Buck, an agent of said company, the President of said company not residing in the county."

The claim before the Justice was for cattle, which plaintiff there claimed had been killed by a locomotive running on said road. The justice gave judgment for plaintiff for \$71.20 damages and costs.

Defendants did not appear before the Justice. That there was no proof before the Justice that defendants were running said road, and in fact they were not; but the same was then being run by Farnham & Sheffield, contractors for building said road, on their own account and for their own benefit.

That the Justice erred in rendering judgment, and was wholly without jurisdiction of the subject matter.

That petitioners had no knowledge of said judgment until more than six months after the same was rendered.

That Buck was never at any time their agent, and service on him was no notice to them; and the first notice they had of said judgment was by service of summons on them, in a suit brought on said judgment.

Petition alleges that Justices, proceedings are illegal and erroneous, and prays for a common law writ of certiorari, &c.

Petition is verified by the affidavit of B. C. Cook, December 11, 1854.

On the same day defendants filed their bond in the Circuit Court clerk's office, conditional according to law, to prosecute their appeal, and to pay the judgment, &c., if the Justices' judgment should be affirmed.

On the 27th December, 1854, writ of certiorari issued to the Justice returnable forthwith, who returned the transcript of the judgment and proceedings before him, as herein before stated and set forth, rendered on the 12th November, 1853.

On the 6th day of March, A. D. 1857, in the Peoria county circuit court, (the venue in the case having been previously changed to said county,) the said Warren W. Whipple, by his counsel, entered a motion to dismiss the certiorari in said case for the following reasons:

1st. Because no common law writ of certiorari lies in such case.

2nd. Because the facts on the face of the petition do not authorize the issuing of any such writ.

3rd. Because the transcript and papers show that the Justice decided correctly.

4th. The return does not show that the Justice committed any error in law.

5th. The Justice had jurisdiction, and did not proceed erroneously.

On the 7th December, 1857, this motion came on to be heard, and was argued by counsel for both parties. The court sustained the motion, dismissed the writ of certiorari, and ordered a writ of procedendo to the Justice of the Peace.

This was all the evidence in this cause.

The court gave judgment for the plaintiff for \$93.09 damages and costs of suit. The defendant insisting and setting up, that the judgment of the court dismissing the writ of certiorari and ordering a procedendo in said suit of the Rock Island Railroad Company vs. the Plaintiff, constituted a bar to a recovery in this suit, brought to recover a judgment upon the judgment of 12th November, 1853, aforesaid.

From this judgment the defendant appealed to this court.

### THE ERRORS ASSIGNED ARE:

1. In rendering judgment in favor of the plaintiff, the evidence showing that he was not entitled to recover.

2. In rendering judgment against the defendant in damages, the evidence and record showing, that the judgment (if any) should have been in debt for the amount of the judgment and costs sued for, and damages for interest only.

3. Judgment ought to have been rendered in favor of the defendants.

4. Because the defendants, in the original suit, or judgment rendered November 12th, 1853, were not legally served with process, and said Justice had no jurisdiction in the case.

N. H. PURPLE, Atty. for Appellant.

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Warren W. Whipple

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The Chicago & R. D. R. Co.,

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Filed April 20, 1838

to be sent

to clerk

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