No. 13154

Supreme Court of Illinois

Wear

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vs.

Jacksonville & Savannah

R.R.Co.

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 206.

Brassel
Wear
vs.
L R R Co

Savannah PR
Co

1354

APPELLANT'S POINTS.

Supreme Court of Ill., April Term, A. D. 1860.

William K. Wear,
Appellant,
vs
The Jacksonville & Savannah Railroad Company,
Appellees.

1 The court erred in admitting in evidence the contract under the second and third counts (Common Counts) without proof of the excution of the instrument.

Peake vs. Wabash R. R. Co., 18 Ills., 88.

2 The court erred in refusing the second instruction asked by defendant.

There was evidence tending to show that the contract made with Babcock, June 7, 1858, was made for the sole intent to place the company in a position where they might demand payment of the subscription from the defendant, without any intention to have the contract so made executed.

These facts were the making the contracts a few days prior to passage of the order upon the defendant to pay the whole of his subscription, which contracts were for more than two-thirds of the entire road—were made with one of the Directors—not the first stroke of work had been done under said contracts, although a year had elapsed since the making of the same, and the trial of the suit below—nor was any reason shown why nothing had been done under said contract—no ties nor rails had been laid on any

portion of the road; and but 24 miles of the 174 miles of the road had been graded; all these were circumstances which should have been submitted to the jury for their consideration to determine whether the contracts so made were bona fide contracts, entered into for the purpose of building the road in good faith, or whether they were entered into for the purpose of obviating the conditions in the said subscriptions of defendant.

3. The court erred in refusing the third and fourth instructions asked by defendant.

The contract was that "no payment should be required unless the said road shall cross the Peoria and Oquawka Rail Road, not less than two miles west of Elmwood."

Before payment could be required. The Rail Road must cross the Peoria & Oquawka R. R.; there must be an actual railroad; not a railroad on the map merely; nor a mere survey of a railroad which could be changed at any time at the option of the Company; it must be fixed and certain. A survey of a railroad does not constitute a railroad, as most western people are fully aware, and the mere fact that a survey of a railroad has been made at a certain point is no evidence that there will ever be any railroad built at such point.

The condition that the railroad shall cross the Peoria & Oquawka R. R., renders the subscription void, for the reason that there is no mutuility in the contract and tends to work a fraud on those that subscribe absolutely.

Buttments & Oxford Turnpike Co., vs. North 1. Hill, 518.
Macedon & Bristol Plank Road Co.. vs. Snidiker, 18. Bearbour, 317.

Utica & Schnectaby R. R. Co., vs. Brinkerhoff, 21 Wendell, 139.

In Peirce on American railroad law, page 71, the author states that "in Pennsylvania and Indiana promises to pay the Co., a

certain sum on condition that it will adopt a certain route has been valid and enforced after the condition has been performed," and also same in Ohio and Massachusetts. But the cases cited do not sustain the text so fully as to controvert the decisions above referred to.

In the cases in 6 Indiana, 316, and 7th Indiana 407, this point is not made in the decision. The Pennsylvania courts have so decided in the two cases cited.

Neither as we concieve do the Massachusetts cases cited sustain the text to wit: 1 Gray Rep., 544, and 10 Picking 142. Neither do the Ohio cases cited sustain the text, so fully as to contradict the cases first above cited in New York.

The first count of the declaration is bad. The court should have carried the demurrer to the second plea back to this count of the declaration. There is no sufficient averment that the assessments had been legally made; and there is no averment whatever, that the defendant had been notified of the assessments.

On the trial there was no evidence of any notice to the defendant below that the assessments had been made, nor any evidence of any order of the directors to him to make payment.

The court instructed the jury that "it is not necessary to enable the plaintiffs to recover, to prove notice of the calls of assessments."

The defendent below moved for a new trial, and assigned as causes, the giving of improper instructions, and that the evidence did not support the verdict.

Thus in any view which can be taken in this case, the question whether a recovery can be had on the instrument sued on, upon such an assessment as was proved, and without any notice to the defendant, is fairly raised.

The language of the instrument signed by the appellant is peculiar. It is an agreement to pay to the "order" of the direct-

ors the amount subscribed. It is not to pay it upon their general order, but to pay it to their order to him, the subscriber. No such order was made to him.

But if this literal meaning be modified by the purpose for which and the circumstances under which the subscription was made, it does at least mean that he shall be notified that the order had been made that he should pay an installment.

Our Supreme Court have twice decided that in such cases a notice is necessary.

Spangler v. Ind. & I. C. R. R. Co., 21 Ill. 276.
Barnet v. Alton & Sang. R. R. Co., 13 Ill. 504.

The assessments made were not legal assessments. The averment in the case in 21 Ill., is that ten assessments had been required to be paid. In the case at bar there was one assessment of the whole divided into ten payments. The court say 21 Ill. 278. "The contract must have been understood by both parties to be that the board of directors would make periodically certain assessments on the stock subscribed, of which the subscribers would be duly notified." "Assessments, as understood in such contracts mean a rating or fixing of the proportion by the Board of Directors, which every subscriber is to pay of his subscription 'when notified of it, and when called on.'" If the case of Peak v. Wabash R. R. Co., 18 Ill. 88, conflicts with this view, it is overruled by the case in 21 Ill. But however that may be, we insist that the contract in the case under consideration only required payment to "the order" f the Directors. The order must be brought home to the subscriber.

Then we say that the first count is insufficent in law, that the instrument was improperly admitted in evidence under the other counts without proof of its execution, and that the evidence does not sustain a recovery under them,

MANNING & MERRIMAN,
Attorneys for Appellant

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Mun

vs

I. C. R. R. Co

~~Appts~~ argument

Filed May 4. 1860
L. Leland
Clerk

APPELLANT'S POINTS.

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Wear

v

A & S. R. R. Co

Appts argument &c

Filed May 4, 1860
L. Leland
Clerk

State of Illinois }
Knox County }

Pleas before the Honorable John S. Thompson, Judge of the Tenth Judicial Circuit of the State of Illinois, at a Court began and held at the Court House in the City of Knoxville, in said County and State, on the first Monday in the month of June, A.D. 1859, in the year of our Lord One thousand eight Hundred and fifty nine, it being the seventh day of said month in said year.

Present The Honorable John S Thompson Judge
James H. Stewart, States Attorney
Oscar Sims, Clerk
Andrew Thomson, Sheriff

Jacksonville and Savannah Railroad company } Assumpsit
vs
William A Snare

Be it remembered that at said June term of this Court, this cause was pending therein, And was continued until the September Term of said Court under the General Order of Continuance. Declaration herein having been filed on the 14th day of May A.D. 1859

And be it further remembered that said cause was pending at the September term of said Court, And continued until the February Term A.D. 1860, under a General Order of Court. And the action of said Court at said February Term was as follows:

State of Illinois }
Knox County } ss

Pleas before the Honorable John S. Thompson, Judge of the Tenth Judicial Circuit Court of the State of Illinois, at the Court begun and held at the Court House, in the City of Knoxville, on the Third Monday of February, in the year of our Lord, One Thousand Eight Hundred and Sixty, it being the Twentieth day of February, in the year aforesaid

Present Hon. John S. Thompson, Judge
James H. Stewart. States Attorney
Cephas Arms, Clerk
Andrew Thomson, Sheriff

March 8th 1860

Jacksonville and Savannah Railroad Company vs William K. Ware } Assumpsit

On Motion, It is ordered by the Court that leave be granted to defendant to file additional pleas herein.

March 12th 1860

Jacksonville and Savannah Railroad Company vs William K. Ware } Assumpsit

This day come the plaintiffs

by their Attornies, and file their demurrer to defendants second plea herein; Thereupon came the defendant by his attorney, and moves the Court that demurrer be carried back to plaintiffs declaration; And the Court having heard said demurrer and motion. It is Ordered by the Court that demurrer as to declaration be overruled, And sustained as to plea; Thereupon the defendant moved for Continuance herein for want of Copy of account sued on; and the Court having heard said motion; It is Ordered, that the same be overruled.

Thereupon Issues being joined herein, for trial the parties put themselves upon the country, thereupon came a jury, to-wit: Giles Cook, David Burnett, William Huggins, Elkanah Moss, E. Campbell, Wm Woolsey, A Osborne, E Stonesipher Abram Vangilder, Emanuel Ott, James H Baird and Albinis Gregory, who being Elected, tried and Sworn well and truly to try the issues joined herein, After hearing the Evidence herein and the arguments of Counsel, upon their Oaths do say: "We the Jury find for the plaintiff, And assess the damages at the Sum of Eighteen Hundred Dollars."

Thereupon came the defendant by his Attorney, And moves the Court for a new trial herein, and the Court having heard said motion, It is Ordered that the same be overruled.

Therefore it is Considered by the Court that the plaintiff recover of the defendant the Sum of One Thousand Eight Hundred Dollars, the amount of their damages so assessed by the jury aforesaid, together with their costs by them in this suit Expended,

And may have Execution therefor.

March 14th 1860

Jacksonville & Savannah Railroad Company vs William K Dear } Assumpsit.

This day again comes the defendant, by his Attorney, and enters his motion for arrest of judgment herein, And the Court having heard the same, It is ordered by the Court, that the same be overruled. Thereupon came the defendant, by Attorney, And excepted thereto and prayed an appeal herein to the Supreme Court, which is allowed on defendant Entering into bond in the sum of Three Thousand Five Hundred Dollars, with securities to be approved by the Clerk, by agreement. The bond and bill of Exceptions to be filed within thirty days.

And afterwards, to-wit: On the 2nd day of April A.D. 1860, came the defendant and filed his bond in accordance with the requirements of Court, which is in words and figures as follows:

"Know all men by these presents that we William K Dear and John Sloan are held and firmly bound unto the Jacksonville and Savannah Railroad Company, in the penal sum of Three Thousand Five Hundred Dollars, lawful money of the United States for the payment of which well and truly to be made, we bind ourselves our heirs, And administrators, jointly

severally and firmly by these presents. Witness our hands and seals this 2d day of April A.D. 1866.

The condition of the above obligation is such, that whereas the said Jacksonville and Savannah Railroad Company did on the 12th day of March A.D. 1866, at the February term of the Knox Circuit Court A.D. 1866, in and for Knox County Illinois, recover a judgment against the above bounden William R Ware, for the sum of Eighteen Hundred Dollars and costs of suit, from which judgment the said William R Ware has taken an appeal to the Supreme Court of the State of Illinois. Now if the said William R Ware shall pay said judgment and all costs, interest and damages, in case said judgment shall be affirmed, and shall prosecute said appeal with Effect, then this obligation shall be void, otherwise of full force and Effect

Approved by me this 2d day of April, 1866.
C Abms, Clerk

W R Ware (seal)
John Sloan (seal)

And said defendant, also on the 7th day of April A.D. 1866, filed his bill of exceptions herein, which is in words and figures, as follows, to-wit:

State of Illinois }
Knox County } ss

Knox Circuit Court
February Term A.D. 1866

Jacksonville and Savannah Railroad Company
vs
William R Wear

Be it remembered, that this cause came on to be heard at this term of this

Court, and a jury duly Empannelled. The declaration was in the following words:

State of Illinois }
County of Knox } Circuit Court
June Term A.D. 1859.

The Jacksonville and Savannah Railroad Company
vs
William K. Mar

} Trespass &c on promises
Damages $3000

The Jacksonville and Savannah Railroad Company, plaintiff, complain of W.K. Mar, the defendant, who was summoned to answer unto said plaintiff of a plea of trespass on the case on promises; for that whereas heretofore, to-wit: On the twenty Eighth day of August A.D. Eighteen Hundred and fifty-six, at and within the County of Knox and State of Illinois the said defendant under the style of W.K. Mar, together with certain other persons hereinafter set forth, signed, subscribed and executed a certain instrument in writing, on one of the books of the said Jacksonville and Savannah Railroad Company, which with the signatures thereto attached and appended, reads as follows:

"Jamming Ills Aug 28/56"

"We the undersigned do Each for himself hereby subscribe for the number of shares of the Capital stock of the Jacksonville and Savannah Railroad Company set opposite our respective names and do hereby severally agree to pay to the order of the Directors of said Jacksonville and Savannah Railroad Company the installments hereafter assessed thereon as they respectively become due, and to be governed by the Charter and By-laws

of said Company. It is Conditioned that no payment shall be required of the Stockholders until the road is Contracted for its grading. It is also conditioned that no payment will be required unless said Railroad shall cross the Pena & Oquawka Road not lefs than two miles west from Elmwood"

Shares One Hundred Dollars Each

Subscribers Names	
W. K. Mar	20 shares
~~Bostwick Read~~	5
John Ewalt	5
S. S. Gould	8
E B Kent	8
Joseph Pearce	2
J Shoonaker	5

And then and there and thereby the said defendant in Consideration of twenty shares of the Capital Stock of the said Jacksonville and Savannah Railroad Company together with the right, privileges and immunities belonging to the Stockholders in said Jacksonville and Savannah Railroad Company by virtue of the Charter, by-laws, rules and Regulations of said Company, then and there sold and granted to the said defendant by the said plaintiffs became and was a Stockholder in said Jacksonville and Savannah Railroad Company, and liable and promised to pay the sum of Two thousand Dollars, the same being twenty shares of the Capital Stock of said Company, and Each share being One Hundred Dollars, in such installments as might thereafter be called for and required by order of the Directors of said Company

And the said plaintiffs Aver that the said Jacksonville and Savannah Railroad before the payment hereinafter mentioned were required, was Contracted for its grading and they further Aver that the said Railroad Crosses the Pena and Oquawka Railroad not lefs than two miles west from Elmwood

And the said plaintiff avers, that afterwards, to-wit, on the twenty sixth day of July A.D. Eighteen Hundred and fifty Eight at and within the County and State aforesaid, the Board of Directors of said Railroad Company by an order duly and legally made and entered upon the records, among other things and aforesaid in said order contained required Each and Every of the Stockholders in said Railroad Company who had not been included in previous Calls for the payment of stock, which said order included the said defendant, who had not been included in such previous calls, to to pay on the several shares of stock respectively subscribed by them ten per cent, on the first day of September A.D. 1858, and other ten per cent. On the first day of Each and Every months next thereafter, of which the said defendant then and there had notice.

And the said plaintiff avers that in pursuance of such order nine installments upon the whole Amount of stock so taken and subscribed by defendant as aforesaid, said installments Amounting to the sum of Eighteen Hundred dollars, the same being ten per cent, per month. from and after the said first day of September A.D. 1858 upon Each of said twenty shares of stock so taken and subscribed by the said defendant as aforesaid, became due and payable from the said defendant to the said plaintiff before the Commencement of this suit, to wit: at the County and State aforesaid, whereby an Action hath accrued to the said plaintiff to have and recover of and from the said defendant the sum of Eighteen Hundred dollars the same being the nine installments due upon the whole Amount of stock so taken and subscribed by the said defendant to the said Jacksonville and Savannah Railroad Company, in pursuance of the order made as aforesaid by the Board of Directors of the said Jacksonville and Savannah Railroad Company.

And whereas, also, the said defendant, afterwards, to-wit: on the second day of May A.D. Eighteen Hundred and fifty nine, at the place

aforesaid, was indebted to the said plaintiff in the further sum of three thousand Dollars of lawful money, for money due and payable from the said defendant to the said plaintiff for certain installments, calls or sums, to wit: the sum of Eighteen Hundred dollars, duly called for and required by the Board of Directors of the said Jacksonville and Savannah Railroad Company to be paid by the said defendant to the said plaintiff at certain times before then Elapsed, upon and in respect of a certain sum, to-wit: the sum of two thousand dollars, the same being twenty shares of the Capital Stock of the said Jacksonville & Savannah Railroad Company, which the said defendant had before that time subscribed and agreed to pay to the order of the Directors of the said Jacksonville and Savannah Railroad Company, in such installments as might thereafter be affixed upon and called for in respect of such shares;

And for that, whereas the said defendant, afterwards, to-wit: On the second day of May A.D. Eighteen Hundred and fifty-nine, at the place aforesaid was indebted to the said plaintiff in the further sum of three thousand dollars of like lawful Money for divers goods, wares and merchandise by the said plaintiff before that time sold and delivered to the said defendant and at his special instance and request, And also, in the further sum of three thousand dollars of like lawful money for other money by the said plaintiff before that time lent and advanced to and paid, laid out and expended for the said defendant, and at his like special instance and request, And also in the further sum of of three thousand dollars of like lawful money for other money by the said defendant before that time had and received, to and for the use of the said plaintiff; And also the further sum of three thousand dollars for the price and value of work and labor done and

materials furnished, by the plaintiffs for the said defend
ants before that time, at his late special instance and
request. And also the further sum of Three Thousand dollars
of like lawful money for money found to be due from
said defendant to the said plaintiffs on account of them
and them stated between them.

And whereas, the said defendant afterwards, to wit
on the day and year last aforesaid, and at the place
aforesaid, in consideration of the premises respectively, then
and there promised to pay the said mentioned several sums
respectively to the said plaintiffs on request. Yet he has
disregarded his promises and he has not paid any of the
said sums, or any part thereof; to the plaintiffs damage
of three thousand dollars, and thereupon they bring suit
&c

Gordy, Judd & Boyd
Attorneys for Plaintiffs

See first Count for Copy of Instrument Sued on

Gordy, Judd & Boyd

The Pleas of the defendant was in the following words:

Jacksonville and Savannah Railroad Company vs Wm D Mears } Knox Cir. Court

And now comes the defendant and defends the wrong and injury, when &c, And says he did not undertake and promise in manner and form as the plaintiffs above in declaring hath alleged, And of this he puts himself upon the country, &c

Manning, Douglas & Craig
Attys for Defts

And the said plaintiffs does the like

Tyler & Sanford
Attys for Plffs.

And for further Plea in this behalf defendant says actio non, because he says

That at the time the defendant is alleged to have subscribed, and did subscribe, twenty shares to the Jacksonville and Savannah Railroad Company as is alleged in first count of plaintiffs declaration, It was by parol Expressly agreed by and between said plaintiff, by their agent, And defendant, that defendant should pay no part of said subscription until the Jacksonville and Savannah Railroad Company should build and complete said Railroad in and through Knox County Illinois, And have the cars running upon said road.

And that defendant subscribed twenty shares to said Railroad Company upon that condition and understanding, And in no other way

or manner or agreement.

And defendant avers that said Jacksonville and Savannah Railroad Company have not by themselves or otherwise built and completed said Railroad through Knox County Illinois. That said Jacksonville and Savannah Railroad Company have not the cars running upon said road in Knox County. Illinois.

And this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him

Douglas & Craig
Att'ys for deft

The demurrer to defts second plea was in the following words:

State of Illinois } Knox Circuit Court
Knox County } Of May Term A.D. 1860

Jacksonville and Savannah Railroad Company
vs
William N Haw } Assumpsit

And the said plaintiff as to the said plea of the said defendant by him secondly above pleaded, saith, that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him from having or maintaining his aforesaid action against the said defendant, And that the said plaintiff is not bound by

law to Answer to the same, And this the said plaintiff is ready to verify. Wherefore the said plaintiff prays judgment And his damages by reason of the non performing of the said several promises and undertakings in said declaration mentioned to be Adjudged to him &c.

Tyler & Sanford
Attys for plff

After the Case was called, And some of the Jury Called, the defendant Entered his motion for the continuance of this Cause, for the reason that there was no account filed by the plaintiff under the declaration, And the Court, After hearing of said motion, overruled the same, And the defendant there and then to this decision of the Court in overruling said motion, objected and Excepted. And now at this term this Cause coming on to be tried the Plaintiff to maintain the issue on his part introduced the following Evidence.

Mr Vaughn being duly sworn, said, I am the Engineer of the plaintiff, This Record shown is the Record of the Railroad Company, Kept by the Secretary of the Company. It has been in my possession about three months And I have seen it at the meetings of the Board of Directors and Know it to be the Book of the Company in which the Records are Kept. Olsen is the present Secretary, and some of the book is in his Hand writing. It is the original record. I have been present at most of the meetings of the Board for the past three and a half Years, And I Know the book to be the only book in which the Company Keeps its records.

And thereupon said book was introduced

in Evidence and on pages One to Eight inclusive showed the organization of the said Railroad Company Pages twelve, Seventeen, forty, forty-two, forty three and forty four, of said books were offered and objected to by the defendant, And the Court overruled the objection, And the defendant then and there excepted to the opinion of the Court in overruling said objection, And the same was read to the jury as follows:

Page twelve, showed the appointment of A.C. Babcock and Ingersoll as agents of plaintiffs, appointed by the Board of Directors, 14 June, 1856. for Engaging Engenies to Survey and make Estimates of cost of that portion of Road from Liverpool to Galva, and secure right of way and additional subscription, And prepare the same to put under Contract, and shows a proposition by Babcock & Farnell to grade, bridge, &c the road from Liverpool to Galva, Proposition was referred to a Committee to draw up a Contract on the basis of the proposition And report the same to the next meeting.

Under date of November 24th 1856. Page 17. Showed a report of a Contract for Grading, bridging, Masonry, &c. of the road from Galva to Liverpool, with A.C. Babcock & F. Farnell, which was signed by the President in duplicate by the order of the Board.

Under date of April 12, 1858, on page forty, said books showed a proposition of Farnell & Babcock, to grade, tie and build bridges and masonry on that part of the road not contracted

which was laid over for consideration until the next meeting of the Board

Under date of May 29, 1858, on page forty-three, said book showed that the Committee reported progress, and asked more time,

Under date of June 7, 1858, on page 44. The Committee reported a contract with A. C. Babcock and F. Farwell, for the grading, bridging Masonry &c of the road from Jacksonville in Morgan County and Springfield in Sangamon County, Except the bridge across the Illinois River, and the masonry for the same, and from the Central Military Tract or Chicago Burlington and Quincy Road, in Henry County to Savannah, in Carroll County, which was executed in duplicate by the President, by order of the Board, said Contract now on file in the office of the Secretary.

Each of said pages showed a meeting of the Board of Directors.

On page 45 in said book, was the following Record

Canton July 26, 1858

At a meeting of the Board of Directors of the J & S RR Co. held at their office in Canton, this 26 day of July A.D. 1858, pursuant to notice

Present, W. A. Duncan Pres. T. Maple, J. M. Bass, I. S. Pepper, A. C. Babcock & A. R. Montgomery.

On Motion, it was ordered, that an assessment upon all the Stock subscribed, or to be hereafter subscribed, to the Capital Stock of the

Jacksonville and Savannah Rail Road Company, and on which an assessment has not heretofore been made payable at the office of the Treasurer &c as follows. That is to say: That all Stockholders who have not been included in previous Calls for the payment of Stock, be required to pay on the several shares respectively subscribed by them ten per cent. on the first day of September A.D. 1838, and ten per cent. on the first day of Each and Every Month next thereafter, and that all persons who may subscribe stock hereafter shall pay ten per cent. on the first day of the month succeeding the time of such subscription, and ten per cent. on the first day of Every month next thereafter, and whenever by any stipulation, condition or agreement, the stock shall not be payable according to this, or previous orders for assessment, the same shall be paid at the rate of ten per cent. on the first day of Every month after the said Stockholders shall be liable to pay the same according to such stipulations, conditions or agreements.

To the reading of which Record to the Jury the defendant objected. The objection was overruled by the Court, and the defendant excepted then and there to the decision of the Court in overruling said objection, and all of said Record was then and there read to the Jury.

Plaintiff then offered in Evidence a contract for the Grading, Bridging and Masonry on said Railroad from Liverpool to Galveston, said Contract was signed as appeared by the proof by A. & Babcock & F. Farnell and the President of

said Railroad Company, and dated 24 November 1856, which was read to the Jury.

And the Plaintiff also read in Evidence a Contract for the Grading, bridging and Masonry upon said Road from Jacksonville to Liverpool, Except the Bridge across the Illinois River, And from Galva to Savannah, which was proved to have been signed by A B Babcock and the President of the Road, and dated 7th June A.D. 1858.

Witness, Vaughn, sworn to the Execution of both of said Contracts.

Vaughn, recalled, testified that he got those Contracts for grading from the Secretary of the Railroad Company; he gave them to me when I came up here; I have had and handled them before in the hands of Babcock the former Secretary.

Cross Examined. Said, This Railroad crosses the Peoria and Oquawka Railroad two miles and 109 & ~~[illegible]~~ 4/10ths feet west of Elmwood.

Plaintiff then offered in Evidence the Subscription of defendant, And the defendant objected to the same comming in Evidence under the 2d & 3d Counts in the declaration. The Court overruled the objection, And the same was read in Evidence, And the defendant then and there Excepted And objected to the reading of the same in Evidence, And to the decision of the Court in overruling the objection. The Subscription was the same as that copied in the 1st Count in the declaration.

Vaughn, the Witness, was recalled, who tes-

ified, That there was ~~$1.00~~ no order for installments made, or appearing upon the books of the Company that applied to this subscription but the one shown in the Evidence. That only three orders for installments Ever had been made by the directors of said Company, two of them were made before this subscription by its terms became due, And the one read in Evidence, is the only one made since this subscription became due.

This Evidence of Vaughn was objected to, by the defendant, but the objection was overruled by the Court, And the Evidence given, And the defendant then And there to the overruling of the objection to said Evidence And admitting the same to the jury then And there excepted.

On cross Examination he stated he never was Secretary of the Company, or one of the Board of Directors And never Kept the books of the Company, Except as aforsaid, And that Babcock & Farwell, Contractors, have never done anything to my knowledge upon the line of the road, covered by the Contract dated June 7, 1858. I have been Engineer Ever since that date, I should have known it if anything had been done. The road has been surveyed, The Company have not made contracts for grading Except these. Babcock & Farwell have done work on the road from Liverpool to Galva. There are no ties or rail laid on the Entire road. I think the grading of twenty-four out of twenty-Eight miles from Liverpool to Peoria and Oquawka Railroad is graded. Some of the distance no grading done between those points. No grading done between Liverpool and Jacksonville. Some grading is done between P. J. & C.

RR and Galva, but no grading done north from Galva to Savannah. It is 45 miles from Jacksonville to Liverpool, to Yates City 28½ miles, from Yates City to Galva 31 miles, And from Galva to Savannah 70 Miles. The Contractors have not to my knowledge made any preparation to work under the Contract of June 7, 1858. No track has been laid on any of the road And no Engines run.

Here the plaintiff rested his case And the foregoing is all the Evidence given on the trial of said Cause.

The defendant here moved the Court to Exclude the foregoing Evidence from the jury, And the Court refused, to the decision of the Court in refusing to Exclude said Evidence the defendant then and there Excepted.

The Court gave to the Jury at the plaintiffs request the following instructions:

The jury are instructed, that even if they should believe from the Evidence, that no work has been done between Galva and Savannah And between Liverpool and Jacksonville by Farwell & Babcock, under their Contract for grading, dated June 7th 1858, that fact does not furnish any Evidence of itself of fraud in the Execution of said Contract.

The plaintiffs are Entitled to recover in this Action upon the subscription in Evidence, provided the jury believe from the Evidence that the plaintiffs have complied with the terms of the Contract on their part, by Contracting for the grading of the road, and that said road, is located across the Peoria and Oquawka Railroad not less than two miles west from Elmwood, and that

the installments sued for have been duly assessed be-
fore the Commencement of this suit

3a It is not necessary to Enable the plaintiff
to recover to prove notice of the Calls or assessments,
given or to show that any portion of the work under the
Contract has been done.

And the defendant asked the Court
then and there to give the following instructions.

1 The Jury is instructed that they must
be satisfied from the Evidence that the grading of the
Entire line of the plaintiffs road was Contracted in good
given faith by a valid and subsisting Contract for its
Grading before the 26th day of July AD 1858, the day
of the Call of the assessment, or they will find for the
defendant.

2 If the jury believe from the Evidence that
the Contract Executed by the plaintiff and Babcock &
Farnell was made simply for the purpose of being and
in Evidence in this and other cases, and not with the
intention to be performed, then the jury will find that
Refused the line of the road is not under Contract as stated in
the Condition to the Subscription. The jury is to judge
from the Contract and circumstances

The jury is instructed that the plaintiff
3 cannot recover in this action unless the jury believe from the
Refused Evidence that that part of plaintiffs Railroad which
crosses the Peoria and Oquawka Railroad is com-
pleted &

4 The jury is instructed that the Plaintiff cannot recover until the plaintiffs road is so far completed as to run cars and Engines across the Peoria and Oquawka Road, and unless the jury believe from the Evidence, that it is thus far completed, they will find for the defendant

Refused

5 The Jury is instructed that before the plaintiff is Entitled to recover in this cause, plaintiff must show that the directors of said Railroad Company before the Commencement of this suit, made or declared dividends on said stock at different times. That it is not sufficient to declare all the dividends at one assessment although due at different periods

Refused

6 If the jury believe from the Evidence that the order of Assessment, made July 26th 1858, as shown in Evidence is the only order of assessment made by said Company requiring the defendant to pay his subscription, then they will find for the defendant

Refused

7 The Jury is instructed that they must believe from the Evidence that the defendant was notified of the call for the assessments upon his subscription before the Commencement of this suit, and the money demanded, or the Jury will find for the defendant

Refused

And the Court then and there refused to give the said instructions so asked for by the defendant, and the defendant then and there to the refusal of the Court to give the instructions so asked and refused, then and there excepted and objected

Thereupon the Jury retired, and returned into Court, And by their verdict found for the plaintiff and assessed damages against the defendant for the sum of Eighteen Hundred Dollars, And the defendant then and there moved the Court for a new trial, which motion and the reasons therefor is in the following words:

Jacksonville and Savannah Railroad Company
vs
William B Hart

And now comes the defendant, and moves for a new trial herein for reasons following,

1st The Court erred in giving the instructions asked for by plaintiff

2d Because the Court erred in refusing the instructions asked by defendant

3d Because the Court erred in allowing Evidence improperly to go to the Jury

4 Because the Court erred in refusing to exclude the plaintiffs Evidence from the Jury

5 Because the verdict is against the law and the Evidence.

6 The Evidence does not support the verdict.

Douglas & Craig
for deft

And the Court then and there refused to grant a new trial, And the defendant then and there to the decision of the Court in refusing to

grant a new trial, then and there, Excepted and objected.

And the defendant, then and there, moved the Court in arrest of judgment, which motion is in the following words.

Jacksonville and Savannah Railroad Company
vs
Wm S. Dear

And now comes the defendant and moves the Court for the arrest of judgment in this cause

1st For the want of a sufficient declaration.
2d For the want of a sufficient Record.
3d Because of a variance between the summons, and declaration and proof

Douglass
for defts

And the Court, then and there, refused to grant said Motion in arrest of judgment.

And the defendant, then and there, to the decision of the Court in refusing to allow said motion in arrest of judgment, then and there, Excepted and objected.

That the matters aforesaid might be made a matter of Record I have caused to be signed and sealed this bill of Exceptions

John S Thompson,
Judge (Seal)

State of Illinois
Knox County } ss

I Cephas Arms, Clerk of the Circuit Court within and for said County, hereby Certify that the above and foregoing is a correct copy of the record and bill of Exceptions in the foregoing case, as appears of record and on file in my office

In testimony whereof I have hereunto subscribed my name and affixed the Seal of said Court, at Knoxville, this 16th day of April A.D. 1865

Cephas Arms, Clerk

William K. Dean
Appellant

v.

The Jacksonville Savannah
Rail Road Company
Appellee

And said appellant
Counsel says there is manifest error
in the within record assigns
the following causes of error
1 The Court erred in overruling
the demurrer to the declaration
2 The Court erred in sustaining
the demurrer to the 5th plea of defendant
3 The Court admitted improper
evidence on the trial below
4 The Court gave improper
instructions to the Jury -
5 The Court refused proper instructions
asked by defendant below,
6 The Court erred in refusing to set aside
evidence under the defendants
motion
7 The Court erred in overruling
the motion for a new trial -
8 The Court erred in overruling
the motion in arrest of judgment
9 The Court erred in rendering
judgment for the plaintiff below
And for other sufficient causes
therefore appellant prays that
the said Record may be corrected
and the said judgment reversed

Manuel [illegible]

201 — 151

William K. Weer

vs

The Jacksonville & Savannah Rail Road Company

Record

Filed April 17, 1860
L. Leland
Clerk

$9.00

And the said Appellees come by their atty & say there is no such error as alleged

Gandy & Bell & Boyd
attys

Jameson & Morse, Printers, 14 La Salle Street, Chicago.

STATE OF ILLINOIS—THIRD GRAND DIVISION.

SUPREME COURT,

APRIL TERM, 1860.

WILLIAM K. WEAR
vs.
THE J. & S. R. R. CO.
} *Appeal from Knox.*

POINTS AND BRIEF FOR APPELLEES.

I.

The special plea was bad, because it set up a verbal condition to vary the subscription in writing.

Dill vs. Wabash V. R. R., 21 *Ill.*, 91.

II.

The declaration sets forth all the contract of subscription *hæc verba;* that part of it which bound the subscribers "to be governed by the charter and by-laws of the Company," had reference to the duties assumed as stockholders, and was no part of the obligation to pay installments. The payments were to be made according to the assessment. The declaration is sufficient.

III.

It was not necessary to aver or prove demand and notice.

Peake vs. The W. V. R. R. Co., 18 *Ill.*, 89.

IV.

The first refused instruction of the defendant, if it was law, was properly refused, because the whole law on that point was embraced in the instruction given at defendant's request, and therefore he could not have been injured; that question was fairly submitted to the jury.

V.

Was the second condition to the subscription, namely, "It is also conditioned that no payment will be required unless said railroad shall cross the Peoria and Oquawka Railroad not less than two miles west from Elmwood," complied with by the appellees?

The object of the subscription was to construct and build the road, and such a construction should be given as will facilitate that object. Where does the road "cross" the point designated? It was not required to be completed. It might with equal propriety be said to "cross" another road when located permanently in good faith, and the work prosecuted so far as it had progressed.

This subscription was doubtless taken as many others, before a location was made, when two or more rival routes were contending for the location, and for the purpose of influencing the action of the Company in locating the road, subscriptions were obtained for the different routes with such a condition.

A condition that the road should be *located and constructed* so as to make a certain place a point in its route, is fulfilled when the *location* is made, so as to require payment.

McMillan vs. M. & L. R. R., 15 *B. Mon.*, 218.
Pierce on Am. R. R. Law, 75.
Fort Miller, &c., vs. Payne, 17 *Barb.*, 579.

GOUDY, JUDD & BOYD,
Appellee's Attorneys.

206-187

Mary vs J. & S. R. R. Co

Appellees Points & Brief

Filed May 8. 1860

L. Leland

SUPREME COURT OF ILLINOIS,

APRIL TERM. 1860.

WILLIAM K. WEAR, APPELLANT,
vs.
THE JACKSONVILLE AND SAVANNAH RAILROAD COMPANY, APPELLEES.

APPEAL FROM KNOX.

ABSTRACT.

This was a suit brought by Appellee against Appellant, June term, 1859, and the following declaration filed:

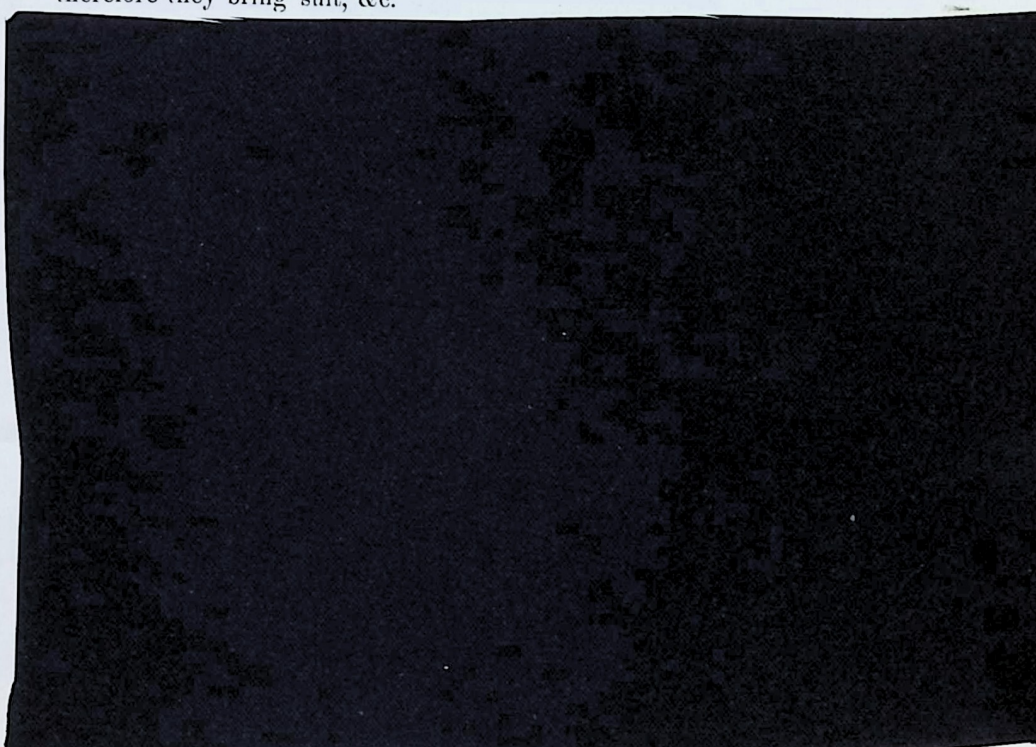
"The JACKSONVILLE & SAVANNAH RAILROAD COMPANY, plaintiff, complains of WM. K. WEAR, the defendant, who was summoned to answer unto said plaintiff of a plea of trespass on the case, on promises; for that whereas, heretofore, to wit: on the twenty-eighth day of August, A. D. eighteen hundred and fifty-six, at and within the county of Knox and State of Illinois, the said defendant, under the style of W. K. Wear, together with certain other persons hereinafter set forth,

in the said Jacksonville and Savannah Railroad Company, by virtue of the charter, by-laws, rules and regulations of said company, then and there sold and granted to said defendant by the said plaintiff, became and was a stockholder in the Jacksonville and Savannah Railroad Company and liable and promised to pay the sum of two thousand dollars, the same being twenty shares of the capital stock of said Company, and each share being one hundred dollars, in such instalments as might thereafter be called for and required by order of the directors of said Company. And the said plaintiff avers that the said Jacksonville and Savannah Railroad, before the payments hereinafter mentioned were required, was contracted for its grading, and they further aver that the said Raidroad crosses the Peoria and Oquawka Railroad not less than two miles west from Elmwood, and the said plaintiffs aver that afterwards, to wit: on the twenty-sixth day of July, A. D. 1858, at and within the county and state aforesaid, the Board of Directors of said Railroad Company, by an order duly and legally made and entered upon the records, among other things and assessments in said order contained, required each and every of the stockholders in said railroad company who had not been included in previous calls for the payment of stock, which said order included the said defendant, who had not been included in such previous calls to pay on the several shares of stock respectively subscribed by them, ten per cent. on the first day of September, A. D. 1858, and other ten per cent. on the first day of each and every month next thereafter, of which the defendant then and there had due notice. And the said plaintiffs aver that in pursuance of such order, nine instalments upon the whole amount of stock so taken and subscribed by defendant as aforesaid, said instalments amounting to the sum of eighteen hundred dollars, the same being ten per cent. per month, from and after the said first day of September, A. D. 1858, upon each of said twenty shares of stock so taken and subscribed by the said defendant as aforesaid, became due and payable from the said defendant to the said plaintiffs, before the commencement of this suit, to wit: at the county and state aforesaid, whereby an action hath accrued to the said plaintiff to have and recover of and from the said defendant the sum of eighteen hundred dollars, the same being nine instalments due upon the whole amount of stock so taken and subscribed by the said defendant to the said Jacksonville and Savannah Railroad Company, in pursuance of the order made as aforesaid by the Board of Directors of the said Jacksonville and Savannah Railroad Company.

2d Count. And whereas also, the said defendant aferwards, to wit: on the 2d day of May, A. D. 1859, at the place aforesaid, was indebted to the said plaintiffs in the further sum of three thousand dollars of lawful money for money due and payable from the said defendant to the said plaintiffs, for certain instalments, calls, or sums, to wit: the sum of eighteen hundred dollars, duly called for and required by the Board of Directors of the said Jacksonville and Savannah Railroad Company, to be paid by the said defendant to the said plaintiff, at certain times before then elapsed upon and in respect of a certain sum, to wit: the sum of two thousand dollars, the same being twenty shares of the capital stock of the said Jacksonville and Savannah Railroad Company, which the said defendant

had before that time subscribed and agreed to pay to the said directors of the said Jacksonville and Savannah Railroad, in such instalments as might thereafter be assessed upon and called for in respect of such shares.

3d Count. Common money counts. And whereas, the said defendant, afterwards, to wit: on the day and year last aforesaid, and at the place last aforesaid, in consideration of the premises respectively, then and there promised to pay the said mentioned several sums respectively to the said plaintiffs on request. Yet he has disregarded his promises and he has not paid any of the said monies, or any part thereof, to the plaintiff's damages of three thousand dollars, and therefore they bring suit, &c.



Upon the trial, the record of the railroad company was identified and introduced in evidence, and pages one to eight inclusive showed the organization of said railroad company; pages 12, 17, 40, 42, 43 and 44, of said book, were offerred and objected to by defendant. Objection overruled and exception taken. Page 12 showed the appointment of A. C. Babcock and Ingersoll as agents of plaintiffs, appointed by the Board of Directors 14th June, 1856, for engaging engineers to survey and make estimate of cost of that portion of road from Liverpool to Galva, and secure right of way and additional subscriptions and prepare to put the same under contract, and show a proposition by Babcock and Farwell to grade, bridge, &c., the road from Liverpool to Galva; proposition was referred to a committee to draw up a contract on the basis of the proposition, and report the same to the next meeting.

Under date of November 24, 1856, page 17 showed report of a contract for grading, bridging, masonry, &c., of the road from Galva to Liverpool with A. C. Babcock and F. Farwell, which was signed by the President, in duplicate, by order of the Board.

Under date of April 12, 1858, page 40, said book showed a proposition of Farwell and Babcock to grade, tie, and build bridges and masonry on that part of the road not contracted, which was laid over for consideration until the next meeting.

Under date of May 29, 1858, page 40 showed the committee reported progress, and asked more time.

June 7, 1858. Page 44. The comittee reported contract with Farwell and Babcock for grading, bridging, masonry, &c., from Jacksonville to Liverpool, except the bridge across the Illinois River, and the masonry for same, and from the Central Military Tract Road, in Henry County, to Savannah, in Carroll County, which was executed in duplicate, by the President, by order of the Board.

Vaughn testified to the execution of the contracts, and further testified that he got the contracts from the secretary. On cross-examination said this railroad crosses the Peoria and Oquawka Railroad two miles and 109 $\frac{4}{10}$ feet west of Elmwood.

Plaintiff then offerred in evidence the contract described in the first count. Defendant objected to reading the same under the 2nd and 3d counts. Objection overruled, to which decision the defendant excepted.

Vaughn testified that there was no order for installments made, or appearing upon the books of the company, that applied to this subscription, but the one shown in evidence, that only three orders for installments ever had been made by the company; two of them were made before this subscription, by its terms, became due, and the one read in evidence is the only one made since the subscription became due.

This evidence of Vaughn was objected to; the objection was overruled and defendant excepted. On cross-examination, Vaughn stated he never was secretary for said company; never kept the books of said company except as aforesaid; that Babcock and Farwell, contractors, have never done anything to my knowledge upon the line of the road covered by the contract of June 7, 1858; I have been engineer and would have known if anything was done; the road has been surveyed; the company have not made contracts for grading except these; Babcock and Farwell have done work on the road from Liverpool to Galva; there are no ties or rails laid on the entire road; I think twenty-four out of twenty-eight miles between Liverpool and the Peoria and Oquawka Railroad is graded—no grading between Liverpool and Jacksonville—some between Peoria and Oquawka Railroad and Galva—more between Galva and Savannah; it is 45 miles from Jacksonville to Liverpool; to Yates City 28$\frac{1}{8}$ miles; from Yates City to Galva 31 miles; and from Galva to Savannah 70 miles; the contractors have not, to my knowledge, made any preparations to work under contract of June 7, 1858; no track has been laid on any of the road, and no engines run.

This was all the evidence.

The defendant then moved the court to exclude the foregoing evidence, which motion was overruled, and defendant excepted.

The court gave the following instructions for plaintiff:

1. The jury are instructed that even if they should believe from the evidence, that on work has been done between Galva and Savannah, and between Jacksonville and Liverpool, by Farwell & Babcock, under their contract for grading, dated June 7, 1858, that fact does not furnish any evidence of itself of fraud in the execution of said contract.

2. The plaintiffs are entitled to recover in this action upon the subscription in evidence, provided the jury believe from the evidence that the plaintiffs have complied with the terms of the contract on their part, by contracting for the grading of the road, and that said road is located across the Peoria and Oquawka Railroad, not less than two miles west from Elmwood, and that the instalments sued for have been duly assessed before the commencement of this suit.

3. It is not necessary to enable the plaintiffs to recover, to prove notice of the calls or assessments or to show that any portion of the work under the contract has been done.

And gave the following instruction for defendant :

The jury is instructed that they must be satisfied from the evidence that the grading of the entire line of the plaintiffs' road was contracted in good faith by a valid and subsisting contract for its grading, before the 26th day of July, 1858, the day of the call of the assessment, or they will find for the defendant.

The defendant also asked the following instructions, which were refused by the court :

1. If the jury believe from the evidence that the contract executed by the plaintiffs and Babcock & Farwell, was made simply for the purpose of being read in evidence in this and other cases and not with the intention to be performed, then the jury will find that the line of this road is not under contract as stated in the condition to the subscription; the jury is to judge from the contract and circumstances.

2. The jury is instructed that the plaintiffs cannot recover in this action unless the jury believe from the evidence that that part of plaintiffs' Railroad which crosses the Peoria and Oquawka Railroad is completed.

3. The jury is instructed that the plaintiffs cannot recover until the plaintiffs' road is so far completed as to run cars and engines across the Peoria and Oquawka Railroad, and unless the jury believe from the evidence that it is thus far completed they will find for the defendant.

4. The jury is instructed that before the plaintiff is entitled to recover in this cause, he must show that the directors of said Railroad Company, before the commencement of this suit, made or declared dividends on said stock at different times. That it is not sufficient to declare all the dividends at one assessment although due at different times.

5. If the jury believe from the evidence that the order of assessment made July 26th. 1858, as shown in evidence, is the only order of assessment made by

aid Company requiring the defendant to pay his subscription, then they will find for defendant.

6. The jury is instructed that they must believe from the evidence that the assessments upon his subscription were made before the commencement of this suit and the money demanded, or the jury will find for defendant.

To the refusal of the court to give said instructions the defendant excepted.

The jury found for plaintiffs below $1,800.

The defendant moved the court for a new trial, for the following reasons:

1. The court erred in giving the instructions asked for by plaintiff.

2. Because the court erred in refusing the instructions asked by defendant.

3. Because the court erred in allowing evidence improperly to go to the jury.

4. Because the court erred in refusing to exclude the plaintiffs' evidence from the jury.

5. Because the verdict is against the law and the evidence.

6. The evidence does not support the verdict.

Which motion was overruled by the court, and the defendant excepted.

Defendant then made a motion in arrest of judgment for the following reasons:

1. For the want of a sufficient declaration.

2. For the want of a sufficient record.

3. Because of a variance between the summons and declaration and proof.

Which motion was overruled by the court, and defendant excepted, and thereupon the court rendered judgment upon said verdict.

The errors assigned are as follows:

1. The court erred in overruling the demurrer to the declaration.

2. The court erred in sustaining the demurrer to the defendant's second plea.

3. The court admitted improper evidence to the jury.

4. The court erred in refusing to exclude evidence under the motion of defendant.

5. The court gave improper instructions to the jury.

6. The court refused to give proper instructions to the jury, which were asked by defendant.

7. The court erred in overruling the motion for a new trial.

8. The court erred in overruling the motion in arrest of judgment.

9. The court erred in rendering judgment for the plaintiff below.

And for other sufficient causes of error.

MANNING & MERRIMAN,
Attorneys for Appellant.

Year 206 1/2

vs

Jacksonville & Savanah

R. R. Co

Abstract

Filed April 27th 1860

L. Leland

Clerk