No. 12920

Supreme Court of Illinois

Frye

vs.

Tucker et al

71641

STATE OF ILLINOIS, SS.:

IN THE SUPREME COURT,

OTTAWA TERM, 1860.

SMITH FRYE,
v.
NATHAN TUCKER AND HENRY MANSFIELD.
} *Appeal from Peoria.*

ABSTRACT OF THE RECORD.

BRIEF OF CHARLES C. BONNEY,

FOR THE APPELLANT.

☞ The Abstracts and Briefs required by the rules are printed and filed as prescribed therein.

PEORIA, ILL.:
NASON & HILL, BOOK AND JOB PRINTERS, FULTON ST.
1860.

STATE OF ILLINOIS, *ss.*

{ In the Supreme Court at Ottawa,
{ Of the April Term, A.D. 1860.

SMITH FRYE
v.
NATHAN TUCKER and
HENRY MANSFIELD.

} *Appeal from Peoria.*

ABSTRACT OF THE RECORD.

Page of Record.

1. "Transcript of a Judgment from Bernard Baily, one of the Justices of the Peace of Peoria county," in these words:

"NATHAN TUCKER &
HENRY MANSFIELD
v.
SMITH FRYE.

"In assumpsit. Note filed for $226.40. Summons issued on the 12th day of April, A.D. 1859, returnable on the 19th at 10 o'clock A.M., and returned by D. A. Wheeler, const., served by reading to the defendant on the 13th. On the return day, the defendant made default. It is therefore ordered and adjudged that the plaintiffs recover two hundred and twenty-six dollars forty cents damages, and costs of suit."

2. The usual memorandum of costs is made in the margin of the transcript, and the ordinary certificate of the Justice attached thereto.

A Promissory Note, in these words:

"Peoria, March 11th, 1858.

"$225. Twelve months after date, I promise to pay to

the order of Peoria & Oquawka Rail Road Company, Two Hundred and twenty-five dollars at ———— value received.

"SMITH FRYE."

On the back of which note are the these words:

"Pay to the order of Tucker & Mansfield.

"The Peoria & Oquawka Rail Road Company, by HENRY NOLTE, Secy."

Summons issued by the Justice.

3. Appeal-bond to Peoria Circuit Court.

4. Summons to appellees to Special June Term, 1859, and return of service thereto.

5. PROCEEDINGS AT NOVEMBER TERM, 1859.— Trial by Jury. Verdict for plaintiffs for $235.50. Motion for new trial.

6. Motion for new trial overruled. Judgment on verdict. Appeal to Supreme Court allowed on bond in 30 days in $500, with Peter Sweat surety.

7. BILL OF EXCEPTIONS, setting out all the evidence.

(1.) Promissory note and indorsements, in the same words as those set out after the transcript.

8. Whereto the appellant then and there made the following

OBJECTIONS.—

(A.) The transcript from the docket of the justice of the peace shows that the suit was brought on a different cause of action. This is a note for $225; but the note described in the transcript is for $226.40. This note is payable to the Peoria & Oquawka Rail Road Company; but the note described in the transcript is payable to the plaintiffs.

(B.) The authority of Henry Nolte to indorse this note is not shown, and it doth not appear to have been indorsed in the course of the business of the corporation.

Objections overruled. Note and indorsement admitted and read, and exception taken.

(2.) TESTIMONY OF ISAAC UNDERHILL.— The note sued on was taken by me as collecting agent of P. & O. R. R. Co., in settlement of a suit against Smith Frye upon his subscription. The Company indorsed it to me, and I transferred it to Tucker & Mansfield. I told them it was given for a subscription for stock

in the P. & O. R. R. Co. The stock has not been delivered, but is ready to be when Frye pays the note.

Objection by Frye, that a tender of the stock before the commencement of the suit ought to have been shown. It was then worth from five to twenty cents on the dollar.

9. (3.) Testimony of Henry Nolte. — I am and was Secretary of the P. & O. R. R. Co., and had authority to indorse its notes. Cannot say I had any particular authority to indorse this note, nor that the Company ever ratified this particular indorsement.

(4.) Testimony of George F. Harding. — Stock of P. & O. R. R. Co. not in market in October, 1858. I sold some in 1857 for two cents on the dollar. I think it was not worth anything in October, 1858. Nothing could be realized from it.

(5.) Further Testimony of Isaac Underhill. — I gave Frye no assurance that the road would go on when he gave the note. Offered to relinquish one-half the amount if he would give up his claim to the stock, but he refused to do so.

10. Instructions for Appellees. —

(1.) That the settlement of a suit is a good consideration for a note.

(2.) If the note was given for stock subscription, insolvency of the Company is no defense.

Instruction Refused Appellant. — If Tucker and Mansfield were informed of the consideration of the note, and that such consideration was of no value whatever, the jury should find for Frye.

Verdict as stated above. Motion for a new trial because the court misdirected the jury, and refused proper instructions for appellant, and because the verdict is against the evidence and contrary to the law.

11. Motion overruled and Bill of Exceptions signed.

Appeal-bond to Supreme Court pursuant to allowance of appeal.

13. Certificate, signature and seal of Circuit Clerk.

14. ASSIGNMENT OF ERRORS, TO WIT:

(1.) The note read in evidence is fatally variant from the one described in the justice's transcript.

(2.) The plaintiffs below did not establish a valid assignment by the Peoria and Oquawka Rail Road Company to them of the note read in evidence.

(3.) The evidence shows that the said promissory note was given without any good consideration, and that the plaintiffs below had notice thereof when they received the same.

(4.) The court refused to instruct the jury that if the plaintiffs below knew when they received said note that it was given for a worthless consideration, the verdict should be for the defendant below.

(5.) The record, proceedings and judgment are otherwise manifestly against the law of the land and the rights of the appellant.

Prayer for reversal of judgment.

CHARLES C. BONNEY, *Attorney for Appellant.*

15. Joinder in error, and prayer for affirmance of judgment.

MANNING & MERRIMAN, *Attorneys for Appellees.*

STATE OF ILLINOIS, ss. { In the Supreme Court, Ottawa Term, A.D. 1860.

SMITH FRYE
v.
NATHAN TUCKER & HENRY MANSFIELD. } *Appeal from Peoria.*

BRIEF OF CHARLES C. BONNEY, FOR APPELLANT.

This was an action under the extraordinary jurisdiction of justices in Peoria county, upon a promissory note made by Smith Frye, the appellant, to the Peoria & Oquawka Railroad Company, and indorsed in the name of the corporation by Henry Nolte, acting as Secretary, to Tucker & Mansfield, the appellees. The defendant did not appear before the justice, and judgment was accordingly entered against him. He appealed to the Circuit Court; and the questions which this court is now called upon to review were raised on the trial in the court below.

(1.) Has a plaintiff, in appeal from a justice of the peace, the right (at least without previous notice and special leave for good cause shown) to introduce and establish upon the trial in the court above a cause of action *materially variant* from that described in the transcript sent up by the justice?

(2.) Can the statement of the cause of action in the record certified by the justice to the superior court be, for any cause, or under any circumstances, altered or contradicted upon the appeal?

(3.) Has the Secretary of the Peoria & Oquawka Railroad Company a general right to negotiate and assign promissory notes payable to the corporation by name; or must it appear that he has a special authority therefor, and that he acts within the proper business of the company and of his agency?

(4.) If an assignee of negotiable paper receive it with notice that the consideration for which it was given was altogether worthless at the time of the making thereof, can an action thereon in the name of the assignee be defeated by showing the worthlessness of the consideration?

These questions will be considered in their order.

I.— Of the Variance between the Note read in Evidence and that described in the Transcript.

(1.) The 20th section of the Statute of Justices is in these words:

"It shall be the duty of every justice, whenever a suit shall be commenced before him, to record in a book kept for that purpose the names of the parties, the amount and nature of the debt sued for, the date and description of the process issued, and the name of the officer to whom such process shall be delivered; and throughout the whole of the proceedings in any suit, it shall be his duty, whenever any process shall be issued or returned, or any order made or judgment rendered, to make a written memorandum of the same, in the same book, and to file and safely keep all papers given him in charge."

(2.) Under a similar act in Ohio (Sec. 203 Justices' Code, Swan's St. 528), it has been held that a compliance with the provisions of the statute by the justice is essential to his *jurisdiction*, and that a party can not waive the error of an omission to state any material fact specified in the law.

McCarty v. *Blake*, per Nash, Plyly and Johnson JJ., at Meigs Dist. Court, April, 1859.—1 Law Monthly, 589.

(3.) In our own State it is now settled law that the record of the proceedings of justices of the peace required by the statute can not be changed or contradicted on appeal. A decision to this effect was made at the last Ottawa Term, and will be found in 22 Ill. R.

Garfield v. Douglas 22 Ill. R. 100;
Innerman v. Innerman 15 Ill. R. 84.

(4.) The object of the statute is two-fold: to inform the defendant definitely of the cause of action which he is summoned to answer, and to preserve a public record, whereby the matters adjudicated between the parties may readily be identified, and the judgment of the law thereon conveniently ascertained and shown as future occasion may require. The rule of construction in cases of this nature, familiar to every lawyer, requires that these wise provisions of the statute be firmly upheld and rigorously enforced. More especially should this be done at the present time, when the capricious experiments of poorly-paid legislatures clothe unlearned and inexperienced persons with extraordinary powers and jurisdiction; when that once humble functionary, the Justice of the Peace, is exalted to the office of judge in actions of replevin and trespass to real estate.

(5.) In the case at bar, the variance between the note described in the transcript and the one read in evidence, against the objection of the appellant, is fatal. The amount of the for-

I.— Of the Variance between the Note read in Evidence and that described in the Transcript.

(1.) The 20th section of the Statute of Justices is in these words:

"It shall be the duty of every justice, whenever a suit shall be commenced before him, to record in a book kept for that purpose the names of the parties, the amount and nature of the debt sued for, the date and description of the process issued, and the name of the officer to whom such process shall be delivered; and throughout the whole of the proceedings in any suit, it shall be his duty, whenever any process shall be issued or returned, or any order made or judgment rendered, to make a written memorandum of the same, in the same book, and to file and safely keep all papers given him in charge."

(2.) Under a similar act in Ohio (Sec. 203 Justices' Code, Swan's St. 528), it has been held that a compliance with the provisions of the statute by the justice is essential to his *jurisdiction*, and that a party can not waive the error of an omission to state any material fact specified in the law.

McCarty v. *Blake*, per Nash, Plyly and Johnson JJ., at Meigs Dist. Court, April, 1859.—1 Law Monthly, 589.

(3.) In our own State it is now settled law that the record of the proceedings of justices of the peace required by the statute can not be changed or contradicted on appeal. A decision to this effect was made at the last Ottawa Term, and will be found in 22 Ill. R.

Garfield v. Douglas 22 Ill. R. 100;
Innerman v. Innerman 15 Ill. R. 84.

(4.) The object of the statute is two-fold: to inform the defendant definitely of the cause of action which he is summoned to answer, and to preserve a public record, whereby the matters adjudicated between the parties may readily be identified, and the judgment of the law thereon conveniently ascertained and shown as future occasion may require. The rule of construction in cases of this nature, familiar to every lawyer, requires that these wise provisions of the statute be firmly upheld and rigorously enforced. More especially should this be done at the present time, when the capricious experiments of poorly-paid legislatures clothe unlearned and inexperienced persons with extraordinary powers and jurisdiction; when that once humble functionary, the Justice of the Peace, is exalted to the office of judge in actions of replevin and trespass to real estate.

(5.) In the case at bar, the variance between the note described in the transcript and the one read in evidence, against the objection of the appellant, is fatal. The amount of the for-

mer is $226.40; of the latter, $225. And as the payee of the note specified in the transcript is not named, it shall be intended to be payable to the plaintiffs in the action. As they do not sue as assignees, it shall be intended that they claim as payees; otherwise, there is no compliance with the statute, and the defendant is not informed of the cause of action he is required to meet.

Baker v. Brushy 4 Scam. R. 325.
Pettit v. Maw 13 Ill. R. 251.

II.—Of the Assignment of the Note read in evideece.

(1.) To negotiate commercial paper is not within the ordinary powers of corporations.

1 Kent Com. 277, and cases cited.

(2.) The modern doctrine is, to consider corporations as having such powers as are *specifically* granted by the act of incorporation, or as are *necessary for the purpose of carrying into effect the powers expressly granted*, and not as having any other.

1 Kent Com. 298, and cases.

Penn R. Co. v. Canal. Comrs. 21 Penn. R. 9.
Sedg. S. & L. Law 338, 342 et seq.

(3.) The power to negotiate commercial paper, to deal in and transfer promissory notes, &c., is not given by the Charter of the Peoria and Oquawka Rail Road Company, nor is such a power *necessary* to cary into effect any power *expressly* granted.

Private Laws 1849, p. 99.
Private Laws 1851, p. 60.
Laws 1852, p. 193.

(4.) Under these circumstances, there can be no presumption in favor of the assignment, and it need not be denied by affidavit. Such a case is not within the Statute (Practice Act, Sec. 59), nor contemplated by the cases of *Delahay* v. *Clement*, 2 Scam. R. 575, and *McIntire* v. *Preston*, 5 Gil. R. 57.

In the case of *Frye* v. *Bank of Illinois*, 5 Gil. R. 334, the court say they can not intend that the power to loan money is necessary to the existence and transaction of the ordinary business of insurance companies; so in this case, the court can not intend that the power to negotiate commercial paper is necessary to the existence and transaction of the ordinary business of the Peoria and Oquawka Rail Road Company.

See also Angell & Ames on Corporations, 234, and cases cited.

mer is $226.40; of the latter, $225. And as the payee of the note specified in the transcript is not named, it shall be intended to be payable to the plaintiffs in the action. As they do not sue as assignees, it shall be intended that they claim as payees; otherwise, there is no compliance with the statute, and the defendant is not informed of the cause of action he is required to meet.

Baker v. Brushy 4 Scam. R. 325.
Pettit v. Maw 13 Ill. R. 251.

II.—Of the Assignment of the Note read in evideece.

(1.) To negotiate commercial paper is not within the ordinary powers of corporations.

1 Kent Com. 277, and cases cited.

(2.) The modern doctrine is, to consider corporations as having such powers as are *specifically* granted by the act of incorporation, or as are *necessary for the purpose of carrying into effect the powers expressly granted*, and not as having any other.

1 Kent Com. 298, and cases.

Penn R. Co. v. Canal. Comrs. 21 Penn. R. 9.
Sedg. S. & L. Law 338, 342 et seq.

(3.) The power to negotiate commercial paper, to deal in and transfer promissory notes, &c., is not given by the Charter of the Peoria and Oquawka Rail Road Company, nor is such a power *necessary* to cary into effect any power *expressly* granted.

Private Laws 1849, p. 99.
Private Laws 1851, p. 60.
Laws 1852, p. 193.

(4.) Under these circumstances, there can be no presumption in favor of the assignment, and it need not be denied by affidavit. Such a case is not within the Statute (Practice Act, Sec. 59), nor contemplated by the cases of *Delahay* v. *Clement*, 2 Scam. R. 575, and *McIntire* v. *Preston*, 5 Gil. R. 57.

In the case of *Frye* v. *Bank of Illinois*, 5 Gil. R. 334, the court say they can not intend that the power to loan money is necessary to the existence and transaction of the ordinary business of insurance companies; so in this case, the court can not intend that the power to negotiate commercial paper is necessary to the existence and transaction of the ordinary business of the Peoria and Oquawka Rail Road Company.

See also Angell & Ames on Corporations, 234, and cases cited.

(5.) The second and third sections of the Statute of Negotiable Instruments include only such corporations as have otherwise the power to take and negotiate commercial paper.

(6.) The negotiation of promissory notes is not within the scope of the authority usually exercised by the Secretary of Rail Road Companies, and so his acts and admissions in that behalf can not bind the corporation, unless expressly authorized. The presumption of law is that he has no such authority; and those who take commercial paper payable to the company from him, and on his indorsement, are bound at their peril to inquire into the authority by which he acts.

2 Kent Com. 292, and cases.
Schuyler case, *Mechanics' Bank* v. *New York and New Haven R. R. Co.*, New York Court of Appeals.—4 Am. Law Reg. 717, and cases.
Story on Agency, Secs. 126, 133, 165, &c., and cases.

(7.) In this case the evidence fails to show that Henry Nolte had authority to bind the corporation by his assignment and transfer of the note read in evidence.

III.— Of the Consideration of the Note in question.

(1.) The evidence shows that the consideration of the note was a subscription for stock in the Peoria and Oquawka Rail Road Company; that at the time when the note was given the stock was worthless, and that the plaintiffs below were informed of the consideration when they received the note.

(2.) The case is within the 10th section of the Statute of Negotiable Instruments ; the note was made and entered into without a good or valuable consideration.

(3.) At all events there was evidence *tending* to bring the case within this statute, but the instructions given by the Circuit Court for the appellees, in effect excluded this evidence from the jury.

(4.) A demand for the amount of a subscription for stock in a railroad company, made when such stock has become altogether valueless, can not be deemed a reasonable ground for giving a promissory note; nor can a railroad company making such demand plausibly pretend "honestly to suppose they have a good cause of action." So the compromise of a suit, insisted on by the appellees, is not sufficient to sustain the note.

McKinley v. *Watkins*, 13 Ill. R. 142, and cases.

97

Price
v.
Tucker et ab

Appellants' Brief

Filed March 9. 1860
L. Leland
Clerk

12920

STATE OF ILLINOIS, SS.:

IN THE SUPREME COURT,

OTTAWA TERM, 1860.

SMITH FRYE,
v.
NATHAN TUCKER AND HENRY MANSFIELD.
} *Appeal from Peoria.*

ABSTRACT OF THE RECORD.

BRIEF OF CHARLES C. BONNEY,

FOR THE APPELLANT.

☞ The Abstracts ~~and Briefs~~ required by the rules are printed and filed as prescribed therein.

PEORIA, ILL.:
NASON & HILL, BOOK AND JOB PRINTERS, FULTON ST.
1860.

STATE OF ILLINOIS, *ss.*

{ In the Supreme Court at Ottawa,
{ Of the April Term, A.D. 1860.

SMITH FRYE
v.
NATHAN TUCKER and
HENRY MANSFIELD.

} *Appeal from Peoria.*

ABSTRACT OF THE RECORD.

Page of Record.

1. "Transcript of a Judgment from Bernard Baily, one of the Justices of the Peace of Peoria county," in these words:

"NATHAN TUCKER &
HENRY MANSFIELD
v.
SMITH FRYE.

"In assumpsit. Note filed for $226.40. Summons issued on the 12th day of April, A.D. 1859, returnable on the 19th at 10 o'clock A.M., and returned by D. A. Wheeler, const., served by reading to the defendant on the 13th. On the return day, the defendant made default. It is therefore ordered and adjudged that the plaintiffs recover two hundred and twenty-six dollars forty cents damages, and costs of suit."

2. The usual memorandum of costs is made in the margin of the transcript, and the ordinary certificate of the Justice attached thereto.

A Promissory Note, in these words:

"Peoria, March 11th, 1858.

"$225. Twelve months after date, I promise to pay to

the order of Peoria & Oquawka Rail Road Company, Two Hundred and twenty-five dollars at ———— value received.

"SMITH FRYE."

On the back of which note are the these words:

"Pay to the order of Tucker & Mansfield.

"The Peoria & Oquawka Rail Road Company, by HENRY NOLTE, Secy."

Summons issued by the Justice.

3. Appeal-bond to Peoria Circuit Court.

4. Summons to appellees to Special June Term, 1859, and return of service thereto.

5. PROCEEDINGS AT NOVEMBER TERM, 1859.—Trial by Jury. Verdict for plaintiffs for $235.50. Motion for new trial.

6. Motion for new trial overruled. Judgment on verdict. Appeal to Supreme Court allowed on bond in 30 days in $500, with Peter Sweat surety.

7. BILL OF EXCEPTIONS, setting out all the evidence.

(1.) Promissory note and indorsements, in the same words as those set out after the transcript.

8. Whereto the appellant then and there made the following

OBJECTIONS.—

(A.) The transcript from the docket of the justice of the peace shows that the suit was brought on a different cause of action. This is a note for $225; but the note described in the transcript is for $226.40. This note is payable to the Peoria & Oquawka Rail Road Company; but the note described in the transcript is payable to the plaintiffs.

(B.) The authority of Henry Nolte to indorse this note is not shown, and it doth not appear to have been indorsed in the course of the business of the corporation.

Objections overruled. Note and indorsement admitted and read, and exception taken.

(2.) TESTIMONY OF ISAAC UNDERHILL.—The note sued on was taken by me as collecting agent of P. & O. R. R. Co., in settlement of a suit against Smith Frye upon his subscription. The Company indorsed it to me, and I transferred it to Tucker & Mansfield. I told them it was given for a subscription for stock

in the P. & O. R. R. Co. The stock has not been delivered, but is ready to be when Frye pays the note.

Objection by Frye, that a tender of the stock before the commencement of the suit ought to have been shown. It was then worth from five to twenty cents on the dollar.

9. (3.) Testimony of Henry Nolte. — I am and was Secretary of the P. & O. R. R. Co., and had authority to indorse its notes. Cannot say I had any particular authority to indorse this note, nor that the Company ever ratified this particular indorsement.

(4.) Testimony of George F. Harding. — Stock of P. & O. R. R. Co. not in market in October, 1858. I sold some in 1857 for two cents on the dollar. I think it was not worth anything in October, 1858. Nothing could be realized from it.

(5.) Further Testimony of Isaac Underhill. — I gave Frye no assurance that the road would go on when he gave the note. Offered to relinquish one-half the amount if he would give up his claim to the stock, but he refused to do so.

10. Instructions for Appellees. —

(1.) That the settlement of a suit is a good consideration for a note.

(2.) If the note was given for stock subscription, insolvency of the Company is no defense.

Instruction Refused Appellant. — If Tucker and Mansfield were informed of the consideration of the note, and that such consideration was of no value whatever, the jury should find for Frye.

Verdict as stated above. Motion for a new trial because the court misdirected the jury, and refused proper instructions for appellant, and because the verdict is against the evidence and contrary to the law.

11. Motion overruled and Bill of Exceptions signed.

Appeal-bond to Supreme Court pursuant to allowance of appeal.

13. Certificate, signature and seal of Circuit Clerk.

14. ASSIGNMENT OF ERRORS, TO WIT:

(1.) The note read in evidence is fatally variant from the one described in the justice's transcript.

(2.) The plaintiffs below did not establish a valid assignment by the Peoria and Oquawka Rail Road Company to them of the note read in evidence.

(3.) The evidence shows that the said promissory note was given without any good consideration, and that the plaintiffs below had notice thereof when they received the same.

(4.) The court refused to instruct the jury that if the plaintiffs below knew when they received said note that it was given for a worthless consideration, the verdict should be for the defendant below.

(5.) The record, proceedings and judgment are otherwise manifestly against the law of the land and the rights of the appellant.

Prayer for reversal of judgment.

CHARLES C. BONNEY, *Attorney for Appellant.*

15. Joinder in error, and prayer for affirmance of judgment.

MANNING & MERRIMAN, *Attorneys for Appellees.*

STATE OF ILLINOIS, ss. { IN THE SUPREME COURT, OTTAWA TERM, A.D. 1860.

SMITH FRYE
v.
NATHAN TUCKER &
HENRY MANSFIELD. } *Appeal from Peoria.*

BRIEF OF CHARLES C. BONNEY, FOR APPELLANT.

This was an action under the extraordinary jurisdiction of justices in Peoria county, upon a promissory note made by Smith Frye, the appellant, to the Peoria & Oquawka Railroad Company, and indorsed in the name of the corporation by Henry Nolte, acting as Secretary, to Tucker & Mansfield, the appellees. The defendant did not appear before the justice, and judgment was accordingly entered against him. He appealed to the Circuit Court; and the questions which this court is now called upon to review were raised on the trial in the court below.

(1.) Has a plaintiff, in appeal from a justice of the peace, the right (at least without previous notice and special leave for good cause shown) to introduce and establish upon the trial in the court above a cause of action *materially variant* from that described in the transcript sent up by the justice?

(2.) Can the statement of the cause of action in the record certified by the justice to the superior court be, for any cause, or under any circumstances, altered or contradicted upon the appeal?

(3.) Has the Secretary of the Peoria & Oquawka Railroad Company a general right to negotiate and assign promissory notes payable to the corporation by name; or must it appear that he has a special authority therefor, and that he acts within the proper business of the company and of his agency?

(4.) If an assignee of negotiable paper receive it with notice that the consideration for which it was given was altogether worthless at the time of the making thereof, can an action thereon in the name of the assignee be defeated by showing the worthlessness of the consideration?

These questions will be considered in their order.

I.— Of the Variance between the Note read in Evidence and that described in the Transcript.

(1.) The 20th section of the Statute of Justices is in these words:

"It shall be the duty of every justice, whenever a suit shall be commenced before him, to record in a book kept for that purpose the names of the parties, the amount and nature of the debt sued for, the date and description of the process issued, and the name of the officer to whom such process shall be delivered; and throughout the whole of the proceedings in any suit, it shall be his duty, whenever any process shall be issued or returned, or any order made or judgment rendered, to make a written memorandum of the same, in the same book, and to file and safely keep all papers given him in charge."

(2.) Under a similar act in Ohio (Sec. 203 Justices' Code, Swan's St. 528), it has been held that a compliance with the provisions of the statute by the justice is essential to his *jurisdiction*, and that a party can not waive the error of an omission to state any material fact specified in the law.

McCarty v. *Blake*, per Nash, Plyly and Johnson JJ., at Meigs Dist. Court, April, 1859.—1 Law Monthly, 589.

(3.) In our own State it is now settled law that the record of the proceedings of justices of the peace required by the statute can not be changed or contradicted on appeal. A decision to this effect was made at the last Ottawa Term, and will be found in 22 Ill. R.

Garfield v. Douglas 22 Ill. R. 100 — Zimmerman v. Zimmerman 15 Ill. R. 84

(4.) The object of the statute is two-fold: to inform the defendant definitely of the cause of action which he is summoned to answer, and to preserve a public record, whereby the matters adjudicated between the parties may readily be identified, and the judgment of the law thereon conveniently ascertained and shown as future occasion may require. The rule of construction in cases of this nature, familiar to every lawyer, requires that these wise provisions of the statute be firmly upheld and rigorously enforced. More especially should this be done at the present time, when the capricious experiments of poorly-paid legislatures clothe unlearned and inexperienced persons with extraordinary powers and jurisdiction; when that once humble functionary, the Justice of the Peace, is exalted to the office of judge in actions of replevin and trespass to real estate.

(5.) In the case at bar, the variance between the note described in the transcript and the one read in evidence, against the objection of the appellant, is fatal. The amount of the for-

mer is $226.40; of the latter, $225. And as the payee of the note specified in the transcript is not named, it shall be intended to be payable to the plaintiffs in the action. As they do not sue as assignees, it shall be intended that they claim as payees; otherwise, there is no compliance with the statute, and the defendant is not informed of the cause of action he is required to meet.

Baker v. Ormsby 4 Scam. R. 325.
Pettit v. Maw 13 Ill. R. 251.

II.—Of the Assignment of the Note read in evideece.

(1.) To negotiate commercial paper is not within the ordinary powers of corporations.

1 Kent Com. 277, and cases cited.

(2.) The modern doctrine is; to consider corporations as having such powers as are *specifically* granted by the act of incorporation, or as are *necessary for the purpose of carrying into effect the powers expressly granted*, and not as having any other.

1 Kent Com. 298, and cases.

Penn R.R. Co. v. Canal Comrs 21 Penn. R. 9
Sedg. S. & L. Law 338. 342. Storey

(3.) The power to negotiate commercial paper, to deal in and transfer promissory notes, &c., is not given by the Charter of the Peoria and Oquawka Rail Road Company, nor is such a power *necessary* to cary into effect any power *expressly* granted.

Private Laws 1849, p. 99.
Private Laws 1851, p. 60.
Laws 1852, p. 193.

(4.) Under these circumstances, there can be no presumption in favor of the assignment, and it need not be denied by affidavit. Such a case is not within the Statute (Practice Act, Sec. 59), nor contemplated by the cases of *Delahay* v. *Clement*, 2 Scam. R. 575, and *McIntire* v. *Preston*, 5 Gil. R. 57.

In the case of *Frye* v. *Bank of Illinois*, 5 Gil. R. 334, the court say they can not intend that the power to loan money is necessary to the existence and transaction of the ordinary business of insurance companies; so in this case, the court can not intend that the power to negotiate commercial paper is necessary to the existence and transaction of the ordinary business of the Peoria and Oquawka Rail Road Company.

See also Angell & Ames on Corporations, 234, and cases cited.

(5.) The second and third sections of the Statute of Negotiable Instruments include only such corporations as have otherwise the power to take and negotiate commercial paper.

(6.) The negotiation of promissory notes is not within the scope of the authority usually exercised by the Secretary of Rail Road Companies, and so his acts and admissions in that behalf can not bind the corporation, unless expressly authorized. The presumption of law is that he has no such authority; and those who take commercial paper payable to the company from him, and on his indorsement, are bound at their peril to inquire into the authority by which he acts.

2 Kent Com. 292, and cases.
Schuyler case, *Mechanics' Bank* v. *New York and New Haven R. R. Co.*, New York Court of Appeals.—4 Am. Law Reg. 717, and cases.
Story on Agency, Secs. 126, 133, 165, &c., and cases.

(7.) In this case the evidence fails to show that Henry Nolte had authority to bind the corporation by his assignment and transfer of the note read in evidence.

III.—Of the Consideration of the Note in Question.

(1.) The evidence shows that the consideration of the note was a subscription for stock in the Peoria and Oquawka Rail Road Company; that at the time when the note was given the stock was worthless, and that the plaintiffs below were informed of the consideration when they received the note.

(2.) The case is within the 10th section of the Statute of Negotiable Instruments; the note was made and entered into without a good or valuable consideration.

(3.) At all events there was evidence *tending* to bring the case within this statute, but the instructions given by the Circuit Court for the appellees, in effect excluded this evidence from the jury.

(4.) A demand for the amount of a subscription for stock in a railroad company, made when such stock has become altogether valueless, can not be deemed a reasonable ground for giving a promissory note; nor can a railroad company making such demand plausibly pretend "honestly to suppose they have a good cause of action." So the compromise of a suit, insisted on by the appellees, is not sufficient to sustain the note.

McKinley v. *Watkins*, 13 Ill. R. 142, and cases.

97.

Troye
v.
Tucker etal.

Appellants' Brief

Filed March 5. 1860
L. Leland
Clerk

STATE OF ILLINOIS, *ss.*

In the Supreme Court at Ottawa,
Of the April Term, A.D. 1860.

SMITH FRYE
v.
NATHAN TUCKER and
HENRY MANSFIELD.

Appeal from Peoria.

ABSTRACT OF THE RECORD.

Page of Record.

1. "Transcript of a Judgment from Bernard Baily, one of the Justices of the Peace of Peoria county," in these words:

"NATHAN TUCKER &
HENRY MANSFIELD
v.
SMITH FRYE.

"In assumpsit. Note filed for $226.40. Summons issued on the 12th day of April, A.D. 1859, returnable on the 19th at 10 o'clock A.M., and returned by D. A. Wheeler, const., served by reading to the defendant on the 13th. On the return day, the defendant made default. It is therefore ordered and adjudged that the plaintiffs recover two hundred and twenty-six dollars forty cents damages, and costs of suit."

2. The usual memorandum of costs is made in the margin of the transcript, and the ordinary certificate of the Justice attached thereto.

A Promissory Note, in these words:

"Peoria, March 11th, 1858.

"$225. Twelve months after date, I promise to pay to

the order of Peoria & Oquawka Rail Road Company, Two Hundred and twenty-five dollars at ———— value received.

"SMITH FRYE."

On the back of which note are the these words:

"Pay to the order of Tucker & Mansfield.

"The Peoria & Oquawka Rail Road Company, by HENRY NOLTE, Secy."

Summons issued by the Justice.

3. Appeal-bond to Peoria Circuit Court.

4. Summons to appellees to Special June Term, 1859, and return of service thereto.

5. PROCEEDINGS AT NOVEMBER TERM, 1859.—Trial by Jury. Verdict for plaintiffs for $235.50. Motion for new trial.

6. Motion for new trial overruled. Judgment on verdict. Appeal to Supreme Court allowed on bond in 30 days in $500, with Peter Sweat surety.

7. BILL OF EXCEPTIONS, setting out all the evidence.

(1.) Promissory note and indorsements, in the same words as those set out after the transcript.

8. Whereto the appellant then and there made the following

OBJECTIONS.—

(A.) The transcript from the docket of the justice of the peace shows that the suit was brought on a different cause of action. This is a note for $225; but the note described in the transcript is for $226.40. This note is payable to the Peoria & Oquawka Rail Road Company; but the note described in the transcript is payable to the plaintiffs.

(B.) The authority of Henry Nolte to indorse this note is not shown, and it doth not appear to have been indorsed in the course of the business of the corporation.

Objections overruled. Note and indorsement admitted and read, and exception taken.

(2.) TESTIMONY OF ISAAC UNDERHILL.—The note sued on was taken by me as collecting agent of P. & O. R. R. Co., in settlement of a suit against Smith Frye upon his subscription. The Company indorsed it to me, and I transferred it to Tucker & Mansfield. I told them it was given for a subscription for stock

in the P. & O. R. R. Co. The stock has not been delivered, but is ready to be when Frye pays the note.

Objection by Frye, that a tender of the stock before the commencement of the suit ought to have been shown. It was then worth from five to twenty cents on the dollar.

9. (3.) Testimony of Henry Nolte. — I am and was Secretary of the P. & O. R. R. Co., and had authority to indorse its notes. Cannot say I had any particular authority to indorse this note, nor that the Company ever ratified this particular indorsement.

(4.) Testimony of George F. Harding. — Stock of P. & O. R. R. Co. not in market in October, 1858. I sold some in 1857 for two cents on the dollar. I think it was not worth anything in October, 1858. Nothing could be realized from it.

(5.) Further Testimony of Isaac Underhill. — I gave Frye no assurance that the road would go on when he gave the note. Offered to relinquish one-half the amount if he would give up his claim to the stock, but he refused to do so.

10. Instructions for Appellees. —

(1.) That the settlement of a suit is a good consideration for a note.

(2.) If the note was given for stock subscription, insolvency of the Company is no defense.

Instruction Refused Appellant. — If Tucker and Mansfield were informed of the consideration of the note, and that such consideration was of no value whatever, the jury should find for Frye.

Verdict as stated above. Motion for a new trial because the court misdirected the jury, and refused proper instructions for appellant, and because the verdict is against the evidence and contrary to the law.

11. Motion overruled and Bill of Exceptions signed.

Appeal-bond to Supreme Court pursuant to allowance of appeal.

13. Certificate, signature and seal of Circuit Clerk.

14. ASSIGNMENT OF ERRORS, TO WIT:

(1.) The note read in evidence is fatally variant from the one described in the justice's transcript.

(2.) The plaintiffs below did not establish a valid assignment by the Peoria and Oquawka Rail Road Company to them of the note read in evidence.

(3.) The evidence shows that the said promissory note was given without any good consideration, and that the plaintiffs below had notice thereof when they received the same.

(4.) The court refused to instruct the jury that if the plaintiffs below knew when they received said note that it was given for a worthless consideration, the verdict should be for the defendant below.

(5.) The record, proceedings and judgment are otherwise manifestly against the law of the land and the rights of the appellant.

Prayer for reversal of judgment.

CHARLES C. BONNEY, *Attorney for Appellant.*

15. Joinder in error, and prayer for affirmance of judgment.

MANNING & MERRIMAN, *Attorneys for Appellees.*

97.

Frye

v

Tucker et al.

Abstract

Filed March 9. 1860

L. Leland

Clerk

STATE OF ILLINOIS, *ss.*

In the Supreme Court at Ottawa,
Of the April Term, A.D. 1860.

SMITH FRYE
v.
NATHAN TUCKER and
HENRY MANSFIELD.

Appeal from Peoria.

ABSTRACT OF THE RECORD.

Page of Record.

1. "Transcript of a Judgment from Bernard Baily, one of the Justices of the Peace of Peoria county," in these words:

"NATHAN TUCKER &
HENRY MANSFIELD
v.
SMITH FRYE.

"In assumpsit. Note filed for $226.40. Summons issued on the 12th day of April, A.D. 1859, returnable on the 19th at 10 o'clock A.M., and returned by D. A. Wheeler, const., served by reading to the defendant on the 13th. On the return day, the defendant made default. It is therefore ordered and adjudged that the plaintiffs recover two hundred and twenty-six dollars forty cents damages, and costs of suit."

2. The usual memorandum of costs is made in the margin of the transcript, and the ordinary certificate of the Justice attached thereto.

A Promissory Note, in these words:

"Peoria, March 11th, 1858.

"$225. Twelve months after date, I promise to pay to

the order of Peoria & Oquawka Rail Road Company, Two Hundred and twenty-five dollars at ———— value received.

"SMITH FRYE."

On the back of which note are the these words:

"Pay to the order of Tucker & Mansfield.

"The Peoria & Oquawka Rail Road Company, by HENRY NOLTE, Secy."

Summons issued by the Justice.

3. Appeal-bond to Peoria Circuit Court.

4. Summons to appellees to Special June Term, 1859, and return of service thereto.

5. PROCEEDINGS AT NOVEMBER TERM, 1859.—Trial by Jury. Verdict for plaintiffs for $235.50. Motion for new trial.

6. Motion for new trial overruled. Judgment on verdict. Appeal to Supreme Court allowed on bond in 30 days in $500, with Peter Sweat surety.

7. BILL OF EXCEPTIONS, setting out all the evidence.

(1.) Promissory note and indorsements, in the same words as those set out after the transcript.

8. Whereto the appellant then and there made the following

OBJECTIONS.—

(A.) The transcript from the docket of the justice of the peace shows that the suit was brought on a different cause of action. This is a note for $225; but the note described in the transcript is for $226.40. This note is payable to the Peoria & Oquawka Rail Road Company; but the note described in the transcript is payable to the plaintiffs.

(B.) The authority of Henry Nolte to indorse this note is not shown, and it doth not appear to have been indorsed in the course of the business of the corporation.

Objections overruled. Note and indorsement admitted and read, and exception taken.

(2.) TESTIMONY OF ISAAC UNDERHILL.—The note sued on was taken by me as collecting agent of P. & O. R. R. Co., in settlement of a suit against Smith Frye upon his subscription. The Company indorsed it to me, and I transferred it to Tucker & Mansfield. I told them it was given for a subscription for stock

14. ASSIGNMENT OF ERRORS, TO WIT:

(1.) The note read in evidence is fatally variant from the one described in the justice's transcript.

(2.) The plaintiffs below did not establish a valid assignment by the Peoria and Oquawka Rail Road Company to them of the note read in evidence.

(3.) The evidence shows that the said promissory note was given without any good consideration, and that the plaintiffs below had notice thereof when they received the same.

(4.) The court refused to instruct the jury that if the plaintiffs below knew when they received said note that it was given for a worthless consideration, the verdict should be for the defendant below.

(5.) The record, proceedings and judgment are otherwise manifestly against the law of the land and the rights of the appellant.

Prayer for reversal of judgment.

CHARLES C. BONNEY, *Attorney for Appellant.*

15. Joinder in error, and prayer for affirmance of judgment.

MANNING & MERRIMAN, *Attorneys for Appellees.*

97

Frye

Tuckerdal

abstract

Filed March 2. 1860

L. Leland

Clerk

APPELLEES' BRIEF.

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

SMITH FRYE,
vs.
TUCKER & MANSFIELD. } Appeal from Peoria Circuit Court.

This was a suit brought upon a promissory note before a Justice of the Peace, before whom default was made, and judgment and appeal to the Circuit court.

The first objection is a variance between the note sued, and the transcript of the Justice.

Even if there had been a mistake in the docket of the Justice, it could not have been taken advantage of on appeal. The case then, is tried upon its own merits, as *de novo*, without reference to the manner in which the Justice kept his docket.

In Swingley vs. Haines, 22 Illinois, 216, the Court say the form of the account, the form of the summons, or a mistake in docketing the suit, cannot effect the plaintiff's right to a judgment, if his evidence shows a right of recovery.

But in this case the Justice complied literally with the statute. After stating names of the parties, he says: "Note filed for $226.40;" thus referring to the note on file, for a more particular statement of the cause of action. He did state the "amount and nature of the debt" sued for, and this was all he was required to do. The note filed stands in the nature of a declaration—the docket shows the amount claimed to be due thereon, and refers to the note for particularity.

The second objection is to the authority of Henry Nolte, the Secretary of the payees of the note, to assign the same.

This could properly be raised only upon an affidavit, denying the assignment; but the authority is clearly proven in this case, by Nolte, himself. (See his testimony).

Third objection is upon the consideration of the note.

Even if the charter was wholly silent as to the power of the corporation to give credit for premiums, and take notes in payment, we should feel bound to decide that such power necessarily resulted from its power to make insurances, and to enable it advantageously to conduct its business.

McIntyre, vs. Preston, 5 Gilman, 60, and authorities cited.

1 Phillips on Insurance, 205.

N. Y. Firemans' Insurance Co., vs. Ely, 2 Cow. 678.

The note in this case, is not given for money loaned, but as evidence of the contract by Frye, to pay his subscription to the Railroad Company. The corporation had a right to receive subscriptions, extend time for the pamyent of same, and necessarily to take notes as evidence thereof. This company, as was proved on the trial, was in the custom of receiving notes for subscription, and of assigning those notes for the purpose of raising money. This was essential to the successful carrying on of the corporation. The corporation having the power to take notes, would necessarily have the power to negotiate such notes in the ordinary transaction of business, and the authority to transfer the notes, will be inferred, till the contrary be shown.

McIntyre, vs. Preston, 5, Gillman, 62.

Frye had subscribed to the capital stock of the Peoria and Oquawka Raiload Company, and failing to pay his subscription, was sued. To settle this suit he gave this note, and others to the full amount of his subscription, at which time, it was proposed to receive half of the amount of his subscription, provided he would relinquish his claim to the stock. He preferred to pay the whole subscription, and get his stock. It matters not whether the stock was worth one dollar,

or a hundred dollars, at the time he gave his notes—he had agreed to take the stock, for the purpose of building the road—and was legally and morally bound to pay it, whatever may then have been the market value of the stock. It seems that he had confidence in its ultimate value, as he refused to relinquish his claim to the stock for one half of the amount.

The compromise of a pending suit is a good consideration for a promissory note. Sigsworth, vs. Coulter, 18 Illinois, 204.

The insolvency of a Railroad Company, is no ground for restraining the collection of subscriptions for stock. Dill, vs. Wabash Valley Railroad Company, 21 Illinois, 91.

This is all of this case.

MANNING & MERRIMAN,
Attorneys for Appellees.

9 7

Frye vs Inches

Depos. &c

Filed April 25, 1865

L. L. Leland

Clerk

APPELLEES' BRIEF.

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

SMITH FRYE,
vs.
TUCKER & MANSFIELD. } Appeal from Peoria Circuit Court.

This was a suit brought upon a promissory note before a Justice of the Peace, before whom default was made, and judgment and appeal to the Circuit court.

The first objection is a variance between the note sued, and the transcript of the Justice.

Even if there had been a mistake in the docket of the Justice, it could not have been taken advantage of on appeal. The case then, is tried upon its own merits, as *de novo*, without reference to the manner in which the Justice kept his docket.

In Swingley vs. Haines, 22 Illinois, 216, the Court say the form of the account, the form of the summons, or a mistake in docketing the suit, cannot effect the plaintiff's right to a judgment, if his evidence shows a right of recovery.

But in this case the Justice complied literally with the statute. After stating names of the parties, he says: "Note filed for $226.40;" thus referring to the note on file, for a more particular statement of the cause of action. He did state the "amount and nature of the debt" sued for, and this was all he was required to do. The note filed stands in the nature of a declaration—the docket shows the amount claimed to be due thereon, and refers to the note for particularity.

The second objection is to the authority of Henry Nolte, the Secretary of the payees of the note, to assign the same.

This could properly be raised only upon an affidavit, denying the assignment; but the authority is clearly proven in this case, by Nolte, himself. (See his testimony).

Third objection is upon the consideration of the note.

Even if the charter was wholly silent as to the power of the corporation to give credit for premiums, and take notes in payment, we should feel bound to decide that such power necessarily resulted from its power to make insurances, and to enable it advantageously to conduct its business.

McIntyre, vs. Preston, 5 Gilman, 60, and authorities cited.

1 Phillips on Insurance, 205.

N. Y. Firemans' Insurance Co., vs. Ely, 2 Cow. 678.

The note in this case, is not given for money loaned, but as evidence of the contract by Frye, to pay his subscription to the Railroad Company. The corporation had a right to receive subscriptions, extend time for the pamyent of same, and necessarily to take notes as evidence thereof. This company, as was proved on the trial, was in the custom of receiving notes for subscription, and of assigning those notes for the purpose of raising money. This was essential to the successful carrying on of the corporation. The corporation having the power to take notes, would necessarily have the power to negotiate such notes in the ordinary transaction of business, and the authority to transfer the notes, will be inferred, till the contrary be shown.

McIntyre, vs. Preston, 5, Gillman, 62.

Frye had subscribed to the capital stock of the Peoria and Oquawka Raiload Company, and failing to pay his subscription, was sued. To settle this suit he gave this note, and others to the full amount of his subscription, at which time, it was proposed to receive half of the amount of his subscription, provided he would relinquish his claim to the stock. He preferred to pay the whole subscription, and get his stock. It matters not whether the stock was worth one dollar,

or a hundred dollars, at the time he gave his notes—he had agreed to take the stock, for the purpose of building the road—and was legally and morally bound to pay it, whatever may then have been the market value of the stock. It seems that he had confidence in its ultimate value, as he refused to relinquish his claim to the stock for one half of the amount.

The compromise of a pending suit is a good consideration for a promissory note. Sigsworth, vs. Coulter, 18 Illinois, 204.

The insolvency of a Railroad Company, is no ground for restraining the collection of subscriptions for stock. Dill, vs. Wabash Valley Railroad Company, 21 Illinois, 91.

This is all of this case.

MANNING & MERRIMAN,
Attorneys for Appellees.

97 - 2

Frye vs Tucker

Defts Brief

Filed April 21: 1860
L. Leland
Clerk

APPELLEES' BRIEF.

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

SMITH FRYE,
vs.
TUCKER & MANSFIELD. } Appeal from Peoria Circuit Court.

This was a suit brought upon a promissory note before a Justice of the Peace, before whom default was made, and judgment and appeal to the Circuit court.

The first objection is a variance between the note sued, and the transcript of the Justice.

Even if there had been a mistake in the docket of the Justice, it could not have been taken advantage of on appeal. The case then, is tried upon its own merits, as *de novo*, without reference to the manner in which the Justice kept his docket.

In Swingley vs. Haines, 22 Illinois, 216, the Court say the form of the account, the form of the summons, or a mistake in docketing the suit, cannot effect the plaintiff's right to a judgment, if his evidence shows a right of recovery.

But in this case the Justice complied literally with the statute. After stating names of the parties, he says: "Note filed for $226.40;" thus referring to the note on file, for a more particular statement of the cause of action. He did state the "amount and nature of the debt" sued for, and this was all he was required to do. The note filed stands in the nature of a declaration—the docket shows the amount claimed to be due thereon, and refers to the note for particularity.

The second objection is to the authority of Henry Nolte, the Secretary of the payees of the note, to assign the same.

This could properly be raised only upon an affidavit, denying the assignment; but the authority is clearly proven in this case, by Nolte, himself. (See his testimony).

Third objection is upon the consideration of the note.

Even if the charter was wholly silent as to the power of the corporation to give credit for premiums, and take notes in payment, we should feel bound to decide that such power necessarily resulted from its power to make insurances, and to enable it advantageously to conduct its business.

McIntyre, vs. Preston, 5 Gilman, 60, and authorities cited.

1 Phillips on Insurance, 205.

N. Y. Firemans' Insurance Co., vs. Ely, 2 Cow. 678.

The note in this case, is not given for money loaned, but as evidence of the contract by Frye, to pay his subscription to the Railroad Company. The corporation had a right to receive subscriptions, extend time for the pamyent of same, and necessarily to take notes as evidence thereof. This company, as was proved on the trial, was in the custom of receiving notes for subscription, and of assigning those notes for the purpose of raising money. This was essential to the successful carrying on of the corporation. The corporation having the power to take notes, would necessarily have the power to negotiate such notes in the ordinary transaction of business, and the authority to transfer the notes, will be inferred, till the contrary be shown.

McIntyre, vs. Preston, 5, Gillman, 62.

Frye had subscribed to the capital stock of the Peoria and Oquawka Raiload Company, and failing to pay his subscription, was sued. To settle this suit he gave this note, and others to the full amount of his subscription, at which time, it was proposed to receive half of the amount of his subscription, provided he would relinquish his claim to the stock. He preferred to pay the whole subscription, and get his stock. It matters not whether the stock was worth one dollar,

or a hundred dollars, at the time he gave his notes—he had agreed to take the stock, for the purpose of building the road—and was legally and morally bound to pay it, whatever may then have been the market value of the stock. It seems that he had confidence in its ultimate value, as he refused to relinquish his claim to the stock for one half of the amount.

The compromise of a pending suit is a good consideration for a promissory note. Sigsworth, vs. Coulter, 18 Illinois, 204.

The insolvency of a Railroad Company, is no ground for restraining the collection of subscriptions for stock. Dill, vs. Wabash Valley Railroad Company, 21 Illinois, 91.

This is all of this case.

MANNING & MERRIMAN,
Attorneys for Appellees.

Dec 97 — 2

Tucker & Mansfield

Deft's Brief

Filed April 25: 1860

L. Leland

Clerk

State of Illinois } In the Supreme Court
Ottawa Term A.D. 1860

Smith Frye
v.
Tucker & Mansfield } Appeal from Peoria

No. 97.

Reply of Charles C. Bonney to the points made in the printed brief filed by Manning & Merriman for the appellees.

---

1. The case of Swigley v. Davies 22 Ill. R. 216, does not touch the question in the case at bar. The point presented in this case, neither did, nor was, nor could have been considered in that.

The record made by the justice must like other records, be tried by itself. And as his judgments, when not appealed from, as effectually conclude the parties as the judgments of the highest courts of general jurisdiction, common justice,

sound reason, and the adjudged cases alike require that the subject matter of the suit should be described upon the docket with such certainty and distinct= =ness, that no doubt as to the identity of the cause of action can arise, though all the papers in the case, be lost or destroyed. "Lying loose around" an office to which "all the world" has a "promiscuous access", — shifted from time to time into new and inexperienced hands, it can hardly be expected that the papers in suits before justices of the peace, should remain for any considerable time without injury. As a matter of fact, it is well known that in a large majority of cases, it would be reasonably safe, after a lapse of six months, to make an affidavit that such papers were "lost or mislaid", without taking the trouble to make any particular search!

Unless certainty in the docket,

be imperatively required, the causes of action determined by justices of the peace, will rest only in a kind of migratory tradition, as little limited by the certainty of reason, or the reason of certainty, as the legends of Peter Wilkins, or Sinbad the Tailor!

2 The printed brief for appellants shows that no affidavit was required to question Nolte's authority — the power exercised is not within the scope of his ordinary business, so the presumption is against it and his authority must be shown.
Nolte himself shows that he had no authority to assign the note in question — that he acted without authority and that his act was never ratified, and so could not bind the company.

3 The question is, not at all whether the Railroad Company has authority to receive notes for subscriptions, but whether it shall be allowed to become a mere note-broker — whether it shall be allowed to engage in the vast and unauthorized business of negotiating commercial paper, instead of being compelled to attend exclusively to the business specified in their charter.

4 Again the question is, not whether the compromise of a suit, is a good consideration for a promissory note, but whether Tucker & Mansfield shall be allowed to enforce the payment of a promissory note, which they took with information that it was given for a worthless consideration.

5. A subscriber for stock in a Railroad Company, is entitled to have his obligation to make payment therefor, held by the Company without the power of alienation, subject to all the defences, both legal and equitable, which he may have at the time of the subscription, or which may arise thereafter before payment made. In this way alone can the subscriber be protected, and the corporation be kept within the line of its duty.

97 – 2

Frey

v

Tucker & Mansfield

Reply of Charles C. Bonney to points made by Manning & Merriman for appellees –

Filed May 2. 1860
L. Leland
Clk

Pleas before the Circuit Court within and for the County of Peoria in the State of Illinois at a term thereof begun and held at the Court house in the City & County of Peoria on the third Monday of November A.D. 1859. Honorable Elihu N. Powell Judge of the sixteenth judicial Circuit presiding &c John Bryner Sheriff & Enoch P. Sloan Clerk &c viz:

State of Illinois
Peoria County } ss Be it Remembered that heretofore to wit on the 2nd day of May A.D. 1859 there was filed in the office of the Clerk of the Circuit Court of Peoria County a Transcript of a judgment from Bernard Baily one of the Justices of the peace of Peoria County, which with the papers therewith filed is in the words and figures following to wit:

Nathan Tucker
Henry Mansfield
vs
Smith Foye

In Assumpsit. Note filed for $226.40

Summons issued on the 12th day of April A.D. 1859 returnable on the 19th at 10 o'clock A.M. and

2

Damages $226.40
Justices Costs
Issuing Summ. .19
Docketing suit .12
ent. judgt. .25
taking bond .25
Transcript .25
certificate .25
D. A. Wheelers costs
Serv. writ Summs &c .35

returned by D. A. Wheeler Const: served by reading to the defendant on the 13th on the return day the defendant made default. It is therefore ordered and adjudged that the plaintiffs recover two hundred and twenty six dollars fourty cents damages and the costs of suit

State of Illinois }
Peoria County } ss I Bernard Baily a Justice of the peace within and for said County do hereby certify that the above is a true and correct transcript of the docket kept by me in the above entitled cause. Given under my hand and seal this 2nd day of May A.D. 1859

Bernard Baily J. P. Seal

(note)

$225. Peoria March 11th 1858

Twelve months after date I promise to pay to the order of Peoria & Oquaka Rail Road Company Two hundred and twenty five dollars at ~~Peoria with 6 per cent interest~~ value received

No ~~one~~ due Smith Frye

(Endorsed)

Pay to the order of Tucker & Mansfield.
The Peoria & Oquawka Rail Road Company
By Henry Nolte Secy.

(Summons)

State of Illinois }
Peoria County } ss The people of the State of Illinois to any constable of said County Greeting. You are hereby commanded to summon Smith Frye to appear before me

at my office in Peoria on the nineteenth day of April inst. at 10 o'clock A.M. to answer the complaint of Nathan Tucker and Henry Mansfield for a failure to pay them a certain demand not exceeding $300; and hereof make due return as the law directs. Given under my hand and seal this twelfth day of April 1859

Bernard Baily, Justice of the Peace

(Endorsed)

Served on Smith Frye by reading to him this writ this 13th day of April A.D. 1859

D. A. Wheeler, Const.

(Appeal Bond)

Know all men by these presents that we Smith Frye & John T. Lindsay are held and firmly bound unto Tucker & Mansfield in the penal sum of Four hundred & fifty five 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 and severally and firmly by these presents. Witness our hands and seals this 29th day of April A.D. 1859. The condition of the above obligation is such that whereas the said Tucker & Mansfield did on the 19th day of April 1859 before Bernard Baily a Justice of the peace for the County of Peoria recover a judgment against the above bounden Smith Frye for the sum of two hundred and twenty six 40/100 dollars for which judgment the said Smith Frye has taken an appeal to the Circuit Court of the County of Peoria aforesaid and State of Illinois. Now if the said Smith Frye shall prosecute his appeal with

89

4

effect and shall pay whatever judgment may be rendered by the Court upon dismissal or trial of said appeal then the above obligation to be void, otherwise to remain in full force and effect.

Smith Frye (Seal)

John T. Lindsay (Seal)

Approved before me at my office this 29th day of April 1859

Bernard Baily J. P.

And afterwards to wit on the 3rd day of May AD. 1859 there was issued out of the Clerks office of said Court under the seal thereof a Summons in the above case directed to the Sheriff of Peoria County which is in the words and figures following to wit:

Summons

The People of the State of Illinois to the Sheriff of Peoria County Greeting. We command you to Summon Nathaniel L. Tucker, Henry Mansfield if they may be found in your County to appear before our Circuit Court on the first day of the Special term thereof to be held at Peoria, within and for the said County of Peoria and the 2d Monday of June next then and there in our said Court to prosecute their suit against Smith Frye lately appealed to our Circuit Court from the judgment of Bernard Baily a Justice of the peace by said Frye and make return of this writ with an indorsement of the time and 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 and the seal thereof at Peoria this 3d day of May in the year of our Lord One thousand eight hundred and fifty nine (Seal)

E. P. Sloan, Clerk

Which Summons was afterwards returned by the said Sheriff endorsed as follows to wit:

Return

State of Illinois
Peoria County } I have duly served this writ by reading to Nathaniel Tucker & Henry Mansfield this 11th day of May 1859

John Bryner. Shff
per. T. M. Easley Dpt.

Proceedings at a term of the Circuit Court of Peoria County begun 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 Elihu N. Powell Judge of the 16th judicial Circuit in said State John Bryner Sheriff and Enoch P. Sloan Clerk to wit:

Monday December 19th AD. 1859

Nathaniel Tucker
Henry Mansfield
vs
Smith Frye

Appeal from J. P.

This day come the plaintiffs by Manning his attorney and the defendant by Bonney his attorney and it is ordered by the Court that a jury be empannelled to try the issues in this cause whereupon came a jury of twelve good and lawful men to wit: Fred. Ruppelius M. M. Banard, P. M. Doyle, Jas. Doty, J. M. Sheffield

Geo. W. McMillen, J. G. Maxwell, Hiram Baker, G. B. Parker
John B. Warner, James Elson and Wm L. Moss, who being
duly chozen tried and sworn to well and truly try the issues
joined in this cause and a true verdict give according to the
evidence do say "We the jury find the issues for the plaintiffs
and assess their damages at the sum of two hundred and
thirty five dollars and fifty cents" Whereupon the defendant
by his attorney entered his motion for a new trial.

Friday December 23rd 1859

Nathaniel S. Tucker & al

vs

Smith Frye

Appeal from J. P.

This day come the parties to this cause
by their attorneys and this cause comes on to be heard on
the motion of defendant for a new trial and the Court
being fully advised in the premises do overrule said motion.
Therefore it is considered by the Court that the said
Nathaniel S. Tucker and Henry Mansfield have and recover
of the said Smith Frye the said sum of two hundred and
thirty five dollars and fifty cents their damages aforesaid
and also their costs and charges by them about their suit in this
behalf expended and that they have execution therefor.
Thereupon the defendant by his attorney prayed an appeal
to the Supreme Court of this State which is allowed on his
filing in the office of the Clerk of this Court in thirty days
an appeal bond payable to the plaintiffs in the penal
sum of five hundred dollars with Peter Sweat as security

conditioned as the law directs.

And afterwards to wit on the 23rd day of December A.D. 1859 there was filed in the Clerks office of said Court a Bill of exceptions in the said cause which is in the words and figures following to wit:

Bill of Exceptions

State of Illinois
County of Peoria } ss In the Circuit Court
Of the November Term A.D. 1859

Nathan Tucker &
Henry Mansfield
vs
Smith Frye

Appeal from J.P.

Bill of Exceptions

Be it remembered that on the trial of this cause the plaintiffs offered in evidence a promissory note and an indorsement written on the back thereof in the words and figures following to wit:

" $ 225 Peoria March 11" 1858

Twelve months after date I promise to pay to the order of Peoria & Oquaka Rail Road Company Two hundred twenty five dollars. at ~~Peoria with 6 per cent interest~~ value received

No ___ Due ___ Smith Frye"

(Endorsed)

"Pay to the order of Tucker & Mansfield.
The Peoria & Oquawka Rail Road Company
By Henry Nolte, Secy."

7

To which note and indorsements the defendant then and there made the following objections to wit:

1. The transcript from the docket of the Justice of the peace shows that the action was brought on a different cause of action - This is a note for $225 - but the note described in the transcript is for $226.40/100. This note is payable to the Peoria & Oquawka Rail Road Company, but the note described in the transcript is payable to the plaintiffs.

2. The ~~transcript~~ of authority of Henry Nolle to indorse this note is not shown and it doth not appear to have been indorsed in the course of the business of the Corporation.

But the Court overruled said objections and the plaintiffs read said note and indorsement to the jury whereto the said defendant then and there excepted.

The plaintiffs here rested their case.

The defendant then called Isaac Underhill who being sworn testified as follows - I was collecting agent for the Peoria & Oquawka Rail Road Company in Oct. 1858. I found suit pending against Smith Frye for the amount of his subscription to the Rail Road Company. This note was taken to settle that suit. That the defendant paid a part of his said subscription and gave this note to secure the balance, that it was agreed between the defendant and the witness that the Rail Road Company should dismiss the suit for the subscription and pay the costs of that suit, both of which had been done by the Company, that this was the consideration of the note. The Rail Road Company indorsed it to me, and I indorsed it

to the plaintiffs – I told them that the note was given for a subscription for stock in the Peoria and Oquawka Rail Road Company. The stock has never been delived to the defendant but is ready to be delivered to him when he pays the note. Here the defendant objected that the plaintiffs could not recover without showing an offer to deliver the stock on payment of the money, before the commencement of this suit &c. The stock was then worth from five cents to twenty cents on the dollar.

Henry Nolle being sworn testified as follows to wit: I am and was Secretary of the Rail Road Company, and had authority to indorse its notes. Can't say that I had any particular authority to indorse this note, nor that the Company ever ratified this particular indorsement.

George F. Harding being sworn testified as follows to wit: In October 1858 the stock of the Peoria and Oquawka Rail Road Company was not in the market. I know of no sales thereof at or about that time. I had some in 1857 and sold it for two cents on the dollar. I think the stock was not worth anything in October 1858. Nothing could be realized from it.

Isaac Underhill being recalled testified as follows to wit: I gave Frye no assurances that the road would go on when he gave the note. I offered to relinquish One half of the amount if he would give up his claim to the stock, but he refused to do so.

This was all the evidence.

9

10

The Court gave the following instructions for the plaintiffs whereto the defendant then and there excepted to wit:

If the Jury believe from the evidence that the defendant was a subscriber to the capital stock of the Peoria & Oquawka Rail Road Company, that he was sued upon such subscription that the note was given by said defendant in part payment of such subscription and upon the agreement that the said suit should be dismissed & that said suit was dismissed upon such agreement, that is a good consideration for the execution of said note.

Given

If the Jury believe from the evidence that the note in suit was given by defendant to the Peoria & Oquawka Rail Road Company for his subscription to the capital stock of said Company, then the mere fact that the stock of said Rail Road company was worth nothing in market constitutes no defence to said note.

Given

The defendant prayed the following instruction which was refused by the Court, whereto the defendant then and there excepted to wit:

"If the Jury believe from the evidence that the plaintiffs were informed what was the consideration of the note in suit and that such consideration was of no value whatever, the jury will find for the defendant."

Refused

The Jury returned the following verdict to wit:

"Tucker & Mansfield

vs

Smith Frye We the Jury find the issues for the

plaintiffs and assess the damages at two hundred and thirty five dollars and fifty cents

John B. Waner Foreman

Whereupon the defendant entered and filed his motion and reasons for a new trial to wit;

"State of Illinois } In the Circuit Court
County of Peoria } ss Of the November term AD. 1859

Tucker & Mansfield
vs
Smith Frye } No. 185

The defendant moves the Court for a new trial of this cause for the following among other reasons that is to say

1 The Court improperly instructed the Jury
2. The Court refused proper instructions prayed by defendant
3 The verdict is against the weight of the evidence.
4. The verdict is against the law of the land.

John T. Lindsay & Charles C. Bonney
Attys for dft.

But the Court overruled said motion and gave judgement on said verdict for the plaintiffs, whereto the said defendant then and there excepted and prayed the Court to sign and seal this bill of exceptions which is accordingly done

E. N. Powell Seal

And afterwards to wit on the 7th day of January AD. 1860, the defendant filed in the Clerks office of said Court his appeal Bond in the above cause which is

11

12

in the words and figures following to wit:

"State of Illinois
County of Peoria } ss In the Circuit Court

Nathan Tucker
Henry Mansfield
vs
Smith Frye } Appeal Bond

Know all men by these presents that we Smith Frye as principal and Peter Sweat as surety are held and firmly bound unto Nathan Tucker and Henry Mansfield in the penal sum of five hundred dollars for the payment whereof well and truly to be made we do bind ourselves our heirs, executors and administrators jointly and severally firmly by these presents. Witness our hands and seals at Peoria this thirty first day of December A.D. 1859.

The condition of the foregoing obligation is such, that whereas the said Nathan Tucker and Henry Mansfield, did at the November term A.D. 1859 of the Circuit Court within and for the County of Peoria, in the State of Illinois recover a judgment by the consideration of said Court against the said Smith Frye for the sum of two hundred and thirty five dollars and fifty cents, together with costs of suit, from which said judgment the said Smith Frye has taken an appeal to the Supreme Court of said State of Illinois. Now provided the said Smith Frye shall duly prosecute his said appeal and shall well and truly pay said judgment and costs and all interest and damages in case said judgment shall be affirmed by said Supreme Court then this obligation

shall be void otherwise to remain in full force and virtue

Smith Frye (Seal)
Peter Sweal (Seal)

Witness, Charles C. Bonney.

State of Illinois
Peoria County } ss I, Enoch P. Sloan, Clerk of the Circuit Court of the County of Peoria in the State of Illinois do hereby certify that the foregoing is a full and correct Transcript of the papers filed and of the proceedings of the said Court had in a certain cause wherein Nathaniel Tucker and Henry Mansfield are plaintiffs and Smith Frye is defendant, as the same remain on file and of record in my office.

Given under my hand and the seal of said Circuit Court at my office in Peoria this second day of February in the year One thousand eight hundred and sixty

Enoch P. Sloan, clerk

State of Illinois } In the Supreme Court at
Ottawa Of the April Term
A.D. 1860—

And thereupon comes the said Smith Frye by Charles C. Bonney his attorney and says that in the record and proceed-

=ngs aforesaid, and also in the rendition of the judgment aforesaid, there is manifest error in this towit;

1. The promissory note read in evidence against the objection of the said Smith Frye upon the trial in the court below, and upon which the verdict and judgment below are founded is manifestly and fatally variant from the promissory note described in the record sent up from the justice of the peace.

2. The plaintiffs in the said Circuit Court, did not establish upon the trial therein, any sufficient assignment to them of the promissory note read in evidence, by the payee thereof.

3. It manifestly appears by the evidence that the said promissory note was made and given without any sufficient consideration, and that the plaintiffs below had notice thereof, when they re=ceived the same.

4. The said Circuit Court refused to instruct the jur=y that if the plaintiffs below knew when they received the note read in evidence, that it was given for a worthless consideration, the verdict should be for the defendant below.

5. Said record, proceedings and judgment are otherwise manifestly contrary to the law of the land, and against the rights of the appellant.

Wherefor the said Smith Frye prays that the judgment aforesaid, for the errors aforesaid, may be reversed annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of said judgment &c.

Charles L. Bonney
attorney for appellants

"

Whereupon come the said Nathan Tucker and Henry Mansfield by Manning & Merriam their attorneys and say that in the record and proceedings aforesaid and in the rendition of the judgment afore=
=said, there is no error: wherefor the said Tucker & Mansfield pray that the said Supreme Court may proceed and examine, as well the record and proceed=ings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given may be in all things affirmed &c.

Manning & Merriam
attorneys for appellees

"

15

77

In the Supreme Court

—

Smith Pope

v.

Tucker & Mansfield

—

Appeal from Peoria—

—

Record—Errors—& Joinder—

—

Filed March 2d 1860
L. Leland
Clerk

—

Charles C. Bonney
For Plaintiff