

No. 13606

# Supreme Court of Illinois

Fitch

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vs.

Honnewell et al

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71641  7

STATE OF ILLINOIS,  
SUPREME COURT,  
Third Grand Division.

No. 230

*Fitch*  
*Hornwell*  
*Hill*  
*1802*  
*13606*  
*NY*

October Term of the Whiteside County Circuit Court A.D. 1860

At a regular term of the circuit court in and for the County of Whiteside and State of Illinois begun and holden at the Court House in the town of Morris in said County and State on the second Monday of October in the year of our Lord one thousand eight hundred and sixty (A.D. 1860) it being the eighth day of said month and the Judge not arriving on this day the Court convened and organized on Tuesday morning October ninth A.D. 1860

Present Hon John Pleasance Judge of the twenty second judicial circuit in the State of Illinois

Present Robert L Wilson Clerk of the circuit Court in and for the County of Whiteside and State of Illinois

Present John Dippell Sheriff of Whiteside County and State of Illinois

Present Robert C Burchell States attorney for the twenty second judicial circuit in the State of Illinois

Be it remembered that heretofore to wit on the twenty second day of September in the year of our Lord one thousand eight hundred and sixty. there was filed in the office of the Clerk of the circuit Court of said Whiteside County a certain precept clothed in the words and figures following to wit

State of Illinois }

Whiteside County } Circuit Court of Whiteside County of the oct-  
-ober term A.D. 1860

Daniel H Hummel George A Hill }  
and Joseph S Hill partners in Trade }

under the name and style of  
Hummell Hill & Co

vs  
George W Fitch

R L Wilson clerk

Damages 500\$

You will please file  
this preceper and issue summons in the above entitled cause  
against the above named defendant in a plea of trespass on  
the case or promises, damages five hundred dollars  
Returnable as above

E N Kirk pliffs atty

And afterwards to wit; on the same day and year last aforesaid  
there was issued out of the office of the Clerk of said Court and,  
under the seal thereof the peoples writ of summons, directed to  
the sheriff of said Whiteside County to execute. Clothed in the  
words and figures following to wit:

State of Illinois }  
Whiteside County }

The people of the State of Illinois to the  
Sheriff of said County Greeting,

We Command you to summon George W Fitch if he shall  
be found in your County <sup>personally</sup> to be and appear before the Circuit  
Court of said Whiteside County on the first day of the next term  
thereof to be holden at the Court House in Morrison in said  
Whiteside County on the second Monday of October 1860 to  
answer unto Daniel A Hummell George H Hill and  
Joseph H Hill partners in trade under the name and  
style of Hummell Hill & Co in a plea of trespass on  
the case or promises, to the damage of said plaintiffs

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As they say in the sum of five hundred dollars  
And you have then and there this writ with an indorsement thereon in what manner you shall have executed the same

Seal

Witness R L Wilson clerk of our said court and the  
Seal thereof at Madison aforesaid this 22<sup>th</sup> day of  
September A.D. 1860

R L Wilson Clerk

per F Clendenen depty

And afterwards to wit on the eighth day of October in the  
year last aforesaid said writ of summons was returned into  
said court by said Sheriff endorsed as follows to wit

State of Illinois }  
Whiteside County }

I have duly served the within by reading  
the same to the within named George W  
Fitch in his presence and hearing this 27<sup>th</sup> day of Sept-  
1860 as I am therein commanded

John Dippell Sheriff

By G E Fitch depty

Service, 50 mileage 40 return 10 = 100

Be it remembered that heretofore to wit on the twenty eighth  
day of September in the year last aforesaid said plaintiffs  
filed in the Court aforesaid their certain declaration in  
said cause in the words and figures following to wit;

Circuit Court of Whiteside County, of the October Term  
A.D. 1860. State of Illinois }

Whiteside County }

Daniel A Hummel

George A Hill & Joseph S Hill partners in trade

under the name and style of Hummel Hill & Co plaintiffs  
 in this suit by Edward D Kirk Attorney Complain of George  
 W Fitch Defendant who was summoned &c. in a plea of  
 trespass on the case on promises: For that whereas the said  
 defendant hitherto to wit; on the twenty seventh day of Aug-  
 ust in the year of our Lord one thousand eight hundred and  
 fifty seven. At Lyndon to wit; at Lyndon in said County of  
 Whiteside made his certain promissory note, in writing bearing  
 date the day and year aforesaid and then and there delivered  
 the same to the Sterling and Rock Island Rail Road Company  
 in and by which said note said defendant by name style  
 and description of Geo W Fitch promised to pay to the order  
 of said Sterling and Rock Island Rail Road Company  
 at the expiration of five years next from and after the  
 first day of September A.D. 1857 one thousand dollars to-  
 gether with interest thereon at the rate of ten per cent per ann-  
 um payable semi annually each year, on the first day of  
 March and the first day of September. Both principal and  
 interest payable at the office of said Company at Sterling  
 in said County for value received. And the said Sterling  
 & Rock Island Rail Road Company to whom or to whose or-  
 der said note was payable then and there indorsed and  
 under their hand assigned the said note to Reynolds Wilder  
 & Co. and then and there delivered the same so indorsed  
 to Reynolds Wilder & Co. And the said Reynolds Wilder  
 & Co to whom or to whose order the said note was so indorsed  
 & delivered then and there indorsed and under their hands  
 assigned the said note to the said plaintiffs and then

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and there delivered the same so enclosed to the said  
plaintiffs. by means whereof and by force of the statute  
in such case made and provided said defendant became  
liable to pay to the said plaintiffs said sum of money and  
said several installments of interest mentioned in said note  
and being so liable in consideration thereof he the said def-  
endant then and there undertook and promised to pay the  
same to the said plaintiffs according to the tenor and effect-  
true intent and meaning of the said note. & of the indentments  
aforesaid. to wit at the place aforesaid. And the said  
plaintiff in fact saith that afterwards to wit on the first  
day of September A.D. 1860. a large sum of money to wit the  
sum of three hundred dollars. for divers to wit: six of the  
Semi-Annual installments of interest so payable by the terms &  
tenor of the said promissory note. then last elapsed. became and  
were due and payable from the said defendant to the said  
Plaintiffs upon and by virtue of said promissory note. which  
said last mentioned sum of three hundred dollars. he the  
said defendant then and there became liable to pay and  
ought to have paid to the said plaintiffs. according to the  
tenor and effect of the said promissory note. and of his said  
promise and understanding. to wit at the office of the said  
Sterling and Rock Island rail road company at Sterling  
in said County. And for that whereas also the said  
defendant. heretofore to wit on the twenty seventh day of  
August A.D. 1857. to wit at Lynden in said County. made  
his certain other promissory note in writing bearing date  
by mistake August twenty seventh 1857 but meant and  
intended by the parties thereto to be dated on the said

twenty seventh day of August A.D. 1857. And then and there delivered the same to the Sterling and Rock Island rail road Company in and by which said note the said defendant by the name style and description of Geo W Fitch promised to pay to the order of the <sup>said</sup> Sterling and Rock Island Rail Road Company the sum of one thousand dollars at the expiration of five years next from and after the first day of September A.D. 1857 together with interest thereon at the rate of ten per cent per annum payable semiannually in each year on the first day of March and the first day of September, said principal and interest to be respectively payable at the office of said Company at Sterling in said County for value received. And the said Sterling and Rock Island Rail Road Company to whom or to whose order said note was payable then and there indorsed and under their hand assigned the said note to Reynolds Wilder & co. & then and there delivered the same so indorsed to the said Reynolds Wilder & co. And the said Reynolds Wilder & co to whom or to whose order the said last mentioned note was so indorsed & assigned then & there indorsed and under their hands assigned the said last mentioned note to the said plaintiffs. & then and there delivered the same so indorsed to the said plaintiffs By means whereof and by force of the Statute in such case made and provided. The said defendant became liable to pay the said plaintiffs the said principal sum of money mentioned in said note, and the several installments of interest thereon, at the times when the same should severally become due & payable according to the tenor and effect of said last mentioned

note. And the said plaintiffs in fact saith that there do become due and payable to the said plaintiffs the following several semiannual installments of interest, at the rate of ten percent per annum, upon and according to the tenor and effect of said last mentioned promissory note and the indorsements thereon as aforesaid. That is to say fifty dollars to wit; on the first day of March A.D. 1858 and further fifty dollars on the first day of September A.D. 1858. And further fifty dollars on the first day of March A.D. 1859, and further fifty dollars on the first day of September A.D. 1859. And further fifty dollars on the first day of March A.D. 1860 and further fifty dollars on the first day of September A.D. 1860 amounting in all to a large sum of money. To wit the sum of three hundred dollars. and the same being wholly in arrears, and unpaid, and the said defendant being so liable as aforesaid, undertook and then and there faithfully promised to pay the same to the said plaintiffs, according to the tenor and effect, true intent and meaning of said last mentioned note, and of the indorsements as aforesaid. to wit at the place aforesaid.

And for that whereas also the said defendant heretofore to wit: on the tenth day of September A.D. 1860 was indebted <sup>to the</sup> said plaintiffs in a large sum of money to wit the sum of five hundred dollars, for the loan and for bearence of another large sum of money to wit the sum of one thousand dollars. then and for a long space of time to wit for the space of five years, owing from the said defendant to the said plaintiffs. And the said interest money being due, and the amount thereof in arrear, the said defendant afterwards to wit on the 10<sup>th</sup> day of September A.D. 1860 to wit at the County of Whiteside

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aforesaid in consideration of the premises undertook & faithfully promised the said plaintiffs to pay to the said plaintiffs the amount of said interest. when he the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant, afterward to wit on the tenth day of September in the year of our Lord one thousand eight hundred and sixty to wit at Sterling in said County became and is indebted unto the plaintiffs in a large sum of money to wit the sum of five hundred dollars, for money before that time lent and advanced to, and paid laid out and expended for said defendant by said plaintiff at said defendants request; and for money before that time had and received by said defendant to and for the use of said plaintiff and also in like sum for goods wares and merchandise, before that time sold and delivered by said plaintiffs to said defendant at like special instance and request; and also in like sum for the labor care and diligence of said plaintiffs before that time done and performed by said plaintiffs for said defendant, and at the like instance and request of said defendant, and also in like sum then and <sup>now</sup> found due and owing said plaintiffs on an account stated between them, and being so indebted said defendant in consideration thereof then and there undertook and promised to pay said plaintiffs said last mentioned sum of money when thereunto afterwards requested. Yet the said defendant, not regarding his said promises and undertakings but contriving etc, although often requested to do so has not paid said plaintiffs either of said sums of money above mentioned or any part thereof but so to do has hitherto wholly neglected and refused and still does neglect

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and refuse to the damage of said plaintiff of five hundred dollars. and thereof they bring this suit etc.

Ed Kirk plff atty

Copy of instrument and account sued upon

\$1000, Lyden August 27<sup>th</sup> 1855

For value received I George W Fitch promise to pay to the Sterling and Rock Island Rail Road Co or order the sum of one thousand dollars at the expiration of five years from the first day of September A.D. 1857 with interest thereon at the rate of ten percent per annum payable semi-annually in each year on the first day of March and September. Principal and interest payable at the office of said Company, at Sterling in the County of Whiteside and State of Illinois

Geo W Fitch

George W Fitch

To Hummel Hill & Co Dr

To money lent and advanced	\$ 500
To money expended and paid out for	\$ 500
To money received for use of	\$ 500
To goods wares & merchandise	\$ 500
To labor and services	\$ 500
To balance on account stated	\$ 500

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And afterwards to wit on the sixteenth day of October in the year of our Lord one thousand eight hundred and sixty it being one of the judicial days of the said October Term of said Court the following among other proceedings were had and entered of record to wit:

Daniel H Hummell George H Hill &  
Joseph H Hill partners in trade under the  
name & style of Hummell Hill & Co

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<sup>v.s</sup>  
George W Fitch

Shewers on the case  
for promises

This day came the said plaintiff by Kimball and the said defendant by Strawn and were his attorneys who enter their motion herein for a rule on said plaintiffs to file additional security for cost in this cause which said motion is sustained by the Court and the said plaintiffs are ruled to file additional security herein or show cause by tomorrow morning

And afterwards to wit: on the twenty fourth day of October in the year last aforesaid and yet of said Term of said Court the following among other proceedings were had and entered of record to wit:

Daniel H Hummell George H Hill &  
Joseph H Hill partners in trade under the  
name & style of Hummell Hill & Co

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<sup>v.s</sup>  
George W Fitch

Shewers on the  
case on promises

This day came said

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plaintiff by Kirk their attorney and the said defendant by Strawser & Ware his attorneys and on motion of said plaintiff the said defendant is ruled to plead herein by December 20<sup>th</sup> 1860.

And afterwards to wit on the nineteenth day of December in the year of our Lord one thousand eight hundred and sixty the said defendant filed in the Clerk's office of said Court his certain pleas in the words and figures following to wit:

The State of Illinois  
Whiteside County

Daniel H Hummell George W Hill  
and Joseph Hill partners in trade under  
the name & style of Hummell Hill & Co

In the Circuit  
Court of Whiteside  
County

vs  
George W Fitch

And the said George W Fitch

comes and defends &c and says that he did not assume and promise in manner and form as the said plaintiffs hath declared against him and of this he puts himself upon the Country

Let the  
Court do the like  
at Kirk's petff. atty

Strawser & Ware defts attys

And for a further plea in this behalf by leave of Court first had and obtained for that purpose the said defendant says that the said plaintiffs ought not to have or maintain his action aforesaid against him because he says that heretofore to wit on

the Herling and Rock Island Railroad Company

EA

By its officers and Agents requested this defendant to subscribe for and take ten shares of the Capital Stock of said Sterling and Rock Island Rail Road Company each share being one hundred dollars. The ten shares amounting in all to the sum of one thousand dollars and this defendant says that upon the solicitation of the said Sterling and Rock Island Rail Road Company by its officers and agents he did heretofore to wit on the                      day of                      upon the Stock Books of subscription of said Sterling and Rock Island Rail Road Company subscribe for and did agree to, and did take ten shares of the Capital Stock of said Company, and did then and there agree to pay to the said Sterling and Rock Island Rail Road Company for said ten shares of the Capital Stock of the said Sterling and Rock Island Railroad Company the said sum of one thousand dollars to be paid in such manner and proportions and at such times as the Board of Directors of said Sterling and Rock Island Rail Road Company might from time to time direct. And this defendant says that after he had subscribed for the ten shares of the Capital Stock of the said Sterling and Rock Island Rail Road Company upon the Stock Subscription Book of said Sterling and Rock Island Rail Road Company as aforesaid the said Sterling and Rock Island Rail Road Company by its officers and Agents requested this defendant to make execute and deliver to the said Sterling and Rock Island Rail Road Company his, this defendant's, promissory notes payable at the expiration of five years from the first day of September A.D. 1857 for

The said sum of one thousand dollars with interest there  
 on at the rate of ten percent per annum or ten cents on  
 each and every dollar in said note mentioned for each  
 and every year that said note is to run before it becomes  
 due. or one hundred dollars for each & every year that  
 said note is to run before it becomes due upon the said  
 one thousand dollars in said note mentioned, which  
 said interest money mentioned in said note is to be  
 paid semi-annually in each year to wit on the first  
 day of march and the first day of september in each year  
 and thereupon and in pursuance of the request of the said  
 Sterling and Rock Island Railroad Company the said  
 George W Fitch did to wit; on the twenty seventh day of August  
 in the year of our Lord one thousand eight hundred and fifty  
 seven to wit; at Lynum in said County of Whiteside make  
 execute and deliver to the said Sterling and Rock Island  
 Railroad Company his the said George W Fitch's promissory  
 note calling for the sum of one thousand dollars to be paid  
 at the expiration of five years from the first day of Septem-  
 ber in the year of our Lord one thousand eight hundred  
 and fifty seven with interest at the rate of ten percent  
 per annum. or ten cents on each and every dollar men-  
 tioned in said note for each and every year that said  
 note is to run before it becomes due or one hundred dollars  
 on the one thousand dollars mentioned in said note for  
 each and every year that the said note is to run before  
 it becomes due. and which interest in said note is to  
 be paid semi-annually to wit on the first day of Ma-  
 rch and the first day of september in each year

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And which is the same note mentioned in the Plaintiffs declaration, and the defendant further avers that the said Sterling and Rock Island Rail Road Company did on the 27<sup>th</sup> day of August in the year of our Lord one Eighteen hundred and fifty seven ~~to~~ at the said County of Whiteside demand and receive said promissory note of and from the defendant in consideration of and for the said ten shares of stock of the said Sterling and Rock Island Rail Road Company which the defendant had subscribed for as aforesaid and which said ten shares of stock of the said Sterling and Rock Island Rail Road Company was the sole and only consideration for said note, and that there was no other or different consideration for said note, and the defendant avers that the receiving of said note by the said Sterling and Rock Island Rail Road Company in manner and form aforesaid was and is in violation of the laws of the land and of the articles of the said Sterling and Rock Island Company's Corporation, and that the said indorsing and transferring of said note in the manner mentioned in the plaintiffs said declaration is not authorized by the laws of the land, and was and is in violation of the articles of the said Sterling and Rock Island Rail Road Company's Corporation, and that the said note and the transfers and indorsements thereon is and are fraudulent and void in law all of which the plaintiffs well knew at the time the said plaintiffs received said note and this the defendant is ready to verify. Wherefore he prays judgement if the plain



Sterling and Rock Island Rail Road Company as  
 aforesaid the said Sterling and Rock Island Rail Road  
 Company by its officers and agents requested this defend-  
 ant to make and deliver to the said Sterling and Rock  
 Island Rail Road Company his this defendants promiss-  
 ory note payable at the expiration of five years from the  
 first day of September in the year of our Lord one thous-  
 and eight hundred and fifty seven for said one thous-  
 and dollars with interest at the rate of ten per cent  
 per annum that is to say that the said defendant should  
 pay as interest on said note ten cents upon each and every  
 dollar of the said one thousand dollars for each and ev-  
 ery year for the said five years that said note is to run  
 before it becomes due to wit: from September first A.D.  
 1857. And thereupon this defendant avers that it was the  
 on and there to wit: at the said County of Whiteside unlawfully  
 usurious and corruptly agreed by and between this defend-  
 ant and the said Sterling and Rock Island Rail Road  
 Company that this defendant should make and deliver  
 his said promissory note to the said Sterling and Rock  
 Island Rail Road Company for the said one thousand  
 dollars for the said ten shares of the Capital Stock  
 of the said Sterling and Rock Island Rail Road Comp-  
 any according to the request of the said Sterling and  
 Rock Island Rail Road Company as aforesaid and  
 this defendant avers that afterwards to wit on      day  
 of      the said defendant died in pursuance of said  
 unlawful usurious and corrupt agreement aforesaid

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To wit; at said County of Whiteside make and deliver to the said Sterling and Rock Island Rail Road Company his said promissory note for one thousand dollars payable at the expiration of five years from the first day of September in the year of our Lord one thousand eight hundred and fifty seven with interest thereon at the rate of ten percent per annum which interest is to be paid semi-annually in each year to wit on the first day of March and the first day of September in each year. interest and principal to be paid at the office of said Company at Sterling in said County of Whiteside and State of Illinois. And the defendant avers that said note is the same note mentioned in the said plaintiffs declaration. And the defendant avers that the interest or profit agreed to be paid by the terms of said contract as stated in said note is more than ten percent interest on each and every dollar mentioned in said note for each and every year that said note is to run before it becomes due, and this defendant avers that the paying the interest on said note semi-annually as is required by the terms of said contract as stated in said note gives to the holder of said note two dollars and fifty cents more profit or interest on the amount said note calls for each year than to pay ten percent interest on the amount that said note calls for at the end of each year the said two dollars and fifty cents being the amount of interest that the fifty dollars would acquire or draw for the six months of each year and this defendant avers that the sole and only consideration of and for said note was the <sup>10</sup>ten shares of stock of the said Sterling

-ation

and Rock Island Rail Road Company do subscribed for and taken by this defendant as aforesaid and that there was no other or different consideration of or for said note, and the defendant avers that the demanding and receiving said note by the said Sterling and Rock Island Rail Road Company in manner and form as aforesaid was and is in violation of the laws of the land and of the articles of the said Sterling and Rock Island Rail Road Company's Corporation, and that the indorsing and transferring of said note in the manner mentioned in the plaintiffs said declaration is not authorized by the laws of the land, and was and is in violation of the articles of the said Sterling and Rock Island Rail Road Company's Corporation, and that the said note and the transfers and indorsements thereon was and is and are fraudulent and void in law all of which the plaintiffs know at the time the said plaintiffs received said note and this the defendant is ready to verify wherefore he prays judgement if the said plaintiff ought to have or maintain his action aforesaid against him

Strawder & Ware deff attes

And for a further plea in this behalf by leave of Court first had and obtained the defendant says Actio non because he says that he was induced to make execute and deliver the said supposed note mentioned in the plaintiffs declaration to the said Sterling and Rock Island Rail Road Company by means of the said Sterling and Rock Island Rail Road Company and

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its officers and agents, false and fraudulent representations and of the fraud and circumvention of the said Sterling and Rock Island Rail Road Company its officers and agents which the said Sterling and Rock Island Rail Road Company its officers and agents practiced upon the defendant in procuring the said note mentioned in the plaintiffs declaration, all of which the plaintiffs well knew at the time they received said note, and this the defendant is ready to verify. Wherefore he prays judgement if the said plaintiffs ought to have or maintain their action <sup>as aforesaid</sup> against him.

Strawder & Ware Defts Attys

And for a further plea in this behalf by leave of Court first had and obtained the defendant says actio non because he says that he never received any valued or legal consideration whatever for said note mentioned in the plaintiffs declaration, but that said note was obtained from him this defendant by the false and fraudulent representations of the said Sterling and Rock Island Rail Road Company its officers and agents all of which the plaintiffs well knew at the time they received said note and this the defendant is ready to verify. Whereupon he prays judgement if the said plaintiffs ought to have or maintain his action as aforesaid against him. And for a further plea in this behalf by leave of the Court first had and obtained the defendant says actio non because he says that the amount of Capital Stock required to construct and procure the right of way and motive power and every other

appurtenance for the completion and running the said Sterling and Rock Island Rail Road has not been subscribed for nor has it been taken to wit the sum of six hundred thousand dollars, that being the amount required as stated in the articles of association of the said Sterling and Rock Island Rail Road Company, which articles of association are now on file in the office of the secretary of state in Springfield in the State of Illinois all of which the plaintiffs well knew at the time they received said note mentioned in the plaintiffs declaration and this, this defendant is ready to verify wherefore he prays judgement if the plaintiffs ought to have and maintain his action aforesaid against him

Strawler & Ware deffs attys

And for a further plea in this behalf by leave of the court just had and obtained the defendant says actio non because he says that the said directors of the said Sterling and Rock Island Rail Road Company did not previous to the making and delivering said note mentioned in the plaintiffs declaration, nor have the said directors of the said Sterling and Rock Island Rail Road Company ever demanded of this defendant the full sum of the said capital stock to wit the ten shares that this defendant subscribed for to the said Sterling and Rock Island Rail Road Company as aforesaid all of which the plaintiffs well knew at the time they received said note and this the defendant is ready to verify wherefore the defendant pray judgement

if the said plaintiffs ought to have or maintain their  
action aforesaid against him

Strawder & Ware deff attys

And also on the twenty second day of January  
in the year of our Lord one thousand eight hundred and  
sixty one

January Term A.D. 1861

At a regular term of the circuit court in and for the County  
of Whiteside and State of Illinois. begun and holden at the  
Court House in the town of Morrison in said County and St-

ate on the third munday of January in the year of our  
Lord one thousand eight hundred and sixty one it being  
the twenty first day of said month and the judges not ar-  
riving on this day the Court convened and organized on  
Tuesday morning January the twenty second (22) A.D. 1861

Present Hon John W. Wallace Judge of the twenty second Jud-  
icial circuit in the State of Illinois

Present Addison Farrington Clerk of the circuit court in  
and for said County and State

Present David M. Cartney State attorney for the twenty  
second judicial circuit in the State of Illinois

Present Robert G. Blendin Sheriff in and for the County  
of Whiteside in the State of Illinois

And afterwards, to wit on the twenty second day of January  
in the year last aforesaid and also of said January term of  
said Court. The said plaintiffs filed in said Court their  
certain demurs in the words and figures following

To wit:

State of Illinois

Whiteside County

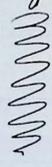
Circuit Court of Whiteside County of the

January Term A.D. 1861

Hammell Hill & co

vs

Geo W Fitch



And the said Hammell Hill & co  
 by E A Kirk their attorney as to the said second third  
 fourth fifth sixth and seventh pleas of the said defend-  
 ant by him above pleaded Come and say precludi non  
 because they say that the said pleas are not verisimily  
 or either of them in manner and form as the same are  
 above pleaded sufficient in law to be answered unto  
 wherefore they pray judgement etc

E A Kirk plffs atty

May Term A.D. 1861

At a regular term of the Circuit Court in and for the  
 County of Whiteside and State of Illinois begun and holden  
 at the Court House in the town of Morrison in said County  
 and State on the third Monday of May in the year of our  
 Lord one thousand eight hundred and sixty one A.D. 1861  
 it being the twentieth day of the month and the Judge not  
 arriving on this day the Court convened and organized on  
 Tuesday morning May twenty first A.D. Eighteen hundred  
 and sixty one (1861).

Present Here John Westace Judge of the twenty second Judicial  
Circuit in the State of Illinois

Present Addison Farrington Clerk of the Circuit Court in and  
for the County of Whiteside and State of Illinois

Present David M. Cartney State's attorney for the twenty second  
Judicial Circuit in the State of Illinois

Present Robert S. Clemenin Sheriff in and for the County of  
Whiteside in the State of Illinois

Attest A. Farrington Clerk

And afterwards to wit: on the twenty first day of May in  
the year of our Lord one thousand eight hundred and  
sixty one it being one of the Judicial days of said May  
Term of said Court. The following among other proceedings  
were had and entered of record to wit:

Daniel H. Hummel George W. Hill

and Joseph S. Hill partners in trade

under the name & style of Hummel & dete

vs

George W. Fisch

Trespass on the case  
on promises

This day came the said pla-  
intiffs by Kirk their attorney and the said defendant by  
Stander and war his attorneys and the demurrer to plea  
after plea of general issue is this day sustained by the Court

And afterwards to wit: on the thirteenth day of May in the  
year last aforesaid and year of said term of said Court  
the following among other proceedings were had and  
entered of record to wit:

57  
Daniel H Hummell George H Hill  
and Joseph S Hill partners in trade under  
the name & style of Hummell Hill & Co

vs  
George W Fitch

Trespasse on the case on  
& promises

This day came the said plaintiffs  
by O'Risk their attorney and the said defendant by Strawn  
& Burt and Ware his attorneys. And by the agreement of  
the parties hereto the intervention of a jury is waived herein  
and this cause is submitted to the Court for trial. And  
after hearing the evidence and argument of Counsel the Court  
finds the issues herein for the plaintiffs. And it appearing  
to the Court that this suit is brought for the interest due upon  
an instrument of writing for the payment of money only and  
that the damages of said plaintiffs rest in computation, it  
is therefore ordered by the Court that the clerk assess compute  
and report the said damages. Whereupon the clerk proceeded  
to make the assessment and computation aforesaid  
and reported to the Court the sum of two hundred dollars  
as the amount of the plaintiffs damages herein. which as-  
essment and computation upon examination by the Court  
appearing to be just and correct is by the Court approved  
and allowed. Whereupon the said defendant enters his  
motion herein in arrest of judgment and for a new trial  
which said motion is overruled by the Court. to which  
ruling the said defendant by his attorney excepts. It  
is therefore considered and ordered by the Court that the said  
plaintiffs have and recover of the said defendant the said

Sum of two hundred dollars being the amount of the damages assessed and computed as aforesaid, together with all the costs and charges in and about this suit expended and that they have execution therefor, And the said defendant by his attorneys pray an appeal in this cause to the supreme Court of the State of Illinois which is allowed by the Court on his filing a bond herein in the sum of five hundred dollars with William C Dudley as security within thirty days from the last day of this term of this Court and on motion of said plaintiffs leave is given them to withdraw the note on file herein on their leaving a copy of the same

Daniel H. Hummel  
George H. Heil &  
Joseph S. Hill. under  
the name and style of  
Hummel Hill & Co  
VS  
George W Fitch

Circuit Court  
Whiteside County

Motion for new trial

And now comes the  
Defendant George W Fitch and moves the  
Court to set aside the verdict and grant  
a new trial, for the following reasons  
to wit

1<sup>st</sup> The Court erred in sustaining the  
special pleas Demurrer to the special  
pleas.

2<sup>nd</sup> The note is void.

3<sup>rd</sup> The note is usurious.

4<sup>th</sup> There is no consideration for the  
note.

5<sup>th</sup> The judgment is against the  
law and the evidence in the case

6<sup>th</sup> The judgment should have  
been for the Defendant.

{ Samuel Stauder & Joe Ware Attys for  
Defendants.

# Bond

Know all men by these presents that George Fitch as Principal and William C Dudley as Surety are held and firmly bound unto Daniel A Hummel George George A Hill & Joseph S Hill partners in Trade & Ferry Business under the name of Hummel Hill & Co in the penal sum of Five hundred dollars lawfull 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 & firmly by these presents. The Condition of the above obligation is such that whereas the said Daniel A Hummel George A Hill & Joseph S Hill partners as aforesaid did at the May Term A.D. 1861 of the Circuit Court of Whiteside County receive a judgement in said Court against the above bounden George Fitch for the sum of two hundred dollars debt and costs of suit from which judgement the said George Fitch has taken his appeal to the Supreme Court of the State of Illinois Now if the said George Fitch shall well and truly prosecute his appeal with effect and shall pay whatever judgement may be rendered by the said Supreme Court upon the dismission or trial of said appeal and shall pay the said judgement so rendered by the said Circuit Court with cost interest and damages in case the said judgement shall be affirmed, then the above obligation to be void otherwise to remain in full force and effect, Witness our hands & seals the seventh day of June A.D. 1861:

G Fitch Recd  
Wm C Dudley Recd

State of Illinois }  
Whiteside County }

I Addison Farrington Clerk of the Circuit Court in and for the county of Whiteside and State of Illinois hereby certify the above and foregoing to be full true and complete copy of all the original papers and proceedings had and entered of record <sup>and of the record</sup> in a certain Cause lately pending in said Court on the Common Law side thereof wherein Daniel H Hummel George H Hill & Joseph S Hill partners in trade under the name & style of Hummel Hill & Co were plaintiffs and William C Dudley defendant

In witness whereof I have hereunto set my hand and affixed the seal of said Court at Morris in said County this 10<sup>th</sup> day of April A. D. 1862  
A Farrington Clerk

Supreme Court of the State of Illinois  
at Ottawa April Term 1862

Appeal ~~from~~ from Whiteside County

George W Fitch

} Appellant

vs

Daniel O Hummel, George  
H Hill and Joseph S Hill partners  
in trade under the name and style  
of Hummel Hill & Co

} Appellee

And the said George W  
Fitch comes and says that in the record and  
proceedings aforesaid there is manifest error in this  
to wit:

- First The Court erred in sustaining the demurrer filed by the plaintiff below to the special pleas filed in this case by George W Fitch
- Second The Court erred in not overruling said demurrer filed by the plaintiff below to all of the special pleas filed by the said George W Fitch in this case
- Third The judgement is manifestly against the law and the evidence in the case
- Fourth The Court erred in overruling the motions for a new trial in this case
- Fifth The Court erred in not granting a new trial in this in this case
- Sixth The said judgement was given in favor of the plaintiffs below, whereas by the law of the land it ought to have been given in favor of the said George W Fitch

Wherefore the said George W Fitch prays that  
the said judgement may be reversed annulled  
and held for nothing and that he may be rest-  
ored to all things he has lost by reason thereof

Samuel Stawder & Joe Ware  
Attorneys for said George W Fitch

Hammervell Hill & Co

vs

George W Fitch

Transcript

Filed April 22, 1862  
S. Kellogg  
Clerk.

per C. H. Paine by  
Defendant

STATE OF ILLINOIS,  
SUPREME COURT AT OTTAWA,

*April* ~~MARCH~~ TERM, 1862.

Appeal from Whiteside County.

George W. Fitch Appellant—vs.—Daniel H. Honnewell,  
George H. Hill, and Joseph S. Hill, partners in trade,  
under the name and style of Honnewell, Hill & Co., Ap-  
pellees.

The plaintiffs below commenced their suit against  
the defendant below, upon a note given by the de-  
fendant to the Sterling and Rock Island Railroad  
Company in payment for ten shares of the Sterling  
and Rock Island Railroad company dated August  
27th 1857 for one thousand dollars, payable five years  
after the 1st day of September 1857, with interest at  
10 per cent payable semi-annually on the first day of  
March and the first day of September each year,  
which was payable at the office of said company at  
Sterling, which note the company endorsed to Rey-  
nolds, Wilder & Co., and by them assigned to the  
plaintiffs below, as set forth in the first count in  
their declaration. This suit is brought to recover the  
first six installments of interest, (viz; \$300) as alleg-  
ed in the first count in their declaration,

The second count in their declaration avers that  
the defendant below is indebted to plaintiffs below  
for six instalments of interest on said note, amount-  
ing to Three Hundred Dollars.

The declaration also contains common counts.

The defendant below, George W. Fitch, filed his  
pleas.

1st. GENERAL ISSUE; 2d. SPECIAL PLEAS, viz;

1st. Special Plea—avers that said note was given  
in payment of ten shares of the capital stock of the  
Sterling & Rock Island Railroad Company, which  
said George W. Fitch had personally subscribed  
therefor. that is the only consideration for said note;  
therefore said note is void.

The 2nd. Special Plea avers that the contract for  
the payment of interest on said note semi-annually is  
usurious and void,

P 18. The 3d special Plea avers that said note was obtained from the said George W. Fitch by fraud and circumvention and the plaintiffs knew it.

P 19. The 4th Special Plea avers that there was no consideration for said note and that the plaintiffs knew it.

P 20. The 5th special Plea, avers that the amount of the capital stock has not all been subscribed for.

P 20. The 6th special Plea, avers that the directors never demanded of the defendants below, the amount of the capital stock subscribed.

The said Plaintiffs below filed their demurrer to the 2d, 3d, 4th, 5th, 6th and 7th pleas.

P 23. May Term 1861. Court sustained the demurrer.

P 24. May term 1861, The Court rendered judgment upon the note for \$200, for the first installments of the interest money due on it,

P 24. The defendant below, entered motions for arrest of judgment and a new trial, which motions were overruled by the Court, to which ruling the defendant below excepted and prays an appeal which is allowed and *bail* given accordingly.

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**ERRORS.**

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1st. The Court erred in sustaining the demurrer to the special pleas,

2nd. The judgment is manifestly against the law and the evidence,

3d. The note is void.

4th. The note is usurious,

5th. The note was obtained by fraud.

6th. There was no consideration for said note,

The first question is, what powers are given to the Company under the *charter*? The company organized under the general Railroad act. Cook's statutes, page 937, sec. 1st, says: "Any number of persons not less than twenty-five, being subscribers to the stock to any contemplated Railroad, may be formed into a corporation for the purpose of constructing and building said Railroad, by *complying* with the following requirements: when stock to the amount of at least one thousand dollars per mile of said road, shall be in good faith subscribed, and ten per cent paid therein, then said subscribers may commence forming a permanent organization to build said Railroad, and not before. They shall severally subscribe articles of association, in which shall be set forth the name of the *corporation*, the number of years it shall continue, which shall not exceed fifty.

The amount of the capital stock of the company which shall be the actual cost of constructing the road together with the cost of right of way, motive power, and every other appurtenance for completing and running said road as nearly as can be estimated by competent engineers, the number of shares of which said stock shall consist, the number of directors and their names, the place from and to which the proposed road is to be constructed and the counties through which said road is to pass, and its length as near as may be. and the names of five commissioners to open books of subscription to the capital stock; each subscriber shall subscribe his name to said articles of association, his place of residence, the number of shares of stock taken by him in said company.

Section 2nd states that such articles of association shall not be filed in the office of the Secretary of State until ten per cent on the amount of the stock subscribed shall actually and in good faith be paid in, in *cash*, to the directors named in the articles of association.

Section 5th states that the commissioners for opening books of subscription shall from time to time after the company shall be incorporated, open books of subscription to the capital stock of said company, which shall be kept open until *all the Capital Stock shall be subscribed*, if the company shall so long exist, and in case a greater amount of stock shall be subscribed than the whole capital required by said estimate, then the commissioner shall distribute said capital stock among the subscribers equally, said commissioners to

open books of subscription to the capital stock of said company. The word *capital stock*, is used for the first time in the fifth section, and "when the capital stock shall all be subscribed for and distributed" &c., then the sixth section says, as *soon as practicable* after such capital stock shall have been subscribed and distributed as aforesaid, the commissioners (not the directors) shall appoint a time and place for the meeting of the stockholders to elect directors, and shall give notice thereof at least twenty days, of the time and place of such election; thirteen directors shall be elected.

Section 7th says that the commissioners shall be inspectors of the *first election of directors*, and shall declare the result thereof, and shall file a certificate of said election in the office of the Secretary of State, and with the Clerks of the different counties through which said road is to run, and shall also deliver to the Treasurer all the moneys by them received on subscriptions to the capital stock of said company, and shall deliver over all books and papers belonging to said company, and all subsequent elections shall be governed by the by-laws of the company. Now the commissioners leave. The permanent organization of the company is completed. 15th Ill. Report, page 400; Smith—vs.—Bangs.

Section 11th says that it shall be lawful for the directors to call in and demand from the stockholders respectively, all sums of money by them subscribed, at such time and in such instalments as the directors may deem proper, giving the necessary notice thereof.

The directors authorized to call in and collect the capital stock could not be elected until after capital stock was all subscribed for, that is a condition *precedent*, for the 6th sec. says, as *soon as practicable after such Capital Stock shall have been subscribed and distributed, &c.*, the commissioner shall appoint the time and place of election at which said directors shall be elected.

Section 7th says the commissioners shall be inspectors of the first election of the directors which are authorized to demand and collect in the capital stock of said company, are not the same directors mentioned in the first section of the charter, because the directors mentioned in the first section were appointed by those who subscribed stock to the amount of one thousand dollars per mile; in the first instance the

thousand dollars per mile; in the first instance the commissioners were at the same time appointed, and after which the articles of association were drawn up and the names of the directors and commissioners were included in said articles of association, which clearly shows that the Legislature when it passed the charter only intended to give to such preliminary organization such powers as were necessary to get the necessary amount of capital stock subscribed to build and equip said road.

The commissioners had no power to call an election to elect directors until *all* the capital stock had been subscribed for, therefore no directors, possessing the power to collect the capital stock can legally exist until after the capital stock is all taken; consequently no person had the authority to demand the money and receive the notes in payment thereof, by virtue of the charter. The commissioners have the control of the Books and Stock until after all the capital stock is subscribed for and the directors elected, and they had no power to take notes in payment of stock from the subscribers; for, the taking of all the *Capital Stock* is a condition precedent, expressly so made in the 6th section of the charter. Also see Redfield on Railways Page 77, Sec. 1, and page 79, and notes. In the case of Atlantic Cotton Mills—vs—Abbott, 9th Cush. Reports, 423, where it was inserted in a subscription for stock, that the capital stock of the company should be not less than \$1,500,000; it was held to be a condition precedent to making calls.

There is a good reason for it. Suppose a project to cost three millions of dollars and the parties got one fourth subscribed that would be all lost if the balance could not be subscribed—it would be a great fraud on those who subscribed if their subscriptions could be collected when they supposed and had a right to suppose they would not be called upon to pay, unless the balance of the *capital stock* was subscribed for to complete the work, and thereby give value to the Stock.

The 1st section of the charter says: "That any number of person not less than *twenty-five* who being subscribers of and contemplated Railroad, may be formed into a corporation, &c." Suppose that the persons only who being subscribers to the stock of a contemplated Railroad, should sub-

scribe stock to the amount of a thousand dollars per mile should make the necessary estimate of its cost, appoint directors, also commissioners to open Books and solicit capital stock, and pay ten per cent in *cash* and file the articles of association in the office of the Secretary of State and get the same recorded; and the commissioners should get a small portion of the capital stock subscribed and should call an election and directors should be elected and the commissioners certify to their election and should then hand over to the Treasurer of said company the books, money and papers. Could the company collect the amount of *capital stock* thus subscribed for? We think not. No legal corporation would exist in such a case, the charter requiring at least twenty-five members before they could become incorporated, when in fact, they had but ten, and by the same parity of reasoning under the 6th section of the charter the whole amount of capital stock must be subscribed for, before the commissioners can call an election to elect the first directors of said company; such directors are the only persons under the charter that have the authority or power to make an assessment or collect the amount of capital stock subscribed from said stockholders. The charter is a part of the contract, and the the party having the right to and in fact does examine it, and upon such examination concludes to become a party to it, and subscribes for stock in it. Now what is the contract if all written out is full at the time the defendant signed it? It is this: "I, George W. Fitch, do hereby agree to take ten shares of the capital stock of the Sterling and Rock Island Railroad Company, at one hundred dollars each, which I hereby agree to pay therefor to said company one thousand dollars, at such times and in such instalments as the directors that have been elected by all the stockholders shall direct, they giving the required notice—provided all of the capital stock required to build and equip said Railroad shall be subscribed for according to the estimate made." If the contract had been thus written out could the money be collected on the subscription until the whole of the capital stock had been taken? I think not; it is a condition *precedent*. We must take the charter, the books of subscription, and the articles of association, and the estimates of the cost of building said road, and put them together, in order to ascertain what the contract really was.

When the organization of the company is perfected for the purpose of building said Road, the company owns no stock, it cannot have any; it must have been all subscribed and taken and owned by its members in their individual right, before the commissioners can call an election to elect directors to build said Road, and when all the capital stock is subscribed for, it may be and should be and would be represented at the first election of directors, which was clearly the design of the Legislature. In the case of Walker—vs—De Vereaux *et al.*, 4 Pagie's Report, page 229. 2 Vol. Rail Road cases page 529.

The act as set forth in that case, creating the Utica & Schenectady Railroad requires the capital stock to be all subscribed for and that the commissioners appointed to open the books for stock subscriptions should in case of an excess of stock subscriptions apportion the stock among the subscribers, the Court says no person can be a stockholder of the corporation, neither does any corporation exist, nor has any person any interest in stock as the legal owner thereof so as to authorize him to vote upon it or transfer it as stock nor can an election be held until the commissioners apportion the stock, In the case of Crocker & Williams—vs—Crane, 23 Wendall's Reports page 211. 2 Vol. Railroad cases page 184, the Court says that when the charter provides for a distribution of the stock among the stockholders no corporation exists before the distribution is made; the Court says it is a *condition precedent*. The 6th section of the charter in this case, requires the commissions to apportion the stock among the subscribers after it is all taken, and before they call an election for it could not be distributed if it had not been subscribed. Therefore, the subscribing for all the *capital stock* is a *condition precedent*. It seems to us that it was the intention of the legislature in making the subscription for all capital stock of said company a *condition precedent* to prevent fraud from being practiced upon those who might first subscribe for capital stock on said books. There is not the twentieth part of the stock taken of said company and the presumption is it will never be taken; the road is not built and in all human probability never will be built. Where the charter prescribes the particular mode in which a corporation shall make and execute its contracts, that mode must be followed. Angel & Ames on Corporations, page 268, sec 253.

The charter in this case provides that the directors shall make estimates, give notice when the estimate must be paid, and a fair construction of the charter is, that the estimate shall be made at such times and in such amounts as will be required to pay for the work as it progresses, and no faster.

A corporation is a mere creature of law, and has no powers nor rights except such as are expressly given it by the charter. Trustees, &c.,—vs.—McConnel, 12th Ill. report, page 138 to 140. Angel & Ames on Corporation, page 276, sec. 257, same, page 279, sec. 260, same, page 103 sec. 111. It was undoubtedly the intention of the Legislature in passing the act under which this company claims to be incorporated, to permit any number of persons not less than twenty-five, who were desirous to build a Railroad between given points, to be incorporated for that purpose. The Road could only be built by a solid capital of a large amount, to be created by voluntary subscription of individuals in the form of stock, and to be paid from time to time as the work progressed, and in order to protect the stockholders from frauds and impositions, as well as the public, the Statute points out the method how the amount of capital stock required to build and equip said Road should be ascertained. The 11th section requires the directors to collect the amount of stock subscribed at such time and in such instalments as they may deem proper.

The company has not the power to take a note in payment of subscription to the capital stock, due five, ten, or twenty years after its date, with or without interest. Such a note is not the capital intended by the Legislature that the company should raise to build the road with. If the interest should be collected as it becomes due and expended on the work, it would rot down before the money became due on the note, so as to complete the road. It may be said that the company may throw the note into the market and sell it. If the company has the power to do so, it can sell it for what it can get for it. Suppose it sold for eight hundred dollars; the party who gave the note would own a thousand dollars of the capital stock, and draw his dividends on it, and the party who actually paid in his thousand dollars would own but a thousand dollars. It would be a fraud upon the other stockholders, and one that the Legislature intended to prevent by prescribing the manner by

\*  
The Bank of Chillicothe  
the vs Stearns  
8 Ohio R P 257  
1 Ohio State R  
P 233 The Bank  
of Wooster vs  
Stearns  
12 Illinois R 147

which the capital stock should be raised and collected. As well might the company take the pay for the stock thus subscribed for in a *flock of sheep* or in *patent rights*. \* The company has undertaken to do a species of banking, using the stock as the capital, taking notes in payment of its stock, payable in five, ten and twenty years after their date with interest at ten per cent, payable semi-annually and annually. The road cannot be built with such a capital, it is impossible. It never was intended by the Legislature that it should be. Such trading and trafficking is foreign to the object for which the company was incorporated, and the *note* is therefore *void*. There is a difference between an incorporation organized to trade, and one to build and run a Railroad. Angel & Ames on Corporations, page 292 and 293, sec. 271; 5th Conn. Reports, page 560, N. Y. Fire Insurance Co.,—vs.—Ely. The case of Hood and Armory,—vs.—The Providence Insurance Co.; 2d Cranch Reports, page 127, Condensed, page 371. The court says it is a general rule that a corporation can only act in the manner prescribed by law, in its corporate capacity, it is the mere creature of the act to which it owes its existence. It may be said to be precisely what the incorporating act has made it—to derive all its powers from that act and to be capable of exerting its faculties only in the manner which that act authorizes. In the case of Crocker & Williams—vs—Crane 23 Wendell's Rep.; 2 Vol. Railroad cases page 485. The defendant Crane subscribed for 143 shares of stock to the Buffalo & Erie Railroad Company, the shares being fifty dollars each, and the act of corporation required the payment of two dollars on each share at the time of subscribing. A check was given and received in payment of and for aid instalments. The court said that the check was void, it being contrary to the policy of the charter or statute. The New York Fire Insurance Co.—vs.—Ely, before referred to; McCullough.—vs.—Moss, 5 Denio reports page 567, same page 579.

The case of the Vermont Central Railroad company—vs—George Coyes, 21 Vermont Reports page 30; 1 Vol. Railroad cases page 226, In this case the defendant subscribed for fifty shares of the stock of said company, the *note* in suit was given for the first five dollars payable on each share, which was required to be paid by the charter

at the time of subscribing. The note was payable on demand. It was claimed that there was no consideration for the note, but the Court held it raised a mutuality in the contract and gave efficiency to the subscription. This case differs very materially from the one at bar. The party gave his contract to pay when they required it as if they ascertained the amount by computation and the party gave his due bill to be paid when called for, and the money was really then to be used as a part of capital to build the road; in effect the relation of the parties was not different from the one contemplated by the charter. Not so in the case at bar; a credit has been given to the defendant for more than five years to pay his stock; there is no authority for such a contract given by the charter.

The general Railroad Law, passed November 5th, 1849, and an amendatory act thereto passed November 6th, 1849, The 3d section of the Amendatory act authorized the Railroad Company to receive in payment for stock subscriptions the bonds of any county or city. If the general law authorized the Company to take notes in payment of stock, payable on time, why pass the amendatory act. Cook's Statutes page 950; Sec. 3.

The special act for the more perfect organization of the Sterling & Rock Island Railroad Company, passed Feb. 19, 1859. Laws of Illinois page 512, does not effect the question made in this case. That act only declares that said Company is a subsisting corporation, duly organized under the act to provide for a general system of Railroads, passed Nov. 5, Eighteen Hundred Forty-nine. The company having filed their certificates in the office of the Secretary of State, they were incorporated for certain purposes and authorized to do certain acts before this special act was passed, and the act has given them no additional powers with reference to any question raised. The 3d section says that capital stock shall be \$250,000, with power to increase the capital stock, which increased stock may hereafter be subscribed for, but it has no reference to the original stock.

The Legislature if it had attempted to do so has no power to make a contract that was valid in its inception, void, nor has it the power to make a void one valid. The note in question was given Aug. 27th, 1857, if it was void then the Legislature had not the power to make it binding in

1859. Lessee Y. Good,—vs.—Zercher, 12th Ohio Reports page 364. Sillimans,—vs.—Cummins & Cummins, 13th Ohio Reports, page 116.

The parties may contract that ten per cent per annum or any less sum of interest may be paid; if more is agreed to be paid, it is usury, and the interest is forfeited; Cook's Statute, page 600. The Statute has made each year the period for rests in the computation of interest, it is the natural division of time, and any contract entered into by parties, or any method of computing interest adopted by parties which will give a greater profit or a greater rate of interest for the use of one dollar for the whole period of one year, than ten per cent, is usury. So a mistake in construing a statute, if it gave the party a greater interest it is usurious. It is the substance and effect of the contract that the Courts look at, and not the words; Blydenburgh on Usury, page 32, 59, 60, 68, 69, 70, 71. To take a note for one thousand dollars, payable in five years, calling for ten per cent interest, to be paid semi-annually, is a species of compound interest not authorized by the statutes. For instance the party desires to loan one thousand dollars for a year, and agrees to pay for the use of it ten per cent, or *one hundred dollars* semi-annually, therefore fifty dollars must be paid in six months, and the remaining fifty dollars at the end of the year. Now, in fact, the party had only the use of nine hundred and fifty dollars for six months of the year, yet the lender received his hundred dollars interest. Such a contract in fact gives the lender the use of fifty dollars of the money for six months of that year, and the longer such a contract has to run the greater will be the amount of the usury. The statute contemplates that the borrower should have the use of the thousand dollars for the whole year.—Contracts that have a less time to run than one year are not analogous, for the reason that the interest is but an incident to the principal, and when the principal is due and paid, the interest being the incident to the principal must cease. Not so with a contract that has a term of years to run. It is not usury to take interest in advance, if the paper is payable in a short time, but it would be if the paper had to run five or ten years; Blydenburgh, page 232 and 233. New York Fireman's Insurance Company,—vs.—Ely & Parsons, 2d Cowen's Reports, page 678, 8th Cowen's Reports, page 398 In Blydenburgh on Usury, page 128, there is a case where

five hundred pounds were lent to the borrower for five years, at the rate of five per cent per annum; fifty pounds were returned at the time of the loan, yet the party paid the interest on the sum of five hundred pounds; the Court said it was usurious, that in fact the party only had the use of four hundred and fifty pounds, the other being returned. So in this case the party pays interest on fifty dollars in each year the note has to run, that he does not have the use of, if the note had been given for money loaned. It makes no difference what the consideration of the note was, the party would have the use of the fifty dollars for six months in each year, the interest on the note was payable semi-annually.

There is no good reason why each fifty dollars when it becomes due at the end of every six months, should not draw interest under the general statute. Many of the States hold that interest payable annually, if not paid when due, will draw interest, and by the same parity of reasoning the amount of interest due each six months, would draw interest if not paid. If the contract be a binding one, the party could sue and recover his judgment for the interest, each six months the judgment would draw interest.

The contract being an executory one the Court will not interpose to enforce it. The note upon which this suit is brought, called for one thousand dollars, and is payable to the Sterling & Rock Island Railroad Company five years after its date, with interest at ten per cent, the interest payable semi-annually. This note conveys to the world upon its face its extraordinary character, therefore every person who purchased and received it was put upon his inquiry as to the powers of the company to take, receive and dispose of it. It was given to a Railroad company whose business is to build and equip it, move and transport passengers and freight upon it. The very name shows that it was not incorporated for trading purposes, like that of a banking institution. A note payable five years from date to a Railroad company, with interest payable semi-annually, is sufficient to put any prudent man on his inquiry, not only as to the powers of the Company under its charter to take and receive and dispose of such notes, but would put him on inquiry as to the manner in which the company received it, the consideration, and every other circumstance that attended it; Story on Promissory Notes, page 229, sec. 179,

Crane—vs—Baldwin, 12 Pickering Reports, 545; Hall—  
vs—Hall 8 Conn. Reports 336.

All persons who deal with a corporation are bound to  
take notice of the powers given by the act of Incorporation.  
Angel & Ames on Incorporations, page 284; Root—vs—  
Goddard, 3 McLean's Circuit Court Report page 102.

The case of the Illinois River Railroad Company—vs.—  
Zimmer, 20 Ill reports, page 654, does not conflict with the  
principles urged in the defence in this case. We claim that  
the subscription to the whole of the capital stock is made  
a condition precedent, by the sixth section of the charter.  
The Statute is imperative. It is said fraud contami-  
nates everything it comes in contact with. A perfect sys-  
tem of frauds were practiced upon the people along the line  
where this imaginary road was to run, in order to obtain  
these notes and mortgages, which is averred in the pleas  
and admitted by the demurrer. The road is not built and  
never will be in all human probability; If these notes are  
held valid and collectable, it will substantially bankrupt  
all that portion of the country through which said road was  
to run.

The general issue puts in issue the existence of the  
corporation, and the corporation is bound to prove that  
they are incorporated; Bell—vs.—Great Western Turn-  
pike Company, 14th Johnson Reports, page 415. General  
plea avers the fact that the instrument was obtained by  
fraud, and circumvention is sufficient; 2d vol. Swan's Prac-  
tice & Precedents, page 742. Ohio Forms & Practice, by  
Wilcox, page 136 and 241. 1st Chitty's Pleadings, page  
136. Marginal, 536 and 538, also 581; marginal, 582.

**SAMUEL STRAWDER & JOE. WARE,**  
Attorneys for G. W. Fitch.

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Fitch

vs

Hammill & Co

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Abstract

Filed April 23 1868

L. Leland

CLM