

12727

No. _____

Supreme Court of Illinois

Chicago & Rock Island

R. R. Co.

vs.

Whipple

34.

~~Book~~

34

The Oregon & Coast
Island Rail Road Company

vs

Warren W. Whipple

12727
1859

1859

Payable

The Chicago & Rock
Island Rail Road
Company,
vs
Wm. M. Whipple

In Supreme Court

And Now Comes the Appellant
and says that in the Record and
proceedings and in the rendition of
the Judgment aforesaid, there is
manifest Error in this to wit.

1. Said Court Erred in Sustaining
Appellee's Motion to dismiss the
Writ of Certiorari

2. Said Court Erred in rejecting the
Evidence offered by the Plaintiff

3. The Court Erred in not reversing
the Judgment of the Justice of
the Peace and in not rendering judg-
ment for the Appellant

For these and other Errors
Manifest in said Record Appellant
prays that said judgment may
be reversed set aside, and wholly
for nothing esteemed

A. M. Whipple
Attorney at Law

The Chicago & Rock Island
Railroad Company

vs
James R. Whipple

In Supreme Court
Do App'd Term Nov 1857

And now comes the said
appellee & says that ^{there} is no error in the record
in proceedings in the rendition of the said
judgment

D. L. Strong
Att'y for appellee

Be it remembered that heretofore to wit: on the thirtieth day of July in the year of our Lord one thousand eight hundred and fifty six there was filed in the office of the clerk of the circuit court in and for the County of Peoria in the State of Illinois a Petition, Bond in Certiorari, Writ of Certiorari & ~~which~~ with the respective endorsement thereon, also a certified Record in the words and figures following, to wit:

"State of Illinois,
LaSalle County, 3 & Circuit Court thereof

To Nov Term A.D. 1854.

To the Hon Edward Seland Judge of the 9th Judicial Circuit -

Your Petitioner the Chicago and Rock Island Rail Road respectfully represents, that they are an incorporated company under and by virtue of an act of the General Assembly of the State of Illinois, entitled an act to incorporate the Rock Island and LaSalle Rail Road Company approved February 27th 1847 and an act to amend an act to incorporate the Rock Island & LaSalle Rail Company approved February 7th 1851. That they were so incorporated and were acting and constructing and operating their Rail Road from Rock Island to Chicago by Contractors in the year A.D. 1853. That on the 4th day of November A.D. 1853 one Warner W. Whipple procured a summons to be issued by one Nicholas Duncan against your petitioner at the suit of said Whipple which summons was as follows in substance

State of Illinois 3

LaSalle County 3

The People of the State of Illinois
To any Constable of said county Greeting
You are hereby commanded to summon the Chicago and Rock Island Rail Road Company to appear before me at my office in LaSalle in said County on the 21st day of November 1853 at

9 o'clock A. M. to answer the complaint of Warner W. Whipple
of a plea of trespass on personal property to the damage of the
said Warner W. Whipple one hundred dollars and have
you then & there this precept. Given under my hand &
Seal this 4th day of November 1853.
Nicholas Duncan J. P.

Which summons was afterwards returned with an endorse-
ment thereon as follows in substance Executed the within
summons by leaving this 7th day of November A.D. 1853 a
true copy of the same with George H. Buck an agent of
said Company the President of said Company not
residing in my County. Signed R. B. Cogswell, Constable

Your Petitioner shows that the only cause of action claimed or
concerning which proof was introduced or heard before the
said Justice on the trial of said suit was as follows,
Said Warner W. Whipple claimed that certain cattle
belonging to him had been killed on the Rail Road of
your petitioner by the cars of your petitioner regularly run-
ning on said road, and said Whipple introduced proof
tending to show that certain cattle owned by him had
prior to that time been killed by being run over by the
cars of your petitioner on the said road of your petitioner
by the person who were then running said cars, which
was all the proof in the case except as to the value
of the cattle.

And your petitioner shows that said Justice
rendered a judgment in said suit against your peti-
tioner for the sum of seventy one dollars and twenty cents
damages and three dollars and sixty cents costs.

Your petitioner further shows that they did
not appear before said Justice or any one for them for
the reason hereinafter stated.

Your petitioner further shows that said
Justice had no jurisdiction of the subject matter which
he then and there attempted to adjudicate that an
action of trespass ought not to have been maintained
against your petitioner for injuries to cattle caused by the

Running of their cars on their rail road in the care & custody of their servants if such a state of case had been shown which it was not no proof having been made before said Justice that said cars were then being run by your petitioners servants. And the truth and the fact being that in all the year A.D. 1853 Messrs. Hornham & Theffield who were the contractors for the building of said Rail Road had the sole and exclusive possession of said Rail Road & Cars & run the same upon their own account & for their own profit.

Wherefore your petitioner shows that said Justice erred in rendering any judgment whatever in said suit and was wholly without jurisdiction of the subject matter he attempted to adjudicate,

Your petitioner further shows that no knowledge of any of said proceedings or of said judgment ever came to your petitioner until more than six months from the rendition of said judgment.

Your petitioner shows that said George H. Buck was not at any time during the year 1853 the agent of your petitioner. Nor was a service of summons on him any notice to your petitioner, whatever. And the first notice your petitioner had of said judgment or proceedings was a service of a summons upon your petitioner the foundation of which was the judgment rendered first above recited, first above

Forasmuch as your ~~petitioner~~ ^{petitioner} hath sustained wrong and is manifestly aggrieved ~~and~~ ^{and} injured by the errors and illegal proceedings of said Justice of the Peace and forasmuch as your petitioner has had no opportunity to take an appeal in the ordinary way or to sue out a writ of certiorari under the statute, Your petitioner prays that a writ of certiorari according to the course of the common law be issued out of and under the seal of this Honble Court directed to said Nicholas Bureaux Justice as aforesaid commanding him to certify to this Court a statement under his hand & seal of the proceedings had before him in said suit and a statement of the claim of the

Plaintiff which was adjudicated upon before him, stating particularly what acts of trespass the Plaintiff claimed to recover for & whether for the trespass of your petitioner as a body or for the acts of their servants & agents and that this court will ~~review~~ ^{review} the said proceedings of the said Justice and correct the errors therein and that said erroneous judgment may be annulled set aside and wholly for nothing esteemed

The Chicago and Rock Island
Rail Road Company
by ~~Chommas~~ ^{Chommas} & Cook
their attys

State of Illinois.

Ladelle County. B. C. Cook being first duly sworn, saith that he is the agent and attorney of the Chicago and Rock Island Rail Road Company, that he has diligently sought to ascertain the truth of the facts stated in the above petition, that the statements of said petition are true to the best of his knowledge, information and belief. The information in relation the agency of George H. Buck was derived from said Buck. Affiant believes that no agent of said Rock Island Rail Road Company could from the nature of the case have personal knowledge of all of the facts stated and affiant believes that no agent of said Co. has more numerous or correct sources of information than affiant in relation to the statements of the petition. Affiant states that he is credibly informed & truly believes all of the statements of said petition to be true -

B. C. Cook

Subscribed & sworn to
this 11th Dec., 1854.

P. Lindley clk. "

Endorsed "Filed December 14th 1854 P. Lindley, clk. "

[Bond in certiorari]

"I now all Men by these presents that we the Chicago and Rock Island Rail Road Company as principals & B. C. Cook as surety are held and firmly bound unto Warren W. Whipple in the

penal sum of one hundred & fifty dollars lawful money for the payment of which well & truly to be made we bind ourselves our heirs, executors and administrators jointly, severally & family by these presents

Sealed with our seals & dated at Ottawa this 15th day of December A.D. 1854.

The Condition of this obligation is such that whereas the said Warren W. Whipple did on the 21st day of November A.D. 1853 before Nicholas Duncan a Justice of the Peace in & for LaSalle County Illinois recover a judgment against the said Rail Road Company for the sum of Seventy one dollars & twenty Cents damages besides costs and whereas the said Rail Road Company have presented a petition to the Circuit Court of said County alleging that said Justice had no jurisdiction to render the judgment aforesaid & whereas said Circuit Court has awarded a writ of certiorari to said Justice requiring him to certify to said Court a statement of said Cause & of his proceedings therein to the end that the same maybe inspected & reviewed in said Circuit Court and the errors therein corrected

Now if said Rail Road Company shall prosecute said writ of certiorari with effect & without delay and shall pay said judgment with all damages interest & costs in case the same shall be affirmed by said Circuit Court then this bond to be void otherwise in force

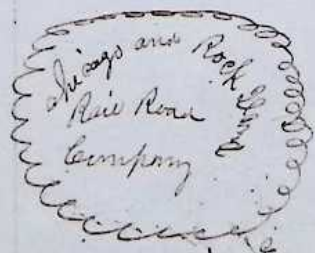
The Chicago & Rock Island

R. R. Company

By Jas. McEnnis Jr
att. Sec.

B. C. Cook

Seal



Endorsed "Filed Dec. 15, 1854 P. Lindley clk."

[Summons]

State of Illinois, 3rd D.
LaSalle County, 3rd

The People of the State of Illinois
To the Sheriff of said County, Greeting
We command you to summon Warren W. Whipple if to be found in your County, personally to be and appear before the Circuit

Court of said County, on the first day of the next term thereof, to be holden at the Court House in Ottawa, on the 2^d Monday of May next, to prosecute his suit, which he instituted against the Chicago & Rock Island Rail Road Company and recovered judgment before Nicholas Duncan a Justice of the Peace of said County, on the 21st day of November 1853 for the sum of seventy one dollars and twenty cents besides costs, which said judgment has been removed to the Circuit Court of said County by certiorari and further to do and perform whatever said Court may then and there consider in the premises And have you then and then this writ.

Witness Phils Lindley Clerk of said Court and the seal of said Court, at Ottawa, this 27th day of December A.D. 1854.
P. Lindley Clerk

Endorsed "Executed this writ by reading the same to Warren W. Whipple April 16 1855 serving it 60
12 miles
F. Warner Sheriff \$1.20

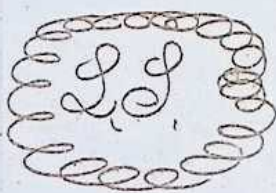
By J. Harris Deft "

"Filed May 11, 1855. J. F. Nash, Clerk"

[Certiorari]

"State of Illinois, ss.
LaSalle County, ss. The People of the State of Illinois To Nicholas Duncan, Greeting: Whereas it has been represented by the petition and affidavit of the Chicago & Rock Island Rail Road Company that in a certain suit lately depending before you wherein Warren W. Whipple was Plaintiff and the said Chicago & Rock Island Rail Road Company were defendants and wherein judgment was rendered in favor of said Whipple and against the said Chicago & Rock Island Rail Road Company that manifest injustice has been done to the said Chicago & Rock Island Rail Road Company in the rendition thereof as aforesaid, And as being willing for certain causes in said petition stated & set forth that the said judgment and the matters and things in controversy between the said Warren W. Whipple and the said Chicago and

Rock Island Railroad Company. Should be re-examined
in the Circuit Court of said County, Do hereby Command and
Require you that you do forthwith without excuse or delay
Certify to the said Circuit Court a transcript of the said
judgment with the proceedings thereon and all things
touching the same by whatever names the parties aforesaid
or any or either of them are or is set down, truly, fully and
exactly, as in your custody they now remain under your hand
and seal together together with this writ, that further thereof
the said Circuit Court may do, that which of right ought
to be done, (Witness Phils Lindley Clerk of said Circuit



Court and the Seal of said Court at my
office in Ottawa this 27th day of December
A.D. 1854

P. Lindley, Clerk

Endorsed "Executed this writ by Reading the same
to Nicholas Duncan and by leaving a copy of the same
with him, Jan 4 12th 1855. J. Warner Chff"

"Filed May 11, 1855 J. F. Nash, Clerk."

[Record]

"State of Illinois, 3
La Salle County, p 3 Pleas before the Honorable Edwin S. Leonard
presiding Judge of the Ninth Judicial Circuit of the State of Illinois
at a circuit Court commenced and held in and for the County of
La Salle and State of Illinois at the Court House in Ottawa on
the Second Monday of November in the year of our Lord one
thousand eight hundred and fifty four and of the Indepen-
dence of the United States the twenty eighth -

Present

The Honorable Edwin S. Leonard

Presiding Judge

Phils Lindley

Clerk

W. H. L. Wallace

States attorney

Richard Thome

Sheriff

On Monday the 18th day of December 1854 the same being one
of the days of the said November Term of said Court the follow-
ing order was entered of Record in said Court, to wit:

"The Chicago & Rock Island
Rail Road Company

vs
Warren W. Whipple

Appeal by certiorari

This day came the plaintiffs by Cook
and Chumasco their attorneys, and the defendant by Hough
his attorney and the Plaintiffs Counsel move the court
for a common law writ of certiorari to issue herein, and
after hearing the arguments of counsel, it is ordered that
said writ issue upon petitioners filing a bond herein payable
to the defendant in the penal sum of one hundred and
fifty dollars with Burton & Cook as security."

And afterwards to wit: on Thursday November 22^d 1855 the
same being one of the days of the November Term of said
Court for the year 1855 the following further order was entered
of record in said cause, viz:

"The Chicago & Rock Island
Rail Road Company

vs
Warren W. Whipple

Appeal by certiorari

In Motion of the plaintiffs by Groves
Cook & Chumasco their attorneys the Justice of the Peace
whose decision this appeal was taken or his successor in office
is ruled to return to this court the cause of action on which
this writ was founded, together with all the records remaining
before him appertaining to this cause."

And afterwards on Wednesday June 4th 1856 the same
being one of the days of the May Term of said Court for the
year 1856 the following final order was made in said
cause, to wit:

"The Chicago and Rock Island
Rail Road Company

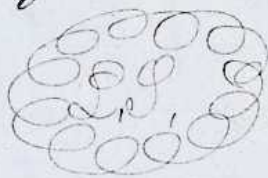
vs
Warren Whipple

Appeal by certiorari

It is ordered by the Court
that a change of venue be had herein to Peoria County Circuit

Court the preceding Judge of this Court having been of counsel in the subject matter of this cause

State of Illinois, ³
La Salle County, ³ ³ I, John T. Nash, clerk of the circuit court
in and for said county and State do hereby certify that the above foregoing
comprises a true, full, perfect and complete record of all the orders
of Court in the above entitled cause as the same appear of record
in my office and that the papers herewith transmitted marked
from letter "A" to "D" inclusive are all the papers in my office
on file in said cause.



In Testimony whereof I have hereunto set
my hand and the Seal of said at Ottawa
this 7th day of July A.D. 1856
J. T. Nash, Clerk."

Proceedings at a term of the Circuit Court begun and held
at the Court House in the City of Peoria in and for the County of Peoria
in the State of Illinois on the third Monday of November in the year of our
Lord one thousand eight hundred and fifty six, it being the
seventeenth day of said month. Present the Honorable Clinch N.
Powell Judge of the District Judicial Circuit in the State of
Illinois, David D. Stone Sheriff and Enock P. Loom Clerk, to wit:
Tuesday, December 2nd A.D. 1856

Chicago Rock Island & Paul Road Company

Warren Whipple

Appeal from L.S.

By Agreement of parties this cause is continued
to next term of Court.

Proceedings in the Circuit Court at a term thereof begun
and held at the Court House in the City of Peoria in and for the
County of Peoria and State of Illinois on the second Monday
of May in the year of our Lord one thousand eight hundred
and fifty seven, it being the seventh day of said month. Present
the Honorable Clinch N. Powell Judge of the 16th Judicial Circuit in said State,
Francis H. Smith Sheriff and Enock P. Loom, clerk, to wit:

Friday May 29th 1857
Chicago & Rock Island
Rail Road Company

vs Appeal - Venue from La Salle
Warren Whipple

This day Came the defendant by Manning
his attorney and moved the Court to quash the writ of certiorari
issued in this cause

Proceedings in the Circuit Court at a term thereof began and
held in the Court House in the City and County of Peoria,
in and for said County and State of Illinois, on
the third Monday of November in the year of our
Lord one thousand eight hundred and fifty seven
it being the sixteenth day of said month

Present the Honorable Oliver St. Powell Judge of
the 16th Judicial Circuit in the State of Illinois
Francis W. Smith Sheriff and Charles P. Sloan, clerk
Monday December 7th A.D. 1857

Warren Whipple

at vs Appeal from La Salle
Chicago & Rock Island
Rail Road Company

This day this Cause came on to be
heard on the motion of defendant by Manning his
attorney to quash writ of certiorari herein and to
dismiss this appeal and the Court being satisfied in the
premises sustained said motion and ordered that a writ
of procedendo be issued herein. Thereupon came the
plaintiff by Purple & Pratt its attorneys and prayed
an appeal to the Supreme Court of this State which was
allowed on condition that the said Chicago & Rock
Island Rail Road Company file a bond with the clerk
of this Court in the penal sum of three hundred dollars
conditioned as the Court directs with Washington buckle
as security, said bond to be filed with said clerk
within thirty days from this date

On the 7th day of December A.D. 1857 then now filed in the office of the clerk of said circuit Court of
Pena County in said cause the defendant Bill of Exceptions in the words figures following to wit:

The Chicago and Rock Island R.R. Co

vs
Warren Whipple

In the circuit Court of Pena County

On this day this cause came on to be
tried upon the motion to quash the writ of certiorari herein which
motion is as follows

" Pena Circuit Court
March Term A.D. 1857

Chicago & Rock Island
Rail Road Company

vs
Warren Whipple

Certiorari

Defendant moves the Court to quash
writ and dismiss said suit for reasons

1 No Common law of writ of certiorari lies in such
case.

2 The facts appearing on the face of the petition in said
Cause do not authorize the issuing of any such writ.

3. The transcript and papers on file show that the Jus-
tice decided correctly in said Cause

4. By the return of said Justice it does not appear that
said Justice has committed any error in law

5 The Justice had jurisdiction and did not proceed
illegally, so that no such writ lies

O'Hearning & O'Herriman
attys for deft"

Upon the hearing of which said motion the counsel for the
defendant contended that the Court should be only examine
into the regularity and legality of the writ and offend and
proposed to prove that the Chicago & Rock Island Rail
Road Company was not in existence at the time of the rendition
of said judgment in the Court below - also that the said judg-
ment and all costs had been fully paid since the rendition
of said judgment and also that another suit had been
brought on said judgment below and a new judgment
rendered upon the said judgment before R. Putnam by a
Justice of the Peace of La Salle County on the 30 Sept 1854

For the Amount of the said judgment and costs by which said subsequent judgment the defendant insisted that said original judgment had been fully satisfied - and merged in said subsequent judgment -

The Court rejected the evidence offered and dismissed the suit and defendant then and there excepted and requested the Court to sign this bill of exceptions which is done -

Dec. 7th, 1857

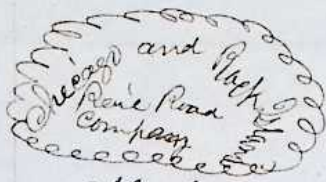
C. N. Powell C. J.

And Afterwards to wit; on the Nineteenth day of December in the Year of our Lord one thousand eight Hundred and fifty seven there was filed in the office of the Clerk of said Circuit Court of Peoria County in said Cause an Appeal bond in the words and figures following, to wit:

"Know all Men by these presents, the me The Chicago & Rock Island Rail Road Company as Principal and Washington Cockle as Security are held and firmly bound unto Wm. H. Whipple in the penal sum of three Hundred dollars lawful money of the United States to which payment well and truly to be made and done we bind ourselves our heirs, successors, executors and administrators jointly and severally by these presents, Witness our Hands and Seals and the official Seal of said Company this 17th day of December A. D. 1857.

The Condition of this bond is this whereas on the seventh day of December A. D. 1857 in a certain suit then pending in the Circuit Court of Peoria County, Illinois upon a change of venue from LaSalle County, wherein the said Chicago and Rock Island Rail Road Company was Plaintiff in the prosecution of a certain suit of Certiorari and the said William H. Whipple was defendant as by the papers and record in said court well fully appear a judgment was then and there rendered by said court dismissing said suit of Certiorari and ordering a procedendo to issue to the justice of the Peace from which said judgment of said Circuit Court the said Plaintiff prayed an appeal to the

Supreme Court which has been allowed. Now if the
said plaintiffs shall duly prosecute their appeal in said
Supreme Court and shall pay the judgment, cost, interest
and damages in case the said judgment shall be af-
firmed by said Supreme Court then this bond shall be
void otherwise in force



Attest

Chicago & Rock Island Rail
Road Company by
Henry Barnum Post
Washington Cookle

Secretary

State of Illinois
County of Peoria

J. Crook P. Town Clerk of the
Circuit Court in and for the County of
Peoria in said State do hereby certify
that the foregoing is a true and
correct transcript from the files and
Records of my Office

In witness whereof I have hereunto set my hand and affixed
the Seal of said Court this 20th day of March A.D. 1888.
Crook P. Town, Clerk

~~#23~~ 34-7

The Chicago & Rock Island R.R. Co.

vs.
Merrill W. Whipple.

Transcript of
Record & Assignment of Eas

Filed April 18, 1888
Leland
C. H.

The Chicago & Rock Island
Railroad Company
vs
James Whipple } Appeal from
Illinois

For suggestions bearing upon
this case, I would refer the Court
to the arguments filed in Nos 32
& 33 on the docket at this term of
this Court.

D. L. Wright
Attorney for appellee

34-7

Chicago & Rock Island
Railroad Company

R. W. Whipple

Argument
D. L. Bough

34-7
The Chicago R.R.
R.R. Co 34
(~~125~~)
Wm Whipple

Argument

W. Whipple

The Chicago & Rock Island
 Rail Road Company } Appellate from
 125)
 versus M. Whipple }

This case has ^{many of} the features
 of the two former cases Nos. 123. 124.
 And the Court is referred to the argu-
 ments in those cases upon those
 points

In addition thereto, the Original
 Suit before the Justice was upon a
 Judgment purporting to have been
 rendered by a Justice, consequently
 it must have been an action of
 debt - And the Judgment is in dam-
 agis only

This Court has often decided
 that this is Error.

Jones vs Jewell Et al Bruso - 174

Guild Et al vs Johnson 1. Scam 405

Jackson vs Hasbrell 2 " 565

Hayt vs Stapf Et al 3 " 96

Patterson vs Hood " " 152

O'Connor vs Mullen 11 Ill. 59

March vs Wright 14 " 248

Mayer vs Hutchinson 2 Gilson 266

Knob vs Brink 12. Ills 61

Sales vs Cole 11 " 563