

No. 14566

Supreme Court of Illinois

Van Buskirk

vs.

Day, et al

199
STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 184

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9-1-90

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14566

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

LAWRENCE VAN BUSKIRK,

vs.

CHARLES B. DAY, ET AL.

} APPEAL FROM PEORIA.

BRIEF FOR APPELLEES.

1. The instrument sued on is a promissory note. It is a promise in writing to pay a specified sum, at certain times therein limited, to the order of a person therein named; and was therefore transferable by assignment.

See Chitty on bills, 516.

Walters v. Short, 5 Gilm., 259.

Purp Stat., 2, 772, cap, 78, Secs. 3 and 4.

3. It is not a mere promise *to loan money*, as assigned by appellant, but an absolute promise *to pay* "to the order of Lewis Howell." The added words, "President of the Board of Trustees of loan to the American Pottery Company," whether regarded as *descriptio personae*, or as indicating the capacity in which, or the use to which Howell takes, do not alter the case, or affect either the negotiability or the measure of damages upon the note.

3. There was no fraud or fraudulent representation connected with the consideration or the execution of this note, to vitiate it in the hands of any one. This was, moreover, a question peculiarly within the province of the jury that tried the case in the Circuit Court, and was fully submitted to, and passed upon, by them. This court, it is believed, will not now disturb their verdict.

Besides, Lewis Howell, at almost the instance of Lyon, was, as were the only persons the Court could legally recognize, as parties to the note. Hence all proof of representation by others, not admissible in law to bind them, was improper - Chadley vs. McCree, 27 Ill. 253 =

4. Said note was given in strict compliance with the written contract between appellant and the commissioners, for organizing the American Pottery Company. This contract purports to set out fully the consideration for, and inducements to, the giving the note; and all the outside proof of other considerations than those named in the written contract, was improperly admitted in evidence and was afterwards, in effect, withdrawn from the jury, by the 4th instruction, given on the part of the plaintiffs, which instruction was not excepted to by the defendant, and it is now too late to raise any question of the kind in this court.

5. The written contract of subscription was substantially complied with by the commissioners, and so the jury found. The objection, and the only one, now made on this head, viz: That the Pottery premises were not mortgaged to secure the loan, is not sustained by the Record. Appellant's own witness, Howell, says, (see p. 13 of Record): "Trustees took mortgage from the Pottery Company on the property to secure the subscriptions." This evidence, introduced by the defendant below himself, or admitted without objection, rendered further ~~the~~ proof of this fact unnecessary.

6. It is not clear from the proof that this note was assigned after maturity. Mr. Howell, the only witness on the point, says, "he thinks it was," but "cannot say." This is not enough, especially where, as in this case, the note had really been paid for long before maturity, (see testimony of Fenton p. p. 24, 25 of Record,) and only waited the mere formal endorsement of Howell to complete the transfer of the legal title.

7. Substantial justice is done by this verdict. Appellant, with many others, gave his note, pledging himself to pay money for the furtherance of a common enterprise. These appellees sold their goods to pay the workmen engaged in advancing that enterprise, under an agreement to accept this, with the notes of other subscribers, in payment, and upon the faith that it would be promptly paid. It is inequitable in appellant now to refuse.

COOPER & MOSS,
For Appellees.

8 = There was no error in p. 4th instruction; and if there were, it was cured by the 10th given for apt to modify it, & so effected in the margin —

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Vankuski
res.
GB Day & Co.
appellees Brief -

The court is of opinion that the appellees are entitled to a decree in their favor. The court is of opinion that the appellees are entitled to a decree in their favor.

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COOK & WOOD
For Appellees

SUPREME COURT OF ILLINOIS.

Third Grand Division.—April Term, 1863,

LAWRENCE VAN BUSKIRK,

vs.

CHARLES B. DAY And Others.

APPEAL FROM PEORIA.

ABSTRACT.

This suit was commenced before a Justice of the Peace in Peoria County, by Charles B. Day & others, partners, against VanBuskirk, and taken by appeal to the Circuit Court.

On the trial in the Circuit Court the plaintiffs below introduced in evidence the following instrument and endorsement, to which the defendants objected, because the same was not assignable, and because it appeared from the face of the instrument that it was only an agreement to loan money, to-wit:

On the back was endorsed payments of \$70.

The court overruled the objection, and defendants excepted.

The plaintiffs then rested their case.

Defendant then called Charles Ballance: It was reported all over the City that the Company were going to employ 1000 men when, everything was completed. The agents exhibited fine ware and brick made at Bennington, Vt., as a specimen of what they would do. They said if the people would promise a loan of \$50,000, the Company would furnish as much more, and would make a fine thing of it—don't know whether the representations were made in public or private. They put in some machinery and made some good ware. H. G. Anderson professes to run the pottery at the present time.

L. Howell sworn: Can not say whether the note sued on was assigned before maturity, or not. If the note became due May 1, 1861, then I think it was assigned after maturity. I think it was assigned after May 1, 1861. The Pottery Company gave nothing for it except what appears on the face of the note. They got this as they did about \$50,000 more—don't know what Day & Co. gave for the note. The note was executed for the benefit of the Pottery Co., and subscribers.

(The signature of the defendant on the subscription book was then shown to witness and he stated that it was the signature of defendant.)

About one sixth of the original plan was completed, and the centre of the 6 wings. The Trustees took mortgage from Pottery Co., on the buildings and property, to secure the subscriptions. They got a portion of their machinery from Vermont—Engine from Rochester, N. Y.—cost \$2,000.

Defendant then offered and gave in evidence, the original subscription book, to which was attached the name of the defendant, for \$200, and which subscription is as follows:

12
24-25

L. Van Burkirk,\$200.

And others.

And the terms of which were accepted by the obligees.

David McCullough, sworn: That the last installment of the note fell due May 1st, 1861.

Eldrick Smith sworn: I know Johnson, one of the men who were getting up pottery subscriptions. He exhibited ware manufactured at Bennington, Vt., to show what they could do here—was fine ware, consisting of a variety of articles. Johnson and myself went to defendant to get him to subscribe to the loan. That the Pottery would advance property two or three times its present value—that they were to employ 1200 to 1500 hands when finished, and would have it completed inside of two years. The Company were to put in one to \$200,000, if the citizens were to subscribe their amount. They said the material was here, and they could manufacture cheaper than east—defendant doubted—said he had been swindled before—would think about

it—said he wanted to know if there was any doubt of the success of the enterprise. We represented that it could go through if \$50,000 was subscribed. A few days after I met defendant down town, and he subscribed—he said he would subscribe if they would go on. I told him I had no doubt but it would go right along. He was induced to subscribe in consideration that it was a fixed fact, and that the buildings would be located where represented. I went with Barker, one of the stockholders, to induce defendant to sign the note sued on. Defendant was afraid to sign it, but I soon induced him to sign it. We held out the same representations as before. They had investigated our clay and said it was all right, and the only obstacle in the way was the want of money. They said they had skill and ability, as good as could be found anywhere. One wing and stack is all that is completed—don't think defendant read the contract when he signed it—considerable machinery and one side house was erected. The round house, or centre part, is commenced. The undertaking was that \$50,000 was to be raised by subscriptions, and the Company were to raise \$150,000 abroad.

H. G. Anderson, sworn: I attended one public meeting of those interested in the enterprise. The Company stated if they got the loan they would establish a big thing that would add largely to the interest of the City—were to employ 1000 men. If they could get \$50,000 they would furnish as much more I think. They had a good talker, and represented they would turn out some millions of ware a year—would monopolize the trade in Mississippi Valley—had specimens on exhibition—very fine. The thing was under operation 8 to 12 months—did not make ware as good as exhibited. I commenced operations Nov. 1, 1861. Have been connected with it ever since—I think that \$150,000 in addition to the \$50,000 would make it a prosperous institution. The building when completed will be five times its present size and require \$350,000 to complete the original design. The Pottery Company have had nothing to do with it since I purchased—is about 5 acres of land with the pottery works.

A. Fenton, sworn: About \$40,000 subscription has been paid—one wing and basement of building is completed. Part of the purchase of premises were donation, and part subscription. The whole purchase money, \$2,600 or \$2,700. We told the citizens if they would raise \$50,000 we would raise enough more to complete the works, about \$300,500. The subscription was raised. The company did business about a year—had some 20 or 30 hands.

It was admitted the Pottery Company was duly organized before the giving of the note sued on, by the commissions named in contract of subscription, and that the pottery premises were insured for the benefit of subscribers to the loan.

The plaintiffs then asked and the Court gave the following instructions, which were excepted to:

1st. That the note read in evidence makes a good prima facie case for the plaintiffs, and the jury should find for the plaintiffs the amount of principle unpaid thereon, with interest on each installment from the time the same became due and payable, unless the defendant has established affirmatively, a good legal defence to said note.

2d. That the legal title to said note was never in the "American Pottery Company", and no proof of representations made by said Company or its agents, to induce the execution of said note, or of the falsity of such representations, can be used to defeat a recovery upon said note, unless it be also shown that Lewis Howell, to whom said note is made payable, or the Board of Trustees of loan, to whom said subscription was made, concurred in said representations, or assisted in misleading the defendant, and procuring him to make such subscription, and sign said note on the faith of such representations.

7th. That said Decius W. Clark, and the others named in said loan contract, as

commissioners for organizing said "American Pottery Company," were parties capable of contracting, and if they afterwards complied, as individuals, or as the "American Pottery Company," with the terms of said contract. this constitutes a sufficient consideration to support said loan contract, provided such contract was made in their individual capacity, but not if made by them as commissioners.

²² The jury returned a verdict for the plaintiffs for \$141,05, and defendants moved for a new trial.

1. Because the Court admitted improper evidence asked by plaintiff.
2. The Court gave improper instructions asked by plaintiff.
3. The verdict is contrary to law.
4. It is against evidence.
5. It is against the instructions of the Court
6. The plaintiff could only recover damages on the contract sued on, to the amount proven that he sustained, and not the amount agreed to be loaned.
7. The note sued on was not assignable.

But the Court overruled the motion, and rendered judgment, to which the defendant then and there ~~excepted~~, and prayed an appeal.

M. WILLIAMSON,
Attorney for Plaintiff.

184-139
Van Buskirk

wt
Gaychal

~~Brief~~
Abstract

Filed Apr 24 1863

J. Giland
clerk

Collected fees for making Record \$8.00

Recd. of Mr. Van Buskirk the above fees,
Noel J. Loan, Clerk

/ Pleas before the Circuit Court of Peoria County, in the State of Illinois on the 13th day of October, in the year of our Lord one thousand eight hundred and sixty two.

Be it remembered, that heretofore, to wit: on the 23rd day of September, in the year of our Lord One thousand Eight hundred and sixty one, there was filed in the office of the Clerk of the Circuit Court, of Peoria County, in the State of Illinois, a Transcript, Note, Summons and bond, which, with the endorsements thereon, are in the words and figures following, to wit:

Transcript

Charles B. Day
Lucius L. Day
Larkin B. Day
James Humphrey
vs.
Lawrence Van Buskirk

Sum	25	Suit brought on note & interest for \$133.90
Subp	25	On application of Plffs. Summons issued to A.R. Kidwell
Dock	10	leant. July 17 1861. Returned July 22 nd at 1 Oclk P.M.
Kidwell	53 1/2	Returned duly served July 22 1861 The parties appear
Judg.	25	ed and after hearing some evidence judgment was
Bond	50	rendered against the defendant for One Hundred
Trans	25	and thirty three dollars and ninety cents debt and
Ger	25	Certs of Suit Debt \$133.90
		Costs 1.47 1/2

State of Illinois
Peoria County

J. Lamboy Justice of the Peace in & for said

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County, do certify that the foregoing transcript & papers annexed contain a full and perfect statement of the proceedings had before me in the above entitled cause, Given under my hand & seal this 12th day of September A.D. 1861.

Jamboy B. J.P.

Note

\$200⁰⁰/₁₀₀

Peoria November 11th 1859.

For Value received I promise to pay to the order of Lewis Howell, President of the Board of Trustees of Loans, to the American Pottery Company Two Hundred X Dollars payable at the Banking House of S. Pulsifer & Co in Peoria, in instalments == first instalment, 10 per cent at date; second instalment, 5 per cent. on the 1st day of December, 1859, and the balance in instalments of five per cent. on the first day of each month thereafter until paid.
No. 102. L. Van Buren Kirk

Endorsements on
note

Endorsements on the back of the foregoing note.

Dec-9th 1859. Rec^d Twenty Dollars on this

May 12 1860 Rec^d Ten Dollars on this

May 12 1860 Rec^d Ten Dollars on this

June 16 1860 Rec^d Ten Dollars on this

June 16 1860 Rec^d Ten Dollars on this

June 16 1860 Rec^d Ten Dollars on this

I assign this to Day Bros & Co without recourse to me

L Howell Pres of Board of Trustees

Day Bros & Co

133.90

3

Summons

State of Illinois
 Peoria County, Ill. The People of the State of Illinois, to any
 Constable of said County, Greeting:

You are hereby commanded to summon Lawrence VanBurskirk
 to appear before me at my office in Peoria, on the 22nd day of
 July 1861. at 1 O'clock P.M. to answer the Complaint of Charles B
 Day, Lucius S. Day, Larkin B. Day, & James Humphrey for a failure
 to pay them a certain demand not exceeding \$300; and hereof
 make due return as the law directs. Given under my hand and
 seal this 17th day of July 1861. Jamboy *JB* Justice of the Peace.

Endorsement on
 Summons

(Which, said Summons was Endorsed on the back as follows)
 Served on Lawrence VanBurskirk by reading to him this
 writ July 18th 1861. A R Kidwell Const
 Fees 35.

Appeal bond
 from J.P.

Know all men by these presents, That we, Lawrence Van Bus-
 Kirk and Thornton Wolf, are held and firmly bound unto
 Charles B. Day, Lucius S. Day, Larkin B. Day, & James Humphrey,
 in the penal sum of Two hundred & seventy five dollars, lawful
 money of the United States; for the payment of which, well and truly
 to be made, we bind ourselves, our heirs and administrators, jointly
 and severally, and firmly by these presents. Witness our hands and
 seals, this 29th day of July 1861. The condition of the above
 obligation is such, that whereas the said Day Brothers & Co did
 on the 22nd day of July 1861. before Jamboy a Justice of the
 Peace of the County of Peoria recover a judgment against the above
 bounden Lawrence VanBurskirk for the sum of One Hundred thirty
 five ³⁷/₁₀₀ dollars; for which judgment the said Lawrence VanBurskirk
 has taken an appeal to the Circuit Court of the County of Peoria

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aforesaid, and State of Illinois: Now if the said Lawrence
VanBurskirk shall prosecute his appeal with effect, and shall
pay whatever judgment may be rendered by the Court upon
dismissal or trial of said appeal, then the above obligation
to be void, otherwise to remain in full force and effect.

Approved before me at my office }
on this 29 day of July 1861 }
James J.P.

L. VanBurskirk
Thornton Wolf

And afterwards, to wit: on the said 23^d day of September A.D. 1861.
there was issued out of the office of the clerk of the Circuit Court of
said Peoria County a summons in words and figures following, to wit

Summons,

The People of the State of Illinois,

To the SHERIFF of Peoria County, Greeting.

We Command you to Summon Charles B. Day, Lucius S. Day,
Larkin B. Day, and James Humphrey,

if they may be found in your County, to appear before our Circuit Court on the first day of the
term thereof, to be held at Peoria, within and for the said County of Peoria on the first
Monday of October next ~ ~ then and there in our said Court to ~~answer~~
prosecute their suit against Lawrence VanBurskirk, lately appealed to our
Circuit Court, from the judgment of John A. McWay a Justice of the
Peace, within and for said County by said VanBurskirk

and make return of this writ, with an indorsement of the time and manner of serving the same, on
or before the first day of the term of said Court, to be held as aforesaid

Witness ENOCH P. SLOAN, Clerk of our said Court, and the seal thereof, at Peoria,
this 23^d day of September ~ in the year of our
Lord one thousand eight hundred and sixty One

Enoch P. Sloan
for Newton Dwyer
CLERK.

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and afterward said summons was returned into the office of the clerk of said Court. endorsed as follows, to wit:

Sheriff's Return

I have duly served this writ by reading the same to the within named Charles D. Day, Lucius L. Day, Larkin B. Day, and James Humphrey this 25th Sept. 1861.

Fee \$ 2.30

James Stewart Sheriff.

By J. M. Gill Sept.

Proceedings at a term of the Circuit Court, begun and held at the Court house in the City and County of Peoria, Illinois, on the first Monday in the month of April in the year of our Lord One thousand eight hundred and sixty two. It being the seventh day of said month. Present the Honorable Amos L. Merriman Judge of the 16th Judicial Circuit in said State, Alexander M. Day, States Attorney, James Stewart Sheriff, and Crook B. Sloan clerk, to wit:

Thursday April 17th A.D. 1862.

Charles D. Day
Lucius L. Day
Larkin B. Day
James Humphrey

vs.

Appeal from J.P.

Lawrence VanBuren

This day come plaintiffs by Cooper their attorney and the defendant by Williamson Ingersoll & M. Bullock attorneys, and it is ordered that a jury be impanelled to try this cause, whereupon come a jury of twelve good and lawful men

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to wit: Andrew Lindsay, Seth Griffin, Samuel Dimon, Wm. Spurr, Amos Reed, S. Durney, Alva Moffitt, Elijah Hancock, Jacob Silzell, John Maxwell, John Trager and Lorenzo Boon who were duly chosen tried and sworn to well and truly try this cause and a true verdict give according to the evidence and the said jury not having heard the evidence &c, were adjourned to meet the court at 9 o'clock tomorrow morning.

Friday April 18th 1862.

Charles B. Day vs.

Appeal from J.P.

Laurence Vanbushkirk

This day came the parties &c. and also come the jury sworn to try this cause, and the jury not having heard all the case, were adjourned to meet the court at 9 o'clock tomorrow morning.

Saturday April 19th A.D. 1862

Charles B. Day vs.

vs.

Appeal from J.P.

Laurence Vanbushkirk

This day came the parties to this suit by their attorneys and also came the jury sworn to try this cause, and the said jury not having heard all the case were adjourned to meet the court at eleven o'clock next Monday morning.

Monday April 21st A.D. 1862

Charles B. Day vs.

vs.

Appeal from J.P.

Laurence Vanbushkirk

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This day came the parties to this suit, and also come the jury sworn to try this cause, and the said jury not having heard all the evidence &c were adjourned to meet the court at 9 O'clock to morrow morning.

Tuesday April 22nd A.D. 1862.

Charles B. Day vs

vs.

Appeal from J.P.

Laurence Vanbuskirk

This day came the parties to this suit, and also come the jury sworn to try this cause, and the said jury not having heard all the evidence &c. were adjourned to meet the court at 9 O'clock tomorrow morning.

Wednesday April 23rd A.D. 1862.

Charles B. Day vs

vs.

Appeal from J.P.

Laurence Vanbuskirk

This day came the parties to this suit, and also come the jury sworn to try this cause, and the said jury having heard all the evidence, the argument of counsel and the instructions of the court, upon their oaths aforesaid, do say that the jury find for the plaintiffs and assess their damages at the sum of One hundred and forty one dollars & five cents, The defendant moved the court for a new trial.

Proceedings at a term of the Circuit Court of Peoria County, begun and held at the Court house in the City and County of Peoria, Illinois, on the first Monday in the Month of June, in the year of Our Lord one thousand eight hundred and sixty two.

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it being the second day of said month, Present the Hon.
A. L. Merriman Judge of the 16th Judicial Circuit in said state
James Stewart Sheriff, and Enoch P. Sloan Clerk, to wit:

Thursday June 3rd A.D. 1862.

Charles B. Day & als

vs.

Appeal from J.P.

Lawrence Van Buskirk

This day this cause came on to be heard on the motion of defendant for a new trial, and the Court not being fully advised in the premises takes time to consider.

Saturday June 14th A.D. 1862

Charles B. Day & als

vs.

Appeal from J.P.

Lawrence Van buskirk

This day this cause came on to be heard on motion of defendant for a new trial, and the court not being fully advised in the premises, takes further time to consider,

Proceedings at a term of the circuit Court of Peoria County in the State of Illinois, begun and held in the Court house in the City of Peoria, in said County and State, on the first Monday in the month of October, in the year of our Lord One thousand eight hundred and sixty two, it being the sixth day of said month Present. the Honorable Amos L. Merriman Judge of the 16th Judicial Circuit in said state, James Stewart Sheriff, and Enoch P. Sloan Clerk, to wit:

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Monday October 13th A.D. 1862.

Charles B. Day &als

vs.

Appeal from J.P.

Lawrence Van Buskirk

This day this cause come on, and the Court now being fully advised in the premises, overruled the motion for a new trial. Therefore it is considered by the court, that said Charles B. Day, Lucius L. Day, Larkin B. Day, & James Humphrey have and recover of the said Lawrence Van Buskirk, the said sum of One hundred and forty one dollars & five cents their damages aforesaid and also their costs and charges by them about their suit in this behalf expended, and that execution issue therefor.

Saturday October 18th A.D. 1862

Charles B. Day &als

vs.

Appeal from J.P.

Lawrence Van Buskirk

This day come the defendant by his attorney and prayed an appeal to the Supreme Court of this State, which is allowed on his giving bond in the sum of three hundred dollars payable to said Plaintiff, with Joseph Genochio as security to be conditioned as the law directs, which was done.

Appeal bond

Know all men by these presents that we Lawrence Van Buskirk and Joseph Genochio are held and firmly bound unto Charles B. Day, Larkin B. Day, Lucius L. Day, and James Humphrey composing the firm of Day &als in the penal sum of three hundred dollars for the payment of which we bind ourselves, our heirs,

10

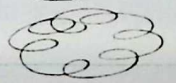
Executors & administrators jointly & severally by these presents,
 Witness our hands & seals this 18th day of October 1862. The
 condition of the above obligation is such that whereas the said
 Larkin B. Day, Lucius S. Day, and Charles B. Day, & James Humphrey
 did at the October term 1862 of the Circuit Court of Peoria County,
 Illinois receive a judgment against said Lawrence Van Burskirk
 for the sum of

Dollars & costs of suit from which said judgment
 the said Van Burskirk has prayed an appeal to the Supreme Court.
 Now if the said Van Burskirk shall well and truly prosecute his
 appeal and without delay and shall pay said judgment & all
 judgments costs damages in case the said judgment shall be
 affirmed on said appeal then the above obligation to be void
 otherwise to be and remain in full force & virtue

L Van Burskirk



Joseph Jencchio



And afterwards, to wit on the 11th day of April A.D. 1863 there
 was filed in the office of the clerk of said court, a bill of exceptions
 in words and figures following, to wit:

Bill of Exceptions

Day et al

vs

Lawrence Van Burskirk

3
3
3

Be it remembered that on this day, came
 on this cause to be tried before the court Hon. A. L. Merriam
 and a jury and the plaintiffs to maintain the issues on his
 part offered and read in evidence to the jury the following note, to wit

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\$ 200⁰⁰ Georgia November 11th 1859.

For value received, I promise to pay to the order of Lewis Howell, President of the Board of Trustees of Loan, to the American Pottery Company Two Hundred & Dollars, payable at the Banking House of J. Pulifer & Co, in Georgia, in instalments -- first instalment, 10 per cent at date, second instalment, 5 per cent on the 1st day of December 1859., and the balance in instalments of five per cent, on the first day of each month thereafter until paid.

No. 102.

L. VanDuskerk

(Endorsed on the back as follows)

Dec. 9th 1859. Rec Twenty Dollars on this

May 12 1860. Rec Ten Dollars on this

May 12 1860. Rec Ten Dollars on this

June 16 1860 Rec Ten Dollars on this

June 16 1860 Rec Ten Dollars on this

June 16 1860 Rec Ten Dollars on this

I assign this to Day Bros & Co without recourse to me

L. Howell Pres. of Board of Trustees

Day Bros & Co

133.90

to the introduction of which the defendant then and there objected but the court overruled the objection & defendant excepted. The Plaintiff then rested their case.

The Defendant then called Charles Dallance who testified as follows, It was reported all over the city that the company were going to employ 1000 men when every thing was completed. It was spoken of as a fine thing - The agents exhibited fine ware and brick made at Bennington Vt. as a specimen of what they would do - much was said about the capital they were going

I can't tell where these representations were made whether in public or in private, at first the proposition was to have subscriptions for a joint-stock Co.

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to furnish - They said "if the People would furnish a loan of \$50,000 the Company would furnish as much more capital and and would make a fine thing of it - were to employ 1000 men. I saw some brick that were made in imitation of some fine brick that the Company had on exhibition, they were attempted to be glazed but were not fit, some one said clay taken to Vermont from here proved to be first quality. The brick that I saw was an inferior article, the glaze didn't adhere, they brot some brick here that was a splendid article. I think the fault was in the brick and not in the glaze, these brick were very inferior don't know where they were burnt. I don't know how much work they have done, they put in Machinery and made some very good ware - The brick business is considered a failure. H. B. Anderson professes to own the pottery at the present time - I knew two men who were engineering the pottery company but don't know their names hearsay information is all

Lewis Howell sworn.

I cannot say whether the note sued on was assigned before maturity or after. If the note became due May 1, 1861. then I think it was assigned after maturity. I think it was assigned after May 1, 1861. The Pottery Company gave nothing for it except what appears on the face of the note. They got it as they did about \$50,000 more. I do not know what Day also gave for the note. The note was executed for the benefit of the Pottery Company & subscribers. The signature of defendant on the subscription book was then shown witness, and he stated - He was acquainted with the signature of defendant and that the signature to the subscription was his. Think the moneys raised

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by subscription were faithfully applied, about one sixth of the original plan was completed and the centre of the whole & wings. don't know the value of the improvements, Trustees took mortgage from the Pottery Company on the building & property to secure the subscriptions, they got a portion of their machinery from Vermont, they got their Engine from Rochester N.Y., it cost \$2000. The Defendant then offered & gave in evidence the subscription book.

In Consideration of the undertaking of Messrs Decius W. Clark Christop^r W. Stenton Thomas W. Johnson George W. Lascell and Amos W. Johnson, Commissioners for organizing the American Pottery Company, either by themselves, or in a corporate capacity under a Charter granted by the Legislature of the State of Illinois, 'entitled An Act to incorporate the American Pottery Company' Approved Feb. 19th 1859. to build a Pottery establishment and complete the same in Peoria according to a plan originated by the said Commissioners and hereto attached, and the further promise that the said Stenton or the said Clark shall personally devote their best energies & skill to the successful rebuilding and operation of the same, and that they will not personally connect themselves with any other Pottery manufactory except that known as the New England Pottery" to be used in preparing. Frit Saggers &c.

We the Undersigned agree to pay the said Commissioners the sums set opposite our respective names, to be paid to Tobias S. Bradley, William Tobay, Lewis Howell Elbridge S. Johnson, and Sidney Pulsifer as Trustees for the faithful appropriation in building and operating the said Pottery establishment, said

sums of money, to be loaned for the purposes aforesaid for
 the term of ten years and to bear interest at the rate of
 ten per cent to be paid annually by said Company, and the
 said Company or Commissioners shall have the right of Repaying
 said loan to the Trustees herein named or to the parties sub-
 scribing the same in instalments of ten per cent or more at
 any time within ten years that they may elect. The moneys
 hereby subscribed are to be paid to the Trustees aforesaid
 in instalments as follows, to wit: Ten per cent thereof so soon
 as the said Commissioners shall accept the conditions of this
 agreement, and the balance thereof in monthly instalments as
 the same may be called for by said Commissioners or by the
 Directors of the said American Pottery Company provided
 that no more than five per cent of said subscription shall be
 called for at one time nor shall such calls be made oftener
 than once in thirty days (after the payment of the first instal-
 ment of ten per cent as above mentioned) The said instalments
 are to be collected and paid to said Commissioners or Company
 without cost to them. The said Commissioners or the American
 Pottery Company to be organized by them are (for the purpose
 of securing the repayment of the money hereby subscribed with
 interest thereon as herein before expressed) to execute a mortgage
 to said Trustees of their Franchises and Pottery Property to be
 fully designated and described in said mortgage, and are
 further to keep said property insured for the benefit of the sub-
 scribers hereto. All proper and needful papers for the carrying
 out of the objects of this subscription and for the security of the subscribers
 hereto are to be made and executed when the said Commissioners
 shall accept the conditions of this agreement. Peoria Aug. 22^d 1859

15-

Subscribers Names	Amount.
Wm Barker	\$5.000.
Sidney Pulsifer	1.000
L. Howell	1.000
Jno D. Arnold	1.000
Tobias S. Bradley	1.000
Isaac Underhill	1.000
William Moore	1.000
H. G. Anderson (in Lumber)	1.000
A. Brebner in Lumber	1.000
Ball & Hurlburt	500
J. M. M. Ball	500
H. A. Wheeler	500
A. L. Merriman	500
P. B. Roberts	500
Jacob Frye	500
Wm Gebhardt	300
J. H. Calhoun	200
W. R. Bush in Bricks	200
Geo W. Odell Bricks	200
Floriam Haungs	300
W. Troyer	200
J. Elting	500
S. L. Schmann	100
William Brady	100
Joseph Bouzger	100
Levi Robert	100
Jno T. Lindsay	100
H. G. Farrell	100
D. C. Farrell	100

Same amount as opposite page

in mason work

Tobey & Anderson	500	Boiler
L Cleveland	350	
Huber & Goldbeck	300	
Caver Haering	200	
G A Crook	200	
Roger J Braps	200	
Mrs. Bryant	625	in Land as per bond
George Sprueck	500	
M Pettengell	500	
R Rouse	500	
S. S. Clarke	500	
W J Lathrop	500	
Walker & McAlaine	500	
Dredge & Lincoln	500	
Bryan & Stone	500	
J Durham	500	
B. S. M. Bourland	500	
Wm Truesdale	500	
George Field & Co	500	
E Smith Jr.	200	
Mrs Hamlin	500	
E Andrew	500	
J Murphy	500	
J Elting	500	
T. C. Moore	500	
Otis & Brother	500	
Phelps & Coe	500	
Jacot Hesperly	500	
E H Jack	500	

17

Notchless & Mansel	\$ 2 00
G S Ryors	2 50
Wm Peters	2 00
W Bishop	2 50
W. C. Geer	2 50
D C Green	2 00
Garrett Tront	2 00
Mathew Henneberg	2 00
Joseph W. Parish	Water Lime 1 00
Charles Kettelle	2 00
C Greenleaf & Son	2 00
C Breir	2 50
James Green	3 00
Joseph Wright	2 50
Aquila Moffitt	2 50
Adam Shall	2 50
George Haller	50
W. D. Tinal	1 00
Fred Monnighoff	\$ 1 00
Thos S. Lupton	2 50
E. N. Powell	2 00
Thomas S Davis	2 00
John Ramsay	1 00
Joseph Miller	2 00
Ward J Speck	1 00
R A Culter	2 00
J. G. Hermaker & Co	2 00
Thomas Scholey	3 00
A. F. Johnson	2 00
William Emory	2 00
Roswell Bills	3 00

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A. S. Norton	250
J B Smith	300
P H Merwin	200
A & O Freeman	300
J A Bush	200
B. F. Miles	200
E J. Lowell	200
John H Hall	200
J K Cooper	200
H W Reynolds	100
W. DeWain	200
John B Smith	100
Patrick Barrett	100
W D Allen	100
C. P. Westcott	200
S W Doup	200
A H Bryan	100
Mawhyrter & French	100
Imo Tjaden	100
A Heller	100
Wm H Davis	100
S S Guyer	100
S Keyon	100
Nelson & Garrett	100
Job Smith	250
Robert Strehlow	200
Jesse Knowlton	(paid) 200
S C Kengen & Co	200
W Krue	250
Wm Hughes	300

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Robert H. Trial	\$ 50	
L T X Barton	250	
W. H. Barton	250	
Henry Sammers	250	
John Glasen	100	
John Wrench	\$100	
John H. Wenke	\$300	
John Aiken	100	
Henry Meier	\$50	
William Kearns	50	
Stephen Pinkney	250	
Peter Blunt	250	
Jack Thurston	100	
Jacob Koerner	100	
Smith Trupe	500	
L Van Buskirk	200	
Robert Campbell	100	
C B Campbell	100	
Ann H Case	150	
Bryon Stearnes	\$100	Oliverwood Rosefield P.O.
David R Gregory	200	Tricoli
Joseph Batts	200	
H J Rugg	100	
A S Hattner	100	
T Muller	250	
H Grove	500	
C Ballance	1000	Sep 27 th /59
W H Ellis	200	at all Spring Pa \$2000
Harold & Land	500	payable in Mason Work
W Frank	\$100	

Lester Patee	\$250	
P. L. Merwin	\$100	
Hiram Jackson	\$100	
Henry W. Maffell	\$100	If below F&C Rail Road keeps
John Kin Shesser	200	
Patrick Hannan	100	
Wm. A. Gray	200	
E. G. Johnson	200	Peter Hays Brick
S. L. Neal	\$100	
B. Foster	100	
J. L. Berket	2000	in Land as per agreement
John McCarty	200	to be Pd in hauling
Jacob ^{his} _{mark} Brown	100	

We accept the conditions of the foregoing agreement
 Peoria Oct 15th 1839.

C. W. Fenton.

G. W. Lascell.

A. W. Johnson

D. W. Clark

Thos. W. Johnson

J. A. M. Johnson

David M^c Culloch sworn testified that the last instalment
 on the note fell due May 1 1861.

Eldrick Smith testified, I know Dr Johnson one of the
 men who were getting up the Pottery subscriptions. The exhibited
 ware manufactured at Bennington Vt. to show what they
 could do here. It was fine ware consisting of a variety of

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Articles - Dr Johnson & myself went to see the defendant to get him to subscribe to the loan - no subscription was signed at that time but was subsequently - We told defendant that the loan was for the purpose of building a Pottery. That it would advance property two or three times its present value. They were to employ 1200 to 1500 hands when finished and have it completed inside of two years. The Company were to put in one to 200 000 \$ if the Citizens would subscribe their amount - represented great increase of property - I think they said the material was here & they could manufacture cheaper than east. Defendant doubted - said he had been swindled before but would think about - said he wanted to know if there was any doubt about the success of the Enterprise - We represented that it could go through if \$50,000 was subscribed - I understood that they had the ability - They got up engravings of the plan & buildings contemplated - A few days after this I met defendant down town and he subscribed - He said he would subscribe if the thing would go on - I told him I had no doubt it would go right along. He was about the most doubtful of any we got hold of - He was induced to subscribe in consideration that it was a fixed fact and that the building would be located where represented. I went with Barker one of the stockholders to induce the defendant to sign the note sued on - defendant was afraid to sign it but I soon induced him to sign it. We held out the same representations as before - I have seen the ware manufactured here - The Gl ware is as good as any they brought here - They invited defendant to go and look at the samples on exhibition said to be manufactured by them at Birmingham

Wt. They had investigated our Clay & said it was all right
 and the only obstacle in the way was the want of Money
 They said they had the Skill & ability as good as could
 be found any where - That Clark was the Patentee of the
 glazing and that they were to use it here exclusively - They start
 up a concern in Wt. for infringing said Patent - I am no
 judge of Pottery ware - Don't know how many men they em-
 ployed nor cost of building & fixtures - One wing and stack
 is all that is completed - I don't think Deft read the contract
 when he signed it, but it was exhibited to him at the time
 Considerable Machinery and one side house is erected.
 The round house or centre part is commenced. The way I
 understood it at first was that the Citizens were to subscribe
 \$100,000 as stock in the concern but we found that would
 not do - The understanding was that \$30,000 was to be raised
 by subscription and the Company was to raise \$150,000
 abroad, I think the glaze a good one Anderson is the present
 financial manager Norton is the Potter and Dr Johnson
 is also there - The ware they are making now is just as good
 as any I ever saw.

H. G. Anderson testified I know some of the men connect-
 ed with the American Pottery Co & attended one public meeting
 of those interested in the enterprise - The Company stated
 if they succeeded in getting a loan they would establish a
 big thing which would add largely to the interest of the city
 were to employ 1000 men - If they could get \$30,000 they
 would furnish as much more I think - Don't know what they
 said was the capital stock - They had a good talker for
 them and represented they would turn out some millions

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of ware a year - They conveyed the idea they could monopolize the trade in the Mississippi valley - They had specimens of ware on exhibition - Very fine - represented they could make as good here - The thing was under operation 8 to 12 months - don't think they ever had full complement of hands - did not make ware as good as that exhibited - Since that time & since I have been connected with the establishment they have made as good ware as that exhibited - I commenced operations Nov 1. 1861 - I think the machinery was competent to make as good ware as that exhibited - The business cannot be learned in a day - We are learning something every day - I think \$150,000 in addition to the \$50,000 subscriptions ought to make a prosperous institution out of it - The building when completed will be five times its present size - It would require \$350,000 to complete the original design - a joint stock Co. was first contemplated - think it would take about 800 men to run the whole thing when completed - I have very good evidence that our ware will compare favorably with any thing apt to be brought in competition with it - I can sell all I can make of a certain kind of ware - I have not seen any ware made in the United States that exceeds it, and English ware only in appearance Commerce clay answers good purpose for b.b. ware - I can sell as cheap or cheaper than any other place in the United States - I employ the principal Potter Mr Clark that the old Company did - I am acquainted with this Glaze - All Potters say the glaze is first class - better than English glaze - will stand enormous heat - an essential quality - think after time the whole thing will prosper - I had nothing to do with the business before last November - I have had sole control financially since

The Pottery company have had nothing to do with it since I purchased - We get quartz opposite Utica in LaSalle Co & Clay at other points West - Coal is the heaviest item of expense, except labor - Coal does not cost half as much here as East - My materials are the same as those used by the original Co. - Mr Clark superintends the Scientific department the same as before I purchased it out - Some of their ware appears good - I have a fifth order from dealers in Quincy & Iowa who bought of the old Co, I undersell others - Can turn out about a kiln of ware a week worth \$800 - There is about 5 acres of land with the Pottery works - I think this a favorable location for the Pottery business =

A Gorton testified - about \$40,000 subscription has been paid - One wing & basement of building is completed - So far as I know all the money received has gone into the building, Machinery & fixtures - a portion of the purchase money of the premises was subscription and part premises a donation - The whole of the purchase money for the premises was 26 or 2700 dollars The rest donation - The original design was a joint stock company, a committee of citizens was appointed to go East and examine into the matter - They reported unfavorably - We then told the citizens if they would raise \$50,000 we would raise enough more to complete the works - about \$300,000 - The subscription was raised - Our design was to commence with the \$50,000 and then complete by selling stocks - The contract in the book exhibited is the only one I have any knowledge of - There are 5 or 6 acres of ground connected with the Pottery works - The note used on was assigned to Plffs in part pay for goods they

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furnished the Company to pay hands for work done in erecting the Pottery Buildings - The goods were furnished long before the notes fell due & upon the understanding that they were to be paid for in the notes of the subscribers to this loan and the assignment was afterwards made in fulfillment of that agreement = The estimate I submitted to the public meeting was correct as far as I was capable of making it - I have had extensive experience in the business = The company did business about a year - had some 20 or 30 hands The defendant then rested his case -

Eldrick Smith recalled by Plffs, said - I represented to Deft that the Pottery Buildings would be located where they were afterwards put & now are = Deft lived near the works - I told him if the concern was not located there I would see he need not pay his subscription = This was a material point in his mind - The Establishment even as now conducted is a benefit to the city =

It was here admitted by the parties that said American Pottery Company was duly organized under its Charter after the making of the subscription & before the giving of the note sued on - by the Commissioners in said Contract of subscription named and that the Pottery premises were duly insured for the benefit of the subscribers to such loan, as required by said Contract =

This was all the evidence in the case. The court then gave the following instructions to the jury asked for by the Plaintiff to which the defendant then and there excepted & objected

1st

Given

That the note read in evidence makes a good prima facie case for the plaintiffs and the jury should find for the plaintiffs the amount of principal unpaid thereon with interest on each instalment from the time the same became due & payable unless the defendant has established affirmatively a good legal defence to said note =

2nd

Refused

That the legal title to said note was never in the "American Pottery Company" and no proof of representations made by said Company or its agents to induce the execution of said note or of the falsity of such representations, can be used to defeat a recovery upon said note, unless it be also shown that Lewis Howell to whom said note is made payable, or the Board of Trustees of Loan to whom said subscription was made, concurred in said representations or assisted in misleading the defendant and procuring him to make such subscription and sign said note on the faith of such representations.

3

Given

Where a note given on time is assigned without date, it is presumed to have been assigned before maturity, and a note assigned before maturity is not liable to any defence in the hands of a bona fide holder, for value, in a suit against the maker, except fraud in procuring the signing or execution of said note = And if the jury shall believe from the evidence that the plaintiffs are bona fide holders of the note sued on in this case they should find for the plaintiffs unless fraud or circumvention in obtaining the execution of said note has been proved, or it has been satisfactorily proved that said note was not assigned till after it fell due = The jury are further instructed

that false or fraudulent representations made by the "American Pottery Company" or its agents as to the resources & prospects of said Company, if the jury shall believe from the evidence that any such were made to induce the defendant to subscribe to the loan in pursuance of which said note was given, do not constitute the fraud or circumvention in obtaining the making or execution of a note intended by the law = Unless such American Pottery Company was the certain trustee or for whose use & benefit such note was made -

- 4 If the jury believe from the evidence that the note sued on was given in pursuance of a subscription theretofore made, to loan the sum of \$200, to the American Pottery Company, or to a Board of Trustees of such loan for the use of said Company, and that said subscription was made upon and under a written contract between certain parties, as commissioners for organizing said Company, and the subscribers to such loan, of whom defendant was one, which contract purports to set forth the terms and conditions of and inducements to and consideration for such loan, such written contract is the sole & exclusive evidence of what said terms, conditions consideration & inducements were, and no evidence of prior or contemporaneous statements or representations made to induce defendant to become a subscriber to such loan is to be taken into consideration by the jury in making up their verdict =

Given

The jury are instructed that it is true that all prior and contemporaneous conversations are merged in the contract yet the jury may examine into such prior and contemporaneous conversations and representations for the purpose of ascertaining whether the contract was procured through fraud and false representations and if they find from the evidence that the contract was so obtained through fraud & false representations the contract would be void.

- 5 That the books & papers read in evidence ^{show} prima facie that the "American Pottery Company" has been duly organized, and if the jury shall find from the evidence that the note in suit was given by the defendant in part of a loan of fifty thousand dollars to be applied in the erection of Pottery Buildings for the use of said company, and if the jury shall further believe from the evidence before them, that the terms of and consideration for said loan were evidence by a written contract, and that the terms of said contract have been substantially complied with, and that the plaintiffs have given value for said note, the jury should find for the plffs, unless the jury shall further believe from the evidence that fraud or circumvention was used to obtain the signature of defendant to said contract of subscription to said loan, or to said note - and unless the jury shall also believe from the evidence that the organization of the company was a mere pretence and that there was no organization under the provisions of its charter

Given as a qualification to 4th instruction of Plffs

Given

29

6

Refused

The jury are further instructed that the deed of Trust or Mortgage read in evidence, if the jury shall believe the same from the evidence, to be given upon the premises of the "American Pottery Company" establishes a lien in favor of the subscribers to the loan to such company, which may be enforced at law or in equity, and is so far a substantial compliance with the contract for such loan between said subscribers and the commissioners for organizing said "American Pottery Company".

7

Given

That said Decius W. Clark & the others named in said loan contract, as Commissioners for organizing said "American Pottery Company" were parties capable of contracting and if they afterwards complied as individuals or as the "American Pottery Company" with the terms of said contract, this constitutes a sufficient consideration to support said loan contract, provided such contract was made in their individual capacity but not if made by them as Commissioners.

The defendant then asked the following instructions which the court gave.

Given

If the jury believe from the evidence that the note on which this suit was brought was assigned to the plaintiff after maturity and that it was obtained by fraud and false representations or without consideration they will find for the defendant.

- 2 If the American Pottery Company were not legally incorporated or if they were incorporated by the Commissioners named in the Charter for the purpose of defrauding the persons agreeing to make such loan they will find for the defendant provided the note was assigned after it became due.
- 3 If the American Pottery Company did not execute the security they were by their Contract bound to do to secure the persons making such loan then the Plaintiff is not entitled to recover in this case and the jury are further instructed that the mortgage given in evidence is not competent evidence to prove it was so secured.
- 4 The mortgage offered in evidence was allowed to go to the jury not for the purpose of proving that the loan was secured but for the purpose of rebutting the fraud alleged as a defence to the note sued on and for no other purpose.
- 5 If the jury believe that the note sued on was merely a promise to loan money to the Trustees and that it was assigned after maturity the Plaintiff cannot recover in this case any more than he proves he has sustained damages on account of said non compliance with said agreement to loan as aforesaid and would not be the amount agreed to be loaned.
- 6 The jury will weigh all the evidence in this case, and if they believe the defendant was induced to agree to make

3/

Given

Said loan by fraud and false representations? and without any consideration and that the note was assigned after maturity they will find for the defendant and if the note was assigned after any instalment thereon became due they will not find for the plaintiff as to the instalments due at the time of the transfer of said note but only for the amount of the instalments not due at the time of such assignment

7

Given

The jury are instructed that a corporation possesses no powers except what is expressly given by the act of incorporation or necessarily implied from the powers given and if the jury believe from the evidence that the contract or note sued on was not given or contracted within the scope of such powers express or implied they will find for the defendant provided they find the note on which this suit was brought was assigned after maturity.

8

Given

The jury are instructed that every contract to be binding must be mutual and binding upon all the parties thereto and unless the jury believe from the evidence that the contract entered into by the defendant in this case was not binding upon the Commissioners or the Pottery company as well as the defendant then such contract would not be binding upon the defendant.

9

In every contract there must be a promisor and a promisee in existence at the time and a subject to be contracted about and if either is wanting it would be a void contract and no recovery could be had on such a contract.

The jury found a verdict in favor of Plaintiff for \$

Verdict

That the jury find for the Plaintiff and assess the damage at. \$141.05

Samuel Dimon

Foreman

Whereupon the Defendant moved the Court for a new trial for the following reasons.

Day the

as

Motion for new trial

Vanburen

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

- 1 The Court admitted improper evidence asked by Plaintiff
- 2 The Court gave improper instructions asked by the plaintiffs
- 3 The verdict is contrary to law
- 4 It is against the evidence
- 5 It is against the instructions of the Court
- 6 The Plaintiff could only recover damages on the contract sued on to the amount proven that he sustained and not the amount agreed to be loaned
- 7 The note or contract sued on was not assignable

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But the court overruled the motion for a new trial and rendered judgment upon the verdict, to which the defendant then & there objected and excepted and prays the court to sign & seal this bill of exceptions which is accordingly done.

A. S. Merriman

BB



State of Illinois)
Peoria County S.S.

I, Enoch F. Sloan, clerk of the Circuit Court within and for said County, do hereby certify that the foregoing is a true full and complete copy of all the papers filed in the cause wherein Charles B. Day, Lucius L. Day, Larkin B. Day and James Humphrey were plaintiffs and Lawrence Vanbuskirk was defendant, and of the proceedings of said court pertaining to said cause; as the same appears on file and of record in my office. Given under my hand, and the seal of said court, at Peoria this 16th day of April in the year of our Lord One thousand eight hundred and sixty three.

Enoch F. Sloan Clerk,
Jr Newton Dwy

Assignment of Errors

SUPREME COURT OF ILLINOIS.

Third Grand Division.—April Term, 1863,

LAWRENCE VAN BUSKIRK;

vs.

CHARLES B. DAY And Others.

APPEAL FROM PEORIA.

And the said Lawrence Van Buskirk, plaintiff, comes and says: that in the record and proceedings aforesaid there is manifest error in this, to-wit:

1. The Court erred in admitting evidence to the jury on part of plaintiff below.
2. The Court gave improper instructions asked by plaintiff below.
3. The verdict is contrary to the evidence.
4. The verdict is contrary to law.
5. It is contrary to the instructions of the Court.
6. The damages are excessive.

The said judgment was given in favor of the said plaintiffs below, whereas by the laws of the land it ought to have been given for defendants below, wherefore the said Van Buskirk prays that the said judgment may be reversed, annulled, set aside, and for nought held and esteemed, and that he may be restored to all things he has lost by reason thereof.

M. WILLIAMSON, Att'y for Plff.

And now come the said Appellees, and say
that in said Record & proceedings there is no error
for which said judgment should be reversed.—
They therefore pray that the same may be affirmed.
Cooper & Holts
for Appellees.

184
L Van Buren
my
L B Day chal

Record

Filed Apr 22. 1863

J Selman
O/R

SUPREME COURT OF ILLINOIS.

Third Grand Division.—April Term, 1863,

LAWRENCE VAN BUSKIRK,

vs.

CHARLES B. DAY And Others.

APPEAL FROM PEORIA.

BRIEF AND POINTS.

On the 22d day of August, 1859, the plaintiff, Van Buskirk entered into an agreement with D. W. Clark, Fenton, Johnson, Lasselle and A. M. Johnson, as commissioners for organizing the American Pottery Company, to loan them \$200. The money was to be paid to T. S. Bradley and four others, as trustees, who were to see it faithfully appropriated, and such loan to be repaid in ten years, with interest at the rate of ten per cent. interest per annum.

This was only an agreement to loan money, and if the contract was violated by either party, the measure of damages would not be the sum agreed to be loaned but would be the damages sustained by reason of the breach of the contract. No such damage was proven, and consequently the verdict should have been for the defendant.

On the 11th day of November, 1859, the plaintiff was by false and fraudulent representations, induced to give his note for the subscription, reciting that it was given for this loan to the American Pottery Company. This note contained sufficient upon its face to show that it was only a promise to loan money—It was payable in installments and was assigned to the plaintiffs after the last installment became due, and therefore any defence was good that would have been available in the hands of the payee. The note was given for \$200, for no other consideration than that of a loan and seventy dollars paid upon it.

A promise to loan money or any other article is not assignable either at common law or under the statute. There is a wide distinction between a promise to pay money or property, and a promise to loan it, and the note containing evidence of this fact upon its face, was therefore not transferrable so as to enable the assignees to sue in their names.

The note and subscription were obtained by fraudulent representations and promises. The pottery Company or commissioners made all manner of false representations among which, were that they would raise \$150,000 to prosecute the building of the pottery, in addition to the \$50,000 loan, and that the subscribers should have mortgage on the whole premises so improved as security, for the repayment of the loan. They never advanced a dollar, and at the expiration of one year sold all out to H. G. Anderson, who still holds it. The subscribers to the loan have then no security, but upon the property erected by their own funds, and that after it has been run down with ten years use—the length of the credit.

The Court erred in giving the 4th instruction asked by plaintiff. The defence attempted to be set up was fraud and fraudulent representations in order to induce the signing of the subscription and note, and the Court tells the jury that nothing but the written contract can be looked at for that purpose. It is true the Court intends to modify that by instruction 10th. A bad instruction should never be given, even if modified by a different instruction—it has the effect of misleading the jury. The fourth instruction, therefore, should have been refused. The evil effect of a bad instruction cannot be remedied by giving one that is correct.

M. WILLIAMSON, For Plffs.

1863
Van. Bunkirk
vs
Day. Et al

Brief

Filed Apr 24 1863
S. Secord clk

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

LAWRENCE VAN BUSKIRK, }
 } *vs.* } APPEAL FROM PEORIA CIRCUIT COURT.
CHARLES B. DAY AND OTHERS. }

ADDITIONAL ABSTRACT OF RECORD, BY APPELLEE.

In addition to testimony abstracted by appellant,—

- 12 *Charles Ballance* swears: At first the proposition was to have subscriptions for a Joint Stock Co. I saw some brick made in imitation of brick exhibited by Co. They were attempted to be glazed but were not fit. Some one said clay taken from here to Vermont proved first quality. The brick I saw were inferior; glaze didn't adhere; they bro't some brick here that were splendid; I think the fault was in the brick, not in the glaze; the brick were very inferior; don't know where they were burnt; don't know how much work they have done. The brick business is considered a failure; (and his last words are,) "hearsay evidence is all."
- 13 *L. Howell* further testified: "I think the money raised by subscription was faithfully applied."
- 21 *Eldrick Smith* further testified; "*I think* they said the material was here," &c.
I have seen the ware manufactured here. The C. C. ware is as good as any they brought here. They invited def't to go and examine their samples on exhibition, said to be manufactured by them at Bennington,

- 22 Vt. The contract was exhibited to def't at the time he signed it. At first, I understood the intention to be, that the citizens were to subscribe \$100,000 as stock, but we found that would not do.

I think the glaze a good one. Anderson is the present financial manager. Fenton is the Potter, and Dr. Johnson is also there. The ware they are making now, is as good as any I ever saw.

- 23 *H. G. Anderson* further testified: Since I have been connected with the matter, they have made as good ware as exhibited. I commenced Nov. 1, '61; think the machinery was competent to make as good ware as that exhibited. The business cannot be learned in a day; we are learning something new every day. . . . A joint stock Co. was just contemplated. I think it would take about 800 men to run the thing when completed. I have good evidence that our ware will compare favorably with any bro't in competition; can sell all I can make of a certain kind. Have not seen any made in the U. S. that excels it, and English ware, only in appearance. Commerce clay answers good purpose for C. C. ware. I can sell cheaper than any other place in the U. S. I employ the same principal Potter old Co. did. Am acquainted with the glaze; old Potters call it first class, better than English; it will stand enormous heat, an essential quality. Think after a time the whole thing will prosper. I had nothing to do with the business before last Nov.; have sole control financially since.
- 24 We get quartz opposite Utica in LaSalle Co., and clay at other points west. Coal is heaviest expense except labor, but does not cost half as much as East. My materials are same used by old Co. Mr. Clark superintends scientific part, same as before I purchased. Some of their ware appears good. I have a fifth order from dealers in Quincy and Iowa, who bought from old Company. I undersell others. Can turn out a kiln a week worth \$800. I think this is a favorable location for the Pottery business.

- A Fenton* testified: About \$40,000 subscription has been paid. One wing and basement is done. So far as I know, all the money received has gone into the buildings, machinery and fixtures; a portion of the purchase money of the premises was subscription, and part of the premises a donation. The whole purchase money for premises was 26 or 2700 dollars—the rest donation. The original design was a joint stock Co. A committee of citizens examined the matter and reported unfavorably. [We then told them if they would raise \$50,000 we would raise enough more to complete the works, about \$80,000. The subscription was raised. Our design was to commence with \$50,000 and then complete by selling stock.] The contract in the book exhibited is the only one I have any knowledge of. The note sued on was assigned to pl'ffs in part pay for goods they furnished the Co. to pay hands for work done in erecting the Pottery buildings. The
- 25 goods were furnished long before the notes fell due, and upon the understanding that they were to be paid for in the notes of the subscribers to this loan, and the assignment was afterwards made in fulfillment of that agreement. The estimate I submitted to the public meeting was correct

as far as I was capable of making it. I have had extensive experience in the business.

Eldrick Smith, re-called by pl'ff, said: I represented to def't that the Pottery buildings would be located where they were afterwards put and now are. Def't lives near the works. The location of the Pottery there was a material point in his mind. The establishment even as now conducted is a benefit to the city.

26 The second instruction asked by plaintiffs, was refused.

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5th. The instruction given for plaintiffs is this. That the books and papers read in evidence show prima facie, that the "American Pottery Co." has been duly organized, and if the jury shall find, from the evidence, that the note in suit was given by defendant in part of loan of \$50,000, to be applied in the erection of Pottery buildings, for the use of said company, and if the jury shall further believe, from the evidence before them, that the terms of, and consideration for such loan, were evidenced by a written contract, and that the terms of said contract have been substantially complied with, and that the plaintiffs have given value for said note, the jury should find for the plaintiffs, unless the jury shall further believe, from the evidence, that fraud or circumvention was used to obtain the signature of defendant to said contract of subscription to said loan, or to said note; and unless the jury shall also believe, from the evidence, that the organization

of the company was a mere pretence, and that there was no organization under the provisions of its charter.

28 Defendant's instructions :

1st. If the jury believe from the evidence that the note on which suit was brought, was assigned to plaintiff after maturity; and was obtained by fraud and false representations, or without consideration, they will find for the defendant.

30 2d. If the American Pottery Company were not legally incorporated, or if they were incorporated by the commissioners, named in the charter, for the purpose of defrauding persons agreeing to make such loan, they will find for the defendant, provided the note was assigned after due.

5th. If the jury believe that the note sued on was merely a promise to loan money to the trustees, and that it was assigned after maturity, plaintiff cannot recover, in this case, any more than he proves he has sustained damages on account of said non-compliance with said agreement to loan, as aforesaid, and would not be the amount agreed to be loaned.

31 6th. The jury will weigh all the evidence in this case, and if they believe defendant was induced to agree to make said loan by fraud and false representations, and without any consideration; and that the note was assigned after maturity, they will find for defendant. If the note was assigned after any instalment thereon became due, they will not find for plaintiff, as to instalments due at time of transfer, but only for instalments not due then.

7th. The jury are instructed that a corporation possesses no powers except those expressly given by the act of incorporation, or necessarily implied from the powers given; and if the jury believe from the evidence that the contract, or note given, was not given, or contracted within the scope of such powers, expressed or implied, they will find for defendant provided they find the note in suit was assigned after maturity.

8th. The jury are instructed that every contract, to be binding, must be mutual, and binding upon all the parties thereto; and unless the jury believe, from the evidence, that the contract entered into by defendant, in this case, was not binding upon the commissioners, or the Pottery Company, as well as the defendant, then it would not be binding upon the defendant.

9th. In every contract there must be a promisor and a promisee in existence at the time, and a subject to be contracted about, and if either is wanting it would be a void contract, and no recovery could be had on it.

COOPER & MOSS,
Attorneys for Appellee.

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COOPER & MOSS,
Attorneys for Appellee.

184
 Van Buskirk
 vs.
 Day & Co.
add^d Abstract

Filed May 12, 1883
 L. Leland
 Clerk

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Declaratory instructions:

under the provision of its charter, and that there are no objections

and that the defendant

and the plaintiff are assigned to judgment upon matters; and upon

the fact that the plaintiff is not a party to the case on which

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and that they were introduced by the defendant and that the plaintiff

51. If the American Bank Company were not legally incorporated

will be for the plaintiff's benefit and the same are assigned after the

and that the plaintiff is not a party to the case on which

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1. Lawrence Van Buxkirk } Supreme Court 1863
vs
Charles B Day et al }

Plaintiffs argument

This suit was originally commenced before a justice of the peace to recover a balance due upon a note copied in the abstract. This note was made payable to Lewis Howell president of the board of trustees ^{of loan} to the American Pottery Company in installments the first installment of ten per cent at the date of the note (Nov 11 1859) and balance in installments of five per cent on the first day of each month thereafter. This note was assigned after the last installment became due so the plaintiffs below can not claim to be bona fide assignees of the note. Lewis Howell the payee of the note swears that the note was assigned after May 1 1860 at which time the note and each installment thereon was due. This then leaves the assignees of the note in no better position than the payees of the note if the suit had been brought in the name of the payees for their own

2. benefit. The law is too well settled to require citation of authorities that when suit is brought by the assignee after maturity that all defences legal or equitable that would be available against the payee would also against the assignee.

It then was proven by the ~~plaintiff~~ defendant below beyond any controversy that the agreement of the defendant was only a loan. The contract ^{of subscription} offered in evidence signed by the defendant below (on the persuasion of Smith and Johnson) contains these words. "Said sum of money to be loaned for the purposes aforesaid for the term of ten years and to bear interest at the rate of ten per cent to be paid annually by said Company". This was the subscription signed by the defendant and others =

What liability then does a man assume that agrees to loan money or any other article? If he violates his contract is he liable for the value of the property or sum of money agreed to be loaned. If so then the action must be in the nature of an action to enforce specific performance of the contract and not to recover damages for the non performance.

3.

Suppose the suit had been brought upon the Contract of subscription instead of the note. Could the plaintiffs below have recovered? and if not what better Condition are they in when it is proven that the note in suit was not given upon Any other Consideration than the subscription = If I agree to lease a farm for ten years for a stipulated rent or compensation and break my contract or refuse to deliver possession the measure of Damages is not the value of the farm but would be the damages sustained by reason of such breach. So if I agree and bind myself to loan or hire a horse and afterwards violate my contract the obligee in an action against me could not recover the value of the property but the amount of damages sustained.

This is the universal rule upon all contracts and I can not see any reason that takes a contract to loan money out of this general rule.

In order to recover also as the plaintiffs below took the note with notice of all defenses and equities against it as they took it after maturity the burden of proof was upon them to show compliance on

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the part of the Company or commissioners for whose benefit the loan was to be made. The Commissioners or company agreed as the evidence shows when this note was given to raise \$150,000 dollars themselves and to have the pottery complete in two years - work from 1000. to 1500 hands build an establishment consisting of six wings and a centre - These representations were made to defendant at the time of his subscribing by Smith and one of the Commissioners to induce him to subscribe and repeated at the time the note in suit was executed. ^{nothing but one wing was ever built and centre commenced} The further consideration for the loan was that it was to be secured upon the pottery buildings which were to cost not only the \$50,000 subscribed by the citizens but also with \$150,000 additional to be raised by the Commissioners. Under such representations the deft below was induced to subscribe and execute this note - and the representations ^{and promises} being made to induce him to execute the note may be enquired into. One strong inducement for any body to loan money is that it will be aban-

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 dantly secured - and this would
 have been the case here if the Com-
 missioners had carried out their
 part of the contract - The defend-
 ant executed the note under such
 representations and paid each
 installment as it matured until
 the Commissioners refused to raise
 a dollar of the portion stipulated
 to be raised by them and actually
 sold out the entire thing to H. G. Ander-
 son ^{and put it out of their power to carry out their contract} - The Commissioners having been
 engaged at the enterprise about one year
 as is shown by the testimony - Anderson
 testifies that the pottery enterprise was
 in operation from 8 to 12 months when
 he purchased it and that he commenced
 Nov 1 1861. ^{Heyton} ~~Baker~~ who was one of the
 Commissioners mentioned in the subscrip-
 tion says that the Company did business
 about a year and worked 20 to 30 hands
 now as not a dollar was ever expended
 but the amount subscribed by the citizens
 and that under such false and fraud-
 ulent representations as shown by the
 evidence and then sold out to Anderson
 it is only fair to presume that the security
 at the end of ten years when the loan

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matures would be utterly worthless even if a mortgage had been given upon the property to secure the same which was not done - The Plaintiffs below were obliged to show this was done in order to recover as the property had passed into the hands of H. G. Anderson by purchase - As the record shows no mortgage it is only fair to presume none was ever given and is forever out of the power to have ~~the~~ of the Commissioners or company to secure it according to the contract of subscription - and which is stipulated therein to be done by them - It may however not be amiss to remark that they offered an instrument in evidence to prove compliance in this respect but was ruled out by the Court below on the ground that it was not a mortgage nor a lien upon the premises and that Anderson the purchaser took the premises discharged of any lien whatever. There has been then no compliance by the Company or Commissioners with the written subscription signed by the defendant and they have put it out of their power to comply with their

7. Contract in any respect - And even if there were no fraudulent or false representations in the case they should not be allowed to recover - The assignee with notice assume all the burdens that lie upon the payee to prove; otherwise it would be advantageous to assign a note after maturity and would throw a heavier burden upon the defendant - The rule of law therefore requires that the assignee shall prove compliance wherever the payee would have to do the same thing - Now when it is shown that no security whatever was given for this loan and none ever can or will be given it is inequitable and unjust to compel the party to make the loan when the written stipulation by which he contracted to make the loan provided that he should have certain security and ~~he~~ ^{the other party} afterwards put it out of his power to give such security. The plaintiff never agreed to make any loan but on condition expressed in the written subscription that it should be secured as therein stipulated and when the other party has put it out of their power voluntarily to give the security

The plaintiff ought ~~not to~~ to be discharged from his contract to make the loan - The truth is the whole thing was "one grand swindle on a big scale" and was sold out by the commissioners who put the price in their pockets and left after transferring ~~all~~ the notes in suit with others.

The pottery was to be complete in two years from the date of the subscription and was to be composed of six wings and a centre - Only one wing was completed and centre commenced when they sold out - On the whole of this vast establishment the plaintiff and other subscribers were to be secured and be^{re} paid in ten years with ten per cent interest - This would have been a good investment - But under the circumstances in proof it was certainly a very bad one and if the plaintiff would never have given a thought to such an investment as that shown by the evidence - The fact is it shows a total failure of consideration for his promise to loan & it shows false and fraudulent representations that either of which ought to discharge him

9. from his contract

If the note was merely an agreement to loan money as I insist it was and shown upon the face of the note at least sufficient to put the assignee upon inquiry then it was not assignable and should have been excluded - It was not a note to Lewis Howell nor was it intended to be by the parties at the time of its execution and therefore Howell could not sell assign or transfer it. And being assigned after maturity the assignee even if he did not have notice would not be protected - The Supreme Court of Illinois 20 Ills page 635 use this language "The appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate and not an individual transaction; to which must be added the circumstance that the Cashier is the drawer and the teller the payee" "The evidence therefore predominates on the face of the bill predominates in favor of its being a bank transaction. But it is enough for the defendants

10.

to establish ~~to establish~~ that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was one or the other" - The above is quoted from 5 Wheaton R 326 and approved by our Supreme Court and ~~was~~ if followed and I think it sound law shows that not only may the face of the instrument be consulted to determine the liabilities of the plaintiff and defendant but that extrinsic evidence may be resorted to in doubtful cases - There then is evidence to show that the note never was the note of Howard He swears it was executed for the benefit of the pottery Company and that he never had any interest in it It was in fact a note payable to them and he had no right to assign it for two reasons First because on its face it showed it to be only a promise to loan money; and ~~second~~ not assignable and second The legal title was not in him to assign

In relation to the instructions I would say that by mistake the second in -

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struction was copied in the abstract instead of the fourth. The second instruction was refused and should not have been Copied at all

The fourth instruction is clearly bad under the defense that was set up if. Where the defendant relies upon either fraud or failure of consideration he must necessarily go outside of the written Contract. In Cases of fraud All the Circumstances are open to enquiry without which the grossest frauds might be perpetrated and there never could be relief unless the fraud can be shown. It was therefore error in the Court to instruct the jury that the written Contract furnished all the evidence for their consideration and this was not cured by giving one afterwards telling them differently.

This being done in this case I think the Court committed an error. An instruction calculated to mislead the jury should never be given nor should one ~~that~~ that even though it state the law correctly if it is not applicable to the Case

M. Williams

appeals will file written argument
in a few days - Dec 19/63
copy

for p. 11

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Van Burskirk
Day ^{vs} et al
Plffs argument

Filed May 5th 1868.
Leland
Clerk
mm