No. 8659

Supreme Court of Illinois

Spencer S. Eubank

---

vs.

President & Trustees, Town of Ashley

In Sup. Court. Pt. Gr'd Division.

Spencer S. Ewbanks, Plf in Error.
vs } Error to Washington County
The President Trustees of
the Town of Ashley, Defdts in Error.

The Clerk will please
issue Writ of Error in the above entitled
cause, directed to the Clerk of the
Circuit Court of Washington County.

W. H. Green
Atty for Plf. in Error.

[8659-1]

16

Eastbanks

v

The Pres[t] & Trustees

&c

Praecipe

Filed July 19. 1864

A. Johnston Cl[k]

Spencer & Eubank Plff in Error
vs
The President & Trustees of the
Town of Ashby

Written argument of Defendant

The transcript of the Justice
shows that Warrant was issued
on the 24 day of April 1863
& trial on the 27 June Court
& year which is as good
evidence as to the time suit
was commenced as the date
of the warrant Respectfully
J. M. Cochran
atty for Def
in error

[illegible]

16.

Spencer S Eubank

vs

President & Trustees of the Town of Ashley

Written argument of Def in Error

Filed, Nov. 18. 1864.

N Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Sheriff of Washington *County.*

Because, *In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of* Washington *county, before the Judge thereof between*

President and Trustees of the Town of Ashley *plaintiffs and*

Spencer S. Ewbanks *defendant it is said that manifest error hath intervened to the injury of said* Spencer S. Ewbanks *as we are informed by* his *complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at* Mount Vernon, *before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said* President and Trustees of the said Town of Ashley

that they *be and appear before the justices of our said Supreme Court, at the next term of said Court, to be holden at* **Mount Vernon,** *in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if* they *shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said* President & Trustees *notice together with this writ.*

WITNESS, *the Hon.* P. H. Walker *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* Nineteenth *day of* July *in the year of our Lord one thousand eight hundred and* Sixty four.

Noah Johnston
Clerk of the Supreme Court.

[8259-3]

No 16

SUPREME COURT.

First Grand Division.

S. S. Ewbanks

Plaintiff in Error,

VS.

President & Trustees of Town of Ashley

Defendant in Error.

8657

SCIRE FACIAS.

FILED.

Sheriff Fees	
Service	0.50
10 Miles	50
Returning	10
	1.10

The writ of Error issued and filed in this Cause, is made a Supersedeas, and as such, is to be obeyed by all concerned.
July 19 - 1864 - N. Johnston Clk

Served July 26th 1864 the within writ by reading to Thomas C Greaves President of the Town of Ashley.
James Gannon Sheriff of Washington County Ills

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Washington Greeting:

Because, *In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of* Washington *county, before the Judge thereof between*

President & Trustees of the Town of Ashley *plaintiffs and*

Spencer S. Eubanks *defendant it is said manifest error hath intervened to the injury of the aforesaid* Spencer S. Eubanks *as we are informed by his complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid; with all things touching the same; under your seal, so that we may have the same before our Justices aforesaid at* **Mount Vernon,** *in the County of Jefferson, on the* 1st Tuesday after the 2d Monday in November *next, that the record and proceedings, being inspected, we may cause to be done therein; to correct the error, what of right ought to be done according to law.*

WITNESS, *the Hon.* P. H. Walker *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* Nineteenth *day of* July *in the year of our Lord one thousand eight hundred and* Sixty four.

Noah Johnston
Clerk of the Supreme Court.

L8659-47

16

SUPREME COURT.

First Grand Division.

S. S. Ewbanks

Plaintiff in Error,

vs.

President & Trustees of Town of Ashley

Defendant in Error.

WRIT OF ERROR.

Issued, Made a Supersedeas and FILED July 19- 1864.

N. Johnston Clk

This writ of Error is made a Supersedeas, cause is to be obeyed accordingly.

July 19- 1864.

N. Johnston Clk

State of Illinois }
Alexander County } ss
City of Cairo }

This Affiant being duly sworn deposes and says he knows William H. Green, and knows him to be a respectable man. and that he owns several Thousand Dollars of real Estate in Cairo Illinois, and is informed he owns several thousand dollars worth of real Estate in Massac County Illinois. Not further says.

David J. Baker Jr.

Sworn to and subscribed before me this Eighth day of July A.D. 1861.

Alex. H. Irvin Clerk of the Court of Common Pleas of the City of Cairo, Illinois

{B459-4A}

Affidavit

Evebanks
vs
Ashley.

Affidavit

Filed July 19-1864.
A. Johnston Clk

Know all men by these Presents that I, Spencer S. Ewbanks do hereby authorize and Empower William H. Green, as my Attorney in fact, to sign my name to a Certain Bond to be filed as required by law upon application for a Supercedeas in the case of Spencer S. Ewbanks, Plf in Error vs. The President & Trustees of the Town of Ashley.

Signed & Sealed this 25 day of June A D 1864.

S S Ewbanks Seal

Witness R Ford

[8659-5]

Eurbanks

vs

Ashley.

Power of Attorney -

Filed July 19- 1864.

N. Johnston Clk

Know all men by these presents that we, Spencer S. Ewbank and William H. Green are held and firmly bound unto the President & Trustees of the town of Ashley in the penal sum of One ($100) Hundred Dollars lawful money of the United States, which we bind ourselves, jointly and severally, and our heirs Executors and assigns to pay or cause to be paid upon failure of the following Condition:

Whereas the above bounden Spencer S. Ewbank has sued out a writ Error from the Clerk's Office of the Third Grand Division of the Supreme Court of the State of Illinois, to correct Errors in a certain judgment rendered against the said Ewbank and in favor of said President and Trustees of the town of Ashley in the Circuit Court of Washington County, State of Illinois, at its April Term A.D. 1864: Now if the said Ewbank shall well and truly prosecute said Writ of Error or comply with to effect, or shall pay whatever judgment may be rendered or whatever order may be made by the said Supreme Court upon the trial of said writ, then the foregoing obligation is to be void, otherwise, to remain in full force & effect. Signed Sealed the 19th day of July A.D. 1864

Spencer S. Ewbank, by W.H. Green his Atty in fact. (Seal)

William H. Green. (Seal)

Taken July 19. 1864.
N. Johnston Clk

{9459-E}

16

S. E. Ewbanks
vs
President & Trustees
of Town of Ashley

Bond.

Filed July 19-1864
N. Johnston Clk

Paid by
W H Green $11-50

[2659-I]

Abstract

Spencer S. Ewbanks
vs
The President & Trustees of the Town of Ashley.

Error to Washington County.

Page 1 Motion of defendant below (Ewbanks) to quash Writ — overruled.

P. 2 Writ appears a Capias, issued by a J.P. against Ewbanks, Plf. in Error, in an action of debt, wherein Defts in Error were Plaintiffs, for violating an Ordinance of the Town of Ashly. The Capias was issued without Affidavit, & appears dated Apl 24 1862, while the ordinance said to be violated was passed August 4th 1862

P.s 3 & 4 Contains transcript from Justice's Docket, & shows that Plf. in Error moved the Court to dismiss the suit because the Writ was issued without an affidavit.

P. 5. Appeal Bond.

P 6 & 7 & 12. The Bill of Exceptions. — Plaintiffs below proved by one Henry Cole that the town of Ashly was incorporated town &c that the title of said incorporation was The Pres dt & Trustees &c, and that a certain Book presented by Plaintiffs below was a Minute Book of said incorporation in which was kept the minutes and Ordinances of the Board. — Plaintiffs below also proved by one J. M. Durham

YB659-87

that he had prepared a certain Ordinance, Ordinance No 11, which was passed by the Board, & signed by the Pres.dt & Clerk, and said Ordinance, with others was Taken to the printing Office & printed, and printed Copies of the Ordinance No 11 posted up &c, & that the Clerk pasted the printed Ordinances in a Book then held by the Witness, in which the Ordinances of said Board were kept — that said Board treated the said ordinances so pasted as their Ordinances" but made no Ordinance recognizing them as such, or ordering them to be printed — that the authority to print was verbal, & that Ordinance No 11 was a true Copy of the original manuscript Ordinance which was still at the Printing Office.

Plaintiffs below then offered in Evidence a Book Containing a "printed Copy" of Ordinance No 11, to the introduction of which Defdts below objected, Objections overruled & printed Copy read.

Page 12 Copy of the "printed" Copy of Ordinance No 11.

P. 12 & 13. Plaintiff below re-introduced Cole, who sworn that Defts below hauled 16 cords of wood & corded it up within the limits of the Town of Ashley.

This was all the Evidence

over

Motion for new Trial, overruled and excepted to

Errors assigned.

1 The Court Erred in refusing to quash the Writ & dismiss the suit.

2. The Court Erred in admitting as evidence a printed Copy of an Ordinance, when the original was in existence

3. The Court Erred in rendering judgment agst ~~Plff~~ deft^{t} below

4. The Court Erred in refusing to grant a motion for new trial.

Wherefore Plff in Error prays &c

W H Green,
Atty for Plff in Error.

Brief.

1 The Capias by virtue of which service was had upon Defdt, below was a "Warrant", authorized by 22nd Sec of Chap. 59 R. S. — it is a Statutory Writ, & is void absolutely unless issued as the Statute directs. In this case there was no affidavit filed. This case is different from that of Wann vs Mc Foon II Scam. 74. There Deft. gave bail; here Defdt, below was in Court by force & by virtue of a void Writ. He appealed to the Circuit Court that he might be released, & failing he sues out his Writ of Error for the same purpose.

2 The printed Copy of the ordinance should not have been

[8-59-9]

admitted in Evidence. The Witness Durham swears he was Attorney for Plfs below — that Ordinance No 11, was signed in manuscript by the President & Clerk of the Board of Trustees, and the manuscript taken to the Printing Office & left there. The original could have been produced. — The Acts of the Gen. Assembly when printed only become evidence by virtue of a law making them Evidence; — so of the printed Reports of the Supreme Court. Without a law making printed Copies Evidence, the original Rolls & Opinions, or duly certified Copies alone would be evidence. Can there be a different rule governing the enactments of an incorporated town? — Witness said the Board treated the printed Copies pasted in a book as "their Ordinances." If the Supreme Court should use a written & unexemplified Copy of their Opinion & "treat" it as their Opinion, as matter of convenience would that fact make such Copy Evidence in a Court of justice? — In Tefft vs Doze V Gilman 435 the Court intimate that the original Ordinance must be produced. — In Sec 8 Chap 26 II R.S. it is provided that "such ordinances" shall be "in writing". Whence comes the power to enforce printed ordinances?

There is no proof that a copy of the ordinance No 11 was, was "set up" in three of the "most public places" of the town of Ashley. The witness, Durham only says he set up the Copy in "three or four places". Vide Sec 7 — Cap. 26 III R.S. — Without strict compliance

with the Gen. incorp. Laws, the Ordinances of a Town incorporated under such Gen. Laws are inoperative. — Witness may have pasted the Copies in three of the least public places. It seems in Deft vs Size that the Court deemed it necessary to make proof of the publication of the Ordinances of a Town in the manner provided by Law. —

3 Ordinance No 11 (Copied on p 12 of the Record) does not establish any offences. It declares what, in certain cases will amount to a nuisance, & then provides that any one being found guilty of violating this Ordinance shall be fined &c.

4 The Court had not sufficient evidence before it to support a Verdict, & should have granted a new trial. The only Evidence to prove a violation of the Ordinance by Plf in Error was that of the Witness, Cole. His evidence was only that Plf in Error "hauled sixteen Cords of wood and Corded it up within the Corporate limits of the Town of Ashley" and "admitted it was his wood." The Ordinance No 11. declares that "placing wood over ten cords in quantity" "in a manner deleterious to the health of the People &c, "or offensive to them in their business avocations" is a nuisance. The qualifying words, by just construction and by the punctuation, do refer to the "placing of wood" as well as to "keeping a butcher Shop". They must refer to the "placing of wood", else the Ordinance is inoperative as

[2659-48]

against Plf. in Error, because the "placing of wood" is a right, of which Plf. in Error can not be divested by mere ordinance, unless such "placing" is declared and proven to be "hurtful" to some one, or to the Public. But in this case there was not one word of proof showing, or even tending to show, the injurious or hurtful character of the act of Plf in Error in "hauling 16 cords" of his own wood into the Corporate limits of the town of Ashley. This was a fatal deficiency in the evidence; the defendant below should have been acquitted.

There was another fatal deficiency in the Evidence, that must reverse this case. The Evidence no where shows when the alleged nuisance was Committed. The Witness, Henry Cole, testified that the wood was hauled and corded up before the Commencement of the suit. But there was not one word in his testimony, or that of any other witness, even tending to show that the alleged nuisance was Committed after the passage of the ordinance.

W. H. Green,
Atty for Plf. in Error.

16

S. S. Eustaner
Plff in Error
v
Pres. & Trustees of the
Town of Ashby

Abstract & Brief

Julius July 19. 1864.
N. Johnston Clk

SUPREME COURT OF ILLINOIS---FIRST GRAND DIVISION.

NOVEMBER TERM, A. D., 1864.

ABSTRACT.

Spencer S. Eubanks,
VS.
The President & Trustees of the town of Ashley. } Error to Washington County.

Page 1. Motion of Defendant below (Eubanks) to quash writ---overruled.

Page 2. Writ appears a Capias, issued by a J. P., against Eubanks, Plaintiff in Error, in an action of debt, wherein Defendants in Error were Plaintiffs, for violating an Ordinance of the Town of Ashley.—The Capias was issued without affidavit, and appears dated April 24. 1862, while the Ordinance said to be violated was passed August 4th, 1862.

Page 3 & 4. Contain Transcript from Justice's Docket, and shows that Plaintiff in Error moved the Court to dismiss the suit because the Writ was issued without an affidavit.

Page 5. Appeal Bond.

Page 1011-12. The Bill of Exceptions.—Plaintiff below proved, by one Henry Cole, that the Town of Ashley was an Incorporated town, &c., and that the title of said Incorporation was, "The President & Trustees," &c., and that a certain book, presented by Plaintiff below, was a Minute Book of said Incorporation, in which were kept the Minutes and Ordinances of the Board. Plaintiff below also proved, by J. M. Durham, that he had prepared a certain Ordinance, Ordinance No. 11, which was passed by the Board, and signed by the President & Clerk, and said Ordinance, with others, was taken to the Printing Office and printed, and printed copies of the Ordinance No. 11 posted up, &c., and that the Clerk posted the printed Ordinances in a Book, then held by the witness, in which the Ordinances of said Board were kept—that "said Board treated the said Ordinances so posted as their Ordinances," but made no Ordinance recognizing them as such, or ordering them to be printed—that the authority to print was verbal, and that Ordinance, No. 11, was a true copy of the original manuscript ordinance which was still at the printing office.

Plaintiffs below then offered in evidence, a Book, containing a "Printed Copy" of Ordinance No. 11, to the introduction of which Defendant below objected—objection overruled and printed copy read.

Page 12. Copy of the "printed copy" of Ordinance No. 11.

Page 12 & 13. Plaintiff below re-introduced Cole, who swore that Defendant below hauled 16 cords of wood and corded it up within the limits of the Town of Ashley. This was all the evidence.

Motion for new trial overruled and excepted to.

ERRORS ASSIGNED.

1. The Court erred in refusing to quash the Writ and dismiss the suit.
2. The Court erred in admitting as evidence a printed copy of an Ordinance, when the original was in existence.
3. The Court erred in rendering judgment against Defendant below.
4. The Court erred in refusing to grant a motion for new trial.

Wherefore Defendants in Error prays, &c.

W. H. GREEN, Attorney for Plaintiff in Error.

BRIEF OF PLAINTIFF IN ERROR.

Teft, vs. Size, 5 Gilman. page 435.
Revised Statutes, Chap. 25, Sec. 5:
Revised Statutes, Chap. 25, Sec. 7.
Revised Statutes, Chap. 59, Sec, 22.

[81-59-12]

28 Ill. 62
5 Gilman 435

Ewbank

Presdt Town of Ashly

16

Abstract

Filed, Nov. 16-1864.

N. Johnston Clk

SUPREME COURT OF ILLINOIS----FIRST GRAND DIVISION.

NOVEMBER TERM, A. D, 1864.

Spencer S. Eubank, Plaintiff in Error,
VS.
The President and Trustees of the town of Ashley, Defendants in Error.

BRIEF OF POINTS AND AUTHORITIES FOR DEFENDANTS IN ERROR.

This was an action of debt, commenced by the Defendants in Error, before L. F. Blankinship, Police Magistrate of the town of Ashley, and judgment was for the Plaintiff for $20, and appeal taken to the Circuit Court and judgment for the Plaintiff for $10 An appeal from the Justice of the Peace is assimilated to a suit in equity—Conley, vs. Good—Bre, 96. In appeals no exceptions can be taken to the form or service of Summons, or any proceeding before the Justice, but the court shall hear and determine in a summary way, according to the justice of the case. See 66, Chap.. 4-9, Rev. Statutes, Bines, et al, vs. Proctor, et al, 4 Scam. 175 6. Rogers, vs. Blanchard, 2 Gilm. 335, Ballard, vs. McCarty, 11 Ills,, 401. Hough, vs. Larned, 12 Ills., 456, Vaughn, vs. Thompson, et al, 15 Ills., 40. An action for the violation of an ordinance is in remedy debt, but in fact for the recovery of a tort—Trustees, vs. Holland, 19 Ills., 271. Sec. 15, Article 13, State Constitution has no application as tort's—14 Ills., 415. The custom of arresting for violation of municipal ordinances without affidavit, or even without warrant, is general and universal, and is in its nature 'sui generis,' wholly police, and seperable, from criminal and civil jurisdiction, and cannot conform to the practice of either, and to be effective must be summary. The office of Police Magistrate is of limited, though common law jurisdiction, as conservator of the peace, and as such will issue warrants on information of any police officer or take cognizance of his own knowledge, and municipal corporations have the power to make their own form of warrants, and for an immediate arrest, and also to make any ordinance, not repugnant to the Constitution of this State nor the United States. Sec. 34, Act to amend Charter of Springfield. Sess. Laws 1859 p. 278, Laws 1849, p. 224, give all municipal corporations the power and privileges of the charters, Springfield and Quincy and all amendatory laws thereto. (Sess. Laws 1840, p. 6-113, Springfield and Quincy charters.) The Trustees of the town of Ashley, in ordinance No. 1, prescribe the form of warrant, and for the immediate arrest of the party upon information of Attorney or oath of any other person.

As to the second assignment of error, the proof is that the ordinance upon which suit was brought was on the 4th day of Aug., 1862,—was regularly passed by the Board, with a new series of ordinances signed by Clerk and President, and sent with other ordinances to the printing office, and was printed, and three or four printed copies were posted up in the corporate limits, and a copy of the printed ordinance was pasted in a book in which the minutes and ordinances of the town were recorded by the Clerk and treated by the Board as their ordinances, among which was said ordinance No. 11. The book also was in proof and identified—and also that it was a true copy of the original. There is no Statutory law specifying how ordinances shall be passed, whether signed by either Clerk or President of Board. If they are recorded or printed either in book or pamphlet they are 'prima facie' evidence in all courts in this State. [Laws above] It is the custom of the Clerk of Boards of Incorporations for municipal purposes, to record the ordinances passed by the Board, the act of the Clerk becomes the act of Board by adoption, and is usually regarded as the original, somewhat as the engrossed laws of the Assembly of the State. And is there any valid reason why the Board cannot adopt a printed copy for the record or original. Would not such a conclusion comport with the progress of the age in the use of mechanic aids, and conform to the practice of printed or engraved signatures and seals, and would, in fact, be more certain and beneficial? It would be absurd to require a person to read over hundreds of pages of written matter to hunt up some pigmy matter when the same can be ascertained in a few moments when printed. It certainly will not be contended that it is necessary to have both record and original. The evidence is a substantial if not a literal compliance with requirements of the laws.

The Bill of Exceptions does not disclose the nature of the objections of the Plaintiff in Error to the introduction of the ordinance in evidence; this it should specifically do—and his objections should have been made in the court below or otherwise they are like a pit-fall or rebel torpedo to the Defendant in Error.—Had they been there made the witness might have answered that the ordinance was posted up in three of the most public places in the corporation, and that the original could not be found upon vigilant search, and thus avoided the [redacted] dry, [redacted] technicalities contended for. For aught the Defendant in Error knew before he came into this court the Plaintiff's general objection to the ordinance was that it was unconstitutional or void both upon principle and authority. This was all wrong. Stokes, et al vs. Kane 4 Scam. 7, Seargent vs. Kellogg, et al 5 Gilm. 281.

The construction of the ordinance by the Attorney for the Plaintiff in Error is utterly untenable.—The ordinance is a compound sentence, disjunctive in form, containing dependent and independent clauses, as to verity. The independent clause making the placing or allowing wood in quantities over ten cords to remain a nuisance, the quantity over ten cords being an offence 'per se,' so declared by the Board. The dependent clause to verity makes the manner of keeping the butcher-shop either deleterious to health or offensive to business—the offense in the one case the quantity of wood, and in the other the manner of keeping the butcher-shop, constitute the nuisance. This is evident from the reading of the ordinance, and the distinction is sustained by common sense, as butcher shops are a necessity for towns and cities and only become offensive when kept in a filthy manner. The object of the ordinance being to prevent wood from being piled up in large quantities, which obstructed public and private views, and endangered the town by fire, which and other cause made it a nuisance, and with which the people of the town were outraged and grossly insulted. It is more safe for the law to define what shall constitute larceny than to leave for the opinion or caprice of the witness. The "Board shall have power to 'declare' what shall be a 'nuisance,' not the witness.

[1859-13]

There was no necessity for proof that the wood was placed within the corporate limits after the ordinance took effect, as the allowing it to remain was equally an offence by the terms of the ordinance.

The proof that the ordinances were posted up in four places within the corporate limits, for thirty days, is sufficient for the court to presume that they were posted up in three of the most public places for ten days, unless there was something in the evidence to negative that conclusion, which is not the case.

It would be a stern principle of evidence that requires a municipal corporation to go into the particulars of the passage of their ordinances on each trial. It being a public body for public purposes there should be some presumption as to the regularity and legality of their acts. "When publicly kept" is sufficient—a rule to require the production of corporation books is never granted, as the copies are evidence of themselves —Grant on corporations—sec 317 318, Note 2 and Reference M. The By-Laws of a corporation are always obligatory on all of its members and all persons that come within the local jurisdiction, and they must take notice of them at their peril—Sec. 77, Grant Cor.

Upon review of the whole case, the Plaintiff in Error, upon taking appeal from the Justice's court, was estopped to dispute the insufficiency of the writ of the Justice, if any existed. The printed ordinance was by adoption the original ordinance of the Board. The proof of the existence of the corporation was in accordance of numerous adjudged cases. The proof of the quantity and ownership of the wood was ample and the most satisfactory kind of evidence. No question made as to the power of the corporation to pass the ordinance—it has the power to prevent the erection of wooden buildings, and the power exercised is not so great. The Plaintiff in Error did not, in his Bill of Exception, specify his objections to the admission of the ordinance in evidence. It is his own pleading, and he alone is chargable with the omission—Rogers vs. Hall, 3 Scam. 6. There was no necessity for the production of the original ordinance. The principle of evidence is well settled that an examined or certified copy of public documents is admissable, including corporations.—Grant on corporation, sec. 317-318, and notes Greenleaf on ev. Sec. 91-482-3-4-5. We have statutes in aid, but none in derogation of the common law principles of evidence respecting corporations.

J. M. DURHAM, Attorney for Defendants in Error.

[8659-14]

16

Spencer & Eubank
vs
The President &
Trustees of the Town
of Ashley

Defendants Brief

Filed Nov. 14-1864.
A. Johnston - Cly
11

SUPREME COURT OF ILLINOIS----FIRST GRAND DIVISION.

NOVEMBER TERM, A. D., 1864.

ABSTRACT.

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VS.
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Wherefore Defendants in Error prays, &c.

W. H. GREEN, Attorney for Plaintiff in Error.

BRIEF OF PLAINTIFF IN ERROR.

Teft, vs. Size, 5 Gilman. page 435.
Revised Statutes, Chap. 25, Sec. 5:
Revised Statutes, Chap. 25, Sec. 7.
Revised Statutes, Chap. 59, Sec, 22.

28 Ill. p 62
5 Gilman p 462

[4459-13]

Ewbank
v
Pocock & Town of
Ashley

Abstract

16

SUPREME COURT OF ILLINOIS---FIRST GRAND DIVISION.

NOVEMBER TERM, A. D, 1864.

Spencer S. Eubank, Plaintiff in Error,
VS.
The President and Trustees of the town of Ashley, Defendants in Error.

BRIEF OF POINTS AND AUTHORITIES FOR DEFENDANTS IN ERROR.

This was an action of debt, commenced by the Defendants in Error, before L. F. Blankinship, Police Magistrate of the town of Ashley, and judgment was for the Plaintiff for $20, and appeal taken to the Circuit Court and judgment for the Plaintiff for $10. An appeal from the Justice of the Peace is assimilated to a suit in equity—Conley, vs. Good—Bre, 96. In appeals no exceptions can be taken to the form or service of Summons, or any proceeding before the Justice, but the court shall hear and determine in a summary way, according to the justice of the case. See 66, Chap., 4-9, Rev. Statutes, Bines, et al, vs. Proctor, et al, 4 Scam. 175 6. Rogers, vs. Blanchard, 2 Gilm. 335, Ballard, vs. McCarty, 11 Ills,, 401. Hough, vs. Larned, 12 Ills., 456, Vaughn, vs. Thompson, et al, 15 Ills., 40. An action for the violation of an ordinance is in remedy debt, but in fact for the recovery of a tort—Trustees, vs. Holland, 19 Ills., 271. Sec. 15, Article 13, State Constitution has no application as tort's—14 Ills., 415. The custom of arresting for violation of municipal ordinances without affidavit, or even without warrant, is general and universal, and is in its nature 'sui generis,' wholly police, and seperable, from criminal and civil jurisdiction, and cannot conform to the practice of either, and to be effective must be summary. The office of Police Magistrate is of limited, though common law jurisdiction, as conservator of the peace, and as such will issue warrants on information of any police officer or take cognizance of his own knowledge, and municipal corporations have the power to make their own form of warrants, and for an immediate arrest, and also to make any ordinance, not repugnant to the Constitution of this State nor the United States. Sec. 34. Act to amend Charter of Springfield. Sess. Laws 1859 p. 278, Laws 1849, p. 224, give all municipal corporations the power and privileges of the charters, Springfield and Quincy and all amendatory laws thereto. (Sess. Laws 1840, p. 6-113, Springfield and Quincy charters.) The Trustees of the town of Ashley, in ordinance No. 1, prescribe the form of warrant, and for the immediate arrest of the party upon information of Attorney or oath of any other person.

As to the second assignment of error, the proof is that the ordinance upon which suit was brought was on the 4th day of Aug., 1862,—was regularly passed by the Board, with a new series of ordinances signed by Clerk and President, and sent with other ordinances to the printing office, and was printed, and three or four printed copies were posted up in the corporate limits, and a copy of the printed ordinance was pasted in a book in which the minutes and ordinances of the town were recorded by the Clerk and treated by the Board as their ordinances, among which was said ordinance No. 11. The book also was in proof and identified—and also that it was a true copy of the original. There is no Statutory law specifying how ordinances shall be passed, whether signed by either Clerk or President of Board. If they are recorded or printed either in book or pamphlet they are 'prima facie' evidence in all courts in this State. [Laws above] It is the custom of the Clerk of Boards of Incorporations for municipal purposes, to record the ordinances passed by the Board, the act of the Clerk becomes the act of Board by adoption, and is usually regarded as the original, somewhat as the engrossed laws of the Assembly of the State. And is there any valid reason why the Board cannot adopt a printed copy for the record or original. Would not such a conclusion comport with the progress of the age in the use of mechanic aids, and conform to the practice of printed or engraved signatures and seals, and would, in fact, be more certain and beneficial? It would be absurd to require a person to read over hundreds of pages of written matter to hunt up some pigmy matter when the same can be ascertained in a few moments when printed. It certainly will not be contended that it is necessary to have both record and original. The evidence is a substantial if not a literal compliance with requirements of the laws.

The Bill of Exceptions does not disclose the nature of the objections of the Plaintiff in Error to the introduction of the ordinance in evidence; this it should specifically do—and his objections should have been made in the court below or otherwise they are like a pit-fall or rebel torpedo to the Defendant in Error.—Had they been there made the witness might have answered that the ordinance was posted up in three of the most public places in the corporation, and that the original could not be found upon vigilant search, and thus avoided the cruel, dry, and [illegible] technicalities contended for. For aught the Defendant in Error knew before he came into this court the Plaintiff's general objection to the ordinance was that it was unconstitutional or void both upon principle and authority. This was all wrong. Stokes, et al vs. Kane 4 Scam. 7, Seargent vs. Kellogg, et al 5 Gilm. 281.

The construction of the ordinance by the Attorney for the Plaintiff in Error is utterly untenable.—The ordinance is a compound sentence, disjunctive in form, containing dependent and independent clauses, as to verity. The independent clause making the placing or allowing wood in quantities over ten cords to remain a nuisance, the quantity over ten cords being an offence 'per se,' so declared by the Board. The dependent clause to verity makes the manner of keeping the butcher-shop either deleterious to health or offensive to business—the offense in the one case the quantity of wood, and in the other the manner of keeping the butcher-shop, constitute the nuisance. This is evident from the reading of the ordinance, and the distinction is sustained by common sense, as butcher shops are a necessity for towns and cities and only become offensive when kept in a filthy manner. The object of the ordinance being to prevent wood from being piled up in large quantities, which obstructed public and private views, and endangered the town by fire, which and other cause made it a nuisance, and with which the people of the town were outraged and grossly insulted. It is more safe for the law to define what shall constitute larceny than to leave for the opinion as caprice of the witness. The "Board shall have power to 'declare' what shall be a 'nuisance,' not the witness.

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There was no necessity for proof that the wood was placed within the corporate limits after the ordinance took effect, as the allowing it to remain was equally an offence by the terms of the ordinance.

The proof that the ordinances were posted up in four places within the corporate limits, for thirty days, is suffieient for the court to presume that they were posted up in three of the most public places for ten days, unless there was something in the evidence to negative that conclusion, which is not the case.

It would be a stern principle of evidence that requires a municipal corporation to go into the particulars of the passage of their ordinances on each trial. It being a public body for public purposes there should be some presumption as to the regularity and legality of their acts. "When publicly kept" is sufficient—a rule to require the production of corporation books is never granted, as the copies are evidence of themselves.—Grant on corporations—sec 317 318, Note 2 and Reference M. The By-Laws of a corporation are always obligotory on all of its members and all persons that come within the local jurisdiction, and they must take notice of them at their peril—Sec. 77, Grant Cor.

Upon review of the whole case, the Plaintiff in Error, upon taking appeal from the Justice's court, was estopped to dispute the insufficiency of the writ of the Justice, if any existed. The printed ordinance was by adoption the original ordinance of the Board. The proof of the existence of the corporation was in accordance of numerous adjudged cases. The proof of the quantity and ownership of the wood was ample and the most satisfactory kind of evidence. No question made as to the power of the corporation to pass the ordinance—it has the power to prevent the erection of wooden buildings, and the power exercised is not so great. The Plaintiff in Error did not, in his Bill of Exception, specify his objections to the admission of the ordinance in evidence. It is his own pleading, and he alone is chaagable with the omission—Rogers vs. Hall, 3 Scam. 6. There was no necessity for the production of the original ordinance. The principle of evidence is well settled that an examined or certified copy of public documents is admissable, including corporations.—Grant on corporation, sec. 317-318, and notes Greenleaf on ev. Sec. 91–482-3-4-5. We have statutes in aid, but none in derogation of the common law principles of evidence respecting corporations.

J. M. DURHAM, Attorney for Defendants in Error.

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Spencer Embank
vs
The President &
Trustees of the
Town of Ashby
Defendants Brief

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N. Johnston Clk