

8629

No. \_\_\_\_\_

# Supreme Court of Illinois

Spencer S. Eubanks

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vs.

President & Trustees of the  
Town of Ashley

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71641  7

Supreme Court 1st Grand Division  
November term thereof A.D. 1865  
Spencer S. Embank Plaintiff in Error

vs  
The President & Trustees of the town of Ashby Defendants in Error

To Hon. P. H. Walker Sidney Bruce and  
C. B. Lawrence judges of the Supreme  
Court of the State of Illinois.

The Petition of the Defendants  
in error for rehearing in the above  
cause.

The causes found for error by the Hon.  
Court were 1st That there shall of been evidence  
that ten cords of wood declared to be a nuisance  
"an incumbrance", the imperative language of  
decission. 2 That there was no evidence  
that the wood was brought within the corporate  
limits before suit brought.

Authorities in Support of Petition.  
1st The Constitution of Illinois gives the General  
Assembly power to create Public Corporations.

2 "Public Corporations are created by  
Government for Political Purposes  
as counties; they are invested with  
Subordinate legislative power  
to be exercised for the Public  
good". 2 Kent 275.

3rd The General Assembly created Public Corporations. R.S. Chap 25

4th President & C represent and are invested with the legislative Power of Public Corporations and as such have power "to declare what shall be considered a nuisance" Sec 12 Chap 25 R.S.

5th Laws of 1848 gives all Public Corporations the power of the Springfield & Quincy Charters.

6th Springfield Charter R 116 Laws 1839 Sec 7 Survey Legislative powers gives the Mayor & C "to declare what shall be a nuisance"

7th Ordinance in Evidence declares ten cords of wood = a nuisance.

8th A public nuisance may be considered an offence against public order. P 276 Russell's Crims.

9th "What constitutes a nuisance is a question of law" Smith vs McLeanth 11 Missouri P 517

10th In the construction of Statutes reference must first be had to its language. Wood v. Blanchard 19th 38.

11th The language of the ordinance is that if any person shall place or allow to remain wood in quantities over ten cords or keep a butcher shop in a manner deleterious or offensive to the people of the town of Ashby or offensive to them in their business avocation or of any private family the same is hereby declared a nuisance.

As a rule for the construction of language a disjunctive clause is a complete proposition. In being the only office of the disjunctive "or" to introduce new subject every disjunctive clause can have no bearing on any preceding clause without there be words of relation in it in which case reference must be had to the precedent clause to determine the subsequent clause.

The qualifying words "deleterious" and "offensive" would have no meaning in the ordinance were it not for the word "manner"

"keep a butcher shop in a manner  
detrimental to health <sup>of the people of the county</sup> or offensive to them  
(words of relation) in their business relation.

It cannot be maintained that the  
word 'detrimental' has any grammatical  
connection with any other part of the  
ordinance as also with the word  
'offensive' and is used in this sense

"keep a butcher shop in a manner  
offensive to the people of the town  
of Ashby in their business operations"

There are no words <sup>of relation in</sup> the actionable  
clause in which the qualifying  
words "detrimental or offensive" are  
so that they can no way qualify  
the preceding operative clause  
respecting wood is to be considered  
as if they were not at all in the  
ordinance in which case it  
would read "That if any person  
shall place or allow <sup>to remain</sup> wood  
~~to remain~~ in quantities over  
ten cords <sup>to remain</sup> within the corporate  
limits of the town of Ashby the  
same is hereby declared a nuisance"

From the above charges that  
from the language of the

ordinance there is nothing in the language of it requiring proof that the wood was an incumbrance".

As to the law of evidence respecting the ordinance, I argue that it is by the law that offence cometh which is the aggregate sense of a community of offence ascertained and authoritatively published. That before any <sup>thing</sup> in the eye of the law can be a nuisance the law must first have so declared. That without law there can be no offence or violation of law and that what ~~the law~~ is by law an offence it takes no evidence to make it an offence. The ordinance declared the wood to be a nuisance. The wood must be an incumbrance before it can be a nuisance but when the law declared it a nuisance it had determined it to be a nuisance an incumbrance and without a fact of law an incumbrance is not a nuisance.

I argue from the premises above and authorities above cited that the President & as the representatives are invested

with a modicum of the legislative  
power of the People of the State of  
Illinois by virtue of which they  
can do a fiat of law declare  
the piling or allowing <sup>down</sup> of ten cords  
of wood within the corporate  
limits of the town of Ashby  
a nuisance and when so  
declared as in the verbiage of  
the ordinance it is an offence  
per se and the issue of fact  
whether it is an inconvenience  
cannot properly be made and  
if inquired it can only be questioned  
without the propriety step & by the  
validity of an ordinance.

When the  
law has commanded not to kill the  
law is the evidence that to kill is a  
crime. When the <sup>Ordinance</sup> law declares the  
wood a nuisance the ordinance  
is proof that the evidence that the  
wood is an inconvenience.

If one or two persons can make  
ten cords of wood a nuisance a position  
as to the whole community has so  
declared by law. Can be said  
that one or two persons are  
better judges of what constitutes

public  
a nuisance than the whole  
community. Would it be safe  
for the law to declare an offense  
what any person should swear  
to be or do. If it takes effect  
before the ordinance takes effect  
the ordinance is inoperative as such.

That the laws creating public  
corporations are so many limitations  
of power beyond what is granted  
so that there can be no right  
of action except by ordinance and  
no offense except by force of ordinance  
so that it may be stated that  
there is this diversity between  
public corporations and law  
custom of the common law by  
which every thing that worked a  
public inconvenience was a nuisance.  
That in the limits of a public  
corporation there may be  
many things that are a public  
inconvenience but not a nuisance  
without so being declared by law  
and which is really the abrogation of  
the common law for a superior  
rule.

As to what constitutes  
a public nuisance being a



against public or is of  
necessity a question of law  
Smith & McLean above cited

It is true that that state of facts  
which the law declares a nuisance  
must be proved. In this case there  
is but the existence of the quantity  
of wood in question & not the  
manner of its keeping the wood.

The ordinance may be bad but  
without demurrer or plea of un-  
lawful void below its legality is  
not properly put in question  
Smith & McLean above cited.

Very respectfully submitted

Geo. S. Tucker atty  
for petitioners

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Spencer's Embank

The President

Trustees of the  
Town of Albany

Petition of Referent  
in error for rehearing

Filed Nov. 10. 1865

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 ~~was~~<sup>were</sup> 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~~<sup>Book</sup>, 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.

28 Dec p 62  
5-Canon p 462

Printed at the  
Washington Court House  
by G. Green, 1864.

SHEET OF PLAINTIFF IN ERROR.

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

- 1. The Court erred in refusing to grant a motion for new trial.
- 2. The Court erred in rendering judgment against Defendant below.

- 3. The Court erred in admitting as evidence a printed copy of an Ordinance, when the original was kept.
- 4. The Court erred in refusing to grant the writ and dismiss the suit.

ERRORS ASSIGNED.

Motion for new trial overruled and referred to  
Page 12 & 13. Plaintiff below in introduced Ord., and move that Defendant below should be made of  
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receiving them as such, or ordering them to be printed—that the authority to print was vested, and that  
kept—that said Court treated the said Ordinance as printed as their Ordinance, but made no Ordinance  
the printed Ordinance in a Book, then held by the witness in objection the Ordinance of said Court was  
made, and signed by the President of said Court, and said Ordinance with evidence was filed by the Plaintiff  
A. M. Dutton, that he had prepared a certain Ordinance, Ordinance No. 11, which was filed by the Plaintiff  
taining in print the copy of the printed copy of Ordinance No. 11, which was filed by the Plaintiff below the  
Trustee, &c., and that a certain book, containing the said Ordinance, was printed by the Plaintiff below the  
Ordinance as incorporated into the Ordinance of the Court, and that the said Ordinance was printed by the Plaintiff below the  
Page 11-12. The Bill of Exceptions—The Bill of Exceptions was filed by the Plaintiff below the  
Page 13. Appeal Bond.  
Page 14. Appeal Bond.  
Page 15. Appeal Bond.  
Page 16. Appeal Bond.  
Page 17. Motion of Defendant below (Dutton) to dismiss the suit.

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Abstract

Page 1. Motion of Defendant below (Dutton) to dismiss the suit.  
Page 2. Writ against a Copy, issued by a J. C., against Plaintiff's Plaintiff in Error.  
Page 3. Motion of Defendant below (Dutton) to dismiss the suit.  
Page 4. Plaintiff & Trustees of the town of Ashby, vs. Spencer B. Eubanks, } Error to Washington County.

Filed, Nov. 16, 1864.  
N. Schuster, Clerk

Eubanks SS  
Proost Town of Ashby

SUPREME COURT OF ILLINOIS—FIRST GRAND DIVISION.

NOVEMBER TERM; A. D., 1864.

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28 Ju h 62  
5 Com h 462

Printed by G. S. ...  
Washington, D.C. ...  
1864

SHEET OF PLAINTIFF IN ERROR

W. H. GREEN, Attorney for Plaintiff in Error

- 1. The Court erred in refusing to grant a motion for new trial.
- 2. The Court erred in rendering judgment against Defendant below.
- 3. The Court erred in admitting as evidence a printed copy of an Ordinance, when the original was not produced.
- 4. The Court erred in refusing to grant the writ and judgment for the writ.

ERRORS ASSIGNED.

Motion for new trial refused and overruled.

Pages 12 & 13. Printed below introduction of Cole, who were that Defendant below printed 12 copies of

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

the introduction of which Ordinance below assigned—Ordinance reviewed and printed copy true.

Printed below then offered in evidence. ~~Ordinance~~ Ordinance No. 11, in

Ordinance No. 11, was a true copy of the original manuscript ordinance which was still at the printing office

troubling them as such, or ordering them to be printed—that the authority to print was vested, and that

fact—that said Board treated the said Ordinance as printed as their Ordinance, but made to Ordinance

the printed Ordinance in a Book, then that of the witness, in which the Ordinance of said Board was

OGM and printed, and printed copies of the Ordinance No. 11 printed up, &c. and that the Clerk

Board, and signed by the President & Clerk, and said Ordinance, and copies were taken to the Printing

Office in which the Ordinance and Ordinance of the Board. Printed below the fact, by

Ordinance No. 11, and that a certain book, prepared by the said Board, was a printed copy of

Ordinance No. 11, and that the title of said Ordinance was

Page 12-13. The Bill of Exchange—Ordinance below printed, by one H. W. Cole

Page 12-13. Printed below.

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Ewbank  
Proof & Lower of  
Bookly

The President & Trustees of the town of Ashby.  
1864  
Printed by G. S. ...  
Washington, D.C. ...  
1864

Filed Nov 16-1864  
A. Johnston

47.

S. S. Ewbank  
vs

Town of Ashley.

Deb. for Rehearing - and  
Refund -

~~8668~~

Cont bill on Page 635 -

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S. S. Ewbank  
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Cont bill on Page 635