State of Tennessee.

Be it remembered that on the 4th day of January 1858, a writ of Summons was issued from the Circuit Court, which is in the words & figures following to wit:

State of Tennessee.

To the Sheriff of Montgomery County Greeting. You are hereby commanded to Summon George S McCauley to appear before the Judge of our next Circuit Court, to be holden for the County of Montgomery, at the Court House, in the town of Clarksville, on the second Monday in January next, then and there to answer the Franklin Steel & Clarksville Turnpike Company of a plea of trespass on the case to their damage seven hundred dollars. Herein fail not. Witness Chas. Duffy clerk of our said Court at office in the town of Clarksville, the second Monday of September 1857, and 82nd year of the Independence of the United States.

Chas Duffy clk
by Darius Burton D.C.

I acknowledge myself bound and indebted to Geo S McCauley in the sum of two hundred and fifty dollars, as security that he will prosecute his action of trespass on the case with effect, this day commenced in the Circuit Court of Montgomery County Tennessee, by said company against

said McCauley defendant, and in case of failure therein; to pay to the said defendant all such costs and damages as may be awarded against him the said plaintiff, Given under my hand and seal, this 3rd day of Jany 1858.

T. W. Beaumont Clk

Rec'd Jany 4th 1858.

Came to hand same day & Executed on G. S. McCauley January 4th day 1858 executed by W. King, Shff,

And the plaintiffs declaration is in the words & figures following to wit.

Montgomery County }
State of Tennessee } Circuit Court January Term 1858.

The Paradise Hill & Clarksville Turnpike Company by attorney complain of George S. McCauley who is in Court by summons of a plea of trespass on the case on promises.

For that whereas the General assembly of the State of Tennessee, on the 21st day of February 1856 passed an act incorporating the said company with all the rights and privileges necessary to build a Graded Macadamized or gravelled road from Paradise Hill to the town of Clarksville and whereas in the pursuance of the said act of assembly, books were opened for the subscription of stock and the

said company were duly organized under the said act and Whereas heretofore to wit on the day of 18. the defendant subscribed for twenty shares of Stock in said road per share provided ~~that~~ the said road should road should run within a mile and a half of his house or through Fredonia And the plaintiffs aver that the said road does run through Fredonia, He the said defendant in consideration that he had so subscribed for twenty shares of Stock in the said road as aforesaid, and that the said road, was located through Fredonia as aforesaid undertook and faithfully promised to pay the sum of five hundred dollars to the plaintiff in such sums or installments as the the President & Directors of said road should afterwards request to wit at the County of Montgomery aforesaid And the President & Directors aforesaid afterwards made ~~ten~~ several calls of Stock of ten percent each, And requested the defendant to pay fifty dollars on the 22 day of September, 1837, being the first call of Stock, fifty dollars on the 22nd day of February 1837, being the second call fifty dollars on the 22nd day of March 1837, being the third call fifty dollars on the twenty second day of April 1837 being the fourth call, fifty dollars on the 22nd day of ~~April~~ May 1837 being the fifth call, fifty dollars on the 22nd day of June 1837 being

the sixth call, fifty dollars on the 22nd day of July 1837 being the seventh call, fifty dollars on the 22nd day of August 1837 being the eighth call, fifty dollars on the 22nd day of September 1837 being the ninth call and fifty dollars on the 22nd day of October 1837 being the tenth and last call towit at the county of Montgomery aforesaid of all which the said defendant had notice, whereby he became liable to pay the said sums of money at the times he was so requested, but to pay the same or any part thereof he hath ~~heretofore~~ heretofore refused refused and now refuses, though often requested to do so.

And whereas heretofore to wit on January 1835 the said defendant was indebted to said plaintiff in the sum of five hundred dollars on his subscription of stock in the said company for the Clarksville Turnpike company the said defendant in consideration that the said plaintiff would lend the said company money and further promised to pay the said plaintiff fifty dollars on the 22nd day of January 1835, fifty dollars on the 22nd day of February 1835 fifty dollars on the 22nd day of March 1835, fifty dollars on the 22nd day of April 1835, fifty dollars on the 22nd day of May 1835 fifty dollars on the 22nd day of June 1835, fifty dollars on the 22nd day of

the sixth call, fifty dollars on the 22nd day of July 1857 being the seventh call, fifty dollars on the 22nd day of August 1857 being the eigth call, fifty dollars on the 22nd day of September 1857 being the ninth call and fifty dollars on the 22nd day of October 1857 being the tenth and last call towit at the county of Montgomery aforesaid of all which the said defendant had notice, whereby he became liable to pay the said sums of money at the times he was so requested, but to pay the same or any part thereof he hath ~~heretofore~~ heretofore refused and now refuses, though often requested to do so.

And whereas heretofore to wit on the day of 185 the said defendant was indebted to said plaintiff in the sum of five hundred dollars, on his subscription of stock in the said Paradise Hill & Clarksville Turnpike Company the said defendant in consideration that he was so indebted to the said company undertook and faithfully promised to pay the said plaintiff fifty dollars on the 22nd day of January 1857, fifty dollars on the 22nd day of February 1857 fifty dollars on the 22nd day of March 1857, fifty dollars on the 22nd day of April 1857, fifty dollars on the 22nd day of May 1857 fifty dollars on the 22nd day of June 1857, fifty dollars on the 22nd

day of July 1837, fifty dollars on the 22nd day of August 1837 fifty dollars on the 22nd day of September 1837, And fifty dollars on the 22nd day of October 1837, to wit at the County of Montgomery aforesaid, whereby he became liable to pay the plaintiffs the said several sums at the times mentioned, but he hath heretofore neglected and does now refuse to pay the same or any part thereof though often requested so to do, Wherefore the the plaintiffs say they are damaged Seven hundred dollars And therefore they bring this suit.

T. W. Beaumont
Attorney for plaintiffs.

Plea — Non assumpsit.

Homberger & House

And at the May Term 1838 of our said Court, Present & presiding the Hon H. L. Davidson the following proceedings were had to wit,

Paradise Hill & Clarksville Turnpike Company
vs
G. A. McCauley

Case.

This day came the parties by their attorneys by the attorneys and thereupon come a jury of good and lawful men to wit. D. A. Lynn H. C. Ric J. Morrison G. Pierce J. Hickman W. Pollard C. R. Elliott J. Maxwell J. T. Ligon

Affidavit C.M. Brown Clerk &c. the being duly sworn and on oath the truth to speak upon the issues joined upon their oaths say that they find the issues in favor of the plaintiff and that they do assess the plaintiffs damage to the sum of five hundred & eleven dollars and twenty five cents.

Whereupon it is considered by the Court that the plaintiff recover of the defendants the said sum of five hundred and eleven dollars & twenty five cents ($511.25) as also the cost in this behalf expended and that execution issue.

And the defendant moved the Court to grant him a new trial which motion is by the Court overruled and the defendant moved the Court in arrest of judgement which motion is by the Court overruled, and the defendant prays an appeal to the next Supreme Court to be held at Nashville and having entered into bond & security according to law the same is allowed.

And the defendants bill of exceptions are in the words and figures following to wit:

Paradise Hill & Clarksville Turnpike Company,
vs
G. J. McCauley

} Circuit Court
May Term 1858.

Be it remembered that this cause came on to be heard before Hon A L Davidson, Judge presiding in the room & stead of Hon W W Pepper, & a jury of Montgomery County at the May Term 1858 of the Circuit Court for Montgomery County Tennessee And on the trial of said cause the plaintiff introduced E. L. Williams who after being duly sworn deposed as follows. Witness stated that the plaintiff was organised in accordance with the Charter of the company, that after the commissioners mentioned in the Charter opened books for the subscription of stock, that they had obtained about six thousand five hundred dollars in stock, a meeting of the stockholders was called & ten days notice given that said stockholders met in pursuance of said call & the subscribers for stock in said road proceeded to elect seven directors who elected a President - that defendant subscribed his name for twenty shares in said company of twenty five dollars each - that the subscription book was in witness possession at the time said McNairy subscribed stock & witness saw him do subscribe - Witness says he thought the road was built on the most practicable route for a graded road that the road was built by Freedmen as mentioned in the pleadings, subscription

there were two routes discovered to Chief Engineer of the Company — one known as the upper route & the other as the lower route — it was decided on the upper route — the lower route was more convenient to metal & there the upper route was somewhat shorter but the cutting & grading on the upper route would be cheaper than such work on the lower route, that the Company did not to Messrs Waterman & Co a contract to grade the road & that the contract did not embrace the metalling of the road & nothing was said in the contract about the metalling of the road, that the contractors of the Company have built a graded road which was accepted by the directors of the Company & all the cost & pains of the road of proceeded was at their request & that after examining said graded road & getting up & receive said graded road, that the Engineer made a mistake in his estimates as first laid before the Company & that according to said first estimates the Company would have asked the Messrs Waterman & Co to finish grading the road & they believed that they also had enough to metal the road, but it was subsequently ascertained after the road was graded under

contract that they had but little more than enough to grade the road — that if all the subscription of stock was paid in he thought it would pay for the grading and have some little left, but not near enough to metal the road — that the company intended that when they could obtain the means, to metal the road & that the road was graded in such a manner that it could be metalled — defendant offered to prove by the witness that before he took stock in said road during the interview with the witness — he told witness that he had never seen the charter and asked the witness what sort of a road was to be built & that witness told him he had seen the charter & a macadamized road was to be built — that defendant told witness he did not believe that the money could be raised to build the road & asked witness what would be the result if they could not raise sufficient money to build a macadamized road & witness told him the enterprise would be abandoned if they could not raise means sufficient to build a macadamized road & that defendant refused to yield to witness solicitations to subscribe stock until he was assured by witness that he had seen the charter that a macadamized road was to be built & if they could not raise

sufficient stock to build a Mercantile
road the enterprise would be abandoned
It was admitted that these representa-
tions were made by the witness in good
faith. The plaintiff objected to his testi-
mony but the objection was sustained
by the Court to which ruling of Court
the defendant excepted. Whitney stated
that the calls for stock were originally
made by the Company at Jasper on the
Month & first notice thereof given to the
stockholders of the first call through the
Republican Banner a Nashville paper
published in Nashville Tenn. don't
know whether defendant took said
paper or ever saw a notice of the
calls in said paper or that he ever had
any of the calls after the months
after first call was made & notice
was left opposite brand of Dr. Jones of
Mount Pelier in a Memorandum book
Defendant stated that if the company
wanted the money on his stock they
would have to sue & sign for it.
The call of stock was five dollars
(5.) Plaintiff then introduced
Hand to the Jury the subscription
book marked A which is in the words
& figures following to wit, "We the un-
designed do hereby subscribe the amount
annexed to our names in stock in the
Paradise Hill and Calvert Turnpike

and we hereby bind ourselves to pay the calls on said stock at such times as the President and directors of said road may deem proper to make the same said officers to be elected according to the provisions of the charter of said road. Twenty five dollars constitutes one share. The road to be located in such manner and on such grounds as the commissioners may regard the most practicable this the 8 day of March 1858.

W. E. Hunter — $100

Provided the road is located in 1/2 mile of Williams'

C. A. Hunter — 50

Provided the road is located on 1/2 mile of E. L. Williams

Thomas Walker — 200

Provided the road is located in 1/2 mile of E. L. Williams.

R. A. Mercer — 200

If the road is within 1/2 mile of E. L. Williams, the above amount is to be doubled if necessary.

Elijah Bedford Jr — 50

Elijah Bedford Sen — 50

D. B. Bedford — 50

B. F. Bedford — 50

B. A. Bedford — 100

W. A. Lock — 100

together with the right way the latter

Elegan Black — 50

Provided the road is located in 1/4
Mile of my house

W Albright $250

together with right of way and
with Provided the road is located
in 1/4 of Mile of my house, Provid.
it is necessary $50 more.

W M Bagwell — $50

Provided the road is located in
1/4 Mile of my house, also the right
of way and metal.

B Kent — $250

provided the road is located in
half Mile of my house also right
of way and metal

R M Cauley five
hundred dollars if the road runs
in 1/4 mile of my house or through Tho-
donia and right of way & metal — $500

The defendants then introduced & read
to the jury the deposition of C.W. Vance, which in
the words and figures following.

Dep^n of
Wake } Question 1st by defendant.

Were you employed by the commis-
sioners of the Paradise Hill & Clarksville
Turnpike Company to survey plat and
report the nearest and most practicable route
from Paradise Hill to Clarksville Montgomery
County Tennessee.

Answer — I was.

Question 2nd by defendant —

Did you perform that duty, state

did you do it and what route did you recomend?

I did perform that duty as best I could in the short time allowed me which was about one week — I had previously surveyed a line from Paradise Hill to the commencement of said road about two & a half miles from Clarksville, and this enabled me to cut off the angles in the first survey when I thought the nature of the ground would admit, and I proceeded accordingly to survey another line sometimes running near or with the first line and sometimes crossing it and cutting off angles to save distance. — I recommended a route running for the first six miles from Paradise Hill very near the first line thence I bore to the right or East of the first line to the South of Rose Branch where I intersected the first line — from thence I ran up Rose Branch by Harpers & Lows big Spring passing Dr Lowes House and Satterwhites to Spring Creek running very near the first line and the old road — I then bore down Spring Creek to the mouth of a branch which heads in Hunts lands and ran up said Branch to its head and then in a direct line North of West to Mr Shaws on the waters of Half

Pone creek I bore down Mr. Shaws spring branch to a point near Beef Pone creek. Where I crossed the first line & old road and struck the mouth of Ed Williams spring branch, I ran up said Branch to its head crossed Williams field and struck the head of Macedo creek and ran down same leaving the village of Fredonia about 3/4 of mile to the left, — crossed the old road and first line near Baywells Mill and continued down Meads creek to Baywells dwelling house I then bore across the point of a ridge in a north west direction to the North fork of Meads creek crossed same and pursued in some general direction to Coles Bottom near Thompkins where I again struck the first line and old road and ran very near them about one & a half miles to the terminance as above mentioned, From Ed Williams the first line ran with the old road into Fredonia But the second line gaped to the right of Fredonia crossed 1st line at Baywells Mill then ran to the left of first line to Coles Bottom, — as represented by the annexed diagram

Question 3d. Was your Survey received and did the directors proceed to let out the road on said Survey?

My Survey was received and examined by several of the directors, But it is proper that I should say the directors at the time of my appointment (to Survey this second line the nearest and most practicable route in my judgement) distinctly reserved to themselves the right to locate the road as they might choose after the Survey. After this last Survey I laid down on the map both lines and made estimates on both from Bagwells Mill to Boyce — and when the Survey was returned to the directors they directed Mr W. T. Garnett and myself to proceed to Clarksville & put the constructions of the road under contract which we did. We employed Walters & Co to construct the road they agreeing to take and do the work at my estimates. With the privilege to run on either line or to depart from both provided the distance was not thereby materially increased or the grades made steeper than allowed by the charter.

Question 4th by defendant. Did you in the location of the road take into consideration the settling of the road?

Our Survey and estimate were made for a graded road which might at a

Question 30. Was your survey received and did the directors proceed to let out the road on said survey?

My survey was received and examined by several of the directors, but it is proper that I should say the directors at the time of my appointment (to survey this second line the nearest and most practicable route in my judgement) distinctly reserved to themselves the right to locate the road as they might choose after the survey. After this last survey I laid down on the map both lines and made estimates of the from Bagwells Mill to Rice. And when the survey was returned to the directors they directed Mr W. F. Garnett and myself to proceed to Clarksville & put the constructions of the road under contract which we did. We employed Walker Reo to construct the road they agreeing to take and do the work at my estimates. With the privilege to run on either line or to depart from both provided the distance was not thereby materially increased or the grades made steeper than allowed by the charter.

Question 31st by defendant. Did you in the location of the road take into consideration the settling of the road?

Our survey and

Question 3d. Was your Survey received and did the directors proceed to let out the road on said Survey?

My Survey was received and examined by a majority of the Directors, But it is proper that I should say the directors at the time of my appointment (to Survey this second line the nearest and most practicable route in my judgement,) distinctly reserved to themselves the right to locate the road as they might choose after the Survey. After this last Survey I laid down on the map both lines and made estimates on both from Bagwells Mill to Brice. And when the Survey was returned to the directors they directed Mr W. T. Garrett and myself to proceed to Clarksville & put the constructions of the road under contract which we did. We employed Walters & Co to construct the road they agreeing to take and do the work at my estimates. With the privilege to run on either line or to depart from both provided the distance was not thereby materially increased or the grades made steeper than allowed by the charter.

Question 4th by dependent; Did you in the location of the road take into consideration the Mettling of the road?

Our Survey and estimate were made for a graded road which might at a

pretties time be graveled, tho no estimate was given for metalling or gravelling in running my 2nd line, I had in view evenness of surface and shortness of distance, not regarding at the time the nearness or remoteness of Brooke.

Question 5 by defendant, Were the two routes spoken of in the neighborhood of G. S. McCauley if so how were they designated, and which was the nearest and most convenient to metal?

There were two routes spoken of in Geo S McCauleys neighborhood as shown by that part of the diagram between Bagwells Mill and Deer Bottom, the line of the first survey as seen on the old road was called the upper route, the last line run passing down Macedo creek was called the lower route passed near to said McCauleys house, the lower route was the nearest and the most convenient to metal.

Question 6 by defendant, did you not report that the lower route was the cheapest to make a metal road but that the upper route could be graded the cheapest

I do not distinctly recollect the wording of my report, but I do recollect that the lower route was shortest most convenient to gravel but had on it the heaviest grubbing and grading.

and that a comparison of the two showed the lower to be a fraction the cheapest. But I do not recollect the precise difference.

Question 7. Was it not the lower route that was let out to the Builders and did not that route run through Willie Bagwells farm on McAdoo's creek nearer the mills than the old road route.

The Builders had choice of the lower up or a route varying from both provided the distance was not materially increased or the grade put above the degree allowed by the charter. I did not pass through Willy Bagwells old place or farm on McAdoo creek and was more convenient to travel than the upper route.

Question 8 by defendant. Did you attend at the letting out of the road and at what price was it let and what was the character of the road to be built.

I did attend the letting. the road was let at my estimates at a fraction under twenty thousand dollars. for clearing grubbing grading ditching and completing the road bed ready for metling. so as to make a good dirt road. — there was not contract made for the metaling.

Question 9 by defendant. Did you report any bridges to be built on McAdoos Creek?

I think not — of this I am not certain

Question 10, by Defendant, Is not the road located farther from Metac,

The portion from Bagwells mill to Cokes hollow is made on the upper cut & farther from Metac also the portion from Bagwells Mill to Ed Williams the road the road was built thro from Fredonia and is also farther from Metac than my 3rd line down McAdoo Creek.

Question 11. Did the road that the Builders bid on run through Fredonia,

Answer — It did not,

Question 12 by defendants, What variation is it customary to allow builders to vary from the original survey of the Engineers?

Answer, — When a road is absolutely located and location stake put down and the work let by such staking it is not usual to allow builders to vary from such line.

But in this particular case the line was so long the ground for the greater part of the distance so covered with undergrowth - that I did not think in the time allowed me I had been able at every point to select the best ground and as Wattersect had a partner by the name of Cobower who was a good Engineer and was the partner who contracted to do the work - he was distinctly told that he might make changes more ad-

vantagous to the builders, and he was therefore allowed to do as stated in a former part of his deposition

Cross Examined by plaintiff.

Question 1st by plaintiff. Was it not made a part of the contract between the company and the builders that they (the builders) should have the right to change the line of the road by and with the consent of the directory were you present at the letting and did you read the contract entered into between the company and the builders.

Answer I was present at the letting and read & heard read the contract and although I cannot now remember the precise wording of the contract I distinctly recollect that such changes as stated by me above were allowed, and I expressed the opinion to Mr Coburn at the time that by a careful examination of the ground he could derive labour to the builders, that I had a thought of bidding for the work myself & believed a considerable saving might be made by a proper examination of the ground while the work might be in progress.

Question 2d, Have you passed over the road some Recently Well to cover

hollow since it was built and if so how does he next compare with your line from Bagwells Mill to Coxes hollow.

Answer. I have passed over the route from Bagwells Mill to Coxes hollow, so as to take general view of it since it was built and the Grading Clearing and Grubbing was considerable lighter those on my 2nd line upon which the estimates were based - but the distance is somewhat increased.

Question 3.

How close the Cropping of Coxes bottom compare on your line with the line on which the road is built.

The line on which the road the road is built crosses Coxes hollow higher up than my line and required some less work than would have been required on my line also the distance is somewhat increased.

Question 4.

From your knowledge of the Country and the settlements is the line on which this road is built more to the advantage of the citizens than your line.

Answer.

It is better suited to the settlers as it passes near to their buildings than my line. Although it gives the traveller a somewhat wad to travel.

C. N. Nance

This was all the evidence in the cause.
The judge charged the jury as follows.
The Court charged the jury, among other things not excepted to as follows - "This is a suit to recover an alleged subscription of five hundred dollars to the Stock of said Turnpike Co. The plea is non assumpsit, which imposed upon plffs the duty of making out a right to recover upon a cause covered and against defe. The rights of plffs are derived from the charter or act of incorporation. They can exercise no power or authority beyond its provisions. The Court is of opinion that the Style of road mentioned in the second section of the act, is explained and qualified by the seventh section, and that, construing the two sections in pari materia, the company, when organised, could only build such a road as is described in the seventh section.
The jury ought to believe the company was regularly organized under this charter. It ought to appear there was at least $500 Stock subscribed before they could organise.
The 3rd section limits the capital Stock to an amount sufficient to build such a road as is contemplated in the Charter, and if the Board of directors being organised, were reasonably satisfied they had a sufficient amount of Stock subscribed to build such a road, they then might locate and put it under contract, and could proceed to collect the Stock the Stock as a means of carrying forward the work

The Board of directors were bound to locate the road, or cause it to be done, as required by the charter, and if they appointed two persons, as agents, to locate & put it under contract, agreeing with the contractors that it might be built upon either or neither of the exact routes surveyed, but without any material variation from either, and without changing the grade, and if this action was sanctioned by the Board, then it would be a sufficient Compliance with the charter, as regards a location of the road. The deft is not liable beyond the terms of his subscription, that is his contract. Look to the Caption in the opening of the subscription list, with the conditions preceeding his name. And if you find he subscribed under a condition or conditions, then the pltffs ought to show on their part a compliance with the same before they could maintain the action.

The jury found a verdict of $511.25 in favor of the plaintiffs, Defendant moved for a new trial which motion was by the Court overruled. Defendant then moved in arrest of judgement which motion was likewise overruled by the court. to which several rulings of the Court defendant ..... and tendered this as his bill of exceptions and prayed that the same be signed sealed

& made a part of the record which is done, thereupon defendant prayed an appeal to the next term of the Supreme Court to be held at Nashville which is granted he having executed bond & security according to law.

N. L. Davidson Clk

and the defts appeal Bond is in the words & figures to wit.

Know all men by these presents that we George S McCauley & are held & firmly bound to the Paradise Hill & Clarksville Turnpike Co. in the sum of One thousand and twenty two dollars & fifty cents for the payment of which we bind our selves our heirs Executors and administrators jointly & severally firmly by these presents sealed with our seals & dated this 18th day of May 1858. The condition of the above obligation is such that whereas in an action of the case prosecuted in the Circuit Court of Montgomery County by the Paradise Hill & Clarksville Turnpike Co. against George S McCauley judgement was this day rendered by said Court in favor of the said Turnpike Co. against Geo. S. McCauley for the sum five hundred & eleven Dollars & 25 cts from which said the said George S McCauley hath prayed an appeal to the Term of the Supreme Court to be held at Nashville, Now if the said George S McCauley shall well & truly prosecute his said appeal with effect

& made a part of the record which is done. thereupon defendant prayed an appeal to the next term of the Supreme Court to be held at Nashville which is granted he having executed bond & security according to law.

A. L. Davidson Clk

and the defts appeal Bond is in the words & figures to wit.

Know all men by these presents that we George S McCauley & are held & firmly bound to the Paradise Hill & Clarksville Turnpike Co in the sum of One thousand and twenty two dollars & fifty cents for the payment of which we bind our selves our heirs Executors and administrators jointly & severally firmly by these presents sealed with our seals & dated this 18th day of May 1858. The condition of the above obligation is such that whereas in an action of the case prosecuted in the Circuit Court of Montgomery County by the Paradise Hill & Clarksville Turnpike Co against George S McCauley judgement was this day rendered by said Court in favor of the said Turnpike Co against Dr George S. McCauley for the sum Five hundred & Eleven Dollars & 25 cts from which said the said George S McCauley hath prayed an appeal to the Term of the Supreme Court to be held at Nashville, Now if the said George S McCauley shall well & truly prosecute his said appeal with effect

or in case of failure therein shall pay satisfy and perform such judgement or decree as the said Supreme Court shall make therein then this obligation to be void. Otherwise to remain in full force & effect. Given under our hands & seals this 18 day of May 1858.

Seal
Seal
Seal

Bill of cost — R. A. McCreary

Judgment Rendered 18 Sept 1858		$561.25
Interest		
State Tax		3.50
Clk recd 1 Bond 1.15 8 Subpoenas 80, 1 Affidavit 25	2.20	
" judgment 75 jury 10. Bill cost 50. 8 affidavits 40	1.75	
" Continuance 25. appeal bond 75	1.00	
" This transcript 5.50 bond 5.15 seal seal 50 Motion bond and fee issued & forwarded Mots	5.65	10.65
		5.00
Shff W. King Summons		1.00
" J. Murray 2 Subs executed 80 jury 15		.95
" L. Brown 3 Subs executed		75
" J. J. McCreary 2 Lev fa		50
Witnesses Pritt Thompson 2 days 2 Tolls		1.60
" Jacob Forest 2 " 2 "		1.60
" J. W. McMurran 2 " 2 "		1.60
Cost taking depositions pd by Defr		$22.50
		2.00
		24.50

State of Tennessee
Montgomery County } I Charles Pooley Clerk of the Circuit Court of said County do certify that the foregoing is a true & perfect transcript of the motion and proceedings had in the case of the Bank of the State vs Clarksville Turnpike Co against G. J. McCreary as the same appears of record in my office

In Witness whereof I have hereunto set

my hand & affix the Seal of said Court at office in Mobile this 14th day of Nov 1858 & 83rd year of the Independence of the United States

Thos. Pinky

CIRCUIT COURT MOBILE MONTGOMERY COUNTY

571.25
2
16.22
1.22
9.00

5.11
1.50

511.25
10.65

2.66
4

10.22

1111.521 90

$556.95

24th day Judgt. int $521.90
costs . . . 34.95

Paradise Hill &
Clarksville Turnpike

vs

G. J. McCauley

filed 10th day 1859
By the Court
There is no
ground upon which
this petition should be
7th Circuit
received. The charge & ruling
of the court were correct

Entered)
132

Enrolled in Bk R 23
Pages 622 to 624

Judgt. $511.25
11% Int & Costs 9.00
$520.25

Paradise Hill and
Clarksville Turnpike
Company
vs
G. I. McCauley

This is an action of assumpsit by the Plaintiff against the defendant for five hundred dollars the amount of his subscription and a recovery is resisted upon several grounds. The Plaintiff was Chartered by the Legislature of Tennessee on the 21st of February 1854 and the portions of its act of incorporation material to this suit are embodied in the 2nd 3rd & 7th sections thereof. The first of the sections alluded to appoints certain persons commissioners „ to open Books at any time and place they may Choose for the subscription of Stock to be used in the construction of a McAdamized Graveled or graded road „ between certain Points therein named The 3rd section prescribes that „ The capital Stock of said Co shall be sufficient to construct said road divided into Shares of $25 „ each The provisions of the seventh section are „ That said road shall be graded twenty five feet wide and within five degrees of a level covered with fine beaten Stone or gravel twelve feet wide and nine inches deep „ The defendant's subscription was made upon the following condition „ That the road runs within one and a half miles of my house or through Fredonia and right of way and metal „

It is in proof as the court will see from Williams Testimony that the Company have sufficient means to construct a graded road and have completed the work and that the road does run through Fredonia That the calls of Stock were regularly made as prescribed in the Charter That the defendant on his part gave

the company notice that he would not pay his stock unless forced to do so by law.

The court below charged the Jury that under this char=ter the Company was restricted to the construction of a Mc Adamized road, but as the verdict was for the Pltff no exception was taken by it to the charge. As the defence make the point that the finding of the Jury is against the law as expound=ed by the court it is legitimate to show that the verdict was not against the law as it should have been expoun=ded. It is difficult to see upon what reasoning the court below based its construction of this statute. The second section is plain and unambiguous in the grant of power to the Company to construct either a Mc Adamized graveled or graded road this is not denied but because the 7th sec prescribes that the road shall be covered with fine beaten stone a certain width and depth the defendants argue and the court ruled that this limits the grant of powers contained in the second section and restricts the company to the construction of a Mc Adamized road. Now according to a well known rule of construing a statute, That is, That if possible it shall be so construed that all the parts shall stand together what is easier than to ascertain the mean=ing of the Legislature by a single glance at the law. They say You may build a Mc Adamized graveled or graded road but if in Your discretion You elect to build a Mc Adamized or graveled road You shall cover it with gravel or stone to a prescribed depth but if You elect to build a graded road we do not prescribe the mode. It is not to be sup=posed that the Legislature were so unstable in their

legislation as to grant powers in one section and recall them in another of the same act. This part of the case seems to me too plain to admit of argument. I admit that if the construction given this statute by the court below is right the court should not have hesitated in giving the defendant a new trial. But if the verdict of the Jury accords well with a proper exposition of the law though it do not with the charge of the court I understand from former ruling of this court that they will not grant a new trial

The second point of defence relied on is that though the company may have had the power to construct a graded road that the defendant subscribed to a McAdamized road as is indicated in the form of his subscription that he gives "right of way and metal" The same answer may be given to this position as was given to the preceding one to wit that the defendant gave $500 subscription and if the company elected to build a McAdamized road then he also gave the metal necessary for its construction this subscription is entirely consistent with the construction of a graded road and taken alone does not even furnish a presumption that defendant thought at the time that he was subscribing to a McAdamized road But suppose it was the fact that defendant thought he was subscribing to a McAdamized unless this impression was created by the fraudulent misrepresentation of the company or its agent it affords him no defence to this action defendant certainly was or ought to have been informed as to the powers of the company and if he had thought

proper to protect himself the contingency complained of in his written subscription and he will not be heard now when the enterprise is nearly completed to say he was ignorant of the powers of the company and thought a McAdamized road was the only one contemplated the sole condition for which he stipulated has been complied with The road runs through Fredonia, he has received the benefit he ought to perform his contract. But again. It will be seen from the proof that the company still contemplate metalling the road provided they can compel defendant and some other tardy stockholders to pay their stock the enterprise is not abandoned where it is but will be pressed on to completion doubtless The fact that ~~defendants~~ plaintiffs procured an amendment to their charter allowing them to erect gates and receive tolls so far from injuring defendant is a benefit to him among the rest of the stockholders and can afford him no protection in a court. The time in which the road was to be completed is not fixed by the charter and defendant cannot assume to say because it is not completed now it will not be if so every stockholder might say the same thing and all refuse to pay their stock when indeed the road would never be finished nor begun. But defendant replies to this if you contemplate a McAdamized road you have not got sufficient stock to build and therefore you do not come up to the requirement of your charter which prescribes „that the capital stock of said company shall be sufficient to build the road„ to which we rejoin that though this be the fact yet it was not incumbent on the plaintiff to have all the stock

subscribed before they could commence the enterprise in other words before they could let the work to contract for in the 4th & 5th sections of the Charter it is prescribed that so soon as $5000 are subscribed the company may organize and proceed to locate the road and let the work. Now no more effectual bar could be placed upon the whole enterprise than to allow each stockholder to refuse to pay his stock till enough is subscribed to build the road for who is to judge the stockholder on the one hand says You have not sufficient means to build the road The directors say we have. a contest is raised and the enterprise abandoned This would open the door to every disappointed and dishonest stockholder to avoid the payment of his stock But even if it be thought obligatory on the directory to show their ability to build the road before they could collect their stock no more surely would be required than reasonable certainty as perfect accuracy would be impossible. by reference to the proof the court will see that the directory were convinced from the estimates of their Engineer that they had sufficient stock to build a McAdamized road and if they were honestly deceived the defendant can not avail himself of their mistake Defendant excepts to exclusion of Williams testimony in regard to what occured before the subscription was made. He offered to prove by witness that he witness gave him assurances that a McAdamized road was contemplated and that in the event stock enough could not be had to build it the enterprise was to be abandoned. This was in time before the subscription and the presumption is that

defendant waived all other conditions than that embodied in his subscription but in addition to this it appears from the proof that Plaintiffs still contemplate metalling the road so that even if it was error to exclude the proof it would avail the defendant nothing on a rehearing.

G. H. Hazel

Paradise Hill &
Clarksville Turn
pike Company
vs
G. J. McCauley

Geo. I. McCauley

The Paradise Hill & Clarksville Turnpike Co.

The defendant in Error was incorporated on 21st Feb. 1856 to build a Turnpike from the defendant in Error was incorporated on 21st Feb. 1856 to build a Turnpike from the top of Paradise Hill in the county of Davidson to the Town of Clarksville in the county of Montgomery.

There are three Errors relied on for a reversal of the judgment of the Circuit Court.

1. The court correctly charged the jury that the Company was compelled to build such a Road as is described in 7 Sec. of the Charter - to wit - a McAdamized Road. The evidence shows that a graded dirt Road has been constructed. The route was surveyed for a graded Road - a graded Road only was contracted to be built - the nearest route and the one most accessible to metal was departed from - and since the construction of the graded dirt Road, the Company has applied to the Legislature and obtained an amendment of its charter allowing it to put up gates on the dirt Road. It is true Williams says that if the Company can collect all the subscriptions for stock, he thinks there will be money enough to pay for the grading and, perhaps, a little more - but he also says that there will not be near enough left after paying for the grading, to put metal upon the Road. Here there is a dirt Road built - plenty upon it - the company indebted for the grading of the Road - and the ability to pay for even the grading dependent upon the collection of all the stock subscribed - a thing that rarely happens in any subscription of any magnitude - And yet this Company required by its charter to build a McAdamized Road. It will be seen from an inspection of the proof, that the verdict of the jury is plainly contrary to the charge of the Court, and it is sufficient to procure the ground on which the Court could have refused a new trial and to set aside the verdict. It certainly cannot be pretended that the charter required the building of a McAdamized Road, that the Company would have the right to change it to a dirt Road & make the subscribers liable for assessment to build such a Road. When the course of a Road is altered by law, or the party subscribes, he cannot be made liable for his stock, though, by his subscription, he agreed to pay all assessments thereon and, as one of the directors of the corporation, petitioned the Legislature for the amendment. Middlesex Turnpike Co v Swan 10 Mass. 384: Dana v Walker 10 Mass. 390: 8 Wafs: 268. Certainly for a much stronger reason, a subscriber would be released, where the Company, without any authority whatever, abandons the Road it was incorporated to build

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substitutes one in lieu far inferior and in fact, totally unfit to meet the object contemplated in the charter. The witness Williams says that the company intend to metal the Road, if it can ever get the money to do so - but the evidence does not make it even probable that it will ever be done.

2: Although, the Charter might not require a McAdamized Road to be built, yet it is evident that the plaintiff in Error, McCauly, subscribed to a McAdamized Road and no other. He offered to prove by the witness Williams, that he had the subscription book and went to McCauly - McCauly told him he had not seen the charter - and asked Williams what sort of a Road was to be built - witness told him he had seen the charter and a McAdamized Road was to be built. McCauly told witness that he did not think money sufficient could be got to build a McAdamized Road and asked witness what would be done, in case enough could not be had to build a McAdamized Road & that witness replied in that case the enterprise would be abandoned - that McCauly positively refused to subscribe until witness told him he had seen the charter that a McAdamized Road was to be built, and if they could not get enough to build a McAdamized Road the enterprise would be abandoned. This evidence was objected to - the Court sustained the objection and excluded the testimony. This was error. The evidence was offered not for the purpose of explaining or contradicting a written contract, as the Court erroneously supposed, but to show that the contract was founded on fraud or mistake - for however innocent Williams may have been in making his statement, if by his representations McCauly was induced to subscribe, the [illegible] contract it will not be contended if McCauly was induced by misrepresentation (whether made through fraud or mistake), to subscribe, that parol evidence is not admissible to prove it. See Redfield on Railways page 70 & authorities there cited / Bouv. Inst. page 246. / Greenleaf on Ev. page 368. A

3. The third error relied on for a reversal of the judgment of the Circuit Court is contained in the following charge of the Court - "If the Board of Directors, being organized, were reasonably satisfied they had a sufficient amount of stock subscribed to build such a Road [as mentioned in 7 sec of the charter] they then might locate and put it under contract and could proceed to collect the stock as a means of carrying for-

- work the work!" The 3 sec. of the Charter of Deft Error, enacts - "that the capital stock of said company shall be sufficient to construct said Road divided into shares of $25 each." What was the object of this provision? Clearly, to protect the stockholder from a useless and injudicious expenditure of his money, by commencing the work before the means were subscribed to finish it. The 4 sec. enacts that as soon as $5000 are subscribed a meeting may be called & a board organized. Without this provision, a meeting might have been called and a board organized without a dollar having been subscribed, but they are restrained from even organizing until $5000. should be subscribed. Suppose, after getting a subscription of $5000, they had organized and obtained an additional subscription of $1000 - thus making the capital stock $6000. Will it be contended that with this amount subscribed, the board would have had the right to put the road under contract & to have laid & collected assessments? They had no right to put a single mile of the Road under contract until they had enough subscribed to build it and it was incumbent on the Company to prove affirmatively that they had sufficient to build the road, before it was put under contract. Williams says the board thought they had enough to build the Road before it was put under contract, but it was afterwards ascertained that they did not have enough - that the engineer made a mistake & it finally turned out, that they had barely enough subscribed to ~~build~~ grade the Road, much less to metal it. Can the mistake of the engineer, excuse the Company from a compliance with the plain provisions of its charter - the charter says the capital stock shall be sufficient to build the road - it is imperative. The subscriber has a right to look to the [illegible] no mistake of the engineer can affect the rights of the stockholders under the charter. But surely, if the mistake of the Board or of the Engineer could ~~possibly~~ under any circumstances, excuse the Company for a non compliance with this provision of its charter, they ought not to be entitled to the benefit of such mistake against a stockholder, until it was clearly shown that they had used the highest degree of diligence to ascertain the cost of the Road. But the deposition of Mr. the engineer shows that the survey was negligently ~~made~~ hurriedly made - that the builders were allowed to select either one of two routes most advantageous to themselves,

because as the engineer says he was not able in the time allowed him to make a thorough examination of the ground. But I maintain that the provision of the charter in reference to the capital stock is imperative and no mistake can excuse the Company from a compliance with it. In the case of the Salem Mill Dam Corporation v Joseph Ropes 6 Pick. 23, the Court say "When by an act creating a corporation for the purpose of ~~building~~ exciting a mill dams, it was provided that the capital stock should be divided into 5000 shares not exceed $100 each and that after 1000 shares should be subscribed for, a meeting of the proprietors might be called, at which any act might be done for the purpose of organizing the Corporation &c, it was held that no legal agreement could be made for the general objects of the corporation, until all the shares should have been subscribed for." & Chief Justice Parker says this was the unanimous opinion of the Court. This case (which was afterwards approved in 9 Pick. 187) in its reasoning & in its facts, contains the position I assume. To the same purport are the following authorities. Central Turnpike Corp. v Ballentine 10 Pick. 142; Redfield on Railways pages 7. 37. 77 & authorities there cited. "Conditions precedent "must be complied with, before any binding calls can be made. Anything, "which, by the express provisions of the charter, or the general laws of the State "is made a condition to be performed on the part of the Company, or, its "agents, before, and as the foundation of, the right to make calls, upon "the subscriptions to the stock; or when the thing is required to be done, "before calls shall be made, and is an important element in the "consideration of the agreement to take stock in the company, it should "be ordinarily regarded as a condition precedent" Redfield on Railways

[illegible] the provision in this company's charter requiring the capital stock to be sufficient to build the road, was not "an important element in the consideration of the agreement to take stock?" It may have been the chief element in the consideration that induced him to take stock. For, he could look at the charter and see that they were required to obtain sufficient capital stock to build the Road. There was an assurance that, if he subscribed his money, the Company could not waste it on an unsuccessful enterprise. If the road can be built, he is willing to adventure his means - if it cannot, he is unwilling to have it expended on an effort that shall fail & bear no fruits - here is the charter defying

positively and emphatically, that the capital stock should be sufficient to build the House. On the faith of this he subscribes. According to the authority cited and according to the reason & justice of the case, ought not this provision of the charter in reference to the capital stock to be regarded as "a condition precedent" which, in the language of the book cited, "must be complied with, before any binding calls can be made."

Jno. A. Shaw
for Plff in Error,

Geo. J. McCauley

vs

Brief

Paradise Hill & Clarksville N.C.