

No. 13099

Supreme Court of Illinois

Pettijohn

vs.

Taylor

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 163.

Pettijohn
vs
Taylor

15099
appeal

STATE OF ILLINOIS, ss.

{ IN THE SUPREME COURT,
Ottawa Term, A. D. 1860.

JOHN TAYLOR, EDWARD H. CANTWELL,
WILLIAM EVANS,
v.
JAMES PETTIJOHN.

} ERROR TO TAZEWELL.

BRIEF OF CHARLES C. BONNEY FOR DEFENDANT IN ERROR.

A. The plaintiffs in error seek to justify the trespass by proceedings for the right of way for the Tonica & Petersburg Railroad under the act of 1845, entitled RIGHT OF WAY; (P. 1031.)

It is insisted by the defendant in error that such proceedings are utterly void, and without even a plausible semblance of authority.

1. The act of 1845 is confined to PUBLIC works, proper, and does not extend to railroads or other works constructed, owned, and controlled, by private corporations for private advantages: Sections 1 and 5.

The term *public* means the whole body politic, and is applied strictly to that which concerns all the citizens and every member of the State.

11 Bouvier Law Dict., p. 400, title—"Public."

In Alton & Sangamon Railroad Company v. Carpenter, 14 Ill. R. 190, the legislature had specially extended the act of 1845 to that particular case.

So in Austin *et al* v. Belleville & Illinoistown Railroad Company, 19 Ill. R. 310 cited by plaintiff in error. But the 4th section of the charter of the Tonica & Petersburg Railroad, set out on page 2 of printed abstract is expressly limited to acts to "*enable RAILROAD companies to appropriate lands,*" &c.

But if the act of 1845 included railroads in the term "*public road,*" still the proceedings are void, because the 38th section of the statute of ROADS repealed, by implication, the former act.

County of Sangamon v. Brown *et al*, 13 Ill. R. 207.

And there is no pretence of a compliance with the section cited.

It requires among other things a report to, and an adjudication by the *County Court*.

2. The act of 1852 (Purple, page 1033) expressly applies to railroads, and *the mode of procedure is radically different* from that provided for in the act of 1845, and in many material respects better calculated to protect the citizen from the usurpations and encroachments of the corporations. So that if the act of 1845 could have originally been construed to apply to Railroad Companies, it was also repealed by the act of 1852.

The act of 1845 provided :

- (1.) Application to some justice of the peace.
- (2.) Appointment of three householders.
- (3.) Two reports of the majority—one to be filed with the justice, the other to be given to the commissioner or superintendent.
- (4.) Payment of the damages, if any.
- (5.) Right to appeal, as in other cases, before justices.

Sections 1, 4.

The act of 1852 provided :

- (1.) Petition to the Circuit Court, specifying its contents. Section 1.
 - (2.) Reasonable notice of the application. Sections 2, 3, 4.
 - (3.) A hearing of the application, and the appointment of commissioners. Section 2.
 - (4.) Meeting of commissioners at time and place fixed by the court or judge. Section 5.
 - (5.) A hearing, by the commissioners, of the allegations and testimony of the parties. Section 5.
 - (6.) Reports of the commissioners in writing specifying what they must contain. Section 6.
 - (7.) Payment of the damages as particularly specified. Sections 7 and 8.
 - (8.) Appeal from the commissioners to the Circuit Court, *without terms*. Section 13.
3. The measure of damages is not the same under the two act.

Act 1845, Section 1.
 Act 1852, Section 5.
 County of Sangamon v. Brown *et al.*, 13 Ill. R. 210.
 Bartlett *et al.* v. King ex'r 12 Mass. R. 545.
 Nichols v. Squire, 5 Pick. R. 100.

B. If it be necessary to allude at all to the first and second points made by the plaintiff in error, they may certainly be disposed of with "true judicial celerity."

The first point that the action is trespass, whereas it should have been case, is not well taken, because there is no distinction of actions in cases originating before justices of the peace, and because the plaintiffs in error had no lawful authority to enter.

Horton v. Chritchfield 18 Ill. R. 135.
 Pendergast v. City of Peru. 20 Ill. R. 51.
 Swingley v. Haines. 22 Ill. R. 216.
 Chicago & Rock Island Railroad Company v. Whipple. 22 Ill. R. 341.

The second point, that the statutory remedy [?] is exclusive, cannot be sustained, because "the railway company have assumed to appropriate the land in violation of the provisions of the statute to be complied with on their part;" and, because, while there is a conflict of authorities upon the point, the weight of authority and reason is against the position taken.

Redfield on Railways, p. 174, sec. 2.
 Sedgwick Stat. & Con. Law, pp. 91 and 401.

163. 95

SUPREME COURT
AT OTTAWA.

JOHN TAYLOR, EDWARD H. CANTWELL,
WILLIAM EVANS,
VS.
JAMES PETTIJOHN.

DEFENDANT'S BRIEF.

Filed Apr 27, 1860
L. L. Loomis
clerk

CHARLES C. BONNEY.

STATE OF ILLINOIS. SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

JOHN TAYLOR, EDWARD H. CANTWELL AND WILLIAM EVANS,
PLAINTIFFS IN ERROR,

vs.

JAMES PETTIJOHN, DEFENDANT IN ERROR.

ERROR TO TAZEWELL.

Page
Record

ABSTRACT.

- 2 This was an action of Trespass *Quare Clausum Fregit*, commenced before a Justice of the Peace, of the County of Tazewell, by the Defendant in Error, against the Plaintiff in Error, and verdict and judgment in favor of Plaintiff. Defendants below, then filed their appeal bond and prayed an appeal to the Circuit Court. And on the trial of said cause the Court (a jury having been waived,) 6 found the issues for the plaintiff below, and assessed his damages at *ten dollars*, and for that sum rendered judgment against the Defendants below. To reverse which judgment the Plaintiff in Error brings this case to this Court.

BILL OF EXCEPTIONS.

- On the trial of this cause, Plaintiff to maintain the issues on his part, called 7 MARK GOODYEAR, who testified to the entry of Defendants on Plaintiff's land, for the purpose of doing work on the TONICA & PETERSBURG RAILROAD. But he thought Plaintiff's land was damaged twelve or fifteen dollars by means of the entry thereon by Defendants.

- 8 CHARLES HOFER testified to about the same facts, and that the Plaintiff's land was enclosed and that Defendants entered upon it some time in September or October last.

Here Plaintiff rested.

STATE OF ILLINOIS. SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

JOHN TAYLOR, EDWARD H. CANTWELL AND WILLIAM EVANS,
PLAINTIFFS IN ERROR,

vs.

JAMES PETTIJOHN, DEFENDANT IN ERROR.

ERROR TO TAZEWELL.

Page
Record

ABSTRACT.

- 2 This was an action of Trespass *Quare Clausum Fregit*, commenced before a Justice of the Peace, of the County of Tazewell, by the Defendant in Error, against the Plaintiff in Error, and verdict and judgment in favor of Plaintiff. Defendants below, then filed their appeal bond and prayed an appeal to the Circuit Court. And on the trial of said cause the Court (a jury having been waived,) 6 found the issues for the plaintiff below, and assessed his damages at *ten dollars*, and for that sum rendered judgment against the Defendants below. To reverse which judgment the Plaintiff in Error brings this case to this Court.

BILL OF EXCEPTIONS.

- On the trial of this cause, Plaintiff to maintain the issues on his part, called 7 MARK GOODYEAR, who testified to the entry of Defendants on Plaintiff's land, for the purpose of doing work on the TONICA & PETERSBURG RAILROAD. But he thought Plaintiff's land was damaged twelve or fifteen dollars by means of the entry thereon by Defendants.

- 8 CHARLES HOFER testified to about the same facts, and that the Plaintiff's land was enclosed and that Defendants entered upon it some time in September or October last.

Here Plaintiff rested.

10 Defendants then offered in evidence the Charter and amendments thereto of the Tonica & Petersburg Railroad Company. In the Original Charter there was a section relative to acquiring a title to the land for the right of way for said Railroad, which is as follows, to wit:

11 "SECTION 4th. The said Company are hereby authorized by their engineers, agents and surveyors to enter upon any lands for the purpose of making the necessary survey and examination of said road, and to enter upon and take and hold all lands necessary for the construction of said road, and all such lands as may be required in the construction of bridges, dams, embankments, excavations, spoil-banks, turn-outs, depots, engine houses, shops, turn-tables, and other necessary improvements or buildings, first making just compensation to the owner or occupiers of said lands for damages that may arise to them from the appropriation thereof to the uses aforesaid; and in case said Company shall not be able to
12 obtain the title to the lands required for said uses by purchase or voluntary cession, the said Company are hereby authorized to proceed to ascertain and determine the damages sustained by such owners or occupiers, and obtain right and title to said lands in the manner and upon the principles provided in 'An act to amend the law concerning the Right of Way for purposes of Internal Improvement.' Approved June 22d, 1852, or in the manner and upon the principles provided by any other act, that may have been or may hereafter be passed by the General Assembly of the State of Illinois to enable railroad companies to appropriate lands for the purposes aforesaid."

39 Defendant then offered in evidence the certificate of Secretary of the Company that the Company were duly and regularly organized under the provisions of its charter.

Defendant then proved the execution of and offered in evidence the following papers, to wit:

40 1st. Appointment by Elias Wenger, Justice of the Peace, of W. D. Evans, Thos. Birket and J. G. Bell commissioners to appraise and assess the damages done to the land of JAMES PETTYJOHN by reason of the construction of the Tonica & Petersburg Railroad over said land.

2d. Affidavit of James S. Bell, that he duly notified the persons appointed to assess said damages, of their appointment, and that they duly appeared and were sworn according to law, preparatory to entering upon the discharge of their duties.

41 3d. Notice, and proof of the service thereof, to James Pettyjohn, that on the 20th day of October, 1858, the persons appointed to assess the damages that might accrue to him by reason of the construction of said Tonica and Petersburg Railroad over his land, would proceed to view said land and assess the damages that might accrue to him the said Pettyjohn, by reason of the construction of said Railroad across said land, and that he the said Pettijohn might appear on said land at that time if he saw proper.

42 4th. The Certificate of Elias Wenger, J. P., that the said persons appointed to assess said damages, had been severally sworn to discharge their duties accord-

ing to law, and that they were not interested directly or indirectly, in said land, and were neither of them of kin to the said JAMES PETTIJOHN.

43 5th. The report of the commissioners appointed to assess said damages, that after having viewed said land they are of the opinion that the construction of said R. R. would greatly enhance the value thereof, and that the damage done to the owner thereof, over and above the benefit derived from the construction of said Railroad is one dollar, which sum they assess to said Pettijohn as damages. To the introduction of all which Plaintiff then and there objected, and the Court sustained the objection and excluded said evidence, and defendants excepted.

44 Defendants then called JOSIAH SAWYER, who testified that he was a director of the Tonica and Petersburg Railroad and had been such since its organization. That he endeavored to procure of Plaintiff the right of way for said Railroad over Plaintiff's land, but that they could not agree, and he procured the damages to be assessed. That Defendants Cantwell and Evans were contractors on said Railroad, and they went on Plaintiff's land for the purpose of constructing said Railroad, and that Defendant TAYLOR was the agent of Cantwell & Evans.

THOMAS BIRKETT testified that his fee and one of the other Commissioners had been paid.

ELLAS WENGER testified that he was the Justice of the Peace before whom the proceedings to obtain right of way were had; that he lived in Tazewell county, and that a copy of the proceedings of said Commissioners was left with him soon after the same was made, and that his fees had not been paid.

45 W. R. KELLOGG, testified that he tendered to Plaintiff, soon after the damages were assessed, one dollar, the amount assessed to him for his damages, and that he refused to accept. This was before the commission of the *trespass* complained of.

This was all the evidence in the case; and the Court found the issues for the Plaintiff, and Defendant then and there entered his motion for a new trial, but the Court overruled said motion and rendered judgment against the said Defendants, to all of which the Defendant then and there excepted.

Plaintiffs assign for Error the following, to wit:

1st. That the Circuit Court erred in excluding proper evidence offered on the part of the Defendant.

2d. That the Circuit Court erred in admitting improper evidence on the part of the Plaintiff.

3d. That the Circuit Court erred in rendering judgment for the Plaintiff, when by the law of the land it should have been for the Defendants.

BRIEF OF PLAINTIFF IN ERROR.

I. The action will not lie. The remedy is in Case and not Trespass; the charter authorizes the entry; the unlawful entry is the *gist* of the action. Where the right of entry exists, Trespass cannot be maintained.

Blackstone's Com. vol. 3, p. 210.

1 Chitty's Pl.

Redfield on Railroads, p. 173 and 174.

Edleman vs. Yeakle, 27, Penn. State R., 26.

II. The statute has provided an adequate remedy for all damages occasioned by entering upon and using Plaintiff's land for railroad purposes. The remedy pointed out by the statute is exclusive of all other remedies, and the parties were bound to pursue it.

Redfield on Railroads, p. 173.

Kimble vs. White Water Valley Canal Co., 1 Carter Ind. R. p. 285.

Troy vs. Chesire Railroad, 3 Foster 83.

Sabin vs. Vt. Central Railroad, 22 Vt. R., 368.

III. The proceedings required by the statute to acquire the right of way by the Railroad Company, were strictly pursued. It is insisted that the law of 1845, (under which the proceedings in this case were had) was repealed. This is not true. The two statutes are neither inconsistent nor repugnant, and should be construed together. Their charter, (Sec. 4,) authorizes them to proceed under any law in force at the time the proceedings to acquire a right of way are had.

Purple's Statute pp. 1031 and 1033.

The law of 1845 is still in force and has been recognized by this Court since the passage of the act of 1852.

Austin et al. vs. Burlington & Quincy Railroad Company, 19th Ill., 310.

H. M. & J. J. WEED,
Attorneys for Plaintiff in Error.

John Taylor & Others.
Plaintiffs in Error.
vs 163.

James Pettigrew

Abstract & Briefs

Filed Apr. 17, 1860

Leland
Clerk

State of Illinois p. In the Supreme Court
Ottawa Term 1868 -
Taylor & others
v.
Pettijohn
Error to
Tazewell

No. ~~163~~
163.

Reply of Charles C. Bonney for the
defendant to the additional
points made by Williams
& Mead for plaintiffs, on Sec.
19 of Act of 1852 -

1. This section is to be construed
with Section 1. and obviously
relates not to the time when
the corporation was or should
be created, but simply to the
fixing of the termini of the
road, by the legislature.

The words "shall have been
located" expressly extend
to all future cases; the
19th section can be construed
so as not to repeal the fore-
going provision cited from
Section 1.; and as it can

be so construed, the settled rule of construction, requires that it shall be -

2 But however this may be the charter of the Railroad Company, (see section set out in 'printed abstract' expressly defers to the act of 1852, and in fact makes that act a part of the charter.

3 But why was not the plain reading of the law followed? Why this hunting up of the repealed, obsolete, & imperfect act of 1845? Simply because the act of 1852 required the Railroad Company to act openly and justly toward the land owner, and ~~as~~ amply protected his rights, while the act of 1845 allowed ex parte proceedings, afforded lawyer privileges to the corporation, and gave less pro-

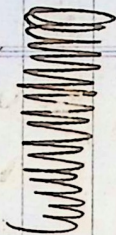
=tection to the citizen. The substance of the argument for the plaintiffs in error is that they smuggled into their charter an ambiguous clause under which they thought they could cheat the legislature, and seize the land of the citizen under a statute not provided for a case of this nature, and that now they have taken such pains and labor to carry out this wrong scheme, this work, from a supposed general sympathy with enterprises conducive to convenience of the public, ought to lend them its aid to complete the adventure!

4 The other points seem sufficiently noted in the printed brief, and the court will remember that the first and second points made for the plaintiffs, were abandoned at the bar.

163-95

Taylor &als

Pettijohn



Reply to additional
points made by
plaintiffs —

Filed May 5, 1860

L Leland
Clerk

STATE OF ILLINOIS, ss.

{ IN THE SUPREME COURT,
Ottawa Term, A. D. 1860.

JOHN TAYLOR, EDWARD H. CANTWELL,
WILLIAM EVANS,
v.
JAMES PETTIJOHN.

} ERROR TO TAZEWELL.

BRIEF OF CHARLES C. BONNEY FOR DEFENDANT IN ERROR.

A. The plaintiffs in error seek to justify the trespass by proceedings for the right of way for the Tonica & Petersburg Railroad under the act of 1845, entitled RIGHT OF WAY, (Purple p. 1031.)

It is insisted by the defendant in error that such proceedings are utterly void, and without even a plausible semblance of authority.

1. The act of 1845 is confined to PUBLIC works, proper, and does not extend to railroads or other works constructed, owned, and controlled, by private corporations for private advantages: Sections 1 and 5.

The term *public* means the whole body politic, and is applied strictly to that which concerns all the citizens and every member of the State.

11 Bouvier Law Dict., p. 400, title—"Public."

In Alton & Sangamon Railroad Company v. Carpenter, 14 Ill. R. 190, the legislature had specially extended the act of 1845 to that particular case.

So in Austin *et al* v. Belleville & Illinoistown Railroad Company, 19 Ill. R. 310 cited by plaintiff in error. But the 4th section of the charter of the Tonica & Petersburg Railroad, set out on page 2 of printed abstract is expressly limited to acts to "*enable RAILROAD companies to appropriate lands,*" &c.

But if the act of 1845 included railroads in the term "*public road,*" still the proceedings are void, because the 38th section of the statute of ROADS repealed, by implication, the former act.

County of Sangamon v. Brown *et al*, 13 Ill. R. 207.

And there is no pretence of a compliance with the section cited.

It requires among other things a report to, and an adjudication by the *County Court*.

2. The act of 1852 (Purple, page 1033) expressly applies to railroads, and *the mode of procedure is radically different* from that provided for in the act of 1845, *and in many material respects better calculated to protect the citizen from the usurpations and encroachments of the corporations*. So that if the act of 1845 could have originally been construed to apply to Railroad Companies, it was also repealed by the act of 1852.

The act of 1845 provided :

- (1.) Application to some justice of the peace.
- (2.) Appointment of three householders.
- (3.) Two reports of the majority—one to be filed with the justice, the other to be given to the commissioner or superintendent.
- (4.) Payment of the damages, if any.
- (5.) Right to appeal, as in other cases, before justices.

Sections 1, 4.

The act of 1852 provided :

- (1.) Petition to the Circuit Court, specifying its contents. Section 1.
 - (2.) Reasonable *notice* of the application. Sections 2, 3, 4.
 - (3.) A *hearing* of the application, and the appointment of commissioners. Section 2.
 - (4.) Meeting of commissioners at time and place *fixed by the court or judge*. Section 5.
 - (5.) A *hearing*, by the commissioners, of the allegations and testimony of the parties. Section 5.
 - (6.) Reports of the commissioners in writing specifying what they must contain. Section 6.
 - (7.) Payment of the damages as particularly specified. Sections 7 and 8.
 - (8.) Appeal from the commissioners to the Circuit Court, *without terms*. Section 13.
3. The measure of damages is not the same under the two acts.

Act 1845, Section 1.
 Act 1852, Section 5.
 County of Sangamon v. Brown *et al.* 13 Ill. R. 210.
 Bartlett *et al.* v. King *ex r* 12 Mass. R. 545.
 Nichols v. Squire, 5 Pick. R. 100.

B. If it be necessary to allude at all to the first and second points made by the plaintiff in error, they may certainly be disposed of with "true judicial celerity."

The first point that the action is trespass, whereas it should have been case, is not well taken, because there is no distinction of actions in cases originating before justices of the peace, and because the plaintiffs in error had no lawful authority to enter.

Horton v. Chritchfield 18 Ill. R. 135.
 Pendergast v. City of Peru. 20 Ill. R. 51.
 Swingley v. Haines, 22 Ill. R. 216.
 Chicago & Rock Island Railroad Company v. Whipple, 22 Ill. R. 341.

The second point, that the statutory remedy [?] is exclusive, cannot be sustained, because "the railway company have assumed to appropriate the land in violation of the provisions of the statute to be complied with on their part;" and, because, while there is a conflict of authorities upon the point, the weight of authority and reason is against the position taken.

Redfield on Railways, p. 174, sec. 2.
 Sedgwick Stat. & Con. Law, pp. 91 and 401.

SUPREME COURT
AT OTTAWA.

JOHN TAYLOR, EDWARD H. CANTWELL,
WILLIAM EVANS,
VS.
JAMES PETTIJOHN.

DEFENDANT'S BRIEF.

Filed Apr 27, 1860.

L. L. L. L.
clerk

13099

CHARLES C. BONNEY.

STATE OF ILLINOIS, ss.

{ IN THE SUPREME COURT,
Ottawa Term, A. D. 1860.

JOHN TAYLOR, EDWARD H. CANTWELL,
WILLIAM EVANS,
v.
JAMES PETTIJOHN.

} ERROR TO TAZEWELL.

BRIEF OF CHARLES C. BONNEY FOR DEFENDANT IN ERROR.

A. The plaintiffs in error seek to justify the trespass by proceedings for the right of way for the Tonica & Petersburg Railroad under the act of 1845, entitled RIGHT OF WAY, (Purple p. 1031.)

It is insisted by the defendant in error that such proceedings are utterly void, and without even a plausible semblance of authority.

1. The act of 1845 is confined to PUBLIC works, proper, and does not extend to railroads or other works constructed, owned, and controlled, by private corporations for private advantages: Sections 1 and 5.

The term *public* means the whole body politic, and is applied strictly to that which concerns all the citizens and every member of the State.

11 Bouvier Law Dict., p. 409, title—"Public."

In Alton & Sangamon Railroad Company v. Carpenter, 14 Ill. R. 190, the legislature had specially extended the act of 1845 to that particular case.

So in Austin *et al* v. Belleville & Illinoistown Railroad Company, 19 Ill. R. 310 cited by plaintiff in error. But the 4th section of the charter of the Tonica & Petersburg Railroad, set out on page 2 of printed abstract is expressly limited to acts to "*enable RAILROAD companies to appropriate lands,*" &c.

But if the act of 1845 included railroads in the term "*public road,*" still the proceedings are void, because the 38th section of the statute of ROADS repealed, by implication, the former act.

County of Sangamon v. Brown *et al* 13 Ill. R. 207.

And there is no pretence of a compliance with the section cited.

It requires among other things a report to, and an adjudication by the *County Court*.

2. The act of 1852 (Purple, page 1033) expressly applies to railroads, and *the mode of procedure is radically different* from that provided for in the act of 1845, and *in many material respects better calculated to protect the citizen from the usurpations and encroachments of the corporations*. So that if the act of 1845 could have originally been construed to apply to Railroad Companies, it was also repealed by the act of 1852.

The act of 1845 provided :

- (1.) Application to some justice of the peace.
- (2.) Appointment of three householders.
- (3.) Two reports of the majority—one to be filed with the justice, the other to be given to the commissioner or superintendent.
- (4.) Payment of the damages, if any.
- (5.) Right to appeal, as in other cases, before justices.

Sections 1, 4.

The act of 1852 provided :

- (1.) Petition to the Circuit Court, specifying its contents. Section 1.
 - (2.) Reasonable *notice* of the application. Sections 2, 3, 4.
 - (3.) A *hearing* of the application, and the appointment of commissioners. Section 2.
 - (4.) Meeting of commissioners at time and place *fixed by the court or judge*. Section 5.
 - (5.) A *hearing*, by the commissioners, of the allegations and testimony of the parties. Section 5.
 - (6.) Reports of the commissioners in writing specifying what they must contain. Section 6.
 - (7.) Payment of the damages as particularly specified. Sections 7 and 8.
 - (8.) Appeal from the commissioners to the Circuit Court, *without terms*. Section 13.
3. The measure of damages is not the same under the two acts.

Act 1845, Section 1.

Act 1852, Section 5.

County of Sangamon v. Brown *et al.* 13 Ill. R. 210.

Bartlett *et al.* v. King *ex'r* 12 Mass. R. 545.

Nichols v. Squire, 5 Pick. R. 169.

B. If it be necessary to allude at all to the first and second points made by the plaintiff in error, they may certainly be disposed of with "true judicial celerity."

The first point that the action is trespass, whereas it should have been case, is not well taken, because there is no distinction of actions in cases originating before justices of the peace, and because the plaintiffs in error had no lawful authority to enter.

Horton v. Chritchfield 18 Ill. R. 135.

Pendergast v. City of Peru, 20 Ill. R. 51.

Swingley v. Haines, 22 Ill. R. 216.

Chicago & Rock Island Railroad Company v. Whipple, 22 Ill. R. 341.

The second point, that the statutory remedy [?] is exclusive, cannot be sustained, because "the railway company have assumed to appropriate the land in violation of the provisions of the statute to be complied with on their part;" and, because, while there is a conflict of authorities upon the point, the weight of authority and reason is against the position taken.

Redfield on Railways, p. 174, sec. 2.

Sedgwick Stat. & Con. Law, pp. 91 and 401.

SUPREME COURT
AT OTTAWA.

JOHN TAYLOR, EDWARD H. CANTWELL,
WILLIAM EVANS,
vs.
JAMES PETTIJOHN.

DEFENDANT'S BRIEF.

Filed Apr 28 1860
A. Deland
** Clerk*

CHARLES C. BONNEY.

Pleas to a Term of the Circuit
Court begun and held at the Court
House in the City of Pekin in and
for the County of Tazewell and State
of Illinois on the first Monday of
Month of February in the year of our
Lord Eighteen hundred and Sixty,
Present the Honorable James Harriott
Judge of the Twenty first judicial
Circuit composed of Tazewell
Mason &c.

Be it remembered that on the 16th day of December
in the year A. D. 1859 an appeal bond and trans-
cript of the justices docket. was filed. which said
Bond and Transcript are in the words and fig-
ures following to-wit

" Know all men by these presents that, we
" John Taylor & E. H. Cantwell and Laurence B.
" Chambers, are held and firmly bound unto James
" Pettyjohn in the penal sum of Twenty one Dollars
" lawfull money of the United States, for the pay-
" ment of which will and truly to be made, we
" bind ourselves our heirs and Administrators
" jointly severally and firmly by these presents. Wit-
" nes our hands and seals this 20th day of October
" 1859. The Condition of the above obligation is

2 " such that, Whereas the said James Pettyjohn
" did on the first day of October A.D. 1859 before
" M. Tachabony a Justice of the Peace for the
" County of Lawrence record a judgment against
" the above bounden John Taylor & E. H. Cantwell for
" the sum of Nine ²⁵/₁₀₀ Dollars from which judg-
" ment the said John Taylor and E. H. Cantwell
" has taken an appeal to the Circuit Court of
" the County of Lawrence and State of Illinois.
" Now if the said John Taylor & E. H. Cantwell
" shall prosecute their appeal with effect, and
" shall pay whatever judgment may be rendered
" by the Court upon dismissal or trial of said
" appeal, then the above obligation to be void,
" otherwise to remain in full force and effect.

" John Taylor Per Cantwell seal

" E. H. Cantwell seal

" Law B. Chambers seal

" Witnessed before me this 20th

" day of October 1859.

" M. Tachabony J.P.

" James Pettyjohn

" -vs-

" John Taylor

" E. H. Cantwell and

" William Evans

Judgment

Damages 3.00

Costs in full 7.50
\$10.50

September 17th 1859 suit in

" a case of Trespass on Real Estate, Damages
 " claimed not exceeding One hundred dollars, sum-
 " monses issued to R. H. Parker C. J. C. returnable on
 " the first day of October 1859 at One O'clock P.M.
 " summonses returned enclosed served by mailing to
 " John Taylor and E. H. Cantwell. Sep 28th 1859. R. H.
 " Parker C. J. C. cost \$1.75. A Subpoena also issued
 " for Mark Goodyear E. Case, and Charles Hofer,
 " returned, enclosed served by mailing to witnesses
 " September 28, 1859. Costs \$2.50. October first 1859
 " one O'clock P.M. Parties appeared and Goodyear,
 " Case, and Hofer, sworn as witnesses. And after
 " hearing all the Proof and allegations of
 " parties. The said John Taylor and E. H. Cantwell
 " were found guilty of trespass as charged and
 " a judgment rendered in favor of Plaintiff aga-
 " inst them for Three Dollars and costs of Suit.

"	Justice	.56
"	Sub	.18 ⁵
"	Serving writs	.25
"	Con	1.75
"	Dr Subpen	2.50
"	witness Goodyear, Case, & Hofer	1.50
"	Bond & Transcript	<u>.75</u>
		\$ 7.50

" October 20th 1859 a Bond for an
 " appeal to the Circuit Court filed and approved.
 " I certify that the foregoing is a cor-
 " rect transcript from my docket of all proceedings

4. " had before me in the above entitled cause,
" Given under my hand and seal the 16th day of
" December 1859.

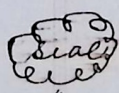
" M. Tachaberry J. P. *seal*

And now afterwards to-wit on the
16th day of December A. D. 1859 a summons
was issued in the words and figures following
to-wit:

" State of Illinois }
" Jaycewell County }^{ss} The People of the State of Illinois.
" To the Sheriff of said County.

" Greeting - I command you that
" you summon James Pettyjohn if he shall
" be found in your County, personally to be and
" appear before the Circuit Court of said County
" on the first day of the next Term thereof to be
" held at the Court House in Pekin in said
" County, on the first Monday of February next
" to prosecute his suit against Taylor, Cantwell,
" & Evans, lately appealed from before M. Tachaberry
" my Esquire. And have you there and then

" this writ with an endorsement thereon in
" what manner you shall have executed the same

 Witness Merrill C. Young, Clerk of said Circuit
Court and the seal thereof, at the city of Pekin
this 16th day of December, A. D. 1859.

" Merrill C. Young Clerk Circuit Court.
" per S. B. Stone Deputy

Which said summons was on the 6th day of February A.D. 1860 returned with the following endorsement thereon to-wit

Served by reading the same to the within named James Pettigohr January 24th 1860

Wm R. Lackland

Deft Sheriff

And now afterwards to-wit at a Term of the Circuit Court begun and held at the Court House in the City of Pekin within and for the County of Tazewell and State of Illinois on the first Monday of the Month of February the same being the 6th day of said Month, in the year of Our Lord Eighteen Hundred and Sixty. Present the Honorable James Harriott Judge of the Twenty first Judicial Circuit Hugh Fullerton Esq, Prosecuting Attorney J. C. Reems Sheriff and Merrill C. Young Clerk. the following proceedings were had in said cause to-wit

Friday Feby 17th 1860
James Pettigohr

v
John Taylor, E. W. Cantwell
and William Evans

3 Appeal
3 Jury waived
3 trial by Court
3

now on this day came

as well the Plaintiff by his attorney B. S. Pettymann, as the Defendants, by their attorney, H. M. Wead, and by agreement of Parties herein, a Jury is waived, and this cause is tried by the Court.

And the Court having heard the proofs and allegations of the parties, and argument of Counsel thereon, and being fully advised in the premises, is of opinion, and therefore does order and adjudge, that the Plaintiff recover of said Defendants the sum of Ten Dollars damages, and likewise the costs and Charges by him about his suit expended and that execution issue therefor.

Whereupon the Defendants enter their Motion for a new trial in this cause, - which motion, is, by the Court, overruled.

James Pettyjohn } In the Laywell Circuit
-vs- } Court February Term
John Taylor } U. S. 1860
E. H. Cantwell & }
William Evans }

Bill of Exceptions

Be it remembered that on the trial of this cause the plaintiff to sustain the issue on his part, called Mark Goodyear, who testified that he knew when the Fouca & Petersburg Rail Road crossed the Plaintiffs land - that the plaintiff lived on the land - and sometime in September last one of the defendants John Taylor came along in a buggy stopped and got out, and laid down the fence, and took a team and plough that was standing there and drove into plaintiffs field and went to plowing along the line of the Rail Road. The Rail Road was started off through plaintiffs land, it was stubble land. The plaintiff then asked the witness "what amount of damage was done" To this question the defendant objected, but the objection was overruled, and the question asked, and the witness stated, that he thought the damage amounted to twelve or fifteen dollars. To which decision of the court in overruling the question and permitting the witness to answer it

the defendants then and there objected.

This witness on cross examination stated that the team and plough belonged to Mr Sperry who was employed to work on the Rail Road by defendants and he was waiting for Taylor to come and let down the fence. The land was plowed up and scraped into piles.

Plaintiff next called Charles Hofer who testified that defendants went on to plaintiffs land in September last to work on the Rail-Road which ran through his land, with teams and plowed up the ground and threw it up into piles. The land was enclosed and sowed in grass and had stubble on it.

Then the Plaintiff rested.

The defendants then offered in evidence the Charter and amendments of the Louisa & Petersburg Rail-Road Company as follows:

"An Act to incorporate the Louisa and Petersburg Railroad Company.

Section 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, That Albert Benzolds, Elijah N. Farnsworth,

9

Jesse Hammers, Henry R. Green, John Bennet,
 William G. Green, William Crow, Josiah Saw-
 yrr and Richard Yates and their associates
 successors and assigns, are hereby created a
 body politic and corporate, under the name
 and style of "The Tonica and Petersburg Rail-
 road Company" with perpetual succession
 and by that name and style shall be and are
 hereby ~~made~~ capable in law and in equity to
 sue and be sued, plead and be impleaded,
 defend and be defended in all courts of Law
 and Equity in this state or elsewhere, to make
 have and use a common seal, and alter the
 same at pleasure and by that name and
 style shall be capable, in law of taking, holding,
 purchasing, leasing, selling, and conveying
 Estate and property, real, personal and mixed
 so far as the same may be necessary for the purposes
 hereinafter named, and not further; and shall
 be and are hereby vested with all the powers, privi-
 -es and immunities which may be necessary to carry
 into effect the objects and purposes of this Act;

§ 2 The said Company shall have power and
 authority to locate and from time to time to
 alter, change, relocate, construct, reconstruct, finish
 maintain, and operate a Rail Road with one or
 more tracks, commencing at a point at or near
 Tonica on the Illinois Central Railroad, running

thence through Magnolia, in Putnam County. Lyons and Mantua in Marshall County. Matamora in Woodford County. Ironmont and Delavan, in Fagwell County. Petersburg in Menard County, at or near Crows point, in Cass County, and terminating at Jacksonville, in the County of Morgan, upon the most eligible route, to be by said Company selected, and for the purpose of constructing the said Railroad, said Company shall have power to lay out and establish their said road, in width not exceeding one hundred feet through the entire length thereof and for the purpose of constructing Bridges, dams, embankments, excavations Spoil-banks engine houses, depots, Station grounds, machine, Shops, turn-tables, Turn-outs and all other buildings and fixtures necessary and suitable for the construction, altering maintaining and operating said road, and also, for obtaining necessary Stone gravel and sand, the said company may take, use and occupy all necessary lands upon either side of said road.

§ 3 The said company shall have power to take and hold all such voluntary grants, and donations, of lands and real estate, as may be made to said Company to aid in the construction maintenance and accommodation of said road, and to take and receive grants and Convey-

- ances of any and all estate therein. to said company and their successors, in office or assigns, in fee or otherwise, and that the right of way, and the real estate purchased, for the right of way for said company, whether by mutual agreement or otherwise, or which shall become the property of the company by operation of law, as in this act provided, shall upon the payment of the amount of money belonging to the owner or owners of said lands as a compensation for the same, become the property of said corporation in fee simple, -

§ 4 The said company are hereby authorized by their engineers agents and surveyors, to enter upon any lands for the purpose of making the necessary survey and examinations of said road and to enter upon and take and hold all lands necessary for the construction of said road, and all such lands as may be required in the construction of bridges dams embankments, excavations, Spoil-banks, turn-outs, depots, engine houses, shops, turno-tables, and other necessary improvements, or buildings first making just compensation to the owners or occupants of said lands for damages that may arise to them from the appropriation thereof to the uses aforesaid. and in case said company shall not be able to obtain the title to the lands required for said uses, by purchase

or voluntary cession the said company are hereby authorized to proceed to ascertain and determine the damages sustained by such owners or occupants, and obtain right and title to said lands in the manner and upon the principles provided in "An act to amend the law condemning right of way for purposes of Internal improvements" Approved June 22^d 1852 or in the manner and upon the principles provided by any other act that may have been or may hereafter be passed by the general assembly of the state of Illinois to enable Railroad companies to appropriate lands for the purposes aforesaid. =

§. 5. The said board of Directors shall have power and authority to provide in their by-laws, if they in their discretion shall think proper to do so, for the construction of said road by divisions, and in such case it shall be lawful for the subscribers of the stock to be taken and subscribed for either of said divisions or for the whole of said road, as those taking and subscribing for the same may deem proper, and in the event that the whole or any portion of said stock be taken and subscribed for by divisions, the amount of stock so taken and subscribed shall be applied and

expended in the construction of that particular division for which the same was taken. Provided that should the amount raised for any division be a surplus or more than will be required for the construction of said division such surplus shall go to the whole road as an entire road and it may be appropriated in such manner and at such place on the road as the company may decide.

§ 6. That all the rights acquired by and all the obligations incurred by an association heretofore and organized for the purpose of constructing and operating a railroad from a point at or near Louisa on the Illinois Central Railroad to Petersburg in Menard County State of Illinois and known by the name of "The Louisa and Petersburg Railroad Company," are hereby made and declared of legal effect as though the said corporation had been constituted a body politic and corporate by legal enactment and organized thereunder, and that the said Corporation shall succeed to all the rights and obligations of the said association; and that the officers or directors of said association or person or persons claiming or having a right to the same shall transfer and convey, and deliver to said corporation all money and property acquired

by or held to the use of said association, also all books maps profiles and all papers of every description pertaining to the same, to be held and used by the said corporation in carrying out the provisions of this act, that all bonds, notes, contracts and promises of every kind made with said association, or its officers or agents, in respect to said rail Road, or its construction, shall run to the benefit of said corporation, and shall be binding and effectual as if made with said corporation; and all debts which may be due from the said association and all contracts or obligations to be performed by it shall be binding upon the said corporation, as if such debts, contracts and obligations had been made originally by the same: Provided that all subscribers who have subscribed to the capital stock of the said association, shall be deemed to be stockholders in the said corporation, to the extent and in proportion to the amount so subscribed, and shall be entitled to all the rights and subject to all the liabilities which other stockholders who shall hereafter subscribe to the capital stock of said corporation, under and in pursuance of the provisions of this act.

§ 7. The capital stock of said corporation shall consist of two millions of dollars, and may be increased by the directors of said company to any sum necessary to complete and equip said road,

and the same shall be subscribed for and taken under the direction of the board of directors at such times and places, and in such manner as the directors shall from time to time direct. The said capital stock shall be divided into shares of One hundred dollars each; shall be deemed personal property; shall be liable to be sold under execution, and shall be transferable in such manner and at such places as shall be ordered by the board of directors.

§ 8. All of the corporate powers of said company shall be vested in and exercised by a board of directors of not more than nine nor less than five, to be determined by the stockholders, and to be chosen annually by the stockholders from among themselves, who shall hold their office for one year after their election, or until their successors are elected and qualified. The time and manner of holding the annual election for the election of directors shall be fixed and determined by the by-laws of the company and at all such elections of directors each stockholder shall be entitled to one vote for each share of stock bona fide held by him and may vote in person or by proxy. The said directors shall have power to appoint all necessary clerks, secretary and other officers or agents necessary in the transaction of the business of the board. The said directors a

majority of whom shall constitute a quorum shall elect one of their own members to be the president of the company.

§ 9. In case of the death, resignation or removal of the president, or any director, at any time between the annual elections such vacancy may be filled for the remainder of the year, whenever, it may happen, by the board of directors, and in the case of absence of the president, the board of directors shall have power to appoint a president pro-tem., who shall have and exercise all the powers of the legal president of the company. In case it shall at any time happen that an election of directors shall not have been made on the day on which it ought to have been made in pursuance of the provisions of this act, the said corporation shall not for that cause be dissolved but such election shall be holden at such other time as shall be directed by the by-laws of said corporation.

§ 10. The first board of directors of said company shall consist of, Albert Kenyolds, Elijah N. Farnsworth, Jesse Hammers, Josiah Savoy, Henry B. Grew, John Brannet, William G. Grew, William Crow, and Richard Yates, who shall hold their office until the next annual election of directors, or until their successor are elected and qualified. Said board of directors shall

cause books to be opened for subscription to the capital stock of the said corporation at such time and in such manner as they shall by their by-laws direct.

§ 11. It shall be lawfull for the directors to make calls upon the sums subscribed to the capital stock of said corporation, at such times and in such amounts as they shall deem fit, giving at least thirty days notice of each of said calls in at least two newspapers published in the vicinity of said roads; and in case of any failure on the part of any stockholder, to make the payment of any call made as aforesaid, by the said directors, for sixty days after the same shall have been made, the said board of directors are hereby authorized to declare said stock so in arrears and all sums paid thereon shall be forfeited to the company; and said company shall have ^{the} power and authority to institute suits in any competent court and recover judgment against any such defaulting subscriber or subscribers for such amount of stock as he or she or they may be so in arrears as aforesaid.

§ 12. The said corporation may transport upon said railroad persons, merchandise and property, by the power of steam or of animals, or of any other power or combination of powers.

and may regulate the time and manner, in which goods, effects and persons may be transported on the same, and may prescribe the manner in which said rail road may be used, and the rate of toll for the transportation, of persons and property thereon, and for the storage of merchandise and other property under their charge, and shall have power to provide all necessary stock and materials for the operation of said road, and to erect and maintain all necessary depots and other buildings and machinery for the accommodation, management and operation of said road. The said directors shall have power to make all necessary rules, regulations, ordinances and by-laws which they may deem necessary and expedient to accomplish the designs and purposes and to carry into effect the provisions of this act.

§ 13. If any person shall maliciously wilfully or wantonly, or shall negligently obstruct the passage of any car on said rail road or upon any part thereof, or any thing belonging thereto or shall damage break or destroy any part of the said rail road or implements^{buildings}, belonging to the same he she or they or any person assisting, shall forfeit and pay said company for every such offense to be the amount of damages that shall be proved

before a competent court has sustained and proceed for in the name and behalf of said company and such offender or offenders shall be deemed guilty of a misdemeanor and shall be liable to indictment in the same manner other indictments are found in any county or counties where such offense shall have been committed, and upon conviction every such offender shall be liable to a fine not exceeding one thousand dollars, for the use of the county where such indictment may be found, or shall be imprisoned in the penitentiary not exceeding five years or both, in the discretion of the court, before whom the same shall be tried.

§ 14. Said company are hereby authorized from time to time, to borrow such sum or sums of money as may be necessary for completing and operating their said road, and to issue and dispose of their bonds in denominations of not less than five hundred dollars, for any amount so borrowed, and to mortgage their corporate property and franchises, and convey the same by deed of trust, to secure the payment of any debt contracted by the said company for the purposes aforesaid; And the directors of said company may confer on any bondholders of any bonds issued for money borrowed as aforesaid

the right to convert the principal due or owing thereon into the stock of said company, at any time not exceeding two years from the date of the bond, under such regulations as the directors of said company may see fit to adopt; and all sales of bonds for less than their par value shall be good and valid and as binding upon said corporation as if the same, were sold for the full amount thereof; and said corporation may loan any surplus funds at such rate of interest as is now allowed upon any money loaned by the laws of this State; Provided, nothing herein contained shall be so construed as to confer banking privileges.

§ 15. The certificate of the secretary of said company under the corporate seal thereof shall be received in all courts of justice and elsewhere as evidence of the regular organization of said company under its charter and of any act or order of the board of directors of said company.

§ 16 That whenever it shall be necessary for the construction of said rail road to intersect or cross any water course or any road or highway lying between the points aforesaid it shall be lawful for the corporation to construct their rail road across or upon the same. Provided, that the corporation shall restore the water course or road or highway thus intersected.

- ted to its former state or in a sufficient manner not to have impaired its usefulness. It shall be lawful for the said company to unite with any other rail road company which may have been or hereafter may be incorporated by this state, and to grant to any company or companies the right to construct and use all or any portion of the road hereby authorized to be constructed; also the right to sell lease or to convey the same to said company or companies, or consolidate its stock therewith, and place the management and control of the same under such board of directors, upon such terms as may be mutually agreed upon by the said railroad companies.

§17. The said corporation shall have power to construct a northern extension of said road to Ottawa and in the event of the extension of said road to Ottawa, the said corporation shall not be compelled to construct that part of the road provided for in the second section of this act, which lies between Tonica and Magnolia, unless said corporation in their discretion see proper so to do, but shall have power to run said road on the most eligible route between Magnolia and Ottawa, crossing the Illinois Central railroad either at Tonica or at a point on said Illinois Central railroad

south of Jolicea, as said company may deem most for the interests of said road; and said corporation shall also have the power to construct a branch of said road from Petersburg to New-Berlin on the Great Western road, and also a southern extension of said road from Jacksonville in the direction of Marietta and Berlinville to such point on the Illinois Central Railroad, as the said corporation may hereafter determine, said extension and branches to be constructed, in every respect according to the provisions, requirements and limitations of this act.

§ 18 This act is hereby declared to be a public act, and shall be in force from and after its passage, and said company shall commence its work within five years and complete the same within ten years after the passage of this Act.

Approved Jan. 15 1857.

An act supplemental to an "Act to incorporate the Jolicea and Petersburg Rail Road company"

Section 1 Be it enacted by the people of the State of Illinois, represented in the general Assembly. That in all cases where subscriptions have been or shall be made to said Com-

-pass by any county of this State, in pursuance of a vote of the County (all of which are hereby declared legal and valid,) it shall be the duty of the County Court of each County, respectively, to levy a sufficient tax to pay the interest on the bonds to be issued for said stock which tax shall remain in force until said bonds are paid off and discharged; and said tax may from time to time be increased or diminished, so as to produce sufficient funds for payment of said interest, that the votes given at the last general election, holden on the fourth day of November A. D. 1856, by the counties of Morgan and Menard in favor of subscriptions to the capital stock of said Company, be and the same are hereby declared of legal effect; and that the clerks of the County Courts of such counties be authorized and required to issue their bonds to said company, in the manner and upon the terms set forth in the election notices and other proceedings of said County Courts in relation thereto.

§ 2 That if the Citizens of Washington, in Fagerwell County, shall, on or before the first day of March A. D. 1857 subscribe within said town of Washington, not less than the sum of fifteen thousand dollars, in good responsible subscriptions, to the

capital stock of said company, and secure, free of expense to said company, the right of way through said town of Washington, and also grounds for a passenger house, at such point as the said road shall cross the Provia and Ogawa-
-waka Eastern Extension, Railroad, free of expense to said company, and also, depot grounds, within three-eighths of a mile of said crossing, free of expense to said company, then the said road shall be located through the said town of Washington.

§ 3. That the county court of each county which, may, by a vote of said county, have subscribed, or may hereafter subscribe to the Capital stock of said company, is hereby authorized to make the interest on the bonds of subscription of said payable at such place or places as the said county courts respectively, may order and determine.

§ 4. The said corporation shall have power to construct a branch of said rail-road from some point thereon between Magnolia and Ottawa, to some point in the town of Morris in the county of Grundy; said points to be fixed by said corporation with spurs to said branch running to the coal beds on Brumfield River which said branch and spurs shall be constructed under the provisions of the original

act to which this is an a Supplement; and said corporation shall have all the powers, privileges and advantages and be liable to all the obligations, liabilities and disabilities, in constructing and managing said branch and Spurs as are imposed upon or granted said company by said charter, in constructing and managing the main trunk of said Railroad.

Approved Feb. 16, 1857.

An Act to amend "An act to incorporate the Tonica and Petersburg Railroad Company" approved January 15th 1857, and also to amend "An act supplemental to an act to incorporate the Tonica and Petersburg Rail Road company" approved February 16th 1857.

Section 1 Be it enacted by the people of the state of Illinois, represented in the general assembly, That said Corporation is authorized to receive subscriptions to its capital stock, payable at any time, and in any manner and at any rate of interest, not exceeding ten per cent, per annum which may be agreed upon by said corporation and the subscribers to the capital stock thereof.

§ 2 The provisions of "An act supplemental

to an act entitled 'an act to provide for a general system of railroad incorporations' approved Nov 6th 1849, and also of "An act to facilitate the construction of Railroads, approved March 1st 1854, and hereby declared and made applicable to each and every town now incorporated, or that may hereafter be incorporated, situated on or near the line of "The Jonica and Petersburg Railroad," and the corporate authorities of any such incorporated town may order an election or elections, to be held in such town by the legal voters thereof, upon the question whether the town, in its corporate capacity, will or will not subscribe to the capital stock of "The Jonica and Petersburg Railroad" any sum not exceeding fifty thousand dollars, and in case said election shall be held, the same shall be conducted as other town elections; and if [at] any such elections, a majority, of ~~the~~ voters voting shall be in favor of making such subscription, all the provisions of the two acts recited in this section, and also all other general laws relating to subscriptions by Counties to the capital stock of rail road companies shall apply to and govern the ^{corporate} authorities of such town in making such subscription and in all the subsequent proceedings relating

27

thereto; and the rights of such town against said corporation shall be the same with the like remedies to enforce such rights as the rights and remedies of counties in cases of county subscription.

§ 3. That any township now or hereafter organized under the township organization laws of this state, which may be situated on or near the route of the Tonica and Peleburg railroad or of any branch of said road, is hereby authorized to subscribe to the capital stock of said company in any sum not exceeding fifty thousand dollars for each township.

§ 4. No such subscription shall be made until the question has been submitted to the legal voters of the township in which the subscription is proposed to be made, and the clerk of each of said towns (in which the subscription is proposed to be made) is hereby required upon presentation to him of a petition signed by at least twenty citizens, who are legal voters and tax payers of the town of which he is clerk (in which petition shall be specified the amount proposed to be subscribed, the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear) to post up

notices in at least three of the most public places of said town, which notices shall be posted at least thirty days before the day of holding such election, notifying the legal voters to meet at the usual place of voting, or some other convenient place in said town, for the purpose of voting for or against subscription; but no such vote shall be taken except at a regular election for town or county officers.

§ 5. If it shall appear that a majority of all the voters voting at such election, have voted for subscription, it shall be the duty of the supervisor of each of said towns that shall vote for such subscription, to subscribe to the capital stock of said rail-road corporation, in the name of the town for which he is supervisor the amount so voted to be subscribed, and to receive from said corporation the proper certificates therefor. He shall also execute to said corporation in the name of said town, bonds in conformity with said vote, which bonds shall specify the place of payment, and shall in no case bear interest at a higher rate than ten per cent, per annum, and shall run for a term of not less nor more than twenty years, and the interest on the same shall be made

payable annually or semi-annually, and which said bonds shall be accepted by said corporation at their par value. Said bonds shall be signed by the supervisor and attested by the clerk of the town in whose name the bonds are issued and it shall be the duty of said clerk to make a record of the issuing said bonds. Said bonds shall be delivered to the president or secretary of said corporation, for the use of said corporation.

§6. It shall be the duty of the clerk of each of said towns in which a vote is given for subscriptions, within ten days thereafter, to transmit to the County clerk of the county in which said town is situated a transcript or statement of the vote given and the amount voted to be subscribed, and the rate of interest named in the bonds, and the times of payment of said interest.

§7. It shall be the duty of said County Clerk annually thereafter, to compute and assess upon all the taxable property, returned by the assessor of each of said towns which have voted to subscribe a sufficient sum to pay the interest on all bonds issued by the respective towns, which taxes shall be extended on the collectors books as other taxes are, and shall be collected in the same manner that other taxes are collected, and when collected shall be paid

into the county treasury as county taxes are paid.

§ 8. It shall be the duty of said treasurer of the county in which said town is situated, to pay out, on the presentation to him of the bonds issued by any town as aforesaid the amount due on each of said bonds as interest, out of any money in his hands for that purpose, and receive the interest coupons thereon due and paid by him or other sufficient vouchers; he shall also keep an account with each town of all moneys received by him and paid out on account of said town which account shall at all times be open to ^{the} inspection of all persons wishing to examine the same.

§ 9. At all elections for officers or other questions voted upon by the stockholders of said corporation, the supervisor of each town making such subscription shall represent and cast the vote which said stock is entitled to.

§ 10. The supervisor of each town voting for subscription as aforesaid is hereby authorized to issue and deliver to said corporation the whole of the bonds payable on its subscription, whether the assessment on the other stockholders of said company have been regularly assessed and made payable or not, and said bonds, both principal and

interest, may be made payable at any place within or without this State, in conformity with the vote that shall have been taken.

§ 11 That in all cases when subscriptions of stock have been made to the said corporation by any county of this State, or shall hereafter be made to said corporation by any county, city or incorporated town it shall be the duty of the County Court of each county and of the corporate authorities of each city and incorporated town, respectively, and they are hereby directed and authorized to levy a sufficient tax to pay the interest and principal as the same matures and becomes due on all the bonds, which may have been heretofore issued, or may be hereafter issued for said stock, which tax shall be collected at the same time and in the same manner as the taxes are collected for other purposes, and shall remain in force until said bonds are paid off, and discharged. And said tax may from time to time be increased or diminished, so as to produce sufficient funds for payment of said interest and principal of said bonds, and the said county, city or town authorities, shall also be empowered to purchase and cancel any of said bonds at any time when there may be funds in

the treasury not otherwise appropriated, at such prices as they deem consistent with the best interests of the County city or town respectively.

§ 12. In every case when an election shall be held by or in any county, city or incorporated town, situated on or near the route of said railroad, as the same has been or may hereafter be surveyed and located in whole or in part upon the question whether such county, city or town shall subscribe for any specified amount in shares of the capital stock of said corporation, said election shall be legal and binding upon such county, city or town, if notices thereof are given and the election is conducted in the mode prescribed in "an act supplemental to an act entitled 'an act to provide for a general system of Railroad incorporations,'" approved November 6th 1849, or in the mode prescribed in any general law of this state, relating to the same subject. And if ~~a~~ majority of the votes cast at any such election be for subscription, it shall be the duty of the county court or the corporate authorities of such city or town to subscribe without any unnecessary delay, upon the request of the president of said corporation, for shares of said capital stock

to the amount so voted and to issue and deliver to said company the same amount as the stock so subscribed of the bonds of said county, city or town, (as the case may be) payable at any time specified, not exceeding twenty years from their date, with annual or semi-annual coupons for not exceeding two per cent. ^{interest} per annum thereon attached, which bonds and coupons may be made payable either within or without this state, as said corporation may request, and all the provisions of the above mentioned act of second November 6th 1849, which are not inconsistent with the provisions of this act, shall apply to and govern every election referred in this section, and the subscribing for stock and issuing of bonds by virtue of such election, and all other matters relating to such election and the proceedings thereunder or by virtue thereof.

§ 13. The said company shall carry and transport the mails of the United States, on such terms as may be agreed upon and all such freights and passengers as may be offered if required so to do, on the terms usual [with] like railroad corporations.

§ 14. The said corporation is hereby authorized to sell and convey, by deed, in fee simple

all lands, town lots or other real estate belonging to or acquired by said corporation or which may hereafter be acquired by purchase, donation or otherwise, which in the judgment of its board of directors is not needed for the purposes of said corporation, and all sales, conveyances, deeds of trust, or mortgages of real estate by said corporation, the conveyances shall be made in the corporate name thereof, and acknowledged by the president; under the seal of corporation, and attested by the secretary thereof.

§15. The said corporation are hereby authorized to make and issue a preferred stock guaranteeing such a rate of interest, not exceeding ten per cent, per annum and with such priority over the remaining stock of such corporation as may be directed by the board of directors of said corporation, and the said directors may cause subscription books for same to be opened at such times and places as they may direct, which shall be governed by the same rules, regulations and liabilities as provided heretofore in the original charter of said corporation and the several amendments thereto, or by any by-laws or regulations which may be

adopted or directed by the said directors. And the said board of directors may make such by-laws and regulations necessary to give and secure to each original stockholder in said corporation a free pass over the said railroad when completed so long as such person may continue the bona fide owner of such original stock: Provided, that no free pass shall be issued to any such stockholder, unless he is the owner of at least five shares of said capital stock.

§ 16. The said corporation is hereby authorized to borrow such sums of money, on the credit of the corporation, which may be necessary for constructing, finishing or operating their said rail road, or for any other purpose connected therewith, at a rate of interest, not exceeding two per cent, per annum, payable semi-annually or annually, and may execute bonds therefor with interest coupons annexed and secure the payment of the same by mortgage or deed of trust, on the whole or any part or any division of said railroad and corporate property, franchises and income of said corporation, then existing or thereafter to be acquired, the said bonds and interest may be made payable either within or without this state, and if the payment of the moneys thereby secured shall be afterwards enforced by a sale of the

property thus conveyed by mortgage or deed of trust, such sale shall convey to the purchaser the right to hold and exercise the said franchises as fully as the same right was possessed by said corporation.

§ 17. That said corporation shall have the power to execute a deed of trust or mortgage on the property, road and income of the company or upon any division or part thereof, to secure the payment of such amount of bonds as may be deemed necessary to be issued by the board of directors of said corporation, for the purposes of the road, and said corporation shall have power to sell and dispose of said bonds at the time said deed of trust or mortgage bears date, or shall have power to execute said bonds and sell the same, in whole or in parts from time to time and of such dates subsequent to said deed of trust or mortgage and payable to such persons or persons, as to said corporation shall seem advisable, till the whole amount of bonds mentioned in such deed of trust is executed and sold, and the said mortgage and deed of trust shall be as valid and efficient to secure the payment of the bonds so executed and sold and every part thereof as if the same

and every part thereof, had been executed and sold with even date with the said deed of trust or mortgage.

§ 18. That whenever the said rail road shall intersect any road, railroad, highway street or alley, the said corporation shall have power to change the line or grade of the said road, railroad highway, street, or alley, so intersected if such change be desirable, and shall not impair the usefulness of such road, rail-road, highway, street or alley, thus intersected and said corporation may take such additional lands as may be necessary for the change of said road, highway, street or railroad, making compensation therefor as in other cases; Provided that in case of intersection with any rail road now incorporated, no change of line of such rail-road, so intersected shall be had except with the consent of the company so intersected, or in case of disagreement, by the direction and award of arbitrators mutually chosen, one of whom shall be selected by each company, and the third chosen by the two thus chosen;

§ 19. That in all proceedings had or hereafter to be had, for right of way or condemnation of real estate, for any purpose of said

rail-road, after any assessment or non-assessment of damages in the premises, by commissioners, and an appeal or other proceedings in the premises by either party the said corporation may proceed in the construction of the said railroad over and upon said real estate, upon giving bond and security in a sufficient amount to be approved by the clerk of the circuit court of the proper county, conditioned to pay to the owners or owners of such real estate all costs and damages that may hereafter be legally taxable and assessed in the premises against said corporation.

§ 20. Said corporation may maintain suit against stockholders for non-payment of capital stock in any county through which said road passes, and no stockholder or other person interested in the affairs of said corporation shall be incompetent to testify as a witness or serve in any material capacity in any proceedings, legal or otherwise, when said corporation may be a party.

§ 21. This act shall be deemed a public act and in force from and after its passage, Approved February 14, 1859."

The defendants then offered in evidence the following certificate of the Secretary

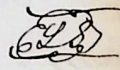
39 -ry of said company:

" State of Illinois }
" Morgan County } I, James Burdau Secretary
" of the Tonica & Petersburg Rail Road company,
" do hereby certify that the said company is duly
" and regularly organized under its charter
" contained in an Act of the General Assembly
" of the State of Illinois entitled "An act to
" incorporate the Tonica and Petersburg Rail-
" Road Company", passed January 15th 1857
" In Testimony whereof, I have hereunto
" subscribed my name and affixed the
" corporate Seal of said company
" at my office in Jacksonvillo, this twen-
" ty third day of January A.D. 1858
" James Burdau Secretary

The defendants next offered in evidence the proceedings of Commissioners appointed to assess the damages for locating the Rail Road over plaintiffs land, as follows

State of Illinois } To James S. Bell or to
Lazewell County } any other citizen of the State
and County aforesaid
Upon the application of John L. Marsh, Director
of the Tonica & Petersburg Railroad company.

you are hereby directed to summon W. D. Evans
 & Thos Burdett J. I. Bell. to appear forthwith
 before me. the undersigned, an acting justice
 of the Peace, within and for said County
 then and there to be sworn as appraisers and
 assessors of damage done to the land of James
 Pettyjohn. by reason of the erection of the Louisa
 at Petersburg over said land and that they
 proceed to make said view and appraisement
 on the 28th day of October. And this you
 are not to omit - and you then and there
 this summons. - Given under my hand and
 seal. this 20th day of October 1858.

Elias Huger J P 

State of Illinois }

Lazearll County } October the 27th 1858

The foregoing summons was
 read by me to the three persons therein named
 who appeared before the said justice of the
 Peace, and were sworn according to law
 preparatory to entering upon said duty as
 Commanded.

Jas S. Bell

State of Illinois }

Lazearll County } To James I Bell or to any
 other citizen of said State

You are hereby directed to notify
 James Pettyjohn that on the 28th day of

441

October. three householders of the County of
said. after being sworn according to law,
will proceed to view the land claimed by him
being the East half of the North East quarter
of Sec 22(7) and the West half of the North
West quarter of Section eight (8) All in Township
Twenty four (24) North, Range three (3) West of
third Principal meridian in said County, and
assess the damage done thereto by the Iowa
& Petersburg Rail Road Company in constru-
-cting a railroad over the same. at which
time the said claimant may attend up-
-on said land with said householders if he
shall think proper. Witness my hand this 20th
day of October 1858

Elias Muger Justice of the Peace
State of Illinois }
Lazavill County } Personally came J. L. Bell
before me the undersigned Justice of the
Peace in and for said County, and made
oath that he did on the 22^d day of Oct-serve
this by reading the same to the said claimant
James Pettyjohn. Witness my hand. this
27 day of Oct. 1858

Elias Muger Justice of the Peace
State of Illinois }
Lazavill County } ss Personally came W. D. Evans

Thos. Birkett & James I. Bell true householders
 of the State and County aforesaid, who were
 severally sworn by me, the undersigned Justice
 of the Peace in and for said County, in manner
 - or and form, as follows, to-wit: - That they
 would faithfully and impartially examine
 the land that shall be pointed out to them
 by C. L. Marsh Director of the Louisa & Peters-
 burg Rail-Road Company or by any other
 agent of said company, as land claimed
 by James Pettyjohn or which any railroad
 now being constructed, or hereafter to be con-
 -structed by said company shall pass, and
 that they will assess the damage said claim-
 -ant will sustain over and above the addit-
 -ional value which such land has or will
 derive from the construction of said Railroad.
 They were further sworn that they or either of
 them, are not interested directly or indirec-
 -tly in the land aforesaid, nor of kin to said
 James Pettyjohn, and that they will after
 said view and assessment, make two written
 reports signed by at least a majority of them
 one of which they will deliver to J. L. Marsh
 Director of said Rail Road and the other
 to the undersigned Justice of the peace

Witness my hand, ~~and~~ this 27 day of Oct
 1858 Elias Muger J.P. E.S.

State of Illinois }
 Lapeer County }^{ss} We the undersigned. house-
 holders of the County of and state aforesaid
 having been summoned and sworn according
 to law to examine appraise and assess the
 damage occasioned to certain lands claimed
 by James Pettyjohn by reason of the construct-
 ion of the Tonica & Petersburg Railroad Comp-
 any of a Railroad across said land, do re-
 port as follows to-wit: — That the Railroad
 of said company passes over the lands of said
 Pettyjohn described as follows to-wit The east
 half of the North east quarter of section seventh
 and the West half of the North west quarter of
 Section Eight (8). All in Township Twenty four
 (24) North Range three (3) west of the third Prin-
 cipal meridian in said County. We further
 report that it is our opinion that the
 construction of said road over said
 Land does greatly enhance the value thereof
 and that the damage done to the owner of
 said land over and above the benefit to be
 derived from the construction of said road
 amounts to the sum of One dollar. — In tes-
 timony whereof we have hereunto set our hands
 and seals. this 28th day of October 1858

W. D. Evans

Real

Thos Birckett

Real

J. B. Bell

Real

In the introduction of these papers the plaintiff by his counsel objected but not because of want of proof of the signatures, and the Court excluded the same, to which decision the defendant then and there excepted.

The defendant then called Josiah Sawyrr, who testified that he was a director in said Company & had been ever since its organization, that he called on plaintiff before the trespass complained of, and tried to agree with him about having the Railroad run over the plaintiffs land, but they could not agree and he procured the damages to be assessed, and the Railroad was laid over plaintiffs land.

The defendants Cartmell & Evans were contractors for building the road and Taylor was their agent, and they went onto the land for the purpose of building the Road.

Birkett testified that his fee and the fee of one other commissioner, for assessing the land had been paid by the rail road.

Elias Muger testified that he was the justice of the peace before whom the proceedings were had & a justice of Taylor County and that a copy of the proceedings and

appointment of the commissioners were left with him soon after they were made.

On cross examination this witness testified that his fee for services in making the appointment had not been paid.

W. B. Killogg testified that he called on the plaintiff soon after the assessment, at the request of the rail road company and tendered to him One dollar the amount assessed to him for his damages, which the plaintiff refused to accept, and stated that it was not sufficient. - This was before the trespass complained of.

This was all the evidence in the case. The Court found a judgment for the plaintiff and assessed his damages at the sum of

whereupon the defendant filed his motion for a new trial as follows

James Pettyjohn	} In the Logansport Circuit Court Feb. 1. 1860
= vs =	
John Taylor et al	

Motion for a new trial

And now comes the said defendants by their attorney and move the Court for a new trial for the following reasons
1st because the Court admitted improper

evidence on the part of the plaintiff.

2nd The Court excluded proper evidence on the part of the defendants.

3rd The finding of the Court is contrary to the law and the evidence & ought to have been for the defendants.

4th The Court erred in rendering judgment for plaintiffs.

For all of which reasons the defendants pray for a new trial

By H. M. & J. J. Mad

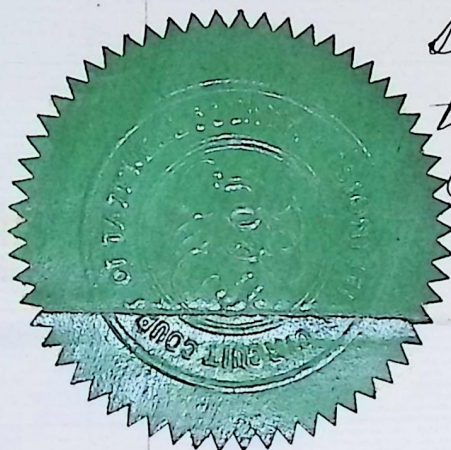
their attorneys

But the court overruled the motion and the defendants then & there excepted all of which exceptions are allowed signed and sealed and ordered to be made of record

James Harriott seal

State of Illinois } ss.
Tazewell County }

I Merrill C. Young, Clerk of the Circuit Court, within and for said County do certify that the foregoing Forty Six Pages contain a true, perfect and complete Copy of the Record of the proceedings had in the Cause therein named, as the same appear of Record in my office.



In Witness whereof. I have hereunto
set my hand and affixed
the seal of said Court, at
Pekin. this 19th day of
March A.D. 1860

Merrill to Young Clerk

James Pettigohn
v

John Taylor
et als.
~~~~~

Transcript  
~~~~~

46 pp \$12.

In the Supreme Court of
Illinois, Third Grand Division
To the April Term 1860.

John Taylor, Edward H. Cawthell,
William Evans - Plaintiffs in Error.
vs Error to Appellate.

James Pettyjohn. Defendant in Error

And now come the said
Plaintiffs and say: Because in the verdict
and judgment aforesaid, and in the record
and proceedings aforesaid, manifest error hath
intervened to their injury in this:

1st That the Circuit Court erred in admitting
improper evidence offered on the part of
the Plaintiff,

2nd That the Circuit Court erred in excluding
proper evidence offered by the Defendants.

3rd That the Circuit Court erred in
finding the issues for, and rendering
judgment in favor of the Plaintiffs
when by the law of the land, the judge-
ment should have been for the Defendant.

For which, and for other errors manifest
in the record and proceedings aforesaid,
the said Plaintiffs pray, that said judgment
be annulled, set aside and for naught
held and esteemed.

H. M. & S. Head.

Attys for Plaintiff in Error.

Whereupon comes the said James Pettibone
by Benjamin R. Putnam
and Charles C. Bonney his attorney,
and says that there is no error,
either in the record and proceedings
aforesaid, or in the rendition of
the judgment aforesaid, and prays
that the said Supreme Court here,
may proceed to examine, as well the
record and proceedings aforesaid, as
the matters aforesaid, above assigned
for error, and that the judgment
aforesaid, in form aforesaid given,
may be in all things affirmed
&c.

Charles C. Bonney
with Benjamin R. Putnam
for defendant in error

James Pettyjohn
183
do
John Taylor et al

Abstract & Assignment
of Errors.

Filed April 16. 1860
L. Leland
Clerk

Robert K Brush } Sup. Court 3^d Division
impled^{re} }
as } Enor to Kankakee
William Godfrey }

The Clerk will
issue writ of Enor & Sci fa
directed to ~~the~~ Shff of Kankakee
R. K. Brush

162
Bruck
Godfrey

Recipe

Filed April 16. 1860
L. Leland
Clark