Pacific Railroad vs. Welton, Jesse 1863 Osage Co. 1st Cir. 264/8

Old 95/7

Reversed

RR transported slave Calvin w/o Wls permission + he hasn't been found

Petition doesn't state defendant Joseph was a RR company or in this state

The State of Missouri, ss.

The State of Missouri, *To the Judge of the* First Judicial Circuit *in said State, Greeting:*

Whereas, *In the Record and Proceedings in a certain cause lately pending in the* Circuit Court of Osage County, in the Judicial Circuit aforesaid *wherein* Lepe Walton was plaintiff and The Pacific Rail Road was Defendant

in an action of _____ *manifest error hath intervened to the great damage of the said* Defendant *as by* its *complaint, we are informed.*

Now, *we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf,* **COMMAND YOU,** *that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the County of Cole, in said State, on the* Second *Monday in* January *next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done, and have then there this writ.*

Witness, W. M. Smallwood ~~WILLIAM L. DONIGHAN~~ *Clerk of our said Supreme Court, at office, in the City of Jefferson, the* 16th *day of* November *in the year of our Lord one thousand eight hundred and* Sixty three

W. M. Smallwood
Clk. Sup. Court

Executed the within writ in Osage County, Mo by sending by mail on the 4th day of December 1863, directed to the Clerk of the Supreme Court, Jefferson City, Missouri, a certified copy of all the record and proceedings in the case of Jesse Walton against The Pacific Railroad.

Witness Wm M Lamkin, Clerk of the Osage Circuit Court, with the seal thereof hereto affixed at Linn, Mo, the day and year above written. W M Lamkin Clerk By J. Zevely D.C.

SEAL SUPREME COURT OF MISSOURI

Be it remembered that on the 11th day of April 1863, the following petition was filed in the Office of the Clerk of the Osage Circuit Court in words and figures as following to wit.

In the Osage Circuit Court
May Term 1863

Jefree Helton } Plaintiff
against
The Pacific Railroad } Defendant

Plaintiff states that defendant by its officers and on its passenger train of cars, did on the sixteenth day of November eighteen hundred and sixty two transport from the town of Hermann in the County of Gasconade in the State of Missouri, to the Gasconade Bridge across the Gasconade River in said Gasconade County and State aforesaid, a certain slave the property of this plaintiff named Calvin alias Jeff, about Twenty eight years of age, and of a dark mulatto color, without the consent or permission of this plaintiff, or of any person who had authority to grant such consent or permission, contrary to the Statute in such case made and provided to wit An act concerning the transportation of slaves by rail road companies, approved February 27th 1855. Plaintiff further states that the value of said slave Calvin alias Jeff, at the time he was so transported as aforesaid, to wit, on the sixteenth day of November

2

1862, was nine hundred dollars, and that an action has accrued to plaintiff to have and recover of said defendant double the value of said slave, to wit, the sum of eighteen hundred dollars, which amount plaintiff avers defendant has forfeited and became liable to pay him under the Statute aforesaid. Plaintiff therefore states that defendant is indebted to him in the sum of eighteen hundred dollars and for which he asks judgement.

Plaintiff further states that defendant by its officers and on its train of cars did on the 22 or 23 day of December 1862, transport from the Gasconade Bridge across the Gasconade River in said Gasconade County, and State aforesaid to some place east of said bridge in said State to this plaintiff unknown, a certain slave, the property of this plaintiff named Calvin alias Jeff about twenty eight years of age and of a dark mulatto color without the consent or permission of this plaintiff or of any person who had authority to grant such consent or permission contrary to the Statute in such case made and provided. to wit, An act concerning the transportation of slaves by railroad companies approved February 27 th 1855.

Plaintiff further states that the value of said slave Calvin alias Jeff, at the time he was so transported as aforesaid, to wit, on the 22 or 23 day of December 1862, was nine hundred dollars, and that an action hath accrued to plaintiff to have and recover of said defendant double the value of said slave

to wit the sum of eighteen hundred dollars which amount plaintiff avers defendant has forfeited and become liable to pay him under the Statute aforesaid.

Plaintiff therefore states that defendant is indebted to him in the sum of eighteen hundred dollars and for which he asks judgement

Plaintiff further states that defendant by its officers and servants and on its cars or other conveyance, on the Twentieth day of December 1862, did transport from a point or place about two miles west of Hanson's Station on said railroad in the County of Osage and State of Missouri, to the Gasconade bridge in the County of Gasconade and State aforesaid, a certain slave the property of this plaintiff, named Joseph about twenty two years of age and of a dark mulatto color without the consent or permission of this plaintiff or of any person who had authority to grant such consent or permission, contrary to the Statute in such case made and provided, to wit, An act concerning the transportation of slaves by railroad companies approved February 27th 1855

Plaintiff further states that the value of said slave Joseph at the time he was so transported as aforesaid to wit on the Twentieth day of December 1862, was nine hundred, and that an action hath accrued to plaintiff to have and recover of said defendant double the value of said slave to wit the sum of eighteen hundred dollars which amount

plaintiff avers defendant has forfeited and become liable to pay him under the Statute aforesaid.

Plaintiff therefore states that defendant is indebted to him in the sum of eighteen hundred dollars and for which he asks judgement

H. C. Ewing for plaintiff.

Jesse Welton the above named plaintiff makes oath and says the above petition and the matters and things therein as stated he believes to be true.

Jesse Welton.

Sworn and subscribed to before the undersigned Clerk of the Cole Circuit Court this 23rd day of February 1863.

In witness whereof I have hereunto set my hand and seal of said Court the day and year aforesaid. G. A. Parsons. Clerk

{L.S.}

Upon which said petition a writ of summons issued, in words and figures following, to, wit

State of Missouri The State of Missouri to the Sheriff County of Osage of Osage County. Greeting. You are hereby commanded to summon the Pacific Railroad defendant to be and appear before the Hon. the Osage Circuit of Court on the first day of the next term thereof, which will be begun and held at the Court House in Linn in Osage County. Missouri on the second Monday after the fourth Monday of April 1863. and then and there to answer the petition of Jesse Welton plain-

5 tiff, and show cause if any it have, why judgement should not be rendered against it as is asked for in said plaintiff's petition.

And have you then and there this writ with your return thereof showing how you executed the same.

{L.S.}

Witness Wm M Lämkin Clerk of the Osage Circuit Court with the seal thereof hereto affixed at office in Linn Mo, this 11th of April 1863. Wm M Lämkin Clerk by F Zevely Dt.

{U.S. Inter Rev. Stamp 0.54 ¢}

Upon which are the following Returns made by John B. Cooper Sheriff of Osage County. Mo, in words and figures following to wit.

Executed the within petition and writ, in Osage County Mo, on the 15th of April 1863, by delivering to and leaving with William J Knott the agent of defendant, (the Pacific Railroad) a certified copy of the within petition and writ, while said W J Knott agent of the Pacific Railroad was in his office. John B Cooper Sheriff. Sheriff's Fees $1.11.

In this my amended return by leave of the Court first had and obtained, I hereby certify that I executed the within writ in Osage County Missouri, on the 15th day of April 1863, by leaving a certified copy of the within petition and writ at the business office of said defendant, in Osage County with William J. Knott the

person having charge thereof. I further certify that the
6 President or other chief officer of said Company, to wit
the Pacific Railroad Company, the defendant, was
absent from and could not be found in said County
of Osage. J. B. Cooper Sheriff of Osage County Mo.

And also the following in words and figures, to wit
Jesse Welton
vs Petition
Pacific Railroad

Filed April 11th 1863. Wm M Lamkin Clerk
by T. Zevely D.C.

[illegible] answer of the defendant was filed in the office of the Clerk of [illegible] Court.

And afterwards to wit at a regular term of the Osage
Circuit Court, begun and held at Linn in Osage
County Mo, on the 11th day of May 1863, among others
had on the fourth day thereof, were the following
in words and figures, to wit.

Jesse Welton Plaintiff
against Damages
The Pacific Railroad

And now at this day, comes
plaintiff by his attorney and the defendant though
duly served with process and now solemnly called,
comes not, but make default, therefore on motion
of said plaintiff by his attorney, it is considered by
the Court, that the plaintiff ought to have judgement
in the premises as mentioned and petitioned for in
said plaintiff's petition. Therefore the Court will pro
ceed at some future day to ascertain and decree the

matter hereof unless said defendant shall appear before this Court, on the first day of the next term thereof and show good cause why he did not sooner appear and plead, answer or demur to said plaintiff's petition. And afterwards to wit on the 24th day of June 1863, the answer of the defendant was filed in the office of the Clerk of the Cage Circuit Court in vacation.

And afterwards to wit, at a regular term of the Cage Circuit Court, begun and held at Neosho Mo, on the 9th day of November 1863, among others had on the first day thereof were the following in words and figures to wit,

Jesse Welton
vs
Pacific Railroad } Motion to quash the Sheriff's return and set aside judgement filed.

And afterwards to wit, on the second day of the term aforesaid were had the following, in words and figures, to wit,

Jesse Welton
vs
Pacific Railroad } Pending the motion to quash return of Sheriff, leave is given by the Court to the Sheriff to amend his return and motion to quash Sheriff's return, and set aside judgement overruled, to which defendant excepts and objects.

And afterwards to wit, on the same day, were had the following in words and figures, to wit.

Jesse Welton
vs
Pacific Railroad } Motion to strike out answer of defendant filed and sustained.

And afterwards to wit, on the same day, were had the

following in words and figures, to wit.

Jesse Welton
vs
Pacific Railroad } Defendants filed a motion and affidavit ~~filed~~ to set aside judgement by default rendered at last term.

And afterwards to wit on the fourth day of said term, were had the following in words and figures to wit.

Jesse Welton
vs
Pacific Railroad } Motion to set aside judgement by default is by the Court overruled to which deft objects and excepts.

And afterwards to wit, on the fourth day of said term were had the following in words and figures to wit.

Jesse Welton
vs
Pacific Railroad } And now at this day comes the Parties aforesaid and announce ~~themselves~~ ready for trial and a jury being demanded by either party this cause is submitted by consent of the parties ~~submitted~~ to be tried by the Court and the Court sitting as a jury, after ~~hearing~~ the allegations proofs and pleadings of the parties, doth find the value of the slave "Jeff" on the 16th of November 1862 to be five hundred dollars, and the value of the slave "Jeff" on the 22nd day of December 1862, to be five hundred dollars and further finds the value of the slave "Joseph" on the 20th of December 1862, to be five hundred dollars.

And afterwards to wit on the same day, were had the following in words and figures to wit.

Jesse Welton

9 Jesse Welton
vs
Pacific Railroad } Evidence filed. Also instructions for plaintiff and defendant filed

And afterwards to wit, on the same day, were the following in words and figures to wit,

Jesse Welton
vs
Pacific Railroad } And now comes the plaintiff and files a motion to double the damages heretofore found in this cause by the Court sitting as a Jury which motion is by the Court ~~[illegible]~~ and it is therefore considered by the Court that said plaintiff have and recover of said defendant the sum of three thousand dollars, and that he have therefor execution.

And afterwards to wit, on the same day, were the following in words and figures, to wit,

Jesse Welton
vs
Pacific Railroad } Motion for new trial filed and overruled.

And afterwards to wit, on the same day, were the following in words and figures, to wit,

Jesse Welton
vs
Pacific Railroad } Motion in arrest of judgement filed and overruled.

And afterwards to wit, on the same day, were had the following in words and figures to wit,

Jesse Welton
vs
Pacific Railroad } Bill of exceptions signed and filed.

Which said bill of exceptions are in words and figures following to wit,

Be it remembered that at a term of the Circuit Court within and for the County of Cass, begun and held

10 at the Court House in the Town of Linn in said County, on the 9th day of November 1863, in a certain cause pending in said Court, wherein Jesse Shelton is plaintiff and the Pacific Railroad is defendant, the defendant filed its motion to quash the Sheriff's return to the summons in this cause, which motion is in words and figures following, to wit

In the Gage Circuit Court. Nov. Term 1863

Jesse Shelton plaintiff
against
The Pacific Railroad Defendant. } Now at this day comes the said defendant by its attorney and moves the Court to set aside the interlocutory judgement by default entered herein, and to quash the pretended return of service, endorsed by the Sheriff upon the writ in this cause, because said return upon its face is illegal and insufficient to give the Court jurisdiction over the defendant. Because it does not appear from said return of said Sheriff that defendant was legally served with process, and because it does not appear from said return that defendant was not legally served with process. By reason of all which it appears that said default was improvidently entered and defendant ought not to be bound thereby. Aikman & Welch, Atty for deft."

Pending the consideration of said motion the Court permitted the Sheriff to amend his return and the same being done, the said motion was then and

11 there overruled, to which action of said Court in permitting said return to amended and overruling said motion, the defendant then and there duly objected and excepted.
The plaintiff then filed his motion to strike out defendant's answer which was by the Court sustained which said motion and answer is in words and figures as follows to wit:

In the Circuit Court Osage County
Novr Term 1863.

Jesse Welton } Plaintiff
against }
Pacific Railroad } Defendant.

And the said plaintiff by his counsel comes and moves the Court to strike out the pretended answer of the defendant in this case for the following reasons.
1. Because the said pretended answer was filed long after a judgement by default had been rendered in this Court in favor of said plaintiff and against said defendant.
2. Because said pretended answer was filed without leave of this Court and after default made by said defendant. H Clay Ewing Atty for plff.

In the Osage Circuit Court
May Term 1863

Jesse Welton Plff }
against }
The Pacific Railroad } Defendant for answer to plain

tiff's petition as to the first count or cause of action therein claimed and set out by plaintiff says it has not sufficient knowledge or information to form a belief as to whether or not the said Calvin alias Jeff, was at the time alleged or at any other time a slave or the property of plaintiff nor what was his value if a slave, but avers that he was not worth nine hundred dollars nor anything near it; nor has defendant sufficient knowledge or information to form a belief as to whether or not the defendant by its officers or its passenger train of cars, or in any other manner, did on the 16th November 1862, or at any other time transport from the town of Hermann in the County of Gasconade in the State of Missouri, to the Gasconade bridge across the Gasconade river in said Gasconade County and State aforesaid or from or to any other place in said State, said Calvin alias Jeff, nor if he was so transported whether or not the plaintiff gave his consent or permission thereto. Defendant avers its belief that if said Calvin alias Jeff was transported in the cars of defendant that such transportation was with the consent and permission of those whose consent was necessary and therefore upon its belief denies that he was so transported without the consent or permission of any person who had authority to grant such consent or permission.

And for answer to so much of the plaintiff's petition as relates to the second

13 cause of action therein alleged defendant says it has not sufficient knowledge or information to form a belief as to whether or not the plaintiff was at the time alleged by plaintiff or at any other time the owner of the said alleged slave nor as to whether or not the said Calvin alias Jeff was a slave nor what was his actual value if a slave, but defendant denies that he was of the value of nine hundred dollars or anything near it.

Defendant has not sufficient knowledge or information to form a belief whether or not defendant did by its officers and on its train of cars or in any other manner on the 22d or 23d day of December 1862, or at any other time, transport the said Calvin alias Jeff from the Gasconade Bridge across the Gasconade River in said Gasconade County to some place East of said Bridge or from or to any other place in said State, nor if such person was so transported whether or not the consent or permission of plaintiff was given thereto but defendant avers its belief that if said Calvin alias Jeff was so transported it was by the consent and permission of those whose consent and permission was necessary and therefore claim that he was so transported without the consent or permission of any person who had authority to give such consent or permission

Defendants further answering

14 as to the third cause of action alleged in the plaintiff's petition says it has not sufficient knowledge or information to form a belief as to whether or not plaintiff was at the time therein alleged or at any other time the owner of the said alleged person named Joseph nor as to whether or not said Joseph was a slave, nor what was his actual value, if a slave, but defendant denies, that he was worth nine hundred dollars or any thing near it.

Defendant cannot state nor has it sufficient knowledge or information to form a belief as to whether or not the defendant by its officers and servants and on its cars or other conveyance or in any other manner on the 20th day of December 1862, or at any other time did transport from a point or place about two miles West of Harrison's Station on said railroad in the County of Osage and State of Missouri, to the Gasconade Bridge in the County of Gasconade and State aforesaid or from or to any other place the said Joseph, nor if he was so transported whether or not any consent or permission of plaintiff was given thereto.

Defendant avers its belief that if said Joseph was transported at all by the officers or servants of defendant on any car or conveyance of defendant it was with the consent and permission of those whose consent and permission

15 was necessary and therefore defendant denies that said Joseph was so transported without the consent or permission of any person authorized to grant such consent or permission.

Defendants further answering as to the whole petition avers that no slave the property of the plaintiff was wilfully or knowingly or carelessly or negligently transported in the cars or other conveyance of defendants by any officer or servant of defendant and avers it belief and charges that if in fact any slave of plaintiff was transported at all on said cars or other conveyance as alleged, it was done under circumstances not within the scope and provisions of and not contrary to the Statute cited in the petition and defendants denies any and all alleged violation of said Statute and all alleged indebtedness damage and liability of and concerning the matters alleged in the petition.

Defendant further avers upon the belief that since the 17th July 1862, and before the time of the alleged transportation of the said several persons claimed by plaintiff to be slaves, the said plaintiff had given aid and comfort to the rebellion and to parties engaged in rebellion against the Government of the United States, contrary to the provisions of the Act of the Congress of the United States entitled an "Act to

suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes." approved July 17th 1862." and by reason thereof forfeited all right to the return, if any then owned by him and became disqualified to prosecute each and every of the causes of action in said petition alleged. whereupon defendant begs judgement for costs.

W. H. Grover. Atty for Dft.

George R Taylor Agent in this behalf for defendant makes oath and says he believes the above the above answer and the matters therein stated to be true.

R Taylor

State of Missouri }
County of Cole } Sworn to and subscribed before the undersigned Clerk of the Circuit Court within and for the County of Cole aforesaid this 23rd day of June 1863.

{ Ld. } In witness whereof I G. A. Parsons Clerk of said Court have hereunto set my hand and seal of said Court the day and year aforesaid G. A Parsons Clerk

Fees of 50 cents paid by defendant

To which action of the Court the defendant excepted. The defendant thereupon filed his mo-

17 tion to set aside the judgements by default rendered at the last term of the Court in this ~~court~~, together with the affidavit of George R Taylor in support of said motion which said motion and affidavit are in words and figures following.

In the Osage Circuit Court
Novr Term AD 1863.

Jesse Welton plaintiff
against
The Pacific Railroad Defendant

Now at this day comes the said Defendant and moves the Court to set aside the interlocutory judgement by default rendered against it at the last term of this Court for reasons assigned in the following affadavit of George R Taylor, President thereof, which is herewith filed in support of this motion and made a part thereof.

Aikman Welch Atty for Defendant.

In the Osage Circuit Court
Novr Term 1863

Jesse Welton Plff
against
The Pacific Railroad Dft

George R Taylor makes oath and says that at the several dates

18 alleged in plaintiffs petition and long before and ever since he held the office of President of the defendant and was its chief executive officer, that the chief business office of defendant is and has always been in the City and County of St Louis, that the directors hold their meetings and all the principal officers of said defendant have their offices in said chief business office and keep their records there. that the only service of the summons attempted to be made in this case so far as affiant is informed or believes was upon Wm. J. Knott, a mere local freight and ticket agent of the defendant in Osage County, known as a station agent and the pretended service upon him as affiant is advised, judging by the express language of the Sheriff's return is insufficient and Knott's duties as agent of the defendant were in no manner connected with the defence of suits against defendants or the employment of counsel, said duties devolving upon affiant exclusively. Affiant states that the first knowledge he had of the pendency of this suit was but a few days before the meeting of the last term of said Court and too late as affiant believes to prepare and file an answer in the case at that term setting forth fairly and justly the grounds of defence, that the facts out of which the alleged cause of action arose were unknown

19 to affiant, that affiant as soon as he could conveniently with other pressing duties caused inquiries to be made and upon such information as he could get had an answer prepared and sworn copy of which he now therewith offered to be filed, setting out the defence to be made as far as affiant was able to set the same out that said original answer sworn to by this affiant was to the best of affiant's recollection and belief sent Lickman Welch Esq of Jefferson City, an attorney in the employment of defendant to be by him filed in this case and affiant supposed it had reached his possession but has since been informed that it did not. Affiant intended in good faith to defend said suit on the grounds alleged in said answer and still denies to defend the same on said grounds and to the best of his knowledge and information believes said answer to be true. Affiant has not omitted or neglected any step in this cause with any view to delay the proceedings and does not now make this application to set aside default for vexatious or delay but simply that a fair trial may be had and full justice done. R Taylor

Subscribed and sworn to before me at St Louis this the 29th day of October 1863. as witness my hand

211 and the seal of the County Court of St Louis County. (Seal) S M Eager Clerk

Which said motion, after being considered by the Court, was by ~~the~~ said Court overruled. to which action of the Court in overruling said motion, the defendant then and there duly objected and excepted.

The said cause was then taken up ~~by consent~~ and by consent submitted to the Court by the plaintiff on the petition and evidence for an inquiry of damages, when the plaintiff introduced the following testimony, to wit.

Jesse Shelton
vs } Evidence for plaintiff
Pacific Railroad }

James M Shobe stated know Jeff. Jeff was worth on the 11th November 1862, one thousand dollars. He was about 27 years old. Was worth as much on the 22nd day of December 1862 as at the previous date named. Jesse Shelton claimed said negro, I also know Joseph. He is about 22 years old. Was worth December 22, 1862 as much as Jeff.

On cross examination witness stated he valued Jeff on the value of labor, his labor is worth as much now as it ever was. I think that Jeff or Joseph if offered in the market for sale in November and December 1862 would each have brought some five or six hundred dollars. I know of no demand for negro property in Osage County

21 in the months of November and December 1862.

Charles Phelps states that he knows Jeff and Joseph. I think that the market value of each of them was about five or six hundred dollars in the winter of 1862.

On cross examination witness stated that he knows of no demand for such property or any sales at that time such property had become very insecure at that time

A. H. Townley, states that he knew Jeff and Joseph in November 1862. Think the market value of each of them at that time was between five and eight hundred dollars.

On cross examination witness stated that he did not know of any demand for such property at that time.

and this was all the evidence in the cause.

The plaintiff thereupon asked the following instructions which was given by the Court. Welton vs Railroad.

The Court will find the market value of the slave Jeff, on the 16th November 1862 and on the 22d Decr 1862 and also the market value of the slave Joseph on the 29th day of Decr 1862.

The defendant asked the following instructions which were given by the Court, to the first of which the plaintiff objected.

Welton vs Pacific Railroad } Instructions asked by Defendant.

The defendant ask the Court to de-

clare the law to be as follows:

22 First That under the pleadings and evidence in this bout, the plaintiff is only entitled to recover the market value of such property at the time of the transportation and that the bout sitting as a Jury shall take into its estimate of the market value of such property its comparative security or insecurity and the demand or want of demand of such property

Second The plaintiff is not entitled to recover the peculiar value which as an individual such property might be worth to him, but only its actual value in the market, and such value shall be estimated in the manner stated in the first instruction.

The bout thereupon sitting as a Jury rendered the following verdict.

"The Court sitting as a Jury, after hearing the allegations, proofs and pleadings of the parties doth find the value of the slave Jeff on the 16th of November 1862 to be five hundred dollars and the value of the slave "Jeff" on the 22nd day of December 1862 to be five hundred dollars and further finds the value of the slave "Joseph" on the 20th of December 1862, to be five hundred dollars"

The plaintiff then filed the following motion to double the damages, so assessed by the Jury.

In the Osage Circuit Court. Novem Term 1863

23 Jesse Welton Plaintiff.

against

The Pacific Railroad Defendant.

And the said plaintiff by his atty comes into Court and moves the Court to double the finding of the Court ~~to double the finding of the Court~~ sitting as a Jury in the above entitled cause, in accordance with the Statute in such case made and provided to wit. "An act concerning the transportation of slaves by railroad companies" Approved Feby 27th 1855, and enter judgement herein for the sum of three thousand dollars.

Jesse Welton by H. Clay Ewing his attorney.

Which said motion was by the Court sustained, whereupon the Court entered judgement against defendant for double the damages so assessed by the Jury, to which action of the Court in sustaining said motion the defendant thereupon duly objected and excepted.

The defendant thereupon filed his motion for a new trial, which was by the Court overruled which said motion is as follows.

Jesse Welton. Plaintiff

against

Pacific Railroad. Defendant.

Now at this day comes the said Defendant by its attorney and moves

the Court to set aside the verdict rendered in this
24 cause and to grant a new Trial and for cause
shows.
First Because the finding of the Jury is contra
ry to the direction of the Court
Aikman & Welch Attys for deft.
To which action of the Court the defendant then
and there duly excepted.
The defendant thereupon filed the following
motion in arrest of judgement, to wit.
In the Osage Circuit Court Nov. Term 1863
Jesse Shelton Plaintiff
against
The Pacific Railroad Defendant } Now at this
day comes the said Defendant by its attorney
and moves the Court to arrest the judgement
rendered in this cause for the following reasons
to wit
First Because said petition does not state
facts to constitute a cause of action in
this that the alleged cause of action purports
to be based upon the violation of a penal stat-
ute and it is not alleged or charged nor
does it appear from the petition that the defend
ant is in any manner included within or
liable to the penalties imposed by said statute. It
does not appear ~~from the petition that the defendant~~
nor is it alleged that the defendant is a
railroad company nor that it is a railroad com

25 pany in this State. The Statute is highly penal in its nature and only applies to a designated class of companies, and it is not alledged nor does it appear from the petition that defendant belongs to the designated class and this defect is one of substance and not of form merely.

Second. Because in and by the third count or cause of action set forth in said petition the plaintiff seeks to hold defendant responsible for the penalties of said Statute, upon the mere acts of the servants of said defendant, whereas defendant can only be held responsible for said penalties when the acts complained of shall be done by its officers and defendant therefor says said petition is insufficient in this respect to sustain the judgement of this Court undered therein

Third Said Petition is otherwise informal and insufficient.

Which motion was by the Court overruled to the overruling of which said motion, the defendant then and there duly objected and excepted

And the said defendant tendered this its bill of exceptions and prays that the same may be signed and sealed and made a part of the records, which is done accordingly.

Dated this 12th day of November AD 1863.

C. W. Miller Judge 1st Judicial Circuit

State of Missouri }
County of Osage } I Wm R. Lankin Clerk of the Osage Circuit Court, certify that the foregoing is a true and complete copy of all the record and proceedings had in the above entitled cause as fully as the same now remains on file and of record in my office.

Witness my hand and seal of said

Court at Linn Mo this 3d day of
27 December 1863. Wm Lamkin Clerk
By T. Zevely D.C.

Jesse Welton Plff
against
The Pacific Railroad Deft

Fee Bill
Wm M Lamkin Clks fees

1863.		
11th Apl.	For 1 file	05
	" issuing writ	1.11
	" copy of petition & writ	1.45
	" certificate & seal thereto	.50
May 7.	" docketing cause	10
" "	" entering appearance	10
" "	" submission of cause	25
" "	" interlocutory judgement	50
" "	" docketing "	10
" "	" continuance	25
Novr 7	" docketing cause	10
" "	" entering appearance	10
" "	" 3 subpoenas issued	75
" "	" entering motion quash return	15
" "	" order overruling motion	25
" "	" motion to set aside answer	15
" "	" order ~~sustaining~~ motion	25
" "	" motion to set judgt by default	15
" "	" " overruling motion	25
" "	" entering verdict	25
" "	" " motion doubling damages	15
		$6.85

		Brt up	6.85
May 5.	For entering ~~order~~ sustaining		25
" "	" " " for new trial.		15
" "	" " order overruling.		25
" "	" " motion in arrest jdt		15
" "	" " order overruling		25
" "	" " filing bill of exceptions		25
" "	" copy of bill of exceptions containing		
" "	" 5725 Words & Figures @ 10¢ per 100.		5.75
" "	" certificate and seal thereto		50
" "	" submission of cause		25
" "	" entering final judgement		50
" "	" docketing " "		10
" "	" filing 15 files		75
" "	" this fee bill		05
" "	" making out bill of costs 224		
" "	" Words & Figures @ 10¢ per 100		22
" "	" Certificate & seal		50
" "	" Postage		15
" "	" Certificate & seal to writ of error		50
" "	" 2 N.J. Rev Stamp		10
			17.52
1863	John B. Cooper Sheriff.		
April 11th	For serving writ		1.00
Novr 5	" " five witnesses		2.50
" "	" action called		10
" "	" 2 parties "		20
" "	5 witness "		25
			4.05
	Witness Fees.		
Novr 5.	Charles Phelps 40 miles 2 days		3.00
	A. M. Townley 40 " 2 "		3.00
	J. M. Shobe 32 " 2 "		2.50
	Jas Dellehanty 46 " 2 "		3.00
			11.50
	Examined and found correct		$33.07

Index.

Petition	Page No. 1
Writ of summons	" " 4
Sheriff's returns	" " 5
Judgement for default	" " 6
Answer filed	" " 7
Record	" " 7 to 9
Bill of exceptions	" " 9 to 26
Clerk's certificate	" 26
Fee Bill	" 28

32

Jesse Welton d. E.
vs
Pacific Railroad
p. E.

Filed Decr 4, 1863
fee $1.00 paid
W. M. Smallwood

Osage – 1st circuit

In the Supreme Court
January term A.D. 1864.

Jesse Welton — Deft in error
against
The Pacific Railroad, Pltff in error

The Plaintiff in error now comes and says that in the record and proceedings in this cause, and the rendition of the judgment therein, there is manifest error, in this,

First. The Court erred in overruling plaintiff in error's motion to set aside the interlocutory judgment and quash the sheriffs pretended return of service. & permitting the same to be amended.

Second. The Court erred in refusing to set aside the judgment by default in this cause for the reasons set forth in the affidavit of George R. Taylor, President of Deft.

Third. The Court erred in rendering judgment for double the value of the slaves as found by the Jury.

Fourth. The Court erred in refusing to set aside the verdict of the Jury.

Fifth. The verdict is contrary to the law and the evidence & against the weight of evidence

Sixth. The Court erred in refusing to arrest the judgment and granting a new trial to plaintiff in error

Wherefore the said Plaintiffs in error, for these and other errors, apparent in the record and proceedings in this cause, and in the judgment therein, asks that the said judgment may be reversed, set aside and held for naught and plaintiffs in error prays this court to do so and to make such orders and decrees, as shall be right and proper in the premises

Aikman Welch
Atty for Pltff in error

5

Jesse Welton
vs
Pacific Railroad

Error to Osage County

Assignment of Errors

Filed Jany 12, 1864

Aikman Welch
Atty for Railroad

Secunda in Errore
H. B. Ewing for Deft
in Error

In the Supreme Court
January Term AD 1864.

Jesse Welton Deft in error
vs
Pacific Railroad, Pltff in error

Error to Osage County.

This is an action instituted by Welton against the Pacific Railroad for damages for the alledged transportation of certain slaves, the property of Welton, contrary to "an act concerning the transportation of slaves by Railroad Companies," approved Feby 27. 1855.

The petition was filed in the Osage circuit Court on the 11th day of April 1863 and charges that the railroad on the 16th day of November 1862 transported slave Calvin from Hermann to the Gasconade bridge and that the value of Calvin alias Jeff at that time was $900.; — that & about the 22nd day of December 1862 the Railroad transported a certain other slave named "Jeff" valued at $900. — and that on the 20th day of December 1862 the Railroad transported the same slave "Jeff" of the said value of $900. The petition asks for double damages under the statute hereinbefore cited and referred to.

The Sheriff made the following return to the writ issued in this cause

" Executed the within petition and writ in Osage County Mo on the 15th of April 1863, by delivering to and leaving with William J. Knott, the agent of Defendant (the Pacific Railroad) a certified copy of the within petition and writ, while said W. J. Knott agent of the Pacific Railroad was in his office. John B. Cooper Sheriff."

The writ issued in this cause was returnable on the second monday after the fourth Monday of April 1863. The next term of the court was held on the 11th day of May 1863 and on the fourth day of the term judgment by default was rendered against defendant with the following reference to an inquiry of damages " therefore the court will proceed at some future day to ascertain and decree the matter hereof, unless said defendant shall appear before this court on the first day of the next term thereof, and show good cause why he did not sooner appear and plead, answer or demur to said plaintiffs petition.

On the first day of the next term, to wit, on the 9th day of November 1863 the defendant appeared and filed the following motion to quash the sheriffs return and set aside the judgment,

"Now at this day comes the said Defendant by its Attorney and moves the Court to set aside the interlocutory judgment by default entered herein and to quash the pretended return of service endorsed by the Sheriff upon the writ in this cause, because said return upon its face is illegal and insufficient to give the Court jurisdiction over the defendant. Because it does not appear from said return of said Sheriff that defendant was legally served with process and because it does ~~not~~ appear from said return ~~of said sheriff~~ that defendant was not legally served with process. By reason of all which it appears that said default was improvidently entered and defendant ought not to be bound thereby"

Pending the consideration of this motion, the Court permitted the Sheriff to amend his return. The defendants motion was then overruled, to which action of the Court, defendant excepted.

The defendant then filed its motion to set aside the judgment by default, which motion was accompanied by the affidavit of George R. Taylor, President of Defendant, in support thereof. Said motion was as follows.

"Now at this day comes the said defendant and moves the Court to set aside the interlocutory judgment by default, rendered against it at the last term of this court for reasons assigned in

the following affidavit of George R. Taylor, President thereof, which is herewith filed in support of this motion and made a part thereof."

(affidavit of Taylor, commences on page 17 of Record)

This motion was overruled by the court, to which action the defendant thereupon objected and excepted.

The cause was then taken up and submitted by Plaintiff to the court sitting as a Jury. The Plaintiff then introduced witnesses to prove the value of the slaves at the time of the transportation. No evidence was offered by the defendant.

The plaintiff then asked the following instructions which was given by the court.

"The court will find the market value of the slave Jeff on the 16th November 1862 and on the 22nd December 1862 and also the market value of the slave Joseph on the 20th day of December 1862"

The defendant asked the following instructions which were given by the court.

"The defendant asks the court to declare the law to be as follows.

First. That under the pleadings and evidence in this cause the plaintiff is only entitled to recover the market value of such property at the time of the transportation and that the court sitting as a Jury shall take into its estimate of the market value of such property its comparative security or insecurity and the demand or want of demand

of such property.

Second The plaintiff is not entitled to recover the peculiar value, which, as an individual, such property might be worth to him, but only its actual value in the market and such value shall be estimated in the manner stated in the first instruction.

The court sitting as a Jury, thereupon found a verdict for plaintiff, which said verdict was on motion of plaintiff, doubled and judgment entered accordingly, to which action of the court in doubling the value as found by the Jury the defendant thereupon objected and excepted.

The defendant then filed its motion for a new trial, which was by the court overruled, assigning as a reason therefor

"That the finding of the Jury is contrary to the direction of the court."

To the overruling of this motion, the defendant thereupon objected and excepted.

The defendant then filed its motion in arrest of judgment, which was overruled by the court. Said motion set forth the following reasons.

"First. Because said petition does not state facts sufficient to constitute a cause of action in this, that the alleged cause of action purports to be based upon the violation of a penal statute, and it is not alleged or charged nor does it appear from the petition that the defendant is in

any manner included within or liable to the penalties imposed by said statute. It does not appear nor is it alledged that the defendant is a railroad company nor that it is a railroad company in this State. The statute is highly penal in its nature and only applies to a designated class of companies and it is not alledged nor does it appear from the petition that defendant belongs to the designated class and this defect is one of substance and not of form merely.

Second. Because in and by the third count or cause of action set forth in said petition, the plaintiff seeks to hold defendant responsible for the penalties of said statute upon the acts of the mere servants of defendant, whereas defendant can only be held responsible for said penalties, when the acts complained of shall be done by its officers and defendant therefore says said petition is insufficient in this respect to sustain the judgment of the court, rendered therein.

Third. Said petition is otherwise informal & insufficient.

The defendant objected and excepted to the action of the court in overruling said motion & tendered its bill of exceptions, which was duly signed and defendant now brings said cause into this court by writ of error.

Aikman Welch
Atty for Pacific RR.

5

Jesse Welton D.E.
vs
The Pacific Railroad. P.E.

Statement of case.

1

Aikman Walch
for P.E.

Filed Jany 12. 1864
W. W. Smallwood clk
By J. W. Smallwood d.c.

In the Supreme Court
January Term 1864

Jesse Welton } Deft in Error
against
The Pacific Railroad } Pltff in Error

Error to Osage

The Statement of the plaintiff in Error is adopted with the addition that prior to the Nov Term 1863 of said Osage Court and subsequent to the May Term 1863 thereof, to wit sometime in June 1863 after a default had been made, the defendant filed in said Court its answer, and that at Nov Term 1863 before the trial came on, plaintiff moved to strike out said answer which was sustained. The judgment by default was entered on the last day of the term.

Points and authorities for deft in Error by H. Clay Ewing and S. Smith

1. The Court did right in refusing to set aside the verdict and grant a new trial.

The evidence would not warrant the granting of a new trial - The finding was not against the evidence, nor against the law, as laid down by the Court The Supreme Court will not interfere with the discretion of the lower Courts in refusing to grant new trial unless gross and manifest injustice is done 1. Mo. 13 + III. Mo. 464 + 7 Mo - 292 - IV. Mo. 295 - V. Mo. 489 + VI. Mo. 489. + 61. + 211. 7 Mo - 220 - + 455 - 8 Mo. 642 - IX. 268. XII. 380

2 The Court did right in refusing to arrest the judgment upon the motion of defendant

It is only necessary in suing a Corporation, to do so by its Corporate

name -
See Goulds pleading chap. III. § 61. p. 86
Modern pleader p. 83 + 2 - Institutes 666 -
Sellons practice p - 77 - 1. Blackstone p
474 + 5 - Grant on Corporations 50 side
page - also 5 - 1. do.
~~Above that it is not~~.
It is submitted that it is sufficient to
sue or be sued by the Corporate name
alone, [redacted]
[redacted] - The silence of the
defendant in its pleading is equiv=
alent to an admission
Vol - 1. Rev. Code 1855 - p - 376. § 1.
It is stated as a rule of pleading in
5. Gillmans Ill. Rep - p. 48 - case of
McIntire vs Preston, "that in suits
brought by Corporations, the defen=
dant, by pleading the general issue,
admits the capacity of the plaintiff
to sue". And "if he would deny the
existence of the Corporation he must
put in a plea for that purpose".

and it is submitted in this case that defendant having failed to answer at all, is in law equally an admission that he is sued properly - and even admitting that it was proper to state that defendant was a company incorporated by the laws of this State &c - for the sake of the argument, can he take advantage of it after failing to answer, by motion in arrest -

14 Court 437 - Phoenix Bank vs Curtis
1 Alabama 241 - Prince & Garrett vs Commercial Bank of Columbus -
4 Peters - 500 - The society, &c vs Pawlet -
6 New Hampshire 197 -
1 Johns cases 132 - Prest U. S. Bank vs Haskins
3 Harrisons N. J. Rep - 105 - Bennington iron Co - vs Rutherford
3 do do do 158 - do do do
4 Blackf - Ind Rep - 267 Harris vs Muskingum Manufg. Co
5 do do 146 Richardson vs St Joseph iron Co
14 Johns Rep - 239. side page Dutchess Cotton Manufacturing Co vs Davis
5 Wend 478 - Bank of Michigan vs Williams
2 Ld Raymonds Rep 1532 -
1 Duer N. Y. 707 - Union Mutual ins Co. vs Osgood
2 Cowan N. Y. 778 -
28 Barbour 59 - Kennedy vs Cotton

C

3 If the Court should be of opinion that the petition is defective, it is contended that it is cured by the verdict — That it is not such defect as can be taken advantage of by motion in arrest but must be by answer or demurrer —

2. Rev. Code 1855 — p — 1256. § 19. 8th subd —

33. Mo Shaler vs Van Wormer p — 386 — authorities cited

2 ~~Chitty [illegible]~~ — " ~~[illegible]~~ "

12 Mo. Rep — 298 Bury vs City of St Louis — Do 307 Mullen vs Pryor

28 Mo. Rep. 335 — Squire et al vs St. Bt. Indianna —

27 " " 167. Andrews vs Lynch — 28. Mo. Rep. 30 Welch vs Bryan

3 Sel — N. Y. 464 — 19. Barb — 185. Gould vs Glass —

32 Mo. 457. Frazier vs Roberts —

2 American Railway cases — 161.

4 The Court did right in allowing the Sheriff to amend his return, and in overruling defts motion to quash the same —

157. Mo. Blaisdell vs St. Bt. Wm Pope.

2. Rev Code 1855 — p. 1255 § 17 —

The return as amended is correct

1. Rev. Code 1855 p. 376. § 2 —

31. Mo. 409 —

5 The Court did right in refusing to set aside the judgment by default upon the Motion and affidavit of the "President of the defendant" - It would be sufficient to refer the Court to the remarkable affidavit itself as authority to sustain this point

3 Mo. Rep Bary vs Johnson & Johnson p. 263
4 Mo. " Lecompte & wife vs Wash p 557
7 Mo. Weiner vs Morris p 6
7 Mo. Green vs Godlow p 25
10 Mo. Kirby & Patton vs Chadwell p. 392
29 Mo. Campbell vs Garton p 343
31. Mo.

5 As to the point in the motion in arrest that the petition alleges that "defendant by its officers & servants" is defective it is considered of no force, and if it was it is too late to take advantage of it by motion in arrest, it should have been done by demurrer or answer see authorities quoted under the 3d point

6 No error is assigned that the judgment by default was taken too soon - Nothing in the motion ~~asking~~ to set aside the default showing or complaining that the default was rendered too soon - No objection was made at the trial or exceptions saved that the judgment by default was taken too soon

Jesse Welton D.C.
against
The Pacific Railroad
Statement and
brief for deft
in Error —
by
H. Clay Ewing
A. L. Smith

2

Filed Jany 18. 1864
W. M. Smallwood Clk
by J. W. Smallwood D.C.

Jesse Welton Plff

vs

The Pacific Railroad—

Aikman Welch, & Doniphan & Lawson ~~Attorney~~ for Plaintiff in error:

1st The Court erred in permitting the Sheriff to correct his return in matters of substance, except upon terms and those terms in this case should have included the setting aside of the judgment by default and permitting the defendant to plead. R. S. 1855. vol 1 p. 376, sec 2; ibid, vol 2. p 1255 sec 17. This is admitted to be, to some extent, a matter of discretion with the court, but in this case it is submitted that such discretion was grossly abused. and in such cases this court will correct the improper exercise of this discretion.

2nd The Court should have set aside the judgment by default, for the reasons set forth in the affidavit of George R. Taylor Esq, as this was a proceeding of a highly penal nature.

3rd The verdict of the Court sitting as a Jury was contrary to the instructions and evidence and the defendants instructions are inconsistant with the instruction given for the plaintiff, and for these, and other reasons, the Court should have sustained Defendants motion for a new trial.

4th The court below should not have doubled the damages found by the Jury. The petition is wholly insufficient to justify such action, inasmuch as the plaintiff did not alledge all the facts in his petition, necessary to bring Defendant within the statute and subject to its penalties. The petitition, if good at all, is only good as a common law pleading and the judgment should have been for single damages only, if ~~he was entitled to~~ for any at all. Sess. Acts 1855 p. 169. Williams vs Hingham & Turnpike Co. 4 Pick. 341; Spieres vs Parker, 1 Term Rep. 141; Bartlett vs Crozier, 17 Johns. 456;

5th The Court should have arrested the judgment for the reason that the ~~facts~~ petition does not state facts, sufficient to constitute a cause of action, under the statute, on which this suit is attempted to be founded. It is not alledged in the petition that the defendant is a Railroad "Company," nor that ~~it is~~ the defendant, if a Railroad Company at all, is a Railroad Company "in this State," and it will not be presumed that facts, ~~not~~ necessary to a recovery, but not stated or alledged, have been proven. Neither did the default admit these facts, since such default only admits well-pleaded facts and such facts as are of a nature to be necessarily inferred from those which are alledged. Such default, as well as the verdict can only avail where ~~the~~ a title is defectively stated,

and not where there is a failure to show any title at all. In this case, there is no title to a recovery stated at all, inasmuch as by the very statute, upon which the action is founded and on which he relies to support his action, it is required that the Defendant, be a Railroad "Company" and a company "within this State."

Williams vs Hingham & Turnpike Co. 4 Pick. 341;
Spiers vs Parker, 1 Term Rep. 141;
Bartlett vs Crozier, 17 Johns 456;
Pollard vs Thompson, 5 Humph. 56;
Hennike vs Contoocook Valley R.R. 9 Foster, (N. H.) 146;
Bristol vs Rensaleer & Saratoga R.R. 9 Barb. S.C.R. 158;
Garvey vs Fowler, 4 Sandf. S.C.R. 665;
Rider vs Smith, 3 Term. R. 766;
State to use Squire vs Bird & als 22 Vol 472

6th The Defendant has a right to demand that these facts be stated in the petition, for it the right of the party, by pleading, to traverse the facts creating this particular and special liability and this would ~~have~~ require the plaintiff to introduce in evidence the charter of the defendant, which is a mere private act.

Bartlett vs Crozier. 17 Johns. 457;

7th An additional reason for arresting the judgment is that the liability of defendant to the penalties of the statute in the second cause of action, stated in the petition is based upon acts of defendant, committed by its officers and servants. The statute creates no liability for the acts of mere servants of the company, but limits that responsibility to the acts of its officers and ~~the verdict~~ how much of the verdict on the second count was based upon such an allegation, this court cannot know, and the only manner of correcting the error is to ~~reverse~~ arrest the entire judgment, at least on that ~~count~~ count, and this the court below refused to do and it is now submitted as a good ground for reversal.

8th It is admitted that the suit was properly brought against "The Pacific Railroad," that being its corporate name, but it is insisted that such "Pacific Railroad," is not subject to the penalties of the statute sued on, unless it be ~~aver~~ averred and proven or admitted by a default or answer, that said Pacific Railroad is a "company" legally existing and existing too "in this state."
Session acts 1855. p. 169.

9th The defects in the petition are not cured either by the default, the verdict or the judgment. The defects alledged form the very gist of the Plaintiffs right to recover and the defendants liability to damages. The only ground for supposing such defects cured, is found in the 8th clause of our statute of Jeofails. R.S. 1855 vol 2. p. 1256. The clause as printed in the revision must be a mistake of the copyist or an error in the printer. See acts 1835. p See acts 1845 p sec. Such a construction as the letter of this clause would warrant, would be in direct conflict with Sec 31 of Art 6, of the Practice act, as well as to many decisions of this court rendered since the revision of 1855 and would render nugatory other provisions contained in same section

Syme vs Steamboat Indiana 28 Mo. Rep. 335.

McDermott vs Pacific Railroad 30 Mo. Rep. 115

Lynch vs Andrews Mo. Rep.

The defects in the pleadings in these case could all have been reached by demurrer and this court could not have rendered such decisions, if judgments by default &c would have cured them. More than this, a literal construction of the 8th clause of the Statute of Jeofails (1855) would deny the power of this court to revise a pleading, even where there was no cause of action stated at all.

Jesse Welton

vs

The Pacific Railroad.

Brief for Plff in error.

1

Aikman Welch
Atty for Plff in Error.

Welton
v
The Pacific Railroad

There is nothing in the record shewing that the Circuit Court unsoundly exercised its discretion in permitting the Sheriff to amend his return to the Summons; Nor did it err in refusing to setaside the interlocutory judgment. There was not the semblance of an Excuse shewn by the ~~ap~~ plaintiff in Error for its failure to appear and answer within the time prescribed by law for pleading.

If these were the only objections to the proceedings of the court we would feel no hesitation in affirming the judgment. But it is urged by the plaintiff in Error that the petition in the case is insufficient to support the judgment; and after a careful consideration of the question we have arrived at the conclusion the objection is well taken.

The petition contains three counts substantially alike, based on

alledged violations of the provisions of an act of the General Assembly entitled "An act concerning the transportation of slaves by rail road companies," approved Feby 27th 1833. Session acts 1833. p 169.—

The act provides "That the several railroad companies in this State, whose officers shall transport any slave from one point or place in this state to any other point or place in the same, in any car or other conveyance of said companies, without the consent or permission of the person to whom such slave does of right belong, or who has authority to grant such consent or permission, shall forfeit and pay double the value of such slave to his owner, to be recovered by action of debt without prejudice to the right of such owner to his action at common law."

The act it will be observed does not embrace ~~all its provisions~~ all railroad Companies, but alone "railroad Companies in this State"; and in order to shew a ~~Company~~ liability ~~under~~ to the penalty it ~~is~~ is essential it should appear on the face of the petition that the ~~Company~~ party sued falls within the class of Companies embraced within the act. This the petition in this case fails to shew - It does not appear from any averment in the petition that the Pfff in Error was ever incorporated, much less that it was an incorporated Company in this State -

The respondent has cited numerous authorities to prove that ~~in suits~~ where the plaintiff ~~is a corporation it is~~ sues in a name appropriate to a corporate body it is not necessary to aver in the Complaint that it is a corporation - The authorities only prove that a party using a name appropriate to a corporate body shall be presumed to be a corporation and capable of suing until denied by the adversary.

And if the principle established by these authorities should be held to apply to a <u>defendant</u> corporation, still the point is not met. The question is not a question of capacity to sue or be sued, or whether the pltff in error is a corporation, but it is whether the pltff in error being presumed to be a corporation and ~~being~~ having capacity to be sued is one of a class embraced within and exposed to the penalties of the law under consideration. The law will not presume it belongs to such class but the fact must appear by averment. ~~and the petition containing no such averment~~ The petition not shewing the pltff in error was a railroad company in this state failed to shew any cause of action and for this reason the judgment will be reversed and the cause remanded with leave to the respondent to amend. The other Judges concur.

Edwd L Dyer

5

Belton

v

the Pacific R.R.

Opinion of court

by Dryden

Reversed & Remanded