Garrette, Elisha vs. Pacific Railroad Co; 1858 Newton Co #13 Cir. 232/8

80/19

- unlawful detainer and trespass
- G dug up lead on land belonging to the Railroad
- they want it back + damages
- no opinion found

St Louis Nov 26/58

Dr Sir.

I wish you immediately upon receiving this to send to "Judge Peter E Blow, Granby Mines Newton County Mo" a writ of Error to the Newton Circuit Court in the case of "The Pacific Railroad vs Elisha Garrett", I will hand you your fee on sight

Truly yours

John D. Stevenson

Wm E Dunscombe Esqr

Jefferson City Mo

P.S. acknowledge Receipt of this

Pacific R R Company

by Pacific

Elisha Granett

Filed Nov. 30th 1858

Wm E Drummond

Clerk

Office of Pacific Railroad Co.

St. Louis, Dec 13 1858

Friend Hunscomb:

I have just received a letter from Newton County advising me that the writ of Error in case of Pacific Rail Road vs Elisha Garrett has not been received. Please issue another the Judgement below was for Pacific Railroad and I procure the writ for the other side at the request of Wm Randolph Garrett atty.

I wish you would send another writ instanter to the clerk of the Newton Circuit Court. Don't settle the fee in sight.

Truly your friend

John D Stevenson

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the thirteenth Judicial Circuit in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Newton County in the Judicial Circuit aforesaid wherein The Pacific Railroad Company were plaintiff, and Elisha Garrett was defendant

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in an action of manifest error hath intervened, to the great damage of the said plaintiff as by their 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.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the twenty-ninth day of November in the year of our Lord one thousand eight hundred and fifty-eight

Wm E. Dunscomb

SEAL OF THE SUPREME COURT OF MISSOURI

N.B. No transcript must be sent before the 25th of Dec.

Dunscomb

State of Missouri } ss
County of Newton }

Be it remembered that on the ninth day of June A.D 1858 the Pacific Railroad instituted suit against Elisha Garrett by filing in the office of the clerk of the circuit court of Newton County in the State aforesaid her petition, which petition is in the words and figures following to wit

"State of Missouri } In the Newton
County of Newton } Circuit Court
} Oct Term 1858

Pacific Railroad Plaintiff
against
Elisha Garrett Defendant

Plaintiff states that they are a body corporate duly created by virtue of the following acts of the general Assembly of the State of Missouri and the several acts amendatory thereto to wit = An act entitled an act to incorporate the Pacific Railroad approved March

12th 1849 by virtue of which they were amongst other things empowered to let, hold, use, possess, enjoy in fee simple or other title in and to any real estate and to sell and dispose of the same, and that afterwards on the tenth day of June A.D. 1852 the Congress of the United States by an act entitled an act granting the right of way to the State of Missouri and a portion of the public lands to aid in the construction of certain Railroads in said State, granted to the State of Missouri for the purpose of aiding and making a Railroad from the City of St Louis to the Western boundary of the State of Missouri every alternate section of land designated by even numbers for six sections in width on each side of said Road and that the Pacific Railroad is a road leading from the City of St Louis to the Western boundary of the

State of Missouri –
Plaintiff further states that the State of Missouri by an act of the general Assembly of said State of Missouri entitled an act to accept a grant of lands made to the said State of Missouri by the Congress of the United States to aid in the construction of certain Railroads in said State of Missouri and to apply a portion thereof to the Pacific Railroad approved December 25th 1852 accepted the said grant of lands as made by the Congress of the United States to aid in the construction of certain Railroads and to apply a portion thereof to the Pacific Railroad and granted the same to plaintiff in full and complete title to the plaintiff for the uses and purposes and subject to the conditions, reversions and provisions set forth and contained in said act of Congress and the act of the General Assembly of the State of Missouri – Plaintiff avers that

The Pacific Railroad have surveyed and located the line of their Road being the first division of the Pacific Railroad and the entire South Western Branch of said Pacific Railroad from the city of St Louis to the Western boundary of the State of Missouri - and the plaintiff avers that in conformity with the act of Congress and the act of the General Assembly of the State of Missouri above recited, the said Pacific Railroad have selected every alternate section of lands designated by even numbers for six sections in width on each side of said Railroad and said sections have been duly approved to the State of Missouri in accordance with the act of Congress making the said Grant and the act of Congress of date August 3rd 1854, entitled an act to vest in the several States and territories the title in fee which have been or may be certified to them - and owning the lands so granted

and approved as aforesaid is section six in Township twenty five North of Range thirty west - Plaintiff avers that by virtue of the said several acts above recited they became the owners of the above described piece of land for the use and purpose and upon the terms prescribed in said acts - that afterwards to wit on the tenth day of December 1855 - the said Pacific Railroad in accordance with the provisions of the act of the General Assembly of the State of Missouri entitled an act supplementary to and explanatory of an act to secure the completion of certain Railroads in the State of Missouri, executed a deed of Mortgage for the lands granted as aforesaid including the above described lands, to the Treasurer of the State of Missouri (a copy of which deed of Mortgage is herewith filed marked B and asked to be made a part of this petition) for the purpose of securing the payment of the principal and interest of

certain bonds in said Mortgage deed described, that afterwards to wit on the 11th day of June AD 1857 the plaintiff executed a deed of Lease for a term of years to Peter E Blow and Ferdinand Kennett for the above described section six for the uses and purposes in said Leare expressed (a copy of which is herewith filed, marked "C" and asked to be made a part of this petition) Plaintiff states that under and by virtue of the several acts of Congress and the General assembly of the State of Missouri herein before refered to, the plaintiff has become and now is the owner of the section of land above described subject to the condition and limitations of said acts and subject to the mortgage and lease above set forth, that said section of land is of great value to plaintiff on account of extensive and valuable deposits of lead ore commonly called mineral underlying the supace thereof and plaintiff avers that the

dependant Elisha Garrett, well knowing the value of the said ore or mineral deposits underlying the surface of the said section six, and most particularly lots number one and two of the North West fractional quarter and lots number one and two of the North East fractional quarter of section six of Township number twenty five North of Range Number thirty west in the County of Newton and the State of Missouri heretofore to wit, on the 5th day of June 1858. wrongfully and unlawfully and without the consent of the said Pacific Rail Road and without the consent of Peter E Blow and Ferdinand Kennett Leasees of said Pacific Railroad entered upon the land of plaintiff heretofore described as Lots, one and two of the North West fractional quarter and lots numbered one and two of the North East fractional quarter of section six of Township twenty five and

of Range thirty West as herein before described, and in which land the defendant had no interest or right, and dug up the surface of the ground, sinking mining shafts upon the same and mining levels or drifts therein, and dug up, removed and carried away large quantities of lead ore or mineral of the plaintiff dug up from said land as aforesaid, to wit four thousand and seven hundred and fifteen pounds of lead ore commonly called mineral then and there lying and being on the land herein before described, which said lead ore was dug up from the land aforesaid and was of great value to wit, of the value of sixteen dollars per thousand amounting to the sum of seventy five dollars and forty four cents, contrary to the Statutes of the State in such cases made and provided to the damage of Plaintiff in the sum of two hundred and

Twenty six dollars and thirty two cents with the value of the mineral so removed, for all of which plaintiff asks judgment.

Payne Price & Crawford
attys for Plaintiff "

J M Payne attorney for Plaintiff makes oath and says that the facts in the above petition as stated are true. J.M. Payne
Sworn to & subscribed
before me June 9th 1858
Jno D Templeton clerk "

(Mortgage) Exhibit A

Mort Page

Indenture of mortgage made and executed this 26th day of December 1855 between the Pacific RailRoad Company duly incorporated by the laws of Missouri of the first part, and the Treasurer of the State of Missouri and his successor in office of the second part Whereas by act of Congress of the United States approved June 10th 1852. granting the right of way to the State of Missouri and a portion

of public lands to aid in the construction of certain Railroads in said State:- certain lands were granted to the said State subject to the Legestature thereof for the purpose of aiding in making Railroads as by reference to said act will more fully appear - and whereas the Legestature of the State of Missouri by an act approved December 25th 1852. entitled an act to accept a grant of land made to the State of Missouri by the Congress of the United States to aid in the construction of certain Rail Roads in this State and to apply a portion thereof to the Pacific Rail Road, granted to said Pacific Railroad for the construction of the South West Branch Rail Road certain portions of said land, being about one Million of acres as will more fully appear by said last mentioned act; and which is refered to as explanatory of this indenture and which

lands are more particularly described in a map of location thereof filed in pursuance of said act with the secretary of the State to which reference may be had - and whereas the Pacific RailRoad for the purpose of Constructing the South West Branch propose to issue their bonds payable in twenty years from date to an amount not exceeding ten million of dollars with interest at the rate of seven per cent, payable semi-annually in the City of New York, which bonds are to be for one thousand dollars each and substantially the form hereto annexed - Now therefore this indenture Witnesseth that the parties of the first part for the better securing the payment of the principal and interest of said money of said bonds as may be issued and sold by the party of the first part each and every of them and also in consideration of one dollar in hand paid by the party of the

second part at the ensealing of these presents the receipt of which is hereby acknowledged, have granted bargained and sold, released and confirmed and by these presents do grant bargain and sell, release and confirm unto the said party of the second part and his successors in office all and singular the lands herein before described together with said South West Branch Rail Road and all the lands rights, easements, franchises appurtenances as well as the same may be and exist at the date hereof as on all additions improvements, erections constructions and appurtenances added to the same after the date of the said Mortgage, to have and to hold all and singular the Rail Road lands and premises hereby granted and intended to be granted and each and every part and parcel thereof with the appurtenances unto the said party hereto of the second

part and his successor or success-
ors in office forever, for the use
and purpose in this indenture set
forth and declared: Provided
always and this indenture is
upon the express condition that
if the said parties of the first part
shall well and truly pay or cause
to be paid to the holder of the said
bonds and every of them the
principal sums of money therein
mentioned according to the true
intent and meaning thereof
with the interest thereon according
to the terms and conditions there-
of, then and in that case this
indenture shall cease determine
and be utterly void — But in
case of the nonpayment of the
said interest and principal on
each and every bond so as afore-
said issued, then and in that
case this indenture shall be in
full force and effect — and the
party of the second part shall
proceed to sell and dispose of
all the estate, rights franchises
and appurtenances hereby conveyed

and intended to be conveyed according to the laws of the State of Missouri for the foreclosure of Mortgages on real estate consistent with the provisions of the act of Congress donating the same of the 10th June 1852- And upon such sale the purchaser or purchasers upon the payment of the purchase money shall become fully seized free of any equity or redemption of all and singular the estate right, title franchise of, in and to all the lands, Railroad, estates easements and appurtenances hereby granted and agreed and intended to be granted as well as the same may be at the date of this indenture as at the time of such foreclosure and sale- And the party of the second part after the payment of the costs and charges of such foreclosure and sale, shall and for himself and his successors in office, covenants to pay to the holders of the bonds actually issued in the premises the amount of principal and interest

of said bonds remaining unpaid and to pay the surplus if any there be to the party of the first part — And in case the proceeds of said sale shall not amount to enough to pay the same then the party of the second part agrees to divide the said proceeds pro rata among respective holders of said bonds. It is further mutually agreed between the parties hereto that any of the lands herein described other than the lands necessary for the use of said Rail Road may be sold by the party of the first part And that the party of the second part upon the payment to him of the purchase money therefor, shall join in a deed of conveyance thereof and such conveyance shall constitute a good and perfect title to such lands to the purchaser notwithstanding anything contain-ed in this indenture. And the party of the second part for himself and his successor in office covenants to hold or invest the proceeds of the sale of any such lands sacred

to the payment of the principal and interest of said bonds; such investment to be either bonds secured by this indenture or the bonds of the United States the State of New York, Massachusetts or Ohio at the lowest rates at which the same can be purchased at the time of said investment - and in the sale of such lands the bonds hereby secured shall be recieved in payment therefor - and in case of any foreclosure and sale in pursuance of the covenants of this indenture, then any and all investments growing out of the sale of said lands shall be applied in payment of the interest and principal on said bonds before the application of the proceeds of said foreclosure sale, and should the proceeds of the sale of said lands or the investment growing out of such sales exceed the amount due or to became due upon the bonds hereby secured then the excess shall be paid to the party of the first part -

It is further mutually agreed that the actual possession, use and management of the said Railroad with all and singular the appurtenances thereto belonging shall be and remain with the parties of the first part so long as they shall remain without default in the payment of principal and interest of said bonds-

In testimony whereof Hudson E Bridge the President of the Pacific Railroad has signed his name hereto and caused the common seal of said Pacific Railroad to be affixed hereto and the secretary of said company has attested the same - Also Alfred W Morrison Treasurer of the State of Missouri has signed his name hereto in acceptance of the trust aforesaid

Hudson E Bridge
President Pacific Railroad

Attest
James Capp jr
Secy P R R Co

18

The State of Missouri: Set

Be it remembered that on this twenty sixth day of December in the year eighteen hundred and fifty five personaly appeared before me the undersigned clerk of the Supreme court of said State at Saint Louis Hudson E. Bridge who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto and acknowledged that he executed the same for the purposes therein mentioned

In testimony whereof I hereunto set my hand and the seal of said court at office in Saint Louis, this day and year above written

Wm L Glanville clerk "

"Filed and recorded Jan 19th 1856
Jno C Templeton clerk "

State of Missouri }
County of Newton } ss

I R W Ellis clerk of the Circuit Court within and for the county of Newton and State of Missouri do hereby certify that

the above and foregoing is a true and perfect copy of the mortgage Executed by Hudson E Bridge President of the Pacific Railroad to the Treasurer of the State of Missouri as appears of record in my office.

In witness whereof I have hereunto set my name and affixed the seal of said court at office this 30th day of Oct 1858 R Wells clerk

(L S)

Lease

(Lease) Exhibit B.

This indenture of Lease made and entered into this eleventh day of June eighteen hundred and fifty seven by and between the Pacific Railroad party of the first part and Ferdinan Kennett and Peter E Blow party of the second part Witnesseth that in consideration of the rents, stipulations and agreements hereinafter mentioned the said parties of the first part doth by these presence lease and demise to said party of the second section number

Six (6) in Township twenty five (25) North of Range thirty West of the fifth principal Meridian and Section number four (4) in Township twenty five (25) North of Range thirty (30) West, both said sections of land, being situate in the county of Newton State of Missouri for the term of ten (10) years from the date hereof and no longer. which lease is given for mining purposes and with full liberty and license to carry on the mining and smelting business and to dig and search for lead upon any and all said lands during said term of ten years, and to use any of the timber on said land that may be necessary for mining purposes including the building of houses needed for miners or the mining business. to have and to hold the same with full power and priveledge to mine on said land or any part thereof and to exercise the right of ownership over the same for and during said term

to be completed and ended on the first day of June A.D 1867. the said parties of the second part yielding and paying said parties of the first part the sum of two dollars per thousand gross weight for all the mineral raised on said land or ten (10) per cent of the mineral which the said party of the first part may elect. the payment to be made quarterly, and the election by the parties of the first part or the President thereof to be made thirty days before the expiration of the quarter, and the parties of the second part to be notified by the president or some officer of the company by letter directed to the place of business of said parties of the second part or by giving the notice to either of the parties in person. If no such notice is given then the rent to be paid in the same way as the payment for the last previous quarter, said parties of the second part

to make full return to the parties of the first part of all the mineral raised during each quarter, and to exhibit their books or mineral account to officer of the Pacific Railroad if required. Said parties of the second part shall not assign or transfer this lease under penalty of forfeiture without the consent of the Pacific Railroad to be evidenced by a resolution of the board of directors of said company. But they may take in other partners in the business. A failure to work on said land in the search or raising of mineral for the term of six months shall be deemed an abandonment of the lease and shall operate as a forfeiture thereof, and the company may by its agent enter upon and take possession of said premises without further delay if the Company shall so elect. A failure to pay a quarters rent for thirty days after the same becomes due, shall make and

create a forfeiture of said lease if so elected by said party of the first part: to be signified by notice in writing delivered to either of said parties of the second part, or by notice in writing put up at some public place on said land, or at their place of business in the neighborhood —

Should there be no forfeiture or surrender of this lease before the expiration of the same, said parties of the second part shall, at the expiration of the lease surrender up possession of said land reserving to themselves the right of removing all valuable improvements they may have placed upon the land! And it is further agreed that said party of the first part, hereby leases for mining purposes to the said party of the second part Sections number ——— number 8 in township number twenty five (25) North Range number thirty (30) West. Section twelve (12) in Township number

twenty five (25) North Range thirty one (31) West and section number thirty six (36) in Township number twenty six (26) North Range thirty one (31) West and section number two (2) in Township twenty five (25) north of Range number thirty one (31) West, upon the same terms and restrictions with the same privileges and upon the payment of the same rents to be paid in the same manner and at the stated periods - and the parties of the first part to have all the same rights of elections in relation thereto as herein before named for the other lands leased to said parties, the said parties of the second part the right to use any timbers necessary for mining or building purposes But not for smelting or making charcoal - The lease on the four sections of land last mentioned and described or so much of said sections as belongs to the said party of the first part may be

terminated by the party of the first part at any time by giving three months notice of such intention to said parties of the second part- said parties of the second part covenanting to surrender up the peacible possession of all said land described or any part of it that may be included in such notice, within three months after notice of the same. It is understood that in naming the sections of land leased to said parties of the second part that all entries made or lawful preemptions claimed within said sections shall be exempted from this lease- and it is further understood and agreed that if at any time the Railroad company shall elect to take the rent in lead then said parties of the second part if required are to smelt said ten per cent of the mineral free of charge- the mineral when smelted to be of as good quality as the said party smelt for themselves.

When the rent is paid in cash, it is to be paid at the office of the Pacific RailRoad in St Louis.

In testimony whereof the said Pacific Railroad by William M. McPherson President thereof and the said parties of the second part have hereunto set their hands and seals in duplicate the day and date above written

Wm M McPherson
President Pacific R R
Ferdinan Kennett Seal
Peter E Blow Seal

Attest
Saml Copp jr Secty
P R R Co

State of Missouri }
County of St Louis } ss

Be it remembered that on the eleventh day of June A D 1857 before me the undersigned Clerk of the St Louis Court of Common Pleas within and for the county aforesaid, came William M McPherson President of the Pacific Railroad, Ferdinan Kennett

and Peter E Blow all of whom are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto and the said William M McPherson President of the Pacific RailRoad acknowledged the same to be his act and deed as the President of the Pacific RailRoad and the act and deed of said Pacific Railroad for the purposes therein mentioned And the said Ferdinan Kennett and Peter E Blow severally acknowledged the same to be their act and deed for the purposes therein mentioned

In testimony whereof I hereby set my hand and affix the seal of said court at office in the city of St Louis the day and year first above written

Charles M Hicks clerk

Filed and recorded on the 16th day of June A.D. 1857.

Jno D Templeton Recorder

By Jamel P Cloud. D. Recorder

State of Missouri }
County of Newton } ss

I R W Ellis clerk of the Circuit Court within and for the county of Newton and State of Missouri do hereby certify that the above and foregoing is a true and perfect copy of the lease executed by William M McPherson President of the Pacific RailRoad and Ferdinan Kennett and Peter E Blow as appears of record in my office -

In Testimony whereof I have hereto set my name and affixed the seal of said court, done at office at Neosho this 29th day of October 1858.

R W Ellis
Cir clerk

"

upon the back of which petition (including said lease and mortgage as parts thereof) is the following endorsement to wit =

"Filed June 9th 1858
Jno L Templeton Clerk
By Saml P Blond D C

"

Filing of Petition

And upon which petition the following summons was issued in words and figures following to wit=

"The State of Missouri to the Sheriff of Newton County Greeting
You are hereby commanded to summons Elisha Garrett that he be and appear in our Newton Circuit Court at the court house in said County on the 3rd Monday after the 4th Monday in September 1858. then and there to answer to the petition of the Pacific Rail Road - Herein fail not and have you then and there this writ with the manner of service hereon endorsed

Summons

Given under my hand with the seal of our Newton Circuit Court hereto affixed at office June 17th 1858.

Jno L Templeton Clerk
By Saml P Cloud D C

Upon which 30 Summons is the following endorsement to wit=

"State of Missouri }
County of Newton }

I H Jennings Sheriff within and for said County do hereby certify that I executed the within petition and writ by delivering a copy of the same to the within named Elisha Garrett in Newton County on the 26th day of June 1858

H Jennings Shff"

Return on Summons

And afterwards to wit, at a regular Term of the circuit Court of Newton County in the State of Missouri, begun and held at the court house in the Town of Neosho on the third Monday after the fourth monday in September 1858 present, Hon John R Shemault Judge, John R Choate Sheriff and R W Ellis clerk The following other proceedings were had in said Cause to wit =

(Oct 28th — 10th day of Term)

"Pacific RailRoad
vs
Elisha Garrett } Civil action

Answer filed } Now at this day comes said dependant by his attorney, and by leave of Court files herein his answer in this cause,"

(Oct 29th — 11th day of Term)

"Pacific RailRoad
vs
Elisha Garrett } civil action

Motion to strike out filed } Now at this day come said plaintiffs by their attorney and by leave of Court, file herein their motion to strike out dependants answer in this cause"

(Oct 30th — 12th day of Term)

Pacific RailRoad
vs
Elisha Garrett } civil action

Answer withdrawn } Now come the parties in this cause and by consent of parties, the answer of dependant

heretofore filed in this cause is withdrawn, and by leave of court said defendant files herein his demurrer,"

Demurrer filed

which demurrer is in words and figures following to wit=

"Pacific RailRoad against Elisha Garrett } Civil action in Newton Circuit Court.

Demurrer

Defendant comes and demurs to the petition for the following grounds of objection

First_ upon the face of the petition it appears that plaintiff has not legal capacity to sue the defendant in manner and form as they have said in this case - Because 1st The plaintiff sets forth in the petition that they claim an interest in the land mentioned in the petition by virtue of certain acts of Congress and of the General Assembly of the State of Missouri, and by virtue of no other title whatever; which acts of Congress and said General Assembly confer on plaintiff

no suppicent title or right to said land or any part thereof or the possession or right to the possession thereof.

Because 2nd Plaintiff sets forth in the petition that long before the time of the committing of the supposed injuries by defendant plaintiff had mortgaged to the Treasurer of the State of Missouri the land and Railroad mentioned in the petition, reserving the possession of the Railroad and appurtenances and not reserving the possession of the land, so that upon the face of the petition it appears that plaintiff has no right to the possession of any part of said land

Because 3rd Plaintiffs sets forth in his petition that long before the time of the committing of the supposed injuries by defendant plaintiff had leased a portion of said land viz Section No 6 in Township No 25. of Range No 30 West to Peter & Blow and Fardinan Kennett and the time for which

the same was leased to said Blow & Kennett has not yet elapsed —

For these reasons defendant says plaintiffs have not legal capacity to sue in manner and form as they have done in this case —

Second. Upon the face of the petition it appears that the petition does not state facts sufficient to constitute a cause of action Because plaintiff sets forth in his petition that they had long before the time of the committing of the supposed injuries by deft, the Pacific RailRoad had parted with the right of the possession of said land mentioned in the petition by first, the Mortgage mentioned in the petition and second, the lease mentioned in the petition — and so the defendant says upon the face of the petition, it appears that the petition does not state facts sufficient to constitute a cause of action — Randolph, Young & Hendrick

Attys for Defd

upon which demurrer is the following endorsement to wit:

"Filed Octr 30th 1858

R.W. Ellis Clerk"

(Oct. 30th — 12th day of term)

"Pacific RailRoad
vs
Elisha Garrett
} Civil action

Judgment on Demurrer

Now at this day the demurrer in this cause coming on to be heard, and the same being seen and fully understood by the Court is by the court overruled: And said defendant refusing to file any other answer, the assessment of damages, was by consent of parties submitted to the court, and by consent of parties the Court assessed the damages of said plaintiff to one dollar — It is therefore considered by the court that said plaintiff have and recover of and from said defendant the said sum of one dollar for their damages together with their costs in this behalf laid out and expended and that execution issue therefor —"

(Same day)

"Pacific RailRoad } civil action
vs
Elisha Garrett }

Bill of Exceptions filed

Now at this day comes the said dependant by his attorney and by leave of court files herein his bill of exceptions in this cause"

Which bill of Exceptions is in the words and figures following to wit,

"Pacific RailRoad plff } In the circuit
against } Court of Newton
Elisha Garrett Deft } County -

Bill of Exceptions

Be it remembered on this the 30th day of October 1858. and on the Twelfth day of the October Term of the Newton Circuit Court this cause came on to be heard, and the demurrer heretofore filed in this cause coming on to be heard, which said demurrer is in the words and figures following to wit;

Pacific RailRoad } civil action in
against } The Newton Circuit
Elisha Garrett } Court -

Defendant comes and demurs to the petition for the following grounds of objection -
first - upon the face of the petition it appears that the plaintiff has not legal capacity to sue defendant in manner and form as they have sued in this case
Because, 1st The plaintiff sets forth in the petition that they claim an interest in the land mentioned in the petition by virtue of certain acts of congress and of the General Assembly of the State of Missouri and by virtue of no other title whatever; which acts of Congress and said General Assembly confer on plaintiff no sufficient title or right to said land, or any part thereof or the possession or right to the possession thereof,

Bill of Exceptions

Because 2nd Plaintiffs sets forth in the petition that long before the time of the committing of the supposed injuries by defendant plaintiff had mortgaged to the Treasurer of the State of Missouri

the land and Railroad mentioned in the petition, reserving the possession of the Railroad and appurtenances, and not reserving the possession of the land - so that upon the face of the petition it appears that plaintiff has no right to the possession of any part of said land

Because 3rd Plaintiffs sets forth in his petition that long before the time of the committing of the supposed injuries by defendant plaintiffs had leased a portion of said land viz. Section No 6 in Township No 25 of Range No 30 West to Peter & Blow and Herdiman Kennett, and the time for which the same was leased to said Blow and Kennett, has not yet elapsed.

Bill of Exceptions

For these reasons defendant says plaintiffs have not legal capacity to sue in manner and form as they have done in this case -

Second - Upon the face of the petition it appears that the petition does not State facts sufficient to constitute a cause of action - Because

Plaintiffs sets forth in his petition that they had long before the time of the committing of the supposed injuries by deft, the Pacific Railroad had parted with the right of the possession of said land mentioned ~~in the~~ in the petition by first, the Mortgage mentioned in the petition - and second the lease mentioned in the petition - And so the defendant says upon the face of the petition, it appears that the petition does not state facts sufficient to constitute a cause of action —

Bill of Exceptions

Randolph Young + Hendrick
attys for Deft.

Which said demurrer being seen and fully understood by the court, was by the court overruled, which overruling of the court is in words and figures following to wit —

Pacific Rail Road
vs
Elisha Garrett. } Civil action

Now at this day the demurrer

in this cause coming on to be heard and the same being seen and fully understood by the Court is by the Court overruled. And said defendant refusing to file any other answer, the assessment

Bill of Exceptions

To the opinion of the Court in overruling said demurrer the defendant excepts and prays that this his bill of Exceptions may be signed, sealed and made a part of the record in this cause, which is accordingly done

John R Shennault
Circuit Judge

(Endorsed) "Filed Oct 30th 1858
R W Ellis clerk"

(Same day)

"Pacific Railroad
vs
Elisha Garrett

Motion to set aside the finding of the court filed

Now comes the said defendant by his attorney and by leave of court files herein his motion to set aside the finding of the Court in this cause, which motion being seen and fully

understood by the court is by the court overruled" -

The Motion overruled

And which motion is in the words and figures following to wit -

"

Pacific Rail Road, Plaintiff
against
Elisha Garrett, Defendant
In the Circuit Court

Motion to Set aside the finding of the Court

Defendant comes and moves the court to set aside the finding of the court in this cause and grant him a new trial - Because said court erred in overruling said demurrer filed in this cause by defendant

Hendrick Randolph & Young attys for Deft"

Upon which motion is the following endorsement to wit

"Filed Oct 30th 1858
R W Ellis clerk
"

(Same day)

"

Pacific RailRoad } Civil action
vs
Elisha Garrett }

Now comes the said defendant by his attorney and by leave of court files herein his motion in arrest of judgment, which being seen and fully understood by the court is by the court overruled" -

Motion in arrest of Judgment filed & overruled

And which motion is in words and figures following to wit -

Pacific RailRoad, Plff } In the Circuit
against } Court for Newton
Elisha Garrett, Deft } County

Motion in arrest of Judgmt

Defendant moves the court to arrest the judgment in this cause - Because the plaintiff does not in its said petition show a sufficient cause of action to entitle said plaintiff to recover in this, that said plaintiff in its said petition does not

show that it is entitled at the time of bringing said suit to the possession of said land

Because said plaintiff in its said petition does not show that the defendant committed the trespass upon land of which plaintiff was at the time of the suit commenced entitled to the land in said petition mentioned. And because petition does not state facts sufficient to show a cause of action.

Randolph, Hendrick & Young attys for Defts "

upon which motion is the following endorsement to wit=

"Filed Oct 30th 1858
R W Ellis clerk.
"

(Same day)

"Pacific RailRoad
vs
Elisha Garrett } civil action

2d Bill of Exceptions filed

Now comes the said defendant by his attorney and by

leave of court files herein his Bill of Exceptions in this cause,"

Which bill of exceptions is in the following words and figures to wit=

"Pacific RailRoad, Plaintiff
against
Elisha Garrett, Defendant

Be it remembered that on this 30th day of October 1858 this cause came on to be heard, and the motions heretofore filed in this cause came on to be heard which motions are in the words and figures following to wit.

Pacific RailRoad Plff } In the
against } Circuit Court.
Elisha Garrett Deft }

Defendant comes and moves the court to set aside the finding ~~Judgment~~ of the court in this cause and grant him a new trial — Because said Court erred in overruling said demurrer filed in this cause by defendant

Hendrick Randolph & Young
attys for Deft

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Pacific Railroad, Plff } In the Circuit
against } Court for Newton
Elisha Garrett Deft } County

Defendant moves the court to arrest the judgment in this cause, because the plaintiff does not in its said petition show a sufficient cause of action to entitle said plaintiff to recover in this, that said plaintiff in its said petition does not show that it is intitled at the time of bringing said suit, to the possession of said land - Because said plaintiff in its said petition does not show that the defendant committed the trespass upon land of which plaintiff was at the time of the suit commenced entitled to the lands in said petition mentioned; and because petition does not state facts sufficient to show a cause of action

Randolph Hendrick & Young
Attys for Deft

which said motions being seen and fully understood, was by the court overruled —
To the overruling said motions by the court the defendant excepts and prays that this his bill of exceptions may be signed sealed and made a part of the record in this cause which is accordingly done

John R Shenault
Circuit judge

upon which bill of exceptions is the following endorsement. to wit =

"Filed Octr 30th 1858
R W Ellis clerk"

State of Missouri }
County of Newton } ss

I R W Ellis clerk of the circuit court within and for the county of Newton in the State aforesaid hereby certify that the foregoing is a true and perfect transcript of the records and proceedings in the above entitled cause. Ins testimony

Whereof I R W Ellis Clerks as last
aforesaid have hereto set my
hand and the seal of said court
at office in Neosho on this 10th
day of December A.D. 1858.

R W Ellis
Cir clerk

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Pacific R.R. Company

Ny Record

Elisha Garrett p.e.

filed December 20 1858

Wm E Duncomb

Clerk

Austin

13th

Grandy Mo Dec the 20th AD 1858

To Wm E Duncanh Esqr

Dear sir

Enclosed I send you the Notices Served upon Garrett on the Case of the Pacific Rail Road Vs Elisha Garrett

Yours respectfully
J R Choate Sheriff

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Pacific RR Co

vs } notice of
mt
Elisha Garrett

filed Dec 27th '88

Wm E Dunscomb
Clerk

Pacific Rail Road Co } In the Supreme
vs } Court Jan Term
Elisha Garrett } 1857

The Defts comes & makes the following assignment of Error

The Court Erred in overruling the Defts demurrer to the Petition. The Court Erred in overruling Defts motion to set aside the finding of the Court

The Court Erred in overruling Defts motion to arrest the Judgment

For these Errors Defts prays that the Judgment be reversed

L Hendrick Atty
pr Defts.

Respondents come and say there is no error in the Judgment of Court below but the Judgment below should in all things be affirmed

Stevenson for
Respondents

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Pacific R.R. Co.

vs

S. Garnett

To be submitted
when called

Filed Jany 24. 1855
Test W.E. Dupratt Clk

Pacific Railroad Deft in Error

vs

Elisha Garrett Pltff in Error

Writ of Error to Newton Circuit Court

Statement of Case

Pacific Railroad sued Elisha Garrett in the Newton Circuit Court for trespass to lands at the return term the deft filed a demurrer, the Court below overruled the demurrer. and upon deft refusing to file answer by consent of parties a Judgement was then entered for want of answer against deft for nominal damages, and deft Brings case here by writ of Error -

This case is so far as the title of the Pacific Railroad to the lands in controversy dependant upon the decision in case of Kennett & Blow vs Plummer to be argued at present term - if Blow & Kennetts lease is held to be void the right of action is clear in the Pacific Railroad - they being unquestionably the owners of the lands -

If the lease is sustained the question arises could the Pacific Railroad ~~Garrett~~ sue

We contend that the Injury being to the Freehold the right of action is in both the holder of the lease hold estate and the owner of the remainder after the expiration of the lease hold estate.

That the doctrine is.

That in case of trespass to the Freehold, the owner of any estate in the land can sue no matter whether it be a present estate, or a Remainder. The statutory trespass being given to the owner whose rights are injured or destroyed by the trespass and in this case the injury complained of being to the destruction of the estate which would exist after the expiration of the lease — the Pacific Railroad is a ~~the~~ proper party to sue

Stevenson for
~~Deft in Error~~

The Deft in Error as in case of Kennett & Blow vs Plummer et al contends that the Mortgage to State Treasurer in no wise affects the right to sue ~~being~~ a mere security incident to a debt;

That a Mortgagor has such estate in the mortgaged property as was intended to be protected by the act concerning trespasses to lands,

That a trespasser who claims no interest in the lands trespassed upon in himself cannot set up as a bar to a recovery any interest in another unless it is a complete divestiture of ownership in pltff

Stevenson
for Deft in Error

Pacific Railroad

vs

Elisha Garrett

Statement & Brief

of Deft in Error

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filed Jany. 25 1859

Wm E Dunscomb

Clerk

The Pacific Rail Road Co plaintiff } In the Newton
against } County Circuit
Elisha Garrett Defendant } Court

To Elisha Garrett Defendant
You are hereby Notified that I have sued
out a writ of Error on behalf of the plaintiff
in the above entitled cause out of the office
of the Clerk of the Supreme court for the
State of Missouri and that said cause
will be set for trial at the next term
of said Court to be begun and held at the
City of Jefferson in the County of Cole
on the 2nd Monday in January A.D. 1859

D. E. Blow
Atty in fact for
Pacific Rail Road Co

I John K Choate Sheriff within and for the County of Newton do hereby certify that I Executed the within notice by delivering a true Copy of the same to the within named Elisha Garrett this December the 18th AD 1858

John K Choate Sheriff

Pacific R.R. Co
18
Elisha Garrett
Notice of
Sheriff fees $1.00

Pacific Rail Road Co. }
against } In the Supreme Court
Elisha Garrett } Jan. Term 1859

This was a civil action for tres-
pass in entering upon certain land & digging up &
carrying away mineral therefrom. To the Peti-
tion Defft. filed an answer & afterwards ~~the~~
to make an agreed case, Plaintiffs amended their
Petition by incorporating in it their mortgage
of the land to the treasurer of the State & their
deed of lease to Blair & Hennett. Defft. then
withdrew his answer & demurred to the
Petition. The court overruled the demurrer
& rendered judgment for Plffs. Defft filed
motions to set aside the finding of the court
& to arrest the judgement. which were over-
ruled. To all the decisions Defft excepted.
and brings the case here by writ of Error.

By reference to the Petition it
will be seen that the land upon which the
trespass was committed is a portion of the
lands granted to the State of Mississippi to aid
in the construction of certain Rail Roads
upon certain conditions & subject to certain
limitations & restrictions. and afterwards
granted to Plffs upon the same terms
That afterwards Plffs. mortgaged
their lands & the Road to the treasurer of
the State of Mississippi reserving the pos-
session of the Road but not of the land
and afterwards leased that which the
trespass was committed upon to Hennett
& Blair for ten years, to possess use &

enjoy for mining purposes

That after the date of the lease Deft. committed the trespass complained of

The Deft. demurred upon the ground that Pltffs had no legal capacity to prosecute the suit. & upon the ground that Petition did not state facts to constitute a cause of action. And Deft relies on these points to reverse the judgement of the circuit court.

First. Plaintiffs by their own showing had no title to the land in question nor right to the possession of it

Second If Pltffs ever had a right to the possession of the land they parted with it when they leased the land to Blow & Kennett. And being lessors to Blow & Kennett have no right to sue for trespasses committed on the land during the Term of the lease which lease they can not deny — L. Hendrick Atty for Deft.

Pacific R.R. Co.

Mr. J. Brief

E. Garrett

To be sent
mitted when
called