

12076

No. _____

Supreme Court of Illinois

Dumass, et al.

vs.

Francis.

71641  7

At a Term of the circuit Court begun
& held at the court house in the city of Rock
Island within & for the county of Rock Island
& State of Illinois on Monday the three
day of November A D 1851, do Yet on
Wednesday the 19th day of said Month of
November as yet of the said November
Term before the Hon Jas C. Wilkinson Presiding
Judge of the Sixth Judicial circuit in the
State of Illinois.

Be it Remembered that heretofore to Yet on the 19th day
of October in the year of our Lord one thousand eight
hundred & fifty, there was filed in the Clerk's Office in the
county of Rock Island, ^{State of Illinois} a certain summons, which said
summons, is in the words & figures following to Yet:

State of Illinois
Rock Island County } set The People of the State of
Illinois, to the Sheriff of said County, Greeting:
We command you, that you summon William Ballance
James Boodle, Peter Demops and Miles Slusky if he
be found in your county, personally to be and appear before
the circuit Court of said County, on the first day of
the next Term thereof, to be holden at the Court house
in the Town of Rock Island in the said County, on
the 4th Monday in the Month of October 1850, to answer
unto Frederick M Francis in a plea of Vesspass to
the damage of the said Plaintiff as he say in the sum of
one thousand dollars, and have you then and there this
writ with an endorsement thereon, in what manner
you shall have executed the same.

Witness J. Wilson Clerk of our said Court and
the seal thereof, at his office in said County this 19th day

day of October A D 1850.

~~Executed~~
and

Frazier Wilson Clerk

and on said summons, an endorsement was made as follows, To Wit: I Return this summons served by reading it to the within named William Ballance, James Boodle, Pet Lernops, this 17th day of Oct A D 1850.

S. S. Guyer Sheriff of Rock Island

J. L. Calkins deputy Sheriff R. I.

Be it Remembered further that on the 15th day of October A D 1850, there was filed in the said clerks office, a declaration, which said declaration is the words & figures following To Wit:

State of Illinois } Circuit Court
Rock Island County } ss of October Term
A D 1850

Frederick A. Francis plaintiff in this suit by Knox & Drury his attorneys, complains of James Boodle, William Ballance, Peter Lernops & Miles Drury in a plea of trespass,

For that the said defendants on the seventh day of October in the year of our Lord one thousand eight hundred & fifty with force and arms &c broke and entered a certain close of the said plaintiff situate, lying and being in the county of Rock Island State of Illinois, known and designated as the North West quarter of Section Twenty nine (29) in Township sixteen (16) North of Range five West of the fourth principal Meridian and then and there forced & broke open, broke to pieces, damaged & spoiled divers, To Wit: ten gales of the said Plaintiff, of great value, To Wit: of the value of one hundred dollars, then standing and being in the said close, and the locks, staples & hinges, To Wit: ten locks

twenty Staples and twenty hinges, of the said plaintiff
of great value, To Wit: of the value of one hundred dollars
respectively, affixed to the said gates and with which
the same were then respectively locked and fastened.
And with feet in walking trod down, trampled upon
consumed & spoiled the grass & corn of the said plaintiff
of great value, To Wit: of the value of Two hundred
dollars, then then growing and being, and with cattle
To Wit: horses, mares, geldings, cows, oxen, & sheep
eat up and depastured the grass and corn of the said
plaintiff, of great value, To Wit: of the value of Two
hundred dollars then growing and being in the said
close and with divers other horses, mares, geldings, sheep
and cattle and also with the wheels of divers carts waggons
and ^{other} Carriages, crushed, damaged & spoiled other the
grass and corn of the said plaintiff of great value To
Wit: of the value of Two hundred dollars then then also
growing and being and with the feet of the said horses
mares and geldings and with the wheels of the said
carts waggons and other Carriages, tore up, subverted
damaged & spoiled the earth and soil of the said
close and also then and there broke down, tore up & prostrated
the fence of the said plaintiff then then standing and
being and being upon the said close of great value
To Wit: of the value of Two hundred dollars and taking
took and carried away the rails and stakes of the said
plaintiff of great value, To Wit: of the value of Two
hundred dollars, then standing & being upon the said close
and converted them to their own use. And also then
and there cut down, prostrated and destroyed, the trees
and underwood To Wit: Fifty oak trees and ten acres
of underwood of the said Plaintiff of great value, To Wit:
of the value of one hundred dollars & took and carried
away the said trees & underwood and converted & disposed

of them to their own use; and also then and then ^{but} placed
& erected and caused to be put, placed & erected divers
to wit: ten shambles, ten booths, in and upon the said
close, and kept and continued the said shambles &
booths without the leave ^{or license and against the will} of the said Plaintiff, for a long
space of time and thereby and therewith during all the time
aforesaid greatly encumbered the said close and
hindered & prevented the said Plaintiff from having the
use benefit and enjoyment thereof, in so large and
ample a manner as he might and otherwise
would have done, to wit: at the county aforesaid
and other wrongs to the said plaintiff, then and there
done against the peace of the People of the State of
Illinois, and to the damage of the said plaintiff of
one thousand dollars and therefore he brings this suit.

Knox & Lunny

Attys for Plff-

Afterwards, to wit: on the 30th day of October A D 1850, there
was filed in the said clerk's office, certain Pleas which
said Pleas are in the words & figures, following, to wit:

State of Illinois

County of Rock Island } ss Rock Island Circuit Court
October Term A D 1850.

William Ballance, James Bode
Miles Lunny and Peter Lunnop.

vs

Frederick A Francis

Trespasps.

And the said defendant William Ballance
comes and defends the force and injury when &c and says
the said Plaintiff actio non, because he says that before
the time when the said several supposed trespasses in
the said declaration mentioned, were committed, to wit:
on the sixth day of October A D 1850 at the county
of Rock Island aforesaid, there was and for a long time

therefore had been a public highway, and as such used by each and every person desiring to pass and repass thereon, which public highway ran and lay upon and over the said close of the said plaintiff, in the said declaration described and before the said time when &c the said plaintiff had wrongfully placed in upon and across the said highway the said gates, locks, staples, hinges, graps, corn, fence, rails, stakes, trees underwood, which at the said time when &c were and remained an obstruction to the said highway; and the said defendant then and there having occasion to pass upon and along the said highway on his lawful business for that purpose only did remove, put aside and take up the said obstructions and in so doing necessarily did a little injure and damage the said gates, locks, staples, hinges, corn, fence, rails, stakes trees underwood, doing no unnecessary damage in so doing which are the said several supposed trespasses in the said declaration mentioned and none other; and this the said defendant is ready to verify, wherefore he prays judgment &c

Manning for Deft Ballanda.

And for further plea in this behalf, the said defendant Ballanda, says actio non, because he says that before the said time when &c the owners of the said declaration described had dedicated to public use a certain public road, laying, leading and being on, upon and across the said close, which was before the said time when &c accepted had used and enjoyed by the said public as such public road; and before the said time when &c the said plaintiff had wrongfully erected, placed and caused to be in upon and across, the said public

the said gates, locks, staples, hinges, graps, corn
fence, rails, stakes, trees and underwood which were
then and there an obstruction being and remaining
in and upon the said public road and the said
defendant Ballance having occasion to pass ~~upon~~ on
and along the said public road on his lawful ~~private~~
business for the purpose of so passing was compelled
to remove the said obstruction and in so doing
necessarily did a little damage and injure the
said gates, locks, staples, hinges, graps, corn, fence
rails, stakes, trees, underwood, doing no unnecessary
damage in so removing the said obstruction for the
purpose of passing as aforesaid as they lawfully
might for such cause; which are the said several
supposed trespasses above in the said declaration
mentioned, and none other; and this the said defendant
Ballance is ready to verify;

Manning for Dep^t Ballance.

And for further plea in this behalf the said defendant
Ballance says actio non, because he says that he
is not guilty of the said several trespasses above
said to his charge, nor any ^{either} nor ~~any~~ of them nor any
part thereof, is in the said declaration set forth, and
of this he puts himself upon the country &c -

Manning for Dep^t Ballance.

And the said plaintiff
doth the like &c

Knox & Drury for Plff.

State of Illinois
County of Rock Island } Rock Island Circuit Court
October Term A D 1850.

William Ballena, James Bodle
Miles Drury and Peter Lemons
ads
Frederick A. Francis.

And the said defendant James Bodle comes and defends the force and injury when &c. and says the said plaintiff. Actio non, because he says that before the time when the said several supposed trespasses in the said declaration mentioned were committed, To Wit: on the sixth day of October A D 1850. at the County ^{of Rock Island} aforesaid, there was and for a long time theretofore had been a public highway, and as such used by each and every person desiring to pass and repass thereon; which public highway run and lay in upon and over the said close of the said plaintiff, in the said declaration described; and before the said time when &c the said plaintiff had wrongfully placed in, upon and across, the said highway the said gates, locks, staples hinges, grasp, corn, fence, rails, stakes, trees and underwood which at the said time when &c were and remained an obstruction to the said highway;

And the said defendant Bodle then and there having occasion to pass upon and along the said highway on his lawful business, for that purpose only did remove the said obstruction and in so doing necessarily did a little injure and damage the said gates, locks, staples hinges, grasp, corn, fence, rails, stakes, trees and underwood doing no unnecessary damage in so doing; which are the said several supposed trespasses in the said declaration

mentioned and none other. and this the said defendant is ready to verify, wherefore he the said Brodle prays Judgment &c

Planning for def^t Brodle.

And for further plea in this behalf the said defendant Brodle says actio non, because he says that before the said time when &c the owners of the said close in the said declaration describing had dedicated to public use a certain public road, laying, leading and being on upon and across the said close which was before the said time when &c accepted had used and enjoyed by the said public as such public road; and before the said time when &c the said plaintiff had wrongfully erected, placed and caused to be in upon and across the said public road the said gates, locks, staples hinges grafts, corn, fence rails, stakes, trees, and underwood, which were then and there an obstruction being and remaining in and upon the said public road; and the said defendant Brodle having occasion to pass on and along the said public road on his lawful business for the purpose of so passing were compelled to remove the said obstruction, and in so doing necessarily did a little damage and injure the said gates, locks, staples, hinges grafts, corn, fence, rails, stakes trees and underwood, doing no unnecessary damage in so removing the ^{said} obstruction for the purpose aforesaid; as they lawfully might for the purpose aforesaid; which are the said several supposed trespasses above in the said declaration mentioned and none other; And this the said defendant Brodle is ready to verify. Wherefore he prays Judgment &c

Planning for def^t Brodle -

And for further plea in this behalf the said defendant
Boale says actio non, because he says he is not
guilty of the said several supposed trespasses above
in the said declaration set forth nor any nor either of
them nor any part thereof, and of this he puts himself
upon the country &c

Manning for Deft Boale

And the said plff
doth the like

Knox & Drury for Plff

State of Illinois
County of Rock Island } Rock Island Circuit Court
October Term A D 1850.

William Balland, James Boale }
Miles Drury and Peter Lunnops. }
vs }
Frederick N. Francis. } 3

And the said defendant Miles
Drury, by his attorney comes and defends the force and injury
when &c and says the said plaintiff, actio non because he
says that before the time when &c; To Wit: on the sixth
day of October A D 1850, at the county of Rock Island
aforesaid, there was and for a long time theretofore had been
a public highway, and as such used by each and every
person desiring to pass and repass thereon, which public
highway run and lay in upon and over the said close
in the said plaintiffs declaration described; and before
the said time when &c the said plaintiff had wrongfully
placed in upon and across the said highway the said gates
locks, staples hinges, grass, corn fence, rails, stakes trees
and underwood which at the said time when &c were

and remained an obstruction to the said highway and the said defendant Drury then and there having occasion to pass upon and along the said highway on his lawful business for that purpose only did remove the said obstructions and in so doing necessarily did a little injure and damage the said gates locks staples, hinges, grafts, corn, fence, rails, stakes, trees and underwood doing no unnecessary damage in so doing as he lawfully might for such cause; which are the said several supposed trespasses in the said declaration described, and none other; and this the said defendant Drury is ready to verify, wherefore he prays judgment &c
Manning for Deft Drury.

And for further plea in this behalf the said defendant Drury says actio non, because he says that before the said time when &c, the owners of the said close in the said declaration described had dedicated to public use a certain public road, laying, leading and being on upon and across the said close, which was before the said time when &c, accepted had used and enjoyed by the said public as such public road; and before the said time when &c the said plaintiff had wrongfully erected, placed and caused to be placed upon and across the said public road, the said gates locks staples hinges, grafts, corn, fence, rails, stakes, trees and underwood, which were then and there an obstruction to the said public road and the said defendant Drury having occasion to pass on and along the said public road on his lawful business, for the purpose of & passing was compelled to remove the said obstruction and in so doing did necessarily a little injure and damage the said gates, locks staples, hinges, grafts

corn, fence, rails, stakes, trees and underwood doing no unnecessary damage in so removing the said obstruction as he lawfully might for the purpose aforesaid; which are the said several supposed trespasses above in the said declaration set forth, and some other.

And this the said defendant is ready to verify, wherefore he prays judgment &c

Manning for Def^t Dunny.

And for further plea in this behalf the said defendant Dunny says actio non, because he says that he is not guilty of the said several supposed trespasses nor any nor either of them nor any part thereof, in manner and form as the same are set forth in the said declaration and of this he puts himself upon the country &c

Manning for Def^t Dunny.

And the said Plaintiff

doth the like &c

Knox & Dunny for Pl^{ff}.

State of Illinois
County of Rock Island } Rock Island Circuit Court
October Term A D 1850.

William Ballance, James Brode
Miles Dunny and Peter Dummop.

vs

Frederick A. Francis.

And the said defendant Peter Dummop by his attorney comes and defends the force and injury when &c and says actio non, because he says that before the said time when &c To Wit: on the sixth day of October A D 1850, at the County

of Rock Island aforesaid, there was and for a long time therefore had been a public ~~road~~ highway and as such used and enjoyed by every person desiring to pass and repass thereon, which public highway ran and lay in upon and over the said close of the said plaintiff, in the said declaration described, and before the said time when &c, the said plaintiff had wrongfully placed, in upon and ~~across~~ the said highway, the said gates, locks, staples, hinges, graps, corn, fence, rails, stakes, trees underwood which at the said time when &c were and remained an obstruction to the said highway; and the said defendant Dunnop then and there having occasion to pass upon and along the said highway in his lawful business, for that purpose only did remove the said obstruction and in so doing necessarily did a little injure and damage the said gates, locks, staples, hinges, graps, corn, fence rails, stakes, trees and underwood, doing no unnecessary damage in so doing, which are the said several supposed trespasses in the said declaration mentioned and described and more other. And this the said defendant Dunnop is ready to verify. Wherefore he prays judgment &c

Manning for deft Dunnop.

And for further plea in this behalf, the said defendant Dunnop, says actio non, because, he says that before the said time when &c the owners of the said close in the said declaration mentioned had dedicated to public use a certain public road laying, leading and being on upon and across the said close which was before the time when &c accepted, had used and enjoyed by the said public as such public road;

and before the said time when &c the said plaintiff
here wrongfully erected, placed and caused to be
placed in upon and across the said public road
the said gates, locks, hinges, graps, corn, fence, rails
stakes, trees, and underwood, which were then and
there an obstruction to the said public road; and
the said defendant Dunnop, having occasion to pass
on and upon the said public road ^{on} and his lawful
business for the purpose of so passing, was compelled to remove
the said obstruction and in so doing necessarily
did a little injure and damage the said gates
locks, staples hinges, graps, corn, fence, rails stakes
trees and underwood, doing no unnecessary damage
in so doing; as he lawfully might for the cause aforesaid;
which are the said several trespasses above laid to his charge
and some other; and this the said defendant is ready to
verify; wherefore he prays judgment &c.

Manning atty for def^t Dunnop.

And for further plea in this behalf the said defendant
Dunnop says actio non, because he says that he is
not guilty of the said several supposed trespasses
above laid to his charge, nor any nor either of them
nor any part thereof, And of this he puts himself
upon the country &c.

And the said Plaintiff Manning for def^t Dunnop
doth the like

K & L for Plff,

And be it Remembred that afterwards to Wit: on the 6th day
of November A D 1851, there was filed in the clerks office in
and for said County, the following applications - which I replicate
are in the words & figures following; To Wit:

Francis

vs

Ballard, Boale et al

}
}
}

And the said Plaintiff as to the said plea of the said defendant William Ballard first above pleaded, says precludi non, because he says there was no such public highway in, upon and over said close as set forth in said defendants said first plea. And this he prays may be enquired of by the country &c.

Knox & Lermy for Plff.

And the said Plaintiff, as to the second plea of the said defendant Ballard says precludi non, because he says the owners of the said close had not dedicated to the public use a certain public road, lying, leading and being on, upon & across said close, as set forth in said defendants said second plea, and this he prays may be enquired of by the country &c.

Knox & Lermy for Plffs.

Be it remembered further that on said sixth day of November 1851, there was filed in the clerks office of said county, a replication in the words & figures following To Wit:

Francis

vs

Boale et al

}
}
}

And the said plaintiff as to the plea of the said defendant James Boale first above pleaded says precludi non, because he says there was no such public highway in, upon and over said close, as set forth in said defendants said first plea and this he prays may be enquired of by the

country &c

Knox & Slumy attys for Plffs-

And the said Plaintiff as to the said second plea of the said defendant Boodle says precludi non, because he says the owners of the said close had not dedicated to the public use ~~the~~ ~~ertain~~ public ~~are~~ a certain public road lying, leading and being on, upon and across said close as set forth in said defendants said second plea and this he prays may be enquired of by the country &c-

Knox & Slumy for Plffs-

Be it Remembered further, that on 8th sixth day of November 1851, replications were filed in said clerks office in the words and figures following to Wit:

Francis
vs
Slumy et al

And the said plaintiff as to the plea of the said defendant Slumy first above pleaded, says precludi non, because he says there was no such public highway, in upon and over said close as set forth in said defendants said first plea and this he prays may be enquired of by the country &c-

Knox & Slumy for Plffs-

And the said Plaintiff as to the second plea of the said defendant Slumy, says precludi non, because he says the owners of the said close had not

dedicated to the public use a certain public road
lying, leading and being on upon and across said
close as set forth in said defendants said second
plea. And this he prays may be enquired of by
the country &c.

Knox & Slany for Plffs -

On the said sixth day of November 1831, the
replications were filed in said clerks office in the
words & figures following, To Wit:

Francis

vs

Dunnops et al

3

And the said plaintiff as to the
said plea of the said defendant Dunnops first above
pleaded, says precludi non, because he says there
was no such public highway, in, upon and over said
close as set forth in said defendants said first
plea. And this he prays may be enquired of by
the country &c

Knox & Slany for Plffs -

And the said plaintiff as to the second plea of
the said defendant Dunnops, says precludi non,
because he says the owner of the said close here
not dedicated to the public use a certain public
road, lying, leading and being on upon and across
said close as set forth in said defendants said
second plea, and this he prays may be enquired
of by the country &c

Knox & Slany for Plffs -

Be it Remembered further, that at a term
of the circuit court begun and held at the court
house in the city of Rock Island within and
for the county of Rock Island and State of
Illinois on the third day of November A D 1851. it
being the first Monday of 8th month ^{Nov} on the fifteenth
day of said Term - an order was made in
said cause in the words & figures following To
Wit:

Frederick A. Francis

vs

William Ballance, James Brodie }
and Peter McDougall & Miles Denny } Respds.

This day came the parties herein
by their attorneys and this cause coming on to be heard
and tried by consent the court by consent, and the
court having heard the evidence adduced herein and
being fully advised in the premises consider that the
plaintiff recover of the defendants the sum of two dollars.

It is therefore ordered by the court, that the plaintiff have
and recover of and from the defendants the sum of
Two dollars by the court assessed as aforesaid, together
with his costs in this behalf expended and that he have
execution therefor and to the aforesaid decision and
judgment of the court, the defendants by their attorneys
excepts and on the motion of the said attorneys
Sixty days is allowed to defendants in which to prepare
and perfect their bill of exceptions herein.

And be it Remembered that on the 22^d day of November
A D 1851, and of the Term aforesaid, the said defendants
by their counsel caused to be filed in the said Court their

bill of exceptions herein duly signed, which bill of exceptions is in the words & figures, following to Wit:

State of Illinois }
Rock Island County } ss In Circuit Court of said County
at November Term A D 1851

Fredrick A Francis plaintiff

William Ballard, James Bodle
Miles Lermy and Peter Lemofs defendants.

Be it Remembered that on the 19th day of November, of the November Term A D 1851, of the circuit Court aforesaid a trial of the above entitled cause was had by consent of the parties thereto before the Hon. Ira C. Wilkinson, Judge of the Sixth Judicial Circuit in said State, sitting as a circuit Court in & for the county aforesaid, upon the issues presented by the said pleadings in this cause,

And upon the trial of the said cause as aforesaid it was admitted by the defendants, that the plaintiff, was at the time alleged in his declaration and yet continued to be, the owner in fee simple and in possession of the land & ~~tenements~~ premises in said declaration described; and on the part of the plaintiff it was proved by the testimony of Elias Hearnbaugh and William Stroup that at about the time mentioned & charged in plaintiffs declaration the said defendants opened a passage way through two or three fences of the plaintiff erected and being upon the said close by taking down a part of said fences; and that they passed through the said fences and across the said close of the plaintiff, with a span of horses and a double waggon; and that the damage there and there occasioned to the said plaintiff, thereby amounted to about the sum of Two dollars; whereupon

the said defendants to sustain the aforesaid issues
on their part the following record of the location and
establishing of a public road, To Wth:

September Term 1836

At a County Commissioners Court begun & holden
in the Town of Stephenson in the County of Rock
Island, on the 5th day of September A D 1836,
Present the Honble Lucius Wells, John S. Miller
and John W. Spencer commissioners,

" on petition of many citizens signers of Rock
Island county, for a road commencing at Clark's Ferry
and passing through the settlement between Coppersas
creek and the Mississippi River to Living's Mill ~~or~~
Coppersas creek and from thence to the county line
of Rock Island County to meet a road running
from New Boston to the county line of Mercer
County and in a direction of said mill;

It is therefore ordered that Benjamin Varnatter
H. A. Olson and Isaac B. Eosey be appointed
viewers to view the ground proposed for the same;
and if after such view, the viewers shall believe the
road applied for to be necessary, they shall proceed
to locate the same upon the nearest and best route
designating its course through prairie and improved
land by fixing stakes in the ground and through
timber land by making the trees and make report
thereof to the next county commissioners Court,

ordered that court be adjourned in course

(signed) Lucius Wells } Co
John W. Spencer } Com^s.

December Term 1836

At a county commissioners court held for Rock Island

County in the Term of Stephenson on the 5th day of
December 1836, present, the Honble John W. Spencer, John S
Miller & Lucius Wells county commissioners.

The viewers that were appointed at the last term
to view a road commencing at Clarks ferry and
passing through the settlement between Copperas creek
and the Mississippi River to Dungs Mill on Copperas creek
and from thence to the county line of Rock Island County
to meet a road running from New Boston to the county
line of Mercer County and in a direction to said Mill
made the following report. To Wit: We the undersigned
having been appointed by the county commissioners
Court of Rock Island County at their September
Term to view and mark out a road commencing at
Clarks ferry, running West on River Street to the line of
Bennetts addition to the Town of Rockport, thence South to
2^d Street, thence West near the Mississippi River
to the South side of Stone Coal creek, thence a Southerly
direction to section five in Township Sixteen, North
of Range three West, and thence South on the West
line of said Section five to the Section coming
between five and six, seven and eight, thence West
on the Section line between six and seven nearly
half a mile, thence a South Westerly direction to the
half quarter line on Section seven between Moses
and John Yitterington's, thence West on said line to
Section ten, thence angle Southwesterly through Sections
9, 8, 7, 12, 11 and on ten, thence Southwesterly to Dungs
Mill (thence South and East to the county line of
Mercer County, and meeting the road leading from
New Boston to the county line of Rock Island
County.) and we find the route to be good
and believe the road one of much service and
benefit to the settlement & public community.

Given under our hands this 19th day of Nov 1836.

Isaac B. Essey
Benjamin Vannatter
H. A. Orton

ordained

That the above be established as a public road.

John W. Spencer }
Lucius Wells } County
John S. Miller } Comm^s

And Joseph Conant having been introduced by the defendants and sworn as a witness, testified that, that he was the clerk of the county Court of Rock Island County Illinois, and was the keeper and had possession and control of the records of said court & of the former county commissioners Court; that the records now produced were the records belonging in his said office and that the foregoing records, were of the record entry & of the proceedings of the county commissioners Court of said Rock Island County - and thereupon the said records were admitted in evidence by said Court.

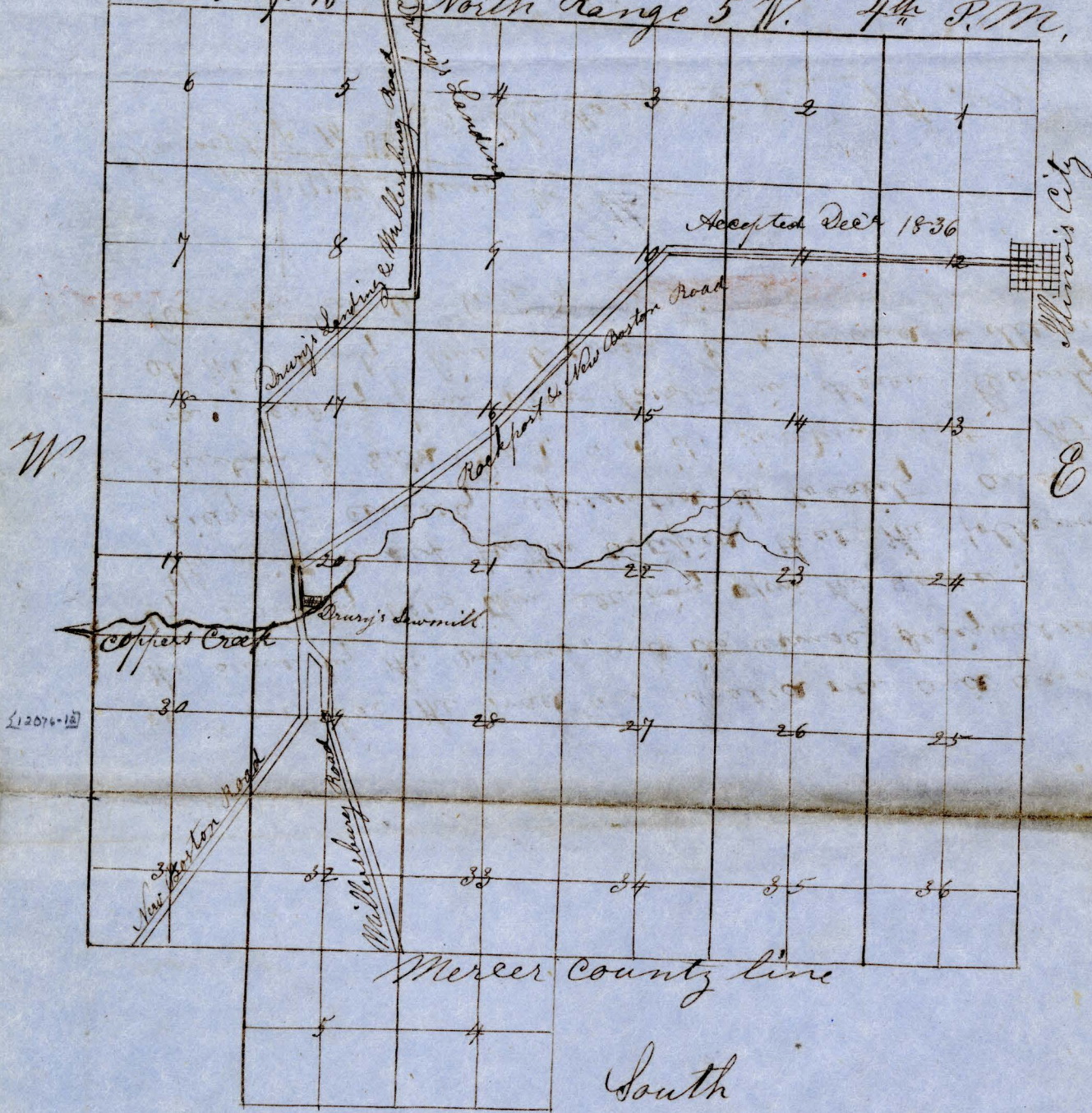
The defendants then called as a witness Isaac B. Essey who being sworn, testified that he was one of the viewers appointed by the county commissioners Court of Rock Island County to view and locate the road mentioned in the record road in this case, (of which the foregoing is a copy,) that said road was the first located or established in that part of the county, that the viewers of said Road (of whom he was one) designated its course through prairie and improved land by fixing stakes in the ground and through timbered land by marking the trees, that upon the close of the plaintiff, there were then scattering trees which have since been cut

down and that the road was located over and across the same by the viewers, and its course designated by marking trees then standing upon the same;

The said Essex further testified that the following diagram correctly represented the locality and direction of said Road and its junction with the road leading from New Boston in Mercer County at the county line between Rock Island & Mercer Counties at the line of Section 31.

Said Essex further testified that said road from the time of its location until just before the trespass complained of were committed remained open, but not much travelled of late years particularly since the opening of the other road marked on the map and which leads to Millersburg and New Boston & which was opened some two years ~~since~~ after the first one; That of late years at least two thirds of the travel was upon the East road from Lunny's mill to Mercer county line, That the course of the road described in his testimony as having been marked out by the viewers was South West from Lunny's Mill to the Mercer county line & that no part of the same between said points was of a South East direction, thinks that the viewers marked three (3) trees on plaintiff land, but cant say that they were on the exact line of the Road & cannot say that fences taken down by defendants were on the line of the road as laid out or within six rods of the line.

Mississippi River North
 Township 16 North Range 5 W. 4th P.M.



(12076-12)

(12076-12)

Silas Lunny, a witness for defendants being sworn testified that he accompanied the viewers at the time they laid out the road, mentioned in the order of the county court herein alluded to by Mr. Essex in his testimony - That the diagram of the same correctly represents the location and direction of said road across Township sixteen (16) North of Range five (5) West of 4th P.M., that viewers designated the course of said Road through prairie and improved land by fixing stakes in the ground and through timbered land by marking the trees, that across the close of the plaintiff the course of said road was designated by marking a few scattering trees, that then stood thereon, but which have since been cut away; That said Road had been travelled as a public road since its location as above mentioned until a few days before the commission of the trespass complained of when the plaintiff erected fences across the same, that he had frequently known said road to be worked during said time under the direction of different men, supervisors, that since the opening of the other road, to Millersburg & New Boston the travel had been considerably diverted from the first named road, and that much the larger share of the travel had of late years passed over the more eastern road running from Lunny & Mill to the Mercer County line, but that the other road had been more or less travelled by the public until obstructed by the fences of the Plaintiff.

12076-12
Silas Lunny, a witness for defendants being

being sworn testified that he was with the viewers at the time they located the road mentioned by the witness Essex; That the same ran across the close of the Poff, and its dissection was designated thereon by marking trees, that said ~~two~~ road continued open up to within a few days before the trespass complained of and have known it worked at different times by supervisors. That the diagram referred to by the witness Essex is a correct representation of said Road across township sixteen & across the close of the Poff, to the line of the Rock Island & Mercer Counties, at the South line of Section thirty one, in said Township sixteen.

And thereupon the said plaintiff further to sustain the aforesaid issues on his part, introduced as a witness on his part,

Standton Prentiss, who being sworn stated that he had resided in Rock Island County and in the neighborhood of the road mentioned for some 15, or 16 years and was well acquainted with the road of the neighborhood & particularly with that in controversy, but knows nothing about the opening of the road claimed here as the New Boston road.

That for many years past it has been very little travelled and that three fourths or more of all the travel between Lundy's Mill and New Boston passes on the road East of the one above mentioned which is sometimes called the Millersburg road; That this road on which the travel passes runs South East from Lundy's Mill to the county line of Mercer County and there intersects the Road leading New Boston to the county line of Rock

Island County and a branch of said Road also continues from the said point to Millerburg in Mercer County, that by running a road from Drury's Mill on Coffey's Creek, South & East to the county line of Mercer County, it would not pass over the Route claimed by the defendant as the New Boston road, and which is marked as such on the plat or diagram referred to by the testimony of Mr Essex.

And that the said plat or diagram does not correctly designate said road as travelled, nor as the same is described in the record; and that running South & East from Drury's Mill to Mercer County line, the road would not pass over any portion of the Plaintiff's close.

John Phillips was also called as a witness by the Plaintiff, and being first sworn, testified that he had resided, for about ten years in Rock Island County and in the neighborhood of the road mentioned & has for said length of time, known well the roads in the neighborhood, and particularly the one now in controversy & claimed to be the New Boston road, as also the one called the Millerburg, & New Boston Road; that the plat shown by depts to the witness Essex, does not correctly represent the location or direction of said road; between Drury's Mill and the county line of Mercer County and its junction, with the road, leading from New Boston to the county line of Rock Island County, that the Road marked on the said plat as the ~~New Boston~~ Millerburg Road, runs from Drury's Mill in an easterly and South Easterly direction to the Mercer County line, & at said line meets the road leading from New Boston to the county line of Rock Island County, and does not pass across the close of the Plaintiff

212076-117

That the road marked on plat as New Boston road and running South Westerly from Lamy's Mill to the line of Mercer & Rock Island Counties does not at said line intersect or meet the road leading from New Boston to the county line of Rock Island County; That this last mentioned Road from Lamy's Mill has generally been considered as a road made merely by the travel of a part of the neighborhood while the country was open & unimproved, and has never known it worked as a county road.

That several years ago it was fenced up by Mr Leguatt, but he shortly afterwards moved his fences again & left it open; for many years past it has been very little used & that at least nine tenths of the travel passes, and has for several years passed upon the other road, known as the Millerling & New Boston Road & that the distance from Lamy's Mill to New Boston is about the same, by the one Road as by the other; Witness further testified, that a road running from Lamy's Mill South & East to the county line of Mercer County would not pass over the close of the said plaintiff;

Matthew Leguatt, a witness for plaintiff, being called & sworn testified, that the land which is now the plaintiff's close, was once and for several years owned and occupied by his (the witness') father, That several years ago Witness' father placed a fence across the road claimed here as the New Boston Road; and running South West from Lamy's Mill to Mercer County line, That not long after the fence was placed there by his father, he again removed it & that since that time, the road had continued open until fenced up by the plaintiff, that the locality of said Road as of late

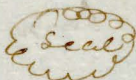
used is not the same as formerly, but deviates therefrom in some places several rods; That said Road has of late years received very little of the travel; That the course of the West road is South West is South West from Drury's Mill to the line of Mercer County and that a road running South and East from Drury's Mill to the county line of Mercer County would not pass over the land of the plaintiff described in the declaration; That the Millerburg, & New Boston road which runs from Drury's Mill South & East to the county line of Mercer County, meets at said line the road leading from New Boston to line of Rock Island County.

Jeremiah Leguatt, a witness for the plaintiff being sworn testified, that in the year 1843, he was road supervisor for the road district in which the plaintiff's close is situated, That he did not cause the West road, called here the New Boston Road to be worked during that year & that he did not have any road bill thereof, during said year for his road district;

Charles V. Bean a witness for plaintiff, being sworn testified, that some few years ago, he was for one year road supervisor of the road district where Plaintiff's close is situated, that he received a bill or notice of his appointment, with a description of the roads of his road district, and the roads therein, and that upon said bill there was no description of the said West Road called here the New Boston Road, nor of any road that passed over plaintiff's close when the trespass complained of was committed; And that

he did not work, appear nor keep open the said
~~road~~ during the year he was Supervisor as aforesaid;
That a road running from Drury's Mill South &
East to Mercer County line would not pass over
the close of the plaintiff.

The above was all the material evidence
introduced in the case; And the testimony
^{considered by the court, the said court}
having been heard and held that the record evidence
of the direction of said mentioned road was the best &
should govern & thereupon decided the issue in favor of
the plaintiff, & thereupon entered a judgment in favor of
the plaintiff & against the defendants, for the sum of
Two dollars, to which decision and judgment of the
said Court the depts by their counsel excepted, and
pray that this their bill of exceptions may be signed
sealed and made a part of the record in said
cause, which is accordingly done.

Ira C. Wilkinson 

State of Illinois
Rock Island County } ss I Frazer Wilson Clerk
of the Circuit Court within and for said County
do hereby certify, that the foregoing pages contain a
true and perfect copy of the Summons, declaration, pleas,
& replications in the cause of Frederick A. Francis against
William Ballard, James Brode, Miles Drury & Peter Le Mors
and also of the bill of exceptions filed by the defendants in
said cause and also that the preceding pages contain
a true & perfect copy of all orders & judgments made
& entered of Record in said cause all as fully

Wherefore by reason of the errors of record
the Petition in error by Manning & Douglass
their Attys pray that Judgment in all
things be reversed & in all things be held
for naught & the record there costs & that the
Plaintiffs are ready to verify

Manning & Douglass
Attys for Petition in Error

"In nullo est Erratum" People for Left

and completely made as the same remain of record
& are on file in my said office:

In Witness whereof I have hereunto
set my hand & affixed the seal of
said Court at Rock Island this
13th day of November A D 1852.
Frederic Wilson Clerk

State of Illinois

William Ballard

James Poole

Miles Derry & Peter Dennis

v. Pepp. in Error

Frederick M. Francis

Def^t in Error

Supreme Court

5^d Division

Error from Rock Island

And now comes

the Plaintiff in Error,

by Manning & Douglass their Attys & assigns
the following Errors of the Circuit Court
on the foregoing transcript

- 1st The Court erred in deciding that the record evi-
dence of the direction of the said road was the
best evidence & should govern
- 2 The Court erred in deciding the issues in
favor of the Pepp. below
- 3 The Court erred in rendition of judgt. against the aff^s
below
- 4 The judgt. was against law & evidence

Manning & Douglass

Attys for Pepp. in Error

2pue to Rock-Island County - Recd. \$5. of Drury for clerk

58. Record
Copy of Record

John Drury,
Wiles L. Drury, et al.

J. N. Francis

Cover to Rock-Island

58

Filed June 14th 1853.

H. Del and Oth.
By J. N. Francis

12076

1853



Dumas and others }
vs
Francis }

This was an action of trespass brought by Francis against Dumas et al.

The defendants pleaded severally

The general issue,

That there was a highway over the locus in quo, and a fence across the highway which they removed which was the same trespass complained

And that there was a road by dedication of the owners of the soil, which was obstructed, which obstruction they removed &c.

The only issue raised on the special pleas is whether there was such a road.

Trial by the court. Judgt. for pef \$2.00

The record of the County Commissioners' Court was introduced without objection. The record shows that a petition for a view and location of the road was presented: the number of petitioners is not shown: the viewers reported favorably, and there was an order that the road be established. The report shows the course of the road and that the road ran from Dumas's mill "south and east"

Ex per a witness introduced by defendants testified that he was one of the viewers

that the road was located over the p^l's land by marking trees [this was in 1836] That from that time until just before the trespass the road had remained open, not much travelled of late years, since the opening of another road which took about $\frac{2}{3}$ the travel.

Giles Drury testified the same as to the location over p^l's land: that it had been travelled as a public road until a few days before the trespass; that the road had been frequently worked under the direction of different supervisors; that the travel had principally gone on the new road of late years but that this had been more or less travelled until obstructed by the plaintiff.

Miles Drury testified substantially the same as to the location of the road: that the road continued open up to a few days before the trespass; had known the road worked at different times by supervisors.

Plaintiffs' Evidence

J. Prentiss. That for many years the road had been little travelled: that $\frac{3}{4}$ the travel went on the other road.

J. Phillips that this road had been considered as a road made merely for a part of the neighborhood to travel; had never known it worked on; that Leguat once fenced it up, but soon removed the fence: for several years there had been little travel on it.

M. Lequat That several years ago the road was fenced up by his father, that not long after he removed the fence. It then continued open till fenced up by p[er]f. That the road as used varies from the road as formerly used: that of late years it has received little travel.

J. Lequat. In 1843 he was supervisor: had no bill of this road: did not work it.

- Bear; that he was supervisor one year had a list of roads: this was not on it and he did not work it: that a road running "south and east from Drury's mill would not run over p[er]f's land.

The court was of opinion that the record evidence was the best, and so decided in favor of the p[er]f [so the record says]

At the time of this view under the act of 1835, no survey of the road was required. The viewers were to designate the course of the road by marking trees, fixing stakes or plowing furrows. The landmarks were to govern as to the locality of the road. These were proved in this case. Even if the viewers should report erroneously as to the course of the road, the landmarks and not the report would govern in determining where the road was actually laid.

The court below thought differently

and forasmuch as it was proved that the course of "south and east" from Drury's mill would not carry the road over the plaintiff's land, determined that no road had been proved.

But "South and east" is no course whatever: such a description of a course would be void for uncertainty - leaving the line of location to be proved by other evidence: that is, by evidence showing the actual place of location. For if the viewers were not required to report the courses of the road at all, and they made a report which was void for uncertainty, it would be the same as if no report of the courses had been made, and it would leave the place of the road to be proved in the same manner as if no report of the courses had been made.

It is objected that there is no proof that there was a road at the place where the trespass was committed. But this question is not raised by the issue. The only question is whether there was any such highway as alleged in the plea.

It is objected that no number of citizens signed the petition, no notice was given of presenting it and that the viewers

were not sworn; but it is not necessary to give evidence of these preliminary steps to entitle the record to be read.

Nealey v. Brown 1 Gil. 10

Parol evidence is admissible to show where the road was located 1 Gil. 10; and it is not necessary to show that the viewers were sworn

Guyer v. Andrews 11 Ills. 494

Nor is it necessary to show that there was an order for opening the road.

Fernis v. Ward 4 Gil. 503-4.

If it is shown that as a matter of fact the road has been opened, recognized as a public road, and worked as such by the proper authorities this is *prima facie* evidence that it is a public road, especially when used as such by the public for a series of years.

Lyman v. The People 1 Gil. 4

Nealey v. Brown 1 Gil. 10

1. There is an order that the road be established. This is sufficient. The Court is presumed to have had jurisdiction without showing the petition or proving the notice of its presentation. *Prima facie* then the Court had jurisdiction. The viewers reported favorably. The Court ordered that the road be established: and this was establishing the road according to the actual location

on the land by the viewers. The road was opened and used as a road, and at least this was an opening of the road thirty feet wide. And the plaintiff cannot object that it was opened wider.

2. It is contended that the record shows no road. Admit it. Then the record, for this purpose, is a nullity. Independent of the record, we have shown prima facie that there was a road. This is subject to be rebutted, it is true, but the introduction of a void record does not rebut it. To have rebutted it successfully, the plaintiff should have introduced all the records of roads of the County: Or it might have been laid under state authority.

Because there was an unavailing attempt to establish a road, which by the record does not appear to have been over the plaintiffs road land at all, this does not prove that there was no road. The presumption is that there is a legal road. It is shown in one instance, that it was not established. This does not at all prove that it was not established at some other time.

The suit was commenced Oct. 10. 1851. The road had been a public road for nearly 15 years - whether it had more

or less travel is immaterial. It had been
acquired in by the owners of the soil.
One person fenced it up, but soon re-
moved the obstruction, thereby abandoning
his opposition to the road, and acquiescing
in it as a road. There was a public claim
that it was a road. It was worked on
as such; the owners of the soil had
notice of this. When they stood by
under these circumstances for nearly
15 years and acquiesced in it ~~for~~ ~~as~~ as
a road, we submit that it was a
dedication.

Dunlap et al
vs
Francis

Ag't for plaintiffs

58-1853

Julius Harney
for defendants

Filed Aug 26th 1853.
L. Ireland Clk.
By Wm. Ireland Depy.

Peter Mumap & others }
 vs } Error to Rich Island
 Frederick, N. Francis }

Points.

1. The Records read in Evidence does not show the legal establishment or Location of any Road.

New Roads - how established -

1. Petition to be signed by 35. Voters when 300 in County
 " " " " 15 in under that number
 Sec. 10. Act. 1835. P. 131.
2. County Court to appoint 3 Viewers to locate Roads
 Sec. 10. Act 1835. P. 132.
3. Viewers to mark road through Prains & improved
 Land by Stakes or Furrows & by Marking trees
 in timber. Distance apart for width Road
4. Roads not to be less than 30. nor more than 50 feet wide
 Sec. 9. Act 1835. P. 131.

In this case Court had not Jurisdiction

1. Records No number of Citizens signed the Petition
2. Records No notice was given of the time of Presenting
 Petition as required by Proviso of 10. Sec. Act 1835. P. 132.
3. Viewers were not sworn - nor does it appear that they ever
 viewed or located the road
4. There is no proper order locating or Establishing Road
5. The width of the road is not fixed. all nullity

6. No order for Opening the Road.

No land appropriated without such order } County Aug. 28. Brown 13. Ill 211.

7. Travel & use of a Public Road Prins & Co. owned
 by its Location. liable to be established. Act 1835. P. 131. *

2. There is no Evidence of the Dedication
of any Road to the Public.

What is a dedication

1. When it is used as such for a Period of time
with consent of the owner — But it ought to
be for such time that Public accommodation and
Private Rights might be materially affected by an
interruption of the enjoyment.

City Cincinnati vs White, 5 Jess. 6 Pet. 438.

Not necessary that it should be so long as }
to raise the presumption of a grant } Adem

Bras.

There is no Evidence to Show that any Road was ever laid, Established or dedicated at the Place of the alleged trespass

* The Presumption is that Defendants below offend all the Record Evidence there was of a Road—
This failing to Establish a Road the prima facie case (if any is made by Proof of hard use) is destroyed.

But I would respectfully suggest that notwithstanding the case of Eymour vs the People 1. Gill. 4. That travelling over a Prairie in a new unsettled Country is but slight prima facie evidence of a Public road legally Established

Peter Durnop Esq,

as

Trust, M. Francis

Jointly & Sevrally

Proper

Filed June 23^d 1854,

L. Leland & Co.,

Reg. P. R. Leland & Co.

James Bodle, William Ballard } Enor to
 Peter Munro, Miles Murray } Rock Island -
 v.
 Frederick M. Francis

Suit commenced by Deft vs Plaintiff
 16th Oct 1856. Ex parte Quon Clausum Fregit

Dec. usual form - Breaking & Entering Close
 Close -

Plea by Ballard

1. Public Highway over the close - Obstructed by Plaintiff.
 Deft removed the Obstruction having occasion to pass
 on the said Highway - Some trespasses &c.

2. Before time when the Owners of land described had
 dedicated to public use Public Highway across the close
 Plaintiff had obstructed it - Deft removed Obstruction
 having occasion to pass along said Road. Some trespasses
 &c.

3. Not guilty.

Plea by Bodle & Miles Murray

1. Some as Ballard

(and Munro)

2. " " "

3. " " "

Reps to 1st, & 2d, Bar Head -

1. Plea - No Public Road

2. No dedication

3. Issue to the Country -

Submitted to Court for trial.

Judgment for Plaintiff \$2.00

Evidence

Admitted that Plaintiff at time alleged trespass was owner in fee & in possession of the land described in Dec. That Defendants opened a passage through the land taking down 2 or 3 fences & passed over with a Span of Horses & double Wagon. Damages \$2.00

Left introduced Records to show location of the Road. as follows.
4 Sept Term 1836.

At a County Commissioners Court begun and holden in the town of Stevenson in the County of Rock Island on the 5th day of September A.D. 1836 Present the Hon Lucius Mills, John A. Miller John W. Spencer Commissioners

On Petition of Many citizens, Signers of Rock Island County for a road commencing at Clarks Ferry, and passing through the settlement between Copers Creek and the Mississippi River to Armys Mill or Copers Creek & from thence to the County line of Rock Island County, to meet a road running from New Boston to the County line of Mercer County and in a direction of said Mill, It is therefore Ordained that Benjamin Vannatta, H. N. Coston and Isaac B. Essig, be appointed Viewers to view the ground proposed for the same, and if after such View, the Viewers shall believe the road applied

for to be necessary, they shall proceed to locate the same, upon the nearest and best route designating its course, through Prairie & improved land, by fixing stakes in the grounds, and through timber land by marking the trees, and make Report thereof to the next County Commissioners Court. Ordered that Court be adjourned in course

James Mills } Co.
John W. Spencer } Comrs,
"

Dec. 5th 1836

Order

"The Viewers that were appointed at the last term to locate a Road commencing at Clark's Ferry and passing through the Settlement between Copera's Creek and the Mississippi River, to Spring Mill on Copera's Creek, and from thence to the County line of Rock Island County to meet a road running from New Boston, to the County line of Mercer County & in a direction to said Mill made the following Report, to wit: The Undersigned having been appointed by the County Commissioners Court of Rock Island County, at their September Term to locate and mark out a road commencing at Clark's Ferry, running West on River Street to the line of Bennett's addition to the town of Richburg thence South to 2nd Street thence West near the Mississippi River to the South Side of Stone Coal Creek, thence a Southwesterly direction to Section five in Township sixteen North of Range three West, and thence South on the West line of of said Section five, to the Section corner between five and six seven and eight, thence West on the Section line, between six and seven, nearly half a mile, thence a Southwesterly direction to the half quarter line on

Section Seven, between Moses & John Fittington
thence West on said line to Section ten, thence
angle South Westely through Sections 9. 8. 7. 12. 11
and on ten, thence South Westely to Spring &
Mill, thence South and East, to the County line
of Mercer County, and meeting the road leading
from New Boston to the County line of Rock Island
County; and we find the route to be good, and
believe the Road one of much Service and benefit
to the Settlement and Public Community

Given under our hands this 19th day of Nov 1836

Isaac B. Essey

Benjamin Vanotter

H. M. Orton.

Ordered that the above be established as a pub-
lic Road

John M. Spencer

Lucius Mills } County

John S. Miller } County

Joseph Conant Defts Witness Testified
Produced the Record & Proved it - Records
now produced were the Records of County Court, & Court.

Isaac B. Essey - one Witness
1 first roads in County - Record designated the course
through Prairie and improved land, by fixing Stakes
in ground. Through timber by marking trees - one
Pile close more than scattering trees since cut. Road
located across same by marking trees. Diagram represents
locality and direction of Road & its Junction with road
leading from New Boston in Mercer County at County line between
Rock Island & Mercer Counties at line Section 31.

Road from time of its location, til just before the pass
remained open - Not much travelled of late years
Since opening other roads marked on map leading
to Millersburg & New Boston. Opened ten years after
first one. Of totel 2/3 hands on E Road from
Dunys Mill to Mercer County line. Course of road
described by line was A.W. from Dunys mill
to the Mercer County line - No parts of it between
those points of a South East direction, think
viewers marked it out on Platts land - Cant say
they were on the exact line of the road
Cant say fences taken down were on the line
of the Road or within six rods of it

Piles Dunys Dpts.

With the viewers when they laid road
Diagram correct across S. 16. & 5. M. - Viewers marked
road through Prairie with stakes - Timber-marked
trees - Marked a full scattering trees across Platts
land - Since cut down - travelled as a public road
til a few days before the pass. Dpts built fences across it
Often known the roads to be marked by Supervisors
Since Eastern roads opened, it principally travelled,
other more or less.

Miles Dunys.

With the viewers when road located
ran across the Plaintiffs close, designated by marked
trees. Continued open to within a few days before the pass was com-
mitted - Marked by different supervisors - Diagram referred to
across S. 16 - correct.

Stanton Phillips - Plff

Knows the Road - Knows nothing
of the Opening of this Road claimed as New Boston
Road - Very little travelled for many years
3/4 have passed on the East Road.

a Road South & East from Marys Mill
an Apprais creek to the County line of Mercer County
would not pass over the Route claimed by Plff &
Plato or diagram incorrect. - & nor over his land.

John Phillips }
Matthew Leggett } Same

Samuel Leggett, Supervisor 1863. did not work
this road.

● Charles A. Bean Same

Errors.

- 1 Court decided that Record Evidence best evidence
and should govern
- 2 Court Erred in deciding issues in favor of Plff
- 3 In rendering Judgment as Plff
- 4 Judgment against law & Evidence

Peter Dumont End
by
Andrew, St. Francis

Abthuel

Duplo

Filed June 23^d 1854.
L. Leland Clerk.
By P. H. Leland Secy.

E. Peck Esq.
Sir

You will oblige me very
much by inserting in your report of this
case, the substance of the depositions, and the
points made, with the authorities for each, as set
forth in the brief Memoirs attached, and oblige

Sir

Your Obedt^t Servant
Daniel Eastman.

E. Peck Esq

E. Peck Esq
Reporter.

Supreme Court, Third Grand Division
Patrick Halligan } of the June Term A.D. 1854, at Albany N.Y.

Chas. & Rock Island
Rail-road Co.

Appeal from LaSalle Co. Cir. Court
Action, - Trespass Du. Claus. Freight.
Appellants Authorities.

1 An allegation of a trespass on two or more closes, is not duplicity, and is allowable. - Definition of Duplicity - Gould's N. Chd. §§ 1, 3, 4, 5, & 6, 4 §§ 99, 100 - Steph. N. 293, & Chit. N. 226.
Precedents of Dec. 2 Swift's Digest 430, - 2 Flum-
phreys' Proc. & P. 722, 723, 509 - 2 Chit. N. 866, 872, -
Cases - Pythian v. White, 1 Mees. & W. 101, 102, 103, 104, 105, 106, - Tapley v. Wainwright 27 Eng. C. L. R. 99 - Richards v. Peake, 9 E. C. L. R. 394

2 If the allegation of the expulsion of the tenants be an impertinent allegation, it does not vitiate the count, nor render it obnoxious to a special demurrer, but only to a motion to strike out. - The demurrer, in such case, should have been overruled, and ~~the~~ such surplusage (if any) stricken out, or disregarded. - Sabine v. Johnston, 1 Bos. & Pul. (top,) 60. - Lord v. Tyler, 14 Pick 156. - Wyatt v. Aland, 1 Salk. 324-5 - 1 Chit. Pl. 229. - Steph. pl. 421, 428.

An impertinent allegation

3

~~Non prosequi~~ only vitiates a count when it shows that no cause of action exists — Goulds Pl. Ch 3. §§ 171, 172, 173. — 1 Chit. Pl. 231, 232. — Steph. Pl. 420. 421

4

Two or more separate or several closes may exist in one general close; and proof of entry upon, or expulsion from, any portion of a several parcel, in the possession of the plaintiff, will support this action. — Tapley v. Wainwright, 27 Eng. C. L. R. 49 — Richards v. Peake, 9 Eng. C. L. R. 394. — Stephens v. Whistler 11 East (top), 51 — Croker v. Grompton D. Eng. C. L. R. 207 — Bapitt v. Mitchell 22. Eng. C. L. R. 34.

5

Any special right of use, however small, in a close, being in the possession of the plaintiff, even if a third party hold a general right over the entire close, subject to the special right, — if invaded, gives the right of action in Tr. Dec. 66. Tr. — 1 Chit. Pl. 174, 170. — 3 Steph. Nis. Tr. 2634. —

6

When from any cause whatever, the particular estate determines, the reversion is extinguished, by merging in the title or possession of the grantor of the particular estate — 49 Lab. Lib. (Whar. Com.) top page 69, 70 & note. — 2 Black. Com. 177 — 5 Bac. Abr. (top p.) 676. — Daniels v. Pond 21 Pick 367 — ~~XX~~ — Packer v. Gibbins 41 Eng. C. L. R. 607. ~~XX~~ 2 Black. Com. 177

7

When there is a tenancy at will, and the lease be broken by a stranger, and permanent injury be done to the ~~leased~~ realty, both landlord & tenant have their actions in T. D. C. Freight, and will recover according to their respective losses. — 1 Thos. Coke, top paging, 504 note 21 — Daniels v. Pond, 21 Pick. 367 — Davis v. Nash, 32 Maine, (2 Medington), 411 — Curtis v. Hopkins, 19 Conn. 154, ^{note} (16740) — 11 Mass. 519

8

If a tenant at will commit waste, the landlord has his action of T. D. C. Freight against him. — 1 Thomas Coke, top paging 503, 504 — Starr v. Jackson, 11 Mass. 519 — 4 Kent's Com. 111 note b. — 3 Steph. N. P. 2634 — 1 Grant's Convey (top paging) § 11 — 5 Conn. Rep. page 207 — 4 Conn. Dig. page 101

9

But the allegation of the expulsion of the tenants, as stated in the declaration, is not surplusage, but is clearly an averment in aggravation of damages, and merely shows a portion of the injury and damages sustained: — And the allegation, "Using & occupying" &c, "at the rate of," &c. — shows clearly that the tenancy was only at ^{will} — or tolerated, — which does not in law create any prospective estate in the premises, and the proper ratio of rent is therefore payable from day to day. — 2 Sel. N. P. "Use & Occupation", — 1 Chit. Pl. 344 — 8 Bac. Abr. page 520, M. 2 — Parker v. Gibbins, 41 P. G. L. R. 507 — Stout v. Whitney, 12 Ill. 210 (on page 227)

10

When the tenant at will abandons the premises, for any cause, the relation of landlord and tenant ceases, and the rents cease; — for the tenant's estate, (such as he had) is terminated by his own act, and

the constructive possession is then in him in whom
the title exists. — Wilcox v. Kinsie 3 Sam., 210 — 4 Latw
Lib. (Ran. on Re. ac.) 472 bottom of page. — Bliss v. Burwick-
1 Salk. 200-g (top paging.) ^{20 Law Lib.} Archb. Lan. & Ten. 70 (top 93) — 25
Law Lib. (2 Arch. N. P. 391) ^{top 37 2/3} — 2 Black Com 146,
177. — 3 Steph. Nis. Pr. 2722-3

11

It may well be ~~questioned~~ ^{questioned} whether a tenant
at will has such degree of estate in the premises,
as can create a reversion — (Mid Ant. Storr
v. Jackson 11 Map. 519 — 4 Kent's Com. ^{27 Ed} 111 note ^{b.} — 1 Chas.
Coke (top.) 503, 504 & note 21, 23, 24 — 3 Steph. N. P. 2034 —
Roscoe on Re. ac. 113, 663. — Daniels v. Pond, 21 Pick. 36 ⁹⁰)
also, Adams on Eject. 31, ^{by Fillingast} — 1 Sel. N. P. 36 ("Consideration") 1 Grand Couine,
top paging ²⁶⁶ ~~to 267 both inclusive~~ Fille IX. "Estate at will"
Adams on ^{Eject} Eject. page 54 note 1 — 4 Corn. Dig. "Estate",
II 2 (page 67) — 1 Sel. N. P. 505 (with "Ejectment")

Patrick Halligan 84
v.
Chas. M. S. M. R. Co.
Indrop Dr. Cl. Freight
Supreme Court, June Term 1854

Brief

Filed July 26th 1854.
L. Delandell
By J. W. Delandell