

14380

No. _____

Supreme Court of Illinois

Town of Blackberry

vs.

Town.

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

14380

No. 264.

Town of Blackberry
vs

Town

1862

Refused

Supreme Court of the State of Illinois,
THIRD GRAND DIVISION.

APRIL TERM, 1862.

TOWN OF BLACKBERRY
vs.
DENNISON K. TOWN.

ERROR TO KANE COUNTY.

POINTS AND BRIEF OF COUNSEL FOR THE DEFENDANT IN ERROR.

FIRST POINT.

The plaintiffs' in Error Abstract of the Evidence does not give all the evidence in the case, and leaves out some portions that we deem important to call the attention of the Court in considering and determining this case. On page No. 26 & 27 of Record, (I have not the Record before me as made up,) Hathaway states, "Remember got the order near the time stated by Mr. Fish, December or January, "I got the money on the order in Spring of 1860." Fish states on Cross-examination on page No. 26 of Record, "Think I delivered the order in December 1859, "it was handed to Mr. Hathaway, he had an order from Mr. Wood for it." On Page 21 of Record Hathaway states, "Was overseer of Highways in Blackberry, "in District No. 5. Received order to open the Road from Snook. (This is a copy of the order.) I opened the road through, has been traveled more or less ever "since, the road is now obstructed at the corner of defendant's land. Think that "I opened it twice as Road Master." This witness further states in his direct examination on P. 21. "I know the lands described in this survey, had an order "from Samuel Wood, drawn on Harry White payable to Samuel Wood, it stated "that there was that amount due to Wood. White was the Supervisor of the town, "Wood assigned it over to me."

On page No. 13 of Record, witness Fish stated on his cross-examination, "The "papers were into my hands Sept. 6, 1860, I think so, had the papers in my hands "ever since until I gave them into the hands of Mr. Rockwell in December last, I "had not seen the papers before for a year and a half, and did not know these "names were gone until I got them to hand to Rockwell, papers had not been out "of my office for a year and a half before."

The Court will see from this last statement of Fish that he had the papers in his possession at the time he handed them to Rockwell, which was in December 1861, for 18 months, and that they had not been out of his possession for that length of time, but he did not know that the names of the petitioners were torn off the petition. This witness also further states that he thinks he received the papers and filed them Sept. 6, 1860, but will not swear positively to it, yet if he had had them in his possession 18 months in December 1861, he must have received them before the 6th of Sept. 1860. On the 4th day of June 1859, the Commissioners of Highways of the town of Blackberry laid out the Road, vide Record p. 17, and that certain owners of land over which said road passed, viz., Hathaway, Samuel Wood, Boyd and Yates, not having released their claims to damages &c., they proceeded to assess them, and assessed to Yates \$80, Boyd \$80, Samuel Wood \$85, Hathaway \$74, and this account was audited by the Board of Auditors of the town of Blackberry Sept. 6th, 1859, vide Record page 18, and Joel Fish, the Town Clerk, was one of the members of this Board of Auditors, and the custom of the town was, as he states, to issue orders immediately on the accounts so audited, vide Record page 26 & 27, from these facts would it not seem to follow, that the papers, in the case, were left with the Clerk Fish at the time of the auditing of the account, if not how was he to make a proper record of it. That the papers were left with him and he carelessly omitted to file them I have no doubt. The Court will bear in mind that

he is a farmer and not a good practical business man, and did not understand the importance of making these entries at once and correctly. That these papers were not filed at the time they were left with him, and afterwards he filed them without looking to the inside of the papers, and without reflection on the subject as to the time when they came into his hands, it seems to me there is left but little room for doubt.

It is also apparent that the date of the filing of the papers with Fish is not correct or entitled to any confidence, from the fact that the notice signed by Kendall, Himebaugh and Snooks, Road Commissioners, dated May 18th, 1860, and served on the defendant Town, some two weeks thereafter, requiring him to open the Road, is marked filed by Fish on the 18th day of April 1860, just one month before it was made, vide Record p. 11, here the mistake is so apparent as to date of the filing, that no proof or argument is required, and in this respect he appears to be very unfortunate, and grossly careless.

SECOND POINT.

A petition was got up and signed by the requisite number of petitioners, asking the Commissioners of said town to lay out a certain road. This part of the proceeding is admitted to be regular, and on the 2d day of May 1859, the Commissioners acted on this petition so far as to view the proposed road, and having determined to lay the road, then fixed a time and place for hearing reasons against the same, and caused notice thereof to be posted up &c., vide Record p. No. 5, and having met at the time and place &c., and having heard such reasons as were offered &c., did on the 4th day of June 1859, cause a survey thereof to be made &c. It is therefore ordered &c., that a road be and the same is hereby established according to said survey, and the plat hereunto annexed, vide Record p. 7. Witness whereof we the said Commissioners have set our hands this 4th day of May 1859. The date is clearly a mistake and should have been the 4th day of June 1859. First, because on the 2d day of May was fixed the time and place for hearing objections against laying it out and gave notice thereof, which took place June 4th, 1859, vide Record p. 7. And they also say that they have caused a survey to be made and annexed it to their report, yet this was not done till June 4th, and this order is dated May 4th, one month before the same was made, and they stated a thing done which did not take place till one month afterwards, if the date is correct. This is a very common error that men fall into who are not in the habit of writing much, to misquote dates and date them of the preceding month or year, and particularly is it the case when it is in the early part of the month or year. And secondly, on the 4th day of June 1859, was the survey and plats made, by Mann, of the Road and the amount of damages assessed to such individuals as did not relinquish them, vide Record p 7, and 17 & 18, and here they state positively that they did on the 4th day of June 1859, lay out a road &c., describing it, on that day, which is the road in dispute. On the second of May they conclude to hear reasons against laying out a Road, as petitioned for, and fixed a time and place for hearing such objections, and gave notice thereof at the time of that hearing, which was on the 4th day of June, one month, after hearing objections they determined to lay out the road, and caused a survey and plat of the road to be made by Adin Mann, County Surveyor, on that day, and had such survey and plat incorporated in their report, and on that day declared such road so laid out, and to be a public highway and assessed damages, fully complying with the very letter of the statute as well as the spirit. So that the first objection made by the plaintiff in Error is not well taken, and is not supported by the Record.

THIRD POINT.

Plaintiff in Error insists that although the proper and legal steps may have been taken to lay out and establish a road, yet as the record was not filed until the 6th of September 1860, there was no legal road. If the Court should be of the opinion that such was or is the fact, yet we insist that the plaintiff is not in a position to question the legality of the proceeding, for as to him and his grantees, it is no mat-

ter whether the Road was legally established according to law or not, he is by the act of his grantees estopped from inquiring into that fact. The Woods having accepted, and when the damages awarded by the Commissioners while they were in the possession, and the owners of the land by that act they sanctioned the laying out of the road across their lands and dedicated the same to the public for that purpose, vide 25 Ill., 153 : 22 Ill., 363. The Woods did take and receive such damages while they held the land as owners is established beyond all controversy, vide Record p. 26 & 27, 16, having received the damages allowed by the Commissioners, it would be an act of injustice to allow them or their grantees to come in and contest the legality of the laying and establishing such road. He, the plaintiff is bound by the acts of his grantor, and if any remedy, he has it against them, not the town, such proposition is too monstrous to require argument. Again, plaintiff in Error was not an innocent purchaser, he knew of the existence of this road when he purchased of the Woods, and that they had received the damages, had not such been the case he would have proved this fact by the Woods after we had put them on the stand. The plaintiff is a land speculator, and bought this farm not to live on, but because he had the Woods at his mercy and he could get it at a bargain.

FOURTH POINT.

But the plaintiff in Error says that they cannot be guilty of obstructing until such times as such highway has been legally opened. In May 1860, Town received notice to open the road, vide Record p. 10, 11, and Hathaway states that, as overseer of Highways he opened the road through, and it has been traveled more or less ever since, and that all the other part of the road is fenced out, but that through the land of plaintiff, and that he opened it twice in 1860, vide Record p. 21, (once in June or July and once in Sept. of that year.) The dates are omitted in the Record. The road there had been legally opened and traveled, the plaintiff had obstructed it on the 31st day of December 1861, he was notified in writing to remove it, this he did not do, and on the 20th day of January 1862, this suit was instituted under the statute for obstructing highways.

FIFTH POINT.

The defence set up by the Plaintiff in Error is in every sense a technical one and without merit or justice, and urged with great pertinacity, and when such is the fact the Court does not receive such objection with favor, or incline to bend a doubtful rule of law to aid such suitors, the road having been laid out and the damages having been assessed and received by the grantor of the plaintiff in Error. And the road also having been opened and used by the public as such more or less for two years, as is shown, and the plaintiff in Error having obstructed it and refused to remove such obstruction, when required to do so by proper authority, he it seems to us is liable under the statute for obstructing public highways, and therefore the judgment rendered in the Court before was just and right, and should be affirmed.

J. H. MAYBORNE,
Att'y for Def't in Error.

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In the ^{2, 144} Supreme Court
Town of Blackberry
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points and Brief

Filed May 13, 1862

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Supreme Court of the State of Illinois,
THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

DENISON K. TOWN, }
vs. } ERROR FO KANE.
TOWN OF BLACKBERRY. }

Reply to Argument of Defendant's Counsel.

In reply to the points made by the Counsel for the Defendant in Error, we have but little to say in addition to that already said in our points and brief first presented in the case.

We insist that the following appears from the record, in relation to the establishment of this road in controversy, and in relation to facts connected therewith which we have arranged in the order of occurrence.

In 1859, March 30—Sale of premises by Samuel Wood to K. O. and T. Wood. Deed recorded same day.

In 1859, Spring and Summer—R. Wilder and one of the grantees occupy premises.

In 1859, April 6—Petition for road. Copies posted.

In 1859, May 4—An order made establishing road.

In 1859, June 4—A survey of road and report of same made.

In 1859, Sept. 6—Report of assessment of damages made, assessing to Samuel Wood the damages to the premises in controversy.

In 1860, January 31—Sale of premises from K. O. and T. Wood to D. K. Town. Deed recorded next day.

In 1860, In the Spring—Damages as assessed paid to Samuel Wood.

In 1860, May 18—An order addressed to D. K. Town, requiring removal of fence within sixty days.

In 1860, July and Sept.—Fence removed twice by overseer of district.

In 1860, Sept. 6—The order establishing the road together with the survey and report of same, filed in Town Clerk's office.

In 1861, Sept. 6—Report of assessment of damages filed in Town Clerk's office.

In 1861, December 31—Notice to D. K. Town to remove obstructions.

In 1862, January 20—Suit commenced to recover penalty for obstructing road.

In 1862, February 19—Copy of this last notice filed in Town Clerk's office.

But it is insisted by the counsel for the defendant in Error, and this is the whole of his second point, that this road report ought to have been dated, to bear the correct date, upon the fourth of June 1859, and not upon the fourth of May. If the theory of counsel is true that it was made on the fourth of June, we ask why did he not introduce testimony on the trial, and show it to have been made on the fourth of June. No such attempt was made for the reason the date of the order was truly stated.

The recital in the order that they caused a survey to be made on the 4th of June is easily accounted for by supposing them to have left a blank in the order in which to add the date of the survey, and the same was afterwards done without noticing the apparent contradiction produced thereby. But it matters not in regard to this.

The counsel wholly fails to make it appear, even by insisting that his witness, Fish, is a "farmer, and not a good practical business man, and did not understand the importance of making these entries at once, and correctly," (any evidence of which deficiency of the witness we have failed to discover in the record,) we say he has failed to show that these papers were deposited in the town clerk's office one

minute before they were marked filed. But on the contrary Fish himself states, (See page 12 of Record) that these papers, referring to the order establishing road embracing the plat of survey, came into his hands in September 1860, which it will be observed, is the time they are marked filed, and which was eight months after Town purchased the premises, and four months after the sixty days' notice to remove his fences.

But the report of assessment of damages was not filed even then. It was not made till three months after the road was established (taking their time the 4th of June,) and was not filed till a year after the order establishing road was filed, to wit, September 6th, 1861.

Now then, supposing everything to have been regular in the preliminary proceedings, the owner of Land is not required to remove his fences till the end of sixty days after notice given him to do so, and this notice cannot be given him till the expiration of thirty days after filing report of assessment of damages. Township Org. Law, 1851, Article 24, Sec. 5, 8, 24.

But the counsel insists that the defendant below is estopped to question the legality of this road by the acts of his grantees.

It will be seen that this road was not claimed by the public till long after D. K. Town became the owner of this land, it never having been opened or traveled, and no record of the same recorded in the Clerk's office; in view of these facts, as well might it be said that Town was estopped by the act of the owner of this land twenty-five years ago, if such owner should receive from the public compensation for damages by reason of a right which the public might desire to assert at some time in the future. But then Town is not an "innocent purchaser," says the counsel, "he knew of the existence of the road when he purchased, if he *did not* he would have *proved* that fact on the trial." Allow us to suggest to the counsel that it would have been quite as proper for the Town of Blackberry to have proved that Town *did* know of the claim of the public, as for him, Town, to have proved that he *did not* know of the same, and vastly more convenient for Town, who *might* have had some difficulty in finding a witness who would swear that he, Town, *did not* know a certain fact to exist.

But the counsel says that the plaintiff in error is a "land speculator, and bought this farm, not to live on, but because he had the Wood's at his mercy and he could get it at a bargain," and from this we suppose he means to insinuate that it matters not whether he was an innocent purchaser or not; a "land speculator" a man who buys a farm not to live on has no rights which the public are bound to respect, but liable to have his property taken from him without notice and compensation at the pleasure of town officers. But from what page of the Record the counsel discovers the speculative character of Town he has not informed the Court.

But the counsel says in his last point, that the defence set up is "without merit or justice." Now we submit that that is mere matter of opinion. To our mind however, it seems that the want of justice would appear to be in the attempt to deprive Town of the land honestly purchased, unburdened by easements without compensating him therefor, but the counsel may have a different view of justice.

He also says the Courts are not inclined to "bend a rule of law, to aid such suitors." Now it certainly seems to us that the "bending" of the Court must be wholly in aid of the counsel and his road, if the Court shall affirm the judgment in this case and thus decide all the proceedings to establish this road to have been regular.

As to the statement of counsel that this road had been traveled more or less for two years, we have simply to say, it was not so. The road was first opened in July 1860, immediately closed up again by Town; again opened in Sept. 1860 and closed again, and no travel has been had, except as occasionally some person would throw down the fence and go through, which was again immediately put up.

We have simply to say in closing, that the statute has provided a way in which private property may be taken for the use of Highways, and in order to vest any right in the public, the course pointed out in the statute must be strictly followed, and when the same is not done the public acquire no right.

It is impossible to discover a single step of the proceedings in this case to have been regular (except, perhaps, the original application for the road) and therefore it is impossible for us to see how the judgment of the court below can be properly affirmed.

PLATO & SMITH,
Atty's for Defendant in Error.

SUPREME COURT,

OTTOWA, APRIL TERM, 1862.

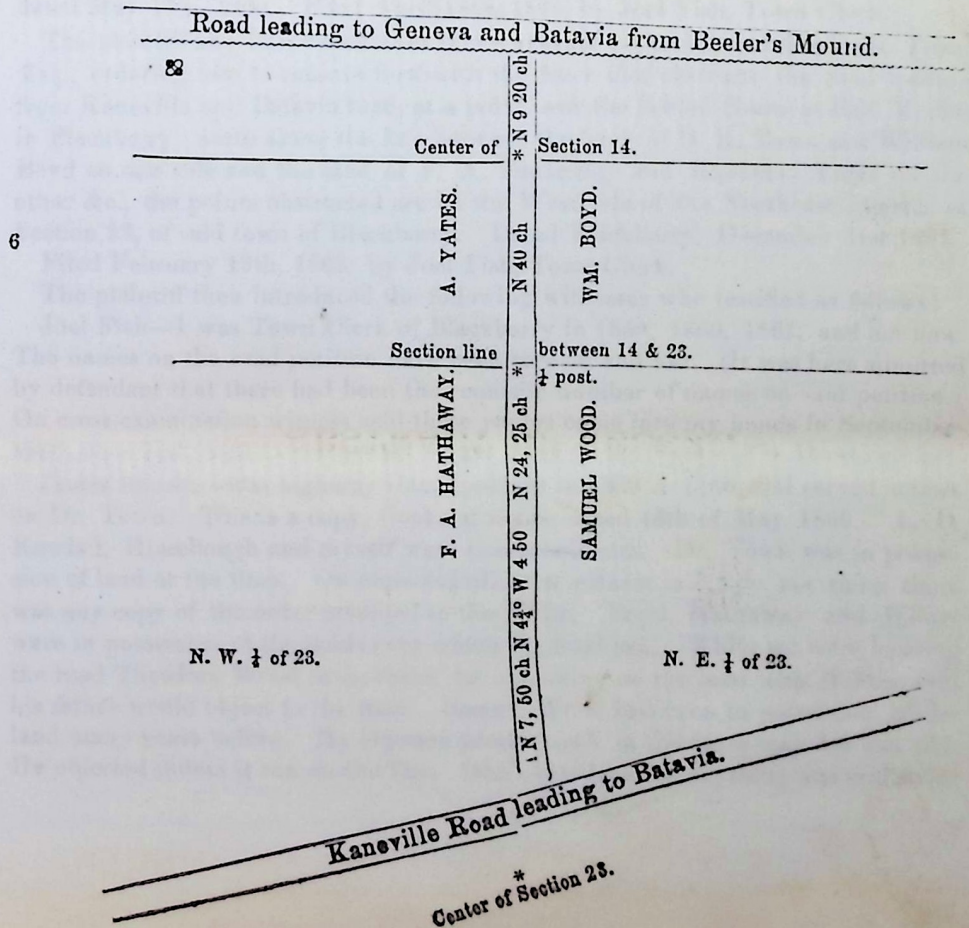
DENNISON R. TOWN
vs.
THE TOWN OF BLACKBERRY. } ERROR TO KANE CO.

ABSTRACT OF RECORD.

PAGE OF RECORD. This was an action to recover a penalty under the Statute for obstructing a highway. Plea not guilty. Jury waived and trial by the Court, on the 5th day of March 1862, the Court found for Plaintiff and rendered a judgment against defendant for the penalty of three dollars and costs. Motion by defendant for new trial overruled, and decision of the Court excepted to by defendant at the time.

Bill of exceptions filed by defendant as follows: Plaintiff introduced as evidence the following papers, in substance as follows: Whereas, upon the application of J. M. Sheets and other legal voters, residing within three miles &c., we the undersigned Commissioners of the town did, on the 2d day of May 1859, personally examine the proposed route &c., commencing on the road from Ball Mound to Kaneville at the line between the lands owned by Hathaway and Wood, in a northerly course to intersect the Beeler Mound Road, the names of owners of land over which the road passes are, A. Yates, Samuel Wood and Hathaway, and having before determining to lay out said road, fixed upon a time and place for hearing reasons for or against the same, and caused notices thereof to be posted up &c., and having met at the time and place &c., and having heard such as were offered &c., we did on the 4th day of June 1859, cause a survey thereof to be made by a competent surveyor, who made a report to us as follows:

MAP OF ROAD.



NOTES OF THE SURVEY OF A ROAD IN BLACKBERRY.

Commencing in the center of the road leading to Batavia, known as the Bald Mound, Kaneville Road, and two rods east of the line between the northeast and northwest quarter of Section 23, in said town; thence north parallel to the quarter line 7. 50 chains; thence north $4\frac{3}{4}^{\circ}$ W. 5. 50 chains to quarter line; thence north on the line between Hathaway and Samuel Wood 24. 25 chains to the $\frac{1}{4}$ corner; thence N. on the quarter line on section 14, and between Boyd and Yates 49. 20 chains to the center of road leading to Geneva from Beeler's Mound, the road being 4 rods wide. See adjoining Map, done by order of Highway Commissioners of Blackberry, June 4, 1859.

ADIN MANN, Co. Surveyor.

Filed Sept. 6th, 1860, by Joel Fish, Town Clerk.

It is therefore ordered &c., that a road be, and same is hereby established &c. In witness whereof, we the said Commissioners have set our hands this 4th day of May 1859.

LEWIS DAMON, }
JAS. N. SNOOK, } Commissioners
L. D. KENDALL. } of Highways.

Petition of voters &c., to Commissioners of Highways of Town of Blackberry, for a road commencing on the road from Bald Mound to Kaneville, at the line between the lands owned by F. A. Hathaway and Samuel Wood &c. Names of owners of Land over which road is to pass are: F. A. Hathaway, Samuel Wood, Wm. Boyd and A. Yates. Dated at Blackberry ———

Affidavit of G. B. Rockwell that copies of same had been put up &c., sworn to &c., April 6th 1859.

The plaintiff then introduced G. H. Kelly as a witness, who said, this is a copy of a paper I served on defendant on the 31st day of December 1861.

G. B. Rockwell testified, I drew the original notice of which this is a copy.

The plaintiff then introduced the notice mentioned by the witnesses Kelly and Rockwell, addressed to D. K. Town, notifying him that a road had been laid out agreeable to an order dated 4th May 1859, and requiring the defendant to remove his fences from within the bounds of such highway within 60 days after the service of said notice. Signed by Kendall, Himebaugh and Snook as Commissioners, and dated May 18th, 1860. Filed April 18th, 1860, by Joel Fish, Town Clerk.

The plaintiff also introduced as evidence another notice addressed to D. K. Town Esq., ordering him to remove forthwith the fence that obstructs the road leading from Kaneville and Batavia road, at a point near the School House at Bald Mound in Blackberry, north along the line between the lands of D. K. Town and William Boyd on one side and the land of F. A. Hathaway and Alphonso Yates on the other &c., the points obstructed are on the West side of the Northeast quarter of Section 23, of said town of Blackberry. Dated Blackberry, December 31st 1861.

Filed February 19th, 1862, by Joel Fish, Town Clerk.

The plaintiff then introduced the following witnesses who testified as follows:

Joel Fish—I was Town Clerk of Blackberry in 1859, 1860, 1861, and am now. The names on the road petition have been torn off and lost. (It was here admitted by defendant that there had been the requisite number of names on said petition.) On cross-examination witness said those papers came into my hands in September 1860, have had them ever since till I gave them to Mr. Rockwell in December last.

James Snooks—was highway Commissioner in 1859 & 1860, and served notices on Dr. Town. This is a copy, (looks at notice dated 18th of May 1860.) L. D. Kendall, Himebough and myself were Commissioners. Dr. Town was in possession of land at the time. On cross-examination witness said I do not think there was any copy of the order attached to the notice. Boyd, Hathaway and Wilder were in possession of the lands over which the road ran. While we were locating the road Theodore Wood came there, he was living on the land with Wilder, said his father would object to the road. Samuel Wood had been in possession of the land many years before. He objected pretty much in the same way his son did. He objected unless it run on the line. Don't recollect that anything was said about

PAGE OF RECORD. damages, he wanted me to let him know what the damages were that he might appeal; that he intended to litigate it.

Repetition of the notice dated May 18th, 1860.

16 F. A. Hathaway—know the lands described in the survey, I had an order from Samuel Wood on Harry White, Supervisor. Wood assigned it to me.

17 The plaintiff here introduced a report of the assessment of damages, made by the Commissioners, reciting that they did, on the 4th day of June 1859, lay out a road &c., and that certain owners of land over which said road passed, viz., Hathaway, Samuel Wood, Boyd and Yates, not having released claims to damages &c., they
18 proceeded to assess the same, and did assess to A. Yates eighty dollars, Boyd 80 dollars, Samuel Wood 85 dollars, Hathaway 74 dollars. In witness whereof we hereunto set our hands this 6th day of September 1859.

LEWIS DAMOND, }
JAS. N. SNOOK, } Commissioners
L. D. KENDALL. } of Highways.

Audited by us this 6th day of September 1859.

HARRY WHITE, Supervisor.
JOEL FISH, Town Clerk.
S. S. MORRILL, N. D. FRARY,
Justices of the Peace.

Filed Sept. 6th, 1861, by Joel Fish, Town Clerk.

19 Examination of Hathaway resumed—The order was given Wood in payment of damages, I saw him and told him what the amount was; he was dissatisfied and said he should take an appeal. My land adjoined Wood's, he had a number of tenants, the last one was Wilder, he was in possession when the road was laid. I got the order in the Winter after the assessment of damages, got the money in the Spring of 1860.

20 R. Wilder said, in Summer of 1859, I lived on Samuel Wood's land, was working the place in the Spring and Summer of 1859, went in as Wood's tenant, worked it on shares; paid the rent to Derby and Barker.

Mr. Damon called—I was one of the Commissioners of Highways in 1859, acted in laying out this road, Yates, Hathaway and Wood were there. He said nothing to me that I recollect.

Rockwell recalled—I drew the Petition. The road was from a point near the School House. Wood told me if the road had continued on the line he should not have objected. The defendant, Dr. Town is the reputed owner of the land now. The road has been obstructed at the point where it is laid out. On defendant's land in December 1861, and January 1862, by a fence across the highway.

Snook recalled—This is the order we gave Hathaway, Overseer, to open road. The road has been opened at other places, traveled and worked.

21 Hathaway recalled—Was overseer of highways in District No. 5, Blackberry, I opened the road through, has been traveled more or less. Upon looking at the order cannot say it is a copy, this has no signature, the original had. The plaintiff here rested. It was here agreed that this case was submitted to the Court without process or pleading, for the purpose of testing the validity of the pretended road &c.

The defendant then introduced the following abstracts of deeds &c., which by consent of parties, were used as evidence, instead of originals on record, viz.

22 A deed of conveyance (warrantee in form) from Samuel Wood and wife of the lands over which the road is said to be laid, to Kenyon O, and Theodore Wood, dated March 30th, 1859, recorded in the Recorder's office of Kane County, March 30th, 1859, subject to certain Mortgages on the same. Also a like deed of the same premises from K. O. and Theodore Wood to the defendant D. K. Town, for the consideration of 12,000 dollars, dated January 31st, 1860, recorded February 1st, 1860, subject to the same Mortgages.

The defendant here rested. The plaintiff then called Theodore Wood, who said I am 22 years old in May, in 1859 I worked on the farm. I, with my brother K. O. Wood received a deed of the farm, was to pay certain Mortgages. Paid nothing down. Paid the Mortgages by selling the land to Dr. Town, was to pay something besides the Mortgages, no definite sum fixed. K. O. Wood made the arrangement with Dr. Town to sell it to him. Father advised the sale, was present, could

23 not say that we ever had the deed in our possession, I took and looked at it, don't think I took it to keep, don't know of its being out of father's possession except when sent to be recorded. Father was a good deal in debt; we gave him no writing to take up mortgages, no money was paid to my knowledge; there was 500 acres in the farm, can't say what was the amount of mortgages, think one was 4,600 dollars. Town had one. Heard father say he appeared and claimed damages. I did not object, he claimed before I knew anything about it; don't know how he came to claim damages, I did not care any thing about it any way.

24 The foregoing testimony was objected to at the time, and as it was given, the Court overruled the objections and allowed the witness to testify, to which decisions of the Court the defendant at the time excepted.

On cross examination, witness said my brother was older than I and took the lead in business, I was going to school at the time, it was understood by us that land was covered by mortgages. It was sold us with the understanding that if we could pay off the mortgages and make anything we should pay father what we could afford, I gave father no authority, and I do not know that my brother did to receive the damages. On re-examination witness said, Dr. Town was to pay 25 dollars per acre. He let father have some money, I received some to pay for land in Nebraska. Town paid some horses, 6 or 8 or 10, they were turned out to pay father's debts. I worked the farm with Wilder, he was to have one-fourth, and I one-fourth, think my brother knew the road was being laid.

Samuel Wood—know the road, I received the damages, was once before the Commissioners, regarded the road as unnecessary, I can hardly say who I did represent, felt an interest for the boys, don't know as the boys knew I was there. To the question by plaintiff "How came you to receive the damages?" Witness said, I was owing Hathaway, or rather he had signed a note with me and said he would get an order for me and I agreed to turn it over to him, he paid the note and took the order. I thought I could represent the boys' interest as well as they could.

26 The foregoing testimony was objected to by defendant, the Court overruled the objection, to which ruling of the Court the defendant at the time excepted.

Fish recalled—the custom in the town of Blackberry is to issue order immediately the account is audited. I think I delivered the order to Hathaway in December 1859.

27 The foregoing is all the testimony &c. The Court found the defendant guilty and rendered judgment for three dollars and costs. Excepted to by defendant, the time defendant made motion for a new trial which was overruled by the Court, to which decision of the Court the defendant by his counsel at the time excepted, and prays this his Bill &c., may be signed, which is done &c.

ERRORS ASSIGNED.

1. The Court erred in admitting improper testimony to be given in the case.
2. In finding defendant guilty and rendering judgment for plaintiff in the case.
3. In overruling the defendant's motion for a new trial.

PLATO & SMITH,
Atty's for Plt'ff in error.

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- 3. In overruling the defendant's motion for a new trial...
- 5. In finding defendant guilty and sentencing...
- 1. The Court acted in error in its judgment in the case.

EXHIBITS LISTED

L. Leland
Clerk.

Filed April 24th 1864

which decision of the Court the defendant by his counsel at the time excepted, and
time defendant made motion for a new trial which was overruled by the Court, so
and rendered judgment for three dollars and costs, the Court found the defendant guilty
The foregoing is all the testimony &c. The Court found the defendant guilty
month 1853.
highly the account is unaltered. I think I shall be ordered to pay the balance in De-
bit which recd. — the one on in the name of the Court, is to issue order immediately.
The foregoing testimony and exhibits to be filed in the Court overruled the
Court.

and finding the order. I think I shall be ordered to pay the balance in De-
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Court.

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bit which recd. — the one on in the name of the Court, is to issue order immediately.
The foregoing testimony and exhibits to be filed in the Court overruled the
Court.

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Court.

Supreme Court of the State of Illinois,
THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

DENISON K. TOWN, }
vs. } *Error to Kane County.*
TOWN OF BLACKBERRY. }

Points and Brief of Counsel for Plaintiff in Error.

Our objections to the Judgment of the Court below, in this case, are briefly these:—

1st. It does not appear from the evidence, that a legal highway was ever established over the premises in controversy.

The 4th sec. of 24th Article, Town Org. Law, of 18~~51~~⁵⁷ says, when the Highway Commissioners shall determine to lay out a new road, they shall cause a survey to be made by a competent surveyor, who shall make a report to them, &c. They shall incorporate such report, and survey, accompanied with the plat, *in an order* to be signed by them, *declaring* such road so laid out to be a *public highway*; which order together with the petition shall be deposited with the Town Clerk, who shall note the time of filing the same.

From this it appears that the survey and the report of the same, are preliminary to the order establishing the road: And therefore an order establishing the road made before the survey would be illegal and void. As well might the order declaring the road to be a public highway be made before the view of the route, as provided in the preceding section. Now then what are the facts in this case.

The Commissioners of Highways of Blackberry, as appears by their order itself, which was introduced in evidence, made the order, declaring this road in controversy to be a public highway, on the 4th day of May, 1859. The Survey and Report thereof was not made till the 4th day of June, 1859, a month after the road had been declared to be a public highway by order of the Commissioners.

Now then if a petition by twelve legal voters—if the posting of a copy of this petition in three conspicuous places in the town—if an examination of the proposed route of the road proposed to be laid out, are necessary preliminary steps to an order declaring a road laid out to be a public highway, by what reason then will it be said that the fourth act in the course of establishing of a road is not a preliminary act, but may be done *after* the road is declared a public highway as well as *before*?

The law by which the individual is to be deprived of his property for the public use must be strictly followed, and an omission of any one of the preliminary steps required by the statute, in divesting the owner of his land for the purpose of establishing a highway is fatal to the proceedings.

It is true the Plaintiffs need not go back of the order establishing the road in the first instance, and show the preliminary steps to have been properly taken, for according to the case in the 1st of Gilman, p. 10, it is to be presumed they were regular, but the presumption may be rebutted by Defendant. In this case, however, the order itself introduced by the Plaintiffs shows the irregularity, and

thus destroys the presumption. That the date of the order and of the survey are truly stated in the papers filed, and introduced as evidence, is certain, from the fact that no error was claimed or explanation attempted on the trial, and from the further fact that the order is again referred to by the Commissioners in their notice to remove fences as made upon the 4th of May.

Again, we say there was no legal highway existing there, for the reason that the report of Commissioners declaring this to be a highway, as also the petition for the same, were not filed in the Town Clerk's office in proper time, as required by statute. It appears from the papers introduced in evidence as also from the testimony of the Town Clerk, that the report, &c., was not deposited with the Clerk till more than a year and a half after this order was made. Now then it is submitted, whether admitting all previous steps to have been regular, is this such a compliance with the law as would make a legal highway as claimed. It is true the statute specifies no time in which this filing of the records of the road shall be made, but it is fairly inferable that it is to be done *immediately*, or within a *reasonable* time at least, and a failure to file the same by the officers locating the road, ought to be held an abandonment of the road, and whatever rights they might have acquired by conforming with the law waived and lost. Upon principle this ought to be done.

But again, there was no legally opened highway here, for the reason, that the report of assessment of damages had not been filed in Town Clerk's office.

But again, we say, the Defendant had no notice of the existence of this road in controversy at the time he purchased said premises, and therefore was not bound by any previous act on the part of the public in regard to this road. A public highway over land is an incumbrance upon the same, and when such a right is claimed on the part of the public, it is but just that the world be informed of the existence of that right, which might be either by the open use of the road claimed, or by filing the records of the same in the proper office as required by law; and a failure to do so on the part of the public claiming the right, ought to deprive them of that right, as against a purchaser of the premises claimed to be burdened with the easement without notice of the same.

The injustice of a different principle is apparent. Take the present case: The preliminary steps are taken for a public highway across the premises now owned by Defendant, yet nothing appears by which the world can be informed that any right is sought on the part of the public. Subsequently the Defendant purchases, pays a full price for the premises unburdened by easements. A year afterwards the record of a road is filed in the Town Clerk's office, and a public highway is claimed across the premises of the owner. The owner says, I have never had notice of any such claim; I have purchased my land unburdened by incumbrances. I have never received any damages or compensation for this right of the the public, now for the first time claimed, to a way over my land. The reply to this on the part of the public officers is—true, you have had no notice, but then long before you purchased, we determined to lay out a road across this land, and took certain preliminary steps for the same, and having done so our right is complete, and you cannot object to our completing these proceedings at our leisure, asserting at any time a right in the public. It seems to us that the above shows clearly the injustice resulting from such a course of procedure on the part of the public, and that which is only calculated to do so great injustice ought not to be considered law; and by requiring the record of a road to be filed within a reasonable time after the making of the same, the difficulty would be obviated, and it could never have been the intention of the law-makers to allow the public to thus lay by for any length of time, and then assert their claims to the prejudice of innocent purchasers. And if such were allowed, one of the objects of requiring an order and the proceedings to be filed, would be lost. But whatever may be the views of Court upon the points already presented, there yet remains another point presented in this case, which utterly precludes the right of the Plaintiff to recover against Defendant.

And 1st. The owner of land across which a highway is laid, cannot be guilty of obstructing a public highway till such highway has been legally opened.—25 Ill., 518.

2nd. The same is not legally opened, (if opened without the assent of the owner of the land,) till the owner shall have had sixty days' notice to remove his fences.—Township Org. Law, 1851, Article 24; 25 Ill. 518.

3rd. The Notice to remove fences cannot be legally given at an earlier time than thirty days after the filing of the Order of the Commissioners, declaring the the road laid out to be a public highway.—Township Org. Law, 1851, Article 24, Sec. 8, 24.

Apply the above propositions to the facts in this case. This suit is for the *obstruction* of a Highway. Notice to remove which obstruction appears to have been given to the Defendant on the 31st Dec., 1861. Having had no legal notice to remove his fence, the Defendant comes to the very sensible conclusion that he is not guilty of obstructing a road not yet opened. That he had no legal notice to remove his fence, as required by Statute, appears from the notice itself, which was in evidence by the Plaintiff, taken in connection with the other evidence. The sixty days' notice to remove fences, is dated the 18th day of May, 1860, some four months before the order establishing said road was filed, and before said highway had any existence.

Now then in view of the facts, and the clear principles of law, it readily appears that the Defendant could not have been guilty of obstructing this supposed highway, by the continuance of his fence therein, for the reason there was no legally opened highway there to obstruct, and even if there was he had had no legal notice to remove his fences from the same, which fences are the obstruction complained of. It seems to us as unnecessarily spending time to further pursue this case, for it seems that more than enough has been shown against the propriety of the Judgment rendered in this case, to induce this Court to reverse the same.

PLATO & SMITH,

Atty's for Plaintiff in Error.

Denison K. Down
Down of Blackberry

Brief of Points
and Authorities ^{sub}
Argument.

See Pltff in Error

United States of America. }
State of Illinois, Kaw County. } ss.

1.
Pleas before the Honourable Isaac
G. Wilson Judge of the 28th judi-
cial circuit of the State of Illinois,
and presiding judge of the Cir-
cuit Court of Kaw County in the
State aforesaid, at a regular
term of said court, begun and
held at the Court House in Gen-
oa in said county, on the third
day of February in the year of
our Lord our thousand Eight
hundredth and Sixty two, and of the
Independence of the United States
the Eighty fifth.

Present Honourable Isaac G. Wilson. Judge.
Charles J. Metzner. State's Attorney.
Demarcus Clark. Sheriff.

Attest

Thomas C. Moon.
Clerk.

Be it remembered that here-
before, to wit: on the distant day of Feb-
ruary A. D. 1862, it being one of the
days of the February term of said Court
the following amongst other proceedings

2

now had and entered of Record in said Court.

8038.

The Town of Blackberry }
vs. } Agreed Case.
Dennison K. Down }

This day comes the plaintiff by Maybourn its attorney and the defendant by Plato^{and} Smith his attorneys comes, raises a jury and submit this cause to the court for trial.

Afterwards to wit; on the fifth day of March A D 1862 the same being one of the days of the said February term of said court the following and other proceedings now had and entered of Record in said Court.

8038.

The Town of Blackberry } Agreed Case:
vs. } penalty for ob-
Dennison K. Down } structing Highway.

This day again comes the parties by their respective attorneys, and this cause ^{again} coming on to be heard, the Court being now fully advised find,

the issues in favor of the plaintiff and assess its damages at the sum of three dollars: and thereupon the defendant by his attorney moves for a new trial; which motion is overruled by the Court, to which ruling of the Court, in refusing a new trial the defendant by his counsel excepts:

It is therefore considered by the Court that the plaintiff recover of the defendant the sum of three dollars damages and also its costs herein expended and that it have execution therefor.

And afterwards to wit; on the seventh day of March A.D. 1862. The same being one of the days of the said February term of said Court the following among other proceedings was had and entered of Record in said Court.

8038

Donn of Blackberry }
 vs. } Agnes Cues. Penally
 Dennis H. Donn } for obstructing Highway.

This day came the defendant by Platt and Smith his attorneys and on his motion made days an allowed by the Court within which time defendant may file his Bill of Exceptions herein.

the issues in favor of the plaintiff and assess its damages at the sum of three dollars: and therefore the defendant by his attorney moves for a new trial; which motion is overruled by the court, to which ruling of the court, in refusing a new trial the defendant by his counsel excepts:

It is therefore considered by the court that the plaintiff recover of the defendant the sum of three dollars damages and also its costs herein expended and that it have execution therefor.

And afterwards to wit; on the 26th day of March A. D. 1862. the following bill of exceptions was filed with the clerk of said court.

The Doms of Blackburny } Agreed case.
 vs. }
 Dennisow H. Doms. }

Be it remembered that on the trial of this cause the plaintiff introduced as evidence the following road petition and papers from the town clerks office to wit;

Kanaw County }
 Town of Blackberry } Ss.

Sheweth upon the application in writing of J. M. Shuts. George Roots. S. O. Jones, Milo George. E. A. Barber. Otis Jones. Joseph Kittle Levi Brundig. James Snook. A. C. Yates. J. S. Kiblin. Geo. H. Gould. W. H. Titus. and others, being legal voters residing within three miles of the route hereinafter described for a public highway, a copy of their petition having been first duly posted up as required by law to the commissioner of highways of said town did on the 2^d day of May A. D. 1859 personally examine the route proposed in said petition for a road to wit; commencing on the road from Pat's Mound to Kanawille at the line between the lands owned by D. W. Hathaway and Samuel Hood running in a northerly course on the most direct and eligible route to intersect the Buler Mound road on or near the line between the lands owned by Alphonse Yates and Mrs. Boyd Jr. The names of owners of land over which the road passes Alphonse Yates. Mrs. Boyd Jr. Samuel Hood and D. W. Hathaway and having before determining to lay out said road fixed upon a time and place when and

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when we would meet to hear any reasons
for or against laying out the same ^{and}
having caused written notices thereof to
be posted up in two of the most public
places in said town eight days previous
to the time of such meeting ^{and} having
met at the time ^{and} place appointed for
hearing such reasons ^{and} having heard
such as were offered for or against the
laying out of said road and being of
the opinion that such laying out is ne-
cessary ^{and} proper and that the public in-
terest would be promoted thereby ^{and} hav-
ing granted the prayer of said petition
it ^{and} determined to lay out said road
we did on the fourth day of June A.D.
1859. cause a survey thereof to be made
by a competent surveyor who made report
to us as follows

Map of Road.

Road leading to General & Batavia from Beelie Mound.

center of Sect. 14

A. Galie.

Wm. Boyd.

Section line between 14 & 23.

D. A. Hathaway.

Saml. Wood

N. W. 1/4 of 23.

N. E. 1/4 of 23.

Kanville Road leading to Batavia center of Sect. 23.

Notes of the survey of a road in Blackberry. Commencing in the center of the road leading to Batavia, known as the Beelie Mound Kanville Road and two rods east of the line between the north east and north

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West quarter of section 23. in said town
 thence running north parallel to the quar-
 ter line 7.50 chains thence N. $4\frac{3}{4}^{\circ}$ N 5.50
 chains to the quarter line, thence north
 on the quarter line between D.A. Heath
 way and Saml. Wood 24.25 ch. to the $\frac{1}{4}$ corner
 thence N on the quarter section line on
 section 14, & between Mrs. Boyd and A. Gates.
 49.20 ch to the centre of the road leading
 to General from Culer's Mound, the line
 described being the centre of the road and
 the road being four rods wide - See
 adjoining map drawn by order of Highway
 Com. of Blackberry June 4th 1859.

Adin Mann, Co Surveyor.

Which is endorsed as follows: Filed September 6th. 1860.

By Joel Fish Town Clerk.

It is therefore ordered and determined that a
 road be and the same is hereby laid out
 and established according to said survey
 and the plat hereunto annexed and made
 part of this order which is hereby declar-
 ed to be a public highway four rods wide
 the line of said survey being the center of
 said road. In witness whereof on the
 said commission we have set our hands
 this 4th day of May A.D. 1859.

Lewis Damon. } Commissioners
 James H. Snow. }
 L. D. Kendall. } Highway

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To the Commissioners of Highways of the
town of Blackberry in the County of Kan.

The undersigned, legal voters, residing
within three miles of the route hereinafter
mentioned and described for a road do hereby
make application to you to lay out a
new road of the width of four rods as
follows: Commencing on the road from
Ball Mound to Karwills at the line be-
tween the lands owned by D. W. Hathaway
and Samuel Stovs thence running in a
northerly course on the most direct and eli-
gible route to intersect the Ball Mound
road on or near the line between the lands
owned by Alphonse Gates and Mrs. Boyd Jr.

The names of the owners of lands over
which the road is to pass, as your peti-
tioners are informed, are D. W. Hathaway,
Samuel Stovs, Mrs. Boyd Jr. and Alphonse
Gates. Your petitioners therefore pray
that you will proceed out said
road, and cause the same to
according to law.

Dated at Blackberry } Done off.
S. B. Rockwell.

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State of Illinois
Kane County } p.

George B. Rockwell being duly sworn, doth depose and say that he posted three copies of the within notice as follows; one at the center school house, one at the road near the house of James Rigby and one at Ball Mound near the house of D. A. Hathaway, (on the fifth day of April A.D. 1859.) in the town of Blackberry being three of the most public places in said town.

Geo. B. Rockwell.

Subscribed and sworn to before me
this 6th day of April A.D. 1859.
Daniel Eastman, J.P.

The plaintiff then introduced the following named witnesses who testified as follows.

G. H. Kelbey. (a paper shown to him)
This is a copy of a paper that I served on the defendant on the 31st day of December 1861. The writing on the back is my writing.

Cross Examination.

I did not write the body of the paper. I compared it with the other. It is a copy. I think my own note the one I gave to the defendant. This paper I take to be Mr Rockwells hand writing.

9

State of Illinois
Kane County } p.

George B. Rockwell being duly sworn, doth depose and say that he posted three copies of the within notice as follows; one at the center school house, one at the road near the house of James Rigby and one at Ball Mound near the house of D. A. Hathaway, (on the fifth day of April A.D. 1859.) in the town of Blackberry being three of the most public places in said town.

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Cross Examination.

I did not write the body of the paper. I compared it with the other. It is a copy. I think my own note the one I gave to the defendant. This paper I take to be Mr Rockwells hand writing.

Mr Rockwell put in the word "Dec" in pencil a few days after the service. I think the word "Dec" was in the original that I gave to defendant, would not say certain.

Direct Ex. Resumed.

We compared the two notices. They were alike.

Geo. B. Rockwell. I drew the original notice of which this is a copy, the date was left blank to be filled up by Kibby as it was the last of December ^{and} we did not know as he would serve it on defendant. I was the supervisor of the Town of Blackbury.

Notice offered in evidence ^{and read}.

To Mr E. K. Dow.

You will take notice that the Commissioners of Highways of the Town of Blackbury in the County of Kau have laid out a public highway agreeable to an order of said Commissioners bearing date the 4th day of May A.D. 1859. a copy of which is herewith annexed.

Commencing in the center of the road leading to Batavia and known as the Ball Mound ^{and} Kanville road, two rods east of the line between the north east ^{and} north west quarter of Section 23. in said Town thence running north parallel to the quarter line 7.50. chains thence

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N 4 3/4° west 5.50 chains to the quarter line
thence north on the quarter line between
D. A. Hathaway and Samuel Wood 24.25
ch to the 1/4 corner.

The line described being
the center of the road and the road being
four rods wide, which highway passes
through certain enclosed lands owned
by you, you are hereby notified and
required to remove your fences from
within the bounds of said highway
within sixty days after the service
of this notice.

L. D. Kendall. } Commissioners
D. J. Kimbrough. } of
James M. Snook. } Highway.

Dated this 18th day of May A.D. 1860.
Filed April 18th 1860.
By Joel Fish. Town Clerk

To D. K. Down Esq.
Sir:

You are hereby ordered
to remove forthwith the fence that ob-
structs the road leading from the
Ranville and Batavia road at a point
near the school house at Ball Mounds
in the town of Blackberry north along
the line between the lands of D. A. Down
and J. M. Boyd Jr on one side and the lands
of D. A. Hathaway and Alpheus Gates

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on the other, to the road running from Geneva to Ouler's Mound. The points in said road obstructed are on the west side of the north east $\frac{1}{4}$ of Sec (23) Twp 23 of said town of Blackberry when the road on the west line of said quarter section intersects the Kanawille ^{and} Batavia road, and one at or near the north west corner of said north east quarter of section Twp 23 in the town of Blackberry. The said fence is an obstruction to the road running on the line of lands owned by you.

Blackberry Dec 31st 1861.

Geo. H. Keller } Commissioner of
Highways for the town
of Blackberry.

A copy of the within notice was personally served on D. K. Ann this 31st day of December 1861.

Geo. H. Keller.

Dated February 19th 1862.
By Joel Fish Ann Clerk.

Joel Fish. testifies.

That he was the Ann Clerk of Blackberry ^{and} was in 1859, 1860 ^{and} 1861. and is still the Ann Clerk ^{and} name run on this road petition ^{and}

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have been torn off ^{and} lost. I copied all the papers into these records including this petition ^{and} the names. I have searched for the papers ^{and} tried to find them, cannot find them, have searched everywhere I thought I might find them. They are lost. These papers are in the same condition now that they were originally except the names. The defendant here admitted that the petition had the requisite number of names on it that is required in road petitions, before they were torn off.

Cross examination.

These papers came into my hands Sept 6th 1860. I think so. Had the papers in my hands ever since until I gave them into the hands of Mr Rockwell in Dec last. I had not seen the papers before for a year ^{and} a half ^{and} did not know their names nor give until I got them to hand to Mr Rockwell papers had not been out of my office for a year ^{and} a half before. The petitioners reside from one ^{and} a half to two miles of the road petitioned for, ^{and} reside in the town of Blackberry, ^{the road lies in} Kankakee County, Illinois. These records are of that town.

James Swank, testified.

I was highway Commissioner in 1859 ^{and} 1860 of Blackberry

(Notice shown him). I served a copy of this on Dr Dunn, the defendant. This is a copy of the notice, served it within a week or two after date of notice. In 1860 S. D. Kendall, Mr Heimbrough, and myself were highway commissioners of the town, at the time of the notice Dr Dunn was supposed to be the owner of the lands described in the notice. I met him and told him that I had a road notice to serve on him and supposed that I ought to have a witness he said he would not litigate it on that account, he was in the possession of the lands at the time.

Ones examination.

The notice is dated the 15th day of May 1860. I think a week or two after I left the copy of this notice with him. Don't think there was copy of order attached. Alpheus Gates, Wm Boyd, D. A. Hathaway, Russell Milder were in possession of lands over which this road ran. The land in the possession of Milder, while we were running and locating the road Theodore Wood came there, he was living on the land with Milder, he said his father would object to this road, the road in controversy crosses this land (points out the land on plat) after that we had a conversation with Samuel Wood he had been

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in possession of the land for many years as owner, I supposed he objected pretty much in the same way as his son had objected, he objected unless we would run the road on the line between him and Dr. A. Hathaway. Do not recollect that any ^{thing} was said about damage he wanted that I should let him know what the damages were that he might take an appeal, that he intended to litigate it. I told him I would let him know the plaintiff offered in evidence and read the following paper:

To Mr E. K. Dow.

You will take notice that the commissioners of Highways of the town of Blackbury in the county of Kan have laid out a public highway agreeable to an order of said commissioners bearing date the 4th day of May A. D. 1859, a copy of which is herewith annexed.

Commencing in the corner of the road leading to Batavia and known as the Ball Mound and Kanville road two rods east of the line between the north east ^{and} north west quarter of section 23. in said town thence running north parallel to the quarter line 7.50 chains thence N 4 3/4°

Met 3.50 chains to the quarter line
thence north on the quarter line between
D. A. Hathaway and Samuel Wood 24.25
ch to the $\frac{1}{4}$ corner.

The line described being
the center of the road and the road
being four rods wide, which high-
way passes through certain enclosed
lands owned by you. You are her-
by notified and required to remove your
fences from within the bounds of said
highway within sixty days after the
service of this notice.

L. D. Kendall. } Commissioners
D. D. Kimbrough } of
James M. Brooks } Highway

Dated this 18th day of May, A.D. 1860.
Filed April 18th 1860.
By Joel Fish, Town Clerk.

Franklin A. Hathaway testifies.

I know the lands de-
scribed in this survey. Had an order from
Samuel Wood, drawn on Henry White pay-
able to Samuel Wood. It states that
there was that amount due to Wood.
White was the supervisor of the town.
Wood assigned it over to me. Order show-
ing the allowing of damages offered in
evidence and read.

The commissioners of Highways of
 the town of Blackberry in the county of
 Row having on the fourth day of
 June 1839. upon due applications
 made to us for that purpose laid out
 a road as follows: Commencing in
 the center of the road leading to Bu-
 laria known as the Bull Mound ^{and}
 Kanville road two rods east of the line
 between the north east ^{and} north west
 quarter of section 23 in said town
 thence running north parallel to the
 quarter line 7.50 chains thence at $4\frac{3}{4}^{\circ}$
 N 5.50 chains to the quarter line between
 D. A. Hathaway ^{and} Samuel Wood 24,
 25 ch to the $\frac{1}{4}$ corner, thence N. on the
 quarter section line on Sect 14. and
 between Wm. Boyd ^{and} A. Yates 49.20
 chains to the center of the road leading
 to Genoa from Bull's Mound the line
 described being the center of the road
^{and} the road being four rods wide. And
 certain owners of land over which
 said road passes to wit; D. A. Hathaway,
 Samuel Wood, Wm. Boyd, A. Yates
 not having released all claims to dam-
 ages sustained by reason of the lay-
 ing out ^{and} opening the same and not
 being able to agree with them as to the
 amount of such damages having ap-
 peared to them ^{and} each of them for
 that purpose ^{and} endeavored to make such

agreement. We proceeded to assess the
 same at what we deem just ^{and} right
 to each individual claimant with
 whom we could not agree taking into
 account ^{and} estimating the advanta-
 ges ^{and} benefits the roads will confer on
 the claimants for the same as well
 as all disadvantages ^{and} have assess-
 ed the damages of each owner as
 follows: Dr A. Yates 80 dollars, to
 Mrs Boyd 80 dollar, to Samuel Wood
 85 dollars, to Dr. A. Hathaway 74 dollars
 being enclosed ^{and} cultivated lands.

In witness whereof we have
 hereunto set our hands this 6th day of
 September A. D. 1859.

Lewis Damon. }
 James M. Smock. }
 L. D. Kendall. } Highway.

Audited by us this 6th day of Sept. 1859.
 Harry White } Supervisor.
 Joel Dish } Town Clerk.
 J. S. Merrill } Justices of the
 N. D. Drury } Peace.

Filed September 6th 1861. }
 By Joel Dish Town Clerk. }

I got from White a state
 ment certifying that there was 80 odd

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dollar Samuel Wood's due. Wood assigned it to me and I drew the money. The order was given him in payment of the damages for the laying of this road across his land. I saw him at Batavia and told him what the amount of damages was. I did so at Mr Brooks's request. He was dissatisfied and said that he should take an appeal. My lands lay next and adjoining Wood's through which this road runs. I have lived there five years last August. Wood controlled the land, he had a number of tenants. The last one was Hilder and he was in possession at the time road was laid. Judging from conversation with Wood I supposed that he owned it.

Cross examination.

Got the order in the winter after assignment of Damages. Got money in the spring of 1860.

Hilder testified.

In summer of 1859 I lived in Samuel Wood's place (looks on the plat) recognizes this land, was working Wood's place in the spring and summer of '59. I went into possession under Samuel Wood as his tenant. I worked it on shares, rented it of Wood, made the bargain for one year. Paid the rent to Derby and Parker and remained

on the place that year.
Cross examination raised.

Mr Daymond, sworn.

Was one of the highway commissioners of Blackberry in 1859. (papers shown him). I acted in laying out this road. Gates - Hathaway ^{and} Wood was then he said nothing to me that I recollect of.

Rockwell recalled.

Petition shown him. I drew this petition. When was a large list of names on this petition a large share of the voters signed it. The road runs from a point near the school house north through lands (described in petition ^{and} survey). Wood told me if the road had continued on the line without deviating he should not have objected. The defendant Dr Dow is now the reputed owner of the lands. The road has been obstructed at this point when it is laid out on defendant's land in the latter part of December 1861. ^{and} in the fore part of January 1862. by fence across the highway. Brooks recalled.

Commission of highways
This is the order we gave to Hathaway overseer of highways to open the road the road has been opened at the other places traveled ^{and} worked. Do not

recollect no of this road district.
 Hathaway recalled.

Was overseer of high-
 ways in Blackburn in district No 5.
 Received order to open the road from ~~Brooke~~
 This is a copy of the order. I opened the
 road through, has been traveled more
 or less ever since, the road is now ob-
 structed at the corner of defendant's
 land. Think that I opened it twice as
 road master.

Cross examination.

Upon looking at this order cannot
 say that is a correct copy, this has
 no signature or date, think the orig-
 inal had. It is admitted by the par-
 ties that this suit was brought in
 this court by agreement of parties
 without service of process or pleadings
 on the 20th day of January 1862, under
 the statute for obstructing Public
 Highways, and if the plaintiff was
 entitled to recover at all then the plain-
 tiff should recover the lowest amount
 fixed by law for obstructing high-
 ways, as the object of this suit was
 mainly to settle the question as to
 whether there was a legal established
 highway across the lands of the
 defendant or not, without any form-
 ality of pleadings. Plaintiff here
 rested.

Defendant.

The defendant then introduced as evidence the following abstracts, which by consent of parties were used in lieu of the original deeds. Viz; A deed of conveyance from Samuel Wood ^{and} wife of the lands over which said road is said to be laid to K. O. ^{and} J. Wood. Dated March 30th 1859.

Recorded in recorder's office of Kaw County March 30th 1859. subject to certain mortgages on the same. Also a deed of said premises from K. O. ^{and} J. Wood to D. C. Don ^{in consideration 12000 dollars} dated Jan'y 31st 1860. ^{and} recorded February 1st 1860. ^{and} subject to the same mortgages.

The defendant then rested.

The plaintiff then called Sheldon Wood who testified that he was twenty-two years old next May '62. In '59. I worked on the farm in question I received with my brother K. O. a deed of the farm. I was to pay certain mortgages on the farm. I paid nothing down. Paid the mortgages by selling the land to Dr Don was to pay some thing besides the mortgage but no definite amount fixed. K. O. Wood made the arrangement with Dr Don to sell it to him. My father advised the sale to

Down he was present at the sale or at the time of the arrangement, could not say who first spoke of selling to Down. Did see the deed to us. Samuel Wood had it, could not say that we ever had it in our possession. I remember that I took it ^{and} looked at it. Don't think that I ever took it to keep it. Don't think that I ever knew of its being out of my father's possession, except when it was sent down to be recorded. My father was a good deal in debt at the time, we gave to father no writing that we would take up the mortgage. No money was paid over to my knowledge. I did not pay any thing nor any property. 500 acres in the farm, could not say what was the amount of the mortgages, think one of \$400. and Down had one. Did hear my father say that he approved ^{and} claimed the damages for the opening of the road. I did not object to it. He claimed it before I knew anything about it. Don't know how he came to claim the damages. I did not care anything about it either way, when I heard that he had received the damages I raised no objection to it.

The foregoing testimony of the witness was objected to by the Defendant on the ground that it was only cumulative

and not rebutting. The court overruled the objection - and allowed the testimony to be given. In which ruling of the court the defendant at the time excepted. Cross Examination.

My brother was older than I and took the lead in business I was going to school at the time. It was understood by us that the land was covered by mortgages. The land was conveyed to us with the understanding that if we could pay off the mortgages and make anything we should pay father what we could afford. I gave my father no authority and do not know that my brother did to receive the damages.

Direct Examinations.

Dr. Down was to pay \$25. per acre for the land. Dr. Down did let father have some money on the sale of the land to him. I did receive some of the money, only four or five dollars. I think I received some money to pay on land in Nebraska. Down also paid some horses on purchasing the lands. When men turned out to pay father's debts with 6, 8 or 10 horses I worked on the farm with Hilder, he was to have one fourth and I one quarter. I think my brother knew that the road was being laid out. Don't know

of his making any claims for damages.

25

Samuel Wood testified.

Q. When the road was laid out, I received the damages for the laying of the road. I was once before the Highway Commissioners when they were laying out the road. Q. Who did you represent? Ans. I regarded the road as unnecessary. I can hardly say who I did represent. I felt an interest in it for the boys, don't know whether the boys know that I was there. Q. How came you to receive the damages? Ans. I was owing Hathaway or rather he had signed a note with me for school money ^{and} said he would get an order for me ^{and} I agreed to turn it over to him. He paid the note ^{and} took the order. The boys know that I got the damages ^{and} had the benefit of it. I thought in going down that I could represent their (the boys) interest as well as they could, they made no objection.

The foregoing testimony of Samuel Wood was objected to by the defendant on the ground that it was only cumulative ^{and} ought to have been offered in the first instance. The court overruled the objection ^{and} the testimony was admitted to which ruling of the court the defendant excepted.

Cross examination.

Don't think the boys had sold to Dr
Dorn before I received the order for
the damages. Don't think the boys knew
of my getting the damages until
after they were paid.

Direct Answered.

My best recollection is
that the time when I got the order is
as I stated in the first place. The
boys upon being informed that I had
got the payment made no objections
to it.

Mr Fish recalled.

It was sometime in
Dec '59. that the order for Mr Wood's
damages was issued. Have been
clerk four or five years. (looks at the
paper). This pertains to audit the ac-
counts of Samuel Wood, Gates, Hatch
array, &c. This is my name as one of
the auditing board. The custom in the
town of Alderbury is to issue order im-
mediately after the account is audited.
Cross examined.

I think I delivered the order
in December 1859. It was handed to Mr
Wathaway. He had an order from Mr
Wood for it.

Mr Wathaway recalled.

Remember getting
the order near the time stated by Mr
Fish Dec or Jan'y. I got the money on

the order in the spring of 1860.
 The foregoing is all the evidence given
 in the case. The court found the defend-
 ant guilty ^{and} rendered a judgment
 against him for the sum of three dollars
 and costs to which decision of the
 court the defendant by his counsel at
 the time excepted. The defendant then
 made a motion for a new trial which
 motion the court overruled ^{and} refused
 to grant the defendant a new trial
 to which judgment ^{and} decision of the
 court in overruling his motion for a
 new trial the defendant by his counsel
 at the time excepted ^{and} prayed that this
 his Bill of Exceptions may be signed
^{and} sealed which is done.

Isaac B. Wilson (Seal)

Which bill of exceptions is endorsed as
 follows to wit;

Filed March 26th 1862.

J. C. Mann.

Clerk.

State of Illinois
 Kane County J. A. Thomas, C. Moore.
 Clerk of the Circuit Court in and for the
 County of Kane in the State aforesaid, do
 certify the foregoing to be true and complete
 copies of all the papers filed, and orders of
 Court, made and entered of Record in a
 cause lately pending and determined in
 said Court, wherein The Firm of Black-
 berry was plaintiff and Demiss &
 Firm was defendant

Witness Thomas C. Moore
 clerk of said Court and the
 seal thereof at Geneva in
 said County this second day
 of April A.D. 1862

Thomas C. Moore
 clerk

Chks for record \$15.00 -



The Firm
 of Blackberry

and now comes the said Plaintiff by Plato & Smith
his atty. and alleges for error in the
foregoing record and proceeding, viz

1. The Court was in admitting the
testimony of the witnesses Meadon Wood
and Samuel Wood.
2. In finding defendant guilty and
rendering judgment for Plaintiff
3. In lawfully defendants motion
for a new trial

Plato & Smith
atty for appellant

And now comes the said depar
dent in error, and says that there
is no error in the foregoing &
proceedings &

J. H. Mayburn
atty for appellee

highway across the lands of the
defendant or not, without any form

22

52
254
Derrinton 16. Town

or
Town of Blackburn

Union Co. Tenn. Co.

Filed April 22. 1862
L. Leland
Clerk

Plato & Smith
attys of note