

No. 14580

Supreme Court of Illinois

Greene, et al

vs.

Greene

71641  7

STATE OF ILLINOIS,
SUPREME COURT.
THIRD GRAND DIVISION.

No. 38

55

J. W. Middleton & Co., Stationers, 196 Lake St.

Clark Supreme Court
3rd Grand Division,
Sir.

Enclosed
please find principle. If a
docket fee or other charge is
necessary to be paid before the
case can be docketed please
let me know immediately. The
acts of the last legislature
have not yet reached here
All the fees and charges in the
case will be promptly paid
at the session of the court
Bergen & Kearley
Pittin H.

March 14. 1863.

Atkin Ills

March 23^d 1863

L Leland Esqr

Clk Supreme Court-

Sir,

Received

Your favor dated the seventeenth
th date, enclosed you will
find Twelve dollars, \$6, for
the Court - \$5, for the Clk and
\$1, for Stamp for writs

Please issue Writ of Error
& Scifa in the case of Green Et al
vs Green as directed in Precept
sent to you a few days ago &
oblige

Yours very Truly
Bergen, & B. Warley

18

~~117~~ 38

State of Illinois, } In the Supreme Court.
 THIRD GRAND DIVISION. } ^{SS.} TO THE APRIL TERM, A. D. 1864.

HENRY R. GREENE, *ET AL.*, PLAINTIFFS IN ERROR,

VS.

NATHANIEL W. GREEN, DEFENDANT IN ERROR.

} ERROR
 TO
 TAZEWELL.

Abstract of Record furnished by Plaintiffs.

This was a bill for an Injunction, by the defendant in error against the plaintiffs in error, filed in the Circuit Court of Tazewell County, June 26, A. D. 1862.

The following is a full copy of the bill :

[p. 1 to 6.] "To the Honorable JAMES HARRIOTT, Judge of the 21st Judicial Circuit of the State of Illinois, in Chancery sitting:

Humbly complaining sheweth unto your Honor, your orator, Nathaniel W. Green, a resident of the County of Tazewell and State of Illinois, that your orator is now, and has been for the space of more than five years next preceding the filing of this Bill, the owner in fee of the following described land, situated in the said Tazewell County, viz: The North-west quarter of Section number twenty-three in Township 22, North of Range Four, West of the third principal meridian, which land is now, and has been for the space of more than five years next preceding the filing of this Bill, in cultivation and enclosed with fences, and your orator further shows that on the 27th day of June, A. D. 1857, the Commissioners of Highways for the Town of Delavan, on the Petition of sundry voters of said Town, laid out a public road in said Town, and running entirely across said Town, commencing at the North-east corner of Section 24, in said town 22, North of Range 4, West of the third principal meridian, and thence running a westerly course on the sectional line between Sections 24 and 13, 23 and 14, 22 and 15, 21 and 16, 20 and 17, 18 and 19, to the West line of said town; and your orator avers that he at the time desired to have said public road so laid out and opened as it was laid out, that your orator might have a convenient and beneficial outlet from his said land over said public road in a westerly direction to two public roads lying west of his said land and running North and South from Springfield in the State of Illinois to the Cities of Pekin and Peoria in the same State, which last named cities are and were the only available market places for the produce of his said land, and which line of road would secure to your orator a better and more convenient road to and from said market places than he would have without said road was so laid out and opened, and your orator

avens that in consideration of the laying out of said public road as above alleged, and that said Commissioners would proceed immediately and open the same, he released to them the right of way over his said land, for said road, and he here avers that on no other consideration, and for no other road or purpose than is above alleged, did he ever release said right of way, or consent that a road might be opened on the North line of his said land so enclosed and cultivated as aforesaid, nor has any such road ever been opened, and he here avers that any attempt now at the opening of said road across his said land at all, and especially from the East end alone, and without opening it across the said Town to the West end of the road as so laid out, would without regard to the fact that the said road is now vacated by law, greatly harrass and seriously injure your orator, greatly increase his outlays and expense and furnish no corresponding advantage, and for such purpose your orator never did and never would give or release a right of way across his said land: and your orator further avers, that damages have already been claimed by, and allowed to sundry owners of land lying west of your orator's said land along said road, and charges that the Commissioners of Highways of the Town of Delavan, neither at the time they laid out said road, and at no time since have ever paid the damages so claimed and assessed for the right of way, nor procured the right of way for said road from the said owners of land, nor have said owners of land released their claim to said damages, nor have said Commissioners of Highways ever opened said road or ordered the same to be opened, and the same is now enclosed over the whole length of the line of said road lying west from the said land of your orator, nor have the said Commissioners of Highways or the said Town ever raised the money to pay said damages but have continually refused so to do, and said road is treated as vacated and as a nullity under the Statute upon the entire length of the same lying west of the said land of your orator, and your orator charges and avers that the same is now vacated and a nullity by law for the reason if no other is required that five years will have elapsed from the time of laying out the same before the same can be opened as required by law, and that the same cannot be now lawfully opened for the reasons aforesaid until long after the lapse of the said five years, and all attempts to open the same or meddle with the property upon the line of the same as originally laid out are mere attempts to trespass without right or lawful authority, and so far as such attempts may be made upon the said land of your orator must greatly injure your orator and require your orator to bring a multiplicity of suits against such trespassers to the great detriment of the Court, and without furnishing any adequate remedy or compensation for the injury done to your orator and others through said trespasses and your orator charges that one Henry R. Greene, Joseph A. Patterson, and John Helmes, pretending to be acting as the Commissioners of Highways, of the Town of Delavan, and one John Snedeker pretending to be acting as Overseer of the Highway of Road District No. 6, in said Town of Delavan unlawfully combined and confederated together and with their agents, servants, aiders and abettors, threaten to and in pursuance of said purpose are about to enter into and upon the said land of your Orator and tear down and remove his fence, and break

up and destroy his crops thereon, contrary to the Law and to the irreparable injury of your orator, and in violation of the rights of your orator in this behalf, and as your orator is remediless except in a Court of Equity, to the end thereof your orator prays that the said Henry R. Greene, Joseph A. Patterson and John Holmes, Commissioners of Highways as aforesaid, and the said John Snedeker, Overseer of the Highways as aforesaid, and all their aiders, abettors, agents and servants, may be strictly enjoined from entering into or upon the said land of your orator, or any part thereof, and from in any way troubling or meddling with the fences or crops of your orator situated on said land, and from all attempts to open any enclosed field upon the said land of your orator, or otherwise opening or further attempting to open said road on said premises until the further order of this Court in the premises, and that they and each of them may be duly summoned to be and appear at the next Term of this Court, and full, true and perfect answer make to all and singular the allegations of this Bill, and on a hearing thereof, that your Honor will make said Injunction perpetual against them, and for such other and further order and decree in the premises as to your Honor may seem meet and proper, and as in duty bound your orator will ever pray, &c."

B. S. Prettyman,
Sol. for Compl't.

NATHANIEL W. GREEN.

STATE OF ILLINOIS,
Tazewell County,

ss. Nathaniel W. Green, the above complainant being first duly sworn according to law, on his oath says that the allegations in the foregoing Bill of Complaint are true in substance and in fact

Subscribed and sworn
to before me this 26th
day of June, A. D. 1862.
JAMES HARRIOTT."

NATHANIEL W. GREEN.

[p. 6.] Copy of Judge's Order for the issuing of Injunction.

[p.p. 7 & 8.] Copy of Preliminary Writ of Injunction with Sheriff's Return of Service.

[p. 9.] Copy of Chancery Summons returnable to the September Term, A. D., 1862, with Sheriff's Return of Service.

[p.p. 10 & 11.] Copy of Demurrer to the Bill.

[p. 12.] Copy of Judgment of the Circuit Court at the September Term, A. D., 1862, over-ruling the Demurrer and ordering the Injunction to be made perpetual.

[p. 13.] The errors assigned are :

1st. The Court erred in over-ruling the Demurrer.

2nd. The Court erred in ordering and adjudging that the Injunction be made perpetual.

A. BERGEN,
Attorney for Plaintiffs in Error.

Henry R. Greene
Et al

^{vs}
Nathaniel W. Green

Abstract of
Records

Filed April 19, 1864
J. Leland Clerk

SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

April Term, A. D. 1864.

HENRY R. GREENE, and al. }
 ^{vs.} }
NATHANIEL W. GREENE. }

BRIEF DEFENDANT IN ERROR.

I.

The bill being taken as true, presents the case of public officers, *colore officii*, attempting to open a public road through the enclosed and cultivated lands of complainant, under pretext of an assumed grant of right of way, no longer binding or in force—the conditions on which it was made having by the acts and default of such officers, or those they represent, failed and become impracticable.

This is a wrong to prevent which an injunction will lie, because—

- 1st. It aims to appropriate to the public the benefits to be derived from such grant, without rendering to the grantor the equivalent for which he bargained.
- 2d. The release having ceased to bind the complainant, he stood as though it had never been given, and his land could not be taken for the road without his consent, otherwise than by having his damages regularly assessed and paid, or provided for under the law.
- 3d. The injury threatened, proceeding from public officers acting under claim of right, and being permanent in its character, and tending to multiply lawsuits, is such as chancery will intervene by injunction to prevent. Where public officers are proceeding illegally under claim of right, to impair public or private rights, or where multiplicity of suits can be thereby prevented, an injunction will lie, especially if the wrong meditated is *continuing* in its nature and calculated to work permanent injury, and this though the remedy by action of trespass is also clear.

Mohawk & Hudson R. R. v. Archer, 6 Paige 85.
Hush v. Trustees Morden College, 1 Vesey Sen. 183.
Bellnap v. Bellnap, 2 John, Ch. R. 463.
Smith v. Bangs, 15 Ills. 399.
Green v. Oakes, 17 Ills 249, and cases cited.

II.

Unless a public road is *opened* within five years from the time it is laid out, it is *vacated* by operation of law. Sec. 17, act Feb. 27, '54, Purp. Stat. 1171.

The road in question had become practically vacated, and the attempt of the defendants below to open it was therefore unwarranted and illegal.

It was laid out June 27, '57. Up till June 26, '62, no move to open it had been made. It was inclosed its whole length of six miles, and damages were claimed and allowed the owners of lands along the route. The right of way was not obtained, nor damages released. No fund was raised to pay them, and the Commissioners and Town not only neglected, but *refused* to provide for their payment. As only one or at most two days remained, this made the opening of the road, as *laid out*, legally impracticable, even if not physically so; and was in fact a virtual abandonment of it, as a highway, by the public. The bill shows that it was so treated, and complainant was justified in averting an act on part of the defendants which could only prove mischievous and abortive. If not paid, the damages allowed must at least be *provided for* before the road can be opened. Art. 24, Township Organization, Purp. Stat. 1162 to 1167, inclusive: State v. C. & M. R. R. Co., 26 Ills. 436.

III.

Had two days more, at most, elapsed, all will admit the attempt to open the road would have been illegal, as the road would then have been *vacated*—a nullity under the law. Did beginning within the time cure the difficulty, so as to authorize completion afterwards? We conceive it did not.

The road is to be opened *within* five years. This means *the whole road*, not a part of it. The law intends to guard against vexation and public and private nuisance resulting from indefinitely protracting jobs of this kind, *after they are entered upon*, no less than the evils resulting from indefinite postponement after laying out, and before entering upon the work of opening the road. Hence its positive terms, *unless opened* within five years, the road "*shall be deemed to be vacated*."

COOPER & MOSS,
For Defendant in Error.

Green H. Green.
 Sept's Brief =

Filed April 30, 1864
 J. L. Green H.

Green H. Green is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

He is a native of the State of New York, and is now residing in the City of New York.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

HENRY R. GREENE <i>et al.</i> ,	}	<i>Error to Tazewell.</i>
<i>Plaintiffs in Error,</i>		
<i>vs.</i>		
NATHANIEL W. GREENE,		
<i>Defendant in Error.</i>		

PLAINTIFF'S BRIEF.

I.

The trespass, alleged to have been threatened in this case, is not destructive to the inheritance; those threatening it are not insolvent; the defendant's injury would not be irreparable; the defendant's right has not been established at law; and if he should be injured, he has an adequate remedy at law without any such impediment thereto as would require the extraordinary interposition of chancery, by writ of injunction.

Jerome vs. Ross, 7 John. Ch. 315.

II.

Having released the right of way, the defendant is placed in the same situation as if his damages had been legally assessed and paid, and he can not now object to the opening of the road.

Scates, Treat & Blackwell's Statutes, p. 354. Sec. 6.

III.

The bill undertakes to set up a failure of the consideration for which the release was given. No consideration is necessary to support a release of the right of way.

IV.

Prepayment of damages is not necessary. A road may be opened without such prepayment of damages.

Case *vs. Thompson*, 6 Wendell, 634.

V.

There is no allegation in the bill that the commissioners had not given complainant notice to move his fences. The pleading is to be taken mostly strongly against the pleader, and the court will presume that such notice was given; and if such notice was given, the commissioners might at any time afterwards proceed to open the road and remove the fences.

Mills vs. Thornton, 26 Ills. 300.
Scates, Treat & Blackwell's Statutes, p. 356, Sec. 24.

When an order establishing a road is admitted, the court will presume that the previous steps required by the statute have been taken.

Ferris vs. Ward, 4 Gilm. 499.
Dumoss vs. Frances, 15, Ill. 446.

VI.

The owner of land over which a road is proposed to be laid out must claim damages at the proper time. He must object in the first instance to the location of the road across his land, or he will be concluded from afterwards insisting upon damages, or objecting to the opening of the road.

County of Sangamon vs. Brown, 13 Ill. 212.
Taylor vs. Marcy, 25 Ill. 502.

VII.

This suit is premature. The five years from the time of laying out the road had not elapsed before this suit was brought; and but for the injunction in this case, it may be, that by the payment of damages and the consent of parties, the whole road would have been opened within the five years, and that the road would not have become vacated, and that the land would not have reverted to its original owners.

~~A. BELDEN &
BANGS & SHAW,~~

(over) ~~Attorneys for Plaintiffs in Error~~

VIII.

The defendant in error had the right to compel the Commissioners of Highways to open the road west of his land, and if he neglected so to do, he can not object, for that reason, to the opening of the road over his own land.

City of New York *vs.* Mapes, 6 Johns. Ch. 46.
City of New York *vs.* Dover Street, 18 Johns. 505.
Stafford *vs.* The Mayor, &c., of Albany, 6 Johns. 1.
Boxford *vs.* County Com. of Essex, 7 Pick. 337.

BANGS & SHAW AND
A. BERGEN,

Attorneys for Plaintiffs in Error.

SUPREME COURT,

Third Grand Division,

APRIL TERM THEREOF, A. D. 1864.

GREENE *et als.*
vs.
GREENE *et als.*

} Error to Tazewell.

BRIEF.

A. BERGEN,
Attorney for Plaintiffs.

Bangs Shaw

Filed April 21, 1864
J. Leland

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

HENRY R. GREENE <i>et al.</i> , <i>Plaintiffs in Error</i> , <i>vs.</i> NATHANIEL W. GREENE, <i>Defendant in Error.</i>	} <i>Error to Tazewell.</i>
---	-----------------------------

PLAINTIFF'S BRIEF.

I.

The trespass, alleged to have been threatened in this case, is not destructive to the inheritance; those threatening it are not insolvent; the defendant's injury would not be irreparable; the defendant's right has not been established at law; and if he should be injured, he has an adequate remedy at law without any such impediment thereto as would require the extraordinary interposition of chancery, by writ of injunction.

Jerome vs Ross, 7 John. Ch. 315.

II.

Having released the right of way, the defendant is placed in the same situation as if his damages had been legally assessed and paid, and he can not now object to the opening of the road.

Scates, Treat & Blackwell's Statutes, p. 354, Sec. 6.

III.

The bill undertakes to set up a failure of the consideration for which the release was given. No consideration is necessary to support a release of the right of way.

IV.

Prepayment of damages is not necessary. A road may be opened without such prepayment of damages.

Case vs. Thompson, 6 Wendell, 634.

V.

There is no allegation in the bill that the commissioners had not given complainant notice to move his fences. The pleading is to be taken mostly strongly against the pleader, and the court will presume that such notice was given; and if such notice was given, the commissioners might at any time afterwards proceed to open the road and remove the fences.

Mills vs. Thornton, 26 Ills. 300.
Scates, Treat & Blackwell's Statutes, p. 356, Sec. 24.

When an order establishing a road is admitted, the court will presume that the previous steps required by the statute have been taken.

Ferris vs. Ward, 4 Gilm. 499.
Dumoss vs. Frances, 15, Ill. 446.

VI.

The owner of land over which a road is proposed to be laid out must claim damages at the proper time. He must object in the first instance to the location of the road across his land, or he will be concluded from afterwards insisting upon damages, or objecting to the opening of the road.

County of Sangamon vs. Brown, 13 Ill. 212.
Taylor vs. Marcy, 25 Ill. 502.

VII.

This suit is premature. The five years from the time of laying out the road had not elapsed before this suit was brought; and but for the injunction in this case, it may be, that by the payment of damages and the consent of parties, the whole road would have been opened within the five years, and that the road would not have become vacated, and that the land would not have reverted to its original owners.

~~A. BERGEN &
RANGE SHAW,~~

~~Attorneys for Plaintiffs in Error.~~

(over)

VIII.

The defendant in error had the right to compel the Commissioners of Highways to open the road west of his land, and if he neglected so to do, he can not object, for that reason, to the opening of the road over his own land.

City of New York *vs.* Mapes, 6 Johns. Ch. 46.
City of New York *vs.* Dover Street, 18 Johns. 505.
Stafford *vs.* The Mayor, &c., of Albany, 6 Johns. 1.
Boxford *vs.* County Com. of Essex, 7 Pick. 337.

BANGS & SHAW AND
A. BERGEN,
Attornays for Plaintiffs in Error.

38 55

SUPREME COURT,

Third Grand Division,

APRIL TERM THEREOF, A. D. 1864.

GREENE *et al*:
vs.
GREENE *et als*. } Error to Tuzewell.

BRIEF.

A. BERGEN,
Attorney for Plaintiffs.

Bangs Shaw

Filed Apr. 21, 1864
J. Heard clk

State of Illinois, } In the Supreme Court.
 THIRD GRAND DIVISION. } ss. TO THE APRIL TERM, A. D. 1864.

HENRY R. GREENE, ET. AL., PLAINTIFFS IN ERROR, }
 VS. } ERROR
 NATHANIEL W. GREEN, DEFENDANT IN ERROR. } TO
 TAZEWELL.

Abstract of Record furnished by Plaintiffs.

This was a bill for an Injunction, by the defendant in error against the plaintiffs in error, filed in the Circuit Court of Tazewell County, June 26, A. D. 1862.

The following is a full copy of the bill :

[p. 1 to 6.] "To the Honorable JAMES HARRIOTT, Judge of the 21st Judicial Circuit of the State of Illinois, in Chancery sitting:

Humbly complaining sheweth unto your Honor, your orator, Nathaniel W. Green, a resident of the County of Tazewell and State of Illinois, that your orator is now, and has been for the space of more than five years next preceding the filing of this Bill, the owner in fee of the following described land, situated in the said Tazewell County, viz: The North-west quarter of Section number twenty-three in Township 22, North of Range Four, West of the third principal meridian, which land is now, and has been for the space of more than five years next preceding the filing of this Bill, in cultivation and enclosed with fences, and your orator further shows that on the 27th day of June, A. D. 1857, the Commissioners of Highways for the Town of Delavan, on the Petition of sundry voters of said Town, laid out a public road in said Town, and running entirely across said Town, commencing at the North-east corner of Section 24, in said town 22, North of Range 4, West of the third principal meridian, and thence running a westerly course on the sectional line between Sections 24 and 13, 23 and 14, 22 and 15, 21 and 16, 20 and 17, 18 and 19, to the West line of said town; and your orator avers that he at the time desired to have said public road so laid out and opened as it was laid out, that your orator might have a convenient and beneficial outlet from his said land over said public road in a westerly direction to two public roads lying west of his said land and running North and South from Springfield in the State of Illinois to the Cities of Pekin and Peoria in the same State, which last named cities are and were the only available market places for the produce of his said land, and which line of road would secure to your orator a better and more convenient road to and from said market places than he would have without said road was so laid out and opened, and your orator

avens that in consideration of the laying out of said public road as above alleged, and that said Commissioners would proceed immediately and open the same, he released to them the right of way over his said land, for said road, and he here avers that on no other consideration, and for no other road or purpose than is above alleged, did he ever release said right of way, or consent that a road might be opened on the North line of his said land so enclosed and cultivated as aforesaid, nor has any such road ever been opened, and he here avers that any attempt now at the opening of said road across his said land at all, and especially from the East end alone, and without opening it across the said Town to the West end of the road as so laid out, would without regard to the fact that the said road is now vacated by law, greatly harass and seriously injure your orator, greatly increase his outlays and expense and furnish no corresponding advantage, and for such purpose your orator never did and never would give or release a right of way across his said land: and your orator further avers, that damages have already been claimed by, and allowed to sundry owners of land lying west of your orator's said land along said road, and charges that the Commissioners of Highways of the Town of Delavan, neither at the time they laid out said road, and at no time since have ever paid the damages so claimed and assessed for the right of way, nor procured the right of way for said road from the said owners of land, nor have said owners of land released their claim to said damages, nor have said Commissioners of Highways ever opened said road or ordered the same to be opened, and the same is now enclosed over the whole length of the line of said road lying west from the said land of your orator, nor have the said Commissioners of Highways or the said Town ever raised the money to pay said damages but have continually refused so to do, and said road is treated as vacated and as a nullity under the Statute upon the entire length of the same lying west of the said land of your orator, and your orator charges and avers that the same is now vacated and a nullity by law for the reason if no other is required that five years will have elapsed from the time of laying out the same before the same can be opened as required by law, and that the same cannot be now lawfully opened for the reasons aforesaid until long after the lapse of the said five years, and all attempts to open the same or meddle with the property upon the line of the same as originally laid out are mere attempts to trespass without right or lawful authority, and so far as such attempts may be made upon the said land of your orator must greatly injure your orator and require your orator to bring a multiplicity of suits against such trespassers to the great detriment of the Court, and without furnishing any adequate remedy or compensation for the injury done to your orator and others through said trespasses and your orator charges that one Henry R. Greene, Joseph A. Patterson, and John Holmes, pretending to be acting as the Commissioners of Highways, of the Town of Delavan, and one John Snedeker pretending to be acting as Overseer of the Highway of Road District No. 6, in said Town of Delavan unlawfully combined and confederated together and with their agents, servants, aiders and abettors, threaten to and in pursuance of said purpose are about to enter into and upon the said land of your Orator and tear down and remove his fence, and break

up and destroy his crops thereon, contrary to the Law and the irreparable injury of your orator, and in violation of the rights of your orator in this behalf, and as your orator is remediless except in a Court of Equity, to the end thereof your orator prays that the said Henry R. Greene, Joseph A. Patterson and John Holmes, Commissioners of Highways as aforesaid, and the said John Snedeker, Overseer of the Highways as aforesaid, and all their aiders, abettors, agents and servants, may be strictly enjoined from entering into or upon the said land of your orator, or any part thereof, and from in any way troubling or meddling with the fences or crops of your orator situated on said land, and from all attempts to open any enclosed field upon the said land of your orator, or otherwise opening or further attempting to open said road on said premises until the further order of this Court in the premises, and that they and each of them may be duly summoned to be and appear at the next Term of this Court, and full, true and perfect answer make to all and singular the allegations of this Bill, and on a hearing thereof, that your Honor will make said Injunction perpetual against them, and for such other and further order and decree in the premises as to your Honor may seem meet and proper, and as in duty bound your orator will ever pray, &c."

B. S. Prettyman,
Sol. for Compl't.

NATHANIEL W. GREEN.

STATE OF ILLINOIS,
Tazewell County,

ss. Nathaniel W. Green, the above complainant being first duly sworn according to law, on his oath says that the allegations in the foregoing Bill of Complaint are true in substance and in fact

Subscribed and sworn
to before me this 26th
day of June, A. D. 1862.
JAMES HARRIOTT."

NATHANIEL W. GREEN.

- [p. 6.] Copy of Judge's Order for the issuing of Injunction.
- [p.p. 7 & 8.] Copy of Preliminary Writ of Injunction with Sheriff's Return of Service.
- [p. 9.] Copy of Chancery Summons returnable to the September Term, A. D., 1862, with Sheriff's Return of Service.
- [p.p. 10 & 11.] Copy of Demurrer to the Bill.
- [p. 12.] Copy of Judgment of the Circuit Court at the September Term, A. D., 1862, over-ruling the Demurrer and ordering the Injunction to be made perpetual.
- [p. 13.] The errors assigned are :
- 1st. The Court erred in over-ruling the Demurrer.
 - 2nd. The Court erred in ordering and adjudging that the Injunction be made perpetual.

A. BERGEN,
Attorney for Plaintiffs in Error.

Henry R. Greene
et al
4
 Nathaniel W. Green
Abstract of
Records

Filed April 19, 1864
J. L. G. & W.

STATE OF ILLINOIS, }
SUPREME COURT, }

ss. The People of the State of Illinois,

To the Clerk of the Circuit Court of Tazewell County - Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Tazewell County, before the Judge thereof, between

Nathaniel W. Green Complainant &

oplaintiff, and Henry R. Greene, Joseph A. Patterson
& John Holmes Commissions of Highways for the Town
of Delavan & John Suedaker Overseer of Highways
in said Town

defendants..., it is said manifest error hath intervened, to the injury of the
aforesaid Defendants

as we are informed by their complaints and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. JOHN D. CATON, Chief Justice of
our said Court, and the Seal thereof, at Ottawa, this
25th day of March
in the Year of Our Lord One Thousand Eight Hun-
dred and Sixty three.

L. Seland
Clerk of the Supreme Court.

In obedience to the within writ I have this
day made out and sent to the ^{City of the} Supreme
Court at Ottawa Illinois a complete transcript
of the record and proceedings of the plaintiff
and all matters touching the same
in our said Circuit Court of Taylor
County, Illinois and have properly
certified the same to said Supreme
Court under my seal this the
2 day of April A.D. 1863.

Geo H Harlow
Clerk of the Circuit Court
of Taylor County Illinois

38
55
Henry N. Green et al.
vs.
Charles W. Green

WRIT OF ERROR.

FILED April 19 A.D. 1864

C. C. Harlow
Clerk.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

HENRY R. GREENE <i>et al.</i> , Plaintiffs in Error, vs. NATHANIEL W. GREENE, Defendant in Error.	}	} Error to Tazewell.
---	---	----------------------

PLAINTIFF'S BRIEF.

I.

The trespass, alleged to have been threatened in this case, is not destructive to the inheritance; those threatening it are not insolvent; the defendant's injury would not be irreparable; the defendant's right has not been established at law; and if he should be injured, he has an adequate remedy at law without any such impediment thereto as would require the extraordinary interposition of chancery, by writ of injunction.

Jerome vs Ross, 7 John. Ch. 315.

II.

Having released the right of way, the defendant is placed in the same situation as if his damages had been legally assessed and paid, and he can not now object to the opening of the road.

Seates, Treat & Blackwell's Statutes, p. 354, Sec. 6.

III.

The bill undertakes to set up a failure of the consideration for which the release was given. No consideration is necessary to support a release of the right of way.

IV.

Prepayment of damages is not necessary. A road may be opened without such prepayment of damages.

Case vs. Thompson, 6 Wendell, 634.

V.

There is no allegation in the bill that the commissioners had not given complainant notice to move his fences. The pleading is to be taken mostly against the pleader, and the court will presume that such notice was given; and if such notice was given, the commissioners might at any time afterwards proceed to open the road and remove the fences.

Mills vs. Thornton, 26 Ills. 300.
Scates, Treat & Blackwell's Statutes, p. 356, Sec. 24.

When an order establishing a road is admitted, the court will presume that the previous steps required by the statute have been taken.

Ferris vs. Ward, 4 Gilm. 499.
Dun vs. Frances, 15, Ill. 446.

VI.

The owner of land over which a road is proposed to be laid out must claim damages at the proper time. He must object in the first instance to the location of the road across his land, or he will be concluded from afterwards insisting upon damages, or objecting to the opening of the road.

County of Sangamon vs. Brown, 13 Ill. 212.
Taylor vs. Marey, 25 Ill. 502.

VII.

This suit is premature. The five years from the time of laying out the road had not elapsed before this suit was brought; and but for the injunction in this case, it may be, that by the payment of damages and the consent of parties, the whole road would have been opened within the five years, and that the road would not have become vacated, and that the land would not have reverted to its original owners.

(over)

~~W. B. BANGS & SHAW,~~
~~for Plaintiffs in Error.~~

VIII.

The defendant in error had the right to compel the Commissioners of Highways to open the road west of his land, and if he neglected so to do, he can not object, for that reason, to the opening of the road over his own land.

City of New York *vs.* Mapes, 6 Johns. Ch. 46.
City of New York *vs.* Dover Street, 18 Johns. 505.
Stafford *vs.* The Mayor, &c., of Albany, 6 Johns. 1.
Boxford *vs.* County Com. of Essex, 7 Pick. 337.

BANGS & SHAW AND
A. BERGEN,

Attorneys for Plaintiffs in Error.

38

SUPREME COURT,

Third Grand Division,

APRIL TERM THEREOF, A. D. 1864.

GREENE et al's
vs.
GREENE et al's. } Error to Tuzigall.

BRIEF.

A. BERGEN,

Attorney for Plaintiffs. *✓*

Samuel Shaw

Filed April 21. 1864

L. Leland MR

L. Leland Esq.

Clark Supreme Court

Attaura. Ill.

Dear Sir,

In the case of Henry R. Greene et al vs Nathaniel W. Green, please inform me whether the seire facias to the defendant has been returned served. If it has not been so returned, please send me an alias Sei. fa. in the case. If any action was taken in the case at the last term please tell me what.

and much oblige

Very Respectfully Yours &c

A. Bergen

attys for peff-

Pekin Illinois

March 16. 1864

33

38

SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

April Term, A. D. 1864.

HENRY R. GREENE, and al. }
vs. }
NATHANIEL W. GREENE. }

BRIEF DEFENDANT IN ERROR.

I.

The bill being taken as true, presents the case of public officers, *colore officii*, attempting to open a public road through the enclosed and cultivated lands of complainant, under pretext of an assumed grant of right of way, no longer binding or in force—the conditions on which it was made having by the acts and default of such officers, or those they represent, failed and become inpracticable.

This is a wrong to prevent which an injunction will lie, because—

- 1st. It aims to appropriate to the public the benefits to be derived from such grant, without rendering to the grantor the equivalent for which he bargained.
- 2d. The release having ceased to bind the complainant, he stood as though it had never been given, and his land could not be taken for the road without his consent, otherwise than by having his damages regularly assessed and paid, or provided for under the law.
- 3d. The injury threatened, proceeding from public officers acting under claim of right, and being permanent in its character, and tending to multiply lawsuits, is such as chancery will intervene by injunction to prevent. Where public officers are proceeding illegally under claim of right, to impair public or private rights, or where multiplicity of suits can be thereby prevented, an injunction will lie, especially if the wrong meditated is *continuing* in its nature and calculated to work permanent injury, and this though the remedy by action of trespass is also clear.

Mohawk & Hudson R. R. v. Archer, 6 Paige 85.

Hush v. Trustees Morden College, 1 Vesey Sen. 183.

Belknap v. Belknap, 2 John, Ch. R., 463.

Smith v. Bangs, 15 Ills. 399.

Green v. Oakes, 17 Ills 249, and cases cited.

II.

Unless a public road is *opened* within five years from the time it is laid out, it is *vacated* by operation of law. Sec. 17, act Feb. 27, '54, Purp. Stat. 1171.

The road in question had become practically vacated, and the attempt of the defendants below to open it was therefore unwarranted and illegal.

It was laid out June 27, '57. Up till June 26, '62, no move to open it had been made. It was inclosed its whole length of six miles, and damages were claimed and allowed the owners of lands along the route. The right of way was not obtained, nor damages released. No fund was raised to pay them, and the Commissioners and Town not only neglected, but *refused* to provide for their payment. As only one or at most two days remained, this made the opening of the road, *as laid out*, legally impracticable, even if not physically so; and was in fact a virtual abandonment of it, as a highway, by the public. The bill shows that it was so treated, and complainant was justified in averting an act on part of the defendants which could only prove mischievous and abortive. If not paid, the damages allowed must at least be *provided for* before the road can be opened. Art. 24, Township Organization, Purp. Stat. 1162 to 1167, inclusive; State v. C. & M. R. R. Co., 26 Ills. 436.

III.

Had two days more, at most, elapsed, all will admit the attempt to open the road would have been illegal, as the road would then have been *vacated*—a nullity under the law. Did beginning within the time cure the difficulty, so as to authorize completion afterwards? We conceive it did not.

The road is to be opened *within* five years. This means *the whole road*, not a part of it. The law intends to guard against vexation and public and private nuisance resulting from indefinitely protracting jobs of this kind, *after they are entered upon*, no less than the evils resulting from indefinite postponement after laying out, and before entering upon the work of opening the road. Hence its positive terms,—*unless opened within five years*, the road "*shall be deemed to be vacated*."

COOPER & MOSS,
For Defendant in Error.

38 =
never
no.
Green ~~the~~
Sept 3 Brief

GOOPER & MOORE

State of Illinois, } In the Supreme Court.
THIRD GRAND DIVISION. } ss. TO THE APRIL TERM, A. D. 1864.

HENRY R. GREENE, ET. AL., PLAINTIFFS IN ERROR,

VS.

NATHANIEL W. GREEN, DEFENDANT IN ERROR.

ERROR
TO
TAZEWELL.

Abstract of Record furnished by Plaintiffs.

This was a bill for an Injunction, by the defendant in error against the plaintiffs in error, filed in the Circuit Court of Tazewell County, June 26, A. D. 1862.

The following is a full copy of the bill :

[p. 1 to 6.] "To the Honorable JAMES HARRIOTT, Judge of the 21st Judicial Circuit of the State of Illinois, in Chancery sitting:

Humbly complaining sheweth unto your Honor, your orator, Nathaniel W. Green, a resident of the County of Tazewell and State of Illinois, that your orator is now, and has been for the space of more than five years next preceding the filing of this Bill, the owner in fee of the following described land, situated in the said Tazewell County, viz: The North-west quarter of Section number twenty-three in Township 22, North of Range Four, West of the third principal meridian, which land is now, and has been for the space of more than five years next preceding the filing of this Bill, in cultivation and enclosed with fences, and your orator further shows that on the 27th day of June, A. D. 1857, the Commissioners of Highways for the Town of Delavan, on the Petition of sundry voters of said Town, laid out a public road in said Town, and running entirely across said Town, commencing at the North-east corner of Section 24, in said town 22, North of Range 4, West of the third principal meridian, and thence running a westerly course on the sectional line between Sections 24 and 13, 23 and 14, 22 and 15, 21 and 16, 20 and 17, 18 and 19, to the West line of said town; and your orator avers that he at the time desired to have said public road so laid out and opened as it was laid out, that your orator might have a convenient and beneficial outlet from his said land over said public road in a westerly direction to two public roads lying west of his said land and running North and South from Springfield in the State of Illinois to the Cities of Pekin and Peoria in the same State, which last named cities are and were the only available market places for the produce of his said land, and which line of road would secure to your orator a better and more convenient road to and from said market places than he would have without said road was so laid out and opened, and your orator

avens that in consideration of the laying out of said public road as above alleged, and that said Commissioners would proceed immediately and open the same, he released to them the right of way over his said land, for said road, and he here avers that on no other consideration, and for no other road or purpose than is above alleged, did he ever release said right of way, or consent that a road might be opened on the North line of his said land so enclosed and cultivated as aforesaid, nor has any such road ever been opened, and he here avers that any attempt now at the opening of said road across his said land at all, and especially from the East end alone, and without opening it across the said Town to the West end of the road as so laid out, would without regard to the fact that the said road is now vacated by law, greatly harass and seriously injure your orator, greatly increase his outlays and expense and furnish no corresponding advantage, and for such purpose your orator never did and never would give or release a right of way across his said land: and your orator further avers, that damages have already been claimed by, and allowed to sundry owners of land lying west of your orator's said land along said road, and charges that the Commissioners of Highways of the Town of Delavan, neither at the time they laid out said road, and at no time since have ever paid the damages so claimed and assessed for the right of way, nor procured the right of way for said road from the said owners of land, nor have said owners of land released their claim to said damages, nor have said Commissioners of Highways ever opened said road or ordered the same to be opened, and the same is now enclosed over the whole length of the line of said road lying west from the said land of your orator, nor have the said Commissioners of Highways or the said Town ever raised the money to pay said damages but have continually refused so to do, and said road is treated as vacated and as a nullity under the Statute upon the entire length of the same lying west of the said land of your orator, and your orator charges and avers that the same is now vacated and a nullity by law for the reason if no other is required that five years will have elapsed from the time of laying out the same before the same can be opened as required by law, and that the same cannot be now lawfully opened for the reasons aforesaid until long after the lapse of the said five years, and all attempts to open the same or meddle with the property upon the line of the same as originally laid out are mere attempts to trespass without right or lawful authority, and so far as such attempts may be made upon the said land of your orator must greatly injure your orator and require your orator to bring a multiplicity of suits against such trespassers to the great detriment of the Court, and without furnishing any adequate remedy or compensation for the injury done to your orator and others through said trespasses and your orator charges that one Henry R. Greene, Joseph A. Patterson, and John Holmes, pretending to be acting as the Commissioners of Highways, of the Town of Delavan, and one John Snedeker pretending to be acting as Overseer of the Highway of Road District No. 6, in said Town of Delavan unlawfully combined and confederated together and with their agents, servants, aiders and abettors, threaten to and in pursuance of said purpose are about to enter into and upon the said land of your Orator and tear down and remove his fence, and break

up and destroy his crops thereon, contrary to the Law and to the irreparable injury of your orator, and in violation of the rights of your orator in this behalf, and as your orator is remediless except in a Court of Equity, to the end thereof your orator prays that the said Henry R. Greene, Joseph A. Patterson and John Holmes, Commissioners of Highways as aforesaid, and the said John Snedeker, Overseer of the Highways as aforesaid, and all their aiders, abettors, agents and servants, may be strictly enjoined from entering into or upon the said land of your orator, or any part thereof, and from in any way troubling or meddling with the fences or crops of your orator situated on said land, and from all attempts to open any enclosed field upon the said land of your orator, or otherwise opening or further attempting to open said road on said premises until the further order of this Court in the premises, and that they and each of them may be duly summoned to be and appear at the next Term of this Court, and full, true and perfect answer make to all and singular the allegations of this Bill, and on a hearing thereof, that your Honor will make said Injunction perpetual against them, and for such other and further order and decree in the premises as to your Honor may seem meet and proper, and as in duty bound your orator will ever pray, &c."

B. S. Prettyman,
Sol. for Compl't. }

NATHANIEL W. GREEN.

STATE OF ILLINOIS,
Tazewell County, }

ss. Nathaniel W. Green, the above complainant being first duly sworn according to law, on his oath says that the allegations in the foregoing Bill of Complaint are true in substance and in fact

Subscribed and sworn
to before me this 26th
day of June, A. D. 1862.
JAMES HARRIOTT." }

NATHANIEL W. GREEN.

- [p. 6.] Copy of Judge's Order for the issuing of Injunction.
- [p.p. 7 & 8.] Copy of Preliminary Writ of Injunction with Sheriff's Return of Service.
- [p. 9.] Copy of Chancery Summons returnable to the September Term, A. D., 1862, with Sheriff's Return of Service.
- [p.p. 10 & 11.] Copy of Demurrer to the Bill.
- [p. 12.] Copy of Judgment of the Circuit Court at the September Term, A. D., 1862, over-ruling the Demurrer and ordering the Injunction to be made perpetual.
- [p. 13.] The errors assigned are :
- 1st. The Court erred in over-ruling the Demurrer.
 - 2nd. The Court erred in ordering and adjudging that the Injunction be made perpetual.

A. BERGEN,
Attorney for Plaintiff's in Error.

Henry R. Greene
et al
Nathaniel W. Green

Abstract of
Record

Filed April 19, 1864
J. S. Green

SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

April Term, A. D. 1864.

HENRY R. GREENE, and al. }
vs. }
NATHANIEL W. GREENE. }

BRIEF DEFENDANT IN ERROR.

I.

The bill being taken as true, presents the case of public officers, *colore officii*, attempting to open a public road through the enclosed and cultivated lands of complainant, under pretext of an assumed grant of right of way, no longer binding or in force—the conditions on which it was made having by the acts and default of such officers, or those they represent, failed and become impracticable.

This is a wrong to prevent which an injunction will lie, because—

- 1st. It aims to appropriate to the public the benefits to be derived from such grant, without rendering to the grantor the equivalent for which he bargained.
- 2d. The release having ceased to bind the complainant, he stood as though it had never been given, and his land could not be taken for the road without his consent, otherwise than by having his damages regularly assessed and paid, or provided for under the law.
- 3d. The injury threatened, proceeding from public officers acting under claim of right, and being permanent in its character, and tending to multiply lawsuits, is such as chancery will intervene by injunction to prevent. Where public officers are proceeding illegally under claim of right, to impair public or private rights, or where multiplicity of suits can be thereby prevented, an injunction will lie, especially if the wrong meditated is *continuing* in its nature and calculated to work permanent injury, and this though the remedy by action of trespass is also clear.

Mohawk & Hudson R. R. v. Archer, 6 Paige 85.

Hush v. Trustees Morden College, 1 Vesey Sen. 183.

Bellnap v. Bellnap, 2 John, Ch. R., 463.

Smith v. Bangs, 15 Ills. 399.

Green v. Oakes, 17 Ills. 249, and cases cited.

II.

Unless a public road is *opened* within five years from the time it is laid out, it is *vacated* by operation of law. Sec. 17, act Feb. 27, '54, Purp. Stat. 1171.

The road in question had become practically vacated, and the attempt of the defendants below to open it was therefore unwarranted and illegal.

It was laid out June 27, '57. Up till June 26, '62, no move to open it had been made. It was inclosed its whole length of six miles, and damages were claimed and allowed the owners of lands along the route. The right of way was not obtained, nor damages released. No fund was raised to pay them, and the Commissioners and Town not only neglected, but *refused* to provide for their payment. As only one or at most two days remained, this made the opening of the road, *as laid out*, legally impracticable, even if not physically so; and was in fact a virtual abandonment of it, as a highway, by the public. The bill shows that it was so treated, and complainant was justified in averting an act on part of the defendants which could only prove mischievous and abortive. If not paid, the damages allowed must at least be *provided for* before the road can be opened. Art. 24, Township Organization, Purp. Stat. 1162 to 1167, inclusive: State v. C. & M. R. R. Co., 26 Ills. 436.

III.

Had two days more, at most, elapsed, all will admit the attempt to open the road would have been illegal, as the road would then have been *vacated*—a nullity under the law. Did beginning within the time cure the difficulty, so as to authorize completion afterwards? We conceive it did not.

The road is to be opened within five years. This means *the whole road*, not a part of it. The law intends to guard against vexation and public and private nuisance resulting from indefinitely protracting jobs of this kind, *after they are entered upon*, no less than the evils resulting from indefinite postponement after laying out, and before entering upon the work of opening the road. Hence its positive terms, *unless opened within five years*, the road "*shall be deemed to be vacated*."

COOPER & MOSS,
For Defendant in Error.

W. H. Smith 30 1864
J. H. Smith

2205 3 111099
2205 3 111099

SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

April Term, A. D. 1864.

HENRY R. GREENE, and al. }
vs. }
NATHANIEL W. GREENE. }

BRIEF DEFENDANT IN ERROR.

I.

The bill being taken as true, presents the case of public officers, *colore officii*, attempting to open a public road through the enclosed and cultivated lands of complainant, under pretext of an assumed grant of right of way, no longer binding or in force—the conditions on which it was made having by the acts and default of such officers, or those they represent, failed and become impracticable.

This is a wrong to prevent which an injunction will lie, because—

- 1st. It aims to appropriate to the public the benefits to be derived from such grant, without rendering to the grantor the equivalent for which he bargained.
- 2d. The release having ceased to bind the complainant, he stood as though it had never been given, and his land could not be taken for the road without his consent, otherwise than by having his damages regularly assessed and paid, or provided for under the law.
- 3d. The injury threatened, proceeding from public officers acting under claim of right, and being permanent in its character, and tending to multiply lawsuits, is such as chancery will intervene by injunction to prevent. Where public officers are proceeding illegally under claim of right, to impair public or private rights, or where multiplicity of suits can be thereby prevented, an injunction will lie, especially if the wrong meditated is *continuing* in its nature and calculated to work permanent injury, and this though the remedy by action of trespass is also clear.

Mohawk & Hudson R. R. v. Archer, 6 Paige 85.
Hush v. Trustees Morden College, 1 Vesey Sen. 183.
Belknap v. Belknap, 2 John, Ch. R. 463.
Smith v. Bangs, 15 Ills. 399.
Green v. Oakes, 17 Ills 249, and cases cited.

II.

Unless a public road is *opened* within five years from the time it is laid out, it is *vacated* by operation of law. Sec. 17, act Feb. 27, '54, Purp. Stat. 1171.

The road in question had become practically vacated, and the attempt of the defendants below to open it was therefore unwarranted and illegal.

It was laid out June 27, '57. Up till June 26, '62, no move to open it had been made. It was inclosed its whole length of six miles, and damages were claimed and allowed the owners of lands along the route. The right of way was not obtained, nor damages released. No fund was raised to pay them, and the Commissioners and Town not only neglected, but *refused* to provide for their payment. As only one or at most two days remained, this made the opening of the road, *as laid out*, legally impracticable, even if not physically so; and was in fact a virtual abandonment of it, as a highway, by the public. The bill shows that it was so treated, and complainant was justified in averting an act on part of the defendants which could only prove mischievous and abortive. If not paid, the damages allowed must at least be *provided for* before the road can be opened. Art. 24, Township Organization, Purp. Stat. 1162 to 1167, inclusive: State v. C. & M. R. R. Co., 26 Ills. 436.

III.

Had two days more, at most, elapsed, all will admit the attempt to open the road would have been illegal, as the road would then have been *vacated*—a nullity under the law. Did beginning within the time cure the difficulty, so as to authorize completion afterwards? We conceive it did not.

The road is to be opened *within* five years. This means *the whole road*, not a part of it. The law intends to guard against vexation and public and private nuisance resulting from indefinitely protracting jobs of this kind, *after they ore entered upon*, no less than the evils resulting from indefinite postponement after laying out, and before entering upon the work of opening the road. Hence its positive terms, *unless opened* within five years, the road "*shall be deemed to be vacated*."

COOPER & MOSS,
For Defendant in Error.

38
Greene Val.
N.S.

Green

Spts Brief-

COOPER & MOSE

the road is a very low elevated to be exactly

the road. Hence in position some miles above the river
improvement after passing out and before entering upon the road of open
after this was observed about as low then the road resulting from the
private residence resulting from the high the surrounding top of this road
not a part of it. The low stretches to some extent across the river and
the road is to be opened by the river. This means the whole road

highly, as to the whole completion of the road. It is necessary to the
road is a very low elevated to be exactly the road. Hence in position
some miles above the river improvement after passing out and before
entering upon the road of open after this was observed about as low
then the road resulting from the private residence resulting from the high
the surrounding top of this road not a part of it. The low stretches to
some extent across the river and the road is to be opened by the river.

III.

at the 2nd M. H. Co. 28th 1864

at the 2nd M. H. Co. 28th 1864

at the 2nd M. H. Co. 28th 1864

at the 2nd M. H. Co. 28th 1864

at the 2nd M. H. Co. 28th 1864

at the 2nd M. H. Co. 28th 1864

at the 2nd M. H. Co. 28th 1864

at the 2nd M. H. Co. 28th 1864

at the 2nd M. H. Co. 28th 1864

at the 2nd M. H. Co. 28th 1864

at the 2nd M. H. Co. 28th 1864

Filed Apr 30 1864
S. L. and M.

STATE OF ILLINOIS,
SUPREME COURT.

} ss. The People of the State of Illinois,

To the Sheriff of Jazewell County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgments of a plea which was in the Circuit Court of Jazewell County, before the Judge thereof, between Nathaniel W. Green

plaintiff, and Henry R. Green, Joseph A. Patterson Patterson & John Holmes Commissioners of Highways for the Town of Delavan & John Sneider overseer of Highways for said town defendant, it is said that manifest error hath intervened, to the injury of the said defendants

as we are informed by their complainant the record and proceedings of which said judgments we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: ~~as we have heretofore commanded you~~ Therefore, We Command You, That by good and lawful men of your County, you give notice to the said Nathaniel W. Green

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Nathaniel W. Green

notice, together with this writ.

Proctery to Walter
Witness, The Hon. John A. Eaton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 17th day of March in the year of our Lord One Thousand Eight Hundred and Sixty-four.

L. Leland

Clerk of the Supreme Court.

J. B. Rice Deputy

I have this day served, the within writ upon the
within named Nathaniel W. Green by reading the same
to him and by delivering him a true copy of
the same the Towseville County Illinois, on
the 13th day of April 1864
James S. Hawkins
Sheriff of Towseville County
by A. W. Stone Deputy.

38

Henry H. Green et al.

No.

vs.

Nathaniel W. Green

SCIRE FACIAS.

Amount, \$

FILED... April 19... A. D. 1864

V. Deland Clerk.

Amoy & injure ~~the~~ complainant, without giving him the
benefits contemplated when he made the grant, and
without which benefits the grant would not have been
made = That the lands west of complainant are well
enclosed = That no order to open the road has yet been made
That damages have been claimed & allowed the owners
along its route, which have not been paid nor released
nor the right of way secured And that the Commissioners
of Highways, & said Town of Delaram, have not raised the
money to pay said damages, & refuse to do so. That the
road is treated as vacated, & is in fact vacated, for
the reason that it is now impracticable to open it
as laid out, within the five years limited by law.

That ^{such} Septs, & Commissioners &c. are about to enter com-
plainant's land, remove fences, destroy crops &c., and that
in doing so they will work irreparable injury to complainant.

It is not expressly stated that said Commissioners & Over-
seen intend to enter properly to open said road; but from
the tenor of the Bill, this doubtless may be assumed =

The Bill does not lack Equity = But for the
grant of right of way, the Commissioners and overseen
of Highways had, of course, no right to enter his land
for any purpose. The grant being on condition,
~~and not in fee~~ ~~against complainant~~

It would be unfair to complainant to treat this grant
otherwise than as made upon conditions compliance
with which is essential to its binding force upon him =
One of these conditions, to wit, that the Commissioners
should proceed immediately to open the road, had

Not been complied with in any reasonable sense; and the other, that the road should be opened through, so as to connect with the Springfield, Pekin & Beoria Roads, had become impracticable =

On the former of these points we remark, that while we do not suppose any very rigid rule, as to time, is to be applied to such cases, yet it can hardly be deemed a compliance at all, with an engagement to proceed immediately with the business of opening the road, to allow the whole five years, within a day or two, to elapse, without moving in the matter, after the first action taken; all of which was doubtless preliminary ^{to}, or contemporaneous with this grant - and not only so, but according to the Bill, the Commissioners and Town, were, during the intervening time, actually in the attitude of hostility to the opening of the road, by refusing to pay the damages alleged, or raise the necessary funds for that purpose =

On the latter point, ~~we refer~~ ^{after referring} to suggestions in printed brief -

The Bill avers another thing, which we note in this connection - to wit - that no order for opening the road was ever made - Without knowing positively what the pleader intended by this averment, we assume that he intended to allege that no order, direction or notice, had been given to the owners of land along the route of the road, to remove their fences & open it - This, we think, is the force of the averment from what immediately follows viz: "And the same is now enclosed over the whole length of the

"line of said road lying west from the said land of your
"creator", and again, "said road is treated as vacated
"and as a nullity under the statute, upon the entire
"length of the same lying west of the said land of
"your creator". And so treated doubtless, as well
"because notice to remove the fences & open the road
~~had not been given~~ through these enclosed lands,
"had not been given, and it was now too late to
"do so, as because the damages assessed were
"not paid, nor provision made for them, and
"that the commissioners & Town, refused to raise
"the money for that purpose = If right in
"our view, and the argument is deemed suffi-
"cient to set forth a want of notice on the part
"of the commissioners, to remove the fences a-
"long the line of the road, it makes a point
"which it seems to us is ^{material in} ~~conclusive~~ of the case.
"For the commissioners could not enter upon
"these ^{enclosed} lands, to ^{remove fences &} open the road through them, with-
"out sixty days previous notice to the owners, or
"occupants, (see. 24, Act. 24, Town ^{org.} ~~org.~~ Purp. Stat. 1166) and
"it will not be contended that to give such notice one
"or two days before ~~the~~ the end of the five years ~~would~~
"would authorize the commissioners &c. afterwards to
"enter & open the road =

If the case of *Shute vs. Ch. & Milb. R. R.* 26 W. 436, be not deemed to have settled the point that payment of damages need not precede the opening of the road, we would like to add a word in passing on the hearing of

Constitutional clause on that question, in reply to the point made in Jeffs' Brief - The declaration that "no man's property shall be taken or applied to public use without just compensation being made" indicates, as it ~~seems~~ to us, more than a promise, or provision for payment in the future; and the more especially, from the connection. The entire clause names two things, as limitations on the power to take & apply private property to public use - 1st Consent of Representatives in the General Assembly, and 2nd Just Compensation Made - The former of these, in other words, appropriate legislation, we assume to be a condition precedent, in every case. And under the rule, Modestus a. decid, why not the latter? Must not the same principles of construction & criticism apply to both?

On the 2nd point made in Jeffs' Brief, we ~~have only to remark~~, that if our views, as expressed in this & printed brief, are correct, the ~~so~~ called release is no longer binding on Defendant, and he is therefore reinstated in all his rights, as though the release had never been given, and must have his damages assessed, or a fair opportunity to claim them given him, before his land can be taken for said road. ~~Furthermore~~

But affirming that such release is still in force against him, that is not a reason why he should be precluded from holding the public, for whose benefit ~~to~~ it was granted, to a fair compliance with the terms on which alone the grant was made; or, on the other hand, if such compliance has become ~~legally~~ impracticable, enjoining its enforcement against himself =

It is not seen that the position affirmed for Dept ^{in Error} ~~the~~ Under head No. 3 of p 111 of Brief is well met = Whether true or not that "No Consideration is necessary to support a release of the right of way," don't prove that when ^{such} a release is made for a consideration, that consideration can be rightfully withheld, and the release still insisted on by the party withholding it =

Neither is it supposed there is anything in Point No. 8. calling for special remark = Granting that Dept in Error might have compelled the commissioners to go on & open the road, was that any more or other than a right or privilege the law extended to him? And is his failure to exert a privilege intended for his benefit to justify the commissioners in availing themselves of their own

default to work him an injury? And can they
from that fact, proceed to do what otherwise they
would have no authority to do, to wit - open a part
only of the road, when the law requires them to ~~open~~
open the whole or none? =

The other points taken by Jeffs in Error,
so far as Material, are supposed to be suf-
ficiently answered = all which is res-
pectfully submitted =

Cooper & Mass
Atty's for Opt
in Error =

Ottawa April 29/64 =

38
Henry R. Greene Val.
55
Co. =
Nathaniel W. Green

Argument for
Sept in error =

Filed April 20. 1864
L. Leland
Clerk

1
Meas.

To a Term of the Circuit Court
begun and held at the Court House in
the City of Pekin within and for the County
of Tazewell and State of Illinois, on the
first Monday of the month of September
A. D. 1862. Present, Honorable James Harriott
Judge of the 21st Judicial Circuit of the
State of Illinois, composed of the Counties
of Mason, Tazewell &c. Chairman.
William H. Sheriff and George A.
Harlow, Clerk.

Be it remembered, that on the 26th day of
June A. D. 1862, a Bill for Injunction was filed in the
office of the Clerk of the Circuit Court of said County,
^{on the signature of the petitioner,}
which said Bill is in the words and figures following,
to wit:

B
1.

To the Honorable James Harriott Judge
of the 21st Judicial Circuit of the State of Illinois, in
Chancery sitting.

Humbly complaining sheweth unto
your Honor, your Orator Nathaniel W. Green a resident
of the County of Tazewell and State of Illinois - that your
Orator is now and has been for the space of more than five
years next preceding the filing of this Bill the owner in fee
of the following described land situated in said Tazewell
County, viz: The North west quarter of Section number
twenty three in Township 22, North of Range four West

„ of the third principal meridian, which land is now
 „ and has been for the space of more than five years next
 „ preceding the filing of this Bill in cultivation and
 „ enclosed with fences. and your orator further shows
 „ that on the 27th day of June A.D. 1857. the Commissioners
 „ of Highways for the Town of Pileoran on the Petition of
 „ sundry voters of said Town. laid out a public road in
 „ said Town. and running entirely across said Town.
 „ commencing at the North east corner of Section 24.
 „ in said Town 22. North of Range 4. West of the third
 „ principal meridian, and thence running a westerly
 „ course on the sectional line between Sections 24 and 13.
 „ 23 and 14. - 22 and 15. - 21. and 16. - 20 and 17. - 18. and 19.
 „ to the West line of said Town - and your Orator avers
 „ that he at the time desired to have said public road so
 „ laid out, and opened as it was laid out, that your orator
 „ might have a convenient and beneficial outlet from
 „ his said land over said public road in a westerly
 „ direction to two public roads lying West of his said land
 „ and running North and South from Springfield in
 „ the State of Illinois to the Cities of Peoria and St. Louis in
 „ the same State, which last named cities are and were the
 „ only available market places for the produce of his said land.
 „ and which line of road would secure to your orator a
 „ better and more convenient road to and from said
 „ market places, than he would have without said road.
 „ was so laid out and opened, and your Orator avers that
 „ in consideration of the laying out of said public road

" as above alleged and that said Commissioners
" would proceed immediately and open the same, he
" released to them the right of way over his said land, for
" said road, and he here avers that on no other consideration
" and for no other road or purpose than is above alleged
" did he ever release said right of way or consent that
" a road might be opened on the North line of his said
" land so enclosed and cultivated as aforesaid, nor has
" any such road ever been opened, and he here avers that
" any attempt now at the opening of said road across his
" said land at all, and especially from the East end alone
" and without opening it across the said Town to the West end
" of the road as so laid out, would without regard to the fact
" that the said road is now vacated by law, greatly harass-
" and seriously injure your Orator, greatly increase his
" outlays and expense and furnish ~~no~~ no corresponding
" advantage, and for such purpose your Orator never did
" and never would give or release a right of way across
" his said land: And your Orator further avers, that
" damages have already been claimed by, and allowed
" to sundry owners of land lying west of your Orator's
" said land along said road, and charges that the Com-
" missioners of Highways of the Town of Delavan neither
" at the time they laid out said road, and at no time
" since have ever paid the damages so claimed and
" assessed for the right of way, nor procured the right of
" way for said road from the said owners of land, nor
" have said owners of land released their claim to said damages
" nor have said Commissioners of Highways ever opened

„ said road or ordered the same to be opened and the same
„ is now enclosed over the whole length of the line of said
„ road lying west from the said land of your Orator, nor
„ have the said Commissioners of Highways or the said
„ Town ever raised the money to pay said damages but
„ have continually refused so to do, and said road is situated
„ as vacated and as a nullity under the Statute upon the
„ entire length of the same lying West of the said land
„ of your orator, and your Orator charges and avers that
„ the same is now vacated and a nullity by law for the
„ reason if no other is required that five years will have
„ elapsed from the time of laying out the same before the
„ same can be opened as required by law, and that the
„ same cannot be now lawfully be opened for the reasons
„ aforesaid until long after the lapse of the said five years,
„ and all attempts to open the same or meddle with the
„ property upon the line of the same as originally laid out
„ are mere attempts to trespass without right or lawful
„ authority, and so far as such attempts may be made
„ upon the said land of your Orator must greatly
„ injure your Orator and require your Orator to bring
„ a multiplicity of suits against such trespassers, to
„ the great detriment of the Court, and without furnishing
„ any adequate remedy or compensation for the injury
„ done to your Orator and others through said trespasses
„ And your Orator charges that one Henry R. Greene,
„ Joseph A. Patterson, and John Holmes, pretending to be
„ acting as the Commissioners of Highways of the Town
„ of Pelham, and one John Smelter pretending to be acting

as Overseer of the Highway of Road District No. 6, in
said Town of Orleans unlawfully combined and
confederated together and with their agents, servants,
aiders and abettors threaten to and in pursuance of said
purpose are about to enter into and upon the said land
of your Orator and tear down and remove his fence and
break up and destroy his crops thereon, contrary to the
Law and to the irreparable injury of your Orator and
in violation of the rights of your Orator in this behalf.
And as your Orator is remediless except in a Court of
Equity, to the end thereof your Orator prays that the
said Henry A. Greene, Joseph A. Patterson and John
Holmes Commissioners of Highways as aforesaid and
the said John Spedden & Overseer of the Highways as aforesaid, and
all their aiders, abettors, agents and servants may be
strictly enjoined from entering into or upon the said
land of your Orator, or any part thereof and from
in any way troubling or meddling with the fences or
crops of your Orator situated on said land, and from
all attempts to open any enclosed field upon the said
land of your Orator, or otherwise opening or further
attempting to open said road on said premises until
the further order of this Court in the premises, and that
they and each of them may be duly summoned to be
and appear at the next Term of this Court, and full,
true, and perfect answer make to all and singular
the allegations of this Bill, and in a hearing thereof,
that your Honor will make said Injunction perpetual
against them, and for such other and further order
and decree in the premises as to your Honor may seem

meet and proper, and as in duty bound your
 Obedient servant
 B. B. Puttyman

Nathaniel W. Green

X B. Sol for Compt

State of Illinois } s. Nathaniel W. Green the above
 Bazwell County } complainant being first duly
 sworn according to law on his oath says that the
 allegations in the foregoing Bill of Complaint are
 true in substance and in fact.

Subscribed and sworn
 to before me this 26th day
 of June A. D. 1862,
 James Harriott

Nathaniel W. Green

State of Illinois }
 Bazwell County } Let the writ of injunction issue
 as prayed for in the foregoing bill where complainant
 shall have filed a bond in the sum of Three hundred
 Dollars conditioned as the law requires with H. Don
 Maas as security.

To
 Geo. H. Karlow Clerk

James Harriott

Now afterwards, to wit: on the same day, a writ
 of Injunction and summons was issued from the office
 of the Clerk of the Circuit Court of said County, which
 said writ of injunction and said summons are in the
 words and figures following, to wit:—

" State of Illinois }
" Tazewell County }
"

" The People of the State of Illinois, to
" Henry R. Greene, Joseph A. Patterson and John Holmes
" Commissioners of Highways for the Town of Pelican
" Tazewell County Illinois, and John Brediker Coroner
" of the Highways of said Town, and your aiders, abettors
" agents and servants, Greeting:

" Whereas Nathaniel H.
" Green complainant has lately exhibited his Bill of Complaint
" to the Hon James Harriott Judge of the 21st Judicial
" Circuit of the State of Illinois, against you the said
" Henry Greene, Joseph A. Patterson, John Holmes and
" John Brediker, to be relieved touching the matters and
" things in said Bill complained, and which said Bill
" is still pending in our said Circuit Court for Tazewell
" County Illinois on the Chancery side thereof.

" And therefore
" in consideration of the premises and the particulars
" matters and things in said Bill contained, we do
" strictly enjoin and command you the said Henry
" R. Greene, Joseph A. Patterson and John Holmes
" Commissioners of Highways as aforesaid, and the
" said John Brediker Coroner of the Highways as
" aforesaid, and your aiders, abettors, agents and
" servants, that you, and each and every of you, do
" from henceforth absolutely and entirely desist from
" entering into or upon the Arch west quarter of Section
" No. 23, in Township 22, North of Range 4, West of the 3^d

8 principal meridian in Tazewell County, Illinois, or
any part thereof, or from in any way troubling or
meddling with the fences or crops of the said Nathanial
H. Green situated on said land, or from all attempts to
open any enclosed field upon the said land, or otherwise
opening or further attempting to open the road com-
mencing at the N.E. corner of Section 24, Township 22,
Range 4. West of the 3^d P.M. thence running a westerly
course on the Section line between Sections 24 & 13-23 & 14,
22 & 15-21 & 16-20 & 17-18 & 19 to the West line of said Town.
on said N.W. 1/4 Section 23, Township 22, N. R. 4. West
of the 3^d P.M. until our said Court shall make other
order to the contrary, and hereof fail not under
penalty of what the law directs.

Witness George A. Harlow Clerk of
the Circuit Court of said County, and
the seal thereof hereto affixed this 26th
day of June A.D. 1862.

Seal
Geo A Harlow Clerk
per A.P. Griunold deputy
To the Sheriff of Tazewell County to execute.

Which said writ was returned on the 2nd day
of July ^{A.D. 1862} with the following endorsement, to wit:-
Served the within writ by reading to and leaving copies
with the within named Henry R. Green, Joseph A. Patterson
John Holmes Commissioners of Highways for the
Town of Sullivan Tazewell County, Illinois, and
John Schneider Coercer of Highways of said Town

" the 24th day of June A.D. 1862,

" C. Williamson S. D. C.
" per S. B. Chambers Deputy

" State of Illinois To the People of the State of Illinois,
" Tazewell County To the Sheriff of said County, Greeting:-
" We command you that you summon Henry A. Greene,
" Joseph A. Patterson, and John Holmes Commissioners
" of Highways of the Town of Delevan, and John Engedeker
" Overseer of Highways of the Town of Delevan in your
" county, personally to appear before the Circuit Court of
" Tazewell County, on the first day of the next term
" thereof, to be holden at the Court House in the City of
" Pekin, on the first Monday in the month of Sep-
" tember next, to answer to a certain bill of complaint,
" filed in our said Circuit Court on the Chancery
" side thereof, against them, by Nathaniel H. Green.
" and to do and receive whatever our said Court may
" order and decree in the premises. And have you then
" and there this writ, and make due return thereon in
" what manner you execute the same.

" Witness George A. Harlow Clerk of said
" (Seal) Circuit Court, and the seal thereof affixed,
" at Pekin this 20th day of June A.D. 1862.
" Geo. A. Harlow Clerk
" per A. P. Griswold Deputy

Which said writ was returned on the 1st day
of August A.D. 1862, with the following endorsement, to wit:

" This summons has been duly served by reading to the
 " within named Henry R. Green, Joseph H. A. Patterson, John
 " Holmes and John Snedeker, and by delivering to
 " each of them a copy of the same July 30th 1862,
 " C. Williamson Sheriff, J. C.
 " By H. S. Smith Deputy

Now afterwards, to wit: at a Term of the Circuit
 Court begun and held at the Court House in Pekin
 within and for the County of Tazewell and State of
 Illinois on the first Monday of the month of September
 A.D. 1862, and on the 7th day of said Term it being
 the 8th day of said month, the following proceedings
 were had, to wit:

Nathaniel H. Green }
 vs. } Injunction
 Henry R. Green & als }

Now come the defendants
 by their Solicitor, and enter their demurrer to
 complainant's Bill, which said demurrer is in
 the words and figures following, to wit:-

State of Illinois } In Circuit Court
 " Tazewell County } September Term 1862.

Nathaniel M. Green

Henry N. Green, Joseph
H. Patterson & John Holmes

In Chancery for Disjunction

These defendants by protestation
not confessing or acknowledging all or any of the matters
and things in said complainant's bill to be true in such
manner and form as the same are therein set forth and
alleged doth demur thereto, and for cause of demurrer
sheweth, that his said Bill of Complaint hath no equity
upon its face, and that the complainant has not by his
said Bill shown such a case as entitles him to any
such relief as is thereby prayed inasmuch as it does not
appear that there was any impediment to a motion at
law being brought by the said complainant to ascertain his
right. Wherefore these defendants demand the Judgment
of this Honorable Court whether they shall be compelled
to make any further or other answer to the said Bill, or
any of the matters and things therein contained, and
pray to be hence dismissed with their reasonable costs in
this behalf sustained.

Roberts & Leland
for Defendants

Now afterwards, to wit on the 8th day of said
May it being the 16th day of said month, the
following proceedings were had, to wit:

Nathaniel H. Green.

Henry N. Green et al.

Injunction

Now come the parties by their Solicitors, and this cause having come on to be heard upon the demurrer to the Bill, and the Court having heard argument of counsel thereon, and being fully advised in the premises, is of opinion that said demurrer be overruled, whereupon the defendants abide by their demurrer. It is therefore ordered and adjudged by the Court that said Injunction be made perpetual.

State of Illinois

Tazewell County

I, George A. Harlow Clerk of the Circuit Court in and for said County do hereby certify that the foregoing 11 1/2 pages contains a full true and complete transcript of the Record of Proceedings had in the cause therein named, as fully as the same appears of Record in my office.

In Witness whereof I have hereunto set my hand and affixed the seal of said Circuit Court at office in Pekin this 6th day of April A.D. 1863.

Geo A. Harlow Clerk
per A. P. Griswold Deputy



State of Illinois } In the Supreme Court
 Third Grand Division } ss To the April Term A.D. 1864

Henry R. Greene, et al, } Assignment
 Plaintiffs in error } of Error.
 v }
 Nathaniel W. Green, Defendant in error }

And now the said Henry R. Greene,
 Joseph A. Patterson and John Holmes Commissioners
 of Highway for the Town of Delavan and John
 Medaker Overseer of Highways for said Town the
 Plaintiffs in error, come and say that in the
 record and proceedings aforesaid there is manifest
 error in this, to wit:

I The Circuit Court erred in over ruling
 the demurrer of the Plaintiffs in error, to
 the said bill of defendant in error.

II The Circuit Court erred in ordering and
 adjudging the said injunction to be made
 perpetual.

By reason whereof the said Plaintiffs pray
 that said judgment may be reversed &c
 By A. Briggs, Atty for Plff in error.

And now comes the said defendant

in Error by Cooper & Mags. his Solicitors
And says that in the said Record of proceedings
there is no Error for which the judgment
and decree of said Circuit Court should
be reversed. Wherefore he prays that the
the same may in all things stand & be
affirmed

Cooper & Mags
For Deft in Error

Henry R. Greene
 Et al

by

Anthaniel W. Green

Record

Filed Aug. 9. 1864
 Seal
 Ch.

Inscpt by J. P. [unclear]
 atty of H. R. Greene et al

State of Illinois, } *In the Supreme Court.*
 THIRD GRAND DIVISION. } *ss.* TO THE APRIL TERM, A. D. 1864.

HENRY R. GREENE, <i>ET. AL.</i> , PLAINTIFFS IN ERROR,	}	<i>ERROR</i>
VS.		TO
NATHANIEL W. GREEN, DEFENDANT IN ERROR.	}	<i>TAZEWELL.</i>

Abstract of Record furnished by Plaintiffs.

This was a bill for an Injunction, by the defendant in error against the plaintiffs in error, filed in the Circuit Court of Tazewell County, June 26, A. D. 1862.

The following is a full copy of the bill :

[p. 1 to 6.] "To the Honorable JAMES HARRIOTT, Judge of the 21st Judicial Circuit of the State of Illinois, in Chancery sitting :

Humbly complaining sheweth unto your Honor, your orator, Nathaniel W. Green, a resident of the County of Tazewell and State of Illinois, that your orator is now, and has been for the space of more than five years next preceding the filing of this Bill, the owner in fee of the following described land, situated in the said Tazewell County, viz: The North-west quarter of Section number twenty-three in Township 22, North of Range Four, West of the third principal meridian, which land is now, and has been for the space of more than five years next preceding the filing of this Bill, in cultivation and enclosed with fences, and your orator further shows that on the 27th day of June, A. D. 1857, the Commissioners of Highways for the Town of Delavan, on the Petition of sundry voters of said Town, laid out a public road in said Town, and running entirely across said Town, commencing at the North-east corner of Section 24, in said town 22, North of Range 4, West of the third principal meridian, and thence running a westerly course on the sectional line between Sections 24 and 13, 23 and 14, 22 and 15, 21 and 16, 20 and 17, 18 and 19, to the West line of said town; and your orator avers that he at the time desired to have said public road so laid out and opened as it was laid out, that your orator might have a convenient and beneficial outlet from his said land over said public road in a westerly direction to two public roads lying west of his said land and running North and South from Springfield in the State of Illinois to the Cities of Pekin and Peoria in the same State, which last named cities are and were the only available market places for the produce of his said land, and which line of road would secure to your orator a better and more convenient road to and from said market places than he would have without said road was so laid out and opened, and your orator

avens that in consideration of the laying out of said public road as above alleged, and that said Commissioners would proceed immediately and open the same, he released to them the right of way over his said land, for said road, and he here avers that on no other consideration, and for no other road or purpose than is above alleged, did he ever release said right of way, or consent that a road might be opened on the North line of his said land so enclosed and cultivated as aforesaid, nor has any such road ever been opened, and he here avers that any attempt now at the opening of said road across his said land at all, and especially from the East end alone, and without opening it across the said Town to the West end of the road as so laid out, would without regard to the fact that the said road is now vacated by law, greatly harass and seriously injure your orator, greatly increase his outlays and expense and furnish no corresponding advantage, and for such purpose your orator never did and never would give or release a right of way across his said land: and your orator further avers, that damages have already been claimed by, and allowed to sundry owners of land lying west of your orator's said land along said road, and charges that the Commissioners of Highways of the Town of Delavan, neither at the time they laid out said road, and at no time since have ever paid the damages so claimed and assessed for the right of way, nor procured the right of way for said road from the said owners of land, nor have said owners of land released their claim to said damages, nor have said Commissioners of Highways ever opened said road or ordered the same to be opened, and the same is now enclosed over the whole length of the line of said road lying west from the said land of your orator, nor have the said Commissioners of Highways or the said Town ever raised the money to pay said damages but have continually refused so to do, and said road is treated as vacated and as a nullity under the Statute upon the entire length of the same lying west of the said land of your orator, and your orator charges and avers that the same is now vacated and a nullity by law for the reason if no other is required that five years will have elapsed from the time of laying out the same before the same can be opened as required by law, and that the same cannot be now lawfully opened for the reasons aforesaid until long after the lapse of the said five years, and all attempts to open the same or meddle with the property upon the line of the same as originally laid out are mere attempts to trespass without right or lawful authority, and so far as such attempts may be made upon the said land of your orator must greatly injure your orator and require your orator to bring a multiplicity of suits against such trespassers to the great detriment of the Court, and without furnishing any adequate remedy or compensation for the injury done to your orator and others through said trespasses and your orator charges that one Henry R. Greene, Joseph A. Patterson, and John Holmes, pretending to be acting as the Commissioners of Highways, of the Town of Delavan, and one John Snedeker pretending to be acting as Overseer of the Highway of Road District No. 6, in said Town of Delavan unlawfully combined and confederated together and with their agents, servants, aiders and abettors, threaten to and in pursuance of said purpose are about to enter into and upon the said land of your Orator and tear down and remove his fence, and break

up and destroy his crops thereon, contrary to the Law and to the irreparable injury of your orator, and in violation of the rights of your orator in this behalf, and as your orator is remediless except in a Court of Equity, to the end thereof your orator prays that the said Henry R. Greene, Joseph A. Patterson and John Holmes, Commissioners of Highways as aforesaid, and the said John Snedeker, Overseer of the Highways as aforesaid, and all their aiders, abettors, agents and servants, may be strictly enjoined from entering into or upon the said land of your orator, or any part thereof, and from in any way troubling or meddling with the fences or crops of your orator situated on said land, and from all attempts to open any enclosed field upon the said land of your orator, or otherwise opening or further attempting to open said road on said premises until the further order of this Court in the premises, and that they and each of them may be duly summoned to be and appear at the next Term of this Court, and full, true and perfect answer make to all and singular the allegations of this Bill, and on a hearing thereof, that your Honor will make said Injunction perpetual against them, and for such other and further order and decree in the premises as to your Honor may seem meet and proper, and as in duty bound your orator will ever pray, &c."

B. S. Prettyman,
Sol. for Compl't. }

NATHANIEL W. GREEN.

STATE OF ILLINOIS,
Tazewell County, }
legations in the foregoing Bill of Complaint are true in substance and in fact

ss. Nathaniel W. Green, the above complainant being first duly sworn according to law, on his oath says that the allegations in the foregoing Bill of Complaint are true in substance and in fact

Subscribed and sworn
to before me this 26th
day of June, A. D. 1862.
JAMES HARRIOTT." }

NATHANIEL W. GREEN.

[p. 6.] Copy of Judge's Order for the issuing of Injunction.

[p.p. 7 & 8.] Copy of Preliminary Writ of Injunction with Sheriff's Return of Service.

[p. 9.] Copy of Chancery Summons returnable to the September Term, A. D., 1862, with Sheriff's Return of Service.

[p.p. 10 & 11.] Copy of Demurrer to the Bill.

[p. 12.] Copy of Judgment of the Circuit Court at the September Term, A. D., 1862, over-ruling the Demurrer and ordering the Injunction to be made perpetual.

[p. 13.] The errors assigned are :

1st. The Court erred in over-ruling the Demurrer.

2nd. The Court erred in ordering and adjudging that the Injunction be made perpetual.

A. BERGEN,
Attorney for Plaintiffs in Error.

Henry R. Green
et al

vs

Nathaniel W. Green

Abstract of
Record

Filed April 19, 1864

J. Solano CWR

To the Supreme Court of the State of Illinois
for the third Grand Division, sitting at Ottawa
April Term A.D. 1863.

Henry R. Greene, Joseph A. Patterson,
and John Holmes, Commissioners of
Highways for the Town of Delavan,
and John Suedaker, Overseer of
Highways in said Town
Plaintiffs in Error
vs
Nathaniel W. Green, Defendant in Error
In Chancery
Bill for
Injunction.

Error To Fayzwell.
Judgment in favor of defendant in error and
making injunction perpetual upon demurrer
to bill, at the September Term A.D. 1862 of the
Fayzwell County Circuit Court. State of Illinois.

W. Clerk Supreme Court,
Please issue writ of Error in
the above entitled cause to the clerk of the
Fayzwell Circuit Court; and a Scire facias to
hear error, against said defendant in error,
directed to the Sheriff of Fayzwell County and
returnable to the April Term A.D. 1863 of said
Supreme Court.
Bergen & Bearby
Attys for Plffs in Error.

38 ~~417~~ 55-

Henry R. Green
Et al

^{or}
Nathaniel W. Green

Error to Jazwell

Filed clerk, 25. 1863.
Island
Ct.

Horsely + Middleton

vs

Error & Kane

Marcus White

It is submitted for aught in error that
the law of 1857. Secates Stat 637.
authorize the entry of Judgments in
Kane Co. by confession,

The power of attorney under which this
Judgment was confessed clearly
authorize the entry of the Judgment
in vacation it expressly authorize the
entry in vacation

The affidavit filed with the power of
attorney is defective under the authority
of the case of Heines vs Hopkins deci
ded last term but not reported and
that case differs from this in this partic-
ular, in that case the decision of the
Court in refusing to set aside the
Judgment was excepted to in this
case no exception was taken
We submit that the plaintiff in
error having failed to except to the
decision of the Court below in refusing
to set aside the Judgment can not assign
that decision for error in this Court

The petition upon which the court below
acted ~~are~~ ^{is} not set out in the record and
this court can not know upon what
the circuit Court acted

Glover Leach & Company

atty for app

72 27
Timothy Worsley
vs
Marcus White

Argument for defr
in error

Filed Apr 29 1863
L Seawick