

No.

12075

Supreme Court of Illinois

Kimball, et al.

vs.

Yates.

71641  7

43
Saml. S. Kimball et al.

Alphonso Yates

1853

43

12075

Prepared

1853

Samuel S. Kimball } Kans Co " Cir " Court
Abraham Lambert } May Term of the said Court for 1853
and
Alphonse Gates }

" Be it remembered that at the May term
of the Kans County Circuit Court for 1853 this
Cause came on for trial on the issues joined
"

State of Illinois" of the Kans County Circuit
Court May Term AD 1853

Alphonse Gates
vs
Samuel S. Kimball } In Case Where Claimum Fugit
Abraham Lambert }

Samuel S. Kimball and Abraham
Lambert the defendants in this Suit "was summoned
to answer Alphonse Gates the Plaintiff in this
Suit In In Case Where Claimum Fugit for
that the said defendants on the 6th day of April
AD 1853 and divers other days between that day
and the Commencement of this Suit with force
and arms broke and Entered the plaintiffs
close lying and being in said Kans County
aforesaid and described as follows" to wit "one
half of the North West Quarter of Section Fourteen
& East half of North East Quarter of Section
fifteen all in Township Thirty Nine North
of Range Seven East of 3^d Rm" and then & there

Throw down and lay open certain fences belong-
-ing to and enclosing the said close to wit "Twenty
rods of said fence thereof to the value of Fifty
Dollars and left the same open and carried
away and destroyed the material with which
the same Twenty rods ^{offence} had been erected against
the "Statute in such case made and provided
and other wrongs to the said Plaintiff then and
then did to the great damage of the said Plaintiff
of Fifty Dollars whereupon the said Plaintiff
saith he is injured and hath sustained dan-
-ages to the amount of One Hundred Dollars
and thereupon he brings his suit

Charles B. Wells

Attorney for Plaintiff

and whereas afterwards "to wit"
on the 11th day of May 1853 at being one of
the days of the Kansas County Circuit Court
the following Pleas were filed which read in
the words and figures following "to wit"

Samuel S. Kimball
Abraham Lambert
and
Alphonse. Yates

Kansas Co^y Circuit Court

May Term of the said
Court for 1853"

and the said defendants Samuel S.
Kimball & Abraham Lambert By J. H. Mylons
their attorney ^{came} and defends the force and
injuries then &c and say that they are

not guilty of the said Supposed. Injuries above
said to "them" charges or any part thereof
in manner and form as the said Alphonso
yates hath above complained against them
and of this they put themselves upon the
country

and the Plaintiff doth the like
Chas B. Wille

for Pltff

J. H. Maybourn
attly for Defs

and for a further plea in this
behalf as to the entering the said fence of
the said Plaintiff in the ^{said} Plaintiffs declarative
Mentioned. and around "which PC" and thrown
down and removed destroyed certain fences
belonging to and enclosing said close &
being the same upon and the carrying
away and destroying the material with
which the said fence was made in the said
declarative Mentioned and above Supposed
to have been done by the said defendants.
they the said defendants by leave of the Court
here for this purpose first had & obtained the
said that the said Plaintiff ought not
to have and maintain his aforesaid
action thereof against them because they
say that the said fence when they threw
it down enclosed & fenced in a Public
highway & now a run across & obstructed is

and that they threw down left open the said
 fence enclosing the said close at no other place
 and the said defendants further
 said that before and at the ^{said} ~~present~~ time
 when & there ^{was} and of right ought to have been
 a certain Common and Public Highway
 into through over & "long" the said close in
 which &c" for all good citizens of the State
 of Illinois to go pass and repass on foot
 or with Cattle horses & Carriages teams
 & Waggon at all times in the year at
 their free will and pleasure Whereof the
 said defendants being good citizens of the
^{said} State and having occasion to use the
 said highway at the several times when
 they went pass and repass on foot and
 with teams Cattle horses Carriages & Waggon
 into through over and along the said
 close in about which &c. in & by & "long"
 the said highways then using the same
 as they lawfully might do for the causes
 aforesaid and in so doing they had to throw
 down the said fence because the said
~~said~~ rails & fence in the said declaration
 mentioned before the said several times
 when &c. had been wrongfully erected and
 were then standing & being in & across the
 said Highways and obstructed the same

so that without throwing down & removing
away ~~removing~~ ^{removing} & destroying the said rails that
comprised the said fence they could not pass
& pass with their said cattle horses teams
carriages & waggons into through over and
along the said close owned by him which is
in the said highway there as they ought to
have done and the said defendant in order
to remove the said obstruction at the said
several times when it threw down left open
the said close removed and destroyed the
said rails in the said fence and took
and conveyed the said rails to a small
& convenient distance & there left them for
the use of the said plaintiff they doing
no unnecessary damage to the said plaintiff
on the occasion which the said supposed
trespass is in the introductory part of this
plea mentioned & whereof the said plaintiff
hath above thereof complained against
them & this they are ready to verify it

J. St. Maryson

Att. for Dfnde

and for a further Plea in
this behalf as to the Entering of the said
close of the said Plaintiff as in his declaration
mentioned and in & owned which it and
"thence^{ing} down" and laying open the fence

6
enclosing the Plaintiffs Close and the Carrying
away and destroying of the Plaintiffs rails in
the fence about the said Close as in the said
declaration mentioned & above supposed to
have been done by the said defendants they
by leave of the Court &c saith that the said
Plaintiff ought not to have and maintain
his aforesaid action thereof against them
because they say that as to the Entering
of the said Close with force &c & the Throwing
down leaving open the said fence and the
Carrying away and destroying the rails in
the said fence enclosing the said Close
as in the said declaration mentioned were
and on the same and no other are
differently supposed and the said defendants
further saith that for a long time before
and at the several times when & they was
and still are seized in their demise as of
a fee of a certain Close called & known
as the Lambart farm contiguous and next
adjoining the said Close on the North side
thereof in and around which & and that they the
said defendants and all those whose Estate
they now have and at the said several times
when held of and in the said Close of the
said defendant called the Lambart farm from
time whereof the memory of man is not.

to the Country know had and used and have
been accustomed to have and use and of
right ought to have had and used and the said
defendants at the same time Which it of right
ought to have had and used and still of
right to have ^{use} a certain way for himself
& himself and his and their servants &
tenants occupants of the said Lumbard from
close or farm to pass and reap on foot
and with horses cattle teams & waggons
or Carriages from "a" certain Common
Public Highway in the town of Blackberry
in the County of Kane & State of Illinois
known as the Foot & Wheeler road into
through over and along the close of the
said Plaintiff around which the said fence
was into and into the said close of the said
defendants and so from this back again
into through and over & along the said close
of the said Plaintiff into & enter the said
Common High Way at all times of the year
at their free will & pleasure to the said close
of the said defendants and the appurtenances
thereunto belonging and the said Defendants
being so seized of the said close and in
the possession thereof and having ^{occasional} ~~use~~ to
use the said way did with his teams horses
carriages & waggons at the said several times

8
When the said people and people in by through & along
the said way from the said Common public
highway into through over and along the said
close of the said plaintiff unto the said close-
ings of the said defendants and so from
them back again in through over and along
said way unto the said Public highways
using the said way for the purposes aforesaid
on the occasions aforesaid as they law-
fully might do for the causes aforesaid & for
the end aforesaid and because the said fence
was at the said several times when it
and obstructing the said way so that without
pulling down throwing down ^{removing} ~~removing~~ & destroying
the same & the rails thereof they could not pass
& reap with the said teams horses carriages
& waggon from the said ^{Public} highway into through
& over the said close of the said Plaintiff
into that of the said defendants & back again
as they by right might do for the causes
aforesaid the said defendants did at the said
several times when it. in order to reap &
reap from the said Public High way &
back again to the said close of the said
defendants with their teams horses ~~waggon~~
carriages & waggons because the said fence
there obstructed the said way & throwed it
down and destroyed some of the said rails

and "Carry" them to a convenient distance
& then left them same for the use of the said
defendant Plaintiff doing "no" unnecessary
damage to the said fence or rails of the said
Plaintiff on those occasions which are the
same supposed "Trespass" in the introductory
part of this Plea mentioned and whereof the
said Plaintiff hath above thereof complained
against them and this they are ready to verify
wherein they pray judgment &c

It may be

Deft's Atty

and whereas afterwards to wit

On the 19th day of May 1833 it being one of
the days of the May Term of the Kansas County
Circuit Court the following and Pleas were
filed which read in the words & figures following
to wit

Samuel. Kimball
Abraham. Lambert

Kans Co. Cir. Court

of the May Term of the
said Court for 1833

vs
"H. Yates"

and the said defendants for a
further Plea in this behalf by leave of the Court
do and say that the said Plaintiff ought not
to know and maintain his aforesaid action
thereof against them ^{because they say that the said Defendants} the said Defendants at
the said several times which it by leave &
license of the said Plaintiff to them for that

10
purpose first given and granted to wit at Kane
County in State of Illinois aforesaid committed
the said several supposed trespasses in the
said declaration mentioned as they lawfully
might do for the cause aforesaid and this they
are ready to verify Whereupon they pray judgment
of

J. H. Maybourn
att'y for Defs

and Whereas afterwards to wit
on the 18th day of May 1833 is being one of the
days of the ^{day of} May Term of the Kane County Circuit
Court the following Replication to the 2^d & 3^d Pleas
were filed which read in the words and figures
following to wit

Kane County Circuit Court

Alphonso. Gates

vs

(May Term A.D. 1833

Samuel S. Kimball }
Abraham. Lambert }

and the said Plaintiff as to the said
Plea of the said defendants by them secondly
above pleaded as to the several trespasses in the
introductory part of that Plea mentioned and
therein attempted to be justified saith that the
Plaintiff by reason of any thereof thing by the said
defendants in that Plea alleged ought not to be
~~barred~~ ^{barred} from having and maintaining his aforesaid
action thereof against the defendant
precludi non because he saith that the said

defendant at the said time when &c. of their said
own wrong and without the cause by them
in their said second plea alleged committed the
said several trespasses in the said plea attempted
to be justified in manner and form as the said
Plaintiff hath above in his said declaration
complained against the said defendants and
this the said Plaintiff prays may be enquired
of by the country.

and the said ^{Defendant} Plaintiff saith } Wells & Sturington
the like "by J. H. Mayborn } for Plaff

their atty. And the said Plaintiff
as to the said Plea of the said defendant by
them thirdly above pleaded as to the several
Trespasses in the introductory part of that Plea
mentioned and therein attempted to be justified
saith that the Plaintiff by reason of any thing by
the said defendant in that Plea alleged ought not
to be barred from having and maintaining his
aforesaid action thereof against the defendants
Excludi non" because he saith because the
said defendant at the said time when &c. of
their own wrong and without the cause by them
in their said third plea alleged committed the said
several trespasses in the said plea attempted to
be justified in manner and form as the said Plai-
-tiff hath above in the said declaration complained
against the said defendants and this the said

Plaintiff says "may be engaged of by the County etc
and the said defendant saith Wells & Harrington
the like." by D. May born
their atty

and "whereas afterwards to wit"
on the 19th day of May 1853 at being one of the
days of the May Term of the Kane County Circuit
Court the following Replication to third amended
Plea as amended was filed which must in the words
and figures following to wit

Alphonso. Gates } Kane County Court
Samuel S. Kimball } May Term AD 1853
Abraham Lumbert }

and the said Plaintiff as to the
amended Plea to the amended Plea of the said
defendant by them Thirdly above Pleaded as to
the several responses in the introductory part
of that Plea mentioned and therein mentioned
attempted to be justified saith that the said Plaintiff
by reason of any thing by the said Defendant
in that Plea alleged ought not to be barred from
having and maintaining his aforesaid action
thereof against the defendants. And he saith that the said
defendants at the said time when it of their own wrongs and without
the cause by them in their said third amended
Plea by them amended alleged committed
the said several trespasses in the said Plea —

attempted to be justified in manner and form
as the said Plaintiff hath above in his said
declaration complained against the said defend-
-ant and this the said Plaintiff prays may
be Enquired of by the Country
and the said defendant doth Wells & Harrington
the Like" by J. H. Maybom for Plaintiff
their atty

Or. Motion of the plaintiff a jury
come who after being severally tried and sworn
Thomas A. Scott and Eleazer Ottergood & Lawfull
jurors was Empanelled to try the said Cause and
the Plaintiff in order to prove the issues joined
in said first point title in fee Simple in himself
to the premises described in the declaration he then
called one Davis as a witness who testified that
he was at the house of the defendant Kimball
on the 8th day of April 1853 and that the said
Kimball requested him to go with the said Kimball
him to the Land of the plaintiff to see him through
it as he wished to crop it and and that the
Plaintiff threatened to thrash" or whip him
if he went across plaintiff Lands & that
defendant Kimball lived and owned Lands
adjoining that of the Plaintiff close on the
north and that soon after defendant ^{Lumber Case and that he} Kimball
also requested him to go with him and see him
through as he had witness and that they went

with him to where a ditch had been ^{made} and fence
 built and started across a track that had been
 formerly across Plaintiffs Land and that the
 defendant Kimball let down said fence and drove
 his team on to the Land of the said Plaintiff and
 left the fence down and that defendant Lumbert
 stood by and saw ~~and saw~~ "Kimball let down the
 fence and Defendant Lumbert held Kimball's horse
 while he Kimball let down the fence" That at
 the Election on Town Meeting day previous in
 April last Nitrop heard the Plaintiff declare
 in the ^{hearing} presence of the defendant Lumbert that
 he should take down ~~any~~ any person who
 should take down the fence or go upon the land and
 Lumbert said he should throw the fence down as
 it was across "highway" ... When the Defendant
 Kimball let down fence there had been a Traveller
 track but it was then fenced up with a stronger
 fence than any where else along said fence he
 had passed across said land of the Plaintiff both
 on foot & with teams & had seen others and that
 there had been a travelled road or path running
 across said Land of Plaintiff where the Defendant
 let down the fence and went across said Land
 "he had been in the County about two years
 said road or path he believed now on the section
 line between Section 14 & 15 in Township No 39
 Range 7 East

Peter Lombard, he testified that he knew the Lands of Plaintiff & Defendants. Defendants Land was on Section No 14 did not know on what Section Plaintiff Land lay he sold the Land owned by defendant Kimball and he went on it February last

Elijah Scott "Knew the premises described in the declaration the place where the fence was taken down is on the premises described in the declaration "here the Plaintiff stated"

The defendants then called James Herington who testified that he was the Clerk of the "Kane County Court" had the Custody "of the Records of the County Commissioners Court of said County and the papers on file in said Office, and that he had with him all the records and proceedings papers in his Office of the said Commissioners Court touching and relative to the Establishing of a road across the Lands of the plaintiff petitioners for by Elijah Scott & others the Defendants then offered the following papers in evidence which said witness testified was filed among other papers in said Cause

"To the County Commissioners Court of Kane County"

We the undersigned legal voters of the said County would respectfully petition you to have Cause a view to be made of the following

16"
Road now commencing on the road running
from General West at the South West Corner of
Section 2^d in Town 39th Range 7th running thence
South on Section line to intersect the road from
Forts to D. Wheeler and found Petitioners will con-
suey &c Dated Jan'y 15th 1848

Names of Petitioners

Elijah Scott

Samuel Curtis

Luther Curtis and Signed by Thirty five
other Persons and on the back of the Petition is the
following words and figures to wit^r Petitioners
except it March Term 1848 Filed March
7th 1848 J. L. Ames Clerk to which the Plaintiff
objected and the Court overruled the objection and
permitted the same to go to the jury & Plaintiff
excepted the Defendants then proved that the record
produced by the said Witness used the record of the
said Commissioners Court and then offered to read
the following Order thereon to which the Plaintiff
objected Court overruled the objection & Plaintiff
excepted and the defendant read the following Order
made by said Court which runs in the words
and figures following to wit^r Tuesday March 7th
1848 Orders that the Petitioners this day pre-
sented by Elijah Scott Samuel Curtis & others for the
appointment of Viewers to View & locate a road
leading or commencing on the road running

from General West at the South West corner of
Section 2" in Town 39 Range 7 running thence South
on Section line to intersect the road from Foola
to D. Wheelers and that Roswell Henry Randolph
Baker and P.P. Hunt be appointed Viewers on said
road to report at the next Term

June 7th 1848

Ordered that the Report ~~made~~
Report made this day by R. Baker J.R. Baker
and P.P. Hunt be accepted and the road established
agreeable to the said reports

March 26th 1849

Ordered that the road petitioned for by Elijah Scott
& others & on which W. B. Spaulding & J. Brown
and S. Sterling were appointed appraisers to appraise
Damages Commencing at the center of a road
running W" from General thence South on the 310"
line to the center of a road running W" from
General by E. Foola & D. Wheelers and report Dam-
ages as follows to wit "that the farms occupied by
Stimbaugh W. Pierce & A. Smith will sustain no
Damages but that said road shall not be opened
until such time as the arrangements entered
into and agreed to by the parties interested in said
road shall be completed With "Myers" Pease & Himes
having agreed to open through their Lands as soon
as the rest of the road shall be opened in accor-
- dance with the agreement made Between the

26th March
1849

13

the parties and the reports of the said jurors be accepted & opened fifty feet wide when the above arrangement shall be complied with the County will pay no charges for opening said road.

Then Defendant ^{thus} offered to supply the defect of said ^{Records} ~~jurors~~ by parole evidence which was objected to by Plaintiffs Counsel and the objection sustained and Defendants excepted. The Defendant then offered the following reports of the jurors in evidence which ^{was} identified the same as the aforesaid Petition and with the number of the same as recorded in the record Book of Public Highways of the said Court of the County of St. Paul. The Plaintiff objected. Court overruled the objection & Plaintiff excepted which said reports were in the words & figures following to wit:

We the undersigned Jurors appointed by grand Jurors Body to view and if practicable locate a road commencing at the South West Corner of Section 2^d in T39 N R7 of 3^d Pm and ending in the road running from Fort to D. Whelan. Therefore in conformity to said appointment we would respectfully beg leave to report that we have viewed & caused the same to be surveyed on the 18th day of April 1848 with regard to damages. We are of opinion that A. Yates & Thomas Kernow will

Call on you and lay in their claims and that
 A Gates will Gentile thereunto " all of which
 we would respectfully submitted report

R. W. Jones
 J. R. Baxter (Grooms
 Party, P. Grant)

Survey of a road from the road running
 West from Gravel in Township No 39 Range No 3
 East beginning at the South West
 corner of Section No 2 of said Township at
 a point in said road running West from
 Gravel Thence South Eighty Chains to the corner
 of Section 11. 11. 14. & 15 Thence South 24 chains
 81 links to the center of the road running from
 Mr. Fort to Mr. Wheeler the distance across
 Mr. Gates improved Land is 18 chs 31 lks
 Surveyed by Wm A. Rouse Tanner

R. W. Jones
 J. R. Baxter } Grooms

Plat

	Gravel	Section 21 Road
	Section Road from Wheeler to Fort	Section Road from Wheeler to Fort
Section 15	New Road	Section 14

is to be pointed out to them by the said Supervisors
and to assess the Damages which they shall believe
Shall Small and William Pierce and others if
any done there will sustain and add above
the additional Value which the lands of the said
Small and Pierce & others will derive from the
Construction of a Road beginning at the South
West Corner of Section Two in a Road running
from Genoa in said County West & running
South on Section line to intersect the Road
running from "Elisha" Scott Foote to David
Whedens "if any there shall be" and that at nine
O'clock A.M. on the 17 day of March 1849 the
said W.B. Spaulding L. Sterling & James Brown
did appear before me at my Office in the
said Village of Genoa agreeable to the said
Summons

A. W. Glap

Genoa March 17th 1849

a Justice of the

in and for said County

State of Illinois We took B. Spaulding Samuel Melvin James
Rane County, do each solemnly swear that we
will faithfully and impartially Examine the ground
which shall be pointed out to us by E. G. Mower
the said Supervisor in and over a road recently
located in the "Precinct" of Blackberry in Rane
County and describe and running as follows
to wit Beginning at the South West Corner of
Section Two at the center of a Road running

from Genesee West Thence South on Section
Line and terminating in the Center of a Road
running from Genesee by Elisha Forts to
David Whelan and that we will assess the
Damages which we shall believe that William
Pierce Allen Small or Others will sustain on
and above the additional value which the Crops
of the said Pierce Small or Others if any there be through
which said ^{Road} vines and Claims shall derive from
the Construction of the said Road" make true report
and deliver the same according to Law & that
we will discharge the duties of appraisers as aforesaid
according to the best of our Knowledge and
ability. Subscribed and sworn to
before us this 17 day of March

1849

A. W. Glop.
Justice of the Peace

S. Sterling

James Brown

W. B. Spaulding

We the undersigned being
chosen and sworn to assess the damages
on a Road ^{beginning} ~~lying~~ at the South west corner
of Section 2 at the Center of a road running
West from Genesee Thence South on the Section
Line to the Center of a Road running from
Genesee by Elisha Forts to David Whelan after
Examining said Road under the directions
of the Supervisors report as follows that the
Gains of William Pierce and Allen ^{Small} ~~Contract~~

and occupied by Hensbaugh will sustain
no damage more than they will derive ad-
vantage from said road
March 24th 1849

W B Spaulding

James Brown

S Sterling

This Defendants then called
Elijah Scott who testified that he signed said
petition and that said Road was located on
the line of Sections No "12 + 13" where it crosses
Gates farm and that about a year after said
Road was petitioned for he and said Plaintiff
and Peter ^{abraham} Lumbert went at the house of Defen-
-dant Abraham Lumbert and there it was
agreed that said Gates should open the said
Road and cut across him when he and the
Lumberts should build a Post & Board fence
on each side of it on his premises as good
as that which said Plaintiff had built along
the other Road crossing his farm and that until
such time as said fence was built by the
Lumberts and the Public was to have the right
to travel across his Land where the said Road
was located according to the reports of the
said Jurors and that in the month of May
or June 1849 he and the Lumberts went
on and built a fence on each side of the
Road about 60 rods but while they was

building said fence, that Plaintiff came and
 forbid them from building the fence any further
 as he said they were making the Road to wide
 & threatened to prosecute them if they went on to
 build - any more of said fence. Pltff "stated it
 was 30 feet wide and said they must not
 build it any wider, it was as good & better
 than they agreed to build." No time was set
 when it was to be built - he had papers at
 all times he had occasion to crop said land
 of the Plaintiff. When the Road was laid
 out "on foot & with teams and had seen
 Attns or so Scott also swore that he passed
 to build the fence in three months and Gate
 replied take your own time.

Crop Ex

It was ^{never} agreed to reduce the agreement
 to writing or make it a matter of Record
 "I come down with Mr. Yates when the
 County Commissioners Court met" & I
 and Yates stated over to them the agreement I
 have seen the last order made by the County
 Commissioners Court. "It was made at the time
 and was 'bunglingly' done this agreement
 was made some time in March 1849" We
 built the fence where the Road was stated
 out "we built the fence one & a half rods from
 the center of said Road" the Lumberts myself

and E. G. Mower was present at the time ~~the~~
said agreement was made "No work was done
on Plaintiffs Land in Road"

E. G. Mower called & sworn
I was present at the time Yates made agreement
with Scott & Linn but he agreed if they would
build a cross his farm on each side of the Road
"as good Board fence as he had on the Road
that he would take it in ^{value} of Damages
and that when it was built - he would open
the Road across him. "no time was fixed
for building the fence. Scott said they would build
it in three months he told them they had better
take six months build he did not care when
it was built "Take their own time to do it. I
was Supervisor at the time "I went with the
assessors of Damages" and pointed the Road
out to them as stated "I saw the fence it
was a good fence Board fence" it was built
about three fourth of the way across one side
of Plaintiffs Land. Linn but & Scott were to
put bars at one end & Yates at the other &
keep them in repair so as to allow them
to pass and repass there was work done on
the Road "went over it when ever I had
occasion" to do so either on foot or with teams
saw others travel it "fence is moved do not
know who moved it.

Mr Kemp Ex^l The Road was not worked on Plaintiff's Land no time was mentioned when said fence was to be built - I did not hear any thing said about committing "the agreement" to writing or entering of it of Record

Stephen Wait Sworn

I know the Road mentioned in Kemp's Gates Land on Section Line between Sections 12 & 13 I was Commissioner of Highways last year and I ordered work done on that Road but not on Gates' promise I have gone along said Road & seen where Small is on foot & with Teams

Spaulding Sworn

I was Present at the time the agreement between Gates & the Lumberts & Scott was stated over between them before the County Commissioners Court it was some time in March 1849 Gates agreed that ~~he~~^{on} conditions of the Lumberts & Scott Building a good brand fence on each side of the Road that he would open the Road. The fence was to be as good as the one he had built along the Road running across him no time was fixed for Building the

and E. G. Morse were present at the time ~~the~~
said agreement was made "No work was done
on Plaintiff's Land in Road."

E. G. Morse called & sworn
I was present at the time Gates made agreement
with Scott & Sumner but he agreed if they would
build across his farm on each side of the Road
"as good Board fence as he had on the Road
that he would take it in ^{value} of Damages
and that when it was built - he would open
the Road across him. "The time was fixed
for building the fence. Scott said they would build
it in three months he told them they had better
take six months build he did not care when
it was built "Take their own time to do it. I
was Supervisor at the time. "I went with the
assessors of Damages" and pointed the Road
out to them as stated. "I saw the fence it
was a good fence Board fence" it was built
about three fourths of the way across one side
of Plaintiff's Land. Sumner & Scott were to
put bars at one end & Gates at the other &
keep them in repair so as to allow them
to pass and reap their own work done on
the Road. "I went over it when ever I had
"occasion" to do so either on foot or with teams
saw others travel it" fence is "would do not
know who made it.

fence Gato said he did not know where
 they built it. ^{or if they never built it} He agreed not only that Lambert
 & Schott but that the public might pass
 along said Road running across him until
 such time as the Road was opened which
 was to be done as soon as said fence
 was built. "I have often passed over it
 and seen others do so both on foot and
 with teams Spaulding also testified that
 they were to put up a gate & Bars & keep
 them up ~~up~~ down in season

Re-called
 Scott Recalled Gato knew where the Road
 was started out over him it had been done
 some months "I built the fence where it was
 started and no wider " In the Recalling &
 in examining this witness the Plaintiff objected
 the Court over ruled the objection and allowed
 the witness to testify to which ruling of the Court
 the Plaintiff at the time Excepted " here the
 Defendant Rested

Plaintiff called

Peter Lambert who testified
 that the bars were not kept up "said he had
 seen them down frequently - as often as
 two or three times a week that he had
 entered the Plaintiff's premises that he -

am

Endeavour to keep them off as long ~~time~~ as
he could "but at length gave it up.

"Did not know how the fence came to be
down Do not know that there was any
time when it was to be built— "Do not
know that the agreement was to be comm-
itted to writing

Said Record Term 5th 1848

~~Ordered that~~ The Plaintiff offered the follo-
wing Evidence from Said Record Term 5th 1848

Ordered that the Claims for Damages filed
this Day on the Road was Viewed by RP
Hunt J. R. Baker Viewers by Thos. Keenan
for fifty Dollars \$50. A. Gates for Thos. Amund
Dollars & ct. Small for Fifty Dollars \$50. To
Enter on the Records of this Court—

and the Plaintiff stated
and this was all the Evidence given in this
Case on either Side "

And After the Argument of
Counsel the Court on the Part of the Plaintiff
gave the following Instructions to the Jury

The Jury are instructed
that the Defendants have not proved a Road
Established so long from the time whereof

Hays Claim for
Damages

29
sum
given

the Memory of Mann is not to the contrary
as set forth in the second Special Plead
of the Defendants

No 2"

given

That if any of the terms or
Conditions on which the Plaintiff made the
alleged agreement - In regard to the right
of Way were not complied with in a
reasonable time by the other parties to the
agreement - that then such agreement ^{agreed} ~~was~~
not be binding upon nor conclude the right
of the Plaintiff in that respect -

No 3"

given

That upon the Issues found
on the first Special Plead of the Defendant
the Law is for the Plaintiff

That the Defendant there &
There Excepted to the Instructions given by
the Court on the Part of the Plaintiff

The Defendant then asked the
Court to give the following Instructions which
were refused By the Court

No 4"
Refused

Σ 12075-457

If the Jury believe from the
Evidence that the fence which the Defendant
Kimball took ^{down} was in and across a Public
Highway and obstructed the same at the time
that the Jury should find for Defendants

30 "

Ms 1
Refused

In Contemplation of Law a Road is opened and is a Public Highway when the Reports of the Viewers is accepted by the County Commissioners and ^{adopted} ~~confirmed~~ and the Road located and Established by them

Ms 3 "

Refused

If the Jury believe from the Evidence that the Plaintiff gave License to Scott Lumber and all other Persons to Pass over and across his Plaintiffs Land in Consideration that they should Erect Bars on the Line of his Land and at their own time to fence out a Road along the same and if the Jury further believe that Bars was Erected in pursuance thereof and that said Scott did undertake "to to" fence according to said agreement but was prevented by Gatis and that Gatis in Violation of his agreement fenced up and obstructed the way then the Defendants had a right to remove said Obstructions-

Ms 4 "

Refused

If the Jury believe from the Evidence that there was a Public Road laid out and opened by the County Commissioners Court across the said Close or farm of the Plaintiff and that said Road so laid

cut and opened by them had never been
taken ^{up} or ^{vacated} and that the said
Plaintiff had forced it up and the the said
Defendant let the fence down where the same
was built across said Public Highway in
order to pass over and along said Road.
that then they did not commit a Trospass
and the Law is for the Defendant

Mr 5 "

Refused

If the Jury believe from the
evidence that the said Plaintiff agreed to open
the Road located across his said close by the County
Commissioners Court of Kane County where
the fence was built along his said close on
each side of the said Road and by his own
acts he prevented the building of the said
fence then it becomes a Public Road and if
he afterwards fenced up the said Road or
obstructed it any person who had occasion
to pass over or along said Road had a
Right to throw down ~~the~~ said fence or
remove said Obstruction and in doing so
they committed no Trospass on the Plaintiff
provided in doing so they committed no
unreasonable Damages to said fence or close

Reprints

That upon the issues found
in the 3^d Special Plea of the Defendants the
Law is for the Defendants.

Issue

unless the Plaintiff has proved
to the jury that the Defendants committed a
Trespass on the Lands described in the Plaintiffs
Declaration the Law is for the Defendants and
the Jury should find for the Defendants on
the Plea of the general issue

Issue

If the Jury find the issues
found on either of the Pleas of the Defend-
ants in their favor that then the Defendants
are not guilty of Trespass & they should so
find

Issue

The mere Violation by Yates
of his agreement would not annul the
License if any was given

The jury then retired under an officer of the Court to consider of their verdict and subsequently returned into Court and said that they had agreed and for a verdict say "We the Jury find the Defendant Guilty and assess the Plaintiffs damages at Six Cents" which is ordered by the Court to be entered of Record. Whereupon the Defendants move a motion for a new Trial "and afterwards to wit on the 24th Day of May 1853 the Motion heretofore made in this case for a new Trial by the Defendants comes on to be heard and the Court after hearing the argument of the Counsel and being fully advised over rules the same

Alphonso Yates

vs

Samuel S. Kimball

Abraham Lumbard

Respondents

This day comes on to be heard the Defendants Motion for a new Trial herein. After Argument of Counsel the Court being fully advised overrules said Motion for which the Defendants except. It is therefore considered by the Court that the Plaintiff recover from the Defendants the Sum of Six Cents "Together with his Costs and Charges by him about this Suit in this behalf expended and have Execution therefor

Thereupon the Defendants Except to the
 ruling and decision of the Court in refusing
 to grant a new trial in this Cause and
 prays an appeal to the Supreme Court of the
 State of Illinois and presents to the Court this
 his bill of Exceptions and prays that the same
 may be signed and sealed and made a part
 of the Records in said Cause which is
 accordingly done this 25 day of May 1833
 it being one of the days of the said May
 Term of the said Court for 1833

Isaac G. Wilson
 Judge

State of Illinois
 Rome County J^d I. Luther Dearborn Clerk of the Rome
 County Circuit Court do hereby certify
 that the above and foregoing is a true ^{correct} copy
 of the Declaration. Plea. Amended Plea. Replica-
 tion to 2^d and 3^d Plea. Replication to 3^d Amended
 Plea as Amended. Bill of Exception. Instructions
 and final Judgment as appears on file and of
 Record in my Office



In Witness Whereof I Luther Dearborn
 Clerk of said Court ^{hereby presents for my hand} and the Seal
 thereof at Geneva June 5th 1833

Luther Dearborn Clerk
 By H. A. Blanchard Deputy

36"

Superior Court

Samuel S. Kimball &

Abraham Lumbert

Plaintiffs in Error

vs

James Fenn of the said Court for
1833

Alphonso Yates

The Plaintiff in Error in the
above Entitled Cause assigns the
following Causes of Error

First

The Court below Erred in refusing to allow
the Plaintiffs in Error to give parol Evidence
Explanatory of the Order made by the County
Commissioners Court on the 26th day of March
1849

Second

The Court Erred in giving the first Second
and Third Instructions asked by the Plaintiffs
below

Third

The Court Erred in refusing to give the first
Second third fourth fifth and Sixth In-
structions asked by the Plaintiffs in Error

Fourth

The Verdict is Contrary to the Evidence in
the Case

Fifth

The Verdict is Contrary to Law

Sixth The Verdict - is against Both the Law and
the Evidence in the Case

Seventh The Court erred in Refusing to grant
a new trial

J. H. Maybom

Atty for Plaintiff in Error

Maj. Geo for marking Records 19.00

L. Drustow

Supreme Court Term Nov
1848

Samuel S. Gorton
v Abraham. Lumber
Plaintiffs in error
v

Alphonso. Yates

Filed July 2^d 1853.
L. Leland Clerk
By J. H. Leland
Deputy

Superior Court
Samuel S. Kimball &
Abraham Lumbert
Plaintiffs in Error
vs
Alphonso Yates

June Term of the said
Court for 1853

J. W. Maybourn
Att'y for Plffs in Error
The Plaintiffs in error

in the above entitled case assign the fol-
lowing causes of error

First

The Court below erred in re-
fusing to permit the plaintiffs in
error to give proper evidence explanatory
of the order made by the County Court
Superior Court on the 26 day of -
March 1849. Cid 5 Ill. P 235 & 4. Also the
3 of Scammon R. 357 Also 1. Scammon
R. 97-

Second

The Court erred in giving the -
first, second and third instruction
asked by the plaintiffs below Cid 13 Ill
R. 341-

Third

The Court erred in refusing to
give the first second, third fourth
fifth and sixth instruction asked by
the plaintiffs in error Cid -

Fourth

The verdict is contrary to the evi-
dence in the case

Fifth

The verdict is contrary to law

Sixth

The verdict is against both the law and the evidence in the case

Seventh

The Court erred in refusing to grant a new trial -

The County Commissioners Court under the ^{old} County organization in laying out roads did not act in a judicial capacity - and therefore peremptory evidence is admissible to explain, & to ~~disprove~~ ^{show} defects in their records ~~for that purpose~~ and - 1 Gill Page 12 - also 5 of Gill 235 -

If the records of the County Court do not show & establish ^{where} the location of a road is located by the County Commissioners, the same may be proved ^{by} peremptory evidence and 1 Gill p 14

No Peremptory evidence is necessary to establish the location of a road This may be done - by peremptory evidence, and is said as such and is worked 1 Gill 13 -

It is not necessary for the Records
of the la Cour - Court to ^{show} how or in
what manner the damages are settled
by those claiming them and this may
be proved by private testimony vid 1-
Gill 363.

In contemplation of law a road is
opened when the proper authorities
have approved of the report of the
viewers and sanctioned the location -
vid 11 Gill 499.

This the words of the law are
most fully established.

A claimant of damages in opening
a road must be expressly
made by those closing them, or they
lose all right to ~~them~~ ^{at the proper time} vid 11 Gill 507-
and this defendant in error did not do
in this case as the Records shew -

The instructions asked were appropriate
& pertinent and they should have
been given vid 5 Gill 285.

Supreme Court

Stamball and

Lambert
As

Gates—

Stanton & Bant

Supreme Court
 Samuel S. Kimball &
 Abolition Society
 Plaintiffs in Error
 vs
 Apphansa Gates

Dr. Sir

Please please
 place the above entitled suit an-
 terol docket of the June Term of
 the said court the same as if the
 record was filed with you in
 the case, that we will bring down
 when we come down to dispose
 of the case as by agreement of -
 counsel it is considered as filed
 and I have give thru a copy of -
 errors assigned when I come down
 I will pay your some costs in
 the case

Yours with Respect
 J. H. Mayhew

To
 L. Leland Esq.
 Clerk of the
 3d division of the
 Supreme Court

43
Saml. S. Kimball shos,

Alphonso Yates

Recipe

Frid June 9. 1853.
Holland Ark.

Charles B. Wells & A. M. Stennington.

For the defendant in error refers
to the following Authorities.

Revised Statute, Chap.
93. Sec. 33; The County Commissioners Court shall
establish on Record the width of the Road &c.
^{on file in the office of the County Clerk &c.}
Clearly, Contemplating that the Record should
be the only evidence of the order establishing
the Road & the width thereof; and no Oral
testimony can be allowed perfecting such
Record in order to give it vitality; it is a
summary proceeding authorized by Statute
to amend private property affecting the
rights of individuals, and which divests the
title to real estate, ought to be strictly pur-
sued, and should appear to be so on the face
of the proceedings. 1 Scam 325

The Cases referred to by the
Plaintiffs in Error of Washington Co. is Partier
5 Gill 235. Kimey vs The People 3. Scam 357.
has no Application to the question at bar;
in those Cases the County Commissioners Court was acting
as the fiscal agents of the County, in making
Contracts & settling accounts of the County, &
their determination is no more conclusive than
individuals acting in the same Capacity, open
to the correction of errors.

To establish a public highway
it must be recognized & kept in repair by the
County Authorities, & traveled & occupied by the
public, see 1 Gill 8 & 10; but in the case
at bar, the Record of County Commissioners Court
of March 26th 1849 shows that they did
not take possession of said road paving

though the defendants in error land, or
contemplate it as a public highway, only
on the carrying out of a certain agreement
which the evidence shows never was done.

Stimball et al

v

A. Yates.

Plaintiff of the Defendant

Wells, & Herington

In Debt. in error

Filed July 2^d 1853.

J. Leland Clerk.

By J. H. Leland
Scrip