

12421

No. _____

Supreme Court of Illinois

Champlin.

vs.

Morgan.

State of Illinois 2 Pleas before the Honorable Addison
 Asalle County J. E. Hollister presiding judge of the
 ninth judicial district of the State of
 Illinois at a circuit Court commenced and hold
 in and for the County of Asalle and State of Illinois
 at the Court House in Alton on the 12th day of
 September A.D. 1835. And of the Independence of the
 United States the twenty ninth
 Pursuant

The Honorable Addison E. Hollister Presiding Judge
 John F. Scullerck
 William H. L. Wallace State Attorney
 Francis Wynn Sheriff

12421-1

And afterwards to wit on Monday November 19th
 1835 the Court being one of the days of the Autumn
 term of said Court for the year 1835 an order
 was made and entered of record in said court in the
 words and figures following viz

"John C. Lechamplin
 " 2 Inpass Quam Sacrum fregit
 Per Morgan 3 On motion of the defendants the
 plaintiff is ruled to file his
 declaration herein on or before Monday of the 3rd
 week of this term."

12421-1

Plainta

Pleas before the Honorable the Circuit
Court of LaSalle County Illinois, at a
term of said Court begun and held
at the Court house in Ottawa in said
County on the 12th day of November A.D. 1855

Present, The Honorable Matthew E. Hollister
Judge,
John F. Nash Clerk, and
Eri L. Waterman, Sheriff.

Be it remembered that, on the 14th day
of May A.D. 1855, John C. Champlin caused
to be issued out of the office of the Clerk of
our said Court, under the seal thereof, a
Summons, in the words and figures follow-
ing, that is to say:

State of Illinois
LaSalle County } }

The People of the state of
Illinois, To the Sheriff

of said County Greeting: We command
you that you summon Rice Morgan if he
shall be found in your County personally to
be and appear before the Circuit Court of said
County on the first day of the next term thereof
to be holden at the Court house in Ottawa in
said County on the 12th day of November next
to answer unto John C. Champlin in a

Summons.

Plea of trespass, quare Clausum fecit, to the
 damage of said Plaintiff as he says of one
 thousand dollars - and have you then and
 there this writ with an endorsement thereon
 in what manner you execute the same
 Witness John F. Nash, Clerk of our
 said Court, and the seal thereof at Ottawa
 this 14th day of May, A.D.
 1855.

Great D.

J. F. Nash, Clerk.

Return -

Which Summons was returned into our
 said Court, endorsed, "Executed this writ by
 reading the same to Rees Morgan, July 14th
 1855." J. Warner, Sheriff.

Filing -

And which said writ so returned, was filed
 in our said Court on the 8th day of November
 A.D. 1855.

And afterwards on the 23rd day of November
 A.D. 1855, the said Plaintiff filed in our said
 Court a Declaration in the words and figures
 following, that is to say:

State of Illinois

Saballs County

Circuit Court thereof
 of the Nov. Term, A.D. 1855.

John C. Champin

vs.

Rees Morgan

John C. Champin
 in his own proper person, complains of
 the said defendant in a plea of trespass

Innocent Claudum fugit.

Declaration.

For that the said defendant on the 14th day of July A.D. 1855, and on divers other occasions and days between that day and the day of the Commencement of this suit, at Lushalle County aforesaid, with force and arms broke and entered the close of the Plaintiff situate in the County of Lushalle aforesaid, said close being the south west quarter of the north east quarter of Section thirty one, in Township thirty four, range four east of third principal meridian, and there and there broke down and destroyed a great portion of said Plaintiff's fence to wit fifty perches, ~~to wit~~ and of great value to wit one hundred dollars, then and there being in and of and belonging to the said close of said Plaintiff, and with feet in walking, and with horses, cattle & Carriages, trod down, crushed and injured the grass, herbage and crops of the Plaintiff of great value, to wit of the value of five hundred then and there being and growing and subverted and destroyed and spoiled the earth and soil of said close of said Plaintiff, and other wrongs then and there did, to said Plaintiff to wit at the County aforesaid, against the peace and dignity of the people of said State and to the damage of said Plaintiff in the sum of one

thousand dollars, and therefore he brings suit -

John C. Champion
in response

And at the November term of this Court, A.D. 1855, this Cause was continued.

And afterwards to wit on the 9th day of May A.D. 1856, the said defendant filed his Pleas in this Cause in the words and figures following that is to say:

State of Illinois
Sasalle County, P } Circuit Court May term
1856.

Rees Morgan

atr.

John C. Champion

! Trespass quare Clausum
fecit.

This defendant by Stadden & Cawley his attorney, comes and defends the force and injury when &c. and says that he is not guilty of the said supposed trespass, as laid to his charge in said Plaintiffs declaration in manner and form as therein claimed and charged against him, and of this the said defendant puts himself upon the Country &c. and the Plaintiff doth the like, &c.

Rees Morgan, by
Stadden & Cawley, his attys.

J. C. Champion.

and for a further plea in this behalf as to the
~~said~~ supposed trespass in said Plaintiffs
 2^d Plea. reclamation as described, and therein sets
 forth by him, the defendant says that ~~the~~
 Plaintiff, ought not to have and maintain
 his aforesaid action thereof against him,
 because he says that long before and at the
 time when ~~se~~, there was a certain Common
~~se~~, public highway laid out and established
 into and through over and along the said
 close in which ~~se~~, for all the people of the
 State of Illinois and others to go return, pass
 and repass on foot and on horseback
 with Cattle & Carriages, at all times at their
 free will and pleasure, wherefore the defend-
 ant being one of the Citizens of the ^{said} State of
 Illinois at the several times when ~~se~~,
 went, passed and repassed ~~se~~ into and
 through, over and along the said highway
 there using the same as he ^{lawfully} might for the
 Cause aforesaid, and in so doing he the said
 defendant with his feet in walking, and the
 said Cattle and Carriages unavoidably a
 little trod down, trampled upon and spoiled
 the grass and herbage there growing and
 being in the said close, in which ~~se~~
 and subverted the soil and damaged the
 same in said close, and the said Cattle
 and horses at the said several times, when
~~se~~ in passing and repassing along the said
 highway, by strength & morsels and against
 the will of this defendant eat up and

pastured a little of the grass there growing
 in said highway - and because the said
 fences in the said declaration mentioned
 before and at the time of the several times
 when he had been wrongfully erected
 and were then standing and being
 in and across the said highway and
 obstructing the same, so that without
 breaking down prostrating a ~~part~~^{portion} of said
 fence the said defendant could not
 then pass and repass with his said cattle
 horses and carriages into ~~and~~ through over
 and along the said close in which he
 is in the said highway there as he ought to
 have done the said defendant at the
 said several times when he, in order to
 remove the said obstruction tore down
 a portion of said fences in ^{the} said declar-
 -ation mentioned, and took and removed
 the fences to a small and convenient
 distance on and within the line of said
 highway and there left the same for
 the use of the said plaintiff, doing no
 unnecessary damage to the said
 Plaintiff on those occasions, which
 are the said supposed trespasses in the
 Plaintiff's declaration mentioned and
 whereof the said Plaintiff complained
 against him the said Rees Morgan
 and this he is ready to verify - wherefore
 he prays judgment if the said Plaintiff
 ought not to have or maintain his afores-
 aid action there against him -

Plea

Stadden & Cawley,
for defendant.

And thereupon the said Plaintiff filed his
Replication to the last aforesaid Plea in the
words and figures following, to wit.

Champion }
vs } Respon. gu. cl. fr.
Morgan } May T. Saballe Cir. Court, A.D. 1856.

And now comes the said Plaintiff and saith
that as to any thing by the said defendant
in his plea last above pleaded, precluding
because he saith that there was not at the
time when he any Common or public
highway laid out and established into and
through over and along the said Plaintiff,
close in that behalf in his declaration
mentioned for all the people of the State
of Illinois and others to go, return, pass
repass on foot and on horseback with
Cattle and Carriages at all times at their
free will and pleasure as is in and by
the plea aforesaid alleged, and of this the
Plaintiff puts himself upon the Country.
J. C. Champion

And afterwards to wit at the May Term
A.D. 1856, of our said Court to wit on the
second day of June A.D. 1856, as yet of the
Term aforesaid ~~an order was made and entered~~
~~of never in force occur in the words and figures following~~
~~by the attorneys, and thereupon came~~
~~the following jurors of a jury to wit.~~

Replication

Trial

William Riss, A. C. Putnam, M. W. Dimmick,
Brad Ford, John Stoul, A. S. Putnam, Life
H. Powers, William Parsons, James Prescott
Eben Wicks, David J. Cooper, and B. H. Woodbury
who being duly tried, sworn, and empan-
elled to try the issues joined, upon their oaths
do say that the defendant is guilty in manner
and form as charged in the Plaintiffs declar-
ation, and assess the said Plaintiffs dam-
ages by reason of the premises at the sum
of one Cent., and thereupon the defendant
moved the Court for a new trial of this Cause,
which is granted by the Court at the
defendants Costs of this term, and thereupon
this Cause is continued until the next
term of this Court.

Verdict.

Motion for

New trial.

Granted.

Continuance.

Continuance.

not used
J. H. Chaplin

And afterwards at the November term of our
said Court in the year of our Lord eighteen
hundred and fifty six, this Cause was continued
until the next term of said Court.

Continuance.

not used
J. H. Chaplin

And afterwards at the February term of our
said Court in the year of our Lord eighteen
hundred and fifty seven this Cause was
continued until the next term of said
Court.

John L. Champlin

Rees Morgan

Jury of Quorum

This day came the plaintiff of
 Bushnell & his attorney, and the defendant of
 Stadden & Leavelle his attorney, and thereupon came the
 following jury of a jury to wit: William Rees, A. C. Putnam
 M. W. Dimock, David Ford, John Stodd. A. S. Putnam
 Siger M. Pomeroy, William Peabody, James Prescott, Eben Weeks,
 David T. Cooper, and B. A. Woodbury who are duly sworn
 and sworn to tell and truly say the issues herein
 according to the evidence, and after hearing a part
 of the testimony the further hearing of this cause is
 postponed until nine o'clock to morrow morning.

Tuesday June 3^d

John L. Champlin

Rees Morgan

Jury of Quorum

This day again came
 the parties herein of their attorneys together with the
 jury sworn herein, and after hearing the evidence of the
 evidence and the arguments of counsel, the jury were
 to consider of their verdict, and after due deliberation
 thereon have returned into Court the following verdict
 to wit: "We the jury find the defendant guilty in manner
 and form as set forth in the declaration, and assess the
 plaintiff's damages at one cent."

It is therefore considered by the Court that the plaintiff
 here and heirs of the defendant are entitled for his damages
 and also his costs and charges of him herein expended
 and that he have execution thereon.

Wednesday June 4th

"John C. Chauplin 2

Per Morgan

3 Insup Quam Saussun fregis
3 The defendants cannot meet the
costs for a new trial"

Friday June 6th

"John C. Chauplin 2

Per Morgan

3 Insup Quam Saussun fregis
3 It is ordered by the Court that the
motion be taken for a new trial
of the defendants for a new trial & sustained at the
costs of the defendants of this term to be taxed"

And afterwards to wit: on Monday June 15. 1837 the
Court being one of the days of the June term of said
Court for said year another order was made and
entered of record in said cause in the words and
figures following viz:

John L. Champlin 3
vs Joseph Quam & Samuel Fergis
Revs Morgan 3
This day the plaintiff comes in person
and by C. C. Crofts his attorney and the
defendants of said and said his attorneys and
thereupon comes the following jury of a jury to wit:
Charles Cook, Anthony Burr, Archibald Thompson, W. M.
Shaw, H. D. Galt, John Hoxsey, Cyrus Searcy, E. M.
Griggs, Marshall Meiler, James Prescott, William M.
Penick and D. M. Stearns who are duly elected and
sworn to well and truly try the issues herein
according to the evidence, and after hearing a part
of the testimony, the further hearing of this cause is
postponed until the coming in of the Court
to morrow morning.

Tuesday June 16th

John L. Champlin 3
vs Joseph Quam & Samuel Fergis
Revs Morgan 3
This day again comes the
parties hereto of their attorneys, together with the jury
sworn herein, and after hearing the balance of the
evidence and the arguments of counsel, the jury return
to consider of their verdict: and after due deliberation
thereon send return into Court the following
verdict to wit: "That the jury find the defendant
not guilty in manner and form as charged
in plaintiffs declaration."

Plaintiff cannot now move the Court for a
new trial.

And afterwards to wit on Thursday June 25th the same
 being one of the days of the said term for the year
 1837 the following final order was entered of record
 to wit;

"John L. LeComptie
 vs
 Reuben Morgan 3 Juries
 Joseph Quam Secusman

This day again came the
 parties before their attorneys, and after hearing
 the arguments of counsel, the Court granted the
 plaintiff's motion for a new trial.

It is therefore considered by the Court that the
 defendant here and heirs of the plaintiff his
 costs and charges of him herein expended, and that
 he bear execution therefor.

Plaintiff may prep an appeal to the Supreme
 Court which is granted upon condition that the
 plaintiff within thirty days from this date file an
 appeal bond payable to the defendant in the penal
 sum of three hundred dollars with Richard Brown
 as his security

On the 26th day of June A.D. 1837 and while said
 Court was in session at said term the
 plaintiff filed his Bill of Exceptions in the words
 and figures following to wit;

Jury

Verdict

Motion for
New trial
overruled

Exception

And afterwards to wit at the June term of our said Court in the year of our Lord eighteen hundred and fifty seven, and on the 15th day of June, as yet of the term aforesaid, came again the said parties by their attorneys, and the following Jurors of a Jury also came, that is to say: Charles Lusk, Anthony Berry, Archibald Sharp, H. M. Shaw, H. D. Gorbett, John Hoxie, Cyrus Lovejoy, E. J. Griggs, Marshall Miller, James Prescott, William H. Pennell and L. M. Stevens, who being duly chosen, empanelled and sworn, to try the issues joined, on their oaths do say, that the defendant is not guilty in manner and form as charged in the Plaintiffs declaration, and thereupon the Plaintiff moved the Court for a new trial, which motion was then and there overruled by the Court, and to which decision of the Court in overruling the said motion for a new trial, the said Plaintiff then and there excepted, and then and there tendered to the said Court his Bill of Exceptions, and prayed the Court then and there to sign and seal the same, which was done in open Court on the day and year aforesaid, and ordered to be made a part of the Record in this cause, and which Bill of Exceptions is in the words and figures following, that is to say:—

Bill of
Exceptions

State of Illinois, In the Circuit Court
Sasalle County } thereof, June term
A.D. 1857.

John C. Champlin

vs.

Rees Morgan

Trespass quare clausum fregit.

Be it remembered that on the trial of this cause, the defendant admitted to the Jury that the close in the Declaration mentioned was owned by the Plaintiff, and that he broke and entered said close at the time and place in the said declaration mentioned, and committed the trespasses therein mentioned, and the plaintiff admitted to the Jury that the defendant broke and entered the close and passed out of said close on the surveyed line of a supposed road or public highway, laid out, as the defendant claims, by Commissioners appointed for that purpose by the County Commissioners, Cant of Shelby County in 1832, and leading from the Court house square in Ottumwa to intersect the Chicago road at or near John Greens Mill at Dayton, and that the defendant in passing through said close, travelled substantially on the surveyed line of said alleged public road doing no more damage than was necessary, and that the said close in 1832 was canal land and continued so till some time in September 1848 when it was purchased of the trustees of the Illinois and Michigan canal by James Clark

of whom the Plaintiff purchased afterwards and before the commencement of this suit and before the said trespass complained of were committed,

The Plaintiff here rested his case. The defendant to maintain the issue on his part, offered in evidence a Record of the proceedings of the County Commissioners Court of LaSalle County, had at the September term 1831 and the March term 1832 of said Court, on the Ottawa and Dayton Road to which the Plaintiff then and there objected. This Court overruled said objections, and admitted the said Record to be read in evidence to the Jury, and to the opinion of the Court in that behalf the Plaintiff then and there excepted, which said Record and proceedings were in the words and figures following:

State of Illinois
LaSalle County, ~~Sept~~ County Commissioners Court,
September Term 1831.

Among other things the following order was adopted:

Ordered by the Court, that there be a road viewed, leading from the public square in Ottawa, by J. Green's Mill, to intersect the Chicago road at or near John Greas, and that Luther S. Robbins, Wm. Ritchey and Joseph Cloud, be appointed Commissioners to locate and survey said Road, the nearest to and from said points.

March Term of said Court, 1832.

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The following order and Report was entered of Record to wit:—

Ordered by the Court that the Report of Joseph Cloud and L. S. Robbins, viewers of a Road leading from the public Square in Ottawa by John Greens Mill to intersect the Chicago Road at John Greens and that the aforesaid Road be established as a public highway and that their Report be entered on the Records of this Court, which is in the words and figures following to wit:

To the honorable County Commissioners Court of Shelby County:

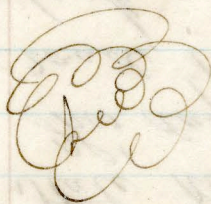
We the Commissioners appointed to view and survey a road from Ottawa to Greens Mill, thence to intersect the Chicago Road at or near Greens, Report to your honorable body that we have surveyed and located the road as follows to wit: beginning at the public square in Ottawa and running North 40° east 40 Chains—thence N. 30° E 21 Chains; thence N. 30° E 35 Chains—thence N. 10° E 28 Chains & 50 links—thence N. 28° E, 12 chains & 50 links thence N. 48° East 100 Chains—thence N. 60° E, 6 chains; thence N. 54° E, 4 chains—thence S. 71° E, 4 Chains—near the Mill—thence North 26° E, 33 chains thence N. 82° E, 8 chains, thence N. 52° E, 8 chains—thence N. 55° E, 48 chains—thence N. 47° E, 11 chains & 50 links—thence N. 50° E,

40 Chains - thence N. 79 E. 25 chains - thence
N. 65 E. 11 chains; thence N. 78 E. 6 chains
thence N. 80 east 25 chains, to John Greens,
all of which we submit to your Consideration

Joseph Cloud,
March 5, 1832., L. S. Robbins } Commis^r

ordered by the Court that
William Stadden be appointed Supervisor
of the Road from Ottawa by Greens Mills
to where it intersects the Chicago Road.
State of Illinois

Saballe County, } I, Samuel W. Raymond
Clerk of the County Court of said County
do hereby Certify that the foregoing is a
true and correct copy from the Records of
the late Co. Court of said County
now remaining in my office.



In witness whereof I have
hereunto set my hand and
affixed the seal of said Court
at Ottawa this 11th day of
June 1857.

S. W. Raymond, Clerk.

The defendant then offered in evidence
to the Jury the record of the proceedings
of the County Commissioners Court of Sa-
balle County, had at their March term
1838 and a plat and Report of the
Naperville State Road, filed in said Court
to which the plaintiff then and there
objected - This Court overruled said

Said objections, and admitted said Record Report and plat to go to the Jury and to the opinion of the Court in that behalf, the Plaintiff then and there excepted - which said Record, Report and plat, admitting the courses & distances, were in the words and figures following -

County Commissioners Court, March Term 1838. Tuesday March 6, 1838. Court met pursuant to adjournment, present the same Commissioners as yesterday. State Road Report.

This day the Report and map of a State road, located by R. M. Sweet, Isaac P. Hallock and Benjamin F. Frealey, from the Court house in Ottawa by Greens Mill w^m. L. Dunovans, betal Vermetts - Georgetown, George Hollenbachs, William Harris' Edward G. Aments, and from thence to Naperville, was handed into the Court by Almon Ives Esq. - and it appearing to the satisfaction of the Court, that the said Commissioners have complied with all the requirements of the act authorizing the locating of said Road the said Report and map are accepted and approved by the Court and ordered to be filed. Ordered that the following compensation be allowed out of any money in the Treasury not otherwise appropriated to the following named persons to wit: To Almon Ives, as Surveyor on said

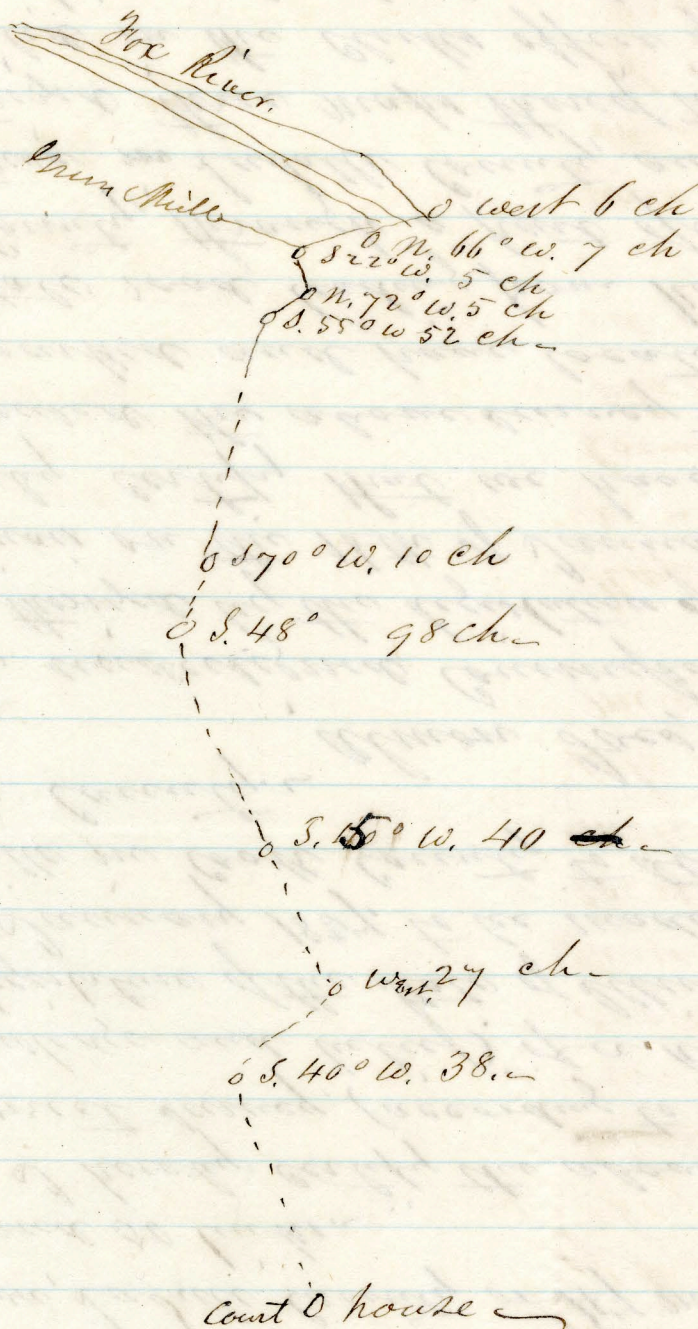
State of Illinois
 Samuel M. Raymond Secy of the County of
 of said County do hereby certify that the foregoing
 and correct, off from the records of the said
 County of said County, and the seal of
 my office, Witness my hand and the seal of
 said County this 23^d of May 1896.
 S. M. Raymond
 Secy

(p 47)

Road \$24.00 To Isaac P. Hallack one of said Commrs. \$53.42

Making the amount paid by this County \$79.42 being the whole amount charged to this County for locating said Road. — \$

The following is a copy of the Plot returned by the Commissioners appointed to locate the Ottawa & Naperville road, omitting the delineation of the Courses and distances on the east side of Fox River:



3831. ch & 50 links, from Naperville Cook County to Ottawa, LaSalle County, or 47 miles and 71 chains and 50 links.

I hereby certify the above to be a true and correct Survey, (according to the best of my knowledge and belief) of a Road authorized by the Legislature of the State of Illinois on the 16th of January 1837, to be made from Naperville in Cook County, to Ottawa in LaSalle County.

Almon Fox, Surveyor.
We, the undersigned Commissioners appointed and authorized by the Legislature of the State of Illinois on the 16th of January 1837, do hereby certify, that we have viewed and caused the above survey to be taken and marked and have located the same as a State road, leading from Naperville in Cook County, through a part of Kane County, to Ottawa in LaSalle County, and have authorized three maps thereof to be made and filed in the Clerk's office of the County Commissioners Court of each of the above said Counties.

B. F. Fridley }
J. P. Pollock } Commissioners.

It was admitted by the Plaintiff that all of said Records were genuine, and were on file in the office of the Clerk of said Court.

The defendant then called John Green

John Green,
for
Deft. -

as a witness, who testified as follows, viz -
The County Road from Ottawa to Dayton
was located in 1831 or 1832 I was one
of the Chain Carriers. I know where that
road crossed the Plaintiffs Close. In the
Spring of 1832 the road through the timber was
cut out by William Stoddard, Supervisor, who
was appointed in 1832. - In 1847 or 1848 I
was Supervisor, and we put all the road
work on the hill at Rees Morgans, which is
on the line of Survey of this road. Richard
Thorne was the first who fenced across this
Road. This was in the Spring of 1847 I think.
Thorne told me that he wanted the travel
to go round for that season. on account of
the trouble and cost of fencing out the
road, and that whenever the public required
it, he would fence out the road. I
objected to his fencing across the road.
James Clark was the next one to fence
across the road, on what is now the
Plaintiffs Close, I think in 1848.

From 1831, till 1847, this road was tra-
velled substantially on the line we surveyed
more or less. The Dayton Travel went
through the timber, by Morgans, except
in wet seasons or wet weather. Loaded
teams went through there. Hugh
Allen, now dead, went through with
loaded teams hauling flour from 1836
to 1838. He made four trips a day
by that route, while Jack Vaughn

John Green,
for
def.

who went the other road round the point of timber only made three trips a day. They were both hauling for me at ~~the~~ ^{own} ~~same~~ time - there was all along considerable travel by the point of timber crossing the ravine on a bridge built there in 1831 or 1832. The travel by the road as now travelled is increased a mile more than by the surveyed road which lacks four chains of being four miles from Ottawa to Dayton.

In 1838 I was present when the Naperville State Road was laid out. We aimed to lay it on the same line as the County road - and it was conceded by Plaintiff that the lines of said roads were identical over Plaintiffs Close.

From Morgans to Ottawa was in 1832 all open prairie, and Clark's Shanty was the first improvement this side of Morgans. From Morgans we took pretty much a straight shoot, sighting for an old tree on the bluff near Ottawa. This tree was then standing, and the stump is still there. There is no other laid out road that I know of, from Ottawa to Dayton, that you can travel on without trespassing on private lands - and I would have known it if there was. There was a bridge built across a ravine between Morgan & Dayton. Work was done on the surveyed road at the ravine, at

John Green -
for
Deft. -

Morgans in 1854 or 1855, before the Commence-
ment of this suit. The public authorities
did not acquiesce in the fencing up of
the road, but there had always been a
controversy between them and those who
had fenced.

The defendant then called Charles
G. Miller who testified as follows:

Charles G. Miller,
for
Deft. -

I came to Dayton June 15th 1837
and worked in 1837, 1838, and 1839 on this
road, in cutting through the timber between
Dayton and Morgans. I worked under
William Stadden and John Green, Supervisors.
I know of travel on this road by foot,
on horseback, with buggies and empty
waggon up to 1841.

I never drove a loaded
team through on that road.

Since 1841 most of the travel
from Dayton to Ottawa, went round by
the point of timber, and passed through
on the plaintiffs tract, north and west
of Clarks shanty, to Haywards sod fence.

There was a bridge at the
point of timber, on this route, built in
1840 to 1842, on land now owned by
Gedney, over which the public passed.
There were three bridges there close
together - I do not know of any
travel on the surveyed line since
1841, as I moved then from Dayton

to my farm, and from my farm to Ottumwa the most direct ^{road} ~~route~~ was by the point of timber - I think the road was cut out through the timber about sixty feet wide.

The defendant then called John Russell, who testified as follows:

John Russell, 1840, I have crossed the ravine at Morgans, for from 50 to 100 times - I went on foot, Drft. - horseback, with a buggy, and with empty waggons - I worked on the hill at Morgans on this road from 1840 to 1843, when John Stadden, William Stadden, and John Green were Supervisors. The chief difficulty on that ~~route~~ was this hill, we could never get enough road work to grade it down.

And for this reason the travel crossed at the point of timber.

It would have taken three years of the road labor in that district then to grade it down.

Those who travelled on this road from 1840 to 1843, crossed the ravine just below Morgans. There was a little bridge there made by the Staddens for their own use. I never saw a great many loaded teams go that way.

The general travel since 1846 when Thorne fenced was by the point of

timber ^{over} by a bridge there. There was a bridge above this again, where the ravine ended in a slough.

The defendant there called Aaron Daniels, who testified as follows:

Aaron Daniels.

for
Deft.

I have lived near Dayton since 1831 - South of East of Dayton 1 1/2 miles. I have travelled from Dayton to Ottawa since I have been in the Country. I never saw many teams go by way of Morgans house except myself. This road was bad at the hill, and for that reason the travel went by the point of timber. I have crossed 50 times or more on this road on foot, on horseback and with ox teams with four yoke of Cattle. When I had heavy loads I always went round by the point of timber on the other road, and when empty I went by Morgans. With 4 yoke of Cattle I have hauled 10 barrels of flour up Morgans hill from 6 to 10 times. From 1838 to 1840 I have seen as many as four or five teams at a time. They would put what load they had on my waggon and we doubled teams on the hill, if I stuck, I never met a team on the hill, and never saw any loaded team go through, but myself. The general travel was by the point of timber and I went that way as early as 1831.

The defendant then called David Green who testified as follows:

David Green
for
Deft.

I have lived at Dayton since 1830. We travelled the surveyed road some at a very early day - with buggies, on horse back and with light loads - we went up back of Morgans till the bridge was built, and this road was used 12 or 15 years, and road labor was laid out on it. There was a finger board put up in Reeds lane in 1835 to 1837 close to the sod fence pointing towards Morgans. It said "2 miles to Dayton" It remained a year or two. It was north of the S.E. corner of the sod fence. The bridge was built at the point of ^{the} timber in 1840, while John Stadden was Supervisor of Dayton. He had it built. There was another bridge about 20 yards above. The general trail since 1840 has been round the point of timber - all the heavy teams and the generality of other teams went that way. The Indian Creek and upper Fox River travel, and the Dayton folks all came together on the other road to the point of the timber, where they took different courses and the roads forked. It would be impossible for me to tell the number of times I travelled the surveyed road - it would average at least twice a week for fifteen years.

Champlin's
Farm,

It was here conceded that the whole of Plaintiffs farm consists of 140 acres, and that the plats show substantially said the

Reference to
Plots, and
fencing thereof.

Travel which went by the head of the timber
crossed his farm before it was fenced. That the
whole 140 acres were fenced in 1853 by Champin.

The defendant then called Jefe Green,
who testified as follows:

Jefe Green,
for
Def.

I have frequently travelled the
surveyed road by Morgan's house. As Morgan's
hill was not much worked, we never teamed
that way with a heavy load. In returning from
Ottawa with empty waggons, we went that
way. The travel with loaded teams was always
chiefly by the point of timber. I have met
the Plaintiff on the road by the point of timber.
In a wet time the ~~road~~^{ground} was bad on the other
road through Champin's meadow.

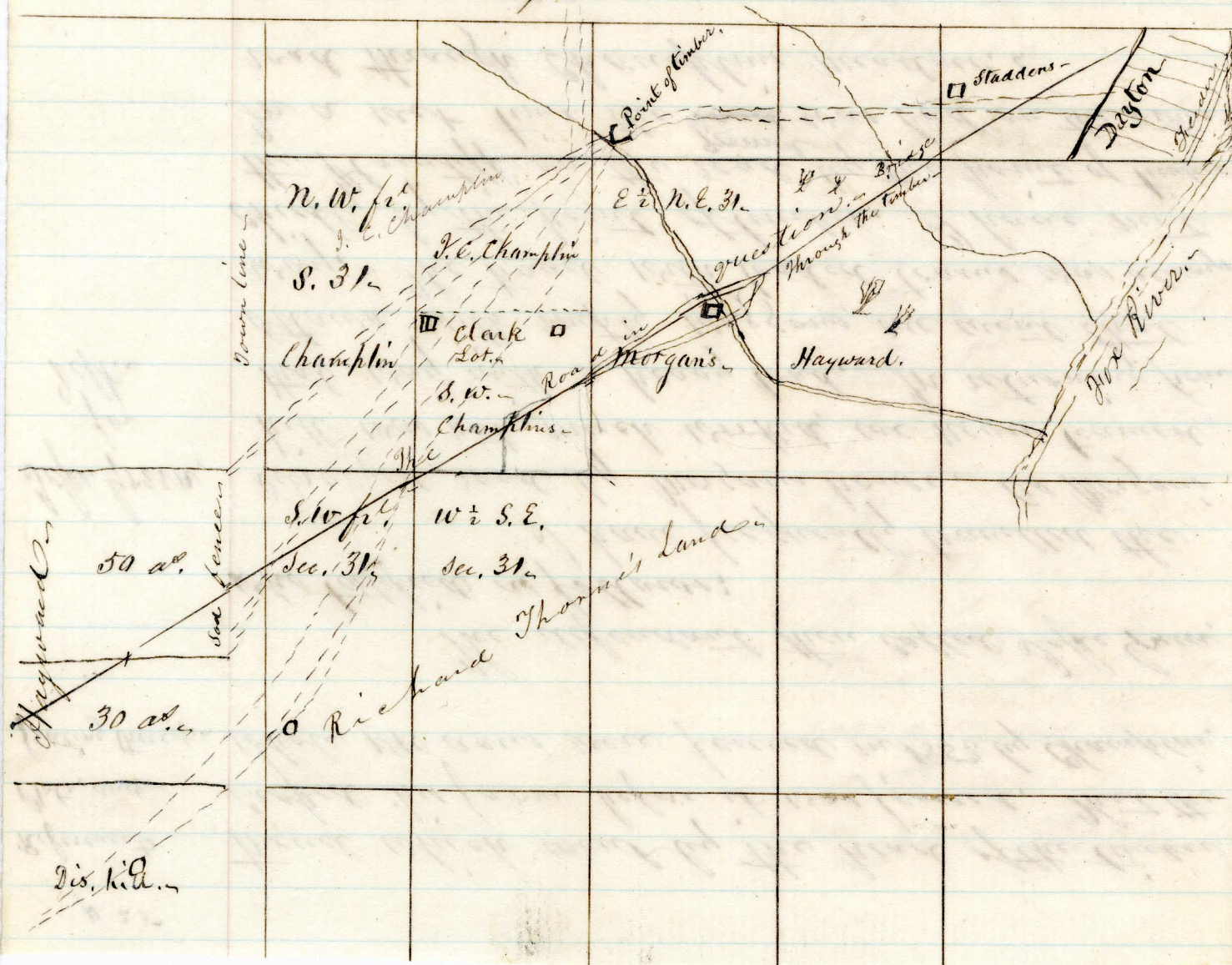
The defendant then called
Richard Stadden, who testified as follows:

Richard Stadden,
for
Def.

I came to Dayton in August 1848
and went from Dayton to my father's house by
this surveyed road. My father then lived
near where Morgan now lives. I live on the
line of this road between Morgan and Dayton.
The surveyed road would run through my
farm, back of my house, through my enclosure.
The surveyed road has been for some years
fenced across on my land. I fenced mine
in 1850. Through Champin's meadow
the marks of the old surveyed road
showing the old travel, now overgrown
with grass, are still visible. I examined

them, ^{on} yesterday. That he and Morgan had no way to get to Ottawa, by a laid out road, except by the one in Controunday, and that since he came to the County, there had been continual "Controunday" between the Dayton people and himself and Morgan and the public authorities on one side, and those who had fenced the surveyed road between Ottawa and Morgan's place on the other side.

The defendant offered in evidence a plat of the roads spoken of, which was identified as generally correct, by all the witnesses. It is herewith filed and marked "1" and is as follows:



The defendant here rested his defence.

The Plaintiff then called William L. Dunovan as a witness, who testified as follows:

Wm. L. Dunovan.

for
Plff. -

I have lived in this County since 1831, and I lived in Dayton from 1836 till 1842, and since then I have lived where I now do beyond Dayton. The Naperville road runs near my house. Hayward fenced while I lived at Dayton. I carried the Chain for the County road in 1832, from my place to Dayton and I know the surveyed line of that road. I went to Ottawa twice a week or oftener. The public travel has always been, since I have known it, a pretty direct course from the north east corner of Haywards sod fence, to the point of timber. I mean, since Hayward built the sod fence. Before that time, the travel went still further north and west of this corner of the sod fence. This was the general direction - and where it has varied, it has borne to the west, on account of the ground rising as you went further west. Before Hayward fenced the travel went back of his house, by Langley's hollow. Those on horseback and in buggies, sometimes went the surveyed road. There was only a foot trail through the timber, from Dayton to Morgan, but there never was any general travel

from Dayton to Morgans, on the surveyed road.

Glenovan,

Contd.

Richard Stadden's place is between Dayton and Morgans. - Stadden fenced in 1847, the surveyed road runs back of his house. His fence shut up the road, and turned the travel down a lane, just in front of his house. His fence is still there.

Old man Stadden lived where Morgan now does. He fenced up to Champlins fence in 1838, and that fence according to my best impression, would cross the surveyed road though. I am not positive. The Naperville Road from my place to Dayton has not been travelled on the surveyed line. It is fenced in, in a good many places and the travel varies from the survey sometimes a mile and a half.

On the County road of 1832 from Ottawa to Dayton, there never has been to my knowledge any fencing made with reference to the surveyed line. From my place to Dayton there has not been any road labor laid out on the Naperville road since 1844. I worked on the surveyed road at Morgans hill, under Supervisors several different years. In 1842 I worked there and at that time the abutments of a bridge had been built there, and the stringers put across. There was a bridge built across Fox River ^{the summer of} in 1855 on the surveyed route, at a cost of three or four thousand dollars. - and that

it was carried away about 4 or 5 months ago, and steps were being taken to have it rebuilt. The Naperville State road has always been travelled ~~from~~^{from} Ottawa ~~to~~^{from} Naperville.

The Plaintiff then called O. Seavans, who testified as follows:

Oranjo Seavans, for Piffs., I have been acquainted with the public travel from Ottawa to Dayton since 1834. In 1837 and 1838, I was Deputy Sheriff, and had occasion to travel to Dayton frequently. The general public travel has been, since 1834, by the point of timber. I know of no travel on the road as surveyed. I would have likely seen it, if there had been travel. The public travel went considerably west of Clark's shanty, I should think as much as 80 rods. Hayward had not fenced in 1838, and before he fenced, the road went up by Markeys, and after he fenced it went by the distillery hill and passed in front of his house, along the sod fence, and then went pretty straight to the point of timber. In 1834 I went once to old man Stadden's. Lugin lived there then. I went on what ~~is~~^{was} described as the surveyed road. It had only the appearance of having been used for family travel.

The Plaintiff then called Henry Green as a witness, who testified as follows:

Henry Green
for
Plff.

I have known the public travel from Ottawa to Dayton since 1833, until Haywood and myself fenced in 1839, the public travel all went, in going from Ottawa to Dayton, west of the Catholic burying ground to an oak tree, that had the highway mark on it of three hacks, that then stood on the point of the bluff, this side of Markers, and from there in a pretty direct course, to the point of the timber near Gedneys place, crossing the stream a little higher up than they now do.

After Haywood and me fenced, the travel went up the distillery hill, past Haywards house along the rod fence, to the point of the timber, bearing a little west on account of better ground.

There was no general travel ever, on the surveyed line, but was a good many rods north and west of it, whatever travel was on the surveyed line, was an exception to the general rule. It was only farm travel.

The Plaintiff then called James Clark, James Clark, as a witness, who testified as follows:

for

Plff.

I have known the public travel from Dayton to Ottawa, since July, 1837.

James Clark,
for
Plffs
Cont'd

I came on ^{to} the land now owned by the Plaintiff in 1845. No teams went by Morgans, unless they were going to see old Mr. Stadden. I teamed for the Greens from Dayton to Ottawa, in 1845, and before I fenced. The public travel came along in front of Richard Stadden's and passed along the timber, on the east side of the ravine which goes down past Morgans, to the point of the timber, where there was a crossing and then made for the sod fence. I never knew of any general travel any other way than by the point of timber. I live still on the Plaintiff's close. I built the first shanty in 1846 when I fenced. It stood at the north west corner of the forty I fenced. That shanty was torn down, and another one built on pretty much the same site. The travel always passed north and west of my shanty, about three and one half rods west of my last shanty. The distillery mill was first worked in 1842 to 1843. All the travel of the public went west of my shantys, towards the point, and any travel by Morgans was an exception. There are no marks of any track from Thom's north line to Morgans. I have not noticed any marks, and have not looked for them particularly. The timber had been cut through from Morgans, towards

Dayton, but the underbrush and trees had grown up so that in passing you would have to push it aside. It would brush you in going along on horseback. I am now in the employment of the Plaintiff.

When Thorn first fenced, I threw down the fence, and went through. Thorn afterwards told me I was wrong in doing so, and I did not go through any more.

The Plaintiff then called Henry J. Reed as a witness, who testified as follows:

Henry J. Reed,

for
Plff.

I have been acquainted with the public travel from Ottawa to Dayton for the last twenty three years. I have lived for some years on the Hayward place. The public travel, till Hayward fenced, went up on the east side of Haughey's farm, through Haywards place back of the house, and through where the orchard now stands, on the surveyed line and then to the point of timber, bearing a little to the west. The Indian Creek and up Fox River travel, and the Dayton travel all went together on this track, till they came to the budge over the ravine at the point of timber; and after they crossed it, they diverged and took different routes. Hayward fenced 50 acres, and Henry Green 40 acres in the Spring of 1839, and after that the travel went still further

Rerd,
Cont.

North and west, until two or three years afterwards, the travel changed and went up the distillery hill, and passed along ^{to} the south east corner of the sod fence, and then made for the point of timber spoken of. I saw a guide board standing at the south east corner of the sod fence in 1839, or 1840, it pointed towards the point of timber. I never knew of any general travel on the surveyed line by the way of Morgan's. It always passed west of Clark's shanty, which stood near the north west corner of the forty he fenced.

Through the Plaintiffs' close the surveyed road and the road as travelled by the public would be apart I should think as much in some places as 100 rods, and generally as much as 80 rods.

It is my impression that the fence which old man Stadden built up to the Plaintiffs' south line of fence, would necessarily cross the road, where the witnesses say it was surveyed.

The Plaintiff then called Richard Thorne as a witness who testified as follows:

I have known the public travel from Ottawa to Dayton since 1845. The road as then travelled entered my land north of my house, and made then directly for the point of timber. I fenced in 1846, and then left out a little corner, and this turned the road

R. Thorne,
for
Affs

further north and west,

p 34

Shorne,
Cont. &

I have never known of any public travel or any travel whatever on the surveyed road by way of Morgans, but the public travel has always been from a point about the middle of the sod fence to the point of timber.

I have heard John Green testify in regard to his making objections to my fencing up the road, and of my request to fence it up for a year, or on account of the scarcity of fencing. I do not recollect, and I do not believe I ever had any such conversation. The way of it was this: Green said I had fenced up the surveyed road. I told him ^{that} I thought I had not, and then told him, that whenever I was satisfied ^{that} I had fenced up a surveyed road, I would take it down. I then got George H. Norris, who was then County Surveyor, to run the road. - He got the plat of the survey, and the records, and run the road. - Afterwards told Green that I was satisfied from that survey, that I had not fenced up the surveyed road. Since Champlin fenced his whole tract in 1853, the trail has gone round his corner where he has thrown out some, by Pembroke, down to the point of timber and there is no difficulty in getting from Ottawa to Dayton on this road. It is unobstructed.

The Plaintiff then called John Hoxie as a witness who testified as follows:

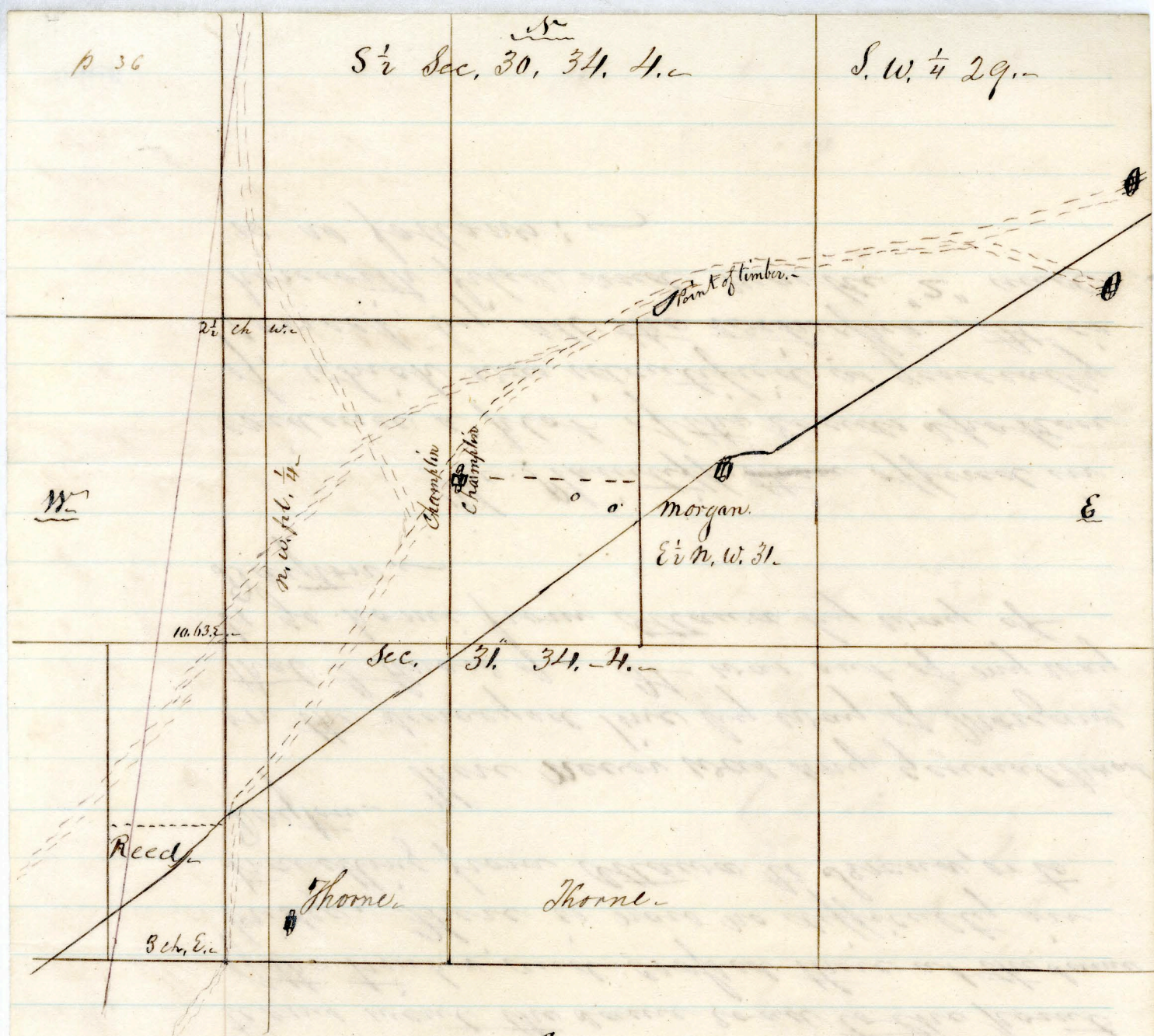
John Hoxie,
for
Plff.

I live in Serena, and have known the public travel on the road from Dayton to Ottawa for the last eighteen years. The public travel has always been from the sod fence to the point of timber, until 1853, when Champlin fenced, and since then the travel has been as stated by Thorne. Before that, the road went about three rods west of Clark's shanty.

The Somonauck and Dayton teams went the same road to the point of the timber, and crossed there at the same bridge. There is now no difficulty in travelling from Ottawa to Serena, or to Dayton.

There never was any general travel on the surveyed line by way of Morgan's, that I know of. It was out of my way to go home from Ottawa by way of Dayton.

The Plaintiff then offered in evidence a plot of the roads spoken of, which was identified as generally correct by all the witnesses. It is herewith filed and marked "2" and is as follows:—



S.

The Plaintiff here closed his Case
and this was all the evidence in the Cause.
The Plaintiff then asked the
Court to give the following instructions to the
Jury

1st If the Jury believe from the evidence, that the defendant broke and entered the quarter section mentioned in the declaration, and that said quarter section was owned by, or in ~~the~~ possession of the Plaintiff at the time of such entry and breaking, then the Jury should find the defendant guilty, unless the defendant has shown by proof, that there was a public highway, across said quarter section, and that the defendant in entering and passing across said quarter section, was on the said road.

2^d The burden of proving a public highway rests upon the defendant, after it is shown that he broke and entered the plaintiff's close.

3^d That no evidence of travel across the land of the Plaintiff, mentioned in the declaration, is sufficient to support the defendant's second plea, unless such travel has been by the public substantially on the line of the ^{surveyed} road: and occasional travel, by individuals along the line of the alleged road, when the same was not travelled, and used by the public generally, and worked by the public authority, is not sufficient.

11th

Given

Working on the alleged surveyed road by the Supervisors is not of itself sufficient to support the defendants second Plea.

5th

Given

No evidence of travel, merely, across the tract of land mentioned in the Plaintiffs declaration, is of itself sufficient to support the defendants second plea, unless such travel was by the public generally, and continuous and uninterrupted for twenty years next before the commencement of this suit.

6th

Given

If the Jury believe from the evidence that a public highway was surveyed and laid out from Dayton to Ottawa in 1832, through the timber to the hill, at a near Morgans, and thence to the sod fence on Haywards land and thence to the Court house square in Ottawa, and that said Road as surveyed runs across the land of the Plaintiff mentioned in the declaration and that ~~said~~ ^{the} defendant broke and entered while on said line of survey, ~~which~~ ^{when} the Plaintiff had obstructed by a fence, such line as surveyed; Yet if the Jury believe from the evidence that the public and the competent authorities, from 1832, when said road was located and surveyed, until ~~until~~ and at the time when the defendant so broke and entered as above, had

abandoned said surveyed road, then the Jury ought to find the defendant guilty.

7th If the Jury believe from the evidence, that the public generally from 1832, till the Commencement of this suit, had not used and travelled upon said road as surveyed from Dayton to Ottawa, but during all that time had used and travelled another road voluntarily and that individuals owning lands, along the line of said surveyed road, had fenced across said surveyed road, and made improvements across the same, without objection from the public or public authorities, these are facts, ^{which} of proven ~~facts~~ are proper to be considered by the Jury, in determining the question, whether or not the public had abandoned said surveyed road.

9th If the Jury believe from the evidence, that the public generally, in travelling from Dayton to Ottawa, passed around and at the point of timber, thence through the Plaintiffs land, and Thorne's land to Ottawa, and that the public have used and travelled said road, for twenty years without interruption from the owners of land, through which the same passed, then the public have acquired a right to so travel by prescription.

The Plaintiff also then asked the Court to give to the Jury his Instruction marked No 8, as follows, viz:

~~2nd~~ 1st If the Jury believe from the evidence, that the public from 1832, till the Commencement of this suit, had ceased to use the said surveyed road, and that the public had adopted another and different line of travel voluntarily, and by so doing had intended to abandon and did abandon said surveyed road, as well as all other roads upon the same line, ~~and had acquired the legal right of the said road to each other line of travel~~ then the Jury should find for the Plaintiff, even although no other public highway was legally laid out from Ottawa to Dayton by the public authorities.

The Court refused to give the said instruction as asked by the Plaintiff but modified the same so as to read as follows: viz:

8th If the Jury believe from the evidence that the public from 1832, till the Commencement of this suit, had ceased to use the said surveyed road, and that the public had adopted another and different line of travel voluntarily, and by so doing had intended to abandon and did abandon said surveyed road, as well as all other roads upon the same line,

and had acquired the legal right to the use of such other line of road travel, then the Jury should find for the Plaintiff even although no other public highway was legally laid from Ottawa to Dayton by the public authorities.

Which instruction so modified the Court gave to the Jury; and to the refusal of the Court to give said instruction as asked by the Plaintiff, and to the giving of said instruction as modified by the Court the Plaintiff then and there excepted, which exceptions were then and there overruled by the Court.

The defendant then asked the Court to give the following Instructions to the Jury -

John C. Champion

vs

Rees Morgan

In LaSalle County
Circuit Court.

June Term, 1857.

Will the Court instruct the Jury for the defendant;

1st That if, at the September Term a.d. 1831 of the County Commissioners Court of LaSalle County, Joseph Cloud, Luther J. Robbins, and William Ritchey were appointed viewers, by said Court, to locate and survey a road from Ottawa to Greens Mill, and to interest the

Greens

Chicago Road at John Greens, and if they, or a majority of them, did locate and cause said Road to be surveyed, and did report the same to said Court, and if said Court in March A.D. 1832, approved of their Report, and ordered said Road to be established, as a public highway; and if said road was for several years, immediately afterwards, used and travelled by the public, and worked by the public authorities, without objection on the part of the then owners of the land in the declaration described, and if ^{since the} ~~said~~ laying out of said road, the same has not been abandoned by the public authorities, then, although its width was never fixed by the County Commissioners, the road would be a valid road, of the width of thirty feet, that being the minimum width fixed by the statute.

2^d If the Jury believe from the evidence that the road was established, opened, used and travelled, as mentioned in the first instruction, without objection, and that the close in the declaration mentioned, was then the property of the State of Illinois, and for many years thereafter remained in the said State, or in the Trustees

of the Illinois and Michigan Canal
 then neither Clark nor the Plaintiff
 had the right when he thereafter became
 the purchaser to fence across or otherwise
 obstruct the line of the road, or prevent
 travellers from passing and repassing
 on said line of road, with their horses
 and vehicles, unless the road had been
 abandoned by the public before said
 obstruction.

3^d In order to make an abandonment
 of the road, it should appear that
 the cessation to use it was with the
 intention of abandoning it, and not
 merely diverging in some places from the
 surveyed route, and travelling where
 there was no road laid out, on account
 of there being a hill or ravine on the line
 of the survey, which it was inconvenient
 to cross with loaded teams, and such a
 diverging with some, or nearly all of the
 loaded teams, for this cause only, while
 travellers with other loaded teams,
 empty waggons, buggies, and on horseback
 and on foot continued to pass along on
 and close to the route of the road where
 it was surveyed across such ravine,
 or over such hill, using it as a road
 would not amount in law to an

Given -

abandonment of the road.

4th The diversion of the travel from the surveyed route of the road by the fences of Clark and Thorne, would nat, if objected to and Contended against by the public and public authorities, amount to an abandonment of the surveyed and laid out road.

5th If said road was established, laid out, opened, used, and worked without objection during several years, next after it was laid out as mentioned in the first instruction, and if said road had not prior to the time of the throwing down of the fences, and passing across the plaintiffs Close, been abandoned by the public, and public authorities as explained in the third and fourth instructions, - and if the trespass complained of, consisted only ⁱⁿ of the defendants throwing down the Plaintiffs fence, and passing along the road within its limits, doing no unnecessary damage, the Jury should find a verdict for the defendant.

6th Will the Court instruct the Jury, That if they believe from the evidence, that the road mentioned in the first instruction, was surveyed, laid out and accepted and

ordered by the County Commissioners Court
 to be established as a public highway, was
 opened, used, and travelled by persons
 as a public highway, and worked upon
 by the public authorities as a public high-
 way, without objections as mentioned
 in the first instruction, it continued to
 be a public highway until abandoned
 by the public, or vacated by competent
 authority; and in order to constitute
 an abandonment, it must have ceased
 entirely to be used as a public highway
 and to have been worked as such - and
 as long as any portion of the public continued
 to use it as a public highway, it could not
 legally, and as long as any public work
 continued to be done on it as a public
 highway, it could not be legally considered
 as abandoned - The travelling public
 must have ceased to use it entirely
 as a public road, and the public authorities
 must have entirely ceased to work it as
 a public highway, before it should be
 considered by the jury as abandoned;
 and if said road was created, as mentioned
 in the first instruction, and had not been
 abandoned as mentioned in this instruction
 prior to the time of the alleged trespass
 by the defendant, it was a valid road at
 the time of the said alleged trespass of
 the defendant; and if the only trespass

Green.

of the defendant, consisted in throwing down of the plaintiffs fence, within the limits of such a road, and passing across Plaintiffs land within the limits of such a road, doing no unnecessary damage, the defendant is not guilty, and such should be the verdict of the Jury.

Green. If the road was established, used and worked without objection, as mentioned in the first instruction, in order to make out a substitution of another road in lieu of it by dedication, a mere voluntary permission of the owner to persons to travel over it, would not alone, unless there was some recognition of said substituted road on the part of the public authorities, be sufficient to make out such dedication or substitution. Such substituted road should be recognized and used as a public road, before the right of the public to use it as a road would be acquired.

Plffs
Exceptions. which were given. The Plaintiff then and there excepted to all of said instructions of defendant, at the time.

The Jury found a verdict for the defendant.

The Plaintiff moved

Atts Mo. for for a new trial on the following grounds
New trial. to wit:

The Court Erred in admitting the
Record evidence and plats of the roads herein
before referred to.

The Court erred in refusing to give
the Plaintiffs 8th instruction as asked,

Reasons
therefor.

The Court Erred in modifying
the said 8th instruction.

The Court erred in giving the
instructions of the defendant.

The verdict of the Jury was
against the law and the evidence.

Mo. for N.J.
or.
&
Exⁿ.

The Court overruled the said
motion for a new trial, and to the decision
of the Court in that behalf, the Plaintiff
then and there excepted, and prayed an
appeal to the Supreme Court, upon
entering in Bond in 30 days from this
date, with Richard Thorne as security
in the sum of \$300.

Verification.

The Plaintiff asked the
Court to sign and seal this Bill of Excep-
tions, which is now accordingly done
in open Court this 28th June, 1857.

W. E. Hottelster, Clerk

State of Illinois, I John H. Nash Clerk of the Circuit
 Audaller County, do hereby certify that
 the above and foregoing comprises a true, full
 perfect and complete record in the case of John
 C. Champlin vs Peas Morgan as the same appears
 of record & on file in my office

In Testimony Whereof I have hereunto set
 my hand and the Seal of said Court at
 Ottumwa this 5th day of April 1888

J. H. Nash Clerk

p 52 Illinois, et al

In the Supreme Court, 3rd Grand Division

John C. Chauplin,

Plaintiff in Error

vs.

Rees Morgan,

Defendant in Error

And now comes the said Plaintiff in Error, and saith that in the record and proceedings aforesaid, there is manifest error to the injury of the said Plaintiff in Error, in this, that is to say:—

- 1 That the said Circuit Court erred in admitting in evidence, the Records from the County Commissioners Court, and plat in the foregoing Record referred to.—
- 2 The Court erred in refusing to give the Plaintiffs 8th instruction as asked.—
- 3rd in giving said 8th instruction as modified.
- 4th The Court erred in giving the Instructions asked by the defendant and each of them.—
- 5 The Court erred in overruling the Plaintiffs motion for a new trial, as well for the Causes aforesaid, as for the further Cause that said verdict was against the law and the evidence in the Cause.—

D. C. Gray,

Counsel for Plff in Error,

The Defendant in error says there is no error & prays an affirmance & demand

John C. Champlin

to 323

Reus Morgan

Reed

Recd May 4, 1858

L. Leland

Clk.

Ans \$13.85 paid
by J. C. Champlin

Supreme Court 3rd Term Minn. Ap. T. 1888

John C. Champlin }
vs. } Error to LaSalle
Rees Morgan }

Argument &c. for Plaintiff in Error.

The defendant below pleaded two public highways, viz. The Staperville State Road, and the County Road from Ottawa to Dayton. Both these roads, as surveyed, crossed Champlin's close on the same line.

We do not insist on the objections made to the validity ^{of the laying out} of these roads, as we suppose that the decision of this Court heretofore made, would dispose of these objections against us. 17 Ill. 363. 395

The controversy in the Court below (and we insist that the whole controversy here) rests altogether upon the question of abandonment by non-user.

However regular the proceedings may have been in laying out these roads, yet we insist that the weight of proof clearly shows

that from the corner of Hayward's sod fence to Dayton, the travel of the public generally has never been on the line, or any thing near the line of the surveyed roads, but on the contrary, the public almost universally, from the time these roads were laid out up to the time Thorne fenced had abandoned the surveyed line and adopted a line of travel from Hayward's sod fence to the point of timber, and thence to Dayton.

We do not claim that every divergence of travel, made by the public, or by individuals, in search of more eligible ground, or to avoid sloughs in bad weather, in an open country, amounts to an abandonment.

That point has also been settled by this Court.

The question of abandonment was the main question in the trial below.

The evidence bearing upon that point was somewhat conflicting it is true, but we think it is not assuming too much to assert that, upon that point, the preponderance of proof was unequivocally on the side of Champlin. At all events, Champlin was entitled to have all the evidence upon that point considered in the true light by the

and applied by the Jury under the test of correct instructions from the Court.

This we think was not done.

The question of abandonment belonged properly to the Jury.

The drift of the Court below in all of its rulings, went to the effect, that it was impossible for the public to abandon the surveyed roads, without having acquired a legal right to travel upon some other line.

To fix the Court squarely upon that proposition the plaintiff in error asked the 8th instruction which was refused.

We submit that the 8th Instruction as asked is undoubtedly good law.

The Court of its own motion modified it, and in the modification set up for the government of the Jury an unheard-of test, viz. that before the public could abandon a right, they had to acquire some other right — a proposition, we opine, the mere mention of which, shows its utter absurdity.

The Court by that instruction as modified bound the Jury not to regard these surveyed lines as abandoned, unless the public had acquired a legal right to

travel upon the line adopted by the public in lieu of it, from Haywards road fence to the point of timber.

This modification, of course, forced Champlin to show that the public had acquired a legal right to use the line of travelled road. either by having a road laid out according to Statute, or by dedication, or by prescription. This we submit was erroneous, and that it was not "a misdirection of an unimportant character", as is suggested by the counsel for Morgan. It was the pivot upon which the whole case turned, It was the thing which beat the plaintiff in error, and nothing else —

It was manifestly a matter where Champlin was entitled to have the law correctly given.

We think there can be very little doubt, that if the 8th. Instruction had been given as asked, the finding would have been the other way, for, to our mind, it is quite clear, that upon the question of intentional abandonment by the public under correct instructions, the Jury must upon the proof, have found that the surveyed lines had been abandoned. and to this point, we beg the attention of this Court to the evidence.

We insist, that the public can abandon any right almost, without acquiring another in lieu of the one abandoned.

The question of abandonment was an isolated one in this case, not at all dependant in any way, upon the acquisition of any other right, and this we understood to be conceded by the counsel for Morgan in their argument.

Amplification upon this point, in our judgment, would be a work of supererogation.

But the error of the Court below becomes a double error, by the Court's giving the 7th Instruction for the defendant, which we think is fully erroneous as the other, and calculated to confuse & mislead the jury - We particularly call the attention of the Court to it.

We admit, in the language of the instruction under comment, "that if the road ^{was} established and worked without objection, in order to make out such a substitution of another road in lieu of it by dedication, a mere voluntary permission of the owner to persons to travel over it, would

not alone, be sufficient to make out such dedication, or substitution" — of course not, because it might be a mere license revocable at pleasure, and of course the mere permission alone, would not amount to a dedication.

But the proof showed a user without objection from the owner ^{of the land}, of the road from the sod fence to the point of timber for more than twenty years, and there might have been a right in the public by prescription, and we submit, that the kind of permission as shown by the evidence, even for a few years, was proper to go to the jury, from which a legitimate presumption might be raised that this permission was given with an intention on the part of the owners of the land to dedicate. But the error of the instruction, as we conceive, lies here, that the instruction assumes, that the public cannot take a road by dedication or substitution unless the dedication or substitution is recognized by the public authorities. This we do not understand, to be the law.

The public may acquire a right by dedication, without the public authorities being in any way consulted, and at

all events, if the public use the road,
it is fair to presume that the public
authorities concurred.

If this court consider the principle of
this 7th instruction erroneous, they will
readily perceive how it may have affected
injuriousely the rights of Champlain.

We insist again, that even if the record
proceedings in laying out these roads
were regular, this alone does not establish
the road, unless the public generally
used the road. Men travel occasionally
by individuals, would not be a sufficient
user. and this is the only kind of travel
shown by the proof to have been on
the surveyed line: so that in this view
of the case, the public never ~~had any~~
~~right to abandon~~.

For these reasons, we think, the judgment
of the Court below should be reversed
~~and the cause reversed.~~ **Dwight B. Gray**
Atty gen. for the Gov.

Supreme Court

No. 322. - 112

John C. Champlin

vs.

Rees Morgan

Argument for
plaintiff in error.

Filed May 31, 1858

S. Leland

CLERK

Oliver B. Gray.

Atty pro p[ro]p[ri]et[or] in error.

Champion vs. Morgan - In Sup. Court, Apr. 7, 1858.

With the permission of the Court,
I would be glad to submit a few observations
in addition to the argument submitted
by my learned Counsel, Mr. Gray. —

Admitting that the records
in this case may be aided by user, (with the
assent of the owners of the land,) of less than
twenty years, — admitting also, that such
user need not be upon the identical line
of the Record road, — where the user is
substantially so — and the variations
are evidently only for the temporary
purpose of avoiding an impassible rough
or hill — or other obstacle. — I yet apprehend,
that the law is, — where user is one of the
ingredients necessary to the establishment
of a road — that such user must be of
a kind to show that the public intend
to rely upon — substantially — the line
of the road for their travel — that
whatever general public travel there
is — much or little — must be upon
substantially — the line of the road — in
order to manifest ^{to the owner of the land,} that the public claim
claim an easement on his land —

If such be, substantially, the law— and I have carefully examined the cases decided by this Court, referred to by the learned counsel for the defendant— and find nothing therein in my judgment conflicting with this position— I may confidently refer to the Record in this case as showing that the judgment below must be reversed in order to make the record conform to the foregoing principles.—

The temporary judgment of this Court on a Chancery record between the parties to this Cause, as rendered at the last term of this Court, also confirms me in the conclusion, that I have a right to rely upon the foregoing principles as the law.—

The verdict in this case, I apprehend, settles nothing— for there was a verdict in this case for the Plaintiff, upon the same evidence— and a new trial granted— for what reason I do not know.—

John Green is mistaken in saying that Thorn was the first to fence

across the road - and Clark the next -

In point of fact, old man Stadden fenced across the road previous to 1839 - and Hayward in 1839 - and the testimony of Reed, - and of William L. Donovan shows it. - The Naperville road beyond Dayton, has not been travelled since 1844, - and the testimony of Donovan shows it - The bridge across Fox River was built since this controversy arose - and the testimony shows it. -

Richard Stadden, Thorne - and Clark - have fenced across the road as early as 1846 or 1847 - and there their fences yet remain, and the testimony shows it -

No man has ever fenced in reference to the road - and the testimony shows it, - or it is a legitimate inference to be drawn from the testimony -

The public generally have never travelled the road - and the evidence shows it - and Greens, Miller and Daniels have exaggerated the amount of travel there was on it.

previous to 1845— and there has been none since— and the evidence shows it.—

The Road was laid straight from the Court House to the North line of the State addition to Ottawa, before the State addition was laid out, and therefore cuts diagonally every block between this house and said North line— and yet no lot was ever fenced in reference to the road— and the evidence fails to show— and could not show if it had been been attempted, because it not true, that the road was ever fenced any where, on the line of it—

The only bridges ever built by the public or any body else for crossing the ravine, (see plat) were built, ~~were built~~ not on the line of the road near Morgan's— (until after this controversy arose)— Not on the line of the road at all— Not near the line of the road— but were built— three of them were built— in various years— where the travel went— where it always went— and where it goes now— at the head of the ravine

and above the head of the ravine —
not to accommodate travel coinciding
generally with the line of the road — but
to accommodate travel that did not
coincide with the road anywhere —
either on the Plaintiffs land or off
of it — and all this the evidence,
examined in connection with the
plots shows —

If I have rightly appre-
hended the law, therefore — I think I
have shown beyond doubt that this
Record must be reformed by a reversal
of the judgment contained in it, in
order to be made to conform to the
laws.

J. C. Champion

Champion

24

322-112

Morgan

Suggestions by

J. C. Champion

Filed May 31st 1858
J. Leland
clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1858.

JOHN C. CHAMPLIN, Plaintiff in Error, *vs.* REES MORGAN,
Defendant in Error.

Error to La Salle Circuit Court.

ABSTRACT OF THE RECORD.

DECLARATION. Trespass *quare clausum fregit*.

Plea not guilty. 2d plea. Two roads across the plaintiff's close, and that defendant broke and entered the close on the line of said roads, as he had a right to do for that cause ; and issue.

EVIDENCE.

It was mutually admitted by the parties, that the defendant broke and entered the plaintiff's close as alleged, but that in doing so he did not go off the survey line of the roads mentioned in his plea, and that he did no unnecessary damage.

The defendant, for the purpose of proving the roads set out in his plea, introduced a copy of the records of the County Commissioner's Court of La Salle county at their September term, 1831, and March term, 1832, by which it appeared that the said Court, at its said September term, 1831, ordered that there be a road viewed, leading from the public square in Ottawa, by J. Green's mill, to intersect the Chicago road at or near John Green's; and that they appointed three persons commissioners to locate and survey said road, "the nearest to and from said points."

And at the March term, 1832, of said Court, the said commissioners reported that they had surveyed and located said road, and gave the survey line, setting out the initial points and courses and distances thereof, which was signed by two of the three commissioners only, and the report was ordered to be entered on the records of the Court, and the road established as a highway, and William Stadden was appointed supervisor thereof.

The defendant also offered in evidence a record from the same Court at their March term, 1838, which recited, that at that term the report of R. M. Sweet, Isaac P. Halleck and Benjamin F. Fridley, of a state road, located by them from the court house in Ottawa, by Green's mill (and other points) to Naperville, with a plat of said road, was handed into the Court by Almon Ives, Esq., and that it "appearing to the satisfaction of the Court that the said commissioners have complied with all the requirements of the act authorizing the locating of said road, the said report and map are accepted and approved by the Court and ordered to be filed,"—and then followed an order allowing compensation to the viewers and surveyor of the road, and a plat thereof is recorded.

The report consists of the plat, and a certificate thereto by Ives, the surveyor, that the above [plat] is a true and correct survey, according to the best of his knowledge and belief, of a road authorized by the legislature of Illinois, on the 16th of January, 1837, to be made from Naperville to Ottawa, and the certificate of *two* only of the viewers; that "they had viewed and caused the above survey to be taken and marked, and had located the same as a state road, leading from Naperville, in Cook county, through a part of Kane county, to Ottawa, in La Salle county, and have authorized three maps thereof to be made and filed in the clerk's office of the county commissioner's court of each of the above said counties." [Signed.]

B. F. FRIDLEY, } Com'rs.
I. P. POLLOCK, }

Which was all the record evidence introduced, and was introduced against the objections of the plaintiff.

The defendant then introduced parol evidence as follows:

JOHN GREEN. *John Green* testified, that he was one of the chain carriers at the location of the county road in 1831 or 1832, and knew where it crossed the plaintiff's close; that in 1847 or 1848 he was supervisor, and they put all the road work on the hill at Morgan's, on the line of the survey.

Richard Thorne was the first who fenced across the road, viz., in the spring of 1847, and Thorne told him he wanted the travel to go round that season on account of the cost of fencing, but would fence out the road whenever the public required it, and witness objected to Thorne fencing across the road.

James Clark was the next to fence across the road, in 1848.

From 1831 to 1847 this road was traveled substantially on the line we surveyed, more or less. The Dayton travel went through the timber by Morgan's, except in wet seasons or wet weather. Loaded teams went through there. Hugh Allen went through with loaded teams, hauling flour, from 1836 to 1838. He made three trips a day by that route, while Jack Vaughn, who went the other road by the point of timber, only made three trips a day—both hauling for witness at one time.

There was all along considerable travel by the point of timber, crossing the ravine on a bridge built there in 1831 or 1832.

The travel is increased a mile or more as now traveled over the surveyed route, which lacks four chains of being four miles from Ottawa to Dayton.

The lines of the county road and Naperville road are identical—(as admitted.)

From Morgan's to Ottawa was, in 1832, all open prairie, and Clark's shanty was the first improvement this side of Morgan's. From Morgan's we took pretty much a straight shoot, sighting for an old tree on the bluff near Ottawa. The stump of the tree is still there. There is no other laid out road that I know of, from Ottawa to Dayton, that you can travel on without trespassing on private lands.

There was a bridge built across the ravine, between Morgan's and Dayton. Work was done on the surveyed road at the ravine, at Morgan's, in 1854 and 1855, before the commencement of this suit.

The public authorities did not acquiesce in the fencing up the road, but there had always been a controversy between them and those who had fenced.

C. G. MILLER.

Charles G. Miller testified for defendant as follows: That he came to Dayton in 1837, and worked on the line of this road in cutting through the timber in 1837, 1838 and 1839, under Green and Stadden, supervisors, and knows of travel by foot, horseback, buggies and empty wagons, up to 1841. Never drove a loaded team through on this road.

Since 1841 most of the travel from Ottawa to Dayton has been by the point of timber north and west of Clark's shanty, to Hayward's sod fence.

A bridge was built at the point of timber, in 1841 or 1842, on what is now Gedney's land, over which the public passed. There were three bridges there close together. I do not know of any travel on the surveyed line since 1841, as I moved then from Dayton to my farm, and from Ottawa to my farm the most direct route was by the point of timber. I think the road was cut out through the timber about sixty feet wide.

And *John Russell*, for defendant, testified as follows:

J. RUSSELL.

I have been here since 1840. Have crossed the ravine at Morgan's from 50 to 100 times. Worked on the hill at Morgan's from 1840 to 1843, when John Green, John Stadden and Wm. Stadden were supervisors. The chief difficulty was at this hill; could never get work enough to grade it down.

And for this reason the travel crossed at the point of timber. It would have taken three years' road labor to grade down the hill.

Those who traveled on this road from 1840 to 1843, crossed the ravine just below Morgan's, on a little bridge the Stadden's had made there for their own use. I never saw many loaded teams go that way.

The general travel since 1846, when Thorne fenced, was by the point of timber, on a bridge there. There was a bridge above this again, where the ravine ended in a slough.

The defendant then called *Aaron Daniels*, who testified as follows:

A. DANIELS.

Have lived one and a half miles from Dayton since 1831, and traveled from Ottawa to Dayton since I have lived in the country. Never saw many teams go by way of Morgan's house except myself. This road was bad at the hill, and for this reason the travel went by the point of timber. I have crossed 50 times or more on this road on foot, on horse back, and with ox teams, with four yoke of cattle. When I had heavy loads I always went round by the point of timber, and when empty by Morgan's.

With 4 yoke of oxen I have hauled 10 barrels of flour up the hill by Morgan's, from 6 to 10 times. From 1838 to 1840 I have seen as many as four or five teams at a time. They would put what load they had on my wagon, and we doubled teams on the hill if I stuck. I never met a team on the hill, and never saw a loaded team go through but myself.—The general travel was by the point of timber, and I went that way as early as 1831.

David Green then testified for defendant as follows:

DAVID GREEN.

I have lived in Dayton since 1830. We traveled the surveyed road some at a very early day, with buggies, on horseback, and with light roads. We went up back of Morgan's till the bridge was built, and this road was used 12 or 15 years, and road labor was laid out on it.

DAVID GREEN. There was a finger board put up in Reed's lane, in 1835 to 1837, close to the sod fence, pointing towards Morgan's. It said, "2 Miles to Dayton."

It was north of the south-east corner of the sod fence.

The bridge was built at the point of the timber in 1840, while John Stadden was supervisor, who had it built. There was another bridge about 20 yards above.

The general travel since 1840 has been round the point of timber.— All the heavy teams, and the generality of other teams, went that way.

The Indian Creek and upper Fox River travel and Dayton folks all came together on the other road, to the point of timber, where they took different courses and the roads forked.

It would be impossible for me to tell the number of times I have traveled the surveyed road. It would average at least twice a week for fifteen years.

It was here conceded that the whole of the plaintiff's farm consists of 140 acres, and that the plats show, substantially, how the travel that went by the point of timber, crossed his farm before it was fenced, and that Champlin fenced the 140 acres in 1853.

JESSE GREEN. *Jesse Green* testified for defendant as follows:

I have frequently traveled the surveyed road by Morgan's. As Morgan's hill was not much worked, we never teamed that way with heavy loads. In returning from Ottawa with empty wagons, we went that way. The travel with loaded wagons was always chiefly by the point of timber. I have met the plaintiff on the road by the point of timber.— In a wet time the ground was bad on the other road, through Champlin's meadow.

R. STADDEN. *Richard Stadden* testified for defendant as follows:

I came to Dayton in August, 1848, and went from Dayton to my father's house by this surveyed road. My father then lived near where Morgan now lives. I live on the line of this road, between Morgan's and Dayton. The surveyed road would run through my farm, back of my house, through my enclosure, and has been fenced across some years on my farm, viz., from 1850.

The marks of the old surveyed road are still visible through Champlin's meadow, overgrown with grass. I and Morgan have no way to get to Ottawa, by a laid out road, except the one in controversy, and there has been a continual controversy since he came to Dayton, between Dayton people, himself, Morgan and public authorities on one side, and those who had fenced the surveyed road between Ottawa and Dayton on the other side.

PLAT. The defendant's plat was identified as being generally correct by all the witnesses, and was given in evidence; and here the defendant rested.

PLAINTIFF'S EVIDENCE.

The plaintiff then called *Wm. L. Dunavan*, who testified substantially as follows:

W. L. DUNAVAN I have lived in this country since 1831, and lived in Dayton from 1836

W. L. DUNAVAN till 1842, and since, where I now do, beyond Dayton. The Naperville road runs near my house. Hayward fenced while I lived at Dayton. I carried the chain for the county road in 1832, from my place to Dayton, and know the survey line of that road. I went to Ottawa twice a week or oftener.

The public travel has always been, since I have known it, a pretty direct course from the north-east corner of Hayward's sod fence to the point of timber; I mean since Hayward built the sod fence. Before that time the travel went still further north and west of the corner of the sod fence. This was the general direction, and where it has varied it has borne to the west, on account of the ground rising as you go further west. Before Hayward fenced the travel went back of his house, by Langley's hollow.

Those on horseback and in buggies sometimes went the surveyed road. There was only a foot trail through the timber, from Morgan's to Dayton, but there never was any general travel from Dayton to Morgan's, on the surveyed road. Richard Stadden's place is between Dayton and Morgan's. Stadden fenced in 1847. The surveyed road runs back of his house. His fence shut up the road and turned the travel down a lane just in front of his house. His fence is still there. Old man Stadden lived where Morgan now does. He fenced up to Champlin's fence, in 1838, and that fence, according to my best impression, would cross the surveyed road, though I am not positive. The Naperville road, from my place to Dayton, has not been traveled on the surveyed line. It is fenced in in a good many places, and the travel varies from the survey sometimes a mile and a half.

On the county road of 1832, from Ottawa to Dayton, there never has been, to my knowledge, any fencing made with reference to the surveyed line. From my place to Dayton there has not been any road labor laid out on the Naperville road since 1844. I worked on the surveyed road at Morgan's hill, under supervisors, several different years. In 1842 I worked there, and at that time the abutments of a bridge had been built there and the stringers put across. There was a bridge built across Fox river in the summer of 1855, on the surveyed route, at the cost of three or four thousand dollars, and it was carried away 4 or 5 months ago, and steps are being taken to have it rebuilt. The state road has always been traveled to Ottawa from Naperville.

O. LEAVENS. The plaintiff then called *O. Leavens*, who testified, that he had been acquainted with the public travel from Ottawa to Dayton since 1834, and in 1837 and 1838 was deputy sheriff, and frequently traveled the road from Ottawa to Dayton.

The general public travel since 1834 has been by the point of timber. I know of no travel on the road as surveyed. I would have likely seen it if there had been travel. The public travel went considerably west of Clark's shanty—I should think as much as eighty rods. Hayward had not fenced in 1838, and before he fenced the road went up by Mackey's, and after he fenced it went by the distillery hill, and passed in front of his house along the sod fence, and then pretty straight to the point of timber. In 1834 I went once to old man Stadden's; Largent lived there then. I went on what is described as the surveyed route. It had the appearance of having been used only for family travel.

HENRY GREEN

Henry Green also testified for plaintiff, that he had known the public travel from Ottawa to Dayton since 1833.

Until Hayward and myself fenced, in 1839, the travel all went west of the Catholic burying ground to an oak tree, that had the highway mark on it, that then stood on the point of the bluff, this side of Mackey's, and from there in a pretty direct course to the point of timber, crossing the stream a little higher up than they now do.

After Hayward and me fenced, the travel went up the distillery hill, past Hayward's house, along the sod fence, to the point of timber, bearing a little west on account of better ground.

There was no general travel, ever, on the surveyed line, but was a good many rods north and west of it. Whatever travel was on the surveyed line was an exception to the general rule. It was only farm travel.

JAMES CLARK.

James Clark also testified for plaintiff, that he had known the public travel from Ottawa to Dayton since 1837, and came on to the land owned by plaintiff in 1845. No teams went by Morgan's unless to see old Mr. Stadden. I teamed for the Green's, from Dayton to Ottawa, in 1845, and before I fenced. The public travel passed in front of Richard Stadden's to the point of timber, and thence to the sod fence. I never knew of any general travel any other way except by the point of timber. I live still on the plaintiff's close. I built the first shanty in 1846, when I fenced. It stood at the north-west corner of the forty I fenced. That shanty was torn down and another built on the same site. The travel always passed north and west of my shanty—about 3 1-2 rods west.—The distillery hill was first worked in 1842 or 1843.

All the travel of the public went west of my shanty, towards the point, and any travel by Morgan's was an exception. I have not noticed any marks from Thorne's north line to Morgan's. The timber had been cut through from Morgan's towards Dayton, but the underbrush and trees have grown up, so that in passing you would have to push it aside. It would brush you in going along on horseback. I am now in the employment of plaintiff.

When Thorne first fenced I threw down the fence and passed through. Thorne afterwards told me I was wrong in doing so, and I did not again.

HENRY J. REED

Henry J. Reed testified for plaintiff, that he had been acquainted with the travel from Ottawa to Dayton for the last 23 years. I have lived several years on the Hayward farm. The public travel, till Hayward fenced, went up on the east side of Langley's place, through Hayward's place back of the house, and through where the orchard now is, on the surveyed line, and then to the point of timber, bearing a little to the west.

The Indian Creek and up Fox River travel, and the Dayton travel all went together on this track till they came to the bridge across the ravine, by the point of timber, and after they crossed it they diverged and took different routes.

Hayward fenced 50 acres and Henry Green 40 acres, in the spring of 1839, and after that the travel went still further north and west, until two or three years afterwards, the travel changed and went up the distillery hill, and passed along to the south-east corner of the sod fence, and then made to the point of timber spoken of.

HENRY J. REED I saw a guide board standing at the south-east corner of the sod fence, in 1839 or 1840. It pointed towards the point of timber.

I never knew of any general travel on the surveyed line by way of Morgan's. It always passed west of Clark's shanty, which stood near the N. W. corner of the forty he fenced.

Through the plaintiff's close the surveyed road and the road as traveled would be apart as much in some places, I should think, as 100 rods, and generally as much as 80 rods.

It is my impression that the fence which old man Stadden built, up to the plaintiff's south line of fence, would necessarily cross the road where the witnesses say it was surveyed.

R. THORNE. *Richard Thorne* then testified for plaintiff, that he had been acquainted with the public travel from Ottawa to Dayton since 1845. The road as then traveled entered my land north of my house, and made then direct for the point of timber. I fenced in 1846, and then left out a little corner, and this turned the travel further north and west.

I have never known any public travel, or any travel whatever, on the surveyed road by Morgan's; but the public travel has always been from a point about the middle of the sod fence to the point of timber.

I have heard John Green's testimony in regard to my fencing the road, and do not believe I had such conversation; the way was this: Green said I had fenced up the surveyed road. I told him I thought not; and then told him whenever I was satisfied I had fenced up a surveyed road, I would take it down. I then got Geo. H. Norris, County Surveyor, to run the road, and after that told Green I was satisfied, from that survey, I had not fenced up the road.

JOHN HOXIE. Since Champlin fenced his whole tract in 1853, the travel has gone round his corner, where he has thrown out some, by Pembroke's, down to the point of timber, and there is no difficulty in getting from Ottawa to Dayton on this road. It is unobstructed.

John Hoxie testified for plaintiff as follows:

I live in Serena, and have known the public travel on the road from Dayton to Ottawa for the last 18 years. It has always been from the sod fence to the point of timber, until 1853, when Champlin fenced, and since then as stated by Thorne. Before that the road went about three rods west of Clark's shanty.

The Somonauk teams went the same road to the point of timber, and crossed there at the same bridge. There is now no difficulty in traveling to Serena or to Dayton.

There never was any general travel on the surveyed line, by way of Morgan's, that I know of. It was out of my way to go home to Serena by way of Dayton.

The plaintiff then offered in evidence a plat of the roads spoken of, which was identified as generally correct by all the witnesses.

The plaintiff then asked the Court to give the jury nine several instructions, which were given as asked, except the eighth, which was asked as follows:

If the jury believe from the evidence, that the public, from 1832 till the commencement of this suit, had ceased to use the said surveyed road, and that the public had adopted another and different line of travel

voluntarily, and by so doing had intended to abandon, and did abandon said surveyed road, as well as all other roads upon the same line, then the jury should find for the plaintiff, even although no other public highway was legally laid from Ottawa to Dayton by the public authorities.

Which the Court refused to give; but modified and gave the same, against the plaintiff's exceptions to such modifications, as follows:

If the jury believe that the public, from 1832 till the commencement of this suit, had ceased to use the said surveyed road, and that the public had adopted another and different line of travel voluntarily, and by so doing had intended to abandon and did abandon said surveyed road, as well as all other roads upon the same line, and had acquired the legal right to use of such other line of travel, then the jury should find for the plaintiff, even although no other public highway was legally laid from Ottawa to Dayton by the public authorities.

And at the request of the defendant, the Court instructed the jury as follows:

That if, at the September Term, A. D. 1831, of the County Commissioners' Court of La Salle County, Joseph Cloud, Luther S. Robbins, and William Ritchey were appointed viewers by said Court, to locate and survey a road from Ottawa to Green's Mill, and to intersect the Chicago road at John Green's; and if they, or a majority of them, did locate and cause said road to be surveyed, and did report the same to said Court; and if said Court, in March, A. D. 1832, approved of their report, and ordered said road to be established as a public highway; and if said road was for several years immediately afterwards used and traveled by the public, and worked by the public authorities without objection on the part of the then owners of the land in the declaration described; and if, since the laying out of said road, the same has not been abandoned by the public authorities, then, although its width was never fixed by the county commissioners, the road would be a valid road of the width of thirty feet, that being the minimum width fixed by the statute.

2. If the jury believe from the evidence, that the road was established, opened, used, and traveled, as mentioned in the first instruction, without objection, and that the close in the declaration mentioned was then the property of the state of Illinois, and for many years thereafter remained in the said state, or in the trustees of the Illinois and Michigan canal, then, neither Clark nor the plaintiff had the right, when he thereafter became the purchaser, to fence across or otherwise obstruct the line of the road, or prevent travelers from passing or repassing on said line of road with their horses and vehicles, unless the road had been abandoned by the public before such obstruction.

3. In order to make an abandonment of the road, it should appear that the cessation to use it was with the intention of abandoning it, and not merely diverging in some places from the surveyed route, and traveling where there was no road laid out, on account of there being a hill or ravine on the line of the survey, which it was inconvenient to cross with loaded teams, and such a diverging with some, or nearly all of the loaded teams, for this cause only, while travelers with other loaded teams, empty wagons, buggies, and on horseback and on foot, continued to pass along on and close to the route of the road where it was surveyed across such ravine, or over such hill, using it as a road, would not amount in law to an abandonment of the road.

4. The diversion of the travel from the surveyed route of the road by the fences of Clark and Thorne, would not, if objected to and contended against by the public and public authorities, amount to an abandonment of the surveyed and laid out road.

5. If said road was established, laid out, opened, used, and worked without objection during several years next after it was laid out as mentioned in the first instruction; and if said road had not, prior to the time of the throwing down of the fences and passing across the plaintiff's close, been abandoned by the public and public authorities as explained in the third and fourth instructions; and if the trespass complained of consisted only in the defendant's throwing down the plaintiff's fence, and passing along the road within its limits, doing no unnecessary damage, the jury should find a verdict for the defendant.

6. If the jury believe from the evidence, that the road mentioned in the first instruction was surveyed, laid out, and accepted and ordered by the county commissioners' court to be established as a public highway, was opened, used, and traveled by persons as a public road, and worked upon by the public authorities as a public highway, without objection, as mentioned in the first instruction, it continued to be a public highway until abandoned by the public or vacated by competent authority; and in order to constitute an abandonment it must have ceased entirely to be used as a public highway and to have been worked as such, and as long as any portion of the public continued to use it as a public highway, and as long as any public work continued to be done on it as a public highway, it could not be considered legally abandoned. The traveling public must have ceased to use it entirely as a public road, and the public authorities must have entirely ceased to work it as a public highway before it should be considered by the jury as abandoned; and if said road was created as mentioned in the first instruction, and had not been abandoned as mentioned in this instruction, prior to the time of the alleged trespass of the defendant, it was a valid road at the time of the alleged trespass of the defendant; and if the only trespass of the defendant consisted in throwing down the plaintiff's fence, within the limits of such a road, and passing across the plaintiff's land within the limits of such a road, doing no unnecessary damage, the defendant is not guilty, and such should be the verdict of the jury.

7. If the road was established, used and worked without objection, as mentioned in the first instruction, in order to make out such a substitution of another road in lieu of it by dedication, a mere voluntary permission of the owner or persons to travel over it, would not alone, unless there was some recognition of such substituted road on the part of the public authorities, be sufficient to make out such dedication or substitution. Such substituted road should be recognized and used as a public road, before the right of the public to use it as a road would be acquired.

Which instructions for the defendant were all duly objected to by the plaintiff at the time. Motion by plaintiff for a new trial overruled; and exception.

O. C. GRAY,
Attorney for Plaintiff in Error.

Supreme Court

John C. Champlin

Rees Morgan

Abstract.

Filed May 13

Filed May 4, 1838

*L. Belmont
Clerk*

Supreme Court - 3^d Division
April term A.D. 1858.

John C. Champlin
vs.
Rees Morgan }

This was an action of
Trespass quare Clausum.

It was conceded that the
defendant took down the plaintiff's
fence & passed across his close within
the limits of the survey of a supposed
road, doing no unnecessary damage.
And the only controversy was, whether
the supposed road was a lawful highway.
The evidence showing that at two
several times two highways were laid out
across the close (the first a County & the
second a State road) & it was conceded
that the last one was laid just where the
former one was. So that if either was a
valid highway at the time of the trespass,
the verdict & judgment were right.

We insist that there is no
objection made to the validity of this road,
which has not been decided by this Court
to be groundless.

1st The order of the County Commissioners' Court establishing the road is all that is necessary to be proved to establish it and the antecedent steps are presumed to have been regular -

Nealy vs Brown 1 Gilman, 10.
Harris vs. Ward 4 " 499.
Darnoss vs Francis 15 Ill. 547, 543

A report signed by two of the three viewers appointed, is sufficient.

Louk vs Woods 15 Ill. 256,

The act appointing the Commissioners to locate the State road which is cited hereinafter, authorizes a majority to act,

If the owner of land over which a road is to be laid out desires damages (and this applies to government & corporations as well as to individuals) he must object to the location in the first instance, or he will be precluded from afterwards insisting upon damages.

Harris vs Ward 4 Gilman, 499

Co. of Sangamon vs. Brown et al 13 Ill. 207.

Simon vs The People - 17 Ill. 416

That the order establishing the road did not fix the width, does not invalidate the road.

Alford vs Ashley 17 Ill. 363.
Morgan vs Green 17 Ill. 395

The uncontroverted facts are, that at the ~~time~~ Sept. term 1831 of the County Commissioners Court of La Salle County, it was ordered that the County road should be viewed, & three viewers were appointed to locate & survey the road.

At the March term 1832 two of the viewers reported that they had surveyed & located the road, giving the points, curves distances &c. The report was ordered to be entered on the records of the Court, the road declared established as a highway, & William Stadden appointed Supervisor thereof.

Upon the establishment of the road, it was worked & used by the public.

In 1837 (See acts of 1836-7 p. 229) three Commissioners were appointed to view, survey, mark & locate a State road from Ottawa to Naperville, & they or a majority of them were authorized to make the location, & as soon as practicable thereafter to cause a map of said road to be made & filed in the Clerk's offices of La Salle, Kane & Cook.

At the March term 1838 of the County Commissioners' Court of LaSalle County, a report of the view & location with an accompanying plat of the road, was returned to the Court by two of the Commissioners, in which report they state that they had viewed & caused the survey to be taken & marked, & had located the same as a State road &c. And at said term an order of the Court was made (reciting that it appeared that the Commissioners had complied with the act) accepting & approving the report & map & ordering them filed.

It was conceded that this survey & that of the County road were identical over the close of the plaintiff.

From 1832 up to 1846 or 1847, about 14 or 15 years, the surveyed route was without any interruption, used as a public highway, & work was done on it from time to time by the public authorities up to 1854 or 1855. An expensive bridge was built across Fox river, & the abutments of a bridge were built at the ravine. And it also appears that it is the only laid out road connecting the towns of Dayton & Ottawa.

Between Ottawa & Dayton & passing near Morgan's the road crossed a ravine & at this point there was a hill difficult of ascent, by which loaded teams were diverted. So as to cross the ravine nearer its head where the hill was easier of ascent. Some loaded teams & many vehicles ~~were~~ ^{by persons} lightly loaded, ~~persons~~ on foot & on horseback continued to use the surveyed route all the time till Thorne diverted the travel in 1846 or 1847 by his fence, considerably to the north west, & then Clark in 1848 fenced across it, & still further diverted it to the north west - but still the public labor continued to be done on the hill at Morgan's up to 1854 or 1855 & the old travelled track was visible across Plaintiff's close in the surveyed route at the time of the trial. And all the time a controversy was kept up between those who had fenced the road & those who desired to use it as a highway. But whether the road was much or little used is immaterial the fact is so, that it was but little used & and the Plaintiff, no authority for shutting it up. Davenport vs Francis 15 Ill 543

A plat showing the location of the road and the ravine may be found on page 26 of the record.

The only controverted question of fact in the whole case was, as to the proportion of the travel which was diverted by the hill at Morgan's.

And the only possible effect of the Plaintiff's evidence on the subject was to show that the surveyed route had been abandoned & the route adopted by reason of the diverging caused by the hill substituted for it. By reference to the plat it is apparent that this was a plan to defeat the surveyed road by a substitution of the other for the purposes of the trial only, not as a permanent arrangement & found, of course, but little favor with the jury, when it appeared that the supposed substituted road had also been fenced up by the plaintiff, & when it was evident that the substituted road, if any such existed, would, much more seriously injure the farm of the plaintiff than the surveyed road would. But the substituted road is a mere myth. It has neither "a local habitation nor a name".

It is a mere diverging & scattering of the travel of the surveyed road, & in contemplation of law, was on it. It could no more be found & fenced than an evening dew or a morning fog.

Road labor was not done on it. No one at home knew where to do it; and no one could have been liable for not keeping it in repair.

That either of these two roads, if the evidence in relation to the other was out of the record, was established by the evidence, is too plain to admit of even a captious & unreasonable doubt, and that a mere divergence of part of the travel in said search of a better crossing of a ravine tends to prove an abandonment of the highway by the public, while bridges & other work are being done on the surveyed route is so far fetched & unreasonable that the Court below might well have refused all instructions based upon an abandonment, as mere abstractions unsupported by any evidence.

A mind capable of viewing the facts of this case as tending to show an abandonment, could easily be convinced that travelling within the surveyed limits of the road with the intention of going off at the end of it, tended to show an abandonment.

~~Instead~~

Instead of being evidence of an abandonment of the road, it is really a user of it, & such an user, as is almost always the case in a new country. Who ever heard of the public travel across an unfenced prairie or through unfenced timber being confined within the surveyed limits of a road? Nearly every road in this State of any considerable length has been abandoned, if such facts tend to prove it.

The only possible objection to the law as laid down in favor of the dependant to be imagined, is, that the Court should not have qualified the plaintiff's eighth instruction.

It is perhaps possible to imagine that the public might have abandoned the surveyed route from Dayton to Ottawa & adopted another route, without ^{acquiring} ~~acquiring~~ in lieu of the former ~~in~~ the right to use the latter, and thus, have cut off the communication between the two places. But it is rather difficult to comprehend how one route could be lost & another adopted, without any right to the latter being acquired.

The idea of the instruction before the modification was, that one road was substituted or exchanged for another across the plaintiff's land, & the language added by the Court does not change the idea. But, if the plaintiff got the old surveyed road & the public did not get the substituted route, the trade as far as the public was concerned should be considered a nudum pactum & void. The plaintiff ought not to be allowed to take any such advantage.

But "it is considering too curiously to consider thus". Whether the modification of the instruction was proper or not, as an abstract proposition of law as applicable to the evidence in this case, it was a matter of no moment whether it was qualified as it was or not.

Whether the public had obtained another road or not was immaterial. The question was, whether the old one was abandoned & the jury had been fully charged on the part of the plaintiff, that, if the public had abandoned the surveyed road, it ceased to be a road.

See plaintiff's 6th & 7th instructions which were given.

By the 6th instruction the jury were expressly charged that if the public had abandoned the surveyed road, the defence failed, & the defendant's instructions conceded the road invalid, if abandoned - And the plaintiff thus had the full benefit of the law in this respect. The 8th instruction as modified was none the less the law than it was before. It was not changed from a correct to an incorrect proposition.

It amounted merely to an intimation on the part of the Court that there could not be an exchange of one road for another without the public obtaining for the road given up the other in exchange. We insist that this was right - that the modification was proper, but that in any event, it could have done no harm.

A judgment - which is clearly right
will not be reversed for a misdirection
of so unimportant a character. There
is such a ~~total~~ lack of evidence of
an abandonment of the road, that the
plaintiff could never hope to obtain
a decision in his favor on this point, &
it is only on the point that there
can be imagined to be any conflict of
evidence.

On the point that a misdirection is
not always ground for reversal, see

Gibbons vs. Dillingham	5 Eng. (Arch.) 7.
Newkirk vs. Cone	18 Ill. 449.

Seland & Seland
for defendant

John C. Champlin
vs. 322-112
Rees Morgan

Brief of depts
attys -

Filed May 13, 1858
L. Leland
CLK

Leland Leland
Defendants

State of Illinois
LaSalle County

Pleas before the Honorable Madison E. Hollister, Circuit Judge for the
tenth Judicial District of the State of Illinois, and
the presiding Judge of the LaSalle County Circuit Court
at a court commenced and held in and for the County of
LaSalle, at the Court House in Ottawa, on the second
Monday in May, the same being the twelfth day
of May in the year of our Lord One Thousand Eight
hundred and fifty six and of the Independence of
the United States of America the Eighth.

Present

The Honorable Madison E. Hollister
Presiding Judge, John F. Bush Clerk,
William H. L. Wallace States Attorney,
Francis Warner Sheriff.

On the 25th day of April 1856 the complainant
John C. Champlin filed his bill of Complaint in the
office of the Clerk of the Circuit Court in the words and
figures following viz:

State of Illinois
LaSalle County

LaSalle Circuit Court. - To May
Term: A.D. 1856,

To the Honorable Madison E. Hollister, Judge of said
County Court, sitting as Chancellor,

Complaining your Orator John C. Champlin sheweth
unto your Honor, that he is seized in fee of the south
west quarter of the North East quarter of Section Thirty
one in Township Thirty four north ^{Ranged} four east, 3^d P.M.
in the Town of Dayton in said County, and became so
seized by deed from James Clark - in the Spring of

the year AD 1853; and that said Clark entered into possession of said land in about the year 1844, the same then being Canal land, & purchased the same of the Trustees of the Illinois & Michigan Canal in May AD 1848, - and received a Deed Therefor of said Trustees in AD 1857, and that said tract was fenced by said Clark in the spring of AD 1849, or the same had been & was fenced by other persons before that time, and was partly plowed by said Clark, and was used & improved by said Clark and your Orator ~~ex aforesaid~~ since from the time when the said Clark entered into possession as aforesaid hitherto, Your Orator further shows unto your Honor: that on or about the 20th day of March AD 1853, Bees Morgan, Richard Stadden, John Curgea, George Dunovan and Patrick Briscoe or some of them, as Complainant is informed, and believes broke open the enclosure of Complainant around said premises on two sides thereof - and by themselves, servants - agents - and teams passed over and through the premises of your Orator, aforesaid, and from time to time afterwards continued to do so, - against the remonstrances of Complainant in that behalf - the said persons aforesaid claiming a right so to do - upon the ground that a public road ran across your Orator's land on the line so traversed by them, and claiming to act under the authority ^{of said} Curgea, Dunovan & Briscoe Commissioners of Highways of St Louis, and which they claimed was ~~interrupted~~ ^{intercepted} by your Orator's fences so broken down by them, all the facts in regard to which pretended road, however, are, next hereafter set out by your Orator, fully and truly, to the best and utmost extent of your Orator's knowledge information and belief

That an act Entitled an Act to Locate a state road from Ottawa in LaSalle County to

Kapierville in Cook County approved January 18 1837, appointed three commissioners to view, survey, mark and locate a road from the Court House in Ottawa by Greens Mills Wm L Dunovans, ^{Detell Vermelle} ~~Detell Vermelle~~, George town, George Hollenbacks - Wm Harris, Edward Glements, and from thence to Kapierville, on the nearest and best rout, and - and the said act required the said commissioners or a majority of them, to meet on the first day of May then next, or within four weeks thereafter, at Kapierville, and after being duly sworn before some Justice of the peace faithfully to discharge the duties required of them by said act, to locate said road on the nearest and best rout, and as soon as possible practicable thereafter to cause a map of said road to be made and filed in the Clerks Office of the County Commissioners Courts of LaSalle Kane & Cook Counties - and requiring said road to be kept in repair as other public roads are.

That said Commissioners returned a plat or map of said road to the County Commissioners Court of LaSalle County, and on the 6th day of March, A.D. 1838, the County Commissioners Court of LaSalle County accepted and approved of said report, & map and ordered the same to be filed, as will at large appear by reference to a certified transcript of the record marked (a) & made part of this bill, and Compts. prays to refer to said map & ^{report} ~~plat~~ now on file in the County Court for ~~more~~ a more particular designation of the line of said alledged road. That the said map and report gives the courses and distances from Kapierville to Ottawa - and in such a manner, as your Orators supposes as to make the line of said road run across your

Craters land on the line opened and traveled as
aforesaid by the persons hereinbefore named.
Your Orator further shows that the said Map
and report after giving the courses and distances
aforesaid concludes as follows, "3831. ch & 50 links
from Waperville Cook County, to Ottawa LaSalle
County or 47 miles & 51 ch & 50 links"

"I hereby certify
the above to be a true and correct survey (according
to the best of my knowledge and belief) of a road
authorized by the Legislature of the State of Illinois
on the 16th day of January 1837, to be made from
Waperville in Cook County to Ottawa in LaSalle
County,

Almon Ives, Surveyor."

We the Undersigned Commissioners appointed and
authorized by the Legislature of the State of Illinois
on the 16th of January 1837, do hereby certify that we
have viewed and caused the above survey to be made
taken and marked, and have located the same
as a State road leading from Waperville in
Cook County through a part of Kane County
to Ottawa in LaSalle County, and have authorized
three maps thereof to be made and one filed in
the Clerks office of the County Commissioners
Court of each of the above said Counties,

B. F. Presley
J. P. Hallock Commissioners

all of which will more fully appear by said map
and report, —

The said persons hereinbefore named, or some of them pretend, that at the September Term A.D. 1831, of the County Commissioners Court of LaSalle County, that it was ordered by said Court that there be a road revived, leading from the public square in Ottawa by Greens Mills to intersect the Chicago Road near John Greens, and that Luther S. Robbins, William Richey, and Joseph Elwood be appointed commissioners to locate said road the nearest to and from the aforesaid points, and that the said commissioners afterwards surveyed marked and located said road between said points giving the courses and distances, and reported the same to said Court, and the said Court made an order and entered the same of record, that the said road so located be established as a public Highway, and thereupon William Stadden was appointed Supervisor of said road.

And your Orator believes that the lines of both said supposed roads across your Orators land as surveyed ~~as surveyed~~ are identical.

Your Orator further shows, that no width was ever fixed to either of said roads, by the act referred to, or by any authority, or pretended authority whatever, or by any public or other law whatever as your Orator is advised and believes.

Your Orator is informed and believes that the ~~persons~~ persons herein before named, pretend that the line of said road across said complainants land was used and travelled by the public as ~~as~~ a public highway for severall years before the said tract of land was fenced by the said James Clark, in the year A.D. 1849, as aforesaid; and that other parts of said road between your Orators land and

John Greens. had been worked as a public Highway and travelled as such before that time - though they do not pretend that the line of said road across your Orator's land, has ever been used as a public highway, since that time, except as to the alleged wrongful acts of the persons aforesaid in attempting to open the same in March A.D. 1855. and of the defendant herein as hereinafter stated.

Your Orator has resided ever since the year A.D. 1837 in Ottawa, and has during all that time been well acquainted with the road usually travelled by the public from Ottawa to Dayton (John Greens) and from his own knowledge and from information derived from other persons who ^{have} resided here as long and longer than complainant, - believes - and believes he can prove and establish - the following to be substantially the truth in regard to the travel upon the said alleged line of road -
ist. That the line of said road through the corporation of Ottawa and thence to a point beyond your Orator's land - towards Dayton - was never for any considerable portion of the distance - travelled by the public generally - nor by any person living at Dayton generally - and if any portion of said line has ever been travelled by any person residing at Dayton - it has been an exception to their general mode of travelling from Ottawa to Dayton, and that the line of said road across your Orator's ^{said} land on the line of said road or connected therewith, has never been travelled by any body since the year A.D. 1846, and for the greater portion of the line between there and Ottawa, never for a much longer period of time. The line of said road as laid cuts diagonally nearly all the lots in its line from the

Court House to the Eastern boundary of the States addition to Ottawa - and both said surveys of said road were made before the states addition was ~~first~~ laid out

2 There is a portion of said alledged line of road commencing about a quarter of a mile beyond where the alledged line of said road leaves Complainants land - and running thence about a mile towards Dayton - Through Timber & Crossing a ravine, which sometime between 1832 and 1855, was trimmed of brush and undergrowth for a width of perhaps fifteen or twenty feet - and some work done towards making the ravine passable - by putting a sort of log bridge across it, barely wide enough to allow a waggon to pass over it - and this part of the road - leading from the residence of John Green and William Stadden, to the residence of the Father of the latter, may have been and probably was used by the members of those families in passing to and from each others residences but not as your Orator believes ever used by them generally with teams - having always been as your Orator believes nearly or quite impracticable for teams, but not by them or any other persons whatsoever as a general public highway and line of travel between Dayton and Ottawa

3^d That the general travel of the public - and of the people of Dayton generally as well - between Ottawa and Dayton, for the last Eighteen or twenty years, has been at a considerable distance north and west from the line of said alledged road - the ground being much more favorable and better for travelling - and if coinciding with the line of said road any where - only accidentally

doing so, and for ~~any~~ ^{a very} short distance - the said line of road as generally travelled by the public with trifling variations. Slightly increasing the distance is now generally travelled by the public as your Orator believes, and wholly ^{so} except as to the alledged wrongful acts ~~sets~~ of the persons in that behalf herein named and is better ground for travel and easier kept in repair than the line of said alledged road.

Complainant further shows that no provision was made by the act aforesaid or by any other public Authority whatever, so far as your Orator knows or believes for the payment of any damages whatever to the persons over whose lands said roads or either of them might pass, and none has been paid to your Orator or those under whom he claims.

There has never been any acquiescence on the part of your Orator in the establishment of either of said roads, for he never ~~had~~ ^{heard} or suspected until the spring of 1855, that there was claimed to be any road across his land in the behalf referred to and is informed by his grantor & believes that he never heard of such road or the pretence of any, previous to that time -

Your Orator does not know whether the Commissioners appointed by the act of 16th January A.D. 1837, ever met at Chaperville, were sworn, and filed copies of their map and report in the Clerks Offices of Cook and Kane Counties as required by said act, or not; but your Orator after careful examination can find no record evidence of those facts in LaSalle County except as herein before

Stated - and believes that he has herein fully and truly stated all the facts in regard to the legality of said alleged roads.

Your Orator therefore is advised and believes that there is no legal road across his land in the behalf mentioned, and that therefore the acts of the persons herein before mentioned in entering upon his said land and attempting to establish a road across the same, are not authorized by law.

Your Orator further shows that the said Rees Morgan herein before mentioned at various times a/c, during the past winter has broken down your Orators fences, on the line of said alleged road as he is informed and believes, ^{and} ~~But~~ is now claiming to act as a Commissioner or overseer of Highways of said Town of Dayton, - and is threatening and endeavoring to keep your Orators fences as aforesaid broken down and to establish a road across your Orators said lands claiming the right ^{to do so} ~~as to do~~, as your Orator is informed and believes upon the facts herein before set forth, and not otherwise. Your Orator further sheweth, that before the last mentioned alleged wrongful acts of the said Rees Morgan during the past winter, he commenced a suit at law in trespass against the said Rees Morgan, for the former trespass in breaking down your Orators fences & passing over his land, in this bill mentioned - and a like suit has also been commenced against said Morgan by Richard Thorne, involving also the same question as in your Orators said suit, both of which suits as your Orator is informed and believes are now pending and undetermined.

in this Honorable Court; and the last mentioned
alleged wrongful acts of said Rees Morgan
were done and committed after the service of
process on him in said last mentioned suits
as your Orator is informed and believes.

And your Orator further shows that the acts of
persons hereinbefore mentioned in breaking down
your Orator's fences, and keeping them broken down
as aforesaid has already occasioned your Orator
great pecuniary harm and damage, by letting
numerous herds of cattle upon his grounds, and
crops whereby a large quantity of the same have
been destroyed - as also a large amount of hay
in stack from the same cause - and the
future damage to your Orator will be much
greater, unless the defendant, hereinafter
named be restrained from committing the
injurious acts complained of - and your
Orator knows of no remedy that will afford
him adequate relief except by injunction.
Your Orator therefore the premises considered
prays that the said Rees Morgan may be made
a defendant to this bill - that process may
issue to bring him before this Honorable Court, and
that in the mean time an injunction may issue
against the said Rees Morgan, his agents servants
and abettors. Strictly commanding and enjoining
them from breaking down your Orator's fences
or passing over his lands, on the line of said
alleged roads, until the further order of this Hon-
orable Court, and until your Orator can try and
obtain the final decision of this Honorable Court
and of the Supreme Court of the State of Illinois
in the suit at law now pending against the

said Pees Morgan, in the behalf herein before referred to - your Orator using all reasonable and proper diligence in the prosecution of said suit at law to final determination as aforesaid. and that on the final hearing the said injunction may be made perpetual - that the said Morgan may answer this Bill but not under oath which is hereby waived, and for such other and further relief as Equity may warrant and require - and your Orator as in duty bound will ever pray &c

John C Champlin

State of Illinois

La Salle County

John C Champlin being duly sworn on oath saith, that he has read the foregoing Bill by him subscribed & is acquainted with the contents thereof, & that all matters therein stated as of the positive knowledge of this affiant are true in substance & in fact & all else in said Bill contained, this affiant believes to be true. J C Champlin
Subscribed and sworn to before me this 21st day of April AD, 1856)

J D Baton Just Sup Court.

Exhibit A - County Commissioners Court March Term 1838 - Tuesday, March 6 1838. Court met pursuant to adjournment. Present

The same Commissioners as on yesterday

State Road Report,

This day the report & map of a state road, located by R. M. Sweat, Isaac W. Hallack, and Benjamin F. Fredly, from the Court House in Ottawa of Greens Mills, William L. Lemmons Petal Permitts, Georgetown

George Hollenbackes, William Harris, Edward G. Amerts, & from thence to Kaperville was handed in to the Court by Almon Ives Esqr - and to appearing to the satisfaction of the Court that the said Commissioners have complied with all the requisitions of the act authorizing the location of said road, the said report and map are accepted and approved by the Court, and ordered to be filed - Ordered, that the following compensation be allowed out of any money in the treasury not otherwise appropriated to the following named persons to wit: To Almon Ives as surveyor on said road 13 days \$26.00 To Isaac P. Wallock one of said Commissioners \$3.42 making the amount paid by this County \$29.42 Being the whole amount chargeable to this County for locating said road.

For the purpose of preventing acts of the character complained of till the complainant can have an opportunity of trying the legality of the alleged road at law in the action now pending, Let an injunction issue to restrain further breaches of the Complainants case till the further order of the ^{Circuit} Court upon the complainant filing a bond in the usual form in the penal sum of one thousand dollars with Augustus M. Zimmerman ^{surety} security
J. D. Baton
Just Sup Court

And afterwards to wit on the same day (April 22nd) Complainant filed his bond for injunction which said bond is in the following words

and figures to wit.

"Know all men by these Presents that we John C Champlin as principal and A M Zimmerman, as security are held and firmly bound unto Rees Morgan, in the penal sum of One thousand dollars for the payment of which well and truly to be made we hereby bind ourselves, our heirs & personal representatives firmly by these presents Witness our hands and seals this 22^d day of April A.D. 1856.

The condition of the above obligation is such that whereas the above bound John C Champlin has this day filed in the LaSalle Circuit Court a Bill in Chancery against the said Rees Morgan, on which an Injunction hath been allowed, now if the said Champlin shall well and truly pay all such costs and damages as shall be finally awarded against him in case said Injunction shall be finally dissolved, — then the above obligation to be void, otherwise to remain in full force and virtue

John C Champlin Seal
A M Zimmerman Seal

And afterwards to wit on the said 22^d day of April a writ of Injunction was issued for the complainant aforesaid in words and figures following to wit

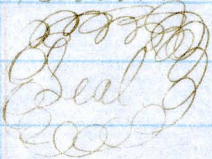
State of Illinois
LaSalle County

The People of the State of
Illinois to Rees Morgan

Greeting:

Whereas John C Champlin hath filed in our Circuit Court within and for the County aforesaid his Bill in Chancery against you, praying an Injunction touching certain matters in the said Bill alledged: and which Injunction hath been allowed by the Honorable John Dean Dixon one of the Judges of our Supreme Court: We therefore the premises considered do strictly command and Enjoin you the said Rees Morgan, from committing any further breaches of the said complainants close in his Bill in that behalf described to wit, the S^W₄ of the N^E₄ Sec 34 T 34 R 4 E 3 PM, until the further order of our said Circuit Court in that behalf to be made to the Sheriff of ~~our~~ said County to execute

Witness John F. Nash Clerk of our said Circuit Court, and the seal of our said Court at Ottawa this 22^d day of April AD 1856



J F Nash Clerk

and on the back of said Injunction the Sheriff made his return in the following words and figures to wit, "

Executed this writ by reading to, and by leaving a Copy of this writ with the within named Rees Morgan April 23^d 1856 F. Warner Sheriff by L S Harris Deputy, done & ret 60 3 miles 15 Copy 50, \$1.25"

And afterwards to wit on the said 22^d day of April a summons was issued, which

is in the following words and figures to wit

State of Illinois }
LaSalle County } 302

The People of the State of Illinois, To the Sheriff of LaSalle County Greeting
We command you to summon Bees Morgan if to be found in your County, personally to be and appear before the Circuit Court of said County on the first day of the next term thereof, to be holden at the Court House in Ottawa, on the day of May next to answer to a certain Bill of Complaint filed in our said Circuit Court on the Chancery side thereof, against him by John C Champlin, and have you then and there this writ, and make return thereon in what manner you execute the same.

Witness John F. Nash Clerk of said Court, and the seal of said Court at Ottawa this 22^d day of April A.D. 1856.
J F Nash Clerk"

On the back of said ~~executions~~ ^{summons} a sheriff's return is made in the following words and figures to wit:

"Executed this writ by reading to, and by leaving a copy of this writ with the within named Bees Morgan April the 23^d 1856.

L. S. Warner Sheriff
by L. S. Warner's deputy
Sum & ret. 60, 3 miles 15, Copy 50, \$ 1.25."

On the 19th day of May 1886, the said Defendant filed his answer herein in the following words and figures to wit

State of Illinois,
LaSalle County, ss:

Circuit Court in and for
said County - May Term

A.D. 1886,

The answer of Reese Morgan to the bill of Complaint of John C. Champlin against him

This respondent saving & reserving all & all manner of exception to the manifold errors & insufficiencies of the complainant's Bill for answer thereto says - that he admits, that the complainant is seized of said land as alleged in the Bill - that said Clark & complainant each purchased it as stated, respondent thinks it was entered in September & not in May A.D. 1848, however - that the land was partly plowed by said Clark and that the tract was enclosed in the spring of 1849, as stated and the track diverted from going across it, & that said Clark & the Complainant have since except when interrupted by attempts to open the roads in said Bill mentioned, been in possession of said land. Respondent also admits that under his direction attempts have been made to open the roads mentioned in the Bill substantially as there is stated, but no more damage has been done than was absolutely necessary - Respondent also admits that an act was passed by the legislature, & commissioners appointed under it - that they surveyed and located the state road & returned

the report and map of the same - that the County Commissioners Court of LaSalle County approved of the same & ordered the road opened as charged in the bill & that the road so located crosses said land. Respondent also states that it is true that at the September term A.D. 1851 of the County Commissioners Court of LaSalle County, it was ordered by said Court that there be a road, viewed leading from the public square in Ottawa by J. Greens Mill to intersect the Chicago road near John Greens - that said commissioners were appointed & that they surveyed marked & located said road between said points, giving the courses & distances & reported the same to said Court - & that said Court made an order & entered the same of record - that the said road so located be established as a public highway & that William Stoddard was appointed supervisor of said road as charged in said Bill. It is not ~~merely~~ ^{merely} ~~merely~~ that these things are so, but respondent states that such are the facts as the complainant well knows.

Respondent also admits that the lines of both said roads across the complainants said land are identical.

Respondent also admits that there is no written evidence, either by order of the County Commissioners Court or otherwise by which aside from the Statute in relation to the width of roads, the width can be ascertained, but respondent insists that by the acts of the Legislature in relation thereto, all roads established when

they were one of the width of thirty feet where no width has been otherwise fixed.

Respondent however states that he is informed & verily believes that said road running from the Public Square in Ottawa to intersect the Chicago road was actually established as fifty feet in width, & that for the distance of about three fourths of a mile where the road passed through timber land, which place ^{is} situated as stated in the bill the road was cleared out to the width of fifty feet & that the road has been worked and used by the public & public authorities as a road of the width of fifty feet. Respondent further answering says that he is also informed & believes that said other road in said bill mentioned during the year next after the same was surveyed & located & between that time & the time when the said Clark Enclosed said tract of land, ~~the said road~~ was fenced in many places on both sides & so as to indicate a width of at least fifty feet & within the distance of three or four miles of said land, the said road was so fenced & that this was known to said Clark when he fenced said land— Respondent states that since the year 1853 he has frequently travelled said road from Ottawa to John Iscenis at Dayton, & from there, & until the time when said Clark enclosed said tract of land all the public travel between the towns of Ottawa & Dayton has been across said tract of land & during all said time before the enclosing the land as aforesaid the travel has been substantially along the surveyed route of said road & prior to the year 1846 when the travel was diverted a little to the north by the fence of one Richard Thorne the travel was

very nearly on the surveyed route and he therefore states according to the best of his knowledge & belief that the statements in said Bill of what the complainant believes & believes he can prove and establish inconsistent with this answer are not true & that complainant is mistaken in relation thereto. Respondent states that said road from Dayton to Ottawa across said land was used and travelled as a public highway & as the only public road leading from Dayton to Ottawa without interruption, from the time it was located until said Thorne & Clark fenced ~~across~~ the same and that frequent attempts have been made ever since the said land was fenced to open the road through & there has ever since the same was so fenced by said Thorne and said Clark been a controversy about the road.

Respondent further states that said Clark was well aware of the existence of said road before the said tract of land was enclosed by him, & that on the said road having been fenced across by said Thorne, the said Clark on one occasion in 1846 removed the fence from across the road as said Clark informed this respondent.

Respondent has no means of knowing whether the commissioners appointed to locate the State road discharged their duties or not.

From the recital in exhibit A, he supposes & believes they did.

Respondent admits that said complainant has sued him as alleged in the bill & that the suits are pending. Respondent having

fully answered all such matters as he is advised
it is material for him to answer. prays to be hence
dismissed &c

State of Illinois LaSalle County ss

The said Rees Morgan
being first duly sworn according to law on oath
says that he has examined, and heard read, the
foregoing answer, and that the matters and things
therein stated as within his own knowledge,
are true, & those statements derived from informa-
-tion he verily believes to be true

Subscribed & sworn to } Rees Morgan
before me this 19 day of }
May A.D. 1856, }
J F Nash Clerk }

And afterwards to wit, on Monday May 19th 1856 the
said being one of the dep of the May term of said
Court for the year 1856 the following order was entered
pursuant in said cause viz:

John C. Champlin }
" } 3 In Chancery
Rees Morgan } This day the defendants comes
by Seland & Seland his solicitors
and moves the Court to dismiss the Legimation herein,

And afterwards on the 5th day of June 1856 the same
being one of the dep of said May term the following
further order was entered pursuant in said cause to wit,

John C. Champlin }
" } 3 In Chancery
Rees Morgan } This day again comes the parties

heads of their solicitors. And after hearing the arguments
of Comrod. the Court overruled the Complainant's exceptions
to defendant's answer, to which ruling of the Court
the Complainant then and there assented.

and after the filing of the affidavits herein after set forth
And finally on Friday June 6th 1856, the same being
also one of the days of said May term 1856 the following
final order was made and entered & read in said
Cause viz:

John C. Champlin }
vs } In Chancery
Rees Morgan } This day again came the
parties heads of their solicitors
and after hearing the arguments of Comrod. the
Court sustain the defendant's motion to dissolve the
Injunction herein.

On the 2^d day of June 1856 Complainant filed his
exceptions to defendant's answer in the words and
figures following viz:

"Champlin }
vs } In Chy. May T. LaSalle Cir
Morgan } Court AD 1856
Exceptions to answer

- 1 To line 152 1st page - "and the wheel diveded from
going across it."
- 2 To lines 25 & 26 2^d page "as the Complainant
will know."
- 3 Answer not signed "

On the 6.th day of June A.D. 1856, the Complainant filed the affidavit of H. J. Reed in the words and figures as follows to wit:

"State of Illinois /
LaSalle County / May 8 LaSalle Cir Court
A.D. 1856. — In Chancery
Clemplin vs Morgan —

Henry J. Reed being duly sworn on oath, saith that he is well acquainted with the location of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ 31, 34, 41, and adjacent lands, & the location of the alleged road mentioned in the Bill across the same also, that he has been well acquainted with the general line of travel between Ottawa & Gayton for the last eighteen years that he has examined the plat embodied in the affidavit of James Clark in this cause and that the said plat represents with substantial correctness, as affiant believes the line of the alleged road across the aforesaid tract of land: also the general line of travel both before and after the fencing by Thorne in 1846 & by Clark in 1847 — Affiant is confident there never was any general travel along the line of said alleged road across complainant's land, or between complainant's land & Gayton along the line of the alleged road or near the same — and affiant does not believe that the last named line has ever been practicable for a loaded team, or that a loaded team ever passed over the same — Further affiant has measured lately the width of a track which appears to have been cut, many years ago, through

The timber on the last named line, and from the appearance of the timber and size of the trees along said line, is of opinion there never has been a rack cut through said timber to exceed fifteen or sixteen feet in width for the last fifteen or twenty years. The line of said alledged road between complainants land and Ottawa has not been travelled at all for the last fifteen years, unless casually, and occasionally a few rods at a time in places along the line of said road,

Subscribed & sworn to before me this 6th day of June AD 1856
 J. W. Raymond Clerk
 E. L. Herrick Depy, "

And also on the 6th day of June the complainant filed the affidavit of James Clark in the words and figures following to wit;

State of Illinois
 LaSalle County
 Champlin
 vs
 Morgan
 May 7 LaSalle Cir Court AD 1856
 In Chancery

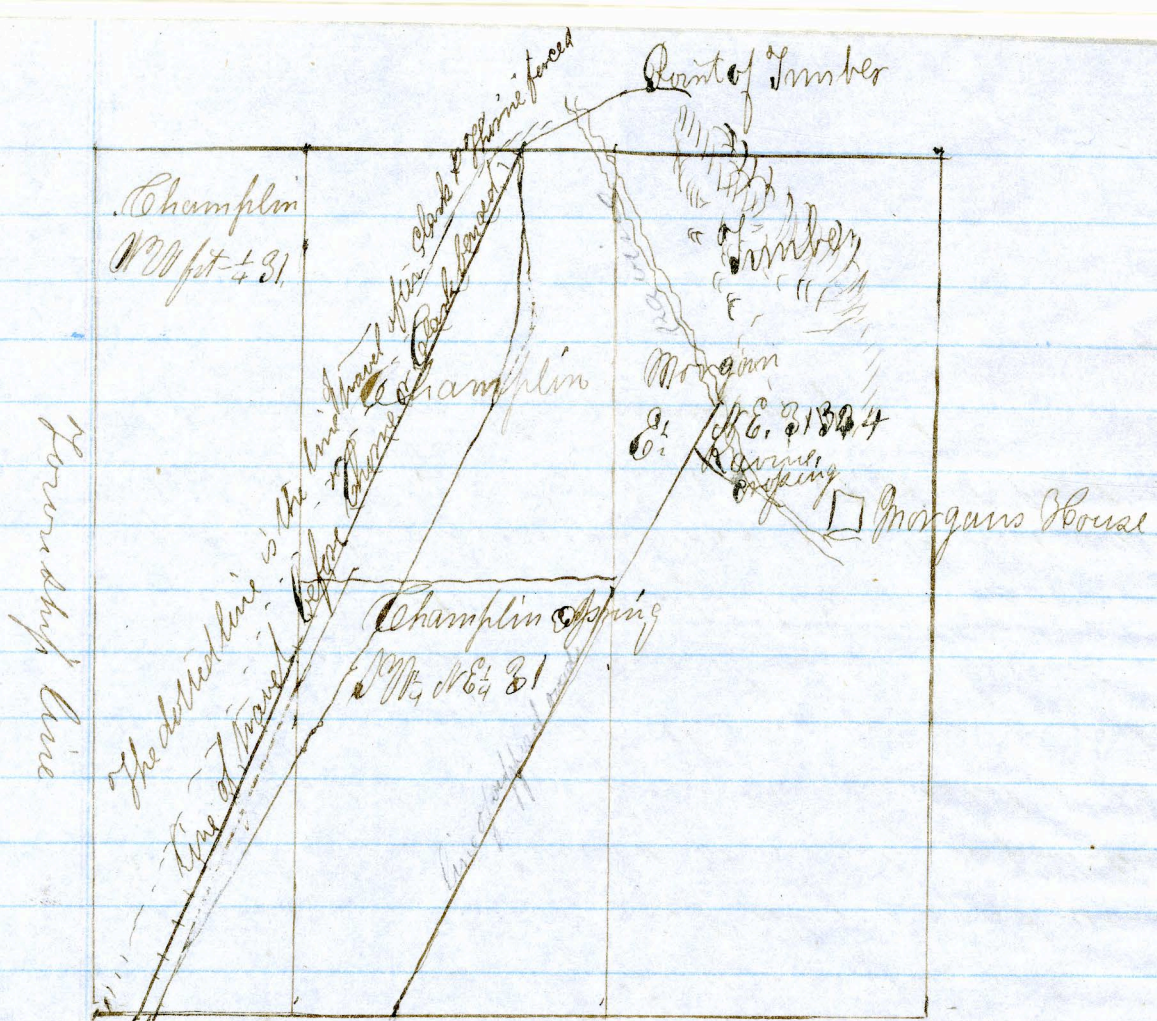
James Clark being duly sworn on oath saith that he has been well acquainted with the general line of travel from Ottawa to Dayton for the last eighteen years (except a little over a year when affiant was absent from the County in parts of the years 1853 and 1854, and affiant knows the location of the S^W₄ of the S^E₄ 31, 34, 4 and formerly owned and lived on the same.

Cultivated & fenced the same, & bought the same of the Trustees of the Illinois & Michigan Canal and sold the same to complainant as stated in the Bill.

During all the time when affiant was so acquainted with the line of travel from Ottawa to Dayton, he knows that there never was any general travel across said tract of land on or near said road - and the location of said tract of land and the adjacent lands and the line of said supposed road in the Bill mentioned, and the general line of travel are all as affiant believes correctly set out in the diagram annexed to this affidavit. From his acquaintance with the alleged line of said road, next beyond complainant's land towards Dayton, affiant does not believe a loaded team ever passed over the same at any time whatever, for the reason that he does not believe that at any time, before the commencement of the trespass suit mentioned in the Bill, the ravine near Morgans house (as per diagram) was ever practicable for a loaded team or an empty one either on the ~~time~~ line of said road; but by diverging a little from the line of said road near Morgans House, the ravine has been practicable for an empty team, and has probably been crossed occasionally, but affiant believes not very often in several of the years next before the commencement of this suit, with empty teams - and sometimes by persons on horseback - but never as affiant believes with a loaded team. Affiant further states that about the year 1845 he was engaged for a

considerable time in hauling flour from Dayton to
Ottawa, Utica, & Peru, and numerous other teams were
engaged at the same time in the same business;—
and in no instance did affiant ever know of any
such teams ever passing said ravine at any
other place than at the point of timber as
represented in the diagram— and is pretty sure that
if any such empty teams ever crossed at any other
place than at the point of timber it was a rare
exception to the general rule of travel,— between
Ottawa & Dayton—

In passing from the point of timber towards
Ottawa, travel could not be brought on the tract
of land complained of on the ~~line~~ ^{line} of the
alleged road, without a considerable deflection
from the nearest rout—as shown by the diagram
and the line of said alleged road across said
land (SW of NE 31, ³⁰~~34~~, 4,) is on much wetter, more
mucky ground than on the line of travel as general-
ly used as shown by the diagram, and in a
wet time, the line of said alleged road across
said tract of land would be nearly impracticable
for a loaded team from the earliest acquain-
tance of affiant with the usual and indeed
nearly universal line of travel between
Ottawa & Dayton in respect to the land in
question has been as near as affiant can
describe it on the line in that behalf
indicated in the annexed plot



Thorne

The foregoing plot affiant believes to be a substantially correct representation of the line of the alledged road across the land in question and of the line of travel between Ottawa and Dayton in reference to the land in question - the distance from where said line of travel crossed the north line of 40 acres before affiant fenced the same, being about twenty rods from the north west corner of said 40 acres, to the best of affiant's recollection and belief, and there has been no affiant fenced the same in 1849, except travel across 2^d 40 acres since the alledged Treppas mentioned in the Bill and other travel connected therewith. Subscribed and sworn to before me this 5th day of June AD 1856.

J. H. Nash Clerk

his
James C. Clark
mark

State of Illinois
Sasalle County

I, John A. Nash, Clerk
of the Circuit Court of said County do
hereby certify, that the suit of Trespas
mentioned in the foregoing Bill of
Champlin vs. Morgan, was tried at
the May term A.D. 1856 of said Circuit
Court, by Jury, who found a verdict
for Plaintiff for One cent damages;
that a motion for a new trial in said
Cause was made by the defendant
in said suit which was sustained by
said Court, & that said suit is now
pending in said Circuit Court.

Witness my hand & the
Seal of said Court this
23rd Day of June A.D. 1856.
J. A. Nash Clerk

State of Illinois
Sasalle County

Sasalle Circuit Court, Vac. after
July Sp. T. 1857.

I John A. Nash Clerk of said Court do hereby certify
that the foregoing suit is still pending & undetermined in said
Court & that the same has not been continued on any applica-
tion of the Plaintiff but under the general order, at Nov
T. 1856, & July Specie T. 1857.

In Witness Whereof I have hereunto set my hand & the seal of
said Court this 16th day of May 1857 J. A. Nash Clerk

6858 ~~178~~ 202
John C. Champlin
is
Reas Morgan
Reed

Filed June 27/1856
L. Leland
Clerk

Filed May 15/1857
L. Leland
Clerk

Reas for road \$8.00
no disbursements

State of Illinois } I John F. Nash Clerk of the Circuit
LaSalle County } Court in and for said County and
State do hereby Certify that the above
and foregoing comprises a true, full, perfect and
complete record in the Chancery suit of John A. Champlin
vs Geo Morgan as the same appears of record and
on file in my office.

In Testimony Whereof I have hereunto set my
hand and the seal of said Court at Ottawa
this 20th day of June A.D. 1836

J. F. Nash Clerk

Illinois, I. C.
In Supreme Court, 3^d Grand Division

Champion, Plff in Error
vs.
Morgan, Deft. in Error } In Chancery

And now comes the said Plaintiff in Error and saith that in the Record and proceedings aforesaid there is manifest Error in this;

- 1st That the Circuit Court Erred in overruling the Complainant's exceptions to the defendants answer, each of them severally.
- 2^d That the Circuit Court Erred in dissolving the Injunction—

Complainant therefore prays that a writ of Error may be allowed, and to the said that said Injunction may be continued in full force according to the prayer of the Bill, that the said writ of Error may be made a Supersedeas.

J. C. Champion

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1858.

JOHN C. CHAMPLIN, Plaintiff in Error, *vs.* REES MORGAN,
Defendant in Error.

Error to La Salle Circuit Court.

ABSTRACT OF THE RECORD.

DECLARATION. Trespass *quare clausum fregit*.

Plea not guilty. 2d plea. Two roads across the plaintiff's close, and that defendant broke and entered the close on the line of said roads, as he had a right to do for that cause ; and issue.

EVIDENCE.

It was mutually admitted by the parties, that the defendant broke and entered the plaintiff's close as alleged, but that in doing so he did not go off the survey line of the roads mentioned in his plea, and that he did no unnecessary damage.

The defendant, for the purpose of proving the roads set out in his plea, introduced a copy of the records of the County Commissioner's Court of La Salle county at their September term, 1831, and March term, 1832, by which it appeared that the said Court, at its said September term, 1831, ordered that there be a road viewed, leading from the public square in Ottawa, by J. Green's mill, to intersect the Chicago road at or near John Green's; and that they appointed three persons commissioners to locate and survey said road, "the nearest to and from said points."

And at the March term, 1832, of said Court, the said commissioners reported that they had surveyed and located said road, and gave the survey line, setting out the initial points and courses and distances thereof, which was signed by two of the three commissioners only, and the report was ordered to be entered on the records of the Court, and the road established as a highway, and William Stadden was appointed supervisor thereof.

The defendant also offered in evidence a record from the same Court at their March term, 1838, which recited, that at that term the report of R. M. Sweet, Isaac P. Halleck and Benjamin F. Fridley, of a state road, located by them from the court house in Ottawa, by Green's mill (and other points) to Naperville, with a plat of said road, was handed into the Court by Almon Ives, Esq., and that it "appearing to the satisfaction of the Court that the said commissioners have complied with all the requirements of the act authorizing the locating of said road, the said report and map are accepted and approved by the Court and ordered to be filed,"—and then followed an order allowing compensation to the viewers and surveyor of the road, and a plat thereof is recorded.

The report consists of the plat, and a certificate thereto by Ives, the surveyor, that the above [plat] is a true and correct survey, according to the best of his knowledge and belief, of a road authorized by the legislature of Illinois, on the 16th of January, 1837, to be made from Naperville to Ottawa, and the certificate of *two* only of the viewers; that "they had viewed and caused the above survey to be taken and marked, and had located the same as a state road, leading from Naperville, in Cook county, through a part of Kane county, to Ottawa, in La Salle county, and have authorized three maps thereof to be made and filed in the clerk's office of the county commissioner's court of each of the above said counties." [Signed.]

B. F. FRIDLEY, }
I. P. POLLOCK, } *Com'rs.*

Which was all the record evidence introduced, and was introduced against the objections of the plaintiff.

The defendant then introduced parol evidence as follows:

JOHN GREEN. *John Green* testified, that he was one of the chain carriers at the location of the county road in 1831 or 1832, and knew where it crossed the plaintiff's close; that in 1847 or 1848 he was supervisor, and they put all the road work on the hill at Morgan's, on the line of the survey.

Richard Thorne was the first who fenced across the road, viz., in the spring of 1847, and Thorne told him he wanted the travel to go round that season on account of the cost of fencing, but would fence out the road whenever the public required it, and witness objected to Thorne fencing across the road.

James Clark was the next to fence across the road, in 1848.

From 1831 to 1847 this road was traveled substantially on the line we surveyed, more or less. The Dayton travel went through the timber by Morgan's, except in wet seasons or wet weather. Loaded teams went through there. Hugh Allen went through with loaded teams, hauling flour, from 1836 to 1838. He made three trips a day by that route, while Jack Vaughn, who went the other road by the point of timber, only made three trips a day—both hauling for witness at one time.

There was all along considerable travel by the point of timber, crossing the ravine on a bridge built there in 1831 or 1832.

The travel is increased a mile or more as now traveled over the surveyed route, which lacks four chains of being four miles from Ottawa to Dayton.

The lines of the county road and Naperville road are identical—(as admitted.)

From Morgan's to Ottawa was, in 1832, all open prairie, and Clark's shanty was the first improvement this side of Morgan's. From Morgan's we took pretty much a straight shoot, sighting for an old tree on the bluff near Ottawa. The stump of the tree is still there. There is no other laid out road that I know of, from Ottawa to Dayton, that you can travel on without trespassing on private lands.

There was a bridge built across the ravine, between Morgan's and Dayton. Work was done on the surveyed road at the ravine, at Morgan's, in 1854 and 1855, before the commencement of this suit.

The public authorities did not acquiesce in the fencing up the road, but there had always been a controversy between them and those who had fenced.

C. G. MILLER.

Charles G. Miller testified for defendant as follows: That he came to Dayton in 1837, and worked on the line of this road in cutting through the timber in 1837, 1838 and 1839, under Green and Stadden, supervisors, and knows of travel by foot, horseback, buggies and empty wagons, up to 1841. Never drove a loaded team through on this road.

Since 1841 most of the travel from Ottawa to Dayton has been by the point of timber north and west of Clark's shanty, to Hayward's sod fence.

A bridge was built at the point of timber, in 1841 or 1842, on what is now Gedney's land, over which the public passed. There were three bridges there close together. I do not know of any travel on the surveyed line since 1841, as I moved then from Dayton to my farm, and from Ottawa to my farm the most direct route was by the point of timber. I think the road was cut out through the timber about sixty feet wide.

And *John Russell*, for defendant, testified as follows:

J. RUSSELL.

I have been here since 1840. Have crossed the ravine at Morgan's from 50 to 100 times. Worked on the hill at Morgan's from 1840 to 1843, when John Green, John Stadden and Wm. Stadden were supervisors. The chief difficulty was at this hill; could never get work enough to grade it down.

And for this reason the travel crossed at the point of timber. It would have taken three years' road labor to grade down the hill.

Those who traveled on this road from 1840 to 1843, crossed the ravine just below Morgan's, on a little bridge the Stadden's had made there for their own use. I never saw many loaded teams go that way.

The general travel since 1846, when Thorne fenced, was by the point of timber, on a bridge there. There was a bridge above this again, where the ravine ended in a slough.

The defendant then called *Aaron Daniels*, who testified as follows:

A. DANIELS.

Have lived one and a half miles from Dayton since 1831, and traveled from Ottawa to Dayton since I have lived in the country. Never saw many teams go by way of Morgan's house except myself. This road was bad at the hill, and for this reason the travel went by the point of timber. I have crossed 50 times or more on this road on foot, on horse back, and with ox teams, with four yoke of cattle. When I had heavy loads I always went round by the point of timber, and when empty by Morgan's.

With 4 yoke of oxen I have hauled 10 barrels of flour up the hill by Morgan's, from 6 to 10 times. From 1838 to 1840 I have seen as many as four or five teams at a time. They would put what load they had on my wagon, and we doubled teams on the hill if I stuck. I never met a team on the hill, and never saw a loaded team go through but myself.—The general travel was by the point of timber, and I went that way as early as 1831.

David Green then testified for defendant as follows:

DAVID GREEN.

I have lived in Dayton since 1830. We traveled the surveyed road some at a very early day, with buggies, on horseback, and with light roads. We went up back of Morgan's till the bridge was built, and this load was used 12 or 15 years, and road labor was laid out on it.

DAVID GREEN. There was a finger board put up in Reed's lane, in 1835 to 1837, close to the sod fence, pointing towards Morgan's. It said, "2 Miles to Dayton."

It was north of the south-east corner of the sod fence.

The bridge was built at the point of the timber in 1840, while John Stadden was supervisor, who had it built. There was another bridge about 20 yards above.

The general travel since 1840 has been round the point of timber.— All the heavy teams, and the generality of other teams, went that way.

The Indian Creek and upper Fox River travel and Dayton folks all came together on the other road, to the point of timber, where they took different courses and the roads forked.

It would be impossible for me to tell the number of times I have traveled the surveyed road. It would average at least twice a week for fifteen years.

It was here conceded that the whole of the plaintiff's farm consists of 140 acres, and that the plats show, substantially, how the travel that went by the point of timber, crossed his farm before it was fenced, and that Champlin fenced the 140 acres in 1853.

JESSE GREEN. *Jesse Green* testified for defendant as follows:

I have frequently traveled the surveyed road by Morgan's. As Morgan's hill was not much worked, we never teamed that way with heavy loads. In returning from Ottawa with empty wagons, we went that way. The travel with loaded wagons was always chiefly by the point of timber. I have met the plaintiff on the road by the point of timber.— In a wet time the ground was bad on the other road, through Champlin's meadow.

R. STADDEN. *Richard Stadden* testified for defendant as follows:

I came to Dayton in August, 1848, and went from Dayton to my father's house by this surveyed road. My father then lived near where Morgan now lives. I live on the line of this road, between Morgan's and Dayton. The surveyed road would run through my farm, back of my house, through my enclosure, and has been fenced across some years on my farm, viz., from 1850.

The marks of the old surveyed road are still visible through Champlin's meadow, overgrown with grass. I and Morgan have no way to get to Ottawa, by a laid out road, except the one in controversy, and there has been a continual controversy since he came to Dayton, between Dayton people, himself, Morgan and public authorities on one side, and those who had fenced the surveyed road between Ottawa and Dayton on the other side.

PLAT. The defendant's plat was identified as being generally correct by all the witnesses, and was given in evidence; and here the defendant rested.

PLAINTIFF'S EVIDENCE.

The plaintiff then called *Wm. L. Dunavan*, who testified substantially as follows:

W. L. DUNAVAN I have lived in this country since 1831, and lived in Dayton from 1836

W. L. DUNAVAN till 1842, and since, where I now do, beyond Dayton. The Naperville road runs near my house. Hayward fenced while I lived at Dayton. I carried the chain for the county road in 1832, from my place to Dayton, and know the survey line of that road. I went to Ottawa twice a week or oftener.

The public travel has always been, since I have known it, a pretty direct course from the north-east corner of Hayward's sod fence to the point of timber; I mean since Hayward built the sod fence. Before that time the travel went still further north and west of the corner of the sod fence. This was the general direction, and where it has varied it has borne to the west, on account of the ground rising as you go further west. Before Hayward fenced the travel went back of his house, by Langley's hollow.

Those on horseback and in buggies sometimes went the surveyed road. There was only a foot trail through the timber, from Morgan's to Dayton, but there never was any general travel from Dayton to Morgan's, on the surveyed road. Richard Stadden's place is between Dayton and Morgan's. Stadden fenced in 1847. The surveyed road runs back of his house. His fence shut up the road and turned the travel down a lane just in front of his house. His fence is still there. Old man Stadden lived where Morgan now does. He fenced up to Champlin's fence, in 1838, and that fence, according to my best impression, would cross the surveyed road, though I am not positive. The Naperville road, from my place to Dayton, has not been traveled on the surveyed line. It is fenced in in a good many places, and the travel varies from the survey sometimes a mile and a half.

On the county road of 1832, from Ottawa to Dayton, there never has been, to my knowledge, any fencing made with reference to the surveyed line. From my place to Dayton there has not been any road labor laid out on the Naperville road since 1844. I worked on the surveyed road at Morgan's hill, under supervisors, several different years. In 1842 I worked there, and at that time the abutments of a bridge had been built there and the stringers put across. There was a bridge built across Fox river in the summer of 1855, on the surveyed route, at the cost of three or four thousand dollars, and it was carried away 4 or 5 months ago, and steps are being taken to have it rebuilt. The state road has always been traveled to Ottawa from Naperville.

O. LEAVENS. The plaintiff then called *O. Leavens*, who testified, that he had been acquainted with the public travel from Ottawa to Dayton since 1834, and in 1837 and 1838 was deputy sheriff, and frequently traveled the road from Ottawa to Dayton.

The general public travel since 1834 has been by the point of timber. I know of no travel on the road as surveyed. I would have likely seen it if there had been travel. The public travel went considerably west of Clark's shanty—I should think as much as eighty rods. Hayward had not fenced in 1838, and before he fenced the road went up by Mackey's, and after he fenced it went by the distillery hill, and passed in front of his house along the sod fence, and then pretty straight to the point of timber. In 1834 I went once to old man Stadden's; Largent lived there then. I went on what is described as the surveyed route. It had the appearance of having been used only for family travel.

HENRY GREEN *Henry Green* also testified for plaintiff, that he had known the public travel from Ottawa to Dayton since 1833.

Until Hayward and myself fenced, in 1839, the travel all went west of the Catholic burying ground to an oak tree, that had the highway mark on it, that then stood on the point of the bluff, this side of Mackey's, and from there in a pretty direct course to the point of timber, crossing the stream a little higher up than they now do.

After Hayward and me fenced, the travel went up the distillery hill, past Hayward's house, along the sod fence, to the point of timber, bearing a little west on account of better ground.

There was no general travel, ever, on the surveyed line, but was a good many rods north and west of it. Whatever travel was on the surveyed line was an exception to the general rule. It was only farm travel.

JAMES CLARK. *James Clark* also testified for plaintiff, that he had known the public travel from Ottawa to Dayton since 1837, and came on to the land owned by plaintiff in 1845. No teams went by Morgan's unless to see old Mr. Stadden. I teamed for the Green's, from Dayton to Ottawa, in 1845, and before I fenced. The public travel passed in front of Richard Stadden's to the point of timber, and thence to the sod fence. I never knew of any general travel any other way except by the point of timber. I live still on the plaintiff's close. I built the first shanty in 1846, when I fenced. It stood at the north-west corner of the forty I fenced. That shanty was torn down and another built on the same site. The travel always passed north and west of my shanty—about 3 1-2 rods west.—The distillery hill was first worked in 1842 or 1843.

All the travel of the public went west of my shanty, towards the point, and any travel by Morgan's was an exception. I have not noticed any marks from Thorne's north line to Morgan's. The timber had been cut through from Morgan's towards Dayton, but the underbrush and trees have grown up, so that in passing you would have to push it aside. It would brush you in going along on horseback. I am now in the employment of plaintiff.

When Thorne first fenced I threw down the fence and passed through. Thorne afterwards told me I was wrong in doing so, and I did not again.

HENRY J. REED *Henry J. Reed* testified for plaintiff, that he had been acquainted with the travel from Ottawa to Dayton for the last 23 years. I have lived several years on the Hayward farm. The public travel, till Hayward fenced, went up on the east side of Langley's place, through Hayward's place back of the house, and through where the orchard now is, on the surveyed line, and then to the point of timber, bearing a little to the west.

The Indian Creek and up Fox River travel, and the Dayton travel all went together on this track till they came to the bridge across the ravine, by the point of timber, and after they crossed it they diverged and took different routes.

Hayward fenced 50 acres and Henry Green 40 acres, in the spring of 1839, and after that the travel went still further north and west, until two or three years afterwards, the travel changed and went up the distillery hill, and passed along to the south-east corner of the sod fence, and then made to the point of timber spoken of.

HENRY J. REED I saw a guide board standing at the south-east corner of the sod fence, in 1839 or 1840. It pointed towards the point of timber.

I never knew of any general travel on the surveyed line by way of Morgan's. It always passed west of Clark's shanty, which stood near the N. W. corner of the forty he fenced.

Through the plaintiff's close the surveyed road and the road as traveled would be apart as much in some places, I should think, as 100 rods, and generally as much as 80 rods.

It is my impression that the fence which old man Stadden built, up to the plaintiff's south line of fence, would necessarily cross the road where the witnesses say it was surveyed.

R. THORNE. *Richard Thorne* then testified for plaintiff, that he had been acquainted with the public travel from Ottawa to Dayton since 1845. The road as then traveled entered my land north of my house, and made then direct for the point of timber. I fenced in 1846, and then left out a little corner, and this turned the travel further north and west.

I have never known any public travel, or any travel whatever, on the surveyed road by Morgan's; but the public travel has always been from a point about the middle of the sod fence to the point of timber.

I have heard John Green's testimony in regard to my fencing the road, and do not believe I had such conversation; the way was this: Green said I had fenced up the surveyed road. I told him I thought not; and then told him whenever I was satisfied I had fenced up a surveyed road, I would take it down. I then got Geo. H. Norris, County Surveyor, to run the road, and after that told Green I was satisfied, from that survey, I had not fenced up the road.

JOHN HOXIE Since Champlin fenced his whole tract in 1853, the travel has gone round his corner, where he has thrown out some, by Pembroke's, down to the point of timber, and there is no difficulty in getting from Ottawa to Dayton on this road. It is unobstructed.

John Hoxie testified for plaintiff as follows:

I live in Serena, and have known the public travel on the road from Dayton to Ottawa for the last 18 years. It has always been from the sod fence to the point of timber, until 1853, when Champlin fenced, and since then as stated by Thorne. Before that the road went about three rods west of Clark's shanty.

The Somonauk teams went the same road to the point of timber, and crossed there at the same bridge. There is now no difficulty in traveling to Serena or to Dayton.

There never was any general travel on the surveyed line, by way of Morgan's, that I know of. It was out of my way to go home to Serena by way of Dayton.

The plaintiff then offered in evidence a plat of the roads spoken of, which was identified as generally correct by all the witnesses.

The plaintiff then asked the Court to give the jury nine several instructions, which were given as asked, except the eighth, which was asked as follows:

If the jury believe from the evidence, that the public, from 1832 till the commencement of this suit, had ceased to use the said surveyed road, and that the public had adopted another and different line of travel

voluntarily, and by so doing had intended to abandon, and did abandon said surveyed road, as well as all other roads upon the same line, then the jury should find for the plaintiff, even although no other public highway was legally laid from Ottawa to Dayton by the public authorities.

Which the Court refused to give; but modified and gave the same, against the plaintiff's exceptions to such modifications, as follows:

If the jury believe that the public, from 1832 till the commencement of this suit, had ceased to use the said surveyed road, and that the public had adopted another and different line of travel voluntarily, and by so doing had intended to abandon and did abandon said surveyed road, as well as all other roads upon the same line, and had acquired the legal right to use of such other line of travel, then the jury should find for the plaintiff, even although no other public highway was legally laid from Ottawa to Dayton by the public authorities.

And at the request of the defendant, the Court instructed the jury as follows:

That if, at the September Term, A. D. 1831, of the County Commissioners' Court of La Salle County, Joseph Cloud, Luther S. Robbins, and William Ritchey were appointed viewers by said Court, to locate and survey a road from Ottawa to Green's Mill, and to intersect the Chicago road at John Green's; and if they, or a majority of them, did locate and cause said road to be surveyed, and did report the same to said Court; and if said Court, in March, A. D. 1832, approved of their report, and ordered said road to be established as a public highway; and if said road was for several years immediately afterwards used and traveled by the public, and worked by the public authorities without objection on the part of the then owners of the land in the declaration described; and if, since the laying out of said road, the same has not been abandoned by the public authorities, then, although its width was never fixed by the county commissioners, the road would be a valid road of the width of thirty feet, that being the minimum width fixed by the statute.

2. If the jury believe from the evidence, that the road was established, opened, used, and traveled, as mentioned in the first instruction, without objection, and that the close in the declaration mentioned was then the property of the state of Illinois, and for many years thereafter remained in the said state, or in the trustees of the Illinois and Michigan canal, then, neither Clark nor the plaintiff had the right, when he thereafter became the purchaser, to fence across or otherwise obstruct the line of the road, or prevent travelers from passing or repassing on said line of road with their horses and vehicles, unless the road had been abandoned by the public before such obstruction.

3. In order to make an abandonment of the road, it should appear that the cessation to use it was with the intention of abandoning it, and not merely diverging in some places from the surveyed route, and traveling where there was no road laid out, on account of there being a hill or ravine on the line of the survey, which it was inconvenient to cross with loaded teams, and such a diverging with some, or nearly all of the loaded teams, for this cause only, while travelers with other loaded teams, empty wagons, buggies, and on horseback and on foot, continued to pass along on and close to the route of the road where it was surveyed across such ravine, or over such hill, using it as a road, would not amount in law to an abandonment of the road.

4. The diversion of the travel from the surveyed route of the road by the fences of Clark and Thorne, would not, if objected to and contended against by the public and public authorities, amount to an abandonment of the surveyed and laid out road.

5. If said road was established, laid out, opened, used, and worked without objection during several years next after it was laid out as mentioned in the first instruction; and if said road had not, prior to the time of the throwing down of the fences and passing across the plaintiff's close, been abandoned by the public and public authorities as explained in the third and fourth instructions; and if the trespass complained of consisted only in the defendant's throwing down the plaintiff's fence, and passing along the road within its limits, doing no unnecessary damage, the jury should find a verdict for the defendant.

6. If the jury believe from the evidence, that the road mentioned in the first instruction was surveyed, laid out, and accepted and ordered by the county commissioners' court to be established as a public highway, was opened, used, and traveled by persons as a public road, and worked upon by the public authorities as a public highway, without objection, as mentioned in the first instruction, it continued to be a public highway until abandoned by the public or vacated by competent authority; and in order to constitute an abandonment it must have ceased entirely to be used as a public highway and to have been worked as such, and as long as any portion of the public continued to use it as a public highway, and as long as any public work continued to be done on it as a public highway, it could not be considered legally abandoned. The traveling public must have ceased to use it entirely as a public road, and the public authorities must have entirely ceased to work it as a public highway before it should be considered by the jury as abandoned; and if said road was created as mentioned in the first instruction, and had not been abandoned as mentioned in this instruction, prior to the time of the alleged trespass of the defendant, it was a valid road at the time of the alleged trespass of the defendant; and if the only trespass of the defendant consisted in throwing down the plaintiff's fence, within the limits of such a road, and passing across the plaintiff's land within the limits of such a road, doing no unnecessary damage, the defendant is not guilty, and such should be the verdict of the jury.

7. If the road was established, used and worked without objection, as mentioned in the first instruction, in order to make out such a substitution of another road in lieu of it by dedication, a mere voluntary permission of the owner or persons to travel over it, would not alone, unless there was some recognition of such substituted road on the part of the public authorities, be sufficient to make out such dedication or substitution. Such substituted road should be recognized and used as a public road, before the right of the public to use it as a road would be acquired.

Which instructions for the defendant were all duly objected to by the plaintiff at the time. Motion by plaintiff for a new trial overruled; and exception.

O. C. GRAY,
Attorney for Plaintiff in Error.

Supreme Court

John C. Champlin

W.

Rees Morgan

Abstract.

Filed May 4, 1838

L. Leland
Clerk

Supreme Court - 3^d Division - April Term 1888

John C. Champlin
vs. } Error to La Salle -
Rees Morgan }

This was a writ of error brought to reverse an order of the Court below dissolving a provisional injunction granted by a judge in vacation till the further order of the Circuit Court.

At the last term of this Court a motion was made by complainant, & sustained by the Court, to revive the injunction.

The Clerk entered up the order reversing the order of the Court below & reviving the injunction till the complainant could be heard at law, & the order contained a judgment for costs against the defendant in error. Since the order was entered, the law suit alluded to in the order reviving the injunction, has been tried in the Circuit Court & a verdict & judgment rendered in favor of the defendant. The original bill has itself since been dismissed in the Circuit Court for want of compliance with a rule taken by defendant upon complainant, to file a replication to the answer.

Upon these facts & upon the facts in the record, the defendant moves to set aside the order of the last term reversing the injunction & adjudging that the defendant shall pay costs, & for the following reasons;

1st That part of the order reversing the decree of the Court below, & that the complainant should ~~pay~~ recover costs, was not the adjudication of the Court, but the same was unadvisedly entered up by the Clerk -

2^d An order dissolving the provisional injunction, whether the bill prays for other relief than that of a perpetual injunction on the hearing or not, is only interlocutory & not final, & a writ of error does not lie. No authority or dictum except that of Judge Treat in the 4th of Scammon 326, can be found in favor of it; & the dissolution of the provisional injunction does not dismiss the bill, but on the contrary, the Complainant may obtain the perpetual injunction on the final hearing, though the temporary one may be dissolved, & to dismiss the bill & deprive him of this right would be error.

Cair vs. Foote	8 Blackford	454
Young vs. Grundy	6 Branch	51.
McCullom vs Eagan	2 How. U.S.	61.
Tanner vs. Irwin et al	1 Mis.	47.
	15 Ill	228.
	5 Gilm.	33.
	13 Ill.	31.
	Hardin	12.
	4 Henning & Ab.	159
	1 Swanst.	550
	3 Daniell's Ch. Prac.	1897-8.
	Breese	15433.
	2 Seam.	58.
	5 Leigh	326.

The fact that the bill has, since the writ of error was brought, been properly dismissed by the Court below for want of a compliance with the rule to file a replication, shows the impropriety of continuing an injunction in this Court after the suit itself has ceased to exist in the Court below. Can there be an injunction after the suit itself has been dismissed?

The law suit itself in aid of which this Court made an order reviving the

injunction, has been determined against the complainant, & must the injunction remain for the five years till the limitation runs on the writ of error in that case? Would it not be wrong to continue this injunction depriving the public of the use of the road any longer?

4th There is no equity in the bill, & there is a sworn answer denying all the material allegations in the bill - and the bill is only supported by some ex parte affidavits not filed with the bill; & all the reasons urged in the bill why the road is invalid, have been decided to be unfounded in the following cases

17 Ill. 421.

17 Ill. 395

There is a general law providing for the appointment of damages
Rev Stat of 1857 p 534

The substance of the bill is, that the complainant owns a tract of land & that the defendant has thrown down the fence around it, & threatens to continue to do so, insisting he has a right because there is a road there.

~~There is a general law providing for
the assessment of damages.~~

~~Rev. Stat. p. 534.~~

The case having been reached & there
never having been any abstracts filed, after
the error on the record of the books here
of this Court the writ of error for this
as well as for the 1st error should
be dismissed.

Deland & Deland
per apt in error

Champlin
vs
Morgan

Powells

He in names of
Harris, Harris
and Harris, etc.

State of Illinois Supreme Court, May 1858

John Champion }
vs
Rees Magan }

Edwin S Leland being duly sworn deposes & says that the common law suit of John Champion mentioned in the Bill in chancery in this cause as pending was at the same term AD 1857 of the Circuit Court tried before a jury and there was a verdict in judgment in the case in favor of Magan. The suit of Thorne vs Magan also mentioned in said Bill was at the same term dismissed by the plaintiffs. In the case of Champion vs Magan the defence was that there was a public highway, & that the turkeys were to remain an obstruction from it. An appeal was granted and allowed in the last mentioned case.

E S Leland

Subscribed & sworn
to before me this twenty-
first day of April AD 1858
Leland Clerk
by J. D. Rice Deputy

684

Thompson's Magazine

Filed April 21st 1888

L. L. Lane

Clk.

Illinois, &c.

In Supreme Court.

John C. Champlin,

vs.

Rees Morgan

} Error to La Salle Circuit
Court.

I, John C. Champlin being
duly sworn on oath do say, that on Thursday,
the 4th day of June A.D. 1857, the said Rees Morgan
did, as affiant is informed and verily believes
break and enter the Plaintiffs Close, ~~on~~ the line
of the alleged road in the pleadings in this
Cause mentioned and to restrain the doing
which the injunction in this Cause ~~was mentioned~~
was granted, (by the Honorable John D. Caton
one of the Judges of this Court) and the said
Rees Morgan, at the time of committing the
breach aforesaid, notified the agent of affiant,
in charge of the said Close, as affiant is infor-
med and believes, not to put up the fence
so broken down by him, in committing the
breach aforesaid, because the said fence, so
broken down by said Morgan, was across a
public highway, as said Morgan alleged.

Subscribed & sworn to before me this,

6th day of June A.D. 1857.

John A. Cook Clerk

John C. Champlin,

In Sup. Court.

Champlin

vs

Morgan

} And now comes the said
Plaintiff in Error, and moves
the Court for an attachment
against said Morgan to bring him before this Honorable
Court, to answer for the matters set forth in

the foregoing affidavit or for such other
remedy in the premises as to this Honorable
Court may seem meet and the Plaintiff in
Error entitled to have.

John C. Champion
for Aff in Error.

In Supreme Court.

John C. Champlin

^{vs}
Rees Morgan

Affidavit.

Know all Men by These Presents, That *We, John C. Champlin*

as principal, and

as security, are held and firmly bound unto

penal sum of

and lawful money of the United States, for the payment of which, well and truly to be made, the said

bind

these Presents.

Witness,

this day of

A. D. 185*7*

The Condition of the above Obligation is such, That, whereas, the above named *Morgan*

did, at the

Term of the

held in and for the County of

judgment against the above bounden

in the State of Illinois, A. D. 185*6*

Court,

recover a

~~for the sum of~~

to reverse which said judgment, the said

has sued out a Writ of

Error from the Supreme Court, within and for the Third Grand Division of said State. Now if the said

shall duly prosecute said Writ of Error, and pay, or cause to be paid, all judgments, costs, interest and damages which the said Supreme Court shall adjudge against

and abide the order and judgment of said Supreme Court in this behalf, then this obligation is to be void, otherwise to remain in full force and effect.

John C. Champlin [SEAL.]

John P. Anthony [SEAL.]

[SEAL.]

John B. Champlin²⁰²

vs
Rees Morgan

Supds Bond

Filed May 21, 1857

L. Leland
Clerk

in the State of Illinois, v. d. 182 recover a
Court

Supreme Court in this behalf, then this obligation is to be void, otherwise to remain in full force and effect.

damages which the said Supreme Court shall adjudge against

shall duly prosecute said Writ of Error, and pay, or cause to be paid, all judgments, costs, interest and

for the sum of
to reverse which said judgment, the said
and out a Writ of

[SEAL]

[SEAL]

[SEAL]

[SEAL]

and lawful money of the United States, for the payment of which well and truly to be made, the said
bond sum of
to be paid, and
as security, are held and firmly bound unto
in the

Know all Men in these Presents, That the

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,
TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF *La Salle* 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 *La Salle* County, before the Judge thereof, between *John C. Champlin*

plaintiff, and

Rees Morgan

defendant it is said manifest error hath intervened, to the injury of the aforesaid

Champlin as we are informed by *his* complaint, 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 plaintiff 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* 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. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *21st* day of *May* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*Seven*

S. Leland
Clerk of the Supreme Court.
By J. B. Rice Deputy

Clerk of the Supreme Court

of Our Lord One Thousand Eight Hundred and Fifty-Three
in the Year
Justice of our said Court and the Seal thereof at Of-
fice, The Hon. WILLIAM B. SCATES, Chief

John C. Champlin²⁰²
vs
Rees Morgan
Writ of Error

This writ of error is to
operate as a supersedeas
and as such is to be
obeyed by all concerned.

L. Leland
Clerk
By J. B. Rice d/s

Filed May 21 1857
L. Leland
Clerk

the Judge thereof, between
of a plea which was in the Circuit Court of

County, before
BENJAMIN. In the record and proceedings, as also in the rendition of the judgment
TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF ASHESBURY, GREENING:

SUPREME COURT.
STATE OF NEW YORK

The People of the State of New York

State of Illinois I, John F. Nash Clerk of the
Sasalle County of Illinois Court in and for said
County & State do hereby certify that
the above and foregoing orders are truly copied from the
records in my office: that they were both entered of record
at the November term of said Court for the year AD 1837
and that they are the only orders entered of record in
said cause since the entering of the order dissolving
the injunction in the same cause.

On Testimony Whereof I have subscribed at my
hand and the seal of said Court at Ottawa
this 20th day of April AD 1838

J. F. Nash Clerk

State of Illinois Supreme Court April the 18th 1838

John Champion }
vs }
Rosa Mifflin }

Edwin S. Leland being
duly sworn deposes & says that the above proceedings
were held in the case now pending in part in the
Supreme Court after the writ of error in this case was
issued and to reverse the order dissolving the injunc-
tion that it is part of the same case &
not another & different one.

Subscribed & sworn
before me this 21st day of April
1838
S. Leland Clerk
by J. B. Rice Deputy

It is remembered that on Saturday November 28th
1857 the Court being one of the days of the Summer
term of the Probate Court Leicestershire Court for said year
a certain order was made and entered of record in
the words and figures following to wit:

"John C. Champlin

vs
Rees Morgan

In Chancery

On motion of the defendant
by Edward Seland his solicitors
the complainant is ruled to file a replication to
defendants answer on or before the coming in of the
Court next Thursday morning."

"Thursday December 3rd"

"John C. Champlin

vs
Rees Morgan

In Chancery

This day the defendant
comes by Edward Seland his
solicitors and the complainant being three times solemnly
called in open Court comes not nor any one for him
but makes default. And it appearing to the Court that
the complainant is in default of a replication to
defendants answer in compliance with the rule, or
motion of defendants solicitor it is ordered that this suit
be dismissed for want of a replication

It is therefore considered by the Court that the
defendant shall and receive of the complainant his
costs and charges by him herein expended and that
he have execution therefor."

684

Rankin as Mungun

Filed April 21st 1898
L. Leland
clk

no to describe
per C. Williams
no to allowed

68½ ~~N3~~ ~~58~~ ~~200~~

John C. Champlin
vs

Reese Morgan

68½

68½

~~12421~~

12421

1858

no supersedeas