

No. 13593

# Supreme Court of Illinois

Beyer, et al

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vs.

Tanner

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STATE OF ILLINOIS,  
SUPREME COURT,  
Third Grand Division.

No. ~~270~~

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1862

135012

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

APRIL TERM, A. D. 1862.

JOHN BEYER, LAWRENCE RUCKDESTELL,  
FRANK BANKER, SAMUEL INGHAM,  
IMPLEADED WITH  
JOHN J. DENNA, PARDON PERKINS, and } *Trespass—Appeal from*  
ALBERT MYHILL, } *Kane.*  
*vs.*  
WILLIAM A. TANNER. }

Abstract of the Record in the Case.

PAGE OF RECORD.

- 2 On the 25th of September, A. D. 1861, the Plaintiff Tanner filed a declaration in Trespass, containing three counts; in the first of which it is charged that the Defendants on the first day of Dec., 1860, and at divers other days between that time and the commencement of this suit, broke and entered Plaintiff's close, to wit: the north-west quarter of section six, in the township of Aurora, in Kane County, and destroyed the fence, and trod down and destroyed grass and wheat.
- 3 The second count for trespass at the same times upon north-east quarter of section one, in the township of Sugar Grove in said county, by cutting timber, destroying grass, wheat, and fences.
- 4 The third count like the second, except the *locus in quo*, was the east part of the south-east quarter of section thirty-five, in Blackberry in said county.
- 5 On the 24th day of January, 1862, the defendants, by Plato and Smith, their attorneys, filed a plea of not guilty.
- 6 On the 10th day of February, 1862, a stipulation of the parties was filed, by which it was agreed that the Defendants might give any special matter in evidence under the general issue.
- 7 On the 11th of February, 1862, a Jury trial was ordered, and on the 14th of
- 9 February, 1862, the Jury returned into Court with their verdict, and finding the Defendants, John Beyer, Frank Banker, Samuel Ingham, and Lawrence Ruckdestell, guilty, and assessing the Plaintiff's damages at ninety-five dollars and forty-two cents, which was entered of record. Defendants moved for a new trial.
- 11 On the 6th day of March, 1862, motion for new trial overruled, and Judgment upon the verdict ordered to be entered. Defendants except, and pray an appeal, which is granted. Defendants allowed to file bill of exceptions, and an Appeal Bond to be approved by the Clerk in sum of \$400 within thirty days.
- 12 On 17th day of March, 1862, Bond filed, and approved by Clerk.
- 13 On the 5th day of April, A. D. 1862, bill of exceptions, duly signed, filed by the Defendants, as follows: Be it remembered that on the trial of this cause, the Plaintiff proved that he was the owner, and in possession of the premises described, and at the time mentioned in his declaration. Also proved that township of Aurora is town 38 north, of range 8, east, and that township of Sugar Grove is town 37 north, of range 7, east, and that township of Blackberry is town 39 north, of range 7, east.  
The Plaintiff than introduced the following witnesses:
- 14 George Wilder says:—Went over different portions of premises mentioned in declaration, in June last. Over the north part of Sugar Grove and south part of Blackberry, across the town line. Buildings on premises—dwelling house and barn. Buckley lives on farm—did last June. Went from house north about fifty rods—found a gap in fence, and then turned west eighty rods before

I came to the timber. Followed in this direction two miles. There was an opening cut through the grove, one to three rods wide—length of opening thirty rods—size of timber 8 to 10 inches. There were large scattering trees, balance brush. This timber in Sugar Grove township. Two pieces of timber in Sugar Grove. There was an embankment in the way I passed. Then I came to the second grove—thirty or forty rods through. Went about one hundred rods and  
 15 came to Plaintiff's land in Blackberry, and passed through a grove. The opening in this grove one or two rods wide—large timber. The way I traveled was upon the north-east quarter of section six, in town 38 north, of range 8, east; thence into town 38 north, of range 7, east, upon section one, thirteen chains to an angle; thence across the town line into Blackberry, to east line of section thirty-five. About one hundred and twenty-seven chains from west line of Aurora to west side of Plaintiff's premises. About one hundred chains through all Plaintiff's land. There was a fence between the wheat field, and first grove passed. The wheat field between the north and south road and grove. Fence on town line between Plaintiff and Defendants was down. Two hundred and sixty rods through Plaintiff's land instead of four hundred as stated—one hundred rods of the distance, timber. Eighty rods through wheat field to first grove from the road. When I passed through, the Plaintiff, Denna, Banker, and I think, Beyer, were with me. Banker said at that time that he and Beyer helped cut the timber. He said they were told by the Defendant Ingham to cut it. Denna said he did not order them to cut nor should, nor to throw down fences. I went at  
 16 this time at request of Denna to survey a road. Have passed through the line before it was cut—fall before. The timber was young oak and hickory trees. The first grove passed, a thick and thrifty grove—the second, more scattered. The grove in Blackberry never passed through so much—think it was a middling grove. Wheat field next to Aurora town line. Width of traveled way over wheat field one rod wide. I have been County Surveyor four years. There may be two hundred trees cut in first grove.

Cross-Examined. Plaintiff's house in north-west quarter of section six in Aurora. About one hundred or one hundred and forty rods south of north line of town. Distance from the road to first grove eighty rods—about sixty rods wheat, twenty rods meadow. Thirty or forty rods through first grove—then we came to a slough thirty rods wide. From first to second grove eighty rods. Did not count the number of trees in first grove, the size of timber from two to eight or ten inches through. Don't know number of eight or ten inch trees cut—did not count them. In second grove less large trees, more small ones. No large trees—don't know the size of trees. The third or Blackberry grove opening two rods wide size of trees from three to four inches through to brush. Don't know the number of trees which had been cut. I entered the wheat field from the north and south road, about sixty rods south of the north line of section six in Aurora. I passed the line between Sugar Grove and Blackberry thirty-eight rods west of quarter post on section one. We were in the second grove spoken of, and in the township of Sugar Grove, where the Defendant Banker said he and Beyer helped cut the timber. This was the only time they said anything. They said they were ordered to cut it for a road—said Ingham ordered them to cut it—and that timber was cut sometime during the previous winter.

Direct Resumed.—Might have been in Blackberry grove that Banker said he cut the timber. This was during the winter.

Cross-Examination Resumed.—I don't know as the Defendants, Banker and  
 17 Beyer, went with us into Blackberry. Middle of opening in second grove was eight chains west of the quarter corner on section one.

18 Henry Tanner says:—He resides on Plaintiff's farm. I resided there last winter. Know premises and know this road way. The timber in road way was cut in December, 1860. Fence thrown down in March, 1861. Timber cut by Defendants Banker, Beyer, and Ruckdestell. They began to cut in the

- middle of December, 1860. They began to cut in the second grove spoken of. They also cut the first grove. Timber in the second grove not very thick—in size from two to six inches through. Width of opening about one and half to two rods. Opening in first grove one to three rods wide—timber thick—size two to twelve inches through—twenty to thirty feet high. Don't know who cut grove in Blackberry. In first grove two or three hundred trees cut. One hundred average ten inches. Banker, Beyer, and Ruckdestell made road across slough with timber. Slough twenty or thirty rods across. The Defendants, Banker, Beyer and Ruckdestell, began to go through on this road from their places, the last of March, 1861, sometimes once a day; sometimes once a week—average once or twice a week. Threw down fence when they came, and broke up the rails. I don't know number of trees in second grove. Think about one hundred cut—size two to six inches. Saw the Defendant Ingham there three or four days before cutting commenced—there to survey. Fences often down. Cattle got in where fence down two or three times a week. The wheat sowed in April. Buckley lives on farm—works for Plaintiff.
- 19
- 20 Cross-Examined.—I saw them cutting two or three times—once in second and once in first grove. Think three hundred trees cut in first grove—size from two to twelve inches—average six inches. Don't know who cut the timber in Blackberry. Am a son of the Plaintiff.
- Eugene Tanner says:—Two hundred and thirty trees in first grove—I counted them. Think twenty of them fourteen inches through, thirty or forty ten inches, balance six inches. The timber was cut by John Beyer and the dutchmen. I am son of Plaintiff.
- 21 A. W. Buckley says:—I reside upon Plaintiff's premises. Came on place in March, 1861. Saw the Defendants, Banker, Beyer, and Ruckdestell, upon the premises in May, 1861. They said it was of no use for me to put up the fence, for they should take it down again. Banker said they had got a road there, and they were a going to keep it. They said, you get along better with us than Church did when we were cutting out the road. They said they had done just as they were ordered. Said that if we put up the fence they would throw it down and burn it. They passed along the road across the wheat field once a week. Last of May I put up the fence eight times in one day. The wheat would average eight bushels per acre. Half acre of wheat destroyed by passing across.—two or three acres around gap by cattle. Wheat selling at Aurora at forty-five cents per bushel. They destroyed one hundred rails worth, two or three dollars. Do not know the number of trees cut in the first grove. Trees worth twenty-five dollars. I don't know the number in second grove. Don't know who cut the grove in Blackberry.
- Rodney McDole says:—I have seen first grove before and since cutting done. Did not notice number of trees. Timber is oak. I should call trees worth if on my land from twenty to twenty-five cents apiece. The amount of wood in the trees cut five or six cords. Twice as much timber in the first as second grove. The second grove worth third less than first. Distance through third or Blackberry grove forty-five rods. Timber worth about the same as second grove. I don't know who cut the Blackberry grove.
- Cross-Examined.—I am opposed to this road—it runs across a corner of my farm. I may have said I wished it would cost the Defendant Ingham one thousand dollars before he got through with this road controversy. I don't know as I ever said I would make it cost him that. If I said I wished it might, what I said was true.
- 22 Ephraim Smith says:—I reside in Sugar Grove township. Know Defendants Banker, Beyer, and Ruckdestell. Know Plaintiff's premises, and locality of the road in controversy. I was Highway Commissioner of the town of Sugar Grove with Defendant Ingham two years. We, as Commissioners, met and concluded there was a road across Plaintiff's premises, and told the Defendants Banker,

Beyer, Ruckdestell, to open the same in Sugar Grove, two rods wide. Myself and Defendant Ingham took fence west of first grove down, in March 1861, and took all of the fence out of the road. The way had been cut out through by direction of Ingham and myself. Tore down no fences in Blackberry.

Cross-Examined.—In 1860 and 1861 we were commissioners. We ordered road opened as commissioners. Ordered it open only in Sugar Grove township. Ordered timber in Sugar Grove cut, and no other. Road had been surveyed by Hanchitt. The Commissioners of Highways for Sugar Grove employed him. It was marked by him so that we knew the location. Tore down the fences in the line of Hanchitt's survey. Ordered the timber cut two rods wide on the line of survey in Sugar Grove, and no other. Size of timber in the first grove from one to five or six inches in diameter. Timber middling thick, eight or ten trees to the rod in distance. Guess work to tell what timber worth—might have been worth fifty cents per rod in distance, or fifteen dollars for lot. Most of the timber was used in bridging the slough on road. Distance through second grove forty rods. The timber was small brush—a few trees eight to ten inches in size. The large trees very scattering, a few left standing—most of these trees cut. Guess work to tell value of this timber—perhaps two shillings per rod, or ten dollars for lot. We opened fences fourteen feet wide.

- 24 Direct Resumed.—Been through the grove three or four times. Did not count the number of the trees—timber used to make bridge across slough. The trees used small. Some of timbers used for stringers for bridge—might have been one tree fourteen inches through. First grove thrifty young timber—good as any grove around, except mine. My grove is all one kind of timber. Perhaps I would not have it cut for fifteen dollars, if on my land. My grove is worth one hundred dollars per acre; it is better than Plaintiff's. It is all white walnut. I would not have my grove cut through as Plaintiff's is for one hundred dollars per acre.

Cross-Examination Resumed.—The bridge across the slough is a corduroy bridge, laid upon poles for stringers.

- 25 The Defendants then introduced the following testimony.

J. L. Hanchitt says:—I was employed in December, 1860, by Highway Commissioners of Sugar Grove, to ascertain location of a State Road across the north-east quarter of section one, in town of Sugar Grove. Commenced at a point on the town line, between towns of Aurora and Sugar Grove, and south of north line of said towns fifteen chains; thence north-westerly some thirty-seven chains to the town line between Blackberry and Sugar Grove townships; crossed the line eight chains west of the quarter corner on said section one. I run according to the notes of a survey which was recorded in the town clerk's office of Aurora, and which purported to be a certified copy of the notes of old State Road survey, made across this section. I run according to the best of my ability, according to the notes. I marked the line by marking trees, and driving stakes. Col. Ingham, Ephraim Smith, H. B. Dinsmore, and Ingham's son, were with me. We measured the distances from point to point. The grove passed in going west from point of beginning was from twenty-five to twenty-eight rods wide. Good second growth timber, in size from brush to twelve inches through. Only few trees as large as timber. I was in the grove in October last. The opening in the same two or three rods wide. Amount of timber put into bridge across the slough, three or four cords. Second grove passed, less in width, and timber inferior in quality to the first. Timber cut so as to allow wagons to pass. Traveled track right upon line of my survey. I found in the township of Blackberry, right upon the line of this road, marked trees. I found at point where I came out upon the Ottawa and Geneva road, evidences that my survey was upon the line of the old survey. There was an oak tree very close to the east bank of Lake Slough, a little to the left of my line. Old stumps in the immediate vicinity. My courses and distances came to the east end of an old turnpike, at the Lake Slough. My

courses and distances brought me to the claim line between Thompson and Simmons to within four or five feet. I made a report and plat of my survey for the Commissioners of Sugar Grove, dated December 22nd, 1860. (A paper shown witness.) This is the report and plat.

- Cross-Examination.—I commenced south of the north-east corner of Sugar Grove. I started at a point in the town line between Aurora and Sugar Grove, and run south 88 deg. west, distance thirteen and one-half chains. Can't tell upon what variation of the compass I run. Variation made to suit the case.
- 27 There was no variation marked on the minutes from which I run. From thence I run north 67 west, some thirty-seven one-half chains to town line, between Blackberry and Sugar Grove. I struck to far to the west by one rod. I then from a point eight chains from the quarter corner on section one corrected back, for I had no business to cross this line except at a point 8 chains from the quarter corner. The quarter corner is established by witness trees. I measured from the quarter to fix the point. There is no monument 8 chains from the quarter. Thence I went west  $67\frac{1}{2}$  west thirty-four and nine-hundredths chains to the west line of section thirty-six in Blackberry; thence on same course three and sixty-two hundredths to an angle. My notes mentioned white oak tree at this point. I could not find any at the point. I changed the variation of my compass after passing Blackberry—don't remember what it was. After passing Blackberry town line, I changed my course half a degree. In October last, I found marks which indicated a survey not on the line of my survey, but out of it, on section one. My course carried east, from a point in the town line between Aurora and Sugar Grove fifteen chains south of the town corner to Fox River, according to the notes from which I run, would strike the River above the Snyder's dam. The notes of old state road survey say, that road crosses below the dam. My survey would not agree by four or five rods with the road as fenced east of that point. The notes I run from, did not make a jog on the line between Aurora and Sugar Grove. We saw an old fence in Blackberry mostly parallel to my
- 28 line. We passed through it. I struck two marked trees on my first course in Blackberry. If I had found the oak tree mentioned, should have been more positive I was right. When I struck the town line between Blackberry and Sugar Grove, I made the distance from the angle about thirty-seven chains. If the distance was forty-one chains it would make the distance more from the quarter corner, something like six rods.

The Defandant then introduced report and plat mentioned by witness, as follows:—

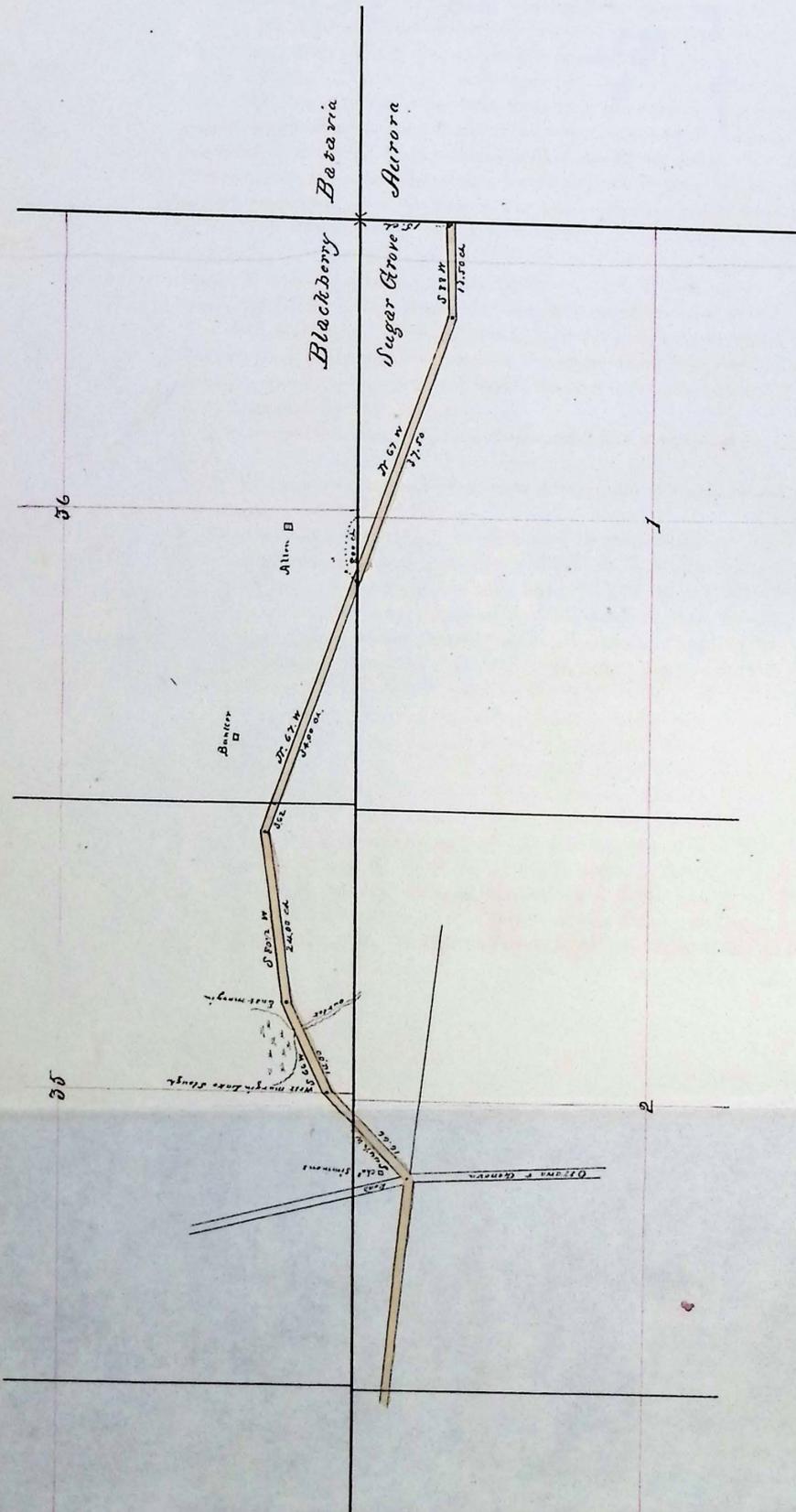
- 29 To the Commissioners of Highways in the town of Sugar Grove, in the County of Kane, and State of Illinois.

The undersigned having been employed by you to survey a State road laid across section 1, 2, 3, 4, 5, and 6 in T. 38 N., R. 7, E., by Edward Eldridge and Horace Potter of Du Page County, and Peleg Y. Bliss of Kane County, Commissioners, to view and locate said Road, and Horace Brooks, Surveyor of Du Page County, would report, that I have done so, in accordance with a copy of the field notes furnished me; as follows, beginning at a stake 15 chains south of N. E. corner of section 1, running thence S. 88 deg. W.  $13\frac{1}{2}$  chains to angle. Thence N. 67 deg. W.  $37\frac{1}{2}$  chains to a point 8 chains west of the quarter post on the north side of section 1. Thence N.  $67\frac{1}{2}$  deg., W. 34 9-100 chains to the west line of sec. 3, T. 39 N., R. 7, (finding along this last distance, old highway marks.) Thence same course 3 62-100 chains. Thence S.  $80\frac{1}{2}$  deg., W. 24 chains to the east bank of Lake Slough, and at the east end of turnpike. Thence S. 66 deg. W. 14 chains along said pike to the west bank of said Lake Slough. Thence S.  $42\frac{1}{2}$  deg. W. 16 66-100 chains to angle in center of a N. and S. road and on the line between Charles Simmons and E. Thompson's. Thence N.  $86\frac{1}{2}$  deg. W. 70 44-100 chains to the center of the Ottawa and Geneva roads, from which the quarter post on the north side of section 3, T. 38 N., R. 7 E, bears N.

50 deg. E, distant 2, 24 chains. Thence N.  $86\frac{1}{4}$  deg. W. 38 44-100 chains to an angle 1 61-100 chains north of the S. W. corner of sec. 34, T. 39 N., R. 7 E. Thence N. 77 deg. W. 26 54-100 chains to an angle in the line between H. White and Seavy land. Thence S.  $89\frac{1}{2}$  deg. W. 82 87-100 chains to the Sugar Grove or Chicken Grove Road. Thence same course 15 28-100 chains to oak tree. Thence S. 56 deg. W. 15 25-100 chains to Blackberry creek bridge, which point is on the town line. Thence S. 56 deg. W. 26 42-100 to top of hill and west line of S. 5, T. 38 N, R. 7, E. Thence S. 45 deg. W. 21 79-100 chains to Aurora to Sycamore Road. Thence same course 25 chains to John Thompson's house. Thence same course 46 15-100 chains to west line sec. 6 and 3 50-100 chains north of the S. W. corner. And that herewith is a correct plat of said route according to said survey.

Dated, Aurora, December 22, A. D. 1860.

J. L. HANCHITT.



33 Henry B. Peirce says:—Am County Clerk of Kane County. Report of State Road Commissioners on file in my office. Filed, A. D. 1855. Filing is in hand writing of the then Clerk of County. I hold in my hand said report.

The Defendants then introduced as evidence said Report referred to by witness Peirce, as follows: Report of Commissioners, Eldridge and Bliss, that on the  
 35 12th day of September, 1855, pursuant to act of Legislature, approved February 15, 1855, they filed a certified copy of a report of a location and survey of a State  
 36 road made by them and Potter, as Commissioners, and Horace Brooks as Surveyor, reciting that on 1st day of September, 1845, they located a State Road, beginning at the Steam Mills in Cook County, thence westerly through Du  
 37 Page County to Fox River, near Snyder's Mill, thence westerly near Wm A. Tanner's, C. Simmons, Henry White, &c., to intersect the Aurora and Dixon road, &c., to wit: From the east line of Kane County, beginning at a stake 15 chains north of the south-west corner of section 36, of Township 39, Range 8, east of 3rd Meridian. Said road is marked by setting stakes two rods from the center, on each side of said line, to establish it a State Road four rods in width, in Kane County.

Thence South 82 deg. West 48 chains to Indian Creek.

Thence South 82 deg. West 80 chains.

38 Thence South 82 deg. West 80 chains.

Thence South 82 deg. West 22,55 chains.

Thence South 45 deg. West 15,66 chains to the line between Section 3 and 4 T. 38, 8.

Thence South 45 deg. West 1 chain.

Thence South 73 $\frac{3}{4}$  deg. West 3,75 chains to the river road North and South by Snyder's.

Thence South 73 $\frac{3}{4}$  deg. West 3,61 chains to east bank of Fox River.

Thence North 89 deg. West 6,10 chains across the east channel and race for Snyder's Mill and the Island.

Thence North 89 deg. West 3,75 chains, by calculation across main channel to a stake in the west bank below the west end of the dam 260 links.

Thence North 49 $\frac{3}{4}$  deg. West 14,34 chains to the Aurora and Batavia road.

Thence South 88 deg. West 80 chains.

Thence South 88 deg. West 80 chains.

Thence South 88 deg. West 31,90 chains to Geneva and Blackberry road near Wm A. Tanner's.

Thence South 88 deg. West 6,10 chains to west line of section 6, T. 38, 8 and south of the north-west corner 15 chains.

Thence South 88 deg. West 13,50 chains.

Thence North 67 $\frac{1}{2}$  deg. West 41,60 chains to the north line of section 1, T. 38, R. 7, and west of the quarter stake 800 links.

Thence North 67 $\frac{1}{2}$  deg. West 42,18 chains to the west line of section 36, T. 39, R. 7.

Thence North 67 $\frac{1}{2}$  deg. West 3,62 to a white oak tree.

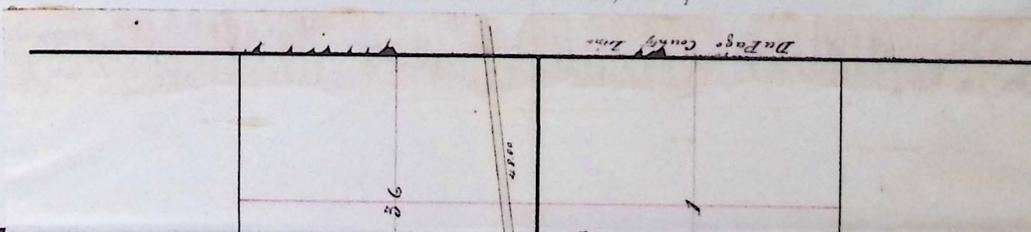
Thence South 80 $\frac{1}{2}$  West 24 to a White Oak tree on east bank of Lake Slough.

39 Thence South 66 deg. West 14 chains to Black Oak tree.

Thence South 42 $\frac{1}{4}$  deg. West 16,47 chains to an angle on the line between C. Simmons and E. Thompson.

Thence North 86 deg. West 70,44 chains to the Geneva and Ottawa road, the  $\frac{1}{4}$  stake in the north line of section 3, T. 38, R. 7, bearing North 50 deg. E. 2,24 links, &c., &c. Dated, December 1st, 1845.

40 HORACE BROOKS, *Deputy Co. Surveyor of Du Page County.*  
 EDWARD ELDRIDGE, } *Commissioners.*  
 HORACE POTTER, }





- 45 The Defendants then introduced an act of the Legislature, entitled, "an act to authorize certain Commissioners to file a State road report in Kane County, and to open the road therein mentioned. Approved, Feb. 15, 1855.
- 46 Orvis C. Hindes says:—I reside in Aurora. Was highway Commissioner in 1856 and 1857. Am acquainted with road in our town called State road. Runs from the Aurora and Batavia road from a point few rods south of north line of Aurora township westerly, to west line of Aurora through Plaintiff's land; think it passed north-west quarter of section 6 in Aurora. Damages assessed to Plaintiff for the opening of this road in Aurora, and paid; amount fifty dollars. We ordered the road opened clear through the town, but it was only opened to road running west of Tanner's house.
- 47 P. Y. Bliss says:—I have resided in Sugar Grove for twenty years. Had to do with laying the road in controversy. I acted under act of Legislature. Horace Brooks, Surveyor; Eldridge, Potter, and myself, Commissioners. (Report and plat of State road shown witness.) I signed this report. Plaintiff was with us when we laid this road over his premises. He was in favor of road—heard nothing in regard to damages. Did not hear Plaintiff make any claim for damages. If he had should have known it. The Plaintiff circulated petition for road in his vicinity. No objection to road—all anxious for it. It passed north part of Plaintiff's premises through brush or openings then; you would call it timber now. Brooks very particular—don't think he would guess at distances.
- Cross-Examined.—All we done was to survey and locate the road. Know nothing of the opening of the road. Since location been considerable opposition. It is opened by Simmons and by Church, west of Plaintiff's. Have not been upon the ground since I laid road. Simmons and Thompson join farms, north and south. Simmons fenced road out. Road not all opened—report lost, and some contended—no road. We made no jog on town line. Original report never came to me. The duplicate brought to me by Judge Gibson; don't know where he got it; don't know as it was a copy of report. Eldridge signed it before it
- 48 came to me. Did not compare report with notes.
- A. C. Gibson:—Know the report of this State road. This second report came from Brooks. I went with law of 1855 to Brooks; he said he could make a copy from papers at Naperville. This road has been opened through my land and Tanner's, to road by Tanner's house.
- Cross-Examined.—Don't know as road was opened by County Court, or County Commissioners' Court, or Supervisors. Supposed road opened where laid; made fence where I supposed road to be, straight through my land and Plaintiff's to town line. I found stakes on section 4 and 5; my fence on these stakes made ten years ago. Sod and ditch fence on line of road front of my house in 1846—this on line of road as now fenced out.
- 49 C. F. Paul says:—He resides in Sugar Grove. Highway commissioner of that town, 1858, '59, & '60. By virtue of office opened road across N. E. part of section 1, in Sugar Grove. Ingham and Smith, also Commissioners. Road entered Sugar Grove, N. E. corner of section 1; road we opened State road, the one under discussion. I had to do with assessing damages to owners over whose land road passed,—made a report of the same; Wm. A. Tanner was included in number to whom damages assessed. Know of notice being prepared and served upon Plaintiff to remove his fences from line of road, signed by Samuel Ingham, Ephraim Smith, and myself, as Commissioners; report of damages signed by same names.
- H. B. Densmore says:—Am town Clerk of Sugar Grove, was in 1859. (Paper shown witness.) These are certified copies of original on file in my office,
- 50 certified by me.

The Defendants then introduced papers shown witness as follows, to wit:—

Rport of assessment of damages reciting laying out of road by Bliss, Eldridge, and Potter, Commissioners appointed by Legislature—reciting names of owners

of lands through which road passed, and assessing to Plaintiff forty dollars. Report dated 29th day of Oct., 1859, signed by S. S. Ingham, Ephraim Smith, C. F. Paul, Commissioners of Highways. Endorsed—Filed, October 29th, A. D. 1859, H. B. Densmore, Town Clerk. Certificate of Town Clerk of Sugar Grove that within is a true and correct copy of original on file in his office. Signed, H. B. Densmore, Town Clerk, [L. S.]

- 51 Notice to remove fences directed to Wm A. Tanner, reciting that Bliss, Eldridge, and Potter, Commissioners appointed by Legislature, March 1st, 1845, laid out and established a road across Plaintiff's premises—describing road—and notifying Plaintiff to remove his fences from within bounds of same, within sixty days after service of notice. Dated, 29th Oct., 1859. Signed, S. S. Ingham, Ephraim Smith, C. F. Paul, Commissioners of Highways. Served a copy of the above notice on the within named Wm A. Tanner, the 29th day of Oct., 1859, S. S. Ingham, Commissioner of Highways. Endorsed, Filed, Nov., 4th, 1859, H. B. Densmore, Town Clerk.

Certificate of Town Clerk of Sugar Grove, that within is a true and correct copy of the original, on file in his office. Dated, 29th January, 1862. Signed, H. B. Densmore, Town Clerk. [L. S.]

- 52 Densmore recalled :—I assisted in surveying a certain road passing through Plaintiff's premises—road called State road—the same road as under discussion. We entered town of Sugar Grove, 15 chains south of north line of town. We crossed north line of Sugar Grove, 8 chains west of quarter corner on section 1. The timber in first and second grove, second growth. In first grove, size from brush to eight inches through ; in second grove size from brush to four or five inches.

- 53 Wm Thompson says :—I reside in Sugar Grove. Was Supervisor from 1856 to 1860. I offered the Plaintiff forty dollars as damages for the opening of this road in controversy.

Paul recalled, says :—Goodwin and Baker, who were highway Commissioners of the town of Aurora at the time mentioned, told Defendants, Banker, Beyer, and Ruckdestell, to take down fence upon Plaintiff's premises in Aurora, upon line of this road, and they would bear them out in it.

- 54 Smith recalled :—Was present at time just spoken of by Paul ; heard the conversation mentioned. Commissioners said they had not time.

The Defendants then offered in evidence, notice directed to Plaintiff, notifying him of action of Commissioners locating said road, and describing it, and requiring him to remove his fence from within bounds of said road, within sixty days of service of said notice. Dated, Sugar Grove, October 29th, 1859. Signed by Ingham, Smith, and Paul, as Highway Commissioners. With affidavit of S. S. Ingham of service of said notice, on said Tanner, on 29th October, 1859. Sworn to 11th day Feb., 1862. To the introduction of which as evidence, the Plaintiff

- 55 objected ; objection sustained, and notice excluded, to which decision of Court, Defendants at the time excepted.

Defendants rested.

Plaintiff introduced the following testimony :—

- George Wilder recalled :—I first went with Defendant Denna to survey this road. Surveyed according to minutes, purporting to be a copy of old State road survey. My line and that before run by Hanchitt did not agree. My first course starting from a point in line between Aurora and Sugar Grove, 15 chains south of the north line of towns, runs S. 88 deg. W. 13,50 chains. Thence N. 67½ W. (Hanchitt run this course N. 67 deg. W.) a distance to north line of Sugar Grove of 39,07 chains, striking town line at a point 9,44 chains west of quarter post, on section 1, thence N. 67½ W. 32,76 chains to west side of section 36 in Blackberry ; thence same course 2,88 chains to an angle,—a White Oak tree, 40 links south of this point. The tree was 4 rods south of Hanchitt's stake at his angle. Think Defendant Denna was present. There was a marked tree

5 rods south of this line. There were others south of the line—half dozen in line of White Oak tree. I started on the town line where I did, at request of Denna, who wanted me to see if Hanchitt's survey was correct. On the 28th August last made another survey and plat of the same. (Paper shown witness.) This is the plat. I started from White Oak tree in Blackberry Grove, before mentioned, run easterly. It was marked with old marks. I run according to minutes which I afterwards compared with minutes of old State road survey on file in County Clerk's office and found them to correspond. Variation of compass 6 degrees. My first course was S.  $67\frac{1}{2}$  E., distance 3,46 chains to west line of section thirty-six in Blackberry. Thence S.  $67\frac{1}{2}$  E., distance 30,75 chains to town line between Sugar Grove and Blackberry. Saw two or three marked trees on this line—trees in a line as if marked for a road—marks old. Saw fence a portion of way along line. Was an old rail or brush fence, a rod and half north of this line. This fence on land of one of the Defendants. I struck line between Sugar Grove and Blackberry 11,42 chains west of the quarter post on section 1, mentioned in the minutes. Could not strike town line only 8 chains from corner, if I run according to minutes. We were 4 or 5 rods south of Hanchitt's line as made by him in December, 1860, and of where road had been cut out. Plaintiff's fence was down four rods north of where we came out upon the north and south road passing Plaintiff's house. Distance from Aurora town line to first angle west is 13,50 chains. We crossed town line 16,53 chains south of north line of town. Hanchitt's line crossed 15 chains south of north line. Can't get the distance 41,30 chains mentioned in Brooks survey from 1st angle to Blackberry town line, if you start at a point only 15 chains south of north line of town; nor distance from them to west line of section thirty-six in Blackberry. My distances correspond nearly with old line. I run my course according to the minutes to the point in the Aurora and Batavia road mentioned in the old State road survey, and then run to a point in the west bank of Fox River, 2,60 chains below Snyder's dam, a point mentioned in the old road survey. The minutes of old State road do not require a jog at the town line between Aurora and Sugar Grove. If you run from the point in the Aurora and Batavia road, where State road crosses that road westerly, according to courses mentioned, you will strike the west line of Aurora, 16,53 chains south of the north line of the town. Plaintiff's fence down four rods north of my line. Running my courses would strike the White Oak tree in Blackberry grove, but the distance given in minutes would carry you beyond the tree for the angle. All cutting done outside of my line of road. Hanchitt's line continued east, would strike Fox River at a point above Snyder's dam, and the Aurora and Batavia road at a point above point mentioned, and State road. My line as last run corresponds with road as opened through Plaintiff's and Gibson's land in Aurora, and as fenced.

59 After I run the line I stood upon the rise near Gibson's, on the line of road as fenced, adjusted my compass at a variation of six degrees, and sighted back to the White Oak tree, and it came directly in the line.

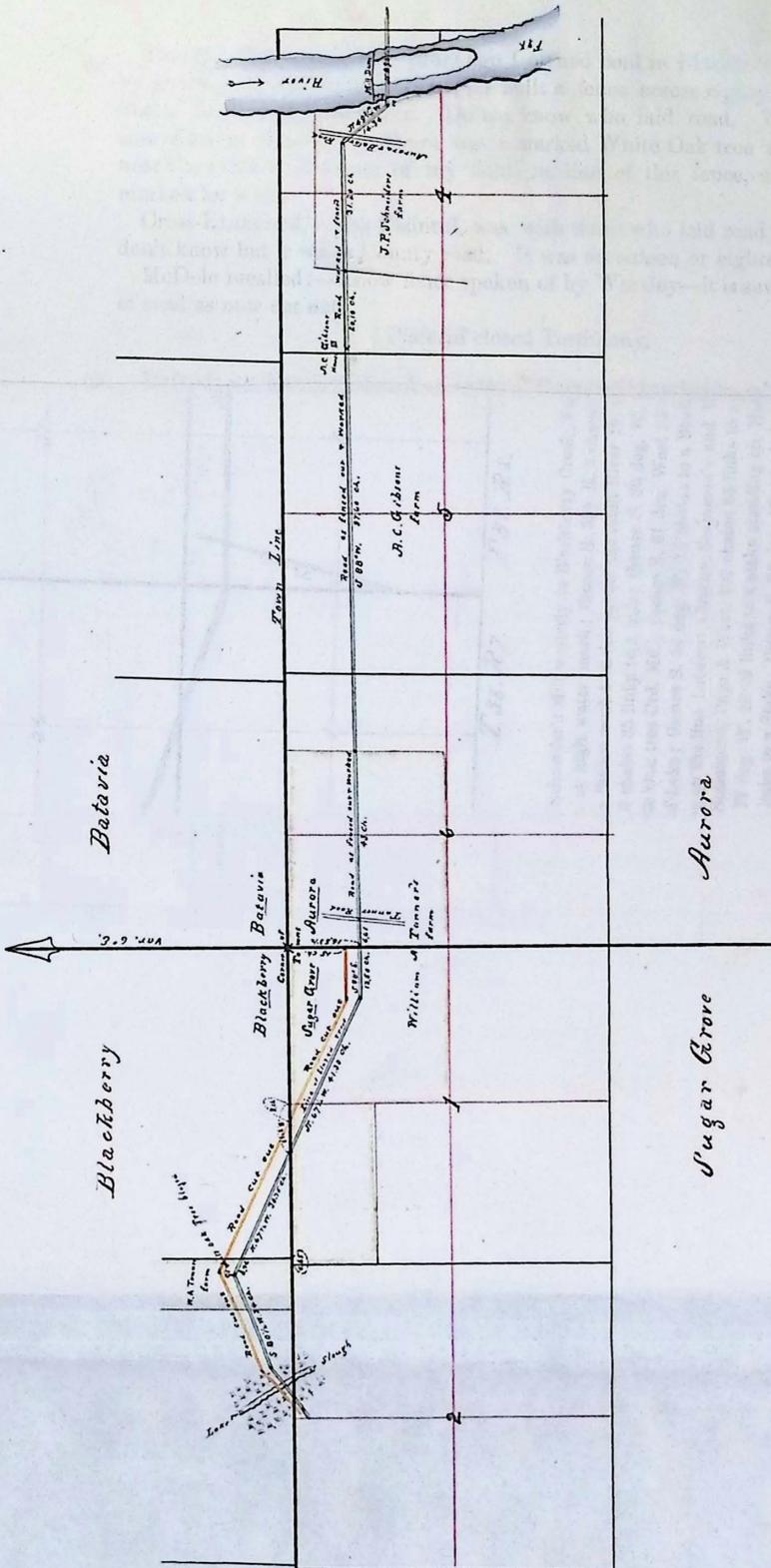
Cross-Examined.—There had been laid out across the premises of the Plaintiff, a County road—laid about the time of old State road—from the Aurora and Batavia, to White Oak tree in Blackberry Grove. Minutes of my survey correspond with old County road survey. Does not follow that courses run from same minutes at different times will be identical, unless you have monuments to guide you. In surveying an old course, if boundaries can be found, the compass must be adjusted accordingly. I did not do this, I run according to minutes of courses. The point 2,30 chains below the dam on Fox River, and the White Oak tree, are points in my survey. White Oak tree is a monument. I run in my survey as far west as the west bank of Lake Slough. White Oak tree not at the end of my course. Cannot make White Oak tree by Hanchitt's line, starting only 15 chains from the north corner of Aurora, nor can you make the point below Snyder's dam, mentioned in minutes. Road straight from west line of

60 Aurora, to Aurora and Batavia road.—Chainmen sometimes make a mistake; they may drop a chain or a tally which is ten chains. On my plat made August, Hanchitt's line represented by red lines, and my line by black lines. (A paper shown witness.) This a plat of my survey, made in June at the request of Denna.

Plaintiff then introduced plat spoken of by witness in his direct examination, as follows:—

61

WILDER'S PLAT.



62 Timothy Worsley says:—Years ago I owned land in Blackberry, now owned by Defendants Banker and others. I built a fence across eighty acres on north line of State road—rail fence. Do not know who laid road. Whately fenced east of me on same line. There was a marked White Oak tree standing in or near the south-west corner of my field, in line of this fence, supposed to be marked for a road.

Cross-Examined.—The Plaintiff was with those who laid road at time laid—don't know but it was a County road. It was seventeen or eighteen years ago.

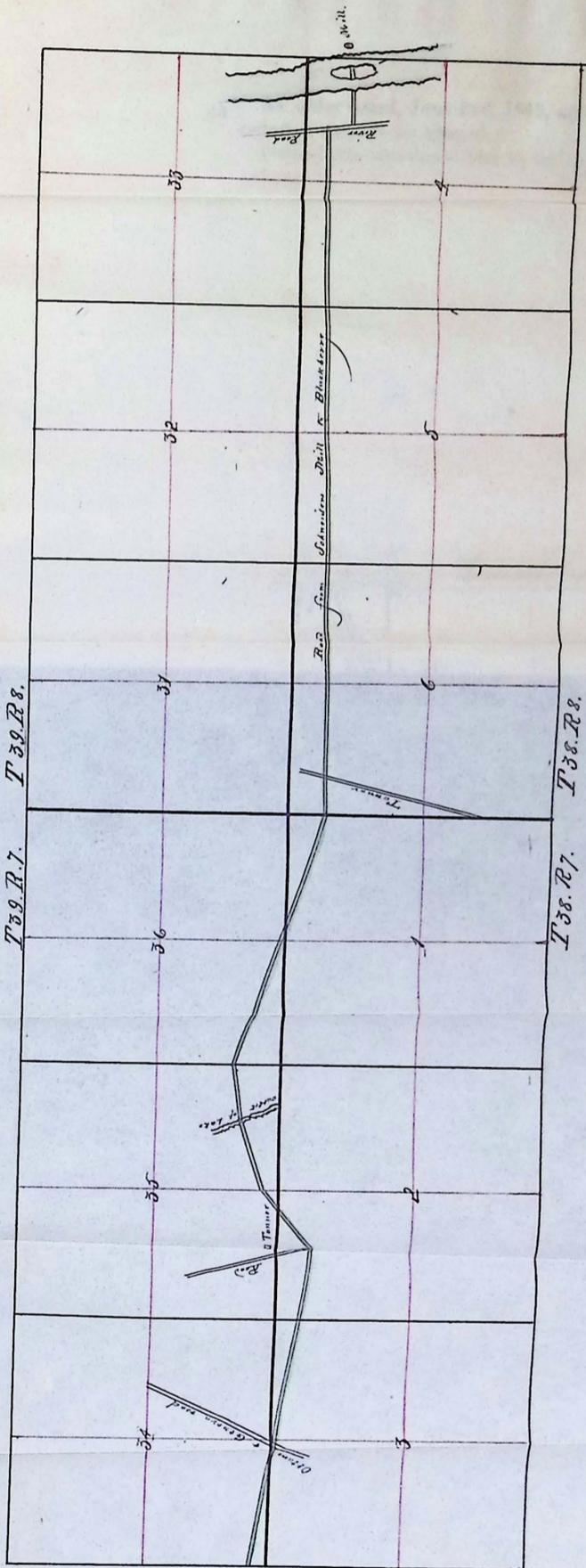
McDole recalled:—Know fence spoken of by Worsley—it is several rods south of road as now cut out.

Plaintiff closed Testimony.

63 Defendants then introduced an order of County Commissioners' Court of Kane County, dated, March 4th, 1845, appointing Wm A. Tanner, Hugh C. Gibson, and Henry White to view and locate a road, from Snyder's mills westerly, passing Plaintiff's house, &c.

Report of said views, survey, and plat, viz.

64 COUNTY ROAD PLAT.



Survey and Plat of the Road from Schneider's Mill westerly to Blackberry Creek, beginning at a point 1 chain northerly of said Mill, on the East Bank of Fox River, at high water mark; thence S. 39½ E. 9 chains across the East branch and Island to a stake standing on the west bank of Island; thence west 4 chains across the main River 13 chains to the center of River Road; thence N. 10½ West along the River Road 10 chains 35 links to a hub; thence S. 88 deg. W. 212 chains 50 links to a stake; thence N. 67½ deg. W. 74 chains 85 links to a White Oak tree Crd. Md.; thence S. 81 deg. West 23 chains 70 links to a White Oak tree Crd. Md. standing on the East Bank of outlet of Lake; thence S. 66 deg. W. 15 chains to a Black Oak tree Crd. Md.; thence S. 43 deg. W. 16 chains 15 links to a Stake standing on the line between Charles Scammon's and Edward Thompson's; thence N. 85½ deg. W. along the line between Thompson & Scammons, Page & West, 107 chains 65 links to a stake standing 1 chain 61 North from the S. W. Cor. of Section 34; thence N. 77 deg. W. 26 39 links to a stake standing on Harry White's South line; thence West along said White's South line 97 chains 23 links to a Stake; thence S. 56 deg. W. 15 chains 25 links to the Center of Blackberry Creek—whole distance 7 miles 4 of a mile and 4 rods—the width 3 rods. As surveyed, April 11th & 13th, 1845, By Wm. A. Tanner. Viewed and located by Wm. A. Tanner, Harry White, H. C. Gibson.

To which is attached proper oaths.

68 The Plaintiff again introduced the following :—

Wilder recalled.—Witness was asked how far the minutes of County Survey correspond or differ from minutes of State road survey—to answering of which Defendants objected—Court overruled objection, allowed witness to answer. Defendants at the time excepted. Witness answered, minutes of both roads are the same. Difference when they cross the River—County road crosses above dam. They both start at the same point in Aurora and Batavia road—no variation on Plaintiff's premises.

69 Cross-Examination.—In my survey I run upon courses or monuments, without reference to points, if points did not correspond with general courses and monuments; but I passed the town line between Aurora and Sugar Grove—the town line between Blackberry and Sugar Grove—disregarding the distance from the north-west corner of Aurora, and distance from quarter post on section one, as fixed in the minutes of State road survey. A variation of the course of one quarter of a degree, at the Aurora and Batavia road, would produce a variation of about four rods at the west line of Aurora. The course of the magnetic needle is subject to constant variation. It has also what is called the diurnal variation. This is said to amount to one-fourth of a degree; so laid down by standard works on surveying; but the variation is imperceptible in my experience as a surveyor I never could discover any such variation.

Defendants then introduced

Harry White, who says :—Have no knowledge of laying out State road. Gibson, Plaintiff, and myself located County road, and marked trees. I was with Hanchitt when he made his survey. I told Hanchitt at first that he was wrong. Supposed State road on County road. I found marks on Hanchitt's line. I was satisfied we were right. I saw marked trees on his line.

70 Cross-Examined.—It was common report that State road was on County road.

The Court then at the request of the Plaintiff instructed the Jury as follows :

“The Defendants must prove affirmatively, that the State road relied on by them was legally located over the particular premises where the alleged trespasses are proven to have been committed, and if there was a legally laid out road over Plaintiff's premises, yet if the trespasses complained of are proved to have been committed, and the Jury believe from the evidence, that they were committed outside of such road, then the Jury should find for the Plaintiff.”

“The Jury are instructed that if they believe from the evidence, that Banker, Beyer, and Ruckdestell were seen cutting out this timber two or three times, this is presumptive proof that they did all the cutting on the premises of Tanner.”

71 “If the Jury believe from the evidence that the trespasses complained of were maliciously committed, they may find for the Plaintiff, not only to the amount of actual damages, but may give to him exemplary damages.”

“The Jury are instructed, that if they believe from the evidence, that these Defendants are not equally guilty of the trespasses mentioned in the Declaration, they can assess several damages against them, provided, that the Jury believe from the evidence that the Defendants are guilty of some of the trespasses mentioned in the Declaration.” To the giving of each of which said instructions the Defendants by their counsel at the time excepted.

72 The Defendants then asked the Court to instruct the Jury as follows : “If the Jury believe from the evidence, that the point in the town line between Aurora and Sugar Grove fifteen chains south from the north line of said towns, and the point in the north line of Sugar Grove eight chains west of the quarter post on section one, and upon said town line, were points specified in said State road

report as being in the line of said road, then the Jury are to regard said points in determining the locality, notwithstanding there may be an apparent disagreement between those points and the minutes of courses run to reach them."

To give which, as asked, the Court refused, but gave the same modified, by inserting after the word report, "And that said points were fixed upon by the Commissioners."

72 To which decision of the Court in refusing to give the said instruction as asked, and in modifying the same, the Defendants by their counsel at the time excepted.

73 Defendants also asked the Court to instruct the Jury as follows:—"The Jury are instructed that fixed points and monuments must control courses and distances, wherever there is a discrepancy between them."

"The proceedings in the locating and laying out of the State road in question, not governed by acts concerning roads in Revised Statutes, nor by the township Organization Law.

"The proceedings in the locating and laying out this road in question are wholly under act of 1845, authorizing this road.

"It is unnecessary to go behind the report of Commissioners, and show previous proceedings to be regular. It is to be presumed they were.

"A road laid out and established by public authority, remains such till vacated by public authority"—which was done.

74 Defendants also asked the Court to instruct the Jury,—“The road in question was established, and in contemplation of law opened, when the Commissioners appointed to locate the same filed their report in the office of the Clerk of the County of Kane.

"The general Law of 1859, giving control of State road to Supervisors of the various Counties, does not repeal the special Law before passed, giving to the Commissioners of Highways of towns in Kane and De Kalb, control of State roads."

To give which the Court refused—to which decision of the Court in refusing to give said instructions, the Defendants at the time excepted.

75 The Jury found Defendants Ingham, Banker, Beyer, and Ruckdestell guilty, and assessed Plaintiff's damages \$95 42. Said Defendants moved for a new trial; motion overruled by Court. Defendants at the time excepted—bill of exceptions signed.

ISAAC G. WILSON, [L. S.]

Errors assigned.—

The Court erred in allowing the witness Wilder to state how far the minutes of the County road and State road correspond or differ.

The Court erred in rejecting the notice to remove fences with the affidavit of S. S. Ingham attached.

The Court erred in giving the instructions as asked by the Plaintiff.

The Court erred in refusing instructions asked by the Defendants.

The Court erred in modifying instructions asked by the Defendants.

The Court erred in refusing to grant Defendants a new trial.

The Court erred in entering Judgment upon the verdict.

PLATO & SMITH,

*Attorneys for Appellants.*

92 263  
Highway st. et.

Panama

also track

~~Highway st. et.~~

Admission

Account

Filed May 8. 1842

L. Selan

clerk

Handwritten mark

United States of America } ss.  
State of Illinois Kane County }

1  
Pleas before the Honorable  
Isaac C. Wilson Judge of the 2<sup>d</sup>  
Judicial Circuit of the State  
of Illinois and presiding Judge  
of the Circuit Court of Kane  
County in the State aforesaid at  
a regular term of said Court be-  
gun and held at the Court House  
in Genoa in said County on the  
third day of February in the  
year of our Lord one thousand  
eight hundred and sixty two, and of  
the independence of the United States  
the eighty fifth.

Present Honorable Isaac C. Wilson Judge,  
Charles J. Metzger State Attorney,  
DeMarcus Clark Sheriff.

Attest.

Thomas C. Moore Clerk.

Be it re-  
membered that heretofore to wit: on the 8<sup>th</sup> day of June  
A.D. 1861. the following summons was issued out of  
the office of the Clerk of said Court to wit:

State of Illinois, } ss.  
Kane County, } The People of the State of Illinois  
to the Sheriff of said County, Greeting:

Thy command you that you Summon John  
Beyer, Lawrence Ruckdistell, Frank Banker, Samuel  
Ingham, John J. Dennis, Pardon Perkins and Ab-  
solut Mighide, if they shall be found in your County.

you are to be <sup>and</sup> appear before the Circuit Court of said  
Kane County, on the first day of the next term thereof, to be  
held at the Court House, in Geneva, in said Kane County, on  
the first Monday of October next, to answer unto William A.  
Danner in a plea of trespass Quare Clausum Injicit to the  
damage of said Plaintiff as he says in the sum of Five <sup>thousand</sup>  
said Dollars <sup>and</sup> have you then <sup>and</sup> there this writ, with an en-  
dorsement thereon, in what manner you shall have executed the  
same.

Witness, Thomas C. Moore, Clerk of our said Court  
<sup>and</sup> the seal thereof, at Geneva, in said County,  
this 8<sup>th</sup> day of June, A. D. 1861.

T. C. Moore Clerk.

I hereby certify that on the tenth day of June 1861. I served  
this writ on Samuel Ingham by reading to him. I further cer-  
tify that on the 25<sup>th</sup> day of June 1861. I served this writ, by rea-  
ding to John Beyer, Lawrence Ruckdestell, Frank Bander <sup>and</sup>  
on the 22<sup>d</sup> day of August 1861. I served this writ, on Pardon Per-  
kins <sup>and</sup> Albert Mighill, by reading to each of them, on the 19<sup>th</sup>  
day of September 1861. I served this writ on John J. Denna by rea-  
ding to him.

D. Clark Sheriff.

Filed Oct. 2<sup>d</sup> 1861. T. C. Moore Clk. } by J. D. Andrus Deputy.

And afterwards to wit; on the 25<sup>th</sup> day of September A. D. 1861,  
the following declaration was filed in the office of the Clerk  
of said Court. to wit:

State of Illinois, } ss. The Kane County Circuit Court, October  
Kane County, } Term thereof A. D. 1861.

William A. Danner of Aurora Kane County Illinois plain-  
tiff in this suit by Wheaton <sup>and</sup> Brown his attorneys complains  
of John Beyer, Lawrence Ruckdestell, Frank Bander, Samuel Ingham,  
John J. Denna, Pardon Perkins <sup>and</sup> Albert Mighill, defendants  
who were summoned &c. in a plea of trespass & or that the said defendants  
on the first day of December A. D. 1860, in the said County of Kane  
and on divers other times and days between that day <sup>and</sup>

the day of commencing this suit with force and arms  
 or broke and entered a certain close of the said plaintiff  
 situate & being in the Township of Aurora in said County  
 of Kane. And being the North West Quarter of Section  
 Six in said Township of Aurora, and then and there  
 forced and broke open, damaged and destroyed one gate  
 & the fence adjoining, of great value, to wit: of the value  
 of One hundred Dollars, then standing and being in said  
 close and with horses, mares, geldings and cattle, and  
 also with nine wheels of nine carts, wagons & other carriages  
 crushed damaged and spoiled the grapes & wheat of the  
 said plaintiff of the value of one Hundred Dollars then  
 and there growing and being in said close, to wit: in the  
 County of Kane aforesaid. And also for that the said defen-  
 dant on the said ~~first~~ day of December A. D. 1860 in the  
 said County of Kane <sup>then</sup> also other days and times between  
 that time and the commencement of this suit with force  
 and arms, broke and entered a certain other close of the  
 said plaintiffs situate and being in the Township of Sugar  
 Grove in said County of Kane. And being the North  
 West and North East quarters of section one, in said Town-  
 ship of Sugar Grove and then and <sup>there</sup> cut down and prostrated  
 and destroyed the trees and saplings and underwood,  
 to wit: One thousand oak trees, one thousand hickory trees,  
 One thousand saplings and other trees, and ten acres of  
 saplings and underwood of the said plaintiff, of great  
 use, to wit: of the value of Two Thousand Dollars and one  
 hundred and wood coming and arising, to wit: 100 cart loads  
 of wood, ten loads of timber of great value, to wit: of the  
 value of Five hundred dollars, took and carried away  
 converted and disposed thereof to their own use, and also  
 with divers other horses, mares, geldings and cattle with divers

other wagons, carts and carriages, crushed, damaged and  
 destroyed other grass and wheat of the said plaintiff of the  
 value of One hundred Dollars, then and there growing and  
 being and also then and there broke and damaged the bars and  
 other fence and rails of the said plaintiff of great value,  
 to wit, of the value of one hundred Dollars to wit, at the  
 County of Kane aforesaid. And also for that the said  
 defendants on the said first day of December A.D. 1860,  
 in the said County of Kane, and on ~~the~~ divers other days  
 and times between that day and the commencement of  
 this suit with force and arms broke and entered a certain  
 other close of the said plaintiff situate and being in the  
 Township of Blackberry in the said County of Kane, being  
 the East part of the South East Quarter of Section thirty  
 five, in said Township of Blackberry, and then and there  
 cut down and damaged and destroyed other trees and  
 saplings and underwood then and there growing, to wit, one  
 thousand oak trees, one thousand Hickory trees one  
 thousand saplings and ten acres of underwood and other  
 trees of the said plaintiff of great value, to wit, of the  
 value of Two Thousand Dollars and the other timber and  
 wood arising therefrom, to wit, 100 cart loads of wood  
 and ten loads of timber of great value, to wit, of the value  
 of \$50, took and carried away and converted and deprived  
 thereof to their own use. And also with divers other horses,  
 mares, geldings and cattle, cows, oxen and sheep, eat up  
 and depastured other of the said plaintiffs grass, of great value  
 to wit, of the value of \$25 then and there growing. And also  
 then and there broke the fence and rails of the said plaintiff  
 of great value, to wit, of the value of \$25 to wit, at the County  
 of Kane aforesaid. And other wrongs to the said plaintiff at  
 the times and places aforesaid did, against the peace of the

5-

people of the State of Illinois and to the damage of  
 the said plaintiff of Five Thousand Dollars, and there-  
 fore he brings this suit &c  
 Filed Sept. 25<sup>th</sup> 1861. Wheaton & Brown  
 J. C. Moore Clk. Plffs. attys.

And afterwards, to wit: On the 24<sup>th</sup> day of January  
 A. D. 1862, the following plea was filed in the office  
 of the clerk of said court, to wit:

State of Illinois } ss  
 Kane County } Kane County Circuit Court  
 October Term A. D. 1861.

John Beyer, Lawrence Buckdestell,  
 Frank Barker, Samuel Ingham,  
 John J. Linn, Gordon Perkins  
 and Albert Myhill } Trespass  
 vs  
 William A. Tanner

And the said defendants  
 by Plato and Smith their attorneys come and defend  
 the force and injury &c and say that they are not  
 guilty of the said supposed trespasses above laid to their  
 charge or any or either of them or any part thereof in man-  
 ner and form as the said plaintiff hath above thereof com-  
 plained against them- and of this the said defendants put  
 themselves upon the country &c.

and the said plaintiff doth the like. Plato and Smith  
 Wheaton & Brown for defts  
 Plffs. attys.

And afterwards, to wit: On the 11<sup>th</sup>  
 day of February A. D. 1862, the following paper was filed  
 in the office of the Clerk of said Court.

6

State of Illinois }  
Kane County } Kane County Cir. Ct.  
Term A. D. 1862.

William A. Tanner  
vs

John Beyer, Lawrence  
Kuckdestell, Frank  
Banker, Samuel Ingham,  
John J. Deenan, Parden  
Perkins and Albert Mchill

It is hereby stipulated  
in the above entitled cause that the said defendants  
may introduce in evidence any special matters of defence  
in said cause under the general issue and the plaintiff  
may introduce in evidence any special matter in reply to  
or as rebutting the same as fully, to all intents and pur-  
poses, as if the same were specially pleaded or specially  
assigned or replied to.

Dated at Geneva this 10th day of February, A. D.  
1862,

Theaton and Brown  
Attys. for Plff.  
Plato and Smith  
Attys. for Defts.

And afterwards, to wit, On the 11th day of February  
A. D. 1862, the same being one of the days of the February  
Term, the following, amongst other proceedings, were  
had and entered of Record in said Court, to wit:

William A. Tanager

7

7846

William A. Tanner  
 v.  
 John Beyer, Lawrence  
 Ruckdestell, Frank  
 Banker, Samuel Ingham,  
 J. J. Danna, P. Perkins  
 and A. Mighill

Trespass Quare Clausum fugit

This day comes the plaintiff by  
 Wheaton and Brown his attorney and the defendants  
 by Plato and Smith their attorneys also come, and on  
 on motion of plaintiffs attorney it is ordered that a jury  
 come, and thereupon comes a jury of the jurors of good and  
 lawful men to wit: John Goland, Wm. A. Moore, Martin  
 Sautzner, John Boyd, Joseph Spalding, John Stringer,  
 A. H. Kelly, Timothy Haydon, Samuel Howland, Benja-  
 min Cox, Egbert Lovell, and Eli Peck, who severally  
 tried, selected and sworn, well and truly to try the issues here-  
 in; and after hearing a part of the plaintiffs testimony, and a-  
 lowed to disperse and meet the Court at 8 1/2 o'clock tomor-  
 row morning.

And afterwards, to wit: On the 12<sup>th</sup> day of February  
 A. D. 1862, the same being one of the days of the February  
 Term, the following amongst other proceedings were had  
 and entered of Record in said Court to wit:

7846

William A. Tanner  
 v.  
 John Beyer, Lawrence  
 Ruckdestell, Frank Banker,  
 Samuel Ingham, J. J. Danna,  
 P. Perkins, and A. Mighill

Trespass

This day again comes the

8

parties by their respective attorneys and the jury heretofore  
empaneled also come, and after hearing the balance of the  
plaintiffs evidence, and a part of the evidence on the part of  
the defendants, are allowed to dispense and meet the Court,  
tomorrow morning at nine o'clock.

And afterwards, to wit: on the 13<sup>th</sup>  
day of February A. D. 1862, the same being one of the days  
of the February Term, the following <sup>among other</sup> proceedings, were had  
and entered of Record, in said Court, to wit:

7846.

William A. Tanner v John Beyer, Lawrence Ruckdestell, Frank Banker, Samuel Ingham, J. J. Dennis, P. Perkins and A. Mighill	}	Trespass D. C. & F.
---	---	---------------------

This day again come the parties by their respective attorneys, and the jury heretofore empaneled also come, and after hearing the balance of the evidence, and argument of counsel, are allowed to dispense, and meet the Court, tomorrow morning at nine o'clock.

And afterwards, to wit: on the 14<sup>th</sup> day of February A. D. 1862, the same being one of the days of the February Term, the following among other proceedings were had and entered of Record, in said Court, to wit:

7846

William A. Tanner v John Beyer, Lawrence Ruckdestell, Frank Banker	}	Trespass D. C. & F.
---	---	---------------------

9  
Samuel Ingham John  
J. Dana, Pardon Perkins  
& Albert Wighell

This day again come the parties by their respective attorneys, and after hearing the instructions of the Court, retire in charge of a sworn officer of the Court to consider of their verdict, and afterwards come into Court and for the verdict say, We the Jury find the defendants John Beyer, Frank Barker, Samuel Ingham and Lawrence Ruck destete guilty in manner and form as charged in the Plaintiffs declaration and assess the Plaintiffs damages at the sum of Ninety five dollars and forty two cents; which is outland of record; and therefore come the defendants, by their attorneys and enter their motion for a new trial herein.

11

And afterwards, took on the 6th day of March A.D. 1862, the same being one of the days of the said February Term of said Court, the following among other proceedings, were had and entered of record in said Court: to-wit.

William A. Sumner

7846

John Beyer, Lawrence	}	Trespas Quare		
Ruckdustell, Frank			}	Clausum Fugit
Barker, Samuel Ingham				
John J. Dana, Pardon				
Putkins & Albert Mitchell				

This day again came the parties by their respective attorneys, and the defendants' motion for a new trial herein, coming on to be heard, the Court being fully advised, overruled the same, and order judgment on the verdict of the jury, rendered herein.

It is therefore considered by the Court, that the plaintiff recover of the defendants Frank Barker, Samuel Ingham, and Lawrence Ruckdustell, the sum of ninety five dollars and forty two cents damages, and also his costs herein expended, and that he have execution therefor.

To which ruling of the Court in refusing to grant a new trial; and entering judgment herein, the defendants by their attorneys except, and pray an appeal to the Supreme Court, which is granted, and the defendants required to file

their bill of 4 captives, and an appeal bond to be approved by the clerk of this Court, in the penal sum of Four Hundred Dollars, within thirty days.

And afterwards, to wit on the 17th day of March A D 1862, the following bond was filed in the office of the Clerk of said Court. to wit:

Know all men by these presents, that we, John Beyer, Lawrence Ruckdestite, Frank Banker and Samuel Ingham as principals, and Harry B Duemore as surety, are held and firmly bound unto William A Farmer, in the penal sum of Four Hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns firmly by these presents, sealed with our seals and dated this 17th day of March A D 1862.

The condition of this obligation is such that Whereas, at the February Term 1862 of the Kaw County Circuit Court, the said William A Farmer received a judgment against the above bounden John Beyer, Lawrence Ruckdestite and Samuel Ingham for the sum of Ninety five dollars and forty two cents, from which judgment the said defendants have taken an appeal to the Supreme Court of this State:

Now if the said defendants shall prosecute their said appeal without delay and

13

with effect. and shall pay and satisfy  
all such judgment and costs as shall be  
awarded against them on the final hearing  
of said cause, then this obligation to be void,  
otherwise to remain full force and effect.

S S Ingham Esq

J Beyer Esq

Lawrence Ruckdeshel Esq

A B Duesmore Esq

On which is the following endorsement: writ

Approved and filed by me this 17th  
day of March 1862.

S C Moore

Clerk

And afterwards, on the 5th day of April  
A D 1862, the following Bill of Exceptions, was filed  
in the office of the clerk of said Court: to wit

William A Jarner

v

John Beyer, Lawrence Ruck-  
deshel, Frank Parker, Sam-  
uel Ingham, John J Dana  
Pardon Perkins<sup>4th</sup> & Albert Mitchell

} Main County Cen-  
tral Court, February  
June 1862.

Be it remembered, that on the trial  
of this cause, the Plaintiff proved that he was the owner  
and in the possession of the premises described, and  
at the time mentioned in his said declaration. He also  
also proved that the Township of Aurora is Town 38  
North of Range 8 East according to government sur-  
vey, and that the Township of Sugar Grove is Town  
7 East according to Government survey. and that

the Township of Blackberry is Town 39 North of Range 4 East, according to Government survey.

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

George Hilder, being sworn says:

I went over the different sections of the premises in the declaration mentioned in your last. I went over the north part of sugar grove and south part of Blackberry across the town line. There are buildings on the premises - a dwelling house and barn. There is a Road running North and South past the house. Buckley lives on the farm and did, last June, I went from the dwelling house North about fifty rods and found a gap in the fence, and then turned West. West West Eighty rods before I came to timber - followed in this direction two miles. There was an opening cut through the grove from one, to three rods wide. The length of the opening was thirty rods. Size of the timber from 8 to 10 inches. There was large scattering trees - the balance brush. This timber was all in Sugar Grove Township. There were two pieces of timber in Sugar Grove. There was also an unbarredment in the way I passed. Then I came to the second grove. It was 30 or 40 rods through the second grove, I went about one hundred and

came to plaintiff's land in Blackberry, and passed through a grove then known, one to two rods wide - large timber. This way I traveled over in town 38. North Range 8 East, and upon the North West quarter of Section six. Thence into Town 38. North Range 7 East upon Section one, thirteen chains to an angle, Thence across the Town line, into the Town of Blackberry, to the East line of Section thirty five. It is about one hundred and twenty seven chains from the West line of Aurora to the West side of plaintiff's premises. It is about one hundred chs through all of plaintiff's land. There was a fence between the wheat field and the first grove passed. The wheat field is between the North and South Road and the grove.

The fence on the Town line of Blackberry, between plaintiff and defendants, was down.

It was two hundred and sixty rods through plaintiff's land, instead of four hundred, as stated; one hundred rods of the distance timber. About 80 rods through wheat-field to the first grove from the road. Then I passed through the plaintiff and the defendants Dana, Beyer, and another, think it was Beyer, were with me.

Burke said at that time, that he and Beyer helped cut the timber - He said they were told by defendant Ingham, to cut it. Dana said he did not order them to cut it; nor should not order them to <sup>throw</sup> down any pieces. I went at this time, at the request of Dana to survey the road.

I passed through the timber before it was cut - the fall before - the timber was young oak and hickory trees. The first grove passed was a thick and chiefly grove. The second was more scattered. The Grove in Blackburg, I never passed through so much. - think it was a middling grove. Then was a Wheatfield, next to Aurora Town line. The width of the traveled way over the wheatfield on one side. My business is surveying - been County surveyor four years. There may be two hundred trees each in the first grove; the opening averages about two rods wide.

Cross examined

The plaintiffs house is on the north west quarter of Section six in the Township of Aurora, about one hundred, or one hundred and forty rods south of the north line of the Township.

I entered the wheatfield fifty or sixty rods north of plaintiffs house, went into field and went eighty rods, nearly a westerly direction - then went more northwesterly to town line, between Sugar Grove and Blackburg. <sup>distance</sup> distance from angle 39, 08 etc. About eighty rods across the wheat field - about sixty rods wheat and about twenty rods meadow. After we passed Wheatfield, we came to the first grove; Thirty or forty rods through it - then came to a slough, about thirty rods wide. Distance from first to second grove, about eighty rods.

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The width of wagon tracks, about four feet. I did not count the number of trees in the first grove, the size was from two, to eight or ten inches in diameter. I don't know the number of eight or ten inch trees, which had been cut. I did not count them.

The opening in the second grove, one to two rods wide - in this grove, less large trees and more small ones - no large trees in this grove. Don't know the size of the trees. The third, or Blackberry grove, opening two rods wide - size of trees from three or four inches through, down to bushes.

I don't know the number of trees which had been cut. I entered the wheat field from the North and South road, about sixty rods south of the North line of Section six in Aurora. I passed the town line between Sugar Grove and Blackberry, thirty eight rods west of the quarter post on section one.

Buckley lives in Plaintiff's house, ~~and~~ has lived there since one year ago. He was in the second grove spoken of, and in the township of Sugar Grove, when the defendant Parker said he Peyer helped cut the timber. This was the only time they said anything. They said they were ordered to cut it for a road - they said Sughan ordered them to cut it. - they said the timber was cut sometime during the previous winter.

Direct examination resumed.

It might have been in Blackberry grove that Parker said he cut the timber; this

was during the winter

Class examination resumed.

I don't know as the defendants Banker and Peyer went with us into Blackberry.

The middle of the opening in the second grove, was eight chains west of the quarter post, in Section one.

Henry <sup>R<sup>n</sup></sup> Tanner, being sworn says:

He resides on plaintiff's farm in North West part of Cannon. I resided there last winter and till October last. I know the premises, and know this road way. The timber in the road way, was cut in December 1860. fences taken down in March 1861. Timber was cut by defendants, Banker, Peyer and Ruckdeschel. They began to cut in the middle of December 1860. They began to cut in the West grove, or second grove on the premises of plaintiff, and cut through second grove spoken of. They also cut the first grove spoken of. The timber in the second grove not very thick. In size, timber from two to six inches through. Width of opening in second grove, one, to two and one half rods.

The opening in the first grove, one to three rods wide - timber thick. size from two to twelve inches through, and two, to thirty feet high.

I don't know who cut the grove in Blackberry. In the first grove, there were two

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or three hundred trees cut. One hundred, would average two inches through.

The defendants Baucker, Beyer and Ruckdestell, made road across the slough, with the timber - the slough twenty or thirty rods across. They finished bridging the slough in the spring of 1861.

The defendants Baucker, Beyer and Ruckdestell, began to go through on the road, from their places the last of March 1861. They went across the wheatfield. They went <sup>sometimes once a day,</sup> and sometimes once a week.

They averaged once or twice a week or more. They threw down the fences when they came through. There was wheat growing on the track in the field at the time they went through.

They went with wagons sometimes, and without sometimes. They broke the rails all up. There were bars up in one place which were cut down - don't know who cut them down.

I don't know the number of trees in the second grove - I think about one hundred trees cut in the second grove - size, two to six inches.

I never saw any one there but defendant Ingham. I saw him at the point where the road came from the land of Baucker and Beyer - they were there to survey - I did not see them do anything. This was three or four days before the cutting commenced.

The fences were often down; Cattle got into the grain sometimes - I don't know the amount destroyed in that way. Cattle got in when the fences were thrown down, two or three times a week. The wheat was sowed in April.

Buckley lived upon the farm and worked for plaintiff.

Cross Examined

I saw them cutting two or three times. The first time, I saw Barker, Beyer, and Buckdestell. I saw them once in second grove and once in first grove. About one third of first grove cut when I see them. First grove thirty or forty rods wide, and width of opening cut, one, to two and a half rods wide. The trees there: not more than one hundred trees cut in the second grove - size from two to six inches. Don't know how many trees upon the road in first grove - think there were three hundred cut - think the size from two to twelve inches - think the average six inches through. I don't know who cut the timber in Blackberry. I am a son of the plaintiff.

George Garner being sworn says:

There were two hundred and thirty trees in the first grove. I counted them. think twenty of them fourteen inches through, thirty or forty, ten inches through, the balance six inches.

The timber was cut by John Beyer and the Dutchman. I am son of <sup>the</sup> plaintiff.

A W Buckley being sworn says:

I reside upon the premises mentioned of the plaintiff, mentioned.

I came on the place in March 1861. Saw the defendants Barker, Beyer and Buckdestell, upon the premises in May 1861. They said it was of

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no use for me to put up the fence, for they should take it down again. Banker said they had got a road thru, and they were going to keep it. They said, you get along better with us than Church did when we were cutting the road out. They said they had done just as they were ordered. They said if we put up the fence, they should throw it down, and burn it. They passed along this road, across the wheat field, once a week. The last of May I put the fence up eight times in one day.

The wheat would average eight bushels to the acre. One half acre of wheat destroyed by passing across, and two or three acres around the gaps in the fence, by cattle getting in.

Wheat was selling at Aurora for forty five cents per bushel. They destroyed one hundred acres, worth two or three dollars.

I don't know the number of trees cut in the first grove. — Trees worth twenty five dollars.

I don't know the number in second grove. I don't know who cut the grove in Blackberry.

Rodney M. Doll, being sworn says:

I have seen the first grove before cutting down, and since. I did not notice the number of trees. The timber is oak — I should <sup>call</sup> the trees worth, if on my land, from twenty to twenty five ~~dollars~~ cents a piece. The amount of wood in the trees cut, five or six cords. — Height of tree thirty or forty feet. Price as much timber in the first, as second grove.

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The second grove with one third less than the first, The distance through the third, or Blackberry grove, forty five rods: Timber worth about the same as second grove. I don't know who cut the Blackberry grove.

Crop Gaminus:

I am opposed to this Road. It runs across a corner of my farm.

I may have said I wished it might cost the defendant Ingham <sup>one thousand dollars</sup> before he got through with this road controversy.

I don't as I've said I would make it cost him a thousand dollars. If I said I wished it might cost him a thousand dollars, what I said is true.

Ephraim Smith being sworn says:  
I reside in Sugar Grove Township. Know of  
ants. Beyer, Banker and Ruckdestell. I know of  
Plaintiff's premises, and the locality of the road  
in controversy. I was Highway Commissioner  
for the Township of Sugar Grove, with defendant  
Ingham, two years. He, as Commissioner, met and  
concluded there was a road across Plaintiff's  
premises, and we told the defendants Banker,  
Beyer and Ruckdestell, to open the same in Sugar  
grove, ten rods wide.

Theyself, and defendant Ingham tore fence  
west of first grove down in March 1861. and took  
all of the fence out of the road. The way had  
been cut out there by direction of Ingham.

myself, Tore down no fences in Blackberry.  
 Pass Examined:

In 1860 and 1861. we were commissioners of Highways of Sugar Grove. He ordered the road opened as commissioners, He ordered it open only in Sugar-Grove Township. He ordered the timber in Sugar-grove only, to be cut - no other.

The Road had been surveyed by Hanchett. The Commissioners of Highways of Sugar Grove, employed him. It was marked by Hanchett so that we knew the location. He tore down the fences in the line of Hanchett's survey. We ordered the timber cut up the line of the survey in Sugar Grove. and no other; Ordered it cut two rods wide.

The width of the first grove was thirty rods. Size of the timber from one to five or six inches in diameter. timber was middling thick; eight or ten trees to the rod in distance.

It would be guesswork to tell what the timber cut was worth - might have been worth fifty cents per rod, or fifteen dollars for the lot. Most of the timber was used in bridging the sloughs on the road.

The distance through the second grove, forty rods. The timber was small brush; occasionally a large tree. A few trees eight to twelve inches in size. The large trees were very scattering, and a few of them left standing - most of these trees were cut. It would be guess-work to tell the value - perhaps two shillings per rod, or two dollars for the amount in this grove.

He opened the fences fourteen feet wide.

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Direct examination resumed.

I have been through the grove, three or four times - did not count the number of trees. The timber was used to make bridges across the slough. The trees used were small - some of the timber was used for the stringers for the slough bridge. There might have been one, ten <sup>twelve</sup> or fourteen inches through. The first grove was chiefly young timber - good as any grove around here except my own. My grove is all of one kind of timber.

Perhaps I would not have it cut for fifteen dollars, if on my land, My grove is worth one hundred dollars per acre. - It better than plaintiff's.

My grove is all white-walnut. I would not have my grove cut through as plaintiff's is, for one hundred dollars per acre.

Cross examination resumed.

The bridge across the slough was an ordinary bridge, laid upon poles for stringers.

Plaintiff has used his case.

The defendants then introduced the following testimony:

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J. L. Hanchett being sworn says:

I was employed in December 1866 by the Highway Commissioners of Sugar Grove to ascertain the location of a State road across the North East quarter of section one, in the Township of Sugar Grove. I commenced at a point in the Town line, between the towns of Aurora and Sugar Grove, and South of the north line of Section one westerly thirteen & one half chs. and thence northwesterly, some thirty seven chs. to the town line between Black Bay and Sugar Grove Townships: Crossed the line between Black Bay and Sugar Grove, eight chains and the quarter corner on said Section one. I run according to the notes of a survey, which was recorded in the town Clerk's office of Aurora, and which purported to be a certified copy of the notes of the old State road survey made across this section. I run this line according to these notes, and according to the best of my ability. I marked the line of my survey by marking trees and driving stakes. Col. Ingham, Ephraim Smith, A. B. Demerore and Ingham's son, were with me. We measured the distances from point to point. The grove we passed in going west, from the point of beginning, was from twenty five, to twenty eight rods in width. It was good second growth timber. In size, it was from brush, to twelve inches through. Only few trees as large as timber. I was in the grove in October last. The opening in the same was from two to three rods

The amount of timber put into the bridge across the slough, three or four cords. The second grove we passed was of less width than the first. and the timber inferior in quality to the first grove. The timber was cut so as to allow wagons to pass. The travel's track is right upon the line of my survey. I found in the township of Blackberry right upon the line of this road marked trees. No large trees upon this line in section one in Sugar Grove suitable for marking on. I found at the point when I came out upon the Ottawa and Genoa road evidences that my survey was upon the line of the old survey. There was an Oak tree very close to the east bank of lake slough a little to the left of my line. There was in the immediate vicinity of that tree old stumps. My course and distances come out at the east end of an old tumpike at the lake slough. My course and distances brought me to the claim line between Thompson and Simmons within four or five feet. I made a report and plat of my survey for the commissioners of Sugar Grove which was dated December 22<sup>d</sup> 1860 (a paper shows witness) this is the report and plat

Crop examination

I commenced fifteen chains south of the North East corner of Sugar Grove. I started at a point on the claim line between Aurora + Sugar Grove and run south  $88^{\circ}$  true distance thirteen and one half ch. I can't tell upon what variation of the compass I run - the variation was made to suit the case. There was no variation marked on the original

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from which I run - I then run North  $64^{\circ}$  West some thirty seven and one half chs to the town line between Blackberry & Sugar Grove I struck to far to the West by one rod - I then from a point Eight chs from the quarter corner on section one corrected back for I had no business to crop this line except at a point <sup>of the quarter corner on sec. one</sup>  $8$  chs west. There was no monument at the point  $8$  chs from the quarter corner - The quarter corner is established by witness trees I measured from the quarter to fix the point - Thence I went West  $64\frac{1}{2}^{\circ}$  West thirty four and nine hundredths chs to the West line of section thirty six in Blackberry. Thence on same course three and sixty two hundredths chs to an angle. My notes mentioned a white oak tree at this point but I could not find any at the point I come out - I changed the variation of my compass after passing Blackberry - I don't remember what the variation was after passing the line between Sugar Grove & Blackberry changed my course one half degree -

In October last I found marks which indicated a survey not on the line of my survey but out of it on section one -

My course carried East from a point in the town line between Aurora & Sugar Grove fifteen chs south of the town corner to Fox River according to the notes from which I run would strike the River above Snyder's dam - The notes of the old State Road report say that the line of the road crosses below the dam -

My survey would not agree by four or five rods with the road as found East of that point The notes I run from did not make a jog on the line between Aurora & Sugar Grove It is strange and unusual that starting at a point just fifteen chs south of the North East corner of Sugar Grove a point should be reached just Eight chs

meat of the quarter section corner - it is unusual that there should be no links in both distances -

We saw an old fence in Blackberry nearly parallel to my line, we passed through it.

I struck two marked trees on my first course in Blackberry -

If I had found the oak tree mentioned I should have been more positive, I was right if the when I struck the town line between Blackberry & Sugar Grove I made the distance from the angle about thirty seven chs. if the distance was 41 chs it would make the distance more from the quarter corner something like six rods more

Direct resumed -

There would be nothing strange or unusual that a point just 8 chs from the quarter corner on section one should be reached if the party surveying should fix upon that place for the line of his road & then adjust his course accordingly -

The defendant then introduced as evidence the report and plat mentioned by the witness as follows:

To the commissioners of the highway in the town of Sugar Grove in the County of Kane & State of Illinois.

The undersigned having been employed by

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You to survey a State road laid across Section 1, 2, 3, 5 & 6 in T. 38 N R 7 E. by Edward Eldridge & Horace Patten of DuPage County and Pelig G. Blip of Kane County commissioners to view and locate said Road, and Horace Crook, surveyor of DuPage County would report that I have done so, in accordance with a copy of their field notes furnished me; as follows, Beginning at a stake 15 ch South of the N E corner of Sect. 1. running thence S. 85° W 13 1/2 chains to angle, Thence N 67° W 37 1/2 chains to a point 8 chains West of the quarter post on the North side of Section 1. Thence N 87 1/2° W 34. 09/100 chs. to the West line of Sec. 36. T 39. N R 7. (finding along this last distance old highway marks.) Thence same course 3. 62/100 chs. Thence S 80 1/2° W 24 chains to the East bank of Lake Slough, and at the East end of turn pike, Thence S. 65° W. 14 chs. along said pike to the West bank of said Lake Slough, Thence S 42 1/2° W 16. 46/100 chs to angle in center of a N + S road and on the line between Charles Simmons and E. Thompson Thence N 86 1/4° W 70. 47/100 chains to the center of the Old + General road from which the quarter post on the North side of Section 3. T 38 N R 7 E bears N 50° E distant 2. 24 chs. Thence N 86 1/4° W 38 1/4 chs to an angle 1. 61 chs North of the S. W. corner of Sec. 34. T 39. N R 7 E. Thence N 74° W 26. 37/100 chs to an angle in the line between H. White & Seary land. Thence S 89 1/2° W 82. 57/100 Chs to the Sugar Grov or chicken Grov Road. Thence same course 15. 28/100 chs to oak tree. Thence S 56° W 15. 23/100 chs to Blackberry creek bridge, which point is on the Town line. Thence S 56° W 26. 42/100 to top of hill and West line of Sec 5. T 38 N R 7 E. Thence S 48° W 21. 74/100 chs to Aurora + Sycamore Road, Thence same course 25 chs to John Thompsons house. Thence same course 46. 15/100 chs to West line Sec. 6 and 3. 72/100 chs North of the S. W.

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comes. And that herewith is a correct plat of  
said Road Rout according to said survey.

Dated Aurora December 22. A. D. 1860.

J. L. Hanchett.

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Sec. 35

Sec. 36

Banker

Allen

Blackberry

Dalavia

Aurora

Sec. 1

West margin of  
Lake Slough.

East margin of  
Lake Slough.

450 ch.

362

367

370 ch.

370

370

Sugar Grove

13.50 ch.

589 ft.

Highway to Geneva

Road

Sec. 2

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Henry B. Pires, sworn says:

I am County Clerk for  
Kauai County. A report of Commissioners ap-  
pointed to locate a State Road is on file in  
my office. It purports to have been filed in  
A.D. 1853. The filing is in the hands-keeping  
of the then clerk of this county. I hold in my  
hands said report.

The defendants then  
introduced as evidence the said report re-  
ferred to by the witness Pires as follows

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Pursuant to an act of the General Assembly of the State of Illinois approved the fifteenth day of February 1845: entitled an act to authorize certain commissioners to file a state road Report in Kankakee County and to open the road therein mentioned.

We the undersigned commissioners appointed under the 17th Section of an act entitled an act for the location of certain State roads therein named and for the vacation of other State roads approved March 1. 1845:

Hereby Report that pursuant to the last named act we located a State road from the Steam Mills in Cook County through Du Page and Kankakee Counties to the intersection of the Aurora and Dixon road, that we in the year 1845 made a report of such location as aforesaid in the counties of Cook, Du Page, Kankakee, and DeKalb and we further certify and report that the following is a copy of our said Report which was heretofore filed in the County of Kankakee.

Edmund Eldridge } Commissioners  
Pelig G. Bliss }

Dated this 12th day of September A.D. 1855.

Horace Prokes County Surveyor of Du Page County.

To the Hon. County Commissioners Court  
of Kanaw County.

The undersigned commis-  
sioners appointed by the act of the General  
Assembly of the State of Illinois<sup>and</sup> approved  
March first A. D. 1845 for the location of a  
certain State road therein named<sup>and</sup> for  
the vacation of the other State roads. Section  
17 of said act enacting that, Edward Eld-  
ridge<sup>and</sup> Horace Patten of DuPage County  
<sup>and</sup> Oleg G. Bliss of Kanaw County be<sup>and</sup>  
they are hereby appointed commissioners to  
view, mark, <sup>and</sup> locate a State road begin-  
ning at the Steam Mill bridge across the  
Des Plaines river in the county of Cook, and  
passing westerly near Eldridge on Salt Creek  
to Mampsville in DuPage County, thence cross-  
ing the DuPage River near Snyder's Mill in Kanaw  
County thence westwardly passing near  
W. A. Dammers, to Charles Simmons,<sup>and</sup> Harvey  
White in Kanaw County by the nearest<sup>and</sup>  
most practicable route to intersect the Aurora  
<sup>and</sup> Dixon road. - Do hereby respectfully  
report that we have performed the duties  
assigned to us by said section 17 of said  
act. - And that we did on the first day  
of September A. D. 1845: met at the Steam  
Mill on the Des Plaines river, that being  
as soon after the first Monday in April  
as convenient, and after having been duly  
sworn before a justice of the Peace, <sup>and</sup> proceed-  
ed to lay out said road according to the

following Dild's Notes, Survey, <sup>and</sup> attached Plat  
 as made by Horace Brooks Dept County Sur-  
 veyor of Du Page County under our direction  
 assisted by W. E. Semant, Mrs. W. Abell <sup>and</sup>  
 others

Chairmen duly sworn.

as follows, to wit: Commencing at the Steam  
 Mills Bridge on the N. E. 1/4 of Section 11 Town-  
 ship 39 North Range 12 East at a stake at  
 the West End of the Bridge wt a red oak 12  
 inches in Diameter bearing South  $9\frac{3}{4}^{\circ}$   
 East 65 links. <sup>and</sup> running by following mag-  
 netic or.  $6^{\circ}$  East. thence as by courses <sup>and</sup>  
 distances as given <sup>and</sup> reported in book coun-  
 ty Four <sup>and</sup> a half  $4\frac{1}{2}$  miles <sup>and</sup> 52 rods to the  
 East line of Du Page County on the N. E. 1/4  
 of Section 13. @ 39. R 11 at a stake 19 chains  
<sup>and</sup> 25 links north of the 1/4 stake in the  
 East line of said Section 13. <sup>and</sup> thence as  
 course <sup>and</sup> distances as given <sup>and</sup> reported  
 to Du Page County Eighteen miles  $8\frac{1}{2}$  rods

To the East line of Kane County, at a stake  
 1500 chains north of the South West cor-  
 ner of Section 36 of Township 39 Range 8  
 East of 3<sup>d</sup> Meridian said road is marked  
 by setting stakes on the line of the above  
 Survey <sup>and</sup> at the angles side stakes two rods  
 from the center on each side of said line  
 to establish it as a State road four rods  
 in width in Kane County

thence South  $82^{\circ}$ . West 48. chains to Indian Creek  
 thence South  $83^{\circ}$ . West 80. chains

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 Thence South  $82^{\circ}$ . West 80. chains.  
 Thence South  $82^{\circ}$ . West 22.53 chains.  
 Thence South  $45^{\circ}$ . West 15.66 chains to the line  
 between Sections 37 4 @ 38. 8  
 Thence South  $45^{\circ}$ . West 1.00 chains  
 Thence South  $73\frac{3}{4}$ . West 3.75 chains to the river road  
 North <sup>and</sup> South by Snyder.  
 Thence South  $73\frac{3}{4}$ . West 3.61 chains to the east bank  
 of Dry River.  
 Thence North  $89^{\circ}$ . West 6.10 chains across the east  
 channel <sup>and</sup> race for Snyder mill <sup>and</sup> the Island.  
 Thence North  $89^{\circ}$ . West 3.75 chains by calculation across  
 main channel to a stake in the West bank. Below  
 the west end of the dam 260 links.  
 Thence North  $49\frac{3}{4}$ . West 14.34 chains to the Aurora  
<sup>and</sup> Patavia road.  
 Thence South  $88^{\circ}$ . West 80.00 chains  
 Thence South  $88^{\circ}$ . West 80.00 chains  
 Thence South  $88^{\circ}$ . West 31.90 chains to the General <sup>and</sup>  
 Thence Blackberry road near Mr. A. Dammie.  
 Thence South  $88.00$  West 6.10 chains to the west line  
 of Sec. 6 @ 38-8 <sup>and</sup> South of the North west  
 corner 13.00 chains.  
 Thence South  $88.00$  West 13.50 chains.  
 Thence North  $67\frac{1}{2}$ . West 41.60 chains to the north line  
 of Section 1 @ 38-R 7. <sup>and</sup> west of the  $\frac{1}{4}$  stake  
 500 links.  
 Thence North  $67\frac{1}{2}$  West 42.18 chains to the west line  
 of Sec 36 @ 39 R 7.  
 Thence North  $67\frac{1}{2}$ . West 3.62 chains to a white  
 oak tree.

- Thence South  $80\frac{1}{2}^{\circ}$  West 24.00 chains to a White oak  
tree on the east bank of Lake Slough.
- Thence South  $66^{\circ}$  West 14.00 chains to a Black oak tree
- Thence South  $42\frac{1}{4}^{\circ}$  West 16.47 chains to an angle in  
the line between C. Simmonds and E. Thompson.
- Thence North  $86\frac{1}{4}^{\circ}$  West 70.44 chains to the corner  
of Ottawa road the  $\frac{1}{4}$  stake in the North line of  
39 - Section 3 @ 38 R  $\frac{1}{4}$  bearing North  $50^{\circ}$  East  
224 links.
- Thence North  $86\frac{1}{4}^{\circ}$  West 38.41 chains to an angle  
north of the south west corner of Section 34.  
@ 39 R  $\frac{1}{4}$  161 links.
- Thence North  $77\frac{1}{2}^{\circ}$  West 26.54 chains to an angle in  
the line between Henry White and Seavy.
- Thence South  $89\frac{1}{2}^{\circ}$  West 82.87 chains to the Sugar  
Grove Road.
- Thence South  $89\frac{1}{2}^{\circ}$  West 15.28 chains to a White oak  
tree corner and marked.
- Thence South  $56^{\circ}$  West 15.25 chains to the bank  
of Blackberry creek.
- Thence South  $56^{\circ}$  West 26.42 chains to the angle on the  
top of hill at burying ground
- Thence South  $48^{\circ}$  West 21.79 chains to the corner  
of Sycamore road running N  $30\frac{1}{2}^{\circ}$  W.
- Thence South  $48^{\circ}$  West 23.00 chains to Mr Seavy's house
- Thence South  $48^{\circ}$  West 46.15 chains to the West line of  
Section 1 @ 38 R 6 and north of the south west corner 350 line
- Thence South  $48^{\circ}$  West 6.21 chains to the south line of  
Sec 1 @ 38 R 6
- Thence West Met of S. N. corner 463 links
- Thence West 76.00 chains to the S. N. corner Sec  
1 @ 38 R 6.

40, Thence S 89 $\frac{1}{2}$ ° West 80.00 chains to the S. W. corner Sec 2 @ 38 R 6.

Thence S 89 $\frac{1}{2}$ ° W 40.00 chains to the  $\frac{1}{4}$  stake in Section 3.

Thence S 89 $\frac{1}{2}$ ° West 11.75 chains to an angle in the north line Section 10.

Thence South 70 $\frac{1}{2}$ ° West 51.36 chains to the division line in N. E.  $\frac{1}{4}$  Sec 9.

Thence South 71° West 38.00 chains to the east side of the dam at Blough bridge.

Thence S 73 $\frac{3}{4}$ ° West 80.00 chains through the dam

Thence South 73 $\frac{3}{4}$ ° West 20.00 chains

Thence South 60° West 27.00 chains to the west bank of Big Rock creek.

Thence South 60° West 6.21 chains

Thence South 75° West 25.75 chains

Thence South 85° West 19.15 chains to a stake in the west line of Section 7 @ 38 R 6 <sup>and</sup> north of the south west corner 22 $\frac{1}{2}$  links <sup>and</sup> the west line of Ramo county.

In De Rabb County  
Thence

1 De Rabb county as by courses <sup>and</sup> distances <sup>and</sup> reported to the County Commissioners Court run 8 $\frac{1}{2}$  miles <sup>and</sup> 64 rods passing the north side of Squaw Grove near John Eastbrooks intersecting the Aurora <sup>and</sup> Dixon road at John-son Grove.

Total distance of the whole road surveyed fifty one  $7\frac{3}{4}$  miles <sup>and</sup> 64 rods.

Dated December 1<sup>st</sup> 1845.

Horace Brooks Dept. Co. Surveyor of Du Page County.

Edward Eldridge } Commissioners.  
Oleg G. Bliss }

South 1/2 of Down 39. Range 7.

South 1/2 of Down 39. Range 7.

27. 26. 25. 30. 29. 28.

34. 35. 36. 31. 32. 33.

3. 2. 1. 6. 5. 4.

10. 11. 12. 7. 8. 9.

North part of Down 38. Range 7.

North part of Down 38.

42

413

General Ottawa road

Simmons Lake Slough

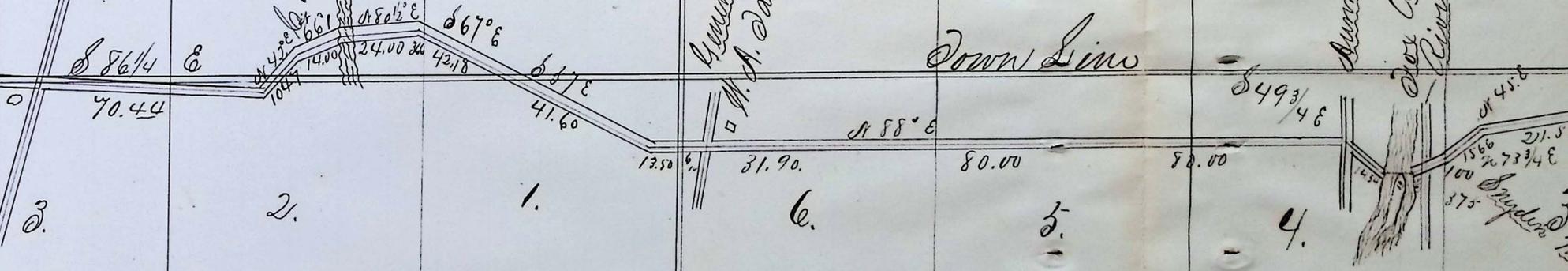
General Blackberry road

M. A. Danner

General Calivios road

Box River

Box River Road





Preamble  
415

12

The defendant then introduced as evidence the following act of the legislature of the State of Illinois, An act to authorize certain commissioners to file a state road report in Kane County, and to open the road therein mentioned.

Whereas Edward Eldridge, Horace Patter and Peleg S. Bliss, commissioners under section 17 of an act entitled "An act for the location of certain state roads therein named, and for the vacation of other state roads," approved March 1<sup>st</sup>, 1845 appointed to locate a state road from the steam Mills, in Cook County, through Dupage and Kane Counties, to the intersection of the Aurora and Dixon road, located the said road and filed or cause to be filed their report thereof, in the office of the Clerk of the County Commissioners' Court in the Counties of Cook, Dupage, and Kane and DeKalb, respectively, in the fall of 1845; and whereas it is represented that the copy of said report, so filed in the Counties of Kane, has become mislaid and lost; therefore,

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That it shall be the duty of the said commissioners above named, or a majority of them, without delay to cause a copy, as near as may be, of their said report, to be made out and signed, and deliver the same to the Clerk of the County of Kane, whose duty it shall be to file the same. Which report made & filed shall be valid and have the full force and

Do make report  
and file the same

216  
Expenses

effect of the said original report so lost or mislaid.  
§ 2. The cost of making and filing such report shall be charged against the County of Kane, to be audited and allowed by the board of supervisors of said County, at the rate allowed by the above recited act to said commissioners' surveyor, for their services under the first section of this act.

Road to be opened

§ 3. It shall be the duty of the Commissioners of highways of the town of Aurora, in said County, to cause the said state road running through said town to be opened and worked for public use, according to the original survey and location thereof, without delay.

Approved Feb. 15<sup>th</sup> 1855.

Oris L. Hinds being sworn says

He resides in

Aurora - was highway commissioner in 1856 & 1857 - and acquainted with a Road in our town commonly called a state Road - This Road runs from Aurora & Batavia road from a point a few rods south of the North line of Aurora Township westerly to the west line of Aurora through plaintiffs land - I should think the road passed the North west quarter of Section six in Aurora - damages were assessed to plaintiffs for the opening of this road in Aurora which were paid, Fifty Dollars was the amount of damage assessed. He ordered the road opened clear through the town of Aurora, but it was only opened to the road running west of Sammers house.

47.

P. Y. Bliss being sworn says

I reside in Sugar

grove and have for twenty four years.

I had something to do with laying the State Road in controversy - I acted under auct of the legislature - Horace Brooks was the surveyor. Eldridge, Potter and myself were commissioners (the report and plat of State Road already introduced shown witness) I signed this report - Plaintiff was with us at the time we laid out this Road over his premises - Plaintiff was in favor of the road. I heard nothing in regard to damages <sup>from</sup> plaintiff. Plaintiff was aware of the character in which we acted in laying the road -

I did not hear plaintiff make any claim for damages - If he had made claim for damages I should have known it -

The plaintiff circulated a petition for the road in his neighborhood heard no objection to the road - all anxious for it -

The road passed the north part of Plaintiffs premises - The line passed through brush or openings then you would call it timber now Brooks was our surveyor he was very particular I dont think he would guess at distances

Crop examined

All were anxious for the road in A. D. 1845 - all we did was to survey & locate the road - Knows nothing of the opening of the Road since the location of the Road there has been considerable It is opened by Simmons & by the church meet of farmers I have not been upon the ground

#  
#

#

L18

ow Somers since I laid out the Road.

Simmons & Thompson join farms North & South  
Simmons fenced road out & considered the road  
necessary in the first place - It was not all opened  
because the report of the same was lost & some parties  
contended there was no road.

I don't remember whether Brooks measured the distance  
from the north line of the town at the point when we  
crossed town line between Aurora & Sugar Grove think  
he would - I might have told Tanner I did not  
know as Brooks measured.

#

We made no <sup>+</sup> ~~pro~~ on the town line  
The original report never came to me  
The duplicate or second report brought to me by Judge  
Gibson - don't know where he got it don't know as it  
was a copy of report - Eldridge had signed it before  
it came to me

I did not compare the report with the notes

A.L.

Gibson sworn says

I know the report of this State  
road, this second report, came from Brooks I went  
to Brooks with law of 1855 and Brooks said he  
could make a copy from papers at Naperville

This Road has been opened through my land and  
Tanners to the Road by Tanners house

Crop Examined - don't know as a road ever  
opened by County Court or County Commissioners Court  
or by supervisors

I supposed the road was open when I understood  
the road to be laid - I made fence when I sup-  
posed the line of the Road to be - The course was

L 9

straight through my land and plaintiffs to main  
line of Sugar Grove. I found stakes on Section 17 +  
5 in ~~across~~ my fence is upon those stakes - Fence  
made ten years ago - a sod and ditch fence along  
the line of the road in front of my house in 1846.  
This <sup>is</sup> on the line of the road as now fenced out. There  
is a sod and ditch fence on the line of road on plaintiff premises made  
about time road was laid

O. J. Paul sworn says -

I reside in Sugar Grove -  
I was highway commissioner ~~of the town~~ of Sugar  
Grove in A. D. 1858, 9, 60 I by virtue of my office  
opened a road across the N. E. part of Section one in  
Sugar Grove

Ingham + Smith also highway commissioners at  
that time of Sugar Grove. The road entered Sugar  
Grove near the North East corner of Section one + passed  
across the North east part of that section.

The road which was opened was a State road the one  
under discussion - I had something to do with the  
assessing of damage to land owners over whose  
land road passed. I made a report of my acting in  
the matter - Am A. Tanner was included in the  
number to whom we assessed damages - know of a  
notice being prepared and served upon Tanner to remove  
his fences from the line of this road - Notice signed by  
Samuel Ingham, Ephraim Smith and myself as  
commissioners. The Report of the assessment of dama-  
ges signed by the same men

H. B. Deemore sworn says

I am town clerk for  
the town of Sugar Grove and was in during the year 1859

(Papers shown the witness) These papers are certified copies of the originals on file in my office - They are certified to by me

The defendants then introduced as evidence the papers shown to witness as follows to wit:

Whereas P. G. Blip, Edward Eldrich & Horace Patten, Commissioners appointed by the legislature of the State of Illinois, March the first 1845, did on the 12<sup>th</sup> day of Sept. 1855, establish and lay out a State road from the Steam mill in Cook Co. thence west to Johnson's Grove in DeKalb Co. which said road passes through the town of Sugar Grove and through the improved lands of Wm. A. Tanner, Edward Thompson, David West and Rodney McDole not having released all claims to damages sustained by reason of the laying out and opening the same and not being able to agree with them as to the amount of such damages having applied to them and of their for that purpose and endeavored to make such agreement, we proceeded to assess the same at what we deemed just and right to each individual claimant with whom we could not agree, taking into account and estimating the advantage and benefits the road will confer on the claimants for the same as well as all disadvantages and have assessed the damages of each owner as follows.

To Wm. A. Tanner, forty dollars (\$40.)  
 part inclosed and cultivated land. To Edward Thompson  
 Eighty dollars (\$80.) inclosed and cultivated land. To  
 David West one hundred and sixty dollars (\$160.) inclosed

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cultivated land. To Rodney W. Dole five dollars (\$5.) in closed <sup>and</sup> cultivated lands.

In witness whereof we have hereunto set our hands this 29<sup>th</sup> day of Oct. A.D. 1859.

E. S. Argham } Commissioner  
Ephraim Smith }  
C. D. Paull } Highway

Filed, October 29<sup>th</sup> A.D. 1859.  
H. B. Deussen  
Town Clerk.

Kaua County }  
Town of Sugar Grove } ss.

I, H. B. Deussen, town clerk of said town of Sugar Grove, do hereby certify that the within is a true <sup>and</sup> correct copy of the original thereof on file in my office.

In witness whereof, I have hereunto set my hand <sup>and</sup> seal this twenty ninth day of Jan'y. A.D. 1862.

H. B. Deussen Town Clerk Seal

on the East line of Section No 1 T. 38. Range 7 E. of the 3<sup>d</sup> P. M. 13.00 Chains South of the N. E. corner of said Sec. No 1. thence N. 88° W 13 chains 50 links. thence N 67 1/2° W. 41 chains 60 links to the N. line of said Sec. <sup>and</sup> 8 chains west of the 14 staks. You are therefore hereby notified <sup>and</sup> required to remove your fence from within

57

cultivated land. To Rodney M. Dole five dollars (\$5.) in closed <sup>and</sup> cultivated lands.

In witness whereof we have hereunto set our hands this 29<sup>th</sup> day of Oct. A.D. 1859.

D. S. Ingraham } Commissioner  
Ephraim Smith }  
C. D. Paul } Highway

Filed, October 29<sup>th</sup> A.D. 1859.  
H. B. Deussen  
Town Clerk.

To Mr Wm A. Danner.

Sir:

You will take notice that P. G. Bliss, Edward Eldridge and Horace Patton Commissioners appointed by the Legislature of the State of Illinois, March the first 1845 did on the 12<sup>th</sup> day of Sept., 1855 establish <sup>and</sup> lay out a State Road from the Steam Mill in Cook Co. thence west to Johnsons Grove in De Kalb Co. which said road passes through the Iron Sugar Grove <sup>and</sup> through your cultivated <sup>and</sup> improved lands to wit,

Commencing at a point on the East line of Section No 1 S. 38. Range 7 E. of the 3<sup>d</sup> P. M. 15.00 Chains South of the N. E. corner of said Sec. No 1. thence N. 88° W 13 chains 50 links. thence N 67 1/2° W. 41 chains 60 links to the N. line of said Sec. <sup>and</sup> 8 chains west of the 14 stakes. You are therefore hereby notified <sup>and</sup> required to remove your fence from within

the bounds of said highway within sixty days after the service of this notice.

Dated Sugar Gro 29<sup>th</sup> Oct. 1859.

S. S. Ingham } Commissioner  
Ephraim Smith } of  
C. D. Paull } Highways

Served a copy of the above notice on the within named <sup>Mr</sup> A. Dammus this 29<sup>th</sup> day of Oct 1859.

S. S. Ingham Com. of Highways

Dated Nov. 4<sup>th</sup> 1859. }  
H. P. Dusenmon. }  
Town Clerk. }

Rand County } ss  
Town of Sugar Gro. }

I, H. P. Dusenmon town clerk of said town of Sugar Gro., do hereby certify that the foregoing is a true and correct copy of the original thereof on file in my office. In witness whereof I have hereunto set my hand and seal this twenty-ninth day of Jan'y A.D. 1863.

H. P. Dusenmon Seal  
Town Clerk

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Genmore recalled

I assisted in surveying a certain road passing across plaintiff's premises. The road was called a State Road - The same <sup>road</sup> as is here under discussion. We entered the township of Sugar Grove at a point fifteen chs. South of the North line of township - I measured that distance - we passed pretty near west something like fifteen chs. Then we angled more Northwesterly - we crossed the north line of Sugar Grove Eight chs west of the quarter post an section one - We pursued a straight course to the timber in Blackburg - run into the timber a few rods to the first angle in Blackburg

This was in december 1860. The width of the first grove through which we passed twenty five rods - The timber was second growth The size was from brush to six or eight inches through - The second grove nearly as wide again - Trees scattering - size from brush to four or five inches through  
Smith marked the road

William Thompson sworn says

I reside in Sugar Grove was supervisor from 1856 to 1860 I offered the plaintiff forty dollars as damages for the opening of this road in controversy

Paul recalled & says

Goodwin & Baker who were highway commissioners of the town of Aurora at the time mentioned told the defendants Banker, Beyer & Ruckdestell to take down fence upon plaintiff's premises

between Aurora & Sugar Grove fifteen ch south of the north line of the town. I run South  $55^{\circ}$  West 13.50 ch. Thence I run North  $67\frac{1}{2}^{\circ}$  West (Hanchett run this course North  $67^{\circ}$  West) distance on this course to the north line of Sugar Grove township 39.08 ch. striking the town line at a point 9.44 ch west of the quarter post on section one - Thence I run North  $67\frac{1}{2}^{\circ}$  West 32.76 ch to the west side of Section thirty six in Blackburn - Thence upon the same course 2.88 ch to an angle - There was a white oak tree forty links South of this point - The plaintiff showed me the tree - It was about four rods south of Hanchett's stake at his angle - I think defendant ~~Dennison~~ was present - The distance between the first and second angle now spoken of as measured by me at this survey did not correspond with the distance as given in old State

#### Road survey

From this last angle I went south  $80^{\circ}$  West 24 ch I did not discover any marks on this line - There was one marked tree by the first grove five rods south of the line - There were others south of the line - Half a dozen in the line of the white oak tree - We went over Lake Slough upon the line - <sup>This was the twenty second day of June last</sup> I was County surveyor - I started when I did on the town line between Aurora & Sugar Grove at the request of Denna who wanted me to see if Hanchett's survey was correct -

On the 28<sup>th</sup> day of August last I made another survey and plat of the same (a paper shown witness) this is the plat - I started from the white oak tree in the Blackburn grove before mentioned and run Easterly - It was marked with

57

old marks. I run according to notes which I afterwards compared with minutes of Old State Road survey on file in County Clerk's office and found them to compare <sup>I run</sup> with a variation of the compass of six degrees.

My first course was South 67 1/2° East distance 3.46 chs to west line of Section thirty six in Blackberry. Thence South 67 1/2° East distance 30.75 chs to town line between Sugar Grove and Blackberry. I saw two or three marked trees on or near this line - the trees were in a line as if marked for a road - marks old. I saw a fence a portion of the way along this line. It was an old rail or brush fence a rod and a half North of this line. This fence was on the land of one of the defendants. They got the land of Hoyt of Batavia. I struck the town line between Sugar Grove and Blackberry 11.42 chs west of the quarter post on section one mentioned in the minutes. I could not strike the town line only 8 chs from the quarter post if I run according to the minutes. We were four or five rods south <sup>west</sup> of Hanchett's line as made by him in December 1860 and of where the road had been cut out through plaintiff's premises. Plaintiff's fence was down four rods North of where we come out upon the North and South road passing plaintiff's house. The distance from the line between Sugar Grove and Aurora to the first angle west is 13.50 chs. we struck the line between Sugar Grove and Aurora in this survey 16.53 chs South of the North line of the town. Hanchett's line crossed this town line 15 chs from the North line of the town.

Could not get the distance 41.30 chs mentioned in Books

survey from the 1<sup>st</sup> angle west of the Aurora town  
 line to the town line of Blackberry if you start at a  
 point only 15 ch south of the North corner of the township -  
 nor the distance from there to the west line of  
 section thirty six in Blackberry. I run the course  
 I did to run according to the minutes - my  
 distances correspond nearly to the old line I run  
 my course according to the minutes to the point in  
 the Aurora + Patavia Road mentioned in the old  
 State Road survey and then run to a point in the  
 west bank of Fox River 2.60 ch below Snyder's dam  
 which is a point mentioned in old state road survey  
 The minutes of the old state road do not require a  
 jog at the town line between Aurora + Sugar Grove  
 If you run from the point in the Aurora + Patavia  
 road where the old state road crosses that road  
 westerly according to the <sup>course</sup> ~~course~~ mentioned in old  
 state road report you will strike the west line of  
 Aurora 16.53 ch South of of the North line of the  
 town - Plaintiffs fence down four rods North of my  
 line of the road -

Running the courses as I run you would strike white  
 oak tree in Blackberry grove but the distance given  
 on old minutes would carry you beyond the tree for  
 the angle - all the cutting was done outside of the  
 line of the old state road as found by me - Kanchell  
 line continued East from the point on the line between  
 Aurora + Sugar Grove 15 ch south of the North line  
 of the town on the course mentioned in the old  
 state road survey would strike Fox River at a point  
 above Snyder's dam, and the Aurora + Patavia  
 Road at a point above the point mentioned in the

59

notes of the old State road survey. my line as last run corresponds with the road as opened through plaintiffs & Gibbons land in Aurora & as fenced after I run the line from the white oak tree to Fox River I stood on the rise of land near Gibbons house on the line as fenced and adjusted my compass at a variation of six degrees & sighted back to the white oak tree & it came directly in the line

### Crop Examined

There had been laid out across the premises of the plaintiff a County road - It was laid about the time of the old state road. From the Aurora & Batavia road to the white oak tree in Blackberry Grove the minutes of my survey corresponds with the old County road survey -

It does not follow that courses run from the same minute at different times will be identical unless you have monuments to guide you - If in rerunning an old course boundaries can be found the compass must be adjusted accordingly. I did not do this. I run according to minutes of courses - The point 2.60 chs below the dam across Fox River and the white oak tree were points in my survey

The white oak tree was a monument I run in my survey as far west as the west bank of Lake Slough - The white oak tree was not at the end of the course as made by me

You can not make the white oak tree by Hanchell's survey if you crop the town line between Aurora & Sugar Grove only 15 chs from the North corner of the town nor can you make the point below Snyder's

60

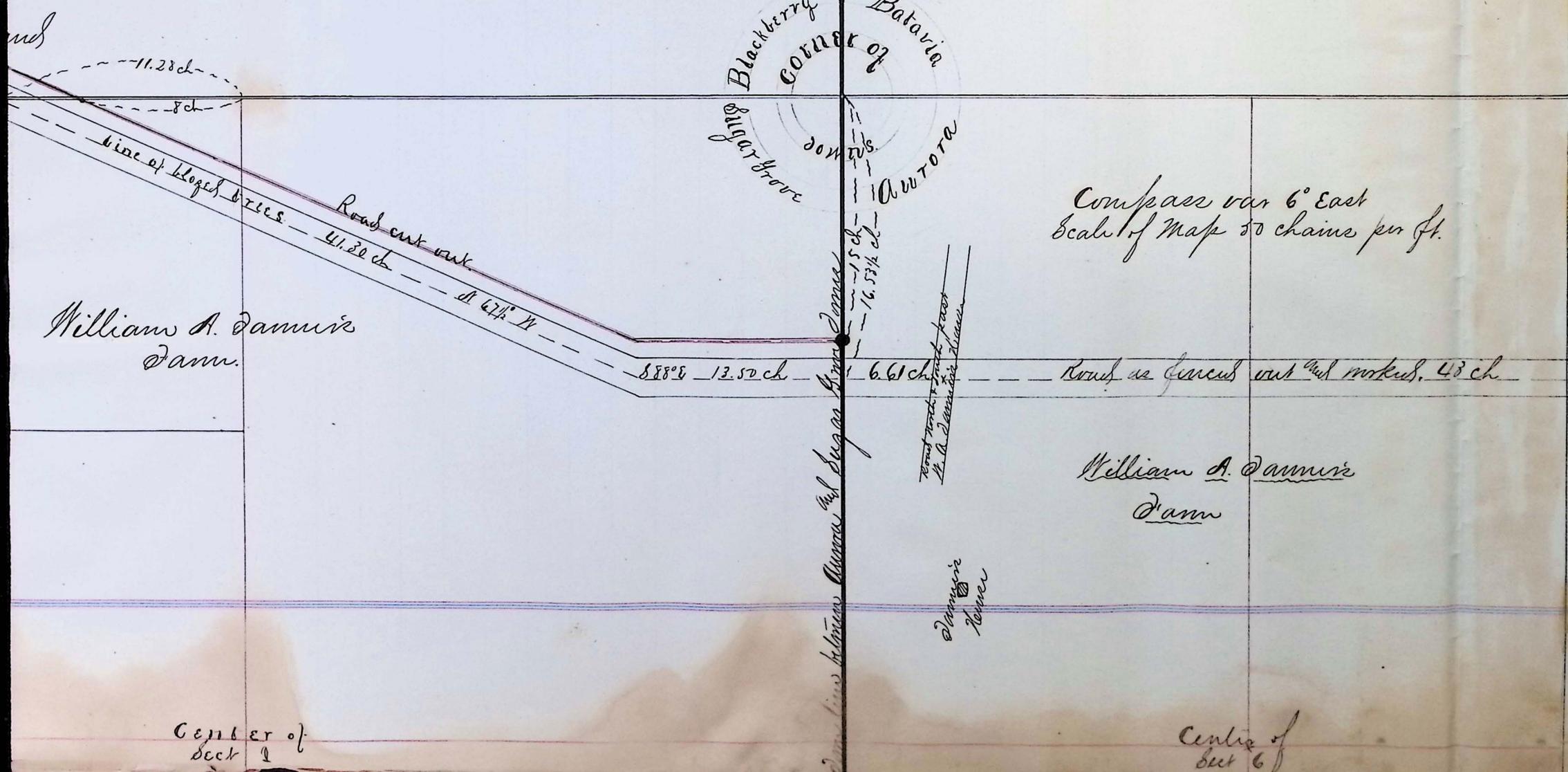
dam mentioned in old state road survey  
The road is straight from Aurora & Sugar Grove town  
line East to Aurora & Batavia road - It is strange and  
unusual for the distance on the Aurora town line to be  
just fifteen chs from corner and just 8 chs from the  
quarter post. It would <sup>be</sup> nothing strange or unusual if the  
party making the survey should fix upon the points  
spoken of as the points where they intended to cross those  
lines -

Chainman sometimes make a mistake in chaining  
may drop a chain or a tally which is ten chs on my  
plat made in August Beauchette's survey & line where  
road is cut out is represented by a red line and old  
state road as I made it from my last survey by  
black lines (a paper shown witness) this a plat of  
my survey made at the request of Denna on June  
last; before spoken of -

The plaintiff then introduced as evidence the  
plat referred to by witness in his direct examination  
as follows -



DUE NORTH.



William A. Damm's  
Dam.

Compass var 6° East  
Scale of Map 50 chains per ft.

William A. Damm's  
Dam

Center of  
Sect 2

Center of  
Sect 6

Vertical line between Sugar Grove and Sugar Grove

road north of fence fence  
W. A. Damm's Home

Damm's  
Home

Dam line between the towns of Batavia and Aurora

3 ch

97.60 ch

Line as fenced out and marked

88° 1'

A. G. Gibson's  
Dam

Center of  
Set of

A. G. Giblin's  
Keweenaw

22.10 ch Road as marked and fenced 31.20 ch Dump pit

John P. Schneiders  
Farm.

Alameda and Katarina Road  
N 47° 14' W. 14.34

River



Mill Dam  
Schneiders

N 89° W

Dock

Center of  
Sect 4

62

Timothy Korsely, being sworn says:

Some years ago I owned land in Blackberry now owned by defendants Bayor, Banker & Buckdestell - I owned it some three years - I built a fence across on Eighty acres on the North line of state road I don't know who laid road - I built rail fence Whitely fenced East of me on some line of my fence across Eighty acres - There was a marked white oak tree standing in or near the South west corner of my field in the ~~line~~ <sup>vicinity</sup> of this fence supposed to be marked for a road

Cross Examined

The plaintiff was with those who laid the road at the time it was laid I don't know but this was a county road. It was seventeen or eighteen years ago. I don't know who made the road

Henry Tanner recalled

I know the fence spoken of by Korsely four or five years - This road ~~has~~ runs an- gling with the fence and crossed it on the town line

McDole recalled

I remember the old fence spoken of by Korsely several rods south of the line cut out <sup>through</sup> the plaintiffs premises

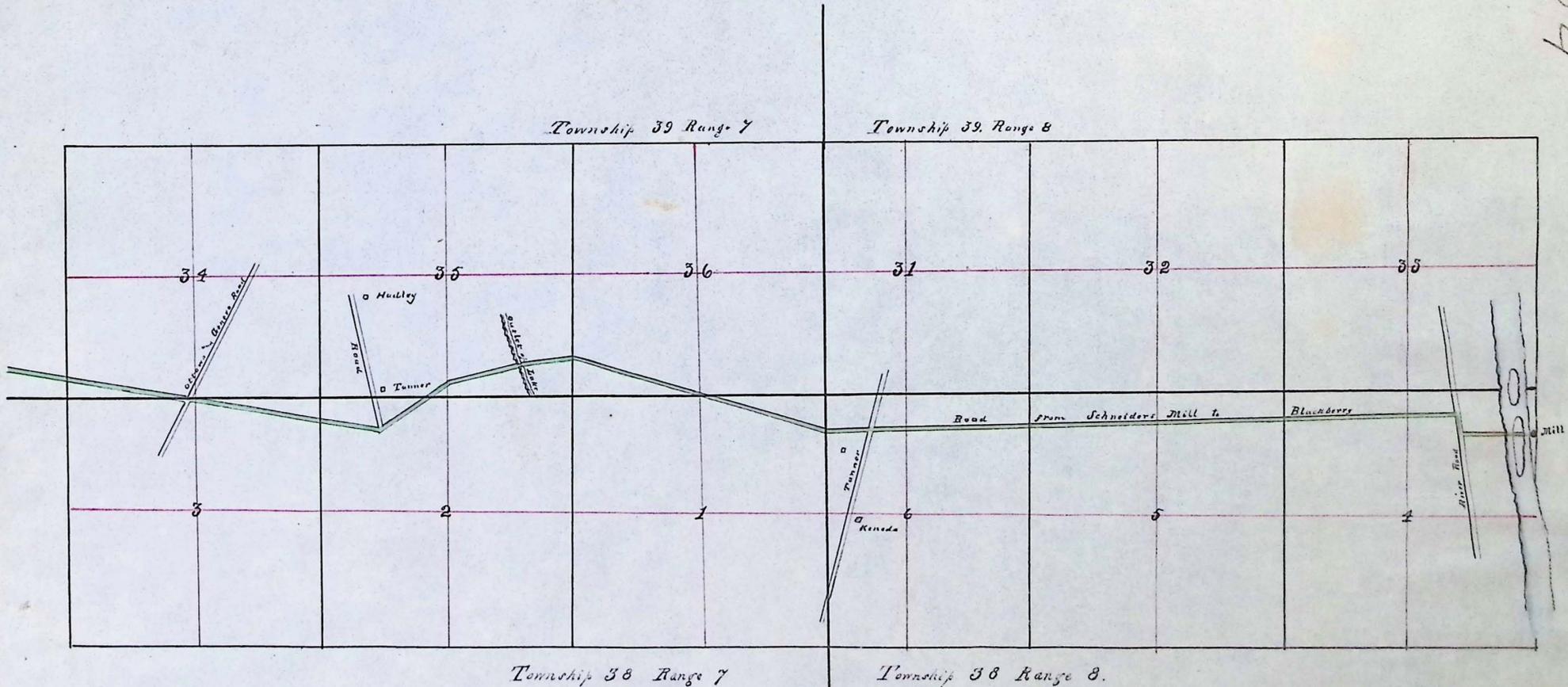
The plaintiff here closed his rebutting testimony

The defendant then introduced as evidence the Record of the County Commissioners Court laying a County Road through the premises in plaintiffs declaration mentioned as follows

Tuesday March 4<sup>th</sup> 1845

Ordered that the petition of William A. Sanner and others for a view of the Road Route from Snyders Mills westerly to the Blackberry Creek near Hoamy Whites, thence to cross the lake slough near Charles Simmons & to cross the road passing W. A. Sanners from 20 to 30 rods North of said Sanners house, be granted and that William A. Sanner, Hugh C. Gibson and Hoamy White be appointed viewers thereon - no charges paid -

710  
64



June Term 1845. Survey and Plat of the Road from Schneiders Mills Western to Blackberry Creek. Beginning at a point on chain northerly of said Mill on the east bank of Fox River at High water mark. Thence S. 39 $^{\circ}$  E. 6.9 chs. across the east branch & Island to a stake standing on the west bank of Island. Thence West 4 chs. across the main River 13 chs. to the ctr. of River Road. Thence N. 10 $^{\circ}$  E. 1/2 N. along the River Road 10 chs. 35 chs. to a hub. Thence S. 83 $^{\circ}$  W. 212 chains 50 chs. to a stake. Thence N. 67 $^{\circ}$  W. 74 chs. 85 chs. to a white oak tree Cr. 26 $^{\circ}$ . Thence S. 51 $^{\circ}$  W. 23 chs. 70 chs. to a white oak tree Cr. 2 $^{\circ}$  W. standing on the east bank of outlet of Lake. Thence S. 66 $^{\circ}$  W. 15 chs. to a Black Oak tree Cr. 2 $^{\circ}$  W. Thence S. 42 $^{\circ}$  W. 16 chs. 15 chs. to a stake standing on the line bet. Charles Scammon & Edward Thompson. Thence N. 85 $^{\circ}$  W. along the line between Thompson & Scammon. N. 90 $^{\circ}$  W. 107 chs. 65 chs. to a stake standing 1 ch. 61. apart from the S.W. cor. of section 34. Thence N. 77 $^{\circ}$  W. 26 chs. 39 chs. to a stake standing on Harry White Smiths line. Thence West along said White Smiths line 97 chs. 25 chs. to a stake. Thence S. 56 $^{\circ}$  W. 15 chs. 25 chs. to the center of Blackberry Creek. Whole distance 774 miles 4 1/2 rods the entire 3 rods as surveyed April 11 $^{\text{th}}$  & 12 $^{\text{th}}$  1845 by W<sup>m</sup> A. Tanner to which is attached proper calls.

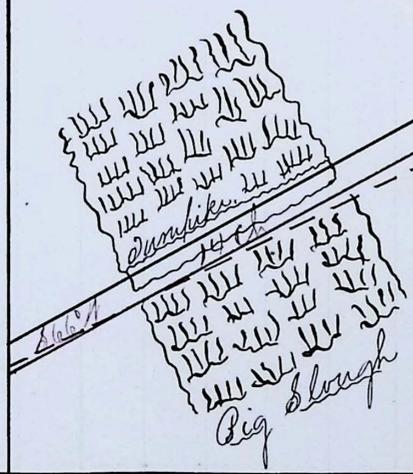
Record of Roads  
Book 1 Page 82

66

June 2<sup>d</sup> 1845.

Ordered that the report of Hugh  
C. Gibson (Harry) White and William A. Cannon  
road viewers be accepted, approved and the road  
established agreeable to said report and opened four  
rods wide if it can be without expense to the Coun-  
ty.

The defendants then introduced as evidence  
the plat of the survey made by witness Hilder in  
June last.



880°

240

White Oak tree  
at angle.

280

ACT

J. L. Hancock

Draw line between Blackberry  
and Sugar Grove

M A P  
of  
State Road  
through

Sections One + Thirty Six Towns. 39. + 39.  
North Range 7 East of 3<sup>d</sup> Principal Meridian

Chubb's line

12 ch  
8 ch  
9.44 ch

Down line between Towns 38<sup>th</sup> and 39.

line of marked trees

$188^{\circ}N$  13.5 ch

Center of Road  
Eastward

Down line between Patavia & Blackberry

15 ch  
16 1/2 ch  
Down line between Aurora & Sugar Grove  
as fenced out

The plaintiff again introduced the following testimony-

Wilder recalled

Witness was asked how far the minutes of the County survey correspond or differ from the minutes of the State road survey - to the answering of which question by the witness the defendants then objected - the Court overruled the defendants objection and allowed the witness to answer the question - to which decision of the Court in overruling defendants said objection and allowing the witness to answer the defendants then excepted. The witness answered, I used notes which I afterwards compared with the minutes of the State Road report and the minutes of both roads are the same

There is a difference between the two reports where they cross the river - The County road crosses above the dam

There is no variation through plaintiffs premises between the minutes of the County road and the State road - They both <sup>start</sup> from the same point in the Aurora or Patavia road

Cross Examined

In my survey I run upon courses and monuments without reference to points, if the points did not correspond with the general courses and monuments but I passed the town line between Aurora & Sugar Grove and the town line between Blackberry

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Sugar Grove, <sup>designating</sup> ~~designated~~ by the distance from the North west corner of Aurora & the distance from the quarter post on Section one in Sugar Grove ~~was~~ as fixed in the minutes of State Road survey. A variation of the course of one quarter of one degree at the Aurora & Burlington road would produce a variation of about four rods at the west line of Aurora - The course of the magnetic needle is subject to <sup>constant</sup> variation.

It also has what is called the diurnal variation. This diurnal variation is said to amount to one fourth of one degree.

It is laid down by standard works on surveying that there is a constant variation of the compass and that the diurnal variation amounts to one fourth of a degree.

But the variation is imperceptible in my experience as a surveyor I never could discern any such variation.

The defendants then introduced the following testimony:

Harry White being sworn says  
 I have no knowledge of the laying of the State Road - I have a knowledge of the County Road - Gibson, Plaintiff & myself located it - We located it and marked trees - I was with Hanchett when he <sup>made</sup> ~~marked~~ his survey of State Road. There were marked trees four rods south of State Road as found by Hanchett. I told Hanchett at first that he was wrong as I supposed State Road was on County Road - I found marks on Hanchett's line afterwards. I was satisfied we were right. I

saw marked trees on Hoanichetts line

Crop examined

It was the common report that the S road was on the County road

Here the evidence closed. The foregoing was all the evidence given upon the trial.

The Court then at the request of the plaintiff instructed the jury as follows. ~~in the giving of each paper which was in the possession of the defendants by their counsel at the~~

St. 2

Given

The defendants must prove affirmatively that the State road relied on by them was legally located over the particular premises where the alleged trespasses are proven to have been committed, and even if there was a legally laid road over plaintiffs premises - yet if the trespasses complained of are proven to have been committed, and the jury believe from the evidence that they were committed out side of such road, then the jury should find for the plaintiff.

Dided Feb. 14th 1862.

B. C. Moore

Clerk

The jury are instructed that if they believe from the evidence that <sup>the defendants</sup> Danner, Beyer, Ruckertell were seen cutting out this timber 2 or 3 times this is presumptive proof that they did all the cutting on the premises of Danner

Given

Dided July 14th 1862.

J. C. Moore  
Clk.

81

Givens

If the jury believe from the evidence that the trespasses complained of were maliciously committed they may find for the plaintiff not only to the amount of actual damage but may give to him exemplary damages.

Filed Decy. 14<sup>th</sup> 1862,

D. C. Moore

clk.

Givens

The jury are instructed that if they believe from the evidence that these defendants are not equally guilty of the trespasses mentioned in the declaration - they can assess several damages against them - provided the jury believe from the evidence that the defendants are guilty of some of the trespasses mentioned in the declaration.

Filed Decy. 14<sup>th</sup> 1862

D. C. Moore clk.

As to the giving of each of which said instructions as alleged the defendants by their counsel at the time excepted.

The defendants then asked the Court to instruct the jury as follows.

Instructions on the part of the defendants.

No 1.

Givens

If the jury believe from the evidence that the point in the town line between Aurora and Sugar Grove fifteen chains South from the North line of said town, and that the point in the North line of Sugar Grove eight chains west of the quarter post or section thirty six and upon said town line, were points

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specified in said State Road report, as being in the line of said road, then the jury are to regard said points in determining the locality notwithstanding there may be an apparent disagreement between those points and the minutes of the courses run to reach them.

Dated Decy. 14<sup>th</sup> 1862

J. C. Moore Clerk.

To give which instructions as asked, the Court refused but gave the said instruction modified as follows.

If the jury believe from the evidence that the point in the town line between Aurora and Sugar Grove and that the point in the north line of Sugar Grove fifteen chains South from the north line of said town, in eight chains west of the quarter post on Section twenty six and upon said town line, were points specified in said State Road report, and that said points were fixed upon by the Commissioners as being in the line of said road then the jury are to regard said points in determining the locality notwithstanding there may be an apparent disagreement between those points and the minute of the courses run to reach them

Dated Decy. 14<sup>th</sup> 1862

J. C. Moore Clerk.

To which decision the Court in the refusal ~~to give~~ of the Court to give said instruction as asked and in modifying the same the defendants by their Counsel at the time excepted

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The defendants also asked the Court to instruct the jury as follows

No 2.

Given

The jury are instructed that fixed points and monuments must control courses and distances whenever there is a discrepancy between them.

Dated July, 14th 1862

J. C. Morre Clk.

No 3.

Given

The proceedings in the locating and laying out of the said State Road in question not governed by act concerning roads Revised Statutes nor by the Township organization Law.

Dated July, 14th 1862.

J. C. Morre Clk.

No 4.

Given

The proceedings in the locating and laying out this road in question are wholly under act of 1845 authorizing this road.

Dated July, 14th 1862.

J. C. Morre Clk.

No 5.

Given

It is unnecessary to go behind the report of Commissioners and show previous proceedings to be regular. It is to be presumed that they were.

Dated July 14th 1862

J. C. Morre Clk.

No 6.

Given

A Road laid out and established by public authority remains such till vacated by

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public authority.

Filed July 14, 1862.

J. C. Moore Clk.

} Which was done.

The defendants also asked the Court to instruct the jury as follows

The road in question was established and in contemplation of law opened when the report of the Commissioners appointed to locate the same filed their report in the office of the Clerk of the County of Kane

Filed July 14, 1862.

J. C. Moore Clk.

Refused

The general law of 1859 giving control of State Roads to the supervisors of the various Counties does not repeal the special law before passed giving to Commissioners of Highways of the Towns in Kane and DeKalb control of State Roads.

Filed July 14, 1862.

J. C. Moore Clk.

Refused

To give which said instructions as asked the Court refused; to which decision of the Court in refusing to give said instructions as asked. the defendants at the time excepted.

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The jury found the defendants Ingham, Barker, Beyer and Ruckdestell guilty and assessed the plaintiffs damages at ninety five dollars forty two cents -

The said defendants then made a motion for a new trial which motion the Court overruled and refused to grant a new trial but entered judgment upon the verdict to which decision of the Court in overruling the defendants motion for a new trial and in entering judgment upon the verdict the said defendants by their Counsel at the time excepted and pray that this their bill of exception may be signed which is done -

Wm G Wilson  
Judge

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State of Illinois } ss.  
 Hancock County } J. Thomas C. Moore, Clerk  
 of the Circuit Court, in and for the County of Hancock,  
 in the State aforesaid, do certify the foregoing to  
 be true and complete copies, of all the papers filed,  
 and orders of Court, made and entered of Record in  
 a cause lately pending and determined in said  
 Court, wherein William A. Danner was plain-  
 tiff and John Beyer et, al's, were defendants.

Witness Thomas C. Moore Clerk  
 of the Circuit Court and the seal  
 thereof, at Geneva, in said County  
 this 22<sup>nd</sup> day of April A.D. 1862.  
 T. C. Moore  
 Clerk.

Clerk fees for record \$40.70



John Beyer Lawrence Buckdestell  
Frank Banker Samuel Ingham

appeared with

John Anna Ransom Perkins  
and Albert Orighill  
appellants vs

vs  
William a Tanner  
appellee

Supreme Court

Third Grand Division

April Term 1862

Appeal from Record

Afterwards found  
on the 1st day of May a d 1862 before  
the justices of the Supreme Court  
aforesaid comes the said William a Tanner  
the appellee by Wheaton a Brown his attorney  
and says that there are no such errors  
in the said Record & proceedings in manner  
& form as the said appellants have  
above there alleged Wherefore he prays  
the said cause and the judgment below  
be in all things affirmed

Wheaton a Brown  
appellee atty

92.263

D. G. Bryan et al

"

Mr. A. ~~Townsend~~

Appel for 1000

Plato Smith

Filed April <sup>with</sup> 23 1862

L. Leland  
Clerk

Supreme Court of the State of Illinois  
Third Grand Division

John S. New Governor, Richard Still  
Frank Baker, Samuel Ingham

complainants with  
John of Emma Jordan Perkins  
Albert Myhill respondents

William A. Tammor appellee

Trespass -  
appeal from  
Kane County

To the Hon. Judges of said Court.

Your petitioners Plots & Smith  
respectfully represent that they are and were  
on the trial of the above cause in the Court  
below the attorneys of the above named appellee  
etc. and as such attorneys present this their  
petition to this Hon. Court praying a rehearing  
of the above cause which was decided by  
this Court at the April Term A.D. 1862  
And your petitioners would respectfully present  
a few reasons why such rehearing ought to be  
had - 1<sup>st</sup> The matter in controversy is a matter  
of public interest to the people of the Township  
of Sugar Grove in said Kane County for the reason  
that the suit is to determine the location of a  
State road through said Township. The Highway  
Commissions of said town having consulted  
with these petitioners as to the locality of said  
road were advised by them that the same

legally laid out highway across the premises  
of the appellee in said Township and that  
the same was laid upon a route which has  
since been by said Highway Commissioners  
opened and for which opening this suit was  
brought. That after the bringing the said  
suit your petitioners at the request of said  
Highway Commrs again most carefully exam-  
-ed the matter and were confirmed in their  
opinion of the correctness of the line of road  
as opened - The Cause was tried in the Court  
below and a judgment was given against  
the defendant. Your petitioners conceived that  
the jury failed to comprehend the testimony  
(which was in some respects difficult of comp-  
rehension by all being scientific) and also  
your petitioners believed that the jury were misled  
by the instructions of the Court as also that  
the Court gave instructions which as applicable  
to this case were not law. Your petitioners  
advised their clients to take an appeal  
to this Court - Your petitioners agreeing to argue  
the case in this Court - Accordingly an appeal  
was taken out on the 30<sup>th</sup> day of April it being  
one of the days of the April Term A.D. 1862 of  
said Court the Cause was submitted to the  
Court on the part of the appellants upon  
written arguments & he filed, that the  
case was also submitted <sup>on the 2<sup>nd</sup> day of May following</sup> on the part of the

appellants upon arguments to be filed -  
That immediately after making the submission  
as aforesaid your petitioners returned to New  
York & at great cost prepared a full argument in  
the case which they caused to be printed  
at a large expense and that the same was  
forwarded to the Clerk of this Court and  
by him received filed the 17<sup>th</sup> day of May  
1862. That two or three days thereafter  
the atty for appellants filed their argument  
in the case both of which facts appear  
from the files of this court -

It further appears from the record of  
this Court that the case was taken under  
consideration by this Court on the 26<sup>th</sup>  
of May 1862 judge of the surprise of them  
your petitioners on reading of the opinion  
of the Court to learn that the Court had  
not seen the arguments of Counsel on either  
side the Court saying that Counsel had  
not seen fit to furnish the Court with  
any arguments in the case -

And your petitioners would further report  
that it appears to them that this Court has  
not noticed all the points of evidence  
involved in the case and your petitioners  
say that they can point out to this Court  
contains <sup>material</sup> errors in regard to the testimony in  
to which the Court has in the opinion of

follow - This Court considers the County  
road and the State road to be identical  
when no your petitioners can show from  
the record that they are not -

Your petition in their Argument which  
is hereto attached and made a part of  
this their petition have pointed out the  
discrepancy between the two roads and  
have also carefully called attention  
to the evidence both for and against  
the correctness of the line as shown -  
It is also evident that this Court has  
been mistaken as to the evidence in the  
case from the fact they ~~are~~ in speaking  
of entire distances <sup>they</sup> apply the <sup>testing</sup> word only -  
Your petitioners also show by their argument  
how the jury were misled by the incorrect  
measures as given - As also they show  
how the instruction as given done  
injuring to these appellants by uncertainty  
as how that which was not -

Wherefore your petitioners feeling that it is  
necessary to relieve your petition from the  
apparent negligence which rests upon them  
under the affairs of this Court as also  
as your petitioners believe it is necessary  
that a rehearing of this case be had in  
order that justice may be done in the  
matter for which reasons your petitioners pray  
a rehearing herein -

Plat & Smith

Supreme Court of the State of Illinois  
Third Grand division, April Term 1863

John Pugh, Lawrence Rockwell  
Frank Procter, Samuel Myhrum  
impleaded with  
John J. Dumas, Parson Perkins &  
Albert Myhill, Appellants } Trespass —  
} Appeal from  
} Kane County  
William A. Tamm, Appellee }

To William A. Tamm — the defendant  
in the above suit or to Wharton & Brown  
his Attys for him

You are hereby notified that  
on the 1<sup>st</sup> day of the April Term A.D. 1863 of said  
Supreme Court, to be holden at Ottawa in said  
State on the 21<sup>st</sup> day of April 1863, or as soon  
thereafter as Counsel can be heard we shall  
apply to said Court for a rehearing of the  
above cause decided by said Court at the  
April Term of said Court for the year 1862 when  
and where you may appear if you see fit —

Truly Yours  
Hanna March 27<sup>th</sup> 1863 Plate & Smith  
Attys for Appellee

We hereby admit service of a copy of the  
above Notice from said Plate & Smith this  
27<sup>th</sup> day of March A.D. 1863

Wharton & Brown  
Attys for Appellee

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

APRIL TERM, A. D. 1862.

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JOHN BEYER, LAWRENCE RUCKDESTELL,  
FRANK BANKER, SAMUEL INGHAM,  
IMPLEADED WITH  
JOHN J. DENNA, PARDON PERKINS, and } *Trespass—Appeal from*  
ALBERT MYHILL, } *Kane.*  
*vs.*  
WILLIAM A TANNER. }

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## POINTS AND BRIEF.

All the Errors assigned upon the record in this case, will not be noticed among the points relied upon for a reversal of the Judgment herein, only the more important will be mentioned. A new trial should be had in this case for various reasons.

1st. The verdict of the Jury was palpably against the evidence in the case.

2nd. The verdict was contrary to the law as applicable to the facts of the case.

3rd. The verdict was erroneous, for the Jury acting in conformity with the second instruction given, on the part of the Plaintiff, must have found as a part of the amount of their verdict the value of the timber cut in Blackberry, with the cutting of which there was no evidence tending to convict the Defendants.—See instruction of Plaintiff and evidence. As before said the verdict must, in accordance with the Plaintiff's second instruction have been for damages to Plaintiff's timber in Blackberry, and there being no evidence to convict Ingham with the same, (and none pretended even,) whatever might have been the evidence against Banker, Beyer, and Ruckdestell—it follows that a joint verdict against all was erroneous.—3 Esp. N. P. Rep. 203; 16 John's 215; 18 Verm. 360; as also Argument of Counsel.

The second instruction given on the part of the Plaintiff was erroneous, and calculated to injure the Defendants.—Wills Cir. Ev. p. 16 and note; Ibid p. 32; 1 Phil. Ev. 4 Am. Ed. 598 and 599, note 2; 3 Hawk. 122 and 3; 3 B. and A., 890; Starker Ev. And please see Argument upon this point.

The Court ought not to have modified the first instruction as asked by the Defendants, but ought to have given the same as asked.—See Argument.

## ARGUMENT OF COUNSEL.

The Plaintiff's declaration contains three counts; in the first of which he alleges substantially that the Defendants on the 1st day of Dec., 1860, and at divers times between that day and the commencement of this suit, with force, &c., broke and entered a certain close of the Plaintiff, being the north-west quarter of section 6, in the township of Aurora, in Kane County, and then and there destroyed the fence, and damaged and spoiled the grass and wheat of the Plaintiff.

The second count is for a trespass claimed to have been committed during the same period, upon a certain other close of the Plaintiff, being the north-west and north-east quarter of section one, in the township of Sugar Grove in said county, by which it is claimed the Defendants cut and destroyed trees and saplings, damaged and destroyed grass and wheat, and damaged fence, &c.

The third count like the second, except the trespass is alleged to have been committed upon a certain other close, being the east part of the south-east quarter of section 35, in the township of Blackberry in said county.

To the declaration the Defendants pleaded the general issue. A stipulation was also filed, whereby it was agreed that any special matter might be given in evidence under the general issue.

The theory of the defence was, that there had been a public highway laid out and established by act of the Legislature across the Plaintiff's premises, in the place of the alleged trespass, and that a portion of the Defendants, as Highway Commissioners of the town of Sugar Grove, and others as their servants, committed the supposed trespass in the second count mentioned, if any such were committed, for the purpose of opening and making passable the said Highway. That the supposed trespass in the first count mentioned, consisted simply in the unavoidable damages to the grass and wheat lying in the line of said Highway by the passage of the Defendants or a part of them along the same, and the removal of the fence obstructing the same, as they had a right to do, and as they were ordered to do by the Commissioners of Highways for the township of Aurora. It also appeared that the trespass claimed to have been done in Blackberry, was upon the line of said Highway, as claimed by the Defendants; but no proof was made, as will be seen from the record, that the Defendants were in any way connected with the same. It was insisted by the Plaintiff that the line of the road as made and used by the Defendants, was not the true line, but that the true line was some four to six rods south of the line traveled and worked.

The Jury evidently took the Plaintiff's view of the case for they brought in a verdict against a portion of the Defendants for the amount of \$95 42.

A motion was made for a new trial. The Court refused the motion. A bill of exceptions was allowed, the entire evidence preserved therein, and the case thus brought to this Court by Appeal.

According to our mind the verdict is so palpably against the evidence given in the case, that the Court below ought not to have refused to set aside the same, and grant a new trial.

What then is the evidence in the case? It appears from the Plaintiff's evidence that the Defendants Banker, Beyer, and Ruckdestell, cut out a road across the Plaintiff's premises in Sugar Grove, under the direction of the Highway Commissioners for the township of Sugar Grove, of whom the Defendant Ingham was one. That the Defendants Banker, Beyer and Ruckdestell, living upon

section thirty-six in Blackberry; after having made this road across the corner of Sugar Grove township passable, were accustomed to pass from their places over and along this way thus made, and passing along the line of the same some little distance in the township of Aurora, till this way intersected a North and South road running near the town line. That in passing along this road at the various times these Defendants trod down the wheat of the Plaintiff growing in this way, and removed the fences obstructing the same. It does not appear that they did unnecessary damage.

It appears from the evidence of the Defendants, that in 1845 a State Road was ordered, by the Legislature of this State, to be established, and certain Commissioners in the Act named were appointed, to view, mark, and locate the same, which said road by the Act was to pass through Kane County, and across the premises of the Plaintiff.—Laws of 1845, page 88. That those Commissioners did locate said road and make a report of the same which was filed according to the act. That the said State Road was located across the north part of the township of Aurora striking the west line of Aurora township at a point 15 chains south of the N. W. corner of the town. That from thence it was located on a line running S. 88 deg. W. a distance in this direction 13,50 chains to an angle. That from thence it passed N. 67½ deg. W. to the north line of section one in Sugar Grove at a point 8 chains from the quarter post on said section one. It does not appear that that portion of said road passing across the N. E. part of section one in Sugar Grove had ever been worked or used previous to the time of the alleged trespass. That on the 22nd day of December, A. D. 1860, the Highway Commissioners of Sugar Grove for the purpose of ascertaining the precise location of said road previous to opening the same employed one J. L. Hanchitt, a civil engineer and surveyor, residing in Aurora, to ascertain the precise location of said road, and mark the same anew across the township of Sugar Grove. That said Hanchitt, as appears by his testimony and the plat made by him on the occasion, did make a re-survey thereof, starting at a stake in the town line between Aurora and Sugar Grove, 15 chains south from the north line of said town, and running thence S. 88 deg. W. a distance of 13,50 chains. Thence N. 67 deg. W., to the north line of section one in Sugar Grove, to a point 8 chains west of the quarter post on section one, marking the line as run by him, by driving stakes, &c. It also appears from the testimony of the Plaintiff's witnesses, as well as those of the Defendants, that the alleged trespasses are upon the line of this road as found and staked out by the witness Hanchitt. Also that the acts of the Defendants complained of were done in opening, working, and using this way upon the line as thus re-established.

The Plaintiff attempted to show by his rebutting testimony, that this line as thus run by Hanchitt, and upon which the travel is had, was not upon the line of the old State road survey, and to sustain that position he introduces the witness Wilder, who testifies that he has made a survey of the old State road in controversy; that in August, 1861, he, at the instance of the Plaintiff, commenced at a certain White Oak tree, in section thirty-five in the township of Blackberry, and run easterly from minutes which he afterwards compared, as he says, with minutes of the old State road survey, and found them to correspond. The witness states that running easterly from the point mentioned, upon the courses mentioned in his notes, he struck the point in the Aurora and Batavia road, at the point where the same is crossed by the old State road. He says, that the line made by Hanchitt, and on which was the cutting and travel, was four or five rods more northerly than his course. That the White Oak tree from which he started was marked, that he found along this line, on or near it, two or three marked trees in the towns of Sugar Grove and Blackberry. That these trees were in a line as if marked for a road. He saw also a portion of the way an old

fence. He also says, "my line as run corresponds with the road as opened through Plaintiff's and Gibson's land in Aurora." It also appeared upon the cross-examination of Hanchitt by the Plaintiff, that Hanchitt, on his survey being extended into the township of Blackberry would not upon the second course in that town terminate at a White Oak tree as mentioned in minutes of State road.

This is the testimony substantially, which the Plaintiff introduced as tending to show that Hanchitt's line was not the true line of the State road. Let us see then how far these facts will go in that direction when examined carefully. The old State road, leaving the Aurora and Batavia road at a certain point, runs a straight line S. 88 deg. W. to the line between Aurora and Sugar Grove at a point 15 chains south of the north-west corner of Aurora. The witness Wilder insists that the State road survey must have crossed the line at a greater distance than 15 chains from the corner, because in his survey, and according to his compass, the course S. 88 deg. W. from the point of intersection in the Aurora and Batavia road, continued to the west line of Aurora, would strike that line 4 or 5 rods south of the 15 chains point specified in the report.

Let us see how far this conclusion of the witness is well taken. He admits in his cross-examination that a variation of one-fourth of one deg. in the course from the point in the Aurora and Batavia road to the west line of Aurora would produce a variance of 4 rods between the points of striking the same. He also says, that it is laid down by standard writers on surveying that the direction of the magnetic needle is constantly changing, and that it has what is called a diurnal variation, which often amounts to one-fourth of deg. In view of these facts, then how strange the circumstance that a survey should be made upon a certain line, and that years afterwards a different man with a different compass should run a line of two miles and half or three miles in length, and not terminate within four rods of the old survey, especially when the variation of the compass required to produce the discrepancy is only one-fourth degree, a variation occurring daily. And what evidence by which to contradict the report of the State road Commissioners saying that they did cross the town line 15 chains from the north line of the town.

But again it is claimed that Hanchitt did not strike the White Oak tree mentioned in the minutes upon his second course in Blackberry, and that Wilder did, and therefore Wilder's and not Hanchitt's is the true line. But let us see. Wilder, it will be recollected, *started* his survey at the White Oak tree, thus assuming in the very outset that *that tree* was the tree mentioned in the minutes, which was simply an assumption. No proof of that fact; none attempted. The witness together with the Plaintiff find a White Oak tree in the Blackberry grove upon section thirty-five, upon the line of road they wish to establish, and forthwith assume it to be the identical tree mentioned; commence here their survey, and proceed to find Hanchitt off the line, because his course did not strike this tree. Again, the witness saw on or near this line two or three marked trees in a line, as if marked for a road. But it does not appear from the testimony of Plaintiff's witnesses, by whom or when they were marked. It is not impossible but that they were marked by the Plaintiff himself, after this road controversy arose, for the purpose as is now attempted to make it appear that the Defendants are off the line of the road. So we say, that so far as these trees are concerned they ought not, with the uncertainty in regard to them, to have any weight against the correctness of Hanchitt's line, standing as they do outside of the line of points mentioned in old report. In regard to the old fence seen along this line a portion of the way, the inference which might be drawn from this is vague and indefinite, and has no tendency to prove either one thing or another. It does not appear when it was built, or for what purpose, or how far along the

line it extended. It will thus be seen that most of those evidences introduced by the Plaintiff for the purpose of creating a doubt about the correctness of Hanchitt's line, as marking the line of the old State road, are, *without explanation*, shown to be no evidence whatever that we are not upon the true line of the old State road.

But the Defendants did not leave the matter thus, but to destroy every vestige of doubt that is attempted to be cast upon the correctness of Hanchitt's line, they introduce the records of the County Commissioners' Court, showing the location, the year before the location of the State road in controversy, of a County road across the premises of the Plaintiff, identical in some places, but not in all with the State road.

It appears from the records of this County road that the White Oak tree mentioned by the witness Wilder, from which he started his survey, the marked trees along his line in Blackberry and Sugar Grove, the old fence, &c., not only probably were, but must have been in the line of the old County survey. It was attempted to be shown by the witness Wilder, that the record of the County road, and the records of the State road, showed that the two roads were identical; but an examination of the two shows that while they may both cross the Aurora and Batavia road at the same point, as is in evidence they do, yet the County road having been laid across Aurora upon the same point of compass as the State road, continued its course four rods further west than did the State road before it angled; by this means taking its northerly course through Sugar Grove, and into Blackberry, upon a line some four or five rods south, and west from the corresponding course of the State road, and passing the marked trees spoken of, the old fence mentioned, and terminating at the White Oak tree, from which Wilder commenced his survey.

Now let us see what are the evidences that Hanchitt's line is the true line of the State road. We find his line crossing the west line of Aurora at the precise point mentioned in the State road minutes, to wit, 15 chains from the north line of the town. We find it running thence westerly to an angle, upon the same course, and the same distance mentioned. Passing thence northerly, we find it to cross the north line of Sugar Grove, at the point specified in old report for it to cross. Thus far then it seems certain we are upon the right track. But for the purpose of satisfying all parties that this is the true line, he continues his survey into Blackberry, and upon section thirty-five finding along these courses in Blackberry marked trees, and old highway marks, (see his report to the Commissioners,) but fails to find the White Oak tree mentioned in the minutes, and because forsooth a certain White Oak tree mentioned, as standing in Blackberry upon section 35, fifteen or sixteen years ago, is not found in the line of this survey, now it is forthwith assumed that the survey is not upon the proper line, notwithstanding the many other evidences of its correctness. Hanchitt continuing his survey still further west proceeds from this point upon the *very same courses and distances*, as mentioned in the State road report, and strikes in his line the end of an old turnpike, thrown up upon Lake Slough, evidence certain that he is upon the line of *some* old road, to say the least. Continuing on still westerly, in accordance exactly with the minutes of old survey, he strikes the claim line between Thompson's and Simmons', within *four or five feet*, a point mentioned also in the minutes. Now, then, if after having passed all these points specified in old survey of State road, there should yet be any doubt as to the correctness of his line, Hanchitt's next course must entirely dissipate the same, for we find him terminating his next course, in the Ottawa and Geneva road, upon the *identical* point mentioned in State road report, *without even the variance of a link of a chain*.

But it is said, that the minutes of this State road, do not require a jog at the town line, between Aurora and Sugar Grove, and that this road is opened and fenced from the point of intersection with the Aurora and Batavia road west, upon a line intersecting the north and south road by Tanner's house, at a point four or five rods further south than where Hanchitt's line would intersect said road. But what does this prove? Simply that there was a departure from the true line in opening this road across Aurora, amounting in the distance of two or three miles to four or five rods. And it is not strange that such should be the case when we consider that the same might have been opened upon a line indicated by some compass, as being S. 88 deg. W. having no regard to where they crossed the town line between Aurora and Sugar Grove, whereas if they had had reference to the point of striking said line, it would have produced a slight change in the course of the road. Or what is quite as probable they may have been misled by the old County road survey, which it will be remembered is claimed to run from the same point in the Aurora and Batavia road, and upon a course minuted as the same as yet crossing the town line at a point a few rods further south. But whatever may have been the course of the departure of the road, as opened, from the true line it matters not, for it cannot be claimed that because the road is not opened upon the precise line as laid, to the north and south road, past Tanner's, that therefore when the balance of the road was opened, it also should be opened off of the proper line. If we in the portion of the road opened, and used by us, are upon the line of the road as it should be, it matters not whether other portions of the road are upon the line or not.

There is one other matter which was urged as evidence, that we were not upon the right line; it was simply this, that Hanchitt's line extended to the point of intersection of the Aurora and Batavia road would strike that road above the point where it should cross the same. This point has been answered before, in saying that the variation of the course of one-fourth deg. from the town line to the Aurora and Batavia road would strike upon the proper point, or four rods from the same, which when we consider the variation of the compass, as was said before, shows the point made to have really no point in it after all. For it is not only possible, but probable, that the course between the two points covering a distance of two or three miles, as run upon two different times, by different men and different compasses, might not agree within one-fourth of one degree. And because that the course as indicated by Wilder's compass, between two known and fixed points in the line of this survey, comes by one-fourth of one degree from the course indicated by the compass of Brooks, in his survey of this road fifteen years ago, it is sought to establish from this, the fact that we in crossing the town line at the point specified in the minutes of the old survey, are not upon the proper line.

We have thus touched briefly upon all the noted points of evidence of the Plaintiff, tending to show the incorrectness of Hanchitt's line, and it will be seen that many of them are not of such a character as to warrant the least inference as to the incorrectness of our line, while the balance which if unexplained could have no greater force than merely to raise a doubt in the matter, are so clearly shown to have reference to and are indicative of the line of another and distinct survey. On the other hand, the evidence shows a complete agreement between Hanchitt's line and the old State road survey in all the essential and prominent points, to wit, 1st. The 15 chain point in the west line of Aurora. 2nd. The 8 chain point in the north line of Sugar Grove. 3rd. The old turnpike at Lake Slough. 4th. The claim line between Thompson's and Simmons. 5th. The point in the Ottawa and Geneva road. And it is impossible to discover what the Jury saw in the testimony given in this case, that induced them to find the Defendants off the true line of the road, and therefore trespassers upon the

Plaintiff's premises. And the only way in our mind to account for the strangeness of the verdict in this case, and at the same time to presume the integrity of the Jury, is to say they wholly misapprehended the nature and effect of the evidence adduced on the trial.

Again, on assuming that the Jury understood the testimony presented to them on the trial of this case, the only possible way to account for their decision, is to say that they wholly disregarded the law of the case as presented in the instructions given for the Defendants. The second instruction is, that *fixed points* and monuments must control courses and distances whenever there is a discrepancy between them. Now then apply the above principle to the facts in this case. 1st. There is a point specified or fixed in the west line of Aurora at which this road was to cross, the evidence is that the road as now used crosses at that point. It is also claimed that the course S. 88 deg. W. would strike south of that point, and that being the course of the road, therefore we are wrong, the road does not cross there—thus disregarding the *point* specified, for the sake of saving the *course* given. A direct violation of the Defendants' second instruction. But it is not so much to be wondered that a Jury should take this course, when the Plaintiff's witness Wilder did the same thing, for the sake it is assumed of showing Hauchitt's line not to be the true line of State road. What is here said in regard to the 15 chains point is true also in regard to the 8 chains point. Hauchitt's line being upon the precise spot mentioned in the State road report, and this road being upon the identical points mentioned, as being in the line of the same—and having done all the law requires on opening the same, and even more, having paid or offered to pay the Plaintiff damages which he did not claim or desire when this road was laid, with what propriety were these Defendants found guilty?

The second instruction given by the Court below, on the part of the Plaintiff is clearly incorrect, as a legal proposition, and calculated to do injury to the Defendants, and therefore should not have been given. And if our notions of its erroneous character are correct there is presented in this one instruction, an error on the part of the Court below of sufficient magnitude to warrant a reversal of the Judgment in this case. The instruction is as follows:—"The Jury are instructed that if they believe from the evidence, the Defendants Banker, Beyer, and Ruckdestell were seen cutting out this timber 2 or 3 times, this is presumptive proof that they did all the cutting on the premises of Tanner." It will be seen on reference to the testimony, that the Defendants named in this instruction, were seen cutting timber upon the premises of the Plaintiff in the township of Sugar Grove, and in that township only. It will be borne in mind that the land of the Plaintiff lay in three different towns—Aurora, Sugar Grove, and Blackberry. Also, that the line of this road in controversy, on entering the town of Blackberry, passed off from the premises of the Plaintiff, and on to the premises of some of the Defendants, and that after passing some distance across the lands of these Defendants, the line again entered upon the premises of the Plaintiff, situated in the town of Blackberry. The timber alleged to have been cut was situated in the township of Sugar Grove, and upon the land of the Plaintiff in Blackberry, separated as before remarked, upon the line of road, by the intervening farms of two or three of the Defendants. Now then the instruction, in connection with the testimony, is in effect saying, that the fact that the 3 Defendants named, cut the timber of the Plaintiff in the town of Sugar Grove is presumptive proof that they also cut that upon his premises in the town of Blackberry. In order to determine fully the meaning and extent of the instruction, it will be necessary to examine and determine what is the correct legal meaning of the term or words, "presumptive proof," used in the instruction. And first of the word "proof." The term proof is often confounded with that of evidence, and applied

to denote the *medium* of proof, whereas in strictness it marks merely the *effect* of evidence; evidence denoting the *means* by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. When the result of evidence is undoubting assent to the certainty of the event or proposition, which is the subject matter of inquiry, such event or proposition is said to be *proved*: and according to the nature of the evidence on which such conclusion is grounded it is either *known* or *believed* to be true. *Proof* then is that quantity of appropriate evidence which produces assurance or certainty. Evidence is therefore as different from proof, as cause from effect.—Wills on Cir. Ev. page 16, and note.

It appears then from the definition and legal meaning of the word proof, that the extent and effect of the instruction under consideration, (unless its effect shall appear to be modified by the adjunct presumptive,) is to say that the fact, that the Defendants named were seen cutting the timber of the Plaintiff in Sugar Grove, is that quantity of appropriate evidence which should produce assurance and certainty, that they also cut the Plaintiff's timber in Blackberry, which to our mind is an assumption on the part of the Court, to dictate to the Jury, as to weight and effect to be given by them to circumstances appearing in evidence on the trial. But it remains to be seen what is the meaning of the word presumptive, and how far, if at all it modifies or changes the meaning which we have already given to the instruction.

The term *presumptive* is frequently used as synonymous with circumstantial evidence, but it is not so used with accuracy. The word presumption *eo vi termini*, imports an *inference* from facts; and the adjunct presumptive, as applied to evidentiary facts *implies* the certainty of some *relation* between the facts and the inference or circumstances.—Wills Cir. Ev., 32. If then presumption means an *inference* from facts, presumptive proof can only mean proof by inference from facts, but none the less *proof* because inferred from other facts. Or in other words the adjunct presumptive simply expresses the *kind* of appropriate evidence a proper quantity of which produces assurance and certainty, and which when such results are produced is called proof. If we are correct in our ideas of the meaning of this word presumption, then it was no other effect in this instruction than to express the kind of proof referred to, thus leaving the instruction to mean, as stated before, simply this; if the Defendants named in the instruction were seen cutting the timber in one place upon Plaintiff's premises, then this is the quantity and the appropriate evidence to produce assurance and certainty that they did the cutting upon the Plaintiff's premises elsewhere.

Nor will it avail the Plaintiff in attempting to sustain this instruction to say, that the term presumptive proof as here used was intended to mean simply circumstantial evidence. If it was intended by the party and the Court to mean simply circumstantial evidence, why did they not so write the instruction? But having used the words "presumptive proof," the Plaintiff can not now claim that he did not mean, by the words used in the instruction, what was their legal import, but meant to convey to the Jury an idea perfectly legal and proper to be given by the Court as an instruction. And because the idea which he meant the Jury to take from the instruction was correct, therefore the instruction even if not expressing the idea meant to be given, ought to be sustained. Jurymen are supposed to be sensible men, and to understand the meaning of words, and are in fact, presumed to know the legal meaning of words as used in the law. An intelligent Juror on reading this instruction as given, or reading that certain facts are "presumptive proof" of the existence of a certain other fact, says immediately to himself, there is more meant by this term than simply that the existence of certain facts has a tendency to prove the existence of certain other facts.

In short this word proof means that quantity of appropriate evidence which should produce assurance and certainty, and therefore by the direction of the Court, I am bound to find that the named Defendants cut the trees in Blackberry if I find they cut those in Sugar Grove. Thus it will be seen the Jury from the improper use of the words "presumptive proof" as used in the instruction, are under the necessity of finding the Defendants guilty of a trespass which they did not commit, and of which the Jury would not have found them guilty, if it were not for the improper use of the word proof in the instruction. But admit for the sake of argument, that the word proof as used in the instruction means simply evidence, and that the Jury gave it that construction, then we say, that the instruction is erroneous. The law as applicable to the facts proven and supposed, as a basis for the instruction is not correctly stated. What then is presumptive evidence? When the facts proved are not the precise facts in issue, and the Jury are to come to the conclusion upon the facts in issue by an act of reasoning from those other proved facts, the evidence in such case is said to be presumptive evidence.—1 Phil. Ev., 598.

A presumption is a probable inference which our common sense draws from circumstances usually occurring in such cases.—1 Phil. Ev., 599. Or as is expressed by another, a presumption is an inference as to the existence of a fact not actually known, arising from its *necessary* or *usual* connection with others which are known.—Starker Ev. It follows therefore that the *ground* of all presumption is the *necessary* or *usual* connection between facts and circumstances. 1 Phil. Ev. 599, Note 2. According with the above definition of presumption, the Courts have from time to time made decisions or promulgated rules, so to speak, which are or ought to be held to govern and direct the mind in arriving at the proper inference or presumption, from the facts proved. One of these rules is stated thus. A necessary and invariable connection of facts is not required; it is enough if one fact is *ordinarily* and *usually* connected with another.—3 B. & A. 890. And again thus: That the fact to be inferred *often* accompanies the fact proven is, not sufficient; it should *most usually* accompany it; and I would say in the absence of all circumstances, that it should *rarely* otherwise happen.—3 Hawk, 122 & 3, and Cases cited in Note; page 598, Phil. Ev.

Now then let us see how far the facts proven in this case on which this instruction is founded, warrant the inference or presumption of the existence of those facts claimed by the instruction to be the property injured.

The fact proven is, the Defendants cut Plaintiff's timber in the opening of this road in Sugar Grove. The deduction claimed and assumed by the instruction to be proper is, that therefore they did the cutting in the opening of the same in the town of Blackberry. Applying the rules before given for forming an inference to the facts proved, we ask is the deduction proper? Does it, in the language of the rule before given, *most usually* follow, that because a party open a road in one town that therefore the same party must have opened the same in an adjoining town? Are the two facts *ordinarily* and *usually* connected together? Are *inferences* of such a nature as was said by Henderson, delivering the opinion of the Court, in the case, Hart vs. Newland, 3 Hawkins, 122, that they could *rarely happen otherwise*? If they were such the inference or presumption was properly taken, otherwise not. If the inference is properly made, and the instruction is correct, by the same course of reasoning might it be said that because the Defendants were cutting the timber of the Plaintiff in the opening of a road in one town, therefore they cut the timber of the Plaintiff lying on the line of the road in the several towns between the Steam Mills in Cook Co. and Dixon, provided the Plaintiff owned timber in the various towns which had been cut.

Again, there are connected with the facts proven, and on which this instruction is based, other facts which cannot be disconnected therefrom, which make the inference or presumption sought to be established by this instruction, the more improper and untenable.

In the 1 Wash. C. C. Rep. 272, the Court says: The circumstances should be strong in themselves—should each of them throw light upon and prove the other: and the result of the whole should be to leave no doubt upon the mind that the offence had been committed, and that the accused and no other could be the person who committed it.

The principle derived from the above is, that the inference should be the result of the whole facts properly belonging together.

Connected with the fact that cutting was done on Plaintiff's premises, was the fact that the same was done by order of the Highway Commissioners of Sugar Grove township. Therefore all the cutting *proved* to have been done by the Defendants, being done by the order of the Highway Commissioners of Sugar Grove, it is to be presumed that no cutting was done by the Defendants, except such as was cut by order of the said Commissioners. Again, aside from the evidence, it is to be presumed that the Highway Commissioners of Sugar Grove ordered no timber cut in Blackberry, which was beyond their jurisdiction, and to that effect was the evidence. Now then the cutting being done by the direction of the Commissioners, and by their direction only, and they having directed no timber outside of the town of Sugar Grove to be cut, it follows, that these facts which are connected with and are a part and parcel of the facts on which the inference of Defendants having cut this timber in Blackberry is attempted to be founded, taken in connection with the fact of cutting by Defendants, (and they must be so taken, according to the rule as above,) utterly preclude the possibility of the inference, as attempted to be established by the instruction; and therefore we say, the instruction being clearly erroneous, in whatever point of view it is examined, and being of such a nature as was calculated to injure the Defendants, it was error in the Court to have given the same.

To the third instruction given on the part of the Plaintiff it is insisted, that while the same may be correct, as an abstract principle of law, yet the same was not warranted by the facts appearing upon the trial of this case. There is not a particle of evidence that any malice existed, or was shown on the part of the Defendants during this entire road controversy; on the contrary, it appears that a portion of the Defendants acted as public officers in the fulfilment of what they supposed to be their duty; and the evidence shows how very careful they were to ascertain the precise location of this road previous to opening the same. The evidence also shows, that the other Defendants acted as the agents or servants of the Highway Commissioners, in the cutting the timber, and opening the road, and that afterward they traveled simply as ordinary travelers, removing only such obstructions as they found in the way, claiming that they had a highway, and they meant to keep it.

The Court erred in refusing to give the first instruction asked by the Defendants in the words as asked. It is conceived that if certain points were *specified* in the State road report as being in the line of the same, the presumption is that they were *fixed* upon as points in the line of the road. But whether the identical point specified, or some other not so specified were fixed upon by the Commissioners, it matters not. They have made a report of the location of said road: the report specifies certain points as being in the line of said road; we have opened the road upon the point specified: now then when sued in trespass for thus opening and using said road we ask the Court to instruct the Jury, that if

certain points are specified as being in the line of said road, they must have regard to those points in determining the location of the road. The Court says, but the Jury must believe that those points were fixed upon by the Commissioners before you can regard those points. This is stating the effect of the instruction. The Jury acting upon the instruction as given, because they don't believe perhaps that the distance from the north line of Aurora, as specified in the minutes, was ever measured, therefore the point was not fixed upon, and they are not to regard it, although specified in determining the location of this road.

Now then we apprehend that the record of the location, as filed by the Commissioners is evidence of the location of the road in controversy; if so, the first instruction as asked by the Defendants was a proper one to be given, and the Court ought not to have refused to give the same as asked—ought not to have so modified the same, as to open the door to the Jury to disregard all or any of the points specified in said report, simply because they might not believe from the evidence that the same were even fixed upon.

But again, there is another reason why a new trial should have been granted in this case, and which reason is in itself sufficient to warrant a reversal of this Judgment, even if nothing else appeared erroneous from the record.

The verdict is a joint one against the Defendants Ingham, Banker, Beyer, and Ruckdestell. The verdict must have included damages for the cutting of the Blackberry Grove, as well as that in Sugar Grove. There was not a particle of evidence tending to show that Ingham had any thing to do with, or was in any way privy to the cutting done in Blackberry.

If the above is true, then the Judgment being against the Defendant Ingham, as well as the others, is erroneous, for the reason, as observed by Lord Kenyon, in a similar case, "a Defendant is subjected to damages for a trespass which he never committed."—See 3 Esp. N. P. Rep. 203; 16 John's, 215; 18 Verm. 360. In the case of Mynak vs. Downer, 18 Verm. 360, the Court says: "if several persons are made Defendants, and the Plaintiff proves several distinct acts of trespass, in some of which a part only of the Defendants were concerned, he can only recover against all the Defendants for those acts in which all participated." Now then that the verdict included damage to Plaintiff's premises there can be no doubt, in fact we are bound to presume that to be the case, for the reason that the evidence showed that the Defendants Banker, Beyer, and Ruckdestell did cut the timber of Plaintiff in Sugar Grove township, and the Court instructed the Jury as in Plaintiff's second instruction—that if they believed from the evidence the Defendants Banker, Beyer, and Ruckdestell were seen cutting out this timber two or three times, this is presumptive proof that *they* did *all* the cutting on the premises of Plaintiff. The Jury were bound to follow this instruction; it is to be presumed they did, and if they did, it follows that they found the Defendants named in the instruction guilty of the Blackberry cutting, and if guilty of the cutting, it is to be presumed they assessed damages for the same as a part of their verdict; and the verdict being against Ingham also, it follows as was said before, that here is a Judgment against Ingham for a trespass which he did not commit. We repeat, there is not a particle of proof that Ingham had any thing to do with the opening of this road in Blackberry; and if there is proof that in his acts in this road controversy in Sugar Grove, he acted in his official capacity, and in that capacity ordered this timber cut, and this road opened in Sugar Grove only; then we see the proof expressly negatives the idea that Ingham had any thing to do with this road in Blackberry, and cannot lawfully be saddled with a Judgment for damages to Plaintiff, by reason of the attempt of any one to open a road in an adjoining town.

There are other errors assigned than those referred to in the argument, but we do not think it necessary to go into a lengthy discussion of those points, for if we are correct in the view of this case thus far, more than enough has already been presented to show that the Defendants ought to have a new trial in this case.

PLATO & SMITH, Attys. for Appellants.

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 Ingham shd  
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 2 J. S. v. C. M.

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

APRIL TERM, A. D. 1862.

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JOHN BEYER, LAWRENCE RUCKDESTELL,  
FRANK BANKER, SAMUEL INGHAM,  
IMPLEADED WITH  
JOHN J. DENNA, PARDON PERKINS, and } *Trespass—Appeal from*  
ALBERT MYHILL, } *Kane.*  
<sup>vs.</sup>  
WILLIAM A TANNER.

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POINTS AND BRIEF.

All the Errors assigned upon the record in this case, will not be noticed among the points relied upon for a reversal of the Judgment herein, only the more important will be mentioned. A new trial should be had in this case for various reasons.

1st. The verdict of the Jury was palpably against the evidence in the case.

2nd. The verdict was contrary to the law as applicable to the facts of the case.

3rd. The verdict was erroneous, for the Jury acting in conformity with the second instruction given, on the part of the Plaintiff, must have found as a part of the amount of their verdict the value of the timber cut in Blackberry, with the cutting of which there was no evidence tending to convict the Defendants.—See instruction of Plaintiff and evidence. As before said the verdict must, in accordance with the Plaintiff's second instruction have been for damages to Plaintiff's timber in Blackberry, and there being no evidence to convict Ingham with the same, (and none pretended even,) whatever might have been the evidence against Banker, Beyer, and Ruckdestell—it follows that a joint verdict against all was erroneous.—3 Esp. N. P. Rep. 203; 16 John's 215; 18 Verm. 360; as also Argument of Counsel.

The second instruction given on the part of the Plaintiff was erroneous, and calculated to injure the Defendants.—Wills Cir. Ev. p. 16 and note; Ibid p. 32; 1 Phil. Ev. 4 Am. Ed. 598 and 599, note 2; 3 Hawk. 122 and 3; 3 B. and A., 890; Starker Ev. And please see Argument upon this point.

The Court ought not to have modified the first instruction as asked by the Defendants, but ought to have given the same as asked.—See Argument.

## ARGUMENT OF COUNSEL.

The Plaintiff's declaration contains three counts; in the first of which he alleges substantially that the Defendants on the 1st day of Dec., 1860, and at divers times between that day and the commencement of this suit, with force, &c., broke and entered a certain close of the Plaintiff, being the north-west quarter of section 6, in the township of Aurora, in Kane County, and then and there destroyed the fence, and damaged and spoiled the grass and wheat of the Plaintiff.

The second count is for a trespass claimed to have been committed during the same period, upon a certain other close of the Plaintiff, being the north-west and north-east quarter of section one, in the township of Sugar Grove in said county, by which it is claimed the Defendants cut and destroyed trees and saplings, damaged and destroyed grass and wheat, and damaged fence, &c.

The third count like the second, except the trespass is alleged to have been committed upon a certain other close, being the east part of the south-east quarter of section 35, in the township of Blackberry in said county.

To the declaration the Defendants pleaded the general issue. A stipulation was also filed, whereby it was agreed that any special matter might be given in evidence under the general issue.

The theory of the defence was, that there had been a public highway laid out and established by act of the Legislature across the Plaintiff's premises, in the place of the alleged trespass, and that a portion of the Defendants, as Highway Commissioners of the town of Sugar Grove, and others as their servants, committed the supposed trespass in the second count mentioned, if any such were committed, for the purpose of opening and making passable the said Highway. That the supposed trespass in the first count mentioned, consisted simply in the unavoidable damages to the grass and wheat lying in the line of said Highway by the passage of the Defendants or a part of them along the same, and the removal of the fence obstructing the same, as they had a right to do, and as they were ordered to do by the Commissioners of Highways for the township of Aurora. It also appeared that the trespass claimed to have been done in Blackberry, was upon the line of said Highway, as claimed by the Defendants; but no proof was made, as will be seen from the record, that the Defendants were in any way connected with the same. It was insisted by the Plaintiff that the line of the road as made and used by the Defendants, was not the true line, but that the true line was some four to six rods south of the line traveled and worked.

The Jury evidently took the Plaintiff's view of the case for they brought in a verdict against a portion of the Defendants for the amount of \$95 42.

A motion was made for a new trial. The Court refused the motion. A bill of exceptions was allowed, the entire evidence preserved therein, and the case thus brought to this Court by Appeal.

According to our mind the verdict is so palpably against the evidence given in the case, that the Court below ought not to have refused to set aside the same, and grant a new trial.

What then is the evidence in the case? It appears from the Plaintiff's evidence that the Defendants Banker, Beyer, and Ruckdestell, cut out a road across the Plaintiff's premises in Sugar Grove, under the direction of the Highway Commissioners for the township of Sugar Grove, of whom the Defendant Ing-ham was one. That the Defendants Banker, Beyer and Ruckdestell, living upon

section thirty-six in Blackberry; after having made this road across the corner of Sugar Grove township passable, were accustomed to pass from their places over and along this way thus made, and passing along the line of the same some little distance in the township of Aurora, till this way intersected a North and South road running near the town line. That in passing along this road at the various times these Defendants trod down the wheat of the Plaintiff growing in this way, and removed the fences obstructing the same. It does not appear that they did unnecessary damage.

It appears from the evidence of the Defendants, that in 1845 a State Road was ordered, by the Legislature of this State, to be established, and certain Commissioners in the Act named were appointed, to view, mark, and locate the same, which said road by the Act was to pass through Kane County, and across the premises of the Plaintiff.—Laws of 1845, page 88. That those Commissioners did locate said road and make a report of the same which was filed according to the act. That the said State Road was located across the north part of the township of Aurora striking the west line of Aurora township at a point 15 chains south of the N. W. corner of the town. That from thence it was located on a line running S. 88 deg. W. a distance in this direction 13,50 chains to an angle. That from thence it passed N. 67½ deg. W. to the north line of section one in Sugar Grove at a point 8 chains from the quarter post on said section one. It does not appear that that portion of said road passing across the N. E. part of section one in Sugar Grove had ever been worked or used previous to the time of the alleged trespass. That on the 22nd day of December, A. D. 1860, the Highway Commissioners of Sugar Grove for the purpose of ascertaining the precise location of said road previous to opening the same employed one J. L. Hanchitt, a civil engineer and surveyor, residing in Aurora, to ascertain the precise location of said road, and mark the same anew across the township of Sugar Grove. That said Hanchitt, as appears by his testimony and the plat made by him on the occasion, did make a re-survey thereof, starting at a stake in the town line between Aurora and Sugar Grove, 15 chains south from the north line of said towns, and running thence S. 88 deg. W. a distance of 13,50 chains. Thence N. 67 deg. W., to the north line of section one in Sugar Grove, to a point 8 chains west of the quarter post on section one, marking the line as run by him, by driving stakes, &c. It also appears from the testimony of the Plaintiff's witnesses, as well as those of the Defendants, that the alleged trespasses are upon the line of this road as found and staked out by the witness Hanchitt. Also that the acts of the Defendants complained of were done in opening, working, and using this way upon the line as thus re-established.

The Plaintiff attempted to show by his rebutting testimony, that this line as thus run by Hanchitt, and upon which the travel is had, was not upon the line of the old State road survey, and to sustain that position he introduces the witness Wilder, who testifies that he has made a survey of the old State road in controversy; that in August, 1861, he, at the instance of the Plaintiff, commenced at a certain White Oak tree, in section thirty-five in the township of Blackberry, and run easterly from minutes which he afterwards compared, as he says, with minutes of the old State road survey, and found them to correspond. The witness states that running easterly from the point mentioned, upon the courses mentioned in his notes, he struck the point in the Aurora and Batavia road, at the point where the same is crossed by the old State road. He says, that the line made by Hanchitt, and on which was the cutting and travel, was four or five rods more northerly than his course. That the White Oak tree from which he started was marked, that he found along this line, on or near it, two or three marked trees in the towns of Sugar Grove and Blackberry. That these trees were in a line as if marked for a road. He saw also a portion of the way an old

line it extended. It will thus be seen that most of those evidences introduced by the Plaintiff for the purpose of creating a doubt about the correctness of Hanchitt's line, as marking the line of the old State road, are, *without explanation*, shown to be no evidence whatever that we are not upon the true line of the old State road.

But the Defendants did not leave the matter thus, but to destroy every vestige of doubt that is attempted to be cast upon the correctness of Hanchitt's line, they introduce the records of the County Commissioners' Court, showing the location, the year before the location of the State road in controversy, of a County road across the premises of the Plaintiff, identical in some places, but not in all with the State road.

It appears from the records of this County road that the White Oak tree mentioned by the witness Wilder, from which he started his survey, the marked trees along his line in Blackberry and Sugar Grove, the old fence, &c., not only probably were, but must have been in the line of the old County survey. It was attempted to be shown by the witness Wilder, that the record of the County road, and the records of the State road, showed that the two roads were identical; but an examination of the two shows that while they may both cross the Aurora and Batavia road at the same point, as is in evidence they do, yet the County road having been laid across Aurora upon the same point of compass as the State road, continued its course four rods further west than did the State road before it angled; by this means taking its northerly course through Sugar Grove, and into Blackberry, upon a line some four or five rods south, and west from the corresponding course of the State road, and passing the marked trees spoken of, the old fence mentioned, and terminating at the White Oak tree, from which Wilder commenced his survey.

Now let us see what are the evidences that Hanchitt's line is the true line of the State road. We find his line crossing the west line of Aurora at the precise point mentioned in the State road minutes, to wit, 15 chains from the north line of the town. We find it running thence westerly to an angle, upon the same course, and the same distance mentioned. Passing thence northerly, we find it to cross the north line of Sugar Grove, at the point specified in old report for it to cross. Thus far then it seems certain we are upon the right track. But for the purpose of satisfying all parties that this is the true line, he continues his survey into Blackberry, and upon section thirty-five finding along these courses in Blackberry marked trees, and old highway marks, (see his report to the Commissioners,) but fails to find the White Oak tree mentioned in the minutes, and because forsooth a certain White Oak tree mentioned, as standing in Blackberry upon section 35, fifteen or sixteen years ago, is not found in the line of this survey, now it is forthwith assumed that the survey is not upon the proper line, notwithstanding the many other evidences of its correctness. Hanchitt continuing his survey still further west proceeds from this point upon the *very same courses and distances*, as mentioned in the State road report, and strikes in his line the end of an old turnpike, thrown up upon Lake Slough, evidence certain that he is upon the line of *some* old road, to say the least. Continuing on still westerly, in accordance exactly with the minutes of old survey, he strikes the claim line between Thompson's and Simmons', within *four or five feet*, a point mentioned also in the minutes. Now, then, if after having passed all these points specified in old survey of State road, there should yet be any doubt as to the correctness of his line, Hanchitt's next course must entirely dissipate the same, for we find him terminating his next course, in the Ottawa and Geneva road, upon the *identical* point mentioned in State road report, *without even the variance of a link of a chain*.

But it is said, that the minutes of this State road, do not require a jog at the town line, between Aurora and Sugar Grove, and that this road is opened and fenced from the point of intersection with the Aurora and Batavia road west, upon a line intersecting the north and south road by Tanner's house, at a point four or five rods further south than where Hanchitt's line would intersect said road. But what does this prove? Simply that there was a departure from the true line in opening this road across Aurora, amounting in the distance of two or three miles to four or five rods. And it is not strange that such should be the case when we consider that the same might have been opened upon a line indicated by some compass, as being S. 88 deg. W. having no regard to where they crossed the town line between Aurora and Sugar Grove, whereas if they had had reference to the point of striking said line, it would have produced a slight change in the course of the road. Or what is quite as probable they may have been misled by the old County road survey, which it will be remembered is claimed to run from the same point in the Aurora and Batavia road, and upon a course minuted as the same as yet crossing the town line at a point a few rods further south. But whatever may have been the course of the departure of the road, as opened, from the true line it matters not, for it cannot be claimed that because the road is not opened upon the precise line as laid, to the north and south road, past Tanner's, that therefore when the balance of the road was opened, it also should be opened off of the proper line. If we in the portion of the road opened, and used by us, are upon the line of the road as it should be, it matters not whether other portions of the road are upon the line or not.

There is one other matter which was urged as evidence, that we were not upon the right line; it was simply this, that Hanchitt's line extended to the point of intersection of the Aurora and Batavia road would strike that road above the point where it should cross the same. This point has been answered before, in saying that the variation of the course of one-fourth deg. from the town line to the Aurora and Batavia road would strike upon the proper point, or four rods from the same, which when we consider the variation of the compass, as was said before, shows the point made to have really no point in it after all. For it is not only possible, but probable, that the course between the two points covering a distance of two or three miles, as run upon two different times, by different men and different compasses, might not agree within one-fourth of one degree. And because that the course as indicated by Wilder's compass, between two known and fixed points in the line of this survey, comes by one-fourth of one degree from the course indicated by the compass of Brooks, in his survey of this road fifteen years ago, it is sought to establish from this, the fact that we in crossing the town line at the point specified in the minutes of the old survey, are not upon the proper line.

We have thus touched briefly upon all the noted points of evidence of the Plaintiff, tending to show the incorrectness of Hanchitt's line, and it will be seen that many of them are not of such a character as to warrant the least inference as to the incorrectness of our line, while the balance which if unexplained could have no greater force than merely to raise a doubt in the matter, are so clearly shown to have reference to and are indicative of the line of another and distinct survey. On the other hand, the evidence shows a complete agreement between Hanchitt's line and the old State road survey in all the essential and prominent points, to wit, 1st. The 15 chain point in the west line of Aurora. 2nd. The 8 chain point in the north line of Sugar Grove. 3rd. The old turnpike at Lake Slough. 4th. The claim line between Thompson's and Simmons. 5th. The point in the Ottawa and Geneva road. And it is impossible to discover what the Jury saw in the testimony given in this case, that induced them to find the Defendants off the true line of the road, and therefore trespassers upon the

Plaintiff's premises. And the only way in our mind to account for the strangeness of the verdict in this case, and at the same time to presume the integrity of the Jury, is to say they wholly misapprehended the nature and effect of the evidence adduced on the trial.

Again, on assuming that the Jury understood the testimony presented to them on the trial of this case, the only possible way to account for their decision, is to say that they wholly disregarded the law of the case as presented in the instructions given for the Defendants. The second instruction is, that *fixed points* and monuments must control courses and distances whenever there is a discrepancy between them. Now then apply the above principle to the facts in this case. 1st. There is a point specified or fixed in the west line of Aurora at which this road was to cross, the evidence is that the road as now used crosses at that point. It is also claimed that the course S. 88 deg. W. would strike south of that point, and that being the course of the road, therefore we are wrong, the road does not cross there—thus disregarding the *point* specified, for the sake of saving the *course* given. A direct violation of the Defendants' second instruction. But it is not so much to be wondered that a Jury should take this course, when the Plaintiff's witness Wilder did the same thing, for the sake it is assumed of showing Hanchitt's line not to be the true line of State road. What is here said in regard to the 15 chains point is true also in regard to the 8 chains point. Hanchitt's line being upon the precise spot mentioned in the State road report, and this road being upon the identical points mentioned, as being in the line of the same—and having done all the law requires on opening the same, and even more, having paid or offered to pay the Plaintiff damages which he did not claim or desire when this road was laid, with what propriety were these Defendants found guilty?

The second instruction given by the Court below, on the part of the Plaintiff is clearly incorrect, as a legal proposition, and calculated to do injury to the Defendants, and therefore should not have been given. And if our notions of its erroneous character are correct there is presented in this one instruction, an error on the part of the Court below of sufficient magnitude to warrant a reversal of the Judgment in this case. The instruction is as follows:—"The Jury are instructed that if they believe from the evidence, the Defendants Banker, Beyer, and Ruckdestell were seen cutting out this timber 2 or 3 times, this is presumptive proof that they did all the cutting on the premises of Tanner." It will be seen on reference to the testimony, that the Defendants named in this instruction, were seen cutting timber upon the premises of the Plaintiff in the township of Sugar Grove, and in that township only. It will be borne in mind that the land of the Plaintiff lay in three different towns—Aurora, Sugar Grove, and Blackberry. Also, that the line of this road in controversy, on entering the town of Blackberry, passed off from the premises of the Plaintiff, and on to the premises of some of the Defendants, and that after passing some distance across the lands of these Defendants, the line again entered upon the premises of the Plaintiff, situated in the town of Blackberry. The timber alleged to have been cut was situated in the township of Sugar Grove, and upon the land of the Plaintiff in Blackberry, separated as before remarked, upon the line of road, by the intervening farms of two or three of the Defendants. Now then the instruction, in connection with the testimony, is in effect saying, that the fact that the 3 Defendants named, cut the timber of the Plaintiff in the town of Sugar Grove is presumptive proof that they also cut that upon his premises in the town of Blackberry. In order to determine fully the meaning and extent of the instruction, it will be necessary to examine and determine what is the correct legal meaning of the term or words, "presumptive proof," used in the instruction. And first of the word "proof." The term proof is often confounded with that of evidence, and applied

to denote the *medium* of proof, whereas in strictness it marks merely the *effect* of evidence; evidence denoting the *means* by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. When the result of evidence is undoubting assent to the certainty of the event or proposition, which is the subject matter of inquiry, such event or proposition is said to be *proved*: and according to the nature of the evidence on which such conclusion is grounded it is either *known* or *believed* to be true. *Proof* then is that quantity of appropriate evidence which produces assurance or certainty. Evidence is therefore as different from proof, as cause from effect.—Wills on Cir. Ev. page 16, and note.

It appears then from the definition and legal meaning of the word proof, that the extent and effect of the instruction under consideration, (unless its effect shall appear to be modified by the adjunct presumptive,) is to say that the fact, that the Defendants named were seen cutting the timber of the Plaintiff in Sugar Grove, is that quantity of appropriate evidence which should produce assurance and certainty, that they also cut the Plaintiff's timber in Blackberry, which to our mind is an assumption on the part of the Court, to dictate to the Jury, as to weight and effect to be given by them to circumstances appearing in evidence on the trial. But it remains to be seen what is the meaning of the word presumptive, and how far, if at all it modifies or changes the meaning which we have already given to the instruction.

The term *presumptive* is frequently used as synonymous with circumstantial evidence, but it is not so used with accuracy. The word presumption *ex vi termini*, imports an *inference* from facts; and the adjunct presumptive, as applied to evidentiary facts *implies* the certainty of some *relation* between the facts and the inference or circumstances.—Wills Cir. Ev., 32. If then presumption means an *inference* from facts, presumptive proof can only mean proof by inference from facts, but none the less *proof* because inferred from other facts. Or in other words the adjunct presumptive simply expresses the *kind* of appropriate evidence a proper quantity of which produces assurance and certainty, and which when such results are produced is called proof. If we are correct in our ideas of the meaning of this word presumption, then it was no other effect in this instruction than to express the kind of proof referred to, thus leaving the instruction to mean, as stated before, simply this; if the Defendants named in the instruction were seen cutting the timber in one place upon Plaintiff's premises, then this is the quantity and the appropriate evidence to produce assurance and certainty that they did the cutting upon the Plaintiff's premises elsewhere.

Nor will it avail the Plaintiff in attempting to sustain this instruction to say, that the term presumptive proof as here used was intended to mean simply circumstantial evidence. If it was intended by the party and the Court to mean simply circumstantial evidence, why did they not so write the instruction? But having used the words "presumptive proof," the Plaintiff can not now claim that he did not mean, by the words used in the instruction, what was their legal import, but meant to convey to the Jury an idea perfectly legal and proper to be given by the Court as an instruction. And because the idea which he meant the Jury to take from the instruction was correct, therefore the instruction even if not expressing the idea meant to be given, ought to be sustained. Jurymen are supposed to be sensible men, and to understand the meaning of words, and are in fact, presumed to know the legal meaning of words as used in the law. An intelligent Juror on reading this instruction as given, or reading that certain facts are "presumptive proof" of the existence of a certain other fact, says immediately to himself, there is more meant by this term than simply that the existence of certain facts has a tendency to prove the existence of certain other facts.

In short this word proof means that quantity of appropriate evidence which should produce assurance and certainty, and therefore by the direction of the Court, I am bound to find that the named Defendants cut the trees in Blackberry if I find they cut those in Sugar Grove. Thus it will be seen the Jury from the improper use of the words "presumptive proof" as used in the instruction, are under the necessity of finding the Defendants guilty of a trespass which they did not commit, and of which the Jury would not have found them guilty, if it were not for the improper use of the word proof in the instruction. But admit for the sake of argument, that the word proof as used in the instruction means simply evidence, and that the Jury gave it that construction, then we say, that the instruction is erroneous. The law as applicable to the facts proven and supposed, as a basis for the instruction is not correctly stated. What then is presumptive evidence? When the facts proved are not the precise facts in issue, and the Jury are to come to the conclusion upon the facts in issue by an act of reasoning from those other proved facts, the evidence in such case is said to be presumptive evidence.—1 Phil. Ev., 598.

A presumption is a probable inference which our common sense draws from circumstances usually occurring in such cases.—1 Phil. Ev., 599. Or as is expressed by another, a presumption is an inference as to the existence of a fact not actually known, arising from its *necessary* or *usual* connection with others which are known.—Starker Ev. It follows therefore that the *ground* of all presumption is the *necessary* or *usual* connection between facts and circumstances. 1 Phil. Ev. 599, Note 2. According with the above definition of presumption, the Courts have from time to time made decisions or promulgated rules, so to speak, which are or ought to be held to govern and direct the mind in arriving at the proper inference or presumption, from the facts proved. One of these rules is stated thus: "A necessary and invariable connection of facts is not required; it is enough if one fact is *ordinarily* and *usually* connected with another.—3 B. & A. 890. And again thus: That the fact to be inferred *often* accompanies the fact proven is not sufficient; it should *most usually* accompany it; and I would say in the absence of all circumstances, that it should *rarely* otherwise happen.—3 Hawk, 122 & 3, and Cases cited in Note; page 598, Phil. Ev.

Now then let us see how far the facts proven in this case on which this instruction is founded, warrant the inference or presumption of the existence of those facts claimed by the instruction to be ~~the property injured~~ *properly injured*

The fact proven is, the Defendants cut Plaintiff's timber in the opening of this road in Sugar Grove. The deduction claimed and assumed by the instruction to be proper is, that therefore they did the cutting in the opening of the same in the town of Blackberry. Applying the rules before given for forming an inference to the facts proved, we ask is the deduction proper? Does it, in the language of the rule before given, *most usually* follow, that because a party open a road in one town that therefore the same party must have opened the same in an adjoining town? Are the two facts *ordinarily* and *usually* connected together? Are *inferences* of such a nature as was said by Henderson, delivering the opinion of the Court, in the case, Hart vs. Newland, 3 Hawkins, 122, that they could *rarely happen otherwise*? If they were such the inference or presumption was properly taken, otherwise not. If the inference is properly made, and the instruction is correct, by the same course of reasoning might it be said that because the Defendants were cutting the timber of the Plaintiff in the opening of a road in one town, therefore they cut the timber of the Plaintiff lying on the line of the road in the several towns between the Steam Mills in Cook Co. and Dixon, provided the Plaintiff owned timber in the various towns which had been cut.

Again, there are connected with the facts proven, and on which this instruction is based, other facts which cannot be disconnected therefrom, which make the inference or presumption sought to be established by this instruction, the more improper and untenable.

In the 1 Wash. C. C. Rep. 272, the Court says: The circumstances should be strong in themselves—should each of them throw light upon and prove the other: and the result of the whole should be to leave no doubt upon the mind that the offence had been committed, and that the accused and no other could be the person who committed it.

The principle derived from the above is, that the inference should be the result of the whole facts properly belonging together.

Connected with the fact that cutting was done on Plaintiff's premises, was the fact that the same was done by order of the Highway Commissioners of Sugar Grove township. Therefore all the cutting *proved* to have been done by the Defendants, being done by the order of the Highway Commissioners of Sugar Grove, it is to be presumed that no cutting was done by the Defendants, except such as was cut by order of the said Commissioners. Again, aside from the evidence, it is to be presumed that the Highway Commissioners of Sugar Grove ordered no timber cut in Blackberry, which was beyond their jurisdiction, and to that effect was the evidence. Now then the cutting being done by the direction of the Commissioners, and by their direction only, and they having directed no timber outside of the town of Sugar Grove to be cut, it follows, that these facts which are connected with and are a part and parcel of the facts on which the inference of Defendants having cut this timber in Blackberry is attempted to be founded, taken in connection with the fact of cutting by Defendants, (and they must be so taken, according to the rule as above,) utterly preclude the possibility of the inference, as attempted to be established by the instruction; and therefore we say, the instruction being clearly erroneous, in whatever point of view it is examined, and being of such a nature as was calculated to injure the Defendants, it was error in the Court to have given the same.

To the third instruction given on the part of the Plaintiff it is insisted, that while the same may be correct, as an abstract principle of law, yet the same was not warranted by the facts appearing upon the trial of this case. There is not a particle of evidence that any malice existed, or was shown on the part of the Defendants during this entire road controversy; on the contrary, it appears that a portion of the Defendants acted as public officers in the fulfilment of what they supposed to be their duty; and the evidence shows how very careful they were to ascertain the precise location of this road previous to opening the same. The evidence also shows, that the other Defendants acted as the agents or servants of the Highway Commissioners, in the cutting the timber, and opening the road, and that afterward they traveled simply as ordinary travelers, removing only such obstructions as they found in the way, claiming that they had a highway, and they meant to keep it.

The Court erred in refusing to give the first instruction asked by the Defendants in the words as asked. It is conceived that if certain points were *specified* in the State road report as being in the line of the same, the presumption is that they were *fixed* upon as points in the line of the road. But whether the identical point specified, or some other not so specified were fixed upon by the Commissioners, it matters not. They have made a report of the location of said road: the report specifies certain points as being in the line of said road; we have opened the road upon the point specified: now then when sued in trespass for thus opening and using said road we ask the Court to instruct the Jury, that if

certain points are specified as being in the line of said road, they must have regard to those points in determining the location of the road. The Court says, but the Jury must believe that those points were fixed upon by the Commissioners before you can regard those points. This is stating the effect of the instruction. The Jury acting upon the instruction as given, because they don't believe perhaps that the distance from the north line of Aurora, as specified in the minutes, was ever measured, therefore the point was not fixed upon, and they are not to regard it, although specified in determining the location of this road.

Now then we apprehend that the record of the location, as filed by the Commissioners is evidence of the location of the road in controversy; if so, the first instruction as asked by the Defendants was a proper one to be given, and the Court ought not to have refused to give the same as asked—ought not to have so modified the same, as to open the door to the Jury to disregard all or any of the points specified in said report, simply because they might not believe from the evidence that the same were even fixed upon.

But again, there is another reason why a new trial should have been granted in this case, and which reason is in itself sufficient to warrant a reversal of this Judgment, even if nothing else appeared erroneous from the record.

The verdict is a joint one against the Defendants Ingham, Banker, Beyer, and Ruckdestell. The verdict must have included damages for the cutting of the Blackberry Grove, as well as that in Sugar Grove. There was not a particle of evidence tending to show that Ingham had any thing to do with, or was in any way privy to the cutting done in Blackberry.

If the above is true, then the Judgment being against the Defendant Ingham, as well as the others, is erroneous, for the reason, as observed by Lord Kenyon, in a similar case, "a Defendant is subjected to damages for a trespass which he never committed."—See 3 Esp. N. P. Rep. 203; 16 John's, 215; 18 Verm. 360. In the case of Mynak vs. Downer, 18 Verm. 360, the Court says: "if several persons are made Defendants, and the Plaintiff proves several distinct acts of trespass, in some of which a part only of the Defendants were concerned, he can only recover against all the Defendants for those acts in which all participated." Now then that the verdict included damage to Plaintiff's premises there can be no doubt, in fact we are bound to presume that to be the case, for the reason that the evidence showed that the Defendants Banker, Beyer, and Ruckdestell did cut the timber of Plaintiff in Sugar Grove township, and the Court instructed the Jury as in Plaintiff's second instruction—that if they believed from the evidence the Defendants Banker, Beyer, and Ruckdestell were seen cutting out this timber two or three times, this is presumptive proof that *they* did *all* the cutting on the premises of Plaintiff. The Jury were bound to follow this instruction; it is to be presumed they did, and if they did, it follows that they found the Defendants named in the instruction guilty of the Blackberry cutting, and if guilty of the cutting, it is to be presumed they assessed damages for the same as a part of their verdict; and the verdict being against Ingham also, it follows as was said before, that here is a Judgment against Ingham for a trespass which he did not commit. We repeat, there is not a particle of proof that Ingham had any thing to do with the opening of this road in Blackberry; and if there is proof that in his acts in this road controversy in Sugar Grove, he acted in his official capacity, and in that capacity ordered this timber cut, and this road opened in Sugar Grove only; then we see the proof expressly negatives the idea that Ingham had any thing to do with this road in Blackberry, and cannot lawfully be saddled with a Judgment for damages to Plaintiff, by reason of the attempt of any one to open a road in an adjoining town.

There are other errors assigned than those referred to in the argument, but we do not think it necessary to go into a lengthy discussion of those points, for if we are correct in the view of this case thus far, more than enough has already been presented to show that the Defendants ought to have a new trial in this case.

PLATO & SMITH, *Attys. for Appellants.*

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Samuel Ingham et al  
Vs

Wm A. Danner  
Brief of points & authorities  
and  
Arguments.

For Plaintiff in Error.

Filed May 17. 1842  
J. Leland  
clerk