No. 14814

Supreme Court of Illinois

Comm'rs of Highways, Town of Lyons

vs.

People ex rel. Kilham et al

71641

STATE OF ILLINOIS.

SUPREME COURT,

THIRD GRAND DIVISION.

No. 215

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

998!

Com of Highways
vs
Pope

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Supreme Court of Illinois.

The People Ex. Rel.
Samuel Killham, et al,
ads.
The Commissioners of Highways of
the Town of Lyons,

Mandamus.

POINTS AND AUTHORITIES OF RELATORS

BY

GARRISON & BLANCHARD,

Attorney's.

This matter was heard before the Judge in the court below, without a jury. The defendants introduced no evidence whatever. There is no dispute of facts.

The Relators feel dissatisfied with the printed Abstract of the record, and therefore think it their duty, to make a short statement of the facts of the case; and therewith insert the material orders which the appellants have omitted to print in full, although they were careful to insert in said Abstract, every objection they made thereto.

The Relators own adjoining farms in the Town of Lyons. In the year 1859, by the improvements and fencing of their neighbors, they found their accustomed prairie Road fenced up, and themselves and families cut off from a public Highway, and from schools and market. They then with their neighbours and others,

who, like themselves had been fenced in, petitioned the commissioners of Highways of the Town of Lyons, for a public Road, which was bitterly resisted by those who had thus fenced them out from the Public Highway leading to Chicago and to market. As the Desplain river is to the East and South of Relators, unless they could obtain a public Highway to the Chicago and Joliet Road, they would be entirely cut off from any public Road whatever.

The Petition was duly signed, presented, and notices thereof duly and properly posted. And the Commissioners Feb. 19, 1859, did act upon the same; and solely upon the ground that the Damages would be heavy, refused to lay out and open said road; not for any irregularity in the proceeding; for every step had been Regularly taken. See Brown's evidence, page 71 of Record. From said order, refusing to lay out said Highway, these Relators (within thirty days thereafter as required by statute Scates 368, sec. 9. March 18, 1859) appealed to three Supervisors of the County of Cook. This Appeal was taken by serving a written notice on the Town Clerk of the Town of Lyons, who by Law makes the selection of said Supervisors. (See Scates Comp. 368, sec. 9.)

The Town Clerk selected three Supervisors viz.

H. Wilmarth of Barrington, S. S. Campbell of Orland, and William White of the Town of Niles. These Supervisors, upon being duly notified, fixed upon the 11th day of April 1859, and the Town Clerk's office of the Town of Lyons, as the time and place of hearing said Appeal. Of said time and place due and seasonable notice was served on the said Commissioners, and on three of the Petitioners for said Road; on which day but two of said Supervisors were present; and there being so much water on the ground, that the route could not be viewed, the case was continued to the 9th day of May A. D. 1859, on which day, all the parties being duly notified and all present, (the Commissioners even appeared with their Attorney), the Supervisors proceeded to hear the proofs, &c., and reversed the order of said Commissioners, and laid out the Road. Upon the reversal the Law makes it their duty to lay out the Road, (Scates Comp., page 385 sec. 15,) and assess the damages. They both laid out the Road and assessed the damages to

the property owners.—They also caused the Road to be surveyed and plated by the County Surveyor. At the time the survey was being made the Commissioners were along, and saw the posts and stakes drove and marks made, showing the center line of said Road. After survey and plat was made, the Supervisors, on the 21th day of June 1859, made their orders, laying out said Highway, and assessing the damages. These orders were filed in the Town Clerks office, June 23, 1859. (The order Reversing the order of the Commissioners and laying out said Highway is herewith printed in full, and the order assessing the damages is at page 24 and 25 of Record not printed in Abstract.)

The laying out of the Highway, causing the survey and map thereof to be made, and making and filing the orders, was all the Supervisors could do towards opening said Road, under the Statute (Scate's comp., page 356, sec. 15). The Commissioners are then required to open said Road as if laid out by themselves. And the Commissioners so regarded their duty, for they, in September 1859, served written notices on the owners of the Land over which said Road passed, to remove their fences within sixty days. This was as required by Law. (Scate's Comp., page 357, sec. 24. See also the evidence of John Brown 70 of Record,) And after the expiration of the 60 days after the service of said notices, went to open said road. And then refused to do so, *as "Polk Vial and Holten would stand between them and all damage."* This is the only excuse they then rendered for wilfully omitting to discharge their sworn duty. See page 69 of Record. They have ever refused to open it since, and say they never will until compelled by Law; and have resorted to all kinds of subterfuges, to evade doing their duty, and wrong the Relators out of their road.

This suit was commenced Feb. 4th, 1860, by filing the petition for mandamus, setting forth in full and particularly the above facts, the orders, &c., and that Relators had no other remedy at Law; and the alternative writ was issued to Bilby Eaton and Havens, then Commissioners, to compel them to open said road. Havens having succeeded John Brown in office.

The followings are the orders on which the writ is based viz.

(Copy of order on Back of Petition by Commissioners, refusing to lay out Highway.)

"Whereas upon the application of William Davis, Samuel Killham, Eben Eaton, Joseph Evans, Richard Evans, George Savage, Alfred Ward, Thomas Cook, Daniel Quinn, James Michie, Lyman Smith, Edward Welch, legal voters, residing within three miles of the route hereinafter described for a public highway, a copy of their Petition having been first duly posted up as required by law;

We, the Commissioners of Highways of said town, did on the 9th day of February, 1859, personally examine the route proposed in said Petition for a road; to wit passing over lands owned by H. H. Polk, P. O'Donal, James Michie, William Davis, S. Killham, S. Vial, W. Polk; and having before fixed upon a time and place, when and where we would meet to hear any reasons for or against laying out the same; and having caused writen notices thereof to be posted up in three of the most public places in said town, eight days previous to the time of such meeting; and having met at the time and place appointed for hearing such reasons; and having heard such as were offered for or against the laying out of said road; and we the Commissioners consider that the damages is more and over above than the benefits of the Public; therefore we conclude not to grant the prayer of said Petition.

Town of Lyons, Feb. 19., 1859.

M. H. Eaton,
Robert Bilby,
John Brown,
} Commissioners of Highways."

"Petition for a Road through H. H. Polk and Commissioners decision.

Filed February 19, 1859."

"I certify that the above is a true copy of the original as filed in this office.

George M. Fox, Town Clerk."

(Copy of notice of Appeal.)

"To Joseph Evans, Clerk of the Town of Lyons in Cook County.

The undersigned William Davis, Samuel Killham, and Edmund Kane, of the town aforesaid, feeling themselves agrieved by an order made by the commissioners of highways of said town, on the nineteenth day of February 1859, in refusing to lay out a highway in such town, do hereby appeal to the decision of three Supervisors of the county of Cook aforesaid, to be selected by you, agreeable to the statute in such case made and provided; which order of said commissioners, was filed in the Town clerk's office of said town, on the nineteenth day of February 1859; a copy of which is herewith annexed, in and by which, the road in question, and the proceedings of said commissioners, will more fully appear.

The grounds upon which this appeal is made is the refusal of said commissioners to lay out said road; and said appeal is brought in relation to the laying out said road, and to reverse entirely the determination of said commissioners. The undersigned therefore ask that you, as Town Clerk of said Town, will proceed according to law and select three Supervisors to hear and determine said appeal.

Dated March 18, 1859.

WILLIAM DAVIS,
SAMUEL KILLHAM,
EDMUND KANE.

Filed March 18, 1859.

I certify the within to be a true copy of the original as filed in the clerk's office.

GEORGE M. FOX, Town Clerk."

(Copy of order of Supervisors Laying out Highway.)

STATE OF ILLINOIS, }
Cook County. }

Whereas Samuel Killham, Wm. Davis and Edmund Kane, of the town of Lyons in said county, did on the 18th day of March A. D. 1859, appeal to us from an order and determination of the commissioners of Highways of said town, contained in the order of said commissioners deposited with the Town Clerk of said Town,

and filed the 19th day of February 1859, a copy of which said order, as well as all the papers before us in said appeal, are hereunto annexed, and we having met on the 11th day of April A. D. 1859, at the Town Clerk's office, at one o'clock P. M., to hear the proofs and allegations of the parties, being the time and place aggreed upon by us, when and where we would meet to consider said appeal; and as but two of us were present, and so much water on the ground that we could not view the route, the case was continued to the 9th day of May A. D. 1859.

1859, May 9th, the parties appeared at the Town Clerk's office, agreeable to adjournment, and it appearing that said Commissioners of Highways, and three of the Petitioners in said case, had been duly notified of such meeting, as required by law, we did proceed to hear the proofs and allegations of the parties, and to consider said appeal; and we being now fully advised in the premises do adjudge order and determine, that the order and determination of said commissioners of highways, be, and the same is, in all things, reversed; and do order and determine, that the road be and the same hereby, is, laid out and established as follows to wit:

Commencing two chains and ninety three (2, 93) links south and on a course North sixty degrees and forty five minutes East, (N. 60° 45″ E.) from said last mentioned point twenty one chains and twenty links (21, 20) from the quarter section corner, on the West side of sec. 15 T. 38 R. 12 in the center of the Chicago and Joliet Road, so called, and running from the center of said Chicago and Joliet Road, S. 12° 5′ E., 7. 66 chains to the $\frac{1}{8}$ section stake, in the East and West quarter section 15 aforesaid, as standing; and running thence south, on the $\frac{1}{8}$ section line one hundred and thirty chains and thirty seven links, (130, 37); variation of needle used (6° 45″ E.).

The above distances are for the center of the road, which is certified by the County Surveyor.

It is, therefore, ordered and determined, that a road be, and the same is, hereby laid out and established, according to said survey and plat hereto annexed and made a part of this order, which

is hereby declared to be a Public Highway, four rods wide, the line of said survey being the center of the road.

In Witness thereof we have hereunto set our hands and seals this twenty first day of June A. D. 1859.

HOMER WILMARTH, Supervisor of Barrington [seal].
WILLIAM WHITE, Supervisor of Niles [seal].
S. S. CAMPBELL, Supervisor of Orland [seal].

Filed June 23, 1859.

J. EVANS, Town Clerk.
Recorded J. EVANS.

I certify the within to be a true copy of the original as filed and recorded in this office.

GEO. M. FOX, Town Clerk.

(Stipulation to amend Record.)

SUPREME COURT.

The Commissioners of Highways of the Town of Lyons
vs.
The People Ex. Rel. SAMUEL KILLHAM, WILLIAM DAVIS, and EDMUND KANE.

} Of April Term 1865. No. 215.

The Parties, make the following Stipulation, to save expense, and certiorari, to the Superior Court of Chicago, to amend the record filed in this cause.

It is Stipulated, from the order, dated March 5th, 1860, on page 37 of the Record, vacating the road in question, an appeal was taken.

And from the order, laying out a new road, dated March 26, 1860, mentioned on page 38 and 39 of Record, (a plat of which new road is upon page 47 of Record) and being the same order, which is given, in the Record as "Exhibit C" on pages 44, 45 and 46, and there dated as of the 31st of March A. D. 1860; another appeal was duly taken.

And that the Relators, upon the hearing, showed by legal evidence, and Town Records, each of said appeals, had been duly taken, to three Supervisors of the County of Cook, in each case; and upon the hearing of said appeals each of said orders, were reversed.

This Stipulation to be filed as part of the record in this cause. April 12, 1865.

GARRISON & BLANCHARD,
Attorneys for Relators.

J. S. PAGE,
Attorney for Appellants.

I.

We insist that the Commissioners should have proceeded and removed the fences, and opened the road. The Relators have a lawful right to said Highway. They have exhausted all their legal remedies and they are entitled to the writ of Mandamus to compel the Commissioners to do their duty.

Mandamus is the proper writ to compel the Commissioners to act.

Tapping on Mandamus 58 and 59.
The People vs. Collins 19 Wendell 56.

The road was lawfully laid out.

The above order of the Commissioners is conclusive evidence in this cause, that the Commissioners had full jurisdiction, power and authority to act.

Neely vs. Brown 1 Gil 10.
Ferris vs. Ward 4 Gil 499, 501.
Dumoss vs. Francis 15 Ill. 543.
Wells vs. Hicks 27 Ill. 343.

The above notice to the Town Clerk, his selection of three Supervisors, notice and certificate to them of such selection, and notice to the Commissioners and three petitioners, of the time fixed for hearing, perfected the appeal, and the law gave them full juris-

diction. Scates Comp., page 368, sec. 9, 10; also page 355, sec. 11.

Coms. of Eden vs. Holdridge 24 Ill. 39.
Keech vs. the People 22 Ill. 478.
Warne vs. Baker 24 Ill. 353.

The order of the Supervisors is conclusive in this cause. It shows, that they had acquired jurisdiction, and had full power and authority to act, and it legally establishes the road. Such order cannot be attacked collaterally.

Wells vs. Hicks 27 Ill. 343, 345.
Galena and Chicago R. R. vs. Pound 22 Ill. 399, 414.
Nealy vs. Brown 1 Gil 10.
Town vs. Town of Blackberry 29 Ill. 137.
Dumoss vs. Francis 15 Ill. 543.

And they, the Supervisors too, were judges of the preliminary proceedings.

Wells vs. Hicks 27 Ill. 345.

The Commissioners cannot say their was any irregular proceedings prior to their order. They acted. They held the proceedings valid.

Coms. vs. Putnam 7 Wendell 266.

By perfecting the appeal and notices, the Supervisors became a Tribunal of exclusive and final jurisdiction; and the only way the defendants could take advantage of irregularities, prior to their order, if any occurred, is by certiorari.

People vs. Wilkinson 13 Ill. 660.
Com'rs. of Sonora vs. Sup'rs Carthage 27 Ill. 143.
Galena and Chicago R. R. vs. Pound 22 Ill. 414.

The damages, $100, were assessed the same day the road was laid out, to H. H. Polk the only person, to whom damages was allowed.

See order page 24 of Record (not printed in the Abstract).
See also the Testimony of S. S. Campbell, page 72.
See also the Testimony of A. Ward, page 71. The $100 so as-

sessed was duly collected and H. H. Polk was one of the Board who audited the same; even the money has been offered to him.

Norton vs. Studley 17 Ill. 556.
Dunning vs. Mathews 16 Ill. 308.

An officer who has a duty to perform which is directed by a competant tribunal cannot decide or examine as to anterior proceedings — neither fears nor doubts excuse him.

School District vs. Tremont 33 Maine 482.
The People vs. Collins 7 John R. 549, 553.

II.

The Relators by permission of the Court had the right to amend the alternative writ of Mandamus, in the way they did.

Tappan on Mandamus, page 334, 330, 390, 368, 59, or. Law Library Vol. 51, page 378, 374, 428, 408.
The People vs. Ransom 2 Comstock 490—the "writ is considered as a declaration."
Canal Trustees vs. the People 12 Ill. 248—says "It answers the same purpose as the declaration in ordinary actions."
Even after return "the same proceedings may he had as if an action on the case had been brought" 3 Blackstone Com. 265.
The Statutes treats the same as an action.
Purple's Statutes 734, sections 3, 4 and 5.

After Return you cannot take advantage of formal defects in the alternative writ.

Bank of Albany vs. Com'rs. of N. Y., 10 Wend 26.
Canal Trustees vs. The People 12 Ill. 248.

Both the original and amended writs were good. The amended writ only contained a more full and explicit description of the Road. But the same road is setforth clearly in the original, no material fact was wanting in the original writ, and the writ was amended because the Court below, thought the description of the Road ought to be repeated in the Mandatory clause.

III.

The Relators commenced their proceedings within a few months after the laying out of the Highway to compel to Commissioners to do their duty and open the same.

The Law gives to Relators for five years the right to said Road, even if laid out by Commissioners, see Scates Comp., page 364, sec. 17. We find no limitation when laid out by Supervisors on appeal.

It was the duty of the Commissioners to open the road, and as Relators right to the same does not expire within the year, even if the Commissioners terms of office expired, their Successors in office must discharge the duty and open the road.

The People Ex. Rel. vs. Collins 19 Wend 56, 68.
The Queen vs. Rochester 7 Ellis and Blackburn 925 or 90 Com. Law 909, 925.
The People Ex. Rel. vs. Champion 16 J. R. 60, 64.
Tapping 82, 106.

IV.

It will be seen from the record in this cause and the above Stipulation amending the same, that the real defendants, Bilby Eaton and Havens, as Commissioners, by their attorneys, have resorted to every objection to delay the action of the court; and that they so succeeded in delaying the action of the court, as they showed by their first answer to the original alternative writ, that they as Commissioners had vacated the road in question, and laid out a new road after the alternative writ had been served on them.

By the Stipulation it appears that Relators had to and did appeal. and by six other Supervisors, reversed their proceedings, and firmly established their just claim to the road.

This took time. Mr. Wilkinson the first Attorney died. The appellants have no ground to complain for delay of which they

were the cause. They waited a year making their return, and two more in dilatory motions and vain attempts to discontinue the road, and still another in this appeal, and now ask that because they have kept relators fenced up five years, they be excused.

It does not excuse them or their successors from doing their duty; and it would be truly unjust that Relators should lose their road because defendants appealed.

As we did not receive appellant's points, in season to note and print our objections thereto, see our writen argument in reply.

GARRISON & BLANCHARD,

Attorneys for Appellees.

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Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, 1865.

COMMISSIONERS OF HIGHWAYS OF TOWN OF LYONS,
Appellants,
vs.
SAMUEL KILLHAM, ET. AL.,
Appellees.

ARGUMENT OF J. S. PAGE, FOR APPELLANTS.

This is a petition for mandamus, by appellees vs. appellants, filed February 4th, 1860, to compel appellants to lay out a road in the town of Lyons. The petition alleges that the commissioners refused the road, and on appeal to three supervisors, the road was ordered by them to be laid out. Makes exhibits of the notices and proceedings. Alternative writ issued February 4th, 1860, returnable first Monday of said month. Peremptory writ allowed June 18th, 1864.

On the return of the alternative writ, the respondents filed their motion to quash the writ:

Filed April 26. 1865
L. Leland
Clerk

1st. Because there is no sufficient affidavit — p. 13 of record.

Chamberlain vs. Chicago, 25 Ill., 486.

2d. "There is no definite or sufficient description in said writ of the road to be opened, or of the fences to be removed.

"The rule as to certainty is laid down by Tapping on Mandamus, p. 322." Page 327—A party was required by the writ to attend, &c., "according to the directions of the act," held that the the generality of command was not qualified by those words, because it "required the defendants to look *dehors* the writ" to ascertain what was required. And same page, "Such accuracy is necessary, notwithstanding the writ may contain a recital properly stating and limiting the right," "because the defendant is not bound to refer to any part but the mandatory clause, in order to ascertain what is required of him." And, page 309 of Tapping, "they (the inducement and recital,) do not require so much certainty as the main averments, or mandatory clause of the writ, which should be expressed with precision and certainty, or the writ may be quashed."

Now, there is no pretense of any description, either in the mandatory clause, or in the body of the writ itself, of the road required to be opened. Page 32 and 33 of record, and 6 of abstract, contain all the description in the writ.

This motion to quash was filed February 6th, 1860, and overruled; and, January 15th, 1864, a motion was made to amend the writ, for this defect, chiefly. It was the right, therefore, of the commissioners to have the writ quashed on this motion.

February 13th, 1860, under the order of the Court, appellants made return consisting of nine causes or items, and June 5th, 1860, relators filed their plea, traversing all but the 8th and 9th, and demurring to these—(see p. 35 to 51). The 8th cause states that proper notices had been given, and on petition of forty voters, and a hearing, an order had been entered by them March 5th, 1859, discontinuing the said road sought to be opened by this writ; and the 9th cause states, a laying out of a new road in the vicinity the better to accommodate all.

The next step was the relators' motion to amend, January 15, 1864. Respondents objected, but same was allowed without terms, and exceptions taken. January 22d, 1864, amended writ filed, stating most of the facts as in the first, but adding a description and plat of the road, and which description is quite different from that in the order of the supervisors, laying it out, (compare p. 22 and p. 60,) and which are the commissioners to follow?

February 4, 1864, respondents filed motion to quash the amended writ, because—

1. Same is not authorized by law nor any order of the Court.
2. Writ is incorgruous and inconsistent.
3. It requires that to be done which, upon its face, is shown to be absurd and impossible.
4. It fails to show jurisdiction in the supervisors.

Formerly, no amendment was allowed after the return; but that rule is now departed from—Tapping, 334. But it it is added, "if the error in the writ be not one properly the subject of amendment, the Court may be moved that it be superceded or quashed."

We claim that while the writ may be amended as to inducements and recitals at almost any stage, the supplying the necessary description in the mandatory clause, and that after nearly five years, can not be allowed. If there can be any part of the writ "not properly the subjecct of amendment," this must be such. See the absurdity. The commissioners are excusable up to the time of the amendment, January 22, 1864. They are not, till then, told what to do. At that time the description is inserted, and they are then required to open that road, "or make return of this, our writ," "on the first day of the next term of this Court, to be holden on the first Monday of February, 1859,"—(p. 60.) True, they are required by the order of the Court, on allowing the amendment, to make return thereto by March 18th, but the alternative is not allowed them of opening the road in the mean time—Tapping, 283.

No part of the pleadings were, at any time, stricken out or withdrawn.

March 18, 1864, appellants filed, by way of amendment, a further return consisting of ten causes; and March 1864, the relators filed a paper, in some respects a general demurrer, and in others a general traverse—(p. 65). If it be considered a demurrer, then the sufficiency of the return is the only question, and this we submit without argument. But the paper has been treated as a general traverse to the amended return.

The first issue is upon the allegation in the writ (p. 53), that, January 17, 1859, the relators, and twenty others, legal voters, residing, &c., petitioned the commissioners to lay out the road. Issue was joined. The allegation is nowhere proved, but the contrary is proved by the petition itself. See record, p. 14. Mr. Kane, who is one of the relators, is not one of the petitioners. The pleadings are strictly as in personal actions. Tapping, 385, 386, 309, 348, "as the prosecutor is supposed to know his own title best, so he is bound by the terms in which he alleges it; therefore, if the title, as he states it, be denied by the return, it is enough."

The People vs. Finger, 24 Barb., 348.
Canal Trustees vs. The People, 12 Ill., 254.

It is sufficient if one cause be good. Tapping 360.

"By pleading to the return, the relators admitted that, upon its face, it was a sufficient answer to the case made by the alternative writ."

The People vs. Finger, 24 Barb., 348.

The issues raised under the 2d, 3d and 4th items in the return, amount to the same as hereinafter considered under the question of jurisdiction.

The issue under 7th item should have been for respondents. The report and survey did not particularly describe the road by metes and bounds, courses and distances, (see this description

page 22.) It is impossible to find the road by that description, and the relators, by entirely re-modeling the description in their amended writ, admit the fact.

The issue on item 8th, as to a demand or request, should have been for respondents, as their is no evidence at all to sustain it on the part of the relators; and besides, this is important in another aspect. The mandatory clause is, "that you do, without delay, give said Henry H. Polk written notice to remove said fences from said road, within sixty days from the service of the same, and in default thereof, to cause the fences to be removed and the road opened." That a demand or request should have been made, lies at the foundation of this writ. "It is an imperative rule of the law of mandamus;" must be "an express and distinct *demand* or request to perform it," "by the prosecutor to the defendant," "it being due to the defendant to have the option of either doing or refusing" "before an application shall be made to the Court;" "must be made *personally* to those from whom the duty is required," "not couched in general terms;" application should be to all.

Tapping, 283-4.

All the testimony as to this, is by J. Michie, p. 69; not meeting the requirements in any particular, either as to requesting removal of fences of Polk, or opening the road.

Demand should have been upon all the commissioners.

Tapping 283.

As to the 9th issue, it will be perceived, that according to the allegation in the amended writ, the supervisors "adjourned from time to time, until June 7th, 1859, when they heard the allegations and proofs, reversed the proceedings of the commissioners and determined to lay the road." This item of defence, in the return, is predicated upon that allegation in the writ. The relators attempt to prove this issue on their part by the order of the supervisors, which they introduced. But this order states that

they had the hearing May 9th, 1859; and there is no evidence of any proceedings June 7th, 1859, or of any notice of such. This issue then is clearly for the defendants.

Furthermore, it will be seen by a separate order, on page 24 and 25, that the supervisors considered the subject of damages at a still different time, to wit: on the 21st day of June, 1859. There is no evidence that they adjourned from the meeting of May 9th, and the parties had no notice of the subsequent meeting when their rights were adjudicated upon.

This Court in Bush vs. People, 22 Ill., 482, say "that the legislature had guarded the rights of the parties in interest with scrupulous care, so as to give them such a notice as would enable them to be heard before their rights should be effected by the determination of the appeal." "When the commissioners met to determine this appeal, their right to act depended upon the observance of the preliminary requirements of the statute, one of which was the services of the notices to the persons designated by the statute. So in McPherson vs Coms, 24 Ill. 39. "They (the parties) must have notice of the time and place by notice, as by a regular continuance, and an order made without such continuance is not binding on either party, unless present and consenting to the trial." "Nor had they, (the supervisors) at the previous times fixed for the hearing, regularly adjourned to meet at that time and place, and they, consequently, were not chargeable with either actual or constructive notice. They were not before the tribunal, and are not bound by the order of affirmance." For the want of jurisdiction of all the parties required by the statute to be before them on the trial of the appeal, they had no power to render a valid judgment."

That the parties had notice is not only not proved but disproved, and that by the record produced by the relators themselves. Aware of the defect, they, on the trial, introduced, against objection, witnesses to prove by parol, certain essential facts as to notices, and what was done at certain meetings, and in fact called one of the supervisors, and attempted by him, to qualify and contradict his own record as to hearing testimony and

what was done.—See testimony of Campbell, Evans, Michie and Brown. All this was incompetent.

People vs. Coms. 27. Barb 94.

It will be remembered that items 8 and 9 of the return to the original writ, (p. 37 to 47) were demurred to by relators. It does not not appear that there was a joinder. But, if, as was decided in Weatherford vs. Wilson, 2 Scam., 256, on pleadings similar to this, the demurrer is still undecided in the Court below, there is error in giving judgment in the issues joined.

But it may be claimed that, by what was treated as a general traverse, the relators waived the demurrers and put in issue said causes 8 and 9, and so it was treated on the trial. The respondents submitted the proofs of those points by the exhibits attached to his return, (see p. 37 to 47) which were not denied, but were attempted to be answered, by the introduction of the proceedings and order of three supervisors on appeal, reversing the order of the commissioners in vacating the road (p. 67). But these were irrelevant, as there were no pleas under which they could be received, being in avoidance merely.

The burden of proof is upon the relators; the return is to be taken as true until disproved.

People vs. Finger, 24 Barb., 341.
Carroll vs. Board of Police, 28 Miss. 38.

Neither the commissioners nor the supervisors had jurisdiction to lay out the road. They exercise a special and limited jurisdiction.

McPherson vs. Coms., 24 Ill, 40.
Ex Parte Clapper, 3 Hill, 458.

Scates Comp., p. 353, Sec. 2, states notice that "they shall cause a copy of their petition to be posted up in three of the

most public places in the town." The relators attached to their petition for mandamus, and read the same at the hearing as the only evidence of the notice given, and upon which the commissioner acted, the affidavit, a copy of which is on page 16, Exhibit C, and although the order of the commissioners recites that "a copy of their petition having been first posted up as required by law;" yet, that being a jurisdictional part, can be, and is, contradicted by record introduced by the relators themselves.

A copy of the petition was not posted, but "notices of a petition." The road therein described does not appear to be the one in question; nor were the notices posted in three of the most public places.

"It would be absurd to say that such finding was conclusive, when the very record would show that this finding was void for want of jurisdiction to find anything whatever in the case."

Goudy vs. Hall, 30 Ill., 116.
Dumors vs. Francis, 15 Ill., 546.
Nealy vs. Brown, 1 Gil., 10.
People vs. Commissioners, 27 Barb., 94.

Nor did the supervisors acquire jurisdiction. Sec. 11, p. 355, Scates' comp. prescribes the manner of acquiring jurisdiction. The relators attached to their petition, and read at the hearing, the notices and the affidavits of service by virtue of which the supervisors acted, (see p. 19, 20, 21).

The statute requires service by copy. The affidavits fail to show such service, or any service on all the three commissioners. The order of the supervisors, as in case of commissioners, states that at the adjourned meeting, the commissioners and three petitioners "have been duly notified of such meeting." But there is no finding as to the notice of the first meeting; nor does such notice comply with the statute, which requires "notice of the time and place agreed on," to be served "by delivering one to each commissioner," and the like on three commissioners.

See Fitch vs. Commissoners, 22 Wend., 134.
The People vs. Commissioners, 27 Barb., 99.

These proceedings for laying out roads, are liable to affect, materially, the interest of many parties, and notice is provided only to a limited extent, and to that extent, at least, it should be insisted upon. Nor is the letter or substance of the statute complied with by evidence showing that the commissioners and three of the petitioners happened to be present at the hearing. By requiring written notices to be served on the commissioners, and three petitioners, eight days before the hearing, it might be supposed that through them others interested would become notified.

The case of Wells vs. Hicks, 27 Ill., 345, will be cited in opposition. In that case there was nothing in the record to rebut the finding of the supervisors as to the notices; in this the notices introduced by the relators themselves, show their own insufficiency, as we have seen, and in this, also, as we claim there was no valid appeal taken.

The supervisors failed to acquire jurisdiction for another reason. The record (p. 9 and 10) states that the order of the commissioners, refusing the road, was made February 19, 1859, and that March 18, 1859, twenty-five days after, the petitioners appealed, and gave notice to the clerk to select three supervisors, &c.; and on same day the clerk selected the three supervisors to hear the appeal, &c. Scates stat., p. 354, sec. 8, provides that any party aggrieved may appeal withing thirty days. The appeal, therefore, could not be perfected until the expiration of the thirty days. Any person interested should have the entire thirty days in which he may appeal, and be heard by the clerk in the selection of the supervisors; otherwise, one person might, the next day after the order, perfect his appeal with the clerk, thus seizing the opportunity of pressing his own choice in the selection of the supervisors to the exclusion of fifty others who might, vainly indeed, claim the right the next day to have a voice in the appeal. Corley vs. Kennedy, 28 Ill., 146, sustains this view.

Scates 349 Sec 10

Again, sections 8 and 14, p. 354–5 Scates comp. state, who may appeal. He must be a petitioner, or agent, or owner of some

part of the land affected. But Mr. Kane was neither, and therefore could not appeal. But the appeal was by Kane, Killham, and Davis jointly, not by Killham & Davis.

The writ of mandamus should not be granted to "command a person to exercise a jurisdiction which that person is not most clearly and certainly appointed to."

Tapping 17, Rex vs. Ely, 1 W., Black. 58, 1 Wils, 268, Rex vs. Middlesex 9 A and E 540. "Ought not to compel commissioners to commit trespass." *Exparte* Clapper 3, Hill 458. 6 Bacon Ab. 432, will not will not grant writ where it will subject defendants to an action, "the event of which would be doubtful."

State vs. Jacobus, 2 Dutch., N. J. 135.
27 Barb. 94.

The issuing these writs is in the discretion of the Court, and not a matter of right. 16 Ill., 547. It is over five years since these proceedings were commenced. Issue was joined by the relators June 5, 1860. The next step taken in the case was their motion to amend, January 15, 1864—nearly five years of slumber. In the mean time, all the original defendants had gone out of office. As to refusal of the writ on account of laches, see

People vs. Seneca, Com. Pleas, 2 Wend., 266,
True vs. Melvin, 43 N. H., 508,

Where, in one case, a delay of one year, and in the other, of about two, was considered ground of refusal.

Besides, by sec. 17, p. 364, Scate's Comp., it is provided that the road "shall be opened within five years from the time of laying out the same. If not opened within the time aforesaid, the same shall be deemed to be vacated." By the order of the Supervisors, it appears the road was laid out either May 9th or June 21st, 1859.

Should the commissioners open this road, and be sued in trespass, if it would not be a clear case against them, would it not be one "the event of which would be doubtful?"

The Court will refuse the writ when it can see that it would be "fruitless," or "must ultimately fail," or will "be vexatious;" nor will they require that done "which is illegal," or "which cannot be legally enforced."

Tapping. 15, 16.

The Court below, in its final order, gave personal judgment for for costs against Brilby, Eaton and Havens, who were the commissioners at the time the first writ was served, in February, 1860, but who, at the time of the amendment of the writ, January 15, 1864, were, and must long have been out of office, as the Court knows judicially, as well as appears by the record. This is most unjust, as there was no description in the writ of the road to be opened, until the amendment of January 15, 1864, and they could not have been in fault.

J. S. PAGE,

Attorney for Appellants.

Supreme Court
The Commissioners of Highways
of the Town of Lyons.
vs
The People Ex Rel
Samuel Killam
William Davis &
Edmund Vain

Of April Term 1865
No 215

The Parties make the following Stipulation to save expense and controversy to the Supervisors of Chicago to Amend the Record filed in this cause

It is Stipulated from the Order dated March 5th 1860 on page 37 of the Record, vacating the the road in Question, an Appeal was taken And from the Order laying out a new Road dated March 26, 1860 mentioned on pages 38 & 39 of Records (a plat of which new road is shown page 47 of records) and being the same Order which is given in the Record as "Exhibit C" on pages 44, 45 & 46 and then dated as of 31st of March A.D. 1860 Also another appeal was duly taken And that the relators upon the hearing showed by legal evidence and Town records each of said Appeals had been duly taken to Three Supervisors of the County of Cook in each case And upon the hearing of said appeals each of said Orders were reversed — This Stipulation be filed as a part of the record in this cause

215 24

Supreme Court

The Board of Highways of the Town of Eaton

vs

The People Ex Rel

Stipulation Amending the Records

Filed April 12, 1865

Garrison & Blanchard Attorneys for Relators

S. L. Selden Attorney for Defendants

For Filing April 24 1865

L. Brandreth

Garrison & Blanchard for Appellants

SUPREME COURT OF ILLINOIS.

Third Grand Division.

APRIL TERM, A. D. 1865.

THE COMMISSIONERS OF HIGHWAYS, of the Town of Lyons, in Cook County, *Appellants*,
vs.
THE PEOPLE, ex-relatione, SAMUEL KILHAM et. al., *Appellees.*
} *Appeal from Superior Court of Chicago.*

ARGUMENT OF HAINES & STORY FOR APPELLANTS.

In this case a peremptory mandamus was awarded by the court below against appellants, directing them to open a highway alleged by appellees to have been laid out, by three supervisors on appeal from the decision of the commissioners of highways, under the provisions of Article 24, Township Act. Sess. Laws 1851 p. 71 *et seq.*

From the judgment of said court awarding said writ, this appeal is brought and a reversal asked because

I.

The proceedings of the court are irregular and illegal:

1. It is essential that a petition *duly sworn to* should be filed, before an alternative writ can issue.

People ex-rel. Chamberlain vs. *City of Chicago*, 25 Ill., 486.

In the case at bar the petition is signed by the relators, (appellees), *two of whom make their mark*, and there follows a purported affidavit wherein they *jointly* swear and, on oath, say they have heard and *read* the above "*bill*" &c. (p. 13, Rec. Abst p. 2.)

This affidavit was not signed by either deponents as the law requires.

1 Barb Chancery Practice, p. 603.

It is submitted that being *joint*, and not several, and the "*petition*" not being mentioned in it, perjury could not be assigned upon this affidavit, and it is in no sense a compliance with the rule.

2. The alternative writ was defective and should have been quashed on motion of appellants, and the refusal of the court to do so was error.

It is a well settled rule of law that the alternative writ of mandamus—which corresponds to a declaration in ordinary actions—must distinctly and specifically set forth all the facts relied upon by the relator as entitling him to his relief; this is requisite in order that they may be admitted, denied, or confessed and avoided or otherwise defeated by the respondent, in his return; it should also specifically point out the particular act or acts performance of which is sought by the writ.

Canal Trustees vs. *The People*, 12 Ill., 254, *and cases cited.*

The defendant is not bound to look beyond the manda tory clause to ascertain what is required of him.

Tapping on Mandamus p. 327.

And if the main averments are not expressed with precision and certainty, the writ may be quashed.

Id. p. 309.

The *first* alternative writ, in the case at bar, contained no description of either the road or the fences in question, (record pp. 32, 33, abstract p. 6,) and the mandatory clause simply directed appellants to cause "said fences" to be removed from "said road," and "said road" to be opened and worked, &c.

Appellants' motion to quash for these grounds (pp. 33, 34, record abstract p. 6,) should have been granted.

12 Ill. 254 *and cases cited.* Tapping on Mandamus 327.

The return to this writ, and issues taken thereon, the amended writ, motion to quash, and amended return have all been considered by our associate, Mr. Page, and need not be repeated here. We simply call attention to the important fact that, as there is no *legal presumption* when an alternative writ issues that the respondent will refuse to obey it, there is no excuse for the action of the relators (appellees) in this case in omitting, in the amended writ, to give appellants *the opportunity* of complying with its requirements, if so disposed.

This writ was *filed January* 22, 1864, and by its terms appellants were required to open "said road" (then described for the first time) or return the writ and show cause on the first Monday of February, 1859, *nearly five years before it was actually issued.* (Abstract pp. 8, 9; Record pp. 58, 62.) To hold this writ good is practically to abolish the rules governing pleadings in legal proceedings, and offer a premium for blundering and inefficiency.

II.

The evidence does not sustain the finding of the court or entitle the appellees to a peremptory mandamus:

1. We have seen that the amended alternative writ, filed January 24, 1864, was the first and only one containing a description of the road sought to be opened in the mandatory clause, as the law requires. This description appears at page 9 of abstract and 59 and 60 of record, where the starting point is described as "21 chains, 20 links north 20° 40', east of a point "2 chains and 93 links *south of the N. W. corner of section* 15, *T.* 38, *R.* 12."

The proof shows the road laid out to be entirely different from the one (compare description in exhibit "H," p. 5 abstract; p. 23 and 24 record,) offered in evidence by appellee at the hearing, where starting point is described as "2 chains and 93 links south and on a course north 60 degrees and 45 minutes east "from said last mentioned point, 21 chains and 20 links from "the *quarter section corner* on the west side of section 15," &c.

The last is the description of the highway in the order of the supervisors' laying it out, and is a *fatal variance* from the road described in the writ and by which all parties are concluded.

By the comparison above suggested, it will be seen the road described in the writ and sought to be opened, is *half a mile* north of the road actually proved at the hearing.

The attempt of appellants to extricate themselves from the effect of this variance by incorporating, or inserting the words "the south west quarter of," after the word "of," and before the words "the northwest corner of section 15," &c., in the judgment order (p. 73, record,) without leave of court or notice to appellants, was unauthorized and only furnishes another ground of error, by rendering the *variance* more important and conspicuous. It can neither cure nor relieve appellants from such error.

2. The description of the road as proved, (exhibit "H" abstract p.5,) is too vague, ambiguous and defective to enable appellants to find the locality should they attempt to open it; observe the language, "commening &c. on a course north 60 degrees, 45 minutes east from *said last mentioned point*" &c. It will be borne in mind this is the order of the supervisors establishing the road. There is no other "point" previously mentioned in it to which reference can be made to help it out. The order itself is void for want of a proper description.

Sess. Laws Ill., 1851, *p.* 72, *Sec.* 4.

Carter vs. *Barnes, et. ux.* 26 Ill. 464.

III.

No legal highway over the route in question, was ever laid out or proved.

The statute requires that COPIES OF THE PETITION for every new road, shall be posted in three of the most public places in the town, twenty days before it is presented to the Commissioners, or before they are authorized to act upon it, in any manner.

Sess. Laws Ill. 1851, *p.* 71, § 2.

The evidence in this case shows: (See affidavit of Kane, exhibit "C," abstract p. 3, offered in evidence with the record of road in question, record p. 66, 67,) that Kane, one of appellees, "did, on the 18th of January, 1859, post three notices of a petition for a new road, running on a line between Polk and Kilham, &c." Under the principal laid down by this Court in *Goudy vs. Hall,* (30 Ill., 116,) the recital in the record of commissioners "that a "copy of their petition

having being first posted up as required by law, is *prima facie* evidence simply, and is rebutted and disproved by an examination of the *proof* in affidavit above referred to, upon which such decision was based.

This, as we have stated, was annexed to appellees' petition, and the order of Commissioners rejecting the road, and was offered at the hearing by appellees, and is the *only evidence in the record* of any act of posting, and is clearly insufficient. In the language of Ch. J. Caton, in *Goudy vs. Hall*, " It would be absurd to say that such finding was conclusive when the very record would show that this finding was *void for want of jurisdiction to find anything whatever in the case*," 30 Ill., 116.

Goudy vs. *Hall, and cases cited.*

The posting of *notices* of the petition merely is no compliance with the act. The posting of *copies of the petition* is jurisdictional, and a condition precedent to the right of the commissioners of highways to entertain such petition for any purpose whatever.

It appearing therefore that copies of the petition were not posted as required by the statute, the commissioners of highways did not acquire this jurisdiction, and all subsequent proceedings are void.

IV.

The judgment is erroneous :

1. This proceeding is brought against Robert Bielby Mitchell, Eaton and D. C. Havens, in their name of office as "commissioners of highways of the town of Lyons, Cook County." At the hearing the appellees were permitted to prove that the defendants aforesaid had gone out of office, and three other persons, viz : Ephraim Holton, Charles Englehardt, and John O'Shea, were their *successors* in office, and the then commissioners of highways of said town.

The Court after awarding the peremptory writ against the last named persons, as such commissioners proceeded to render the following *remarkable* judgment against the old commissioners personally, " and it is further adjudged that the said relators do have and recover *of and from the said Robert Bielby, Mitchell Eaton, and D. C. Havens*, their costs and charges in this behalf expended, and that they have execution therefor." (See order of June 15, 1864, awarding writ record p. 73.)

This was clearly error. The court has *no authority to award an execution* in proceedings of this nature, in any case. The law regulating this class of cases appears at p. 49, § 9, Sess. Laws 1851. Art 13, Original Township Act; which, for convenience, we insert at lenght.

"In all suits or proceedings prosecuted by or against towns, or by or against town officers, in their name of office, costs, shall be recovered, as in like cases, between individuals. Judgments recovered against a town or *against town officers* in actions prosecuted by or against them in their *name of office shall be a town charge* and *when levied and collected* shall be paid to the person or persons to whom the same shall have been adjudged."

§ 4, art. 14, same act, (Laws of 1851, p. 49,) provides that "the moneys necessary to defray the "town charges" of each town, shall "be levied on the taxable property in such town," &c.

No personal judgment was ever contemplated by this act, and none could be rendered. The remedy of appellees for their costs, if not audited and paid, would be by mandamus against the auditing board to compel them to do their duty.

V.

The remedy of appellees is barred by statute.

It is provided by law that all highways laid out by commissioners or supervisors on appeal, shall be opened *within five years* from the time of laying out the same, or be deemed vacated. *Sess. Laws Ills.*, 1851 p. 30, § 17, *do.* 1861, § 91, p. 263.

This road, if it is one, became such June 21, 1859, the date of the order of supervisors declaring it laid out. The time within which it could have been *lawfully opened* therefore, expired June 21st, 1864, by statutory limitation.

This statute is imperative, as much so as that portion authorizing the road to be laid out by the supervisors. It contains no exception for the time the road may be in litigation, or

personal disabilities, as is the case in statutes limiting actions. Sess. Laws Ills. '51 and '61 cited *supra.*

The road not having been opened before June 21, 1864, became *vacated by operation of law.*

VI.

This case furnishes no good reasons for the allowance of the writ.

1. The road in question, though termed such in the proceedings, is not a *public highway.*

Webster defines the word "public" as "expressing something common to mankind at large, to a Nation, State, city, or town."

The record (p. 36,) contains a plat or map of the route in question, showing it to be simply a lane, or *cul de sac,* leading from the lands of appellees, to the Chicago and Joliet Road—open only at one end—its southern terminus being near the Desplaines River.

It is not susceptible of use as a thoroughfare, no one could go through it or have occasion to do so—if opened—for general business, but only for special business connected with the lots owned by the relators. No one could come out, except upon like business and then only by the entrance.

Necessarily, therefore, its use is private, not public, and calling it public cannot make it so.

Holden vs. *Trustees of Cold Spring,* 23 (Barb (N. Y.) 103.

2. Its allowance would subject appellees to actions of trespass, should they attempt to open the road in obedience to the writ, and it is at least very questionable whether they would be protected by it; and, if they were, the writ would operate to cut off and impair the rights of other persons without their being parties to, or having knowledge of, the proceedings, or an opportunity of being heard.

The People vs. *Curyea,* 16 Ill., 547.

3. Its allowance in any case is a matter of discretion.

The People vs. *Curyea, et. al.,* 16 *Ill.,* 547.
People ex-rel, Brewster vs. *Kilduff,* 15 do., 501.
Ex-parte Fleming, 4 *Hill,* 581.
Tapping on Mandamus p. 165-6.

The court will examine the whole record and see if it is the proper remedy and whether the party is entitled to the writ.

Commissioners of La Grange Co. vs. *Cutler*, 7 Ind., 6.

Respectfully submitted,

HAINES & STORY,

Of Counsel for Appellants.

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Commrs of Highways

&

The People ex rel

Horton & Leonard, Printers, Chicago.

IN THE

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1865.

THE COMMISSIONERS OF HIGHWAY OF THE TOWN OF LYONS,
Appellants,
vs.
SAMUEL KILLHAM, WILLIAM DAVIS, AND EDMUND KANE,
Appellees.

Appeal from Superior Court of Chicago.

ABSTRACT.

RECORD PAGE.

1 to 6 FINAL ORDER—APPEAL—BOND.

8 Petition for mandamus, filed February 4th, 1860, states that petitioners live on Sections 15 and 22, T. 38, 12, in Town of Lyons, Cook County, and have no access to public road, except through others' land.

9 That on January 18th, 1859, petitioners, and twenty others, legal voters, and residing within three miles of the road hereinbefore mentioned, petitioned Commissioners, who had jurisdiction of roads, to lay out and open a new road, as per copy of said petition, hereto annexed; that January 18th, 1859, due notice of said petition was made, by posting the same, according to law, as will fully appear by the certified copy of the affidavit of Edmund Kane, annexed, and made a part of petition. (Exhibit "B.")

That February 19th, 1859, said Commissioners made return of their doings, refusing to lay out said road. (Exhibit "C.")

10 That March 18th, 1859, petitioners appealed, and gave notice to Town Clerk of Lyons to select three Supervisors to hear the appeal. (Exhibit "D.") That on same day, said Clerk selected three Supervisors to hear the same, who were duly notified. Copy of notice annexed, as Exhibit "E."

That April 1st, 1859, notice of said appeal was served on Commissioners. (Exhibit "F.") That same day, similar notice was served on three petitioners. (Exhibit "G.")

That accordingly, said Supervisors met, April 11, 1859, according to notice, and adjourned from time to time, till June 20th, 1859, when they heard proof, and reversed the order of

11 the Commissioners, and ordered said road laid out, a survey of which is made part of order of Supervisors. That June 21st, 1859, Supervisors made their order, establishing said road, and adjudging $100 damages to H. H. Polk. Copy of plat and order annexed, marked Exhibit "H." That the $100 adjudged said Polk has been audited, and made part of assess-

12 ment for taxes of Town of Lyons. That September 20th 1859, notice was served on owners of lands to remove fences; that said Polk neglected and refused to remove his fence; that upon such neglect, it was the duty of Commissioners to remove the same, and cause the road to be opened, but that they have

13 neglected and refused so to do. Prays for writ.

[Signed,] SAMUEL KILLHAM.

His
WILLIAM ⋈ DAVIS.
Mark.

His
EDMUND ⋈ KANE.
Mark.

Copy Jurat to Petition.

STATE OF ILLINOIS, }
COOK COUNTY, } ss.

"*Samuel Killham, William Davis,* and *Edmund Kane,* on oath, say they have heard and read the above bill, and, as to such matters as are stated on their own knowledge, they know the same to be true; and as to those stated on information and belief, they believe the same" to be true.

Sworn to before me, this 2d day of February, A. D. 1860.

W. KIMBALL, *Clerk.*

14 **"A."**

Petition to Commissioners of Highways of Town of Lyons, to lay out Road:

Commencing in centre of Joliet and Chicago road, eighty rods east of west line of Sec. 15, 38, 12; thence southerly, to or near O'Plain River, passing through land of H. H. Polk, S. Vial, S. Killham, H. Davis, W. Polk, P. O. Donnell, and James Michie. Signed by twenty-three names.

Date, January 17th, 1859.

15 **"B."**

Order of Commissioners, refusing to lay out Road.

States that an application of petitioners, "a copy of their petition having been first posted up, as required by law," we, the Commissioners, did, on February 9th, 1859, personally examine the route, and, having before fixed upon a time and place, when and where we would meet to hear any reasons for or against laying out the same, and having posted up, in three of the most public places in said town, eight days previous, notice of such meeting, did conclude not to grant prayer of petitioners. (Signed by Commissioners.)

16 February 19th, 1859.

"C."

Affidavit of Notice of Petition.

"STATE OF ILLINOIS, } ss. *Before R. P. Pollock, Justice*
COOK COUNTY, } *of the Peace.*

"WHEREAS. *Edmund Kane* has this day made oath before me, one of the Justices of the Peace in and for the County of Cook, that he did, on the eighteenth day of January last, post three notices of a petition for a new road, running on a line between Samuel Killham and Samuel Vial, and Polk and Vial; and said notices were posted in three public places in the Town of Lyons, viz: one at Mr. Lume's, one on the door of the Town Clerk of said Town of Lyons, and one on the door of Mr. Hoffman's store—all of which are in the Town of Lyons.

"EDMUND His ⋈ Mark. KANE.

"Subscribed and sworn to before me, this eleventh day of February, 1859. "R. P. POLLOCK, J. P. [SEAL.]"

17 **"D."**

Notice of Appeal to J. Evens, Town Clerk of Lyons.

William Davis, Samuel Killham, and *Edmund Kane,* appeal from above order to the decision of three Supervisors. Ground of appeal, the refusal to lay out the road. Ask Town Clerk to select three Supervisors ta hear the appeal. (Signed.)

Dated, March 18th, 1859.

18 **"E."**

Notice to William White, Supervisor of Niles.

SIR: The undersigned have taken an appeal from the decision of the Commissioners refusing to lay out a highway, as follows: which order refusing to lay out said road was deposited with the Town Clerk, March 18th, 1859. Whereupon, Supervisors H. Willmarth, of Barrington, S. S. Campbell, of Orland, and William White, of Niles, were selected by said Clerk to hear said appeal. The ground of the appeal is the refusal to lay out the road.

(Signed.) SAMUEL KILLHAM,
WILLIAM DAVIS,
EDMUND KANE.

19 **"F."**

Notice to Commissioners of the Appeal.

(*Affidavit of service of same.*) Dated APRIL 1, 1859.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

Edmund Kane, being duly sworn, deposes and says that he has served notice on Commissioners of Highways, of which the within is a copy, ten days previous to the appointed day of meeting.

His
EDMUND ⋈ KANE.
Mark.

Sworn and subscribed before me, this 9th day of May, 1859.

H. WILLMARTH, J. P. [SEAL.]

20 "G."

Notice to Joseph Evans, Timothy Sullivan, and James Michie, three of the Petitioners of said Appeal.

States that affiant served within notice on said Evans, Sulli-
21 van, and Michie, ten days before the meeting of the Supervisors. Affidavit of service same as last above.

"H."

Order of Supervisors.

Whereas, *S. Killham, Wm. Davis,* and *Edmund Kane,* did, on the 18th of March, 1859, appeal to us from the order of Commissioners, filed 17th of February, 1859, a copy of which, as well as all the papers before us in said appeal, are hereto annexed, "and we having met on the 11th day of April, 1859, at the Town Clerk's office, at one o'clock P. M., to hear the proofs and allegations of the parties, being the time and place
22 agreed upon by us, when and where we would meet to consider said appeal, and ss but two of us were present, the case was continued to the 9th day of May, A. D. 1859." May 9th, 1859, the parties appeared at the Town Clerk's office, agreeable to adjournment, and it appearing that said Commissioners of Highways and three of the petitioners in said cause, have been duly notified of such meeting, as required by law, we did proceed to hear the proofs and allegations of the parties, and to consider said appeal, and we being fully advised in the premises, do adjudge order," &c., reverse order of Commissioners, and lay out road, as follows:

[redacted]

23

In witness whereof, we have hereunto set our hands and seals, this twenty-first day of June, A. D. 1859. (Signed.)

24 Supervisors find advantages equal to damages in all cases
25 except as to H. H. Polk, to whom they assess $100.

(Signed same as above.)

26 Plat and survey of road in question, showing a *cul de sac,* or lane, running from highway to river.

27 to 33 Alternative writ, containing the substance of what is contained in the petition, states that Supervisors "did adjudge that said highway should be laid out and opened, and worked, as is correctly shown by a survey or plat of the same, made by Edmund Bixby, County Surveyor of said County of Cook, which plat is made part of the return of said Supervisors."

Mandatory clause. "do command you, by firmly enjoining you that, immediately after the receipt of this, our writ, you do, without delay, cause said fences to be removed from said road, and said road to be opened and worked, or make return to this, our writ, * * the first day of the next term, on first
11 Monday of February, 1860.

"Witness, W. Kimball, Clerk of said Court, and seal thereof, this 4th day of February, 1860.

"W. KIMBALL, *Clerk.*"

33 Motion to quash writ, because :

1. There in no sufficient affidavit or jurat upon which to found said writ.

34 3. There is no definite or sufficient description in said writ of what road respondents are required to open, nor any certain description of any fences to be removed.

4. It does not appear that the damages assessed to Polk were ever paid or tendered, nor the necessary steps taken to secure payment of same.

Motion overruled. Exception by appellants, who were ordered to make return.

Respondents' Return to Writ.

1. Deny that said Supervisors had jurisdiction, and aver that their doings are void.

35 2. Deny that the $100 assessed to Polk has been paid, or that such proceedings have been had as to make the payment thereof certain.

3. Aver that the mandatory clause of said writ does not describe the location, direction or boundaries of said proposed road, nor indicate what fences they should remove, nor when they should proceed to open the road.

4. That the description of the road is defective and uncertain, by reason whereof it is impossible for respondents to ascertain the northermost portion thereof, or what fence they should remove.

5. Aver that no notice was ever served on the owners of the land over which the road passes, to remove the fences.

6. Aver that said Killham and Davis have a private road
36 connecting them with the Chicago and Joliet road, and that they are not obliged to send their children over others' land to school.

7. Allege that said Kane has egress to the road over vacant prairie.

8. States that, owing to dissatisfaction with the action of the
37 Supervisors, a petition, dated February 2d, 1860, signed by forty or more legal voters residing within three miles of the road, has been presented to respondents, for the purpose of discontinuing said road; that after giving proper notice, and a hearing, and examining the road, an order was made on the 5th day of March, 1869, by these respondents, and filed by the Town Clerk of Lyons, discontinuing said road.

38 to 47 9. Petition for opening a new road, and proceedings thereunder, and opening the same.

50 and 51 *Relators' Pleas to Return.*

Transversing each item thereof, from No. 1 to No. 7, both inclusive,, and demurring to remaining 8th and 9th.

51 January 15th, 1864, motion by relators for leave to amend the alternative writ, objected to by respondents, and granted by the Court, without terms. Exception by appellants.

January 22d, 1864, amended writ filed, similar, in most respects, to original—above set forth.

53 States that on the 17th day of January, 1859, relators, and twenty others, legal voters, residing within three miles of line of the proposed road, petitioned Commissioners of said Town of Lyons, who had jurisdiction of highways, to lay out and open said road.

"That January 18th, 1859, due and proper notice of said petition was made, by posting copies of the same in three of the most public places in said Town of Lyons."

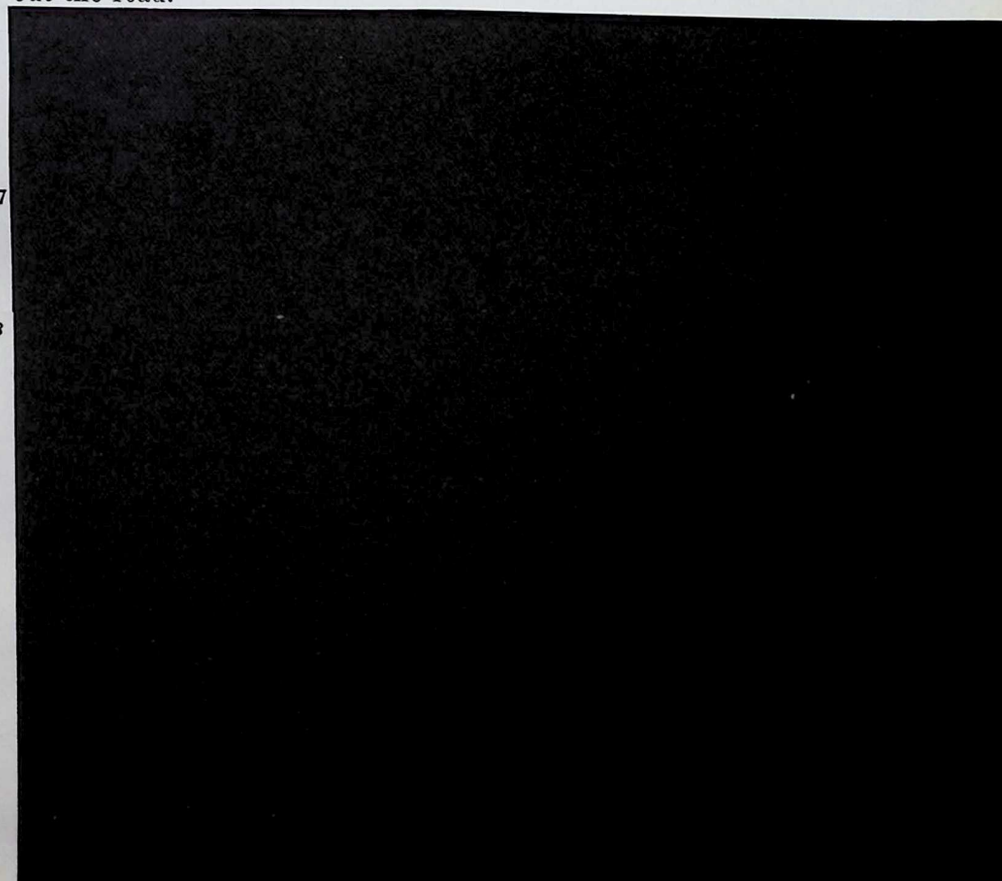
54 That February 9th, 1859, within ten days after the expiration of twenty days from time of posting said petition, Commissioners examined route, and, on 19th February, refused to lay out road.

That March 18th, said petitioners appealed, and gave notice to Town Clerk to select three Supervisors, to hear said appeal.

That on the 18th of March, 1859, said Clerk selected H. Willmarth, S. S. Campbell, and William White, Supervisors, to hear the same, and gave a certificate of such selection to said petitioners, who caused the same to be delivered to one of said Supervisors, and notices thereof to be served on the other two within ten days from the filing of said appeal with the Town Clerk.

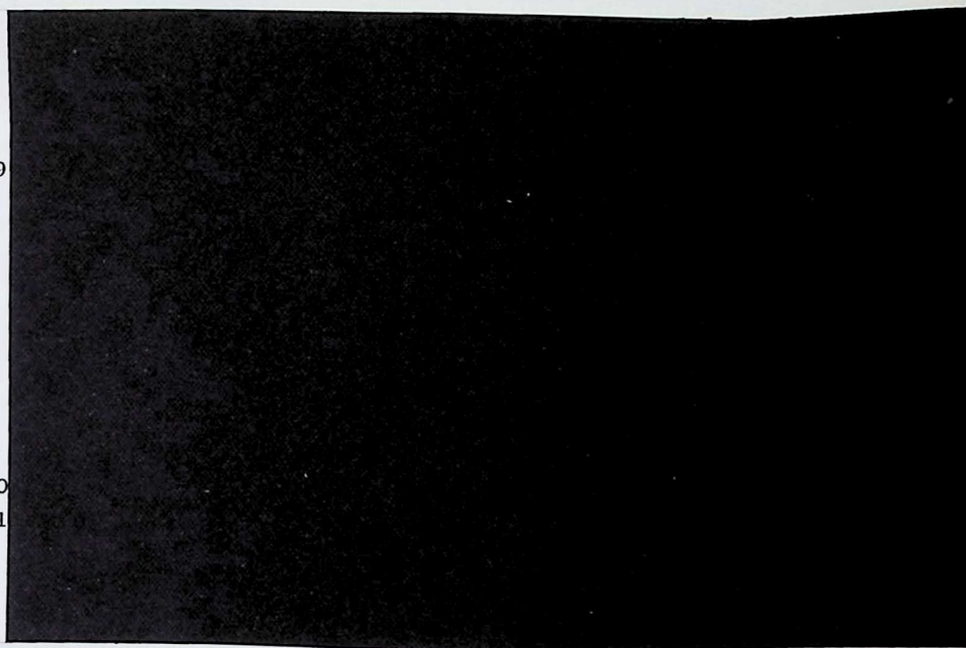
That after thirty days from the filing of said order refusing to lay out said road, said Supervisors agreed to meet at the Town Clerk's office, on the 11th day of April, 1859, to hear said appeal, and said petitioners gave eight days written notice
55 of the time and place agreed upon for the hearing of said appeal to each of the three Commissioners; also, on three of the petitioners.

That in pursuance of said notice, the said Supervisors met April 11th, 1869, and adjourned from time to time until June 7th, 1859, when they heard the allegations and proofs, reversed the proceedings of the Commissioners, and determined to lay out the road.



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[L. S.] "WALTER KIMBALL, *Clerk.*

"Date, February 4th, 1859."

62 Motion by respondents to quash amended writ:

1. Because it is not authorized by law, nor by any order of Court.

2. The said writ is incongruous and inconsistent.

3. It requires that to be done which, upon its face, is shown to be absurd, and impossible of accomplishment.

4. It fails to show any right or jurisdiction in said Supervisors to make any order or act in the premises.

5. It fails to show facts necessary to entitle the relators to the peremptory writ, or to a return from respondents.

6. Said writ is vague, uncertain and insufficient.

Motion overruled, and exception by appellants. Return ordered to be made by 18th of March, 1859.

63 And on said 18th of March, "come the respondents, and by way of amendment, make further return to said writ of mandamus:"

1. They deny that on the 17th day of January, 1859, or at any other time, the said petitioners, with twenty, or with any other legal voters residing within three miles of the line of said road, petitioned the Commissioners of the said Town of Lyons to lay out or open said new road.

2. They deny that on the 18th of January, 1859, or at any other time, due or proper notice of said petition was made, by posting copies of the same in three of the most public places in said town of Lyons.

3. They deny that said Town Clerk of Lyons gave a certificate of the selection of said Supervisors to said petitioners, or that said petitioners caused such certificate to be delivered to one of said Supervisors, or notice thereof to be served on the other two Supervisors within two days from the filing of
64 said appeal with said Town Clerk.

4. They deny that after thirty days from the filing of said order refusing to lay out said road, said Supervisors agreed to meet at the Town Clerk's office, on the 11th day of April, 1859, to hear said appeal, or that petitioners gave eight days written notice of the time and place agreed upon by said Supervisors for hearing said appeal, on each of said Commissioners, or on Joseph Evans, Timothy Sullivan, or James Michie.

5. They aver that there never was given, or served, any legal or sufficient notice of the time or place agreed upon by said three Supervisors, when and where they would meet to consider said appeal, or of the times or places to which the same was adjourned or continued for a hearing.

6, Deny that said Supervisors ever laid out or established the road described in said writ, or ever ordered the same in any order signed by them or otherwise, to be a public highway.

7. Deny that said Supervisors caused a survey, accompanied by a report or plat of said route to be made, particularly describing said road by metes and bounds, courses or distances, or the lands over which the same passes.

8. They deny that they were ever requested to give said Polk sixty days notice to remove his fences from said road
65 described in said amended writ.

9. They aver that the subject of damages was considered and passed upon, by said Supervisors, at another and different meeting, and on a subsequent day from that whereon the expediency of laying out said road was considered, and no notice was given of the time or place or place of meeting for the consideration of damages.

10. Aver that the Supervisors had no authority or jurisdiction to lay out or establish said road.

And, ~~February~~ March 24th, 1864, said relators filed their traverse of said amended return, in the words and figures following:

"And the said relators, by Garrison and Blanchard, their attorneys, come and say that, reserving unto themselves all and all manner of exception which can or may be had or taken to
66 the manifold errors, uncertainties and insufficiencies in said amended return contained, say they ought not to be barred from having and maintaining their said writ, by reason of anything in said amended writ contained, because they say that their said amended writ is true, certain and sufficient, and said amended return is untrue, uncertain, and insufficient, and this they pray may be inquired of by the country."

Upon the trial, the relators, to maintain the issues on their part, read in evidence the original petition, the notice of posting the same, the order of the Commissioners of said town refusing to lay out the road, the notice of appeal to the Town Clerk, notice of hearing appeal to Supervisors, the order of the Supervisors establishing the road—all of which were attached to the petition—the survey of E. Bixby, a copy of which is attached to said petition, (see plat, page 26,) and original order
67 of Supervisors establishing the road.

They also offered in evidence an order of said Supervisors, setting aside the order vacating or discontinuing said road. It was admitted.

That Geo. M. Fox was Town Clerk, and his signature to the papers genuine.

Relators then introduced witnesses, who testified as follows:

Joseph Evans.—Live in Lyons; was Town Clerk in 1859; remember that an appeal was taken from the order of Commissioners; I selected three Supervisors to hear the appeal, and gave a certificate of such selection to some one, can't remember to whom; don't know whether any one suggested names or not; may have done so; was present when Supervisors met at my house; don't know that I went to examine the route; a good many were present; think the defendants were, and had an attorney.

James Michie.—Live in Lyons; have acted as attorney for
68 petitioners to get the road; was present when Commissioners refused road; I furnished Town Clerk a printed list of names of Supervisors of the county to select from; I notified the

Supervisors of such selection, one in person, two by mail; Evans gave his certificate of selection to me or Killham; Supervisors met at Town Clerk's office and adjourned till May 9, 1859, because one could not get across river; they met again May 9th; two of the Commissioners were present with their attorney, Blanchard; Supervisors examined route; Blanchard with them and a large crowd; there was no surveyor there; I went when the survey was made; Bixby drove stakes in the line of the road; don't know that the defendents were there; three broad arrows were marked on the fence of the Joliet and Chicago road; road was run on the ¼ corner stake and then on the line; the Joliet and Chicago is a common road; relators have no private road.

The Supervisors met twice; at the second meeting the subject of damages was considered and assessed; the Commissioners were present; the then Commissioners made out and signed notices to remove fences September 13th, 1859; they were made out at Town Clerk's office, (Mr. Evans house); Mr. Brown was to serve them before sixty days had expired; Brown
69 went out of office and Haven succeeded; after sixty days had expired from the giving notices to remove fences Bilby and Havens went to remove the fences, and asked me whether since it was frosty, they had not better put a gate on till the fences could be made; I afterwards asked them why they did not open the road; they said Holton told them not to open the road, and they would not do it, and that Holton, Vial and Polk would stand between them and all damage.

I have been attorney for relators and drew some of the papers; was at one time interested and owned land to be benefited, but have now no interest, having sold out; all but Polk removed their fence; Davis moved his back; relators have no liberty to cross Vial's land; I have been threatened with suit for offering to do so; some of the notices to remove fences were in Bilby's handwriting, signed by the Commissioners; after Holton advised them not to open the road, they refused to open it.

E. Bixby.—Was County Surveyor in 1859; made the plat and survey, (see plat, page 39); it was made June 14th, 1859, at
70 request of Supervisors; Campbell, Polk, Killham, Kane and others were along; I drove stakes in centre of Joliet and Chi-

cago road, and found stake on the quarter section line and at other points; we usually make broad arrows (for marks); think road was marked so it could be traced out and found: this is copy of platt, (page 36).

John Brown.—Live in Lyons; Robert Bilby, Mitchell, Eaton and myself were Commissioners in 1859; I went out of office in 1859; was present when Supervisors heard the appeal and established the road; I served notices to remove fences on owners of land; this is a copy except signatures:

Copy of notice to H. H. Polk.

"You will take notice that the Supervisors of the towns of Barrington, Orland and Niles have laid out a public highway agreeable to an order of said Supervisors bearing date 21st June, 1859, and now on file in the Town Clerk's office, which highway passes through certain enclosed lands occupied by you, to wit: west half northwest quarter of section fifteen, town thirty-eight, range twelve. You are, therefore, hereby notified and required to remove your fences from the —— said highway within sixty days after the service of this notice.

Lyons, September 13th, 1859.

ROBERT BILBY, *Commissioner of Highways.*"

71 They were signed by the three Commissioners; some were served in the last of September; Commissioners have not opened the road; I attended twice before Supervisors; we had Blanchard for our attorney; we refused to open the road in the first instance because we thought the damages would be so heavy that we would not be justified; the petitioners were known to us, and resided within three miles of the road; we did not reject the road because of any irregularity, for all the steps had been taken and were regular.

Alfred Dowd.—Am Supervisor of Lyons; know H. H. Polk; $100 was paid me as damages assessed by Supervisors in said road; I gave Polk notice of it in fall of 1862; it was admitted that Polk was one of the Board of Auditors who allowed the $100, but he was not present, and did not participate in the allowance.

S. S. Campbell.—Was one of the Supervisors who laid out
72 this road. (Shown original order.) Those are the signatures of myself, White and Willmarth; I met White twice, and once with White and Willmarth, to hear the appeal; I was

notified, according to law, to hear the appeal; had agreed to meet April 11th, 1859, at Evans' house, Town Clerk's office, that is, the full board did; we adjourned to May 9th, to same place, where we had a hearing; Bilby and Brown were there; went over the ground, took whole matter into consideration, and assessed damages that day; had matter of notices in our hands; I was selected to cause survey to be made; when survey was made, we set a stake in centre of Joliet and Chicago road, and other places; marked the fence; we had the matter all in our hands, and decided the question of notice.

To the giving of which testimony of said Campbell, Evans, Michie and Brown, so far as, and because the same went to establish facts which are, or should be, matters of record, and could only be proved thereby, appellants then and there objected, but the same was permitted by the Court, and the appellants then and there excepted.

73 The above contains all the evidence in the cause. The Court found the issues for the relators.

Repondents entered their motion for new trial, because

2. Against objection of respondents: incompetent and improper evidence was admitted on behalf of relators.

3. The finding of the Court was against the law and the evidence.

The Court overruled said motion, and ordered peremptory writ to be issued.

Appellants excepted.

As to appeal and bond, see pp. 2, 3, 4, 6, and 6.

ERRORS ASSIGNED.

1. Court erred in refusing motion to quash original writ.
2. In allowing relators to amend the alternative writ.
3. In refusing motion to quash amended writ.
4. In allowing incompetent testimony on behalf of relators.
5. The finding of the Court was against the law and the evidence.
6. In refusing motion for new trial.
7. In giving judgment for the relators, and against the appellants, when, by law, the judgment should have been for the appellants.

J. S. PAGE,
Attorney for Appellants.

HAINES & STORY, *of Counsel.*

No. 214

Cons. of Town of Lyons

2

& Kilbourn Tracts

Abstract

Filed April 24 1865

L. Sloan Clk

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Sixth day of June in the year of our Lord One Thousand Eight Hundred and Sixty four and of the Independence of the United States of America the Eighty Eighth

Present, The Honorable John. M. Wilson Chief Justice of the Superior Court of Chicago.

Van H. Higgins } Judges.
Joseph E. Gary }

Joseph Kirk Prosecuting Attorney.

Daniel S. Hammond Sheriff of Cook County.

Attest, Hiram B. Carter Clerk.

Be it remembered that heretofore to wit on the fifteenth day of June (being one of the days of the June term of said Court) in the year of our Lord one thousand eight hundred and sixty four the following proceedings were had in the undermentioned cause and entered of record in said Court, to wit,

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And afterwards, to wit, on the 15th day of June (being one of the days of the June Term of said Court) A.D. one thousand eight hundred and sixty four the following proceedings were had in said Cause and entered of record in said Court, to wit,

The People on the relation of
Samuel Kellham
William Davis and Edmund Caine
vs.
Mitchell H. Eaton
Robert Bibby, C. D. Havens, Commissrs
of Highways of the town of Lyons

Petition for Mandamus

This day comes the said plaintiffs relators &c by Garrison and Blanchard their attorneys, and the said Respondents by Rucker & Paige, their attorneys also come, and this cause, being called for trial, upon Agreement of parties now made here in Open Court, this Cause is hereby submitted to the Court for trial upon the issues joined therein, without the intervention of a jury, and after hearing the evidence and the arguments of Counsel and being fully advised in the premises, and it appearing to the Court that no sufficient Cause had been shown why a peremptory writ of Mandamus should not issue herein, and it further appearing, that Ephraim Holtes, Charles Eaglehardt and John O Shea are the successors in office of the said Respondents, and the present Commissioners of Highways of said Town of Lyons, It is ordered and adjudged that a peremptory writ of Mandamus do issue to Ephraim Holtes, Charles Eaglehardt and John O Shea as such

Commissioners requiring them Forthwith to Cause said road to be opened as their predecessors in office were here to Fore Commanded in our Alternative Writ, as follows, to wit, Commencing in the Center of the Joliet and Chicago road, seven Chains and sixty six links (7.66) North, 120 ft. West of the 1/8 Quarter section stake as standing on the East and West Quarter line of section fifteen (15) Town thirty eight (38) Range twelve (12) East, in the town of Lyons, and running thence South twelve degrees and five minutes East (12° 5m E) seven Chains and sixty six links (7.66) to said stake on said Quarter section line, thence south on the 1/8 section line, one hundred and thirty Chains and thirty seven links (130.37). to a stake and stone in the North West Quarter of section twenty seven (27) in said Town — The above distances are for the Centers of the road. and the starting point is further described as being twenty one Chains and twenty links (21.20) North sixty degrees and forty five minutes East (60° 45m E) of the intersection of the center of the Joliet and Chicago road with the West line of said section fifteen (15) which said last mentioned point is two Chains and ninety three links (2.93) South of the South West Corner of the South West Quarter of said section fifteen (15). as shown by the Copy of plat of the survey made by Eden and Bibby, Surveyor. And it is further adjudged. that the said relators do have and recover from the said Robert Bibby, Mitchell Eaton and D C. Havens their costs and charges in this behalf by them expended and that they have Execution therefore.

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And afterwards to wit, on the 18th day of June (being one of the days of the June term of said Court) A D. one thousand eight hundred and sixty four the following proceedings were had in said Cause and entered of record in said Court, to wit,

The People of the State of Illinois on the relation of Samuel Kellham, William Davis and Edmund Cairns
Vs
Mitchell Eaton, Robert Bibby and C D. Havens

Petition for Mandamus

And now at this day Comes said defendants and pray an appeal herein to the Supreme Court of this State, which is allowed to them on filing Bond in penalty of one thousand dollars within five days Conditioned to prosecute this appeal with effect and in case said judgement is affirmed, then to open said road and to obey the direction of said writ within sixty days after such affirmance and to pay all costs and damages sustained by reason of such appeal, with 30 days to file Exceptions

and afterwards to wit, on the 20th day of June A D. 1864. Comes the defendants by their Atty and files at the office of the Clerk of said Court their Appeal Bond in said Cause, Which Bond is in the words and figures as follows, to wit,

Know all men by these presents, That we Ephraim Holton, Charles Englehardt, Henry H. Polk and Samuel Vial of the County of Cook and State of Illinois, are held and firmly bound unto the People of the State of Illinois also of the same County and State in the penal sum of one thousand dollars, lawful money of the United States, for the payment of which well and truly to be made, We bind ourselves, our heirs, Executors, and administrators jointly, severally and firmly by these presents. Witness our hands and seals this 18th day of June A D. 1864

The Condition of the above obligation is such, that whereas on the 15th day of June A D 1864 in the Superior Court of Chicago in and for the County of Cook and State aforesaid and of the June Term thereof A D 1864, a judgement was rendered on behalf of the people of said State, in the relation of Samuel Kilbourn, William Davis and Edmund Kane, and against the Commissioners of Highways for the town of Lyons, in said County awarding a peremptory writ of Mandamus against said Commissioners, Commanding them to open a certain road in said town of Lyons, from which said judgement, said Commissioners have prayed for and obtained an appeal to the Supreme Court of said State

Now then Jord if said Commissioners shall duly prosecute said appeal with effect and in case said judgement is affirmed, then to open said road and obey the direction of said Writ within six by days after such affirmance and to pay all Costs and damages sustained by reason of such appeal in case of such affirmance, then the above obligation to be void; otherwise to remain in full force and virtue

Taken and entered into Before me in Open Court upon this the 20th day of June A D. 1864

Van H. Higgins
Judge

(signed) Ephraim Holton Seal
" Charles Engelhardt Seal
" Henry H. Polk Seal
" Samuel Vick Seal

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And thereafter to wit on the first day of July A.D. Eighteen hundred and sixty four came the said respondents and filed in the office of the Clerk of said Court their Bill of exceptions in the said matter of the Petition for Mandamus; Which said Bill of exceptions is in words and figures as follows to wit,

"State of Illinois }
Cook County . . } ss.

The People &c rel; Samuel Kilburn et als . . . . . }
vs } Bill of Exceptions.
Robert Builey et als Commissioners }
of Highways of Town of Lyons }

Be it remembered that on the fourth day of February A.D 1860 the relators filed in said Court a Petition for a Mandamus with certain papers thereto attached to wit; Certified Copies of the Petition for the road - the Notice of posting the same. the Order of the Commissioners refusing to lay out the road indorsed on said petition - Notice of the Appeal to Commissioners of Highways. Notice of the Appeal to the Petitioners for said road. - the Order of the Supervisors of Orland to provide and Rules purporting to Establish the road and assessing damages, and the survey and plat of Edward Dixby: Which Petition and several papers are in the words and figures following to wit

"To the Honorable the Judges of the Superior Court of the City of Chicago.

Humbly Complaining showeth unto your Honors your Petitioners Samuel Killham, William Davis and Edmund Kane.

That said Samuel Killham resides on the North East Corner Quarter of Section 15. Town 38, range 12, in the Town of Lyons in the County of Cook and State of Illinois.

That said William Davis resides on the South East Quarter of said South West Quarter of said Section 15.

That said Edmund Kane resides on the West half of Section 22, in the above named Town and Range.

That each of your Petitioners are now farmers and have no public road by which to obtain access to or egress from their said farms except by or through the Newly located road hereinafter referred to.

That said William Davis has a Stone quarry on his land which is the principal support of himself and a large family, and that he is now deprived of the means of selling or conveying to Market any of said Stone.

That on the North West Quarter of Section 15 aforesaid is a School House for the building and support of which each of your Petitioners have been taxed - and to which School each of your Petitioners have children to send, but are now obliged to send them across their said farms or keep them away from School.

That on the Seventeenth day of January A.D. 1859 your Petitioners and twenty others, - legal voters - are residing within three miles of the line of the

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New road hereinafter mentioned, petitioned the Commissioners of highways of said Town of Lyons who had jurisdiction of highways and roads in the road district in which said new road is located, to lay out and open said new road, as will appear by a Certified Copy of said Petition hereunto annexed and marked Exhibit "A", and made a part of his Petition.

That on the Eighteenth day of January A. D. 1859 due and proper Notice of said Petition was made by posting the same according to law as will fully appear by the Certified Copy of the affidavit of said Edmund Kane hereunto annexed and marked Exhibit "B" and made a part of this Petition.

That on the Nineteenth day of February A.D. 1859 said Commissioners of highways of said Town of Lyons made return of their doings upon said Petition,- refusing to lay out said road, as will appear by a Certified Copy of said return hereunto annexed marked Exhibit "C" and made a part of this Petition.

That on the Eighteenth day of March A. D. 1859 your Petitioners being themselves aggrieved by said action of said Commissioners in refusing to lay out and open said highway - appealed therefrom and gave Notice thereof to the then Town Clerk of said Town of Lyons, of the same and requested him to Select three Supervisors according to law, to hear and determine said appeal as appears by a Certified Copy of said Appeal Notice hereunto annexed and marked Exhibit "D", and made a part of this Petition.

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That thereupon on said Eighteenth day of March A. D 1859, the said Town Clerk of said Town of Lyons selected Homer Hillmarth Supervisor of Barrington, S. S. Campbell Supervisor of Orland and William White Supervisor of Niles in said County of Cook to hear and determine said Appeal, and they were duly Notified of the same as will appear by a Certified Copy of said Notice hereunto annexed and marked Exhibit "E," and made a part of this Petition.

That on the first day of April A. D 1859 a Notice of said Appeal was duly issued to and served upon the Commissioners of Highways of said Town of Lyons as will appear by a Certified Copy of said Notice and the affidavit of your Petitioner Edmund Kane thereon, hereunto annexed, and marked Exhibit "F." and made a part of this Petition.

That on said first day of April Notice of said Appeal was duly issued to and served upon Joseph Evans, Timothy Sullivan and Joseph Ritchie three Officers of the Petitioners for said road according to law as will appear by a Certified Copy of said Notice, and the affidavit of your Petitioner said Edmund Kane, hereunto annexed, and marked Exhibit "G", and made a part of this Petition.

That in pursuance of the foregoing proceedings the said Supervisors of the said Towns of Barrington Orland and Niles, did on the Eleventh day of April A. D 1859 meet according to Notice, and did thereupon adjourned from time to time until the twentieth day of June A. D 1859 when they proceeded to hear and determine said Appeal and having heard the same and the proofs and

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allegations of the parties thereto did thereupon overrule and reverse the whole of the proceedings of said Commissioners of highways of said Town of Lyons on said Petition - and did thereupon order and lay out said highway as, or substantially as, prayed for in said Petition. and did adjudge that said highway should be laid out, opened and made as is correctly shown by a survey or plat of the same made by Edwin Bixby, County Surveyor of said County of Cook, which plat is made a part of the return of said Supervisors,

That on the twenty first day of said June said Supervisors made their return of their doings ordering and establishing said road, and further adjudging that the advantages were equal to the damages to all owners of lands over which said road passed, except to Henry H. Polk, to whom they assessed the sum of One hundred dollars damages All of which more fully appears by a Certified Copy of the return of said Supervisors, with a Copy of said County Surveyors Map, or plat of said road, and both hereunto annexed marked Exhibit "A" and made a part of this Petition.

And your Petitioners have been informed and believe and do charge the fact to be that the said sum of One hundred dollars so as above adjudged to the said Henry H. Polk was properly and duly audited by the proper authorities of said Town of Lyons, of which authorities the said Polk is and, being an acting Justice of the Peace residing in the said Town of Lyons. and that said sum has been incorporated and imbodied into and made a part of the assessments and taxes of said Town of Lyons.

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That on or about the twenty sixth day of September A.D. 1859 Notice was legally and duly issued to and served upon Each of the owners of Land over which said road passed to remove their fences within Sixty days therefrom as provided by the Statute in such Case made and provided

That your Orator was led hoped that no disputes would have arisen touching the removal of fences and opening and working of said road.- but that the said Henry Polk would have complied with the reasonable request requirements of the Statute in such Case made and provided and would have removed his fences and opened said road to your Orators and the public as in duty bound to do But that upon request thereof he neglected and refused so to do.

That that the said Commissioners of Highways of said Town of Lyons upon the Neglect and refusal of the said Polk to remove his fences as aforesaid were in duty bound by law to cause said fences to be removed, and the said road to be opened and worked. and your Petitioners shall

200 they were requested so to do, and well hoped said Commissioners would have caused said fences to be removed and the road to be opened and worked as by law required but they have neglected and refused so to do.

But Now so it is May it please your Honors that the said Robert Bailey Nathaniel Eaton, and C.D Harris Commissioners of Highways of said Town of Lyons Confederating how to injure and oppress your Petitioners in the premises Neglect and refuse to Comply with the requirements

of the Statute, and have Kept and still continue to Keep said road obstructed with fences and other obstacles and refuse to remove or cause to be removed said fences, or to cause said road to be worked or to open the same to your Petitioners and the Public as by law required.

May it please your Honors to grant unto your Petitioners the Peoples Writ of Mandamus, upon the relation of your Petitioners ordering and commanding the said Commissioners of Highways of said Town of Lyons to cause said fences in the line of said road to be removed and to direct the road to be opened and worked forthwith, and to make return to this Writ and show cause, if they can, why they should not do the same, and to stand to perform and abide such order and decree herein as to your Honors shall seem meet. And so your Orators shall ever pray.

L. D. Wilkinson
Solicitor.

(prique) Samuel Killham
William Davis his Mark
Edmund Kane his Mark "

"State of Illinois }
Cook County . } ss

Samuel Killham. William Davis and Edmund Kane on Oath say they have heard read the above Bill. and as to such matters as are stated on their own knowledge they know the same to be true, and as to those stated on information and belief they believe the same to be true.

Sworn to before me this
2nd day of July A. D. 1860
W. Kimball Clk

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Exhibit "A"

(Referred to in foregoing Petition.)

"To the Commissioners of Highways of the Town of Lyons.

The undersigned who are legal Voters and Residents within three miles of the route hereinafter mentioned and described for a road do hereby make application to you to lay out a new road of the width of four rods as follows, to wit; beginning in the center of the Chicago and Joliet road about 80 rods East of the West line of Section 15. Township 38 - range 12. thence Southerly to or near Aplain River - Said road it is believed by your Petitioners will pass over lands owned by the following named persons, to wit, H. W. Polk. S. Vial. S. Killiam. W. Davis W. Polk, P. O. Connell and James Michie.

Your Petitioners therefore pray that you will take the necessary proceedings to cause said road to be laid out and opened according to law.

Lyons Jan 14 1859.

Signed.

James Cassidy.
Lyman. F. Smith
Amasa Grover
Edward Walsh
Walter Walsh
Timothy Sullivan
William Davis
Samuel Williams
Elias Eaton
Thomas Clark.
James Michie
Joseph Evans
Richard Evans
August Hauptmann
George. W. Savage
Alfred Ward
S. H. Swanwood
Mesmus Marsmann
Thomas Cook
Daniel Quinn.
James Low
Joseph Stevenson
B. M. Waters.

(Endorsed as follows)

"I certify the within to be a true Copy of the original as filed in this office.

Geo. M. Fox
Town Clerk."

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"Exhibit B"

"Whereas upon the application of

William Davis, Samuel Killam Joseph Evans, Richard Evans, George Savage, Alfred Ward, Hiram Cook, Daniel Quinn, James Michie, Lyman Smith, Edward Welch, legal voters residing within three miles of the route hereinafter described; for a public highway, a Copy their petition having been duly first posted up as required by law, we the Commissioners of Highways of said Town did on the 9th day of February /59, personally examine the route proposed in said Petition for a road, to wit passing over lands owned by H. H. Polk. P. O'Donnell. James Michie, William Davis. S. Killham. S. Vial. H. Polk and having before from upon a time and place when and where we would meet to hear any reasons for or against laying out the same, and having caused written Notices thereof to be posted up in three of the most public places in said Town Eight days previous to the time of such meeting and having such at the time and place appointed for hearing such reasons and having heard such as were offered for or against the laying out of said road, and we the Commissioners consider that

the damages is more than, and over above them the
16 benefits of the Public Therefore we conclude not to
grant the prayer of said Petition.
Town of Lyons. February 19. 1859.

Commissioners of Highways. { M. A Eaton.
Robert Bailey "
John Brown "

"Exhibit C"

"State of Illinois } ss.
Cook County. }

Before R. P. Pollock Justice of the Peace.

Whereas Edmund Kane has this day made Oath before me one of the Justices of Peace in and for the County of Cook That he did on the Eighteenth day of January last Post Three Notices of Petition for a New road running on a line between Samuel Kilham and Samuel Vial and Polk and Vial and said Notices were posted in Three Public places in the Town of Lyons viz; one at Nir Lunes, one on the door of the Town Clerks of said Town of Lyons and one on the door of Mr Hoffmans store. all of which is in the Town of Lyons.

Edmund X Kane.

Subscribed and Sworn to this
Eleventh day of February 1859
R. P. Pollock J.P. S.S.

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"Exhibit D"

"To Joseph Evans
Clerk of the Town of Lyons.
Cook County.

The undersigned William Davis, Samuel Killham and Edmond Kane, of the Town aforesaid feeling themselves aggrieved by the order made by the Commissioners of Highways of said Town on the nineteenth day of February 1859 in refusing to lay out a Highway in said Town, do hereby appeal to the decision of three Supervisors of the County of Cook aforesaid to be selected by you agreeable to the Statutes in such cases made and provided: Which order of said Commissioners was filed in the Town Clerks office of said Town on the Nineteenth day of February 1859 - a Copy of which is hereunto annexed as and by which the road in question and the proceedings of said Commissioners will more fully appear.

The grounds upon which this Appeal is made is the refusal of said Commissioners to lay out said road and to reverse entirely the determination of said Commissioners.

The undersigned therefore ask that you as Town Clerk of said Town will proceed according to law and select three Supervisors to hear and determine said Appeal.

Dated 18 March 1859.

(signed) William Davis
Samuel Killham
Edmond Kane."

"Exhibit C."

"To William White Esq.
Supervisor of the Town of Niles
Cook Co.

Sir,

We undersigned have taken an appeal from the decision of the Commissioners of Highways of the Town of Lyons in the County of Cook. aforesaid, in refusing to lay out a Highway as follows Beginning in the center of the Chicago and Joliet Road about 80 rods East of the West line of Section 15. Township 38. range 12, thence Southerly to or near the Aplain River passing over lands owned by H. H. Polk P. O. Dennets, James Mackie. William Davis. S. Williams. S. Vial H. Polk which order of said Commissioners in refusing to lay out said road was deposited with the Town Clerk on the Eighteenth day of March 1859, whereupon Supervisors Howard Wilmarth of Barrington. S. S. Campbell, Orland, and William White of Niles were selected by said Clerk to hear and determine said appeal, the grounds upon which said appeal is made is the refusal to lay out said road of said Commissioners to lay out said road.

Dated the Eighteenth day of March 1859
(signed) Samuel Williams
William Davis.
Edmund Cain."

(Endorsement) "I certify the within to be a true Copy of the original as deposited in this office"
Geo. H. Fox. Town Clerk"

"Exhibit F."

"Sir,

Please take Notice that we have Appealed from the decision of the Commissioners of Highways of said Town of Lyons made on the 19th day of Feby 1859. refusing to lay out a highway as follows. Commencing in the centre of the Chicago and Joliet road about 80 rods East of the West line of the Chicago and Joliet Road Section 15 Township 38. North range 12 E. - thence Southerly to or near the Aplain river, and that N. Whitmarsh of Barrington. H. White of Niles and S. S. Campbell of Orland three Supervisors to whom this appeal is taken will meet at the house of Joseph Evans on the 11th day of April at 10 oblock, A. M. for the purpose of hearing and determining said appeal which appeal is taken for the purpose of wholey reversing the decision of said Commissioners in refusing to lay out said road at which time and place you may appear and show cause, if any you have why such decision should not be wholey reversed

Dated this 1st day of April 1859,

(Signed) Edmund Cain
Samuel Killeam
Thileman Lewis"

"State of Illinois }
Cook County .. } &c

Edmund Cain being duly sworn deposes and says that he served Notice on Commissioners of highways of which the within is a Copy two days previous to the appointed day of meeting.

Edmund his Cain Mark

Sworn to and subscribed before me this 9 May 1859.
N. Whitmarsh, J.P. Seal"

(Indorsed) "I certify the within to be a true Copy of the original as filed in this office."

"Exhibit G."

"To Joseph Evans, Timothy Sullivan, and James Nichie,

Gentlemen.

Please take Notice that we have Appealed from the decision of the Commissioners of Highways of said Town of Lyons made on the 19. day of Feby 1859. refusing to lay out a highway as follows, commencing in the Centre of the Chicago and Joliet road about 80 rods East of the West line of Section 15. Township 38. North range 12. thence Southerly to or near the Aplain river and that H. Dellmarth of Barrington, D. White of Niles and S. S Campbell of Orland three of Supervisors to whom the Appeal is taken will meet at the house of Joseph Evans on the 11. day of April at 10 oclock A. M. for the purpose of hearing and determining said Appeal, which Appeal is taken for the purpose of wholly reversing the decision of said Commissioners in refusing to lay out said road, at which time and place you may appear and show Cause, if any you have, why said decision should not be wholly reversed.

Dated this first day of April 1859.

(Signed) E. Cain,
Samuel Kilham
William Lewis".

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"State of Illinois }
Cook County } &c

Edmund Cain being duly sworn deposes and says that he served the within Notice on Joseph Evans. Timothy Sullivan and James Michie three of the Supervisors of said Division ten days previous to the meeting of Supervisors.

Sworn to and subscribed before me this 9. May 1859 }
Homer Wilmarth J.P.

Edward his X. Cain mark

(Indorsed) "I certify the within to be a true Copy of the original as filed in this office,
Geo. D. Fox
Town Clerk."

"Exhibit H."

"State of Illinois }
Cook County } &c

Whereas Samuel Kilham. William Davis and Edmund Cain of the Town of Lyons in said County did on the 18th day of March A. D 1859 appeal to us from the order and ~~the~~ determination of the Commissioners of Highways of said Town Contained in the order ~~to the order~~ of said Commissioners deposited in the the Town Clerk of said Town and filed the 19th day of February 1859, a Copy of which said Order as well as all the papers before us in said Appeal are hereunto annexed and we having met on the 11th day of April A. D 1859 at the Town Clerks Office at One oClock P. M. to hear the proofs and allegations of the parties being the time and

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place agreed upon by us when and where we would meet to consider said appeal and as but two of us was present and so went under the ground that we could not view the route the case was continued to the 9th day of May A. D 1859.

1859. May 9th

The parties appeared at the Town Clerks office agreeable to adjournment and it appearing that said Commissioners of Highways and three of the petitioners in said cause had been duly notified of such meeting as required by law, we did proceed to hear the proofs and allegations of the parties and to consider said appeal and we, being duly fully advised in the premises do adjudge, order and determine that the order and determination of said Commissioners of Highways be and the same is in all things reversed, and do order and determine that the road be and the same is hereby laid out and established as follows, to wit:- Commencing Two Chains and Ninety Three 2.93 links South and on a course North Sixty degrees and forty five minutes East (N 60.45 E) from said last mentioned point twenty one chains and twenty links (21.20) from the Quarter Section Corner on the West side of Section 15 T 38. R 12 in the Centre of the Chicago and Joliet A. Road, so called and running from the centre of said Chicago & Joliet Road N 15° E 5.66 chains to the 1/8th Section Stake in the East and West Quarter Section 15 aforesaid on said and running thence South on the 1/8th Section line One hundred and Ninety chains &

Thirty seven links (130.74) Variation of Needle West (6° 45' E) in the above distances are for the Center of the road which Certificate by the County Surveyor.

It is Therefore Ordered and determined that a road be and the same is hereby laid out and established according to said Survey and the Plat hereunto annexed and made part of this order which is hereby declared to be a Public Highway four rods wide the line of said Survey, being the Center of said road.

In witness whereof we have hereunto set our names and seals this twenty first day of June A.D. 1859.

(Signed) Homer Wilmarth - Supervisor T. Barrington
Thilemon White. Supervisor T. Niles
S. S. Campbell. Supervisor T. Orland.

"We the undersigned Supervisors of the Towns of Barrington, Niles & Orland in the County of Cook having on the 20th day of June A.D. 1859 upon the application made to us for that purpose laid out a road as follows Commencing two chains Twenty three links (2.23) Southward on a Course North sixty degrees and forty five minutes East (N. 60° 45' E.) from said last mentioned point twenty one chains & twenty links (21.20) from the Quarter corner of the West side of Section 15 T 38. R 10, in the Centre of Chicago and Galena Roads so Called, thence S 30 E. 7.44 chains to the 1/8 Section Stake across the Lands of Haley Polk in the East and West Quarter line of Sec 15 aforesaid as standing and running thence South

on the 1/8 Section line between the lands S. Killam S. Vial & Davis forty chains & Thirteen links to a Stake - thence continuing South on the 1/8 Section between the lands of W. Polk & S. Vial 40 chains and thirty two links to Quarter line of Section twenty two, Continuing thence South of the 1/8 line on land owned by P. O Donnell thirty nine chains and Ninety two links to the Section line on the South side of Section Twenty two - thence continuing South on the 1/8 Sec. line ten chains through lands owned by James Michie to the East of the road - And certain owners of land over which said road passes not having released their claims to Jurors for damages sustained by reason of laying out and opening the same; we proceeded to assess the damage as we deemed just and right to each individual taking into the account and estimating the advantages the road will confer as well as the disadvantages and have assessed the damages as follows, to wit:-

W. W. Polk on land in N. W. Quarter of Section No 15. One hundred dollars ($100.).

Samuel Vial on land in W 1/2 of Sec 15.

S. Killam & Wm Davis in same Sec. we consider advantage equal to the damage.

Samuel Vial E 1/2 of South W Quarter of Section No (22) advantage equal to damage.

Westley Polk W 1/2 of South West Quarter of Section No 22. advantage equal to damage.

P. O. Donnell S. W. 1/4 of Sec 22 the same.

James Michie the N W 1/2 Quarter of 27, the same.

In witness whereof we have hereunto

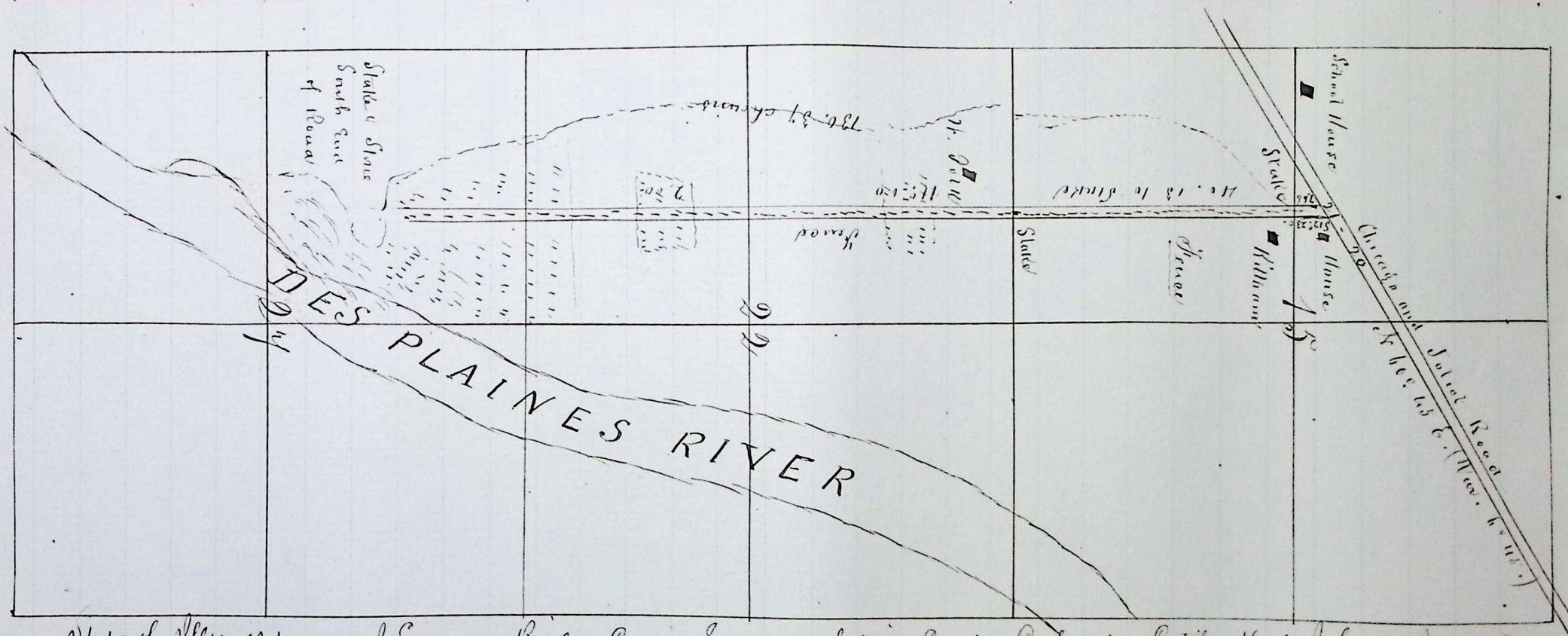
Whereof we have hereunto set our hands and seals
this 21st day of June A. D. 1859.

(Signed) Henry Wilmurth Sup. Barrington
S. S. Campbell do Orland.
Wm White do Niles.

Fees	H. Wilmurth	12 days	$24.00
	S. S. Campbell	8 "	16.00
	W. White	8 "	16.00
	E. Bixby Co. Surveyor		
		Survey & plot	10.00

Wilmurth - paid Cash out

Plat of the Survey of a Highway in Sections 15, 22 & 24 T 38 R. 12.


DES PLAINES RIVER
Chicago and Joliet Road
School House
State
Stake
South end of Road
Stake
Stake
Stake

And that the said Petition and papers attached with the purported Seal, constituted the only affi-
27 davit upon which the proceedings were founded

State of Illinois
Cook County } ss.

The People of the State of Illinois to Robert Bibby, Mitchell Eaton & C. D. Havens Commissioners of Highways of the town of Lyons in said County of Cook. Greeting. Whereas it has been represented to us by Samuel Killhams, William Davis and Edmond Kane as related in their petition to us presented

That said Samuel Killhams resides on the South ~~East~~ West Quarter of Section fifteen (15) township thirty eight (38) range twelve (12) in the town of Lyons in the County of Cook and State of Illinois

That said William Davis resides in the South ~~West~~ East Quarter of the said South West Quarter of Section 15

That said Edmond Kane resides on the West half of section twenty two (22) on the above name town and range, That each of said petitioners are now farmers and have no public road by which to obtain access to or egress from their said farms except by or through the newly located road, here in after referred to, That said William Davis has a stone Quarry on his land

which is the principal support of himself and a large family, and that he is now deprived of the means of selling or conveying to market any of said Stone, That on the North West ~~Corner~~ Quarter of section fifteen (15) aforesaid is a school house for the building and support of which each of said petitioners have been taxed, and to which school each of said petitioners have children to send but are now obliged to send them across other mens farms or keep them away from school

That on the Seventeenth day of January A. D. 1859, said petitioners and twenty other legal voters and residing within three miles of the line of the new road herein after referred to, petitioned the Commissioners of highways of said town of Lyons, to lay out and open said new road, and that said Commissioners of highways had jurisdiction of highways and roads, on the road district on which said new road was located

That on the eighteenth day of January A. D. 1859, due and proper notice of said petition was made by posting the same according to law-

That on the nineteenth day of February A.D. 1859, said Commissioners of highways of said town of Lyons, made return of their doings upon said petition refusing to lay out said road, That on the eighteenth day of March A D 1859 the said petitioners being themselves aggrieved by said action of said Commissioners in refusing to lay out and open said highway, appealed therefrom and gave notice thereof, to the then town Clerk of said town of Lyons of the same, and requested

heir. to select three supervisors according to law. to hear and determine said appeal, That thereupon on said eighteenth day of March A.D. 1859 the said town clerk of said town of Lyons. selected Homer Welmarth, Supervisor of Barrington S.S. Campbell, Supervisor of Inland and William White, Supervisor of Niles. in said County of Cook to hear and determine said Appeal. And that they were duly notified of the same, That on the first day of April A.D. 1859 Notice of said appeal was duly issued to and served upon the Commissioners of highways of said town of Lyons, That on the first day of April A.D. 1859 Notice of said Appeal was duly issued to and served upon Joseph. Evans. Dennis Sullivan and James Michie, three other petitioners of said road according to law. That in pursuance of the foregoing proceedings. the said Supervisors of the said towns of Barrington Inland and Niles did on the eleventh day of April A.D. 1859. met according to notice. and thereupon. adjourn from time to time until the twentieth day of June A.D. 1859. when they proceeded to hear and determine said appeal, and having heard the same, and the proofs and allegations of the parties thereon. did thereupon overrule and reverse the whole of the doing of said Commissioners of highways of said town of Lyons. on said petition. and did thereupon order and lay out said highway as, or substantially as prayed for in said petition and did adjudge that said highway should be laid out. opened and worked. as is correctly shown by a survey or plat of the same made by Edwin

Bix by. County Surveyor of said County of Cook
3a which plat is made part of the return of said Super
visors

That on the twenty first day of June A.D.
1859. said supervisors made their returns of their
doings ordering and establishing said road
and further adjudging that the advantage
rose equal to the damages. to all owners of lands
over which said road passed. Except to Henry H.
Polk. to whom they assessed the sum of one
hundred dollars damages, and that the said
sum of one hundred dollars so adjudged to the
said Henry H. Polk was properly and duly audited
by the proper authorities of said town of Lyons
of which authorities the said Polk was one, being
an acting justice of the Peace, residing in said
town of Lyons, and that said sum has been
incorporated into and embodied into and made
a part of the assessment and taxes of said town
of Lyons

That on or about the twentieth day of
September A. D. 1859. Notice was legally and
duly issued to and served upon each of the
owners of lands over which said road passed
to remove their fences within sixty days therefrom as by the statute in such case made and
provided, but that although requested the said
Henry H. Polk neglected or refused so to do. That
said Commissioners of Highways of said town of
Lyons after the refusal and neglect of the said
Polk, to remove his fences as aforesaid were in
duty bound by law, to cause said fences to be
removed and the said road to be opened and

worked. and that although said Commissioners have been requested yet they neglect or refuse so to do. and that you Robert Bilby, Mitchell Eaton and C. D. Havens, Commissioners as aforesaid. and Contriving and Confederating. how to injure and oppress said petitioners in the premises neglect and refuse. to Comply with the Requirements of the statutes. have kept and still Continue to keep said road obstructed with fences and other obstacles, and refuse to remove or cause to be removed. said fences, or to cause said road. to be worked or to open the same to said petitioners. or the people. as by law required And although the said Henry H. Polk, did not remove his fences within sixty days. after legal notice as aforesaid. yet you the said Robert Bilby. Mitchell. Eaton and C. D. Havens, Commissioners as aforesaid without any just or reasonable, cause. have not caused. such fences to be removed. or have not directed the road to be opened. and worked in Contempt of us and to the great damage and grievance of the said petitioners. and the people at large, as we have been informed from their Complaint made to us in that behalf.

Therefore We being willing. that due and speedy justice, shall be done in this behalf to the said people. as is reasonable. do Command you by firmly enjoining you. that immediately after the receipt of this our writ. You do without delay Cause said fences to be removed from said road and said road. to be opened and worked or make return. to this our writ signifying to us Cause

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to the contrary thereof. that the same Complaint may not by your default be again repeated to us, and how you shall have executed this our writ make it appear to us on the first day of the next term of this Court to be holden at the Court House in Chicago, in said County of Cook on the first monday of February A. D. 1860, there returning to us our writ and this You are not to omit, on peril of what may fall thereon

Witness. Walter Kimball, Clerk of our said Court and the seal thereof. at Chicago in said County. this 4th day of February A D 1860

Walter Kimball

Clerk

Executed by leaving the original of which this is a copy with Robert Bibby Feby 4th 1860, and this Certified Copy of said writ with said De witt C Havens, and another Certified Copy of said writ at the dwelling house of Mitchell Eaton

John Gray Sheriff

by Lewis Jones Deputy

Executed a writ of which the within is a true copy by giving a true and certified Copy of the original to W. H. Eaton therein named and also shewed him the original on February 4th 1860 and on the 6th of February 1860 I called at the dwelling house of the within named D. C. Havens and learned that he had gone out of my I then left a true and certified Copy of said original writ with a white person a man at the dwelling house of said Havens and on the same day gave said original writ to said

Robert Bilby

Fees.

3 Summons.	$1.50
3 Copies	1.50
40 miles travel	2.00
1 return	10
	$5.10

John Gray, Sheriff
by Lewis Jones Deputy

That afterwards, to wit, on the thirtieth day of February 1860, the respondents filed their motion to quash said Alternative writ, in the words and figures as follows to wit

"Superior Court of Chicago

The People, &c relations
Samuel Kilpham et als
vs.
Robert Bilby, Mitchell Eaton
and C. D. Havens

} Petition for Mandamus.

And the said respondents come and move the court to quash the said writ of Mandamus for the following reasons.

1st There is no sufficient affidavit or jurat upon which to found said Writ

2d The right of supervisors to lay out a road on appeal from town Commissioners of highways was taken away by the act of February 1854

3rd. There is no definite or sufficient description in said Writ of what road these respondents are required to open, Nor any certain description of any fences to be removed

4th. It does not appear that the damages assessed to said Henry H. Polk, were ever paid or tendered him, Nor that the necessary steps, have been taken whereby he would be certain of receiving the same

Rucker & Paige
Solrs. Respts

Which motion was overruled by the Court, and to which overruling the respondents, then and there excepted, and the respondents were to make return by,

And on the 21st day of May 1860, the respondents filed in said Court their return to said alternative writ in the words and figures, following, to wit,

"Superior Court of Chicago.

The People of the State of Illinois Ex relatione Samuel Killhams, William Davis Edmund Kane, ... Petition for Mandamus

vs.

Robert Bibby, Mitchell Eaton C. D. Harris, . . .

The same respondents by way of return to the writ of Mandamus issued in the above cause say.

1st They deny that the supervisors who heard and

adjudicated the Appeal from the Commissioners of Highways of the Town of Lyons in this Case have any jurisdiction in the premises, and claim that their doings in this behalf are Null and void

2, They further say that the sum of One hundred dollars assessed as damages to Henry N. Polk has never been paid or tendered to said Polk, nor does it appear by said Writ that such proceedings have been had as to render it certain that he ever will be remunerated the said damages.

3. These respondents for ans of return further show that the mandatory clause of said Writ does not describe the location direction or boundaries of said proposed road nor indicate to these respondents what particular fences they should remove, nor where they should proceed to open the road.

4 These respondents further say that the description of said proposed road as ascertained in said Writ is defective uncertain and insufficient, for reason whereof it is impossible for these respondents to ascertain with certainty where the Northernmost portion of said road should be located or what particular fences they are directed to remove.

5 And these respondents further say that Notice on or about the 20th day of September A.D. 1859, nor any time or times was a Notice served upon each of the owners of lands over which said road proposes to remove the fences within sixty days thereafter.

6 And these respondents for ans of return further say that the said relators Samuel Killam and William Davis have a private road connecting their respective premises directly with the Chicago and Joliet Road, whereby in their intercourse with Chicago

their principal place of business and travel. They are nearly if not fully as well accommodated as they would be by the proposed road.

These respondents deny that said Killham and Davis or either of them are obliged to send their children across other men's farms in order to avail themselves of the benefits of the public School.

4 And as to said Edmund Kane one of said relators these respondents say his said premises do not communicate with any public or private road, nor would they adjoin or communicate with any public or private road the road mentioned in said writ, but these respondents aver that the lands between said premises of said Kane and the said private road are mostly open prairie and the said Kane has always had and now has perfect freedom and permission to pass and repass over said prairie up to and through said private road without let or hindrance, and either with Carts wagons carriages and teams or otherwise.

8 And these respondents by way of further return to said Writ say that there has been a great amount of dissatisfaction and Complaint by many respectable Citizens in the Neighbourhood of the proposed road with the action of the three Supervisors in reversing the decision of the board of Commissioners of Highways of said Town of Lyons, and in laying out said road: that a Petition dated February 2nd 1860 and signed by forty or more of the most substantial Citizens and tax payers and legal Voters residing within three miles of said road sought to be opened by said Writ, has been presented to these respondents for the purpose of discontinuing

the said road - That thereupon on the fourth day of said February they caused a Copy of said Petition to be posted up in three of the most public places in said Town of Lyme - That within two days after the expiration of twenty days from the day of posting said Notices, towit on the twenty fifth day of February 1860, they did personally Examine the road in said Petition prayed to be discontinued, and seeing the same mentioned in said Writ; that they thereupon fixed upon a time and place when and where they would meet and hear any reasons for or against the discontinuing of said road, that there upon they caused written notices of said time and place of said hearing to be posted up in three of the most Public places in said Town of Lyme Eight days previous to said hearing; that at the time and place specified in said Notices they met and after hearing such reasons and arguments as were offered for or against the discontinuance of said road, and hearing fully considered the same, and having been fully advised in the premises, and being of opinion that the prayer of the Petitioners as to the vacating or discontinuing said road should be granted and that said discontinuance was necessary and proper and that the Public interest would be promoted thereby, they did order and adjudge that said road be and the same were thereby discontinued, to wit, on the fifth day of March A.D. 1860. They further ever that said order has been duly filed by the Town Clerk of the said Town of Lyme.

And the Respondents by way of return further

day, that on or about the 23rd day of February 1860, Henry N. Polk with thirty six others, legal voters and residing within three miles of the following route asked to be laid out as a road, presented a Petition to these respondents as Commissioners of Highways of the Town of Lyons asking for a road to be laid out and opened Commencing in the centre of the Chicago and Joliet road in the half Section line of Section fifteen, township 38, North of range 12 E. thence Southerly to or near the Aplain river, a Copy of which Petition with the return and filing thereon is hereto annexed marked Exhibit A. and made a part of this return.

That these respondents thereupon on the 25th day of February 1860, caused a Copy of said Petition to be posted up in three of the most public places in said Town of Lyons. And afterwards to wit, on the 17th day of March 1860, the same being within ten days after the expiration of twenty days from the time of posting said Notices they did personally Examine the route for the new road proposed to be laid out, and thereupon did fix upon a time and place when and where they would meet to hear any reasons that might be offered for or against laying out the same and did cause written Notices of the time and place of said hearing, to be posted up in three of the most public places in said Town, Eight days prior to said hearing, that afterwards to wit, on the 26th day of March 1860 at the time and place mentioned in said Notices. They met pursuant to said Notices, and having heard such reasons as were offered for or against the laying of said road

there being no opposition thereto, and being of opinion that the laying out of said road was necessary and proper and that the public interest would be promoted thereby; they granted the prayer of said Petitioners and determined to lay out said road; that thereupon they caused a survey accompanied with a report and plat of said route to be made by a Competent Surveyor particularly describing said route by metes and bounds courses and distances, and the lands over which such road passes: that they thereupon incorporated such report and survey accompanied with said plat in an order signed by them declaring said road so laid out to be a public highway, that said order together with the Petition has been deposited with the Town Clerk of said Town of Lyons who has duly filed the same.

These respondents further say that no agreement was made with any of the owners of lands over which said New road passes for the damages sustained by such laying, and thereupon these Respondents assessed the damages to Each owner with whom they could not agree, and have deposited a statement thereof with the said Town Clerk, a Copy of which is hereto annexed and marked Exhibit "B." and made a part hereof.

These respondents hereto annex Certified Copies of said order declaring said road to be a public Highway, and also of said report and plat of said Survey and marked "Exhibit C," and "Exhibit D," respectively and made a part hereof. Said Respondents aver that the laying out of the last mentioned road does away with the necessity of the road mentioned

in said Writ, if any such necessity ever existed, which they deny.

All which matters and things these respondents are ready to verify and prove as this Honorable Court shall direct. Wherefore in consideration of the matters and things above set forth and alleged they submit they ought not to be compelled to open said road described in said Writ of Mandamus, and they pray to be hence dismissed and for their costs in this behalf."

(Signed) "Michiel N. Eaton } Commissioners of
Robert Billy } Highways of
De Witt C. Nauens } Town of Lyons."

"Exhibit A"
referred to in the foregoing Return.

"To the Commissioners of Highways of the Town of Lyons County of Cook,

"The undersigned who are legal voters and reside within three miles of the route hereinafter mentioned and described for a road do hereby make application to you to lay a new road of the width of four rods as follows; to wit, Commencing in the center of Chicago and Joliet road on the half section line of Section (13) Township (38) Range (12), thence Southerly to near the Upton River; the names of owners of lands over which said road is to run as far as known to your Petitioners are the heirs of A.B. Witt H.H. Dole. S. Meehan, Wm Davis, John Harrison S. Veal and Edmund Kane on the East half of Section 12 and Dy owners not known to your petitioners.

Your petitioners therefore pray that you will proceed to lay out said road and cause the same

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to be opened according to law.

Dated at Lyons this 23d day of February 1860

(signed) W. H. Polk
John Harrison
Franklin S. Dill
R. M. Waters
George W. Dill
Samuel Vial
Lyman F. Smith
George Schrader
Elias Eaton
James Vial
Ethan Vial
Frederick Pichn
William Pichn
L. L. Wells
Edward Vial
L. C. Drivdruff
N. Spennerdoff
Abram Beaman
Alden J. Grover
Joseph Stephenson

Richard Dill
Amasa Grover
Samuel Meriam
George G. Root
Chester Northrup
O. C. Grover
Samuel Rudolf
Carl Fredrick Eugengle
Zacharias Mulen
John Gehlsman
Wesley Polk
George S. Wells
Herman Decraff
Robert Vial
Seley Ketchum
Isaac Pool
Edmund P. Wells

(Endorsed) "Filed April 6. 1860.
G. W. Fox Town Clerk."

"I certify the within to be a true copy of the original as filed in this office.
Geo: W. Fox
Town Clerk."

"State of Illinois }
Cook County } ss

George S. Wells being duly sworn doth depose and say that he did on the 25th day of February 1860, post up three copies of the within

petition as follows viz at A Hauptmans Store
viz at Wm Timms and Wm Hillbard in the Town
of Lyons in said County it being three of the most
public places in said Town
Subscribed and Sworn to
before me this 25th day of
February 18[illegible]
Henry H. Polk

George. S. Wells.

"Exhibit B"

"We the undersigned Commissioners of Highways of the Town of Lyons County of Cook, having on the 31st day of March 1860, A.D. upon due application made to us for that purpose lay out a road as follows Commencing in the centre of the Chicago and Joliet Road on the half section line of Section (15) Township (38) Range (12) thence Southward to or near the Ogden River as surveyed: Commencing in the centre of the Chicago and Joliet Turnpike 20.50 chains South of the 1/4th corner on the North line of Section (13) thence running South 139.44 chains to the Bank of the Des plaines River as shown by the plat.

And certain owners of lands over which road passes, to wit; the heirs of S.B. Hill H.H. Polk, Samuel Williams and W. Davis, John Harrison, Samuel Vial, Edmund Cain, and in East half of Section (22) and (27) owners not known. That having released all claims to damages sustained by reason of the laying out and opening and not being able to agree with them as to the

amount of such damages having applied to them and Each of them for that purpose & 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 in account and Estimating the advantages 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 the heirs of S.B. Dibb a part of West half of North East Quarter of Section (15) Township (38). Range (19). 35.00 Dollars upon improved lands. John Harrison 5.00 Dollars. for his interest of private road, East half of North West Quarter of section (15) Town (38) range (19).

To S. Kilborn in North half of the East half of South West Quarter of Section (15) Town (38) Range (19) the benefits Equal to all damages.

Wm Davis in South half of the East half of the South west Quarter of Section (15) Town (38) Range (19) his benefits are Equal to all damages.

Samuel Vial in the East half of the North West Quarter Section (22) Town (38) range (19) benefits Equal to all damages.

John Harrison in South East fractional Quarter of Section (15). Town (38). Range (19) $30.00 Dollars for damages.

Wm Davis a part of West half of North East Quarter of Section (15) Town (38) Range (19) $50 for damage for his interest in the private road.

Edmund Cain in East half of the South West Quarter of Section (22) Town (38) Range (19).

benefits Equal to all damages,

In witness whereof we have hereunto Set our hands this 31st day 18th A D. March 1860,

218 (Signed) Wm H. Eaton
D C. Heward } Commissioners of
Robert Billy } Highways."

"I certify the within to be a true Copy of the Original as filed in this office.

Geo: W. Fox
Town Clerk."

"Exhibit C"

"Order of Commissioners of Highways.

Cook County
Town of Lyons }

Whereas upon the application in writing of Henry H. Polk. John Harrison. Frank Hitt. Richard Waters. George H. Hitt. Samuel Vial. Lyman F. Smith George Schrader. Eben Eaton. Elban Vial. Amasa Give James Vial and others, thirty seven (37) in all, legal Voters residing three miles of the route hereinafter described, for Public Highways a Copy of their petition having been first duly Posted up in three of the most public in the Town as required by law We the Commissioners of Highways of the Town of Lyons did on the Seventeenth (17) day March personally Examine the route proposed in said Petition for a road, to wit:

Commencing in centre of the Chicago and Joliet road on the half Section of Section (15) in Township (38) Range (12), thence Southerly to or

near the Plaines River and before having determined
to lay out said road fixed upon a time and place
when and where we would meet to hear any
reasons for or against the laying of the same
and having caused written notices thereof to be
posted up in three of the most public places in
said Town Eight days previous to the time of such
meetings and having met at the house of W. W. Polk
in said Town on the 26th day of March 1860
being the time and place previously appointed for
hearing such reasons and hearing such as was
offered for or against the laying of said road, and
being of the opinion that such laying is necessary
and proper and that the public interest would be
promoted thereby and having the prayers of said
Petitioners and determined to lay out said road, we
did on the day of March 1860 cause a survey
thereof to be made by a Competent Surveyor who
made a report to us as follows.

State of Illinois }
County of Cook .. }

I Alex: Holcott County Surveyor
do hereby Certify that I surveyed a route for a new
road through the centre of Section (15) and (22)
Town (38) North range (12) East, by order of the
proper authorities, and as directed by the road
Commissioners commencing in the centre of Chicago
and Joliet Turnpike 20.50 chains South of corner
on the North line of Section (15). thence running
South 139.44 Chaines to the Bank of the Des Plaines
River as shown in the above plat, and I further
Certify that the annexed plat is a true copy of
said Survey Alex: Holcott
Chicago, March 31st 1860. County Surveyor.

It is therefore ordered and determined that a road be and the same is hereby laid out and established according to the said Survey and the plat is hereunto annexed and made part of this order which is hereby ordered to be hereafter a public Highway four rods wide the line of said Survey being the centre of said road

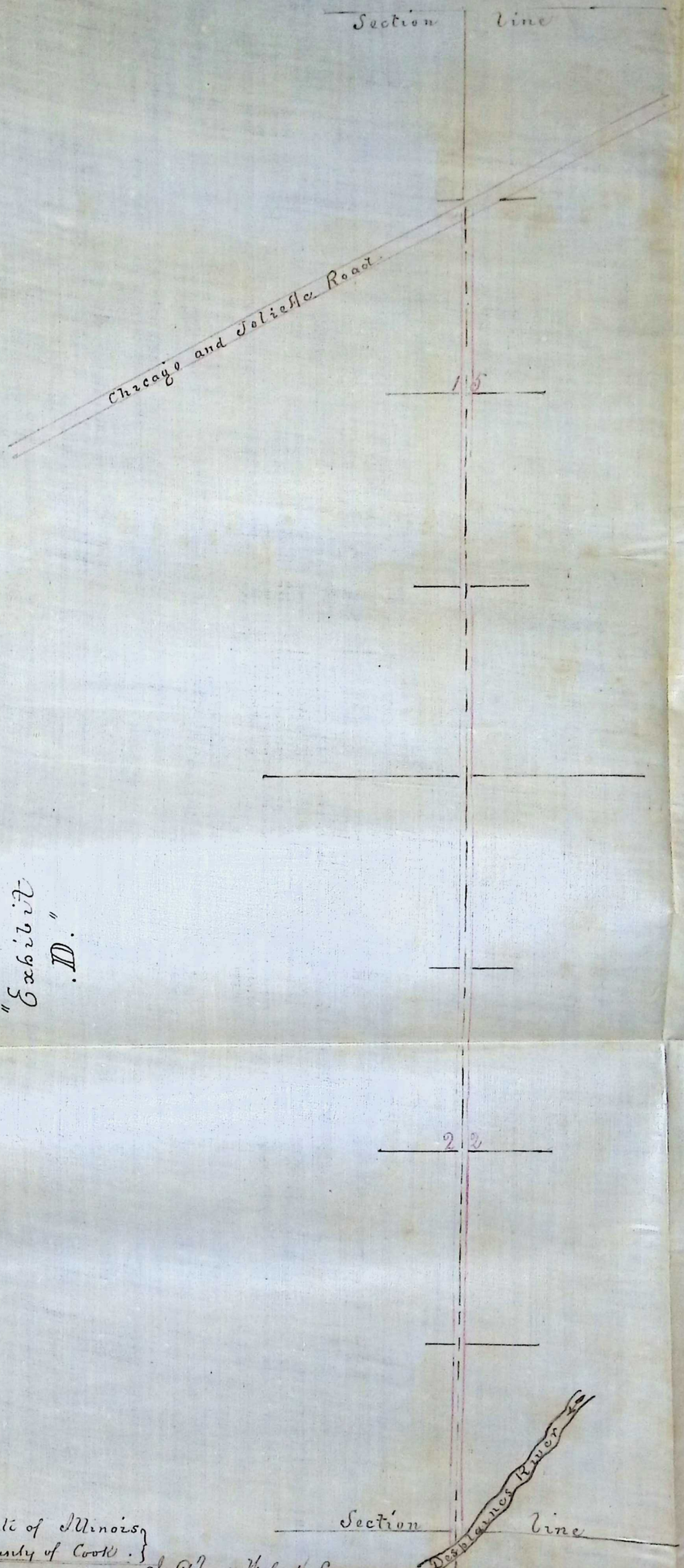
In witness whereof we the said Commissioners have hereunto set our hands this 31st day of March 1860 A. D.

Robert Beilby
D. C. Havens
M. A. Eaton

Commissioners of Highways.

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Map of new road through the centre of Sections 15 and 22.
T. 38. N. R 12 E.



"Exhibit D."

State of Illinois
County of Cook. }

I Alex: Wolcott County Surveyor do hereby Certify that I have Surveyed a route for a new road through the centre of Sec. 15 and 22 Town 38. North. R 12 East by order of the proper authorities, and as viewed by the Road Commissioners. Commencing in the Centre of the Chicago and Joliet Turnpike 20.50 chains, South of the 1/4 Corner on the North line of Sect 15. thence running South 19 14/100 chains to the bank of the Des Plaines River. as shown on the above Plat. And I further Certify that the annexed Plat is a true Copy of said Survey

Chicago. March 31st 1860

Alex: Wolcott
County Surveyor

That on the twenty first day of May 1861. the said relators filed in said Court their motion to strike said 416
return from the files which said motion and the reasons thereof are in the words and figures following, to wit,

"Superior Court of Chicago

The People, Ex relatione
Samuel Kilham et al
vs
Robert Bibby, et al

And now comes the relators by D. D. Wilkinson their attorney, and moves this Honorable Court to strike the return this day filed by the Respondents from the files

Because the same was not filed within the time ordered by the Court.

Because the same and the matter therein entered are irrelevant and improper as a return to the writ

Because the same is insufficient as a return to the writ &c.

D. D. Wilkinson
Atty for Relators

N.B. This motion will be called up as soon as we can be heard by the Court.

D D W.

Atty Rel.

Which motion, affidavit of respondents attorney being filed in excuse for not filing the return on the day required

was overruled by the Court. and to which overruling the relators. then and. there excepted,

State of Illinois } "Superior Court of Chicago
Cook. County }

The. People, by relation
Samuel Kill hand et als
vs
Bilby et. alls
Commissioners &c

D. S. Paige. being duly sworn deposes and says. that the return ordered. to be filed by. the respondents in the above entitled Cause. on the 14th. day of May 1860. was prepared. and made ready. and signed. by respondents in said day.- that this deponent. brought. the same. up to the Court Room in the morning of. that day. for the purpose of having the same filed, but. found the door to said room. locked, that he has had it ready. for filing ever since. but. learning that no Court would be held. during last week. he deemed it not essential. to have the same filed until Monday of the present. term

Jno. S. Paige

Sworn. to this 24th. day of }
May 1860. before me }
Wm Kimball. Clk }

That. on the 1st day of June 1861. the said relators filed. their replication. to the said return in the words and figures following to wit-

"Superior Court of Chicago

The People of the State of
Illinois on the relation of
Samuel Kellham. William
Davis and. Edmund Kane

vs

Robert. Bibby. Mitchell
Eaton and. D. L. Havens

And. the said relators
for. plea. to the return of the Respondents filed herein say.

1st That. the supervisors. to be heard and adjudicated the appeal on said writ of Mandamus and return mentioned. had ample jurisdiction of the matter of said. appeal

2d That. the sum of $100. assessed as damages. to the said. Henry. H. Polk. has been included in the General Tax Warrant. of the town of Lyons. as in said Petition is alleged. and that such. proceedings render it certain that he will be remunerated. the said damages

3d That the mandatory clause of said writ does describe with sufficient certainty. the location, direction and boundaries of the said proposed road and is, in other respects sufficiently plain and definite

4th That the description of said proposed road is not uncertain. defective or insufficient but is sufficiently certain to enable said Respondents, to lay out the same

5th 1

as commanded by said Writ.

5th That legal and proper notice was given to the owners of lands over which said road passes to remove their fences as in said writ is alleged

6th That the said Relators. Hill Lawn and Davis have not a private road. Connecting their premises with the Joliet and Chicago Road

7th That the lands of the said Relators Lawn do not Communicate directly with the road Commanded by the said Writ. to be laid out.

8th And as to the remaining portion of the said Return of the said Respondents. in which certain proceedings. tending. towards. the Vacation of the said road by the said writ of Mandamus. Commanded. to be opened and attempted. to be set up. by way of answer. to the said writ. the relators say that the same are insufficient in law as an answer to the said Writ, and that they are not bound by law. to plead. to, or traverse. the same. and this they are ready to verify.

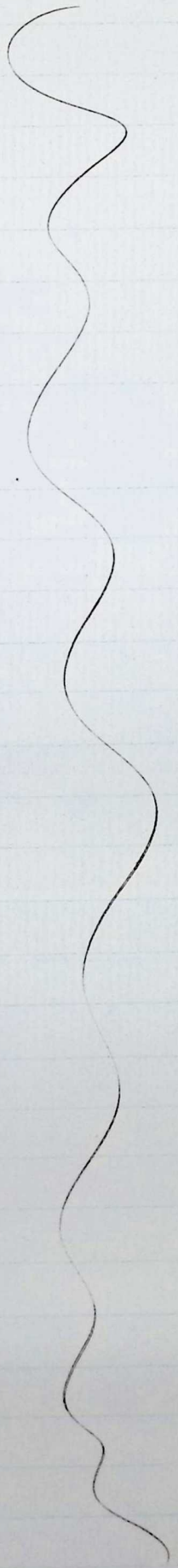
Wilkinson
Att'y for. Relators

That. afterwards. on the 10th day of. January. 1864. the said Relators filed in said Court. their motion. to strike the issues in said Cause. and set the same for. Trial hearing

That on the 15th day of January 1864. the Relators moved the Court for leave to amend the said Alternative Writ, which motion, against the objections of the Respondents was granted by the Court., whereupon

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and to which granting the Respondents then
and there excepted





And afterwards on the 22nd day of January 1864 the Relators filed their amended writ in the words and figures following, to wit,

~~Also that the said Petition was proved & the fact~~
~~with the proper & just constituted the duty officers~~
~~upon which the proceedings were founded.~~

5 2

"State of Illinois }
Cook County .. } ss

The People of the State of Illinois
To Robert Bilby, Mitchell Eaton & D. Havens
Commissioners of Highways of the Town of Lyons in
said County of Cook.

Their Writ included in these words to wit
The People of the State of Illinois
To Robert Bilby Mitchell Eaton and D Havens
Commissioners of Highways of said Town of Lyons
in said County greeting;

Whereas it has been represented to us by
Samuel Killam, William Davis and Edmund Kane
as related in their Petition to us presented,

That said Samuel Killam resides on the South
West Quarter of Section fifteen (15) Town Forty eight
(38) North of range 12 East in the Town of
Lyons in the County of Cook and State of Illinois

That said William Davis resides on the South
East Quarter of the South West Quarter of said
Section 15;

That said Edmund Kane resides on the West
half Section twenty two (22) in the above named
Town and Range.

That each of said Petitioners are now farmers
and have no public road by which to obtain
access to or egress from their said farms, except
by a through the newly located road hereinafter
referred to.

That said William Davis has a stone quarry

on his land which is his principal support of himself and a large family and that he is now deprived of the means of selling or conveying to market any of said Stone.

That on the North West Quarter of Section fifteen aforesaid is a School House for the building and support of which tax of said Petitioners have been taxed and to which School Tax of said Petitioners have Children to send, but are now obliged to send them across their own farms or keep them away from School.

That on the Seventeenth day of January A.D. 1859 said Petitioners and twenty others legal voters residing within three Miles of the line of the new road hereinafter referred to, petitioned the Commissioners of Highways of the said Town of Lyons to lay out and open said New road and that said Commissioners of Highways had jurisdiction of highways and roads in the road District in which said road is located.

That on the 18th day of January A.D. 1859 due and proper Notice of said petition was made by Posting Copies of the same in three of the most Public places in said Town of Lyons according to law.

That on the 9th day of February A.D. 1859 and within ten days after the expiration of twenty days from the time of posting said petition said Commissioners of Highways of said Town of Lyons personally examined the route for said New road then proposed to be laid out and afterwards on the 19th day of February A.D. 1859 refused to lay out and open said road prayed for in said petition and noted the fact of such refusal on

the book of said Petition and deposited the same with the Town Clerk of the said Town of Lyons on the day last aforesaid who then and there duly filed the same.

That on the 18th day of March A.D. 1859 the said Petitioners being themselves aggrieved by said action of said Commissioners of Highways in refusing to lay out and open said road appealed therefrom in writing and gave Notice thereof to the then Town Clerk of said Town of Lyons stating the grounds of their said Appeal and requested him to select three Supervisors according to law of the County of Cook to hear and determine their said Appeal.

That thereupon on said 18th day of March A.D. 1859 the said Town Clerk of the said Town of Lyons selected Abner Wilmarth, Supervisor of Barrington, S. S. Campbell Supervisor of Orland and William White Supervisor of Niles in said County of Cook, neither of whom was a resident of said Town of Lyons to hear and determine said Appeal; and gave a Certificate of such selection to said Petitioners who caused the same to be delivered to one of said Supervisors selected as aforesaid, and Notices thereof to be served on the other two within ten days from the filing of said Appeal with the Town Clerk as aforesaid according to law.

That after the Expiration of Thirty days from the filing of said Order refusing to lay out said road as aforesaid, said Supervisors agreed to meet at the Town Clerks Office on the 11th day of April A.D. 1859 to hear said Appeal, and said Petitioners gave Eight days written Notice of the time and

place agreed upon by the said three Supervisors for the hearing of said Appeal on each of the three Commissioners of highways from whose order they appealed, and also on Joseph Evans, Stanley Sullivan and James Nichols three of said petitioners for said road according to law.

That in pursuance of said Notice the said Supervisors of the said Town of Barrington, Orland and Niles did meet on the 11th day of April A.D. 1859 and thereupon adjourned from time to time until the 4th day of June A.D. 1859 when they proceeded to hear and determine said Appeal, and having heard the same and the proofs and allegations of the parties thereon and being fully advised in the premises and being of the opinion that the laying out of said road was necessary and proper and that the public interest would be promoted thereby and being fully authorized by the Statute in such case made and provided did thereupon overrule and reverse the whole of the doings of said Commissioners of Highways of said Town of Lyons on said Petition and granted the prayer of said Petitioners and then and there determined to lay out and establish said road.

That thereupon they caused a Survey accompanied with a report and plat of said route to be made by Edmund Bischy a competent Surveyor particularly describing said road by metes and bounds courses and distances and also the lands over which said road passes and incorporated such report and survey accompanied with the said plat in an order signed by them declaring such road so laid out and established to be a public highway which order together with said

Section they described with said Town Clerk who duly filed the same on the 21st day of June A.D. 1859.

56 That said road so laid out by said Supervisors on the prayer of said Petitioners commences in the centre of the Chicago and Joliet Road 20 called twenty one chains & twenty links (21.20) on a course North sixty degrees and forty five minutes East from a point on the quarter section line on the West side of section fifteen (15) Town Thirty eight (38) range Twelve (12) two chains & ninety three links (2.93) South of the North West corner of the South West Quarter of said section; thence South Twelve degrees and five minutes East (12° 5 E) seven chains and sixty six links (7.66) to the 1/8 section stake, in the East and West Quarter line of section fifteen as planeing. and running thence South on the 1/8 section line One hundred and thirty chains and thirty seven links (130.37) to a stake and stone, Variation of needle east 1° 45 E. The above distances, are for the center of the road, said road lays over the South part of the N. W. 1/4 of said section 15, being fenced and cultivated land of H. H. Polk the South West Quarter of said section 15. the W 1/2 of said Section 22. and the S part of the N. W. 1/4 of Section 24.

And said Supervisors further adjudged that the advantages were equal to the damages to all owners of lands over which said road lapses except to Henry H. Polk to whom they assessed the sum of One hundred dollars damages and that the same sum of One hundred dollars so adjudged to the said Henry H. Polk was properly and duly audited

by the proper authorities of said Town of Lyons of which authorities the said Polk was one being an acting Justice of the Peace residing in said Town of Lyons, and that said sum was incorporated into and embraced in and made a part of the assessment and taxes of said Town of Lyons and was duly collected and either paid to said Henry H. Polk or kept for him ready to be paid when by him called for, or purposely withheld at his knowledge or acquiescence for the express purpose of defeating the said road.

That on or about the 20th day of September A.D. 1859, the said Henry H. Polk & other owners of land over which said land road runs were requested to remove their fences from said road but that the said Henry H. Polk neglected and refused so to do.

That said Commissioners of Highways of said Town of Lyons after the neglect and refusal of the said Polk to remove his fences as aforesaid were in duly bound by law to give said Polk sixty days notice to remove his said fences from said road and in default thereof to cause said fences to be removed, and the said road to be opened and worked, and that although said Commissioners have been requested yet they neglect and refuse so to do.

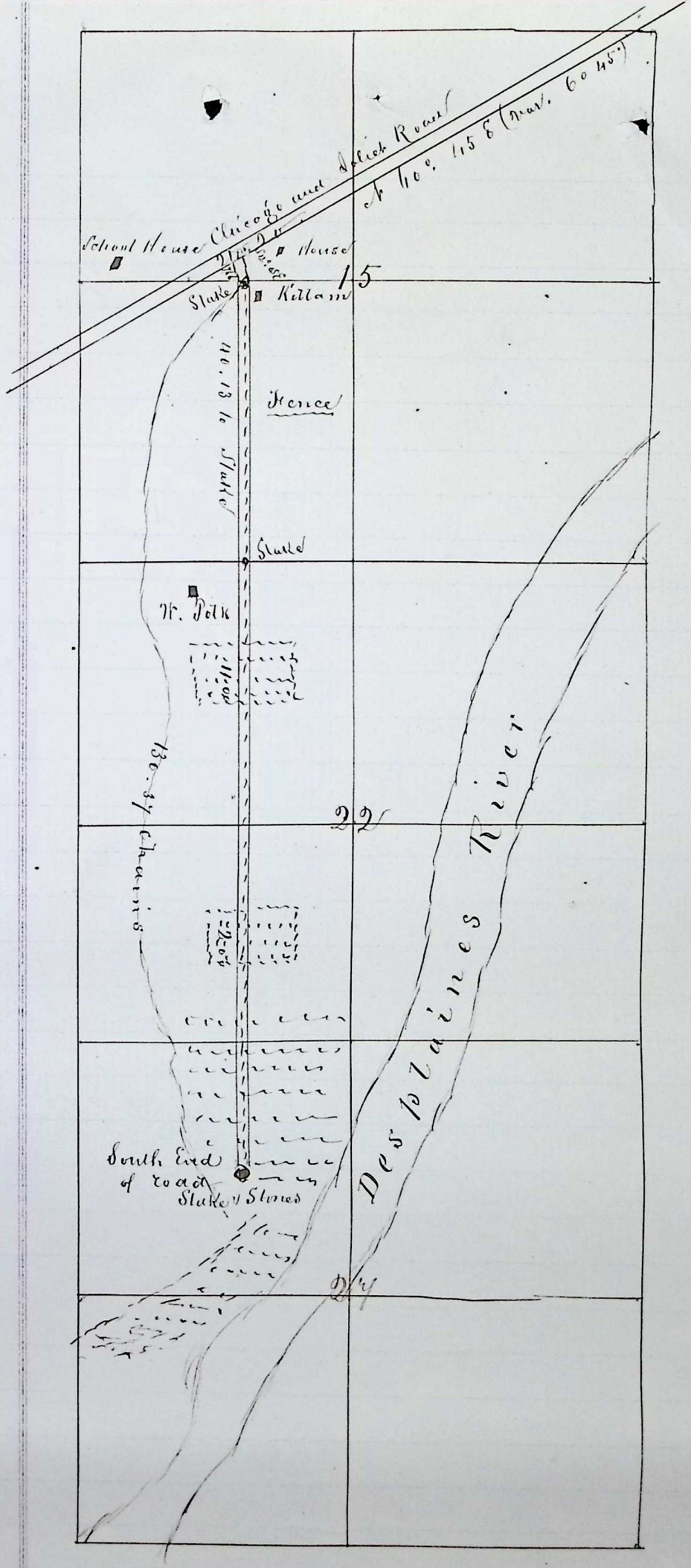
And that you Robert Polley, Mitchell Eaton and C. D. Havens Commissioners of Highways as aforesaid contriving and confederating how to injure and oppress said Petitioners in the premises neglect and refuse to comply with the requirements of the statute have kept and still continue to keep said road

obstructed with fences and other obstacles and refuse to remove or cause to be removed said fences or to cause said road to be opened to the public or to Petitioners, or direct the same to be worked, and although the said Henry H. Polk did not remove his fences from said road within a reasonable time after being requested as aforesaid yet you the said Robert Bibby, Nicholas Eaton and G. D. Havens, Commissioners as aforesaid without any just or reasonable cause have not caused such fences to be removed nor have not caused said road to be opened, or directed the same to be worked in contempt of us and to the great damage and grievance of the said Petitioners and the People at Large as we have been informed by their Complaint made to us in that behalf.

Therefore we being willing that due and speedy justice shall be done in this behalf to the said Petitioners and the Public as is reasonable do Command you by firmly injoining you that immediately after the receipt of this our Writ you do without delay give said Henry H. Polk written Notice to remove his fences from said road within Sixty days from the Service of the same and in default thereof cause the fences and other obstacles to be removed from said road, and said road to be opened of lawful width as laid out and established by said Supervisors according to said Survey, and as follows, to wit.

Commencing in the Center of the Joliet and Chicago Road Seven chains and Sixty Six Links (7.66) North 12° 5' West of the 1/8 Quarter Section Stake, as Standing on the East and West Quarter

line of Section fifteen (15) Town Thirty Eight (38) range Twelve (12) East, in the Town of Lyons, and running thence South Twelve degrees and five minutes East (12° 5' E) Seven chains and Sixty Six links (7.66) to said Stake on said Quarter Section line; thence South on the 1/8 Section line One hundred and Thirty chains and Thirty Seven links (130.37) to a stake and stone in the North West Quarter of Section twenty seven (27) in said Town (Variation of needle west 6° 45' E.) The above distances are for the centre of the road, and the starting point is further described as being twenty one chains and twenty links (21.20) North Sixty degrees and forty five minutes (60° 45' E) of the intersection of the center of the Joliet and Chicago Road with the West line of said Section fifteen (15) which last mentioned point is two chains and Ninety three links (2.93) South of the North West Corner of said Section fifteen (15) as shown by the following Copy of the Plat of said Survey made by Edmund Bixby, Surveyor.


Chicago and Galena Road
N 100. 15 E (Var. 6° 45')
School House
Chicago
House
15
Stake
Killam
N. 13 E. 5 Links
Fence
Stake
N. Polk
Road
13.34 Chains
22
Road
Des Plaines River
South End of road
Stake & Stones
Dry

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or make return of this our writ, certifying to us cause to the contrary. Thereof that the same Complaint may not by your default be again reputed to us. and how you shall have executed this our Writ make it appear to us on the first day of the next term of this Court. to be holden at the Court house. in Chicago, in said County of Cook, on the first day Monday of February 1859. Then returning to us this our Writ, and this you are not to omit on peril of what may fall thereafter

Witness. Walter Kimball, Clerk of our said Court, and the seal thereof at Chicago. in said County this 4th day of February A D. 1859.

L. S.

Walter Kimball
Clerk

And upon the 15th day of February 1864. the Respondents filed their motion to Quash said amended writ in the words and figures following. to wit,

Superior Court of Chicago,

The People &c. ex rel
Samuel. Kilham etals
vs
Robert. Bibby et. als
Comrs of. Highways of
town of. Lyons.

Writ of mandamus

Now. Come the Respondents in the above cause and move. that. the amended writ in this Case be quashed Because 1st The same is not authorized by law, nor by any order we have of the said Court.
2dly Because the same is incongruous and inconsistant
3dly It requires that. to be done which upon its face, is shown to be absurd, and impossible of accomplishment.
4thly It. fails to show any right, or jurisdiction, in said Supervisors. to make any order, or to act in the premises
5thly It. fails to show facts necessary. to entitle. the relators to the peremptory writ, or to a return of these Respondents
6thly Said writ is vague, uncertain and insufficient

Rucker Paige & Fitch
Att'ys for Respondents

Sat. the Court. over ruled. the motion. to which over ruling. the Respondents. then and there excepted and the defendants were required. to make return by the 18th day of March 1864, And on the said

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18th of February the respondents filed their amended return to said Amended writ, in the words and figures as follows, to wit,

Superior Court of Chicago

By People &c by &c
Samuel Killam et als
vs.
Robert Bibby et als
Commissioners of town of Lyons

} Mandamus

Now come the said respondents and by way of amendment make further return to said writ of mandamus

1st They deny that on the 17th day of January A.D. 1859, or at any other time the said petitioners, with twenty or with any other legal voters residing within three miles of the line of said road, petitioned the Commissioners of said town of Lyons, to lay out or open said new road.

2d They deny that on the 18th day of January A.D. 1859, or at any other time, due or proper notice of said petition was made by posting Copies of the same in three of the most public places in said town of Lyons.

3d They deny that said town Clerk of Lyons gave a certificate of the selection of said supervisors to said petitioners, or that said petitioners caused such certificate to be delivered to one of said supervisors, or notice thereof to be served on

the other two supervisors within two days from the
64 filing of said appeal with said town Clerk

4th They deny that after thirty days from the filing
of said order refusing to lay out said road, said Supervisors agreed to meet at the town Clerks office on the
11th day of April 1859 to hear said appeal, or that said
petitioners gave eight days written notice of the time and
place agreed upon by said supervisors for hearing of said
appeal, one each of said Commissioners, or on said
Joseph Evans or Timothy Sullivan or James Mickie

5th They aver that there never was given or served any legal
or sufficient notice of the time, or place agreed upon
by said three supervisors, when and where the proof
met to consider said appeal, or of the times or place
to which the same was adjourned or continued for
hearing

6th They deny that said supervisors ever laid out or
established the road described in said writ, or
ever declared the same in any order signed by them
or otherwise to be a public highway

7th They deny that said supervisors, caused a survey
accompanied with a ~~plat~~ report or plat of said
route to be made by a competent surveyor, particularly
describing said road by metes or bounds, courses or
distances, or the lands over which said road passes

8th They deny that they were ever requested to give
said W H Peck, sixty days notice to remove his
fences from said road described in said amended

9th They aver that the subject of damages was Considered and passed upon by said Supervisors at. another and different meeting, and on a subsequent day from that wherein the expediency of laying out said road was considered, and no Notice was given of the time or place of meeting for the Consideration of damages

10th They aver, that said Supervisors had no authority or jurisdiction to lay out or establish said Road and all their acts and doing in that behalf were null and void

Rucker Page & Fitch
their attys

And on the 24th day of February 1864 said Relators filed their traverse to said amended return, in the words and figures following, to wit

The People of the State of Illinois Ex Rel Samuel Hillard Williams, David Edmund Kane & Robert Bibby et al } vs } Supervisors Court of Cheney } Mandamus

And now the said Relators, Plaintiffs by Garnsey and Blanchard their attorneys, come and say, that reserving unto themselves all and all manner of Exceptions which can or may be had or taken to the manyfoldness uncertainties and insufficiencies in

said amended petition contained, they say that they ought not to be barred from having and maintaining their said writ by reason of any thing in said amended petition contained because they say that their said amended writ is true certain and sufficient and said amended re-
66 turn is untrue uncertain and insufficient and this they pray may be inquired of by the Country

Garrison & Blanchard
Attys for Relators

And afterwards to wit on the 25th day of February 1864 this cause was brought on to a hearing upon the issues joined on said amended Writ, Return and Traverse

And the Relators to maintain the issues on their part, read in evidence the original Petition for the road, The Notice of posting the same The Order of the Commissioners of Highways of the town of Lyons (two of the Defts) refusing to lay out said road. The Notice of Appeal to the town Clerk, Notice of hearing the appeal to the supervisors The order of the supervisors of the towns of Orland Brutus and Wolcott establishing said roads, all of which were attached to said petition

The relators further introduced in evidence the survey of Edmund Bridgeley and Plat, a copy of which is attached to said petition

The Relators then introduced and read in evidence the original order of the supervisors of Orland, Brutus

and. files, establishing said road, a copy of which is attached to said Petition

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They also offered in evidence an order of Town Supervisors setting aside the order vacating or discontinuing said road.

It was admitted that George W. Fox was town Clerk of said town of Lyons and that his signature to said papers were genuine

And then for the relators further to maintain the issues on their part, introduced and Examined the following witnesses, who testified, respectively as follows, to wit.

Joseph Evens. - I live in town of Lyons, was town Clerk of Lyons in 1859. I remember that an appeal was taken from the order of the Commissioners of highways refusing to lay out the road in question — I selected three Supervisors to hear the appeal and gave a certificate of such election to some one, Can't now remember to whom

. I dont know whether any one suggested names or not, they may have done so, I was present when the supervisors met at my house. dont know that I went to examine the route, a good many were present, I think the defendants were there. and had an attorney.

James Michie, I live in Lyons, have acted as attorney for the petitioners to get the road, was present when the Commissioners acted and refused the road, I furnished the town Clerk (

(Evans) a printed list of the supervisors of Cook County, to select from upon such appeal. I notified the supervisors of such selection, one in person and two by mail, Evens gave his certificate of selection to me. or. Killam, Supervisors met at town Clerks office and adjourned till May 9th A.D. 1859. because one could not get across the river it was so high, Supervisors met again May 9th A.D. two of the commissioners were present with their attorney Mr. Blanchard, Supervisors examined the route Blanchard went with them and a large crowd besides, There was no survey for them, I went away when the survey was made, Bixby drove stakes in the line of the road, I dont know whether the defendants were present, Three road anons were marked on the fence of the Joliet and Chicago Road, and the road was run on to the 1/8 Corner stake and then on ~~to Line~~ the line, The Joliet and Chicago road is a common road, The relators have to cross other mens farms and through fences to get out, They have no private road

The supervisors met twice, at the second meeting the subject of damages was considered and assessed— the Commissioners of highways were present.

The then Commissioners of highways made out and signed Notices to remove fences. Sept. 13th 1859. The Notices were made out at town clerks office (Mr. Evens house) Mr. Brown was to serve them before sixty days had expired. Brown went

out of office, and Havens succeeded him, After 60 days had expired from the giving of the notices to remove fences Bibby and Havens went to remove the fences and asked me whether, since it was frosty, they had not better put a gate in till the fences could be made, I afterwards asked them why they did not open the road, they said Hollen told them not to open the road and they would not do it and that Hollen Vol & Polk would stand between them and all damage

I have been attorney for the Re-lators and drew some of the papers, I was at one time interested in the road and owned land to benefitted, but have sold out and now have no interest whatever in the road,

Davis removed his fences, so did all but H. H. Polk, Davis moved his back again

The petitioners have no liberty to crop Vols land, I have been threatened to be sued in trespass when I offered to do it, Some of the notices to remove fences were in Robt Bibby hand writing and signed by the three Commis-sioners of Highways, After Hollen advised them not to open the road, they refused to open it,

Edmund Bibby — sworn, I was County surveyor of Cook County Ill in 1859, I made this plat and description, shown said plat and survey aforesaid and report — the survey was made June 14th 1859 at the request of the supervisors who laid out the road — Campbell H. H. Polk, S. Kellham, E. Kane and others were along — I think the Commissioners of High

roads of Lyons were along. I drove a stake in the centre of the Joliet and Chicago Road and found a stake on the 1/4 section line. and at other points, We usually make broad arrows (for marks). I think. the road was marked so it could be traced out and found, This is a copy of the plat I made (shown Copy of plat above set out)

John Brown, sworn, I live in Lyons, Robert Bibby, Mitchell Eaton and myself were Commissioners of Highways of town of Lyons in 1859. I went out of office in the fall of 1859, was present with Bibby and Eaton. when the supervisors heard the appeals and established the road, Bibby and Eaton were present and were notified to appear, I served notices to remove fences on owners of land This is a copy except the signatures (shown Copy of notice as follows).

A Copy of Notice to M. M. Polk

You will take notice that the supervisors of the town of Barrington, Orland and Niles have laid out a public highway agreeable to an order of said supervisors, bearing date, 21st of June 1859. and now on file in the Town Clerks office. which highway passes through certain enclosed lands occupied by you to wit, W 1/2 N.W. 1/4 of section 15, town 38 Range 12. You are then for. hereby. notified and required to remove your fences from the of said high ways within sixty days after the service of this Notice

Lyons September 13th 1859

Robert Bibby, Commissioner of Highways

71 That were signed by the three commissioners, Bill of note those that I served, Some of them were served on the last of September 1857. The Commissioners have not opened the road, I attended twice before the supervisors We had Blanchard as our attorney. We refused to open the road in the first instance because we thought the damage would be so heavy. we would not be justified in doing it

The petitioners were known to us and resided with three miles of the road. We did not reject the road because of any irregularity in the papers or want of notice. for all the steps had been taken and were regular.

Alfred Doud, sworn. I am supervisor of the town of Lyons, I know H. H. Polk, this is my second year in office, $100 in money was paid over to me by Mr. White my predecessor in office as damages assessed to H H Polk by the supervisors who established this road, I notified Mr. Polk that I had the money, He did not take it. It was collected with the General tax of the town of Lyons, I gave Polk this notice in the fall of 1862.

It was admitted by Respondents that H. H. Polk was one of the board of town auditors, who allowed the $100 damages to said Polk, but said Polk was not present and did not participate in said allowance

S. S. Campbell, sworn, I was one of the supervisors who laid out this road in Controversy

(shown original order). that is my signature and the signatures of White and Wentworth, I met Mr White ~~and~~ twice, and once with White and Dillmouth. to hear the Appeal, I was notified according to law. to hear the Appeal. We had agreed. to meet on the 11th day of April 1859 at Joseph Evens house, the town Clerks office to hear the Appeal, that is the full board did, We adjourned. from April 11th to May 9th 1859. to same place when We had a hearing, Mr. Bibby and Brown were there, We went over the ground. We took the whole matter into Consideration and assessed damages that day We had the matter of notices in our hands. I was selected. to cause a survey. to be made, when the survey was made several were along, We set a stake in the centre. of the Chicago and Joliet Road and other places and marked the fence, We afterwards met at Bibbys office to make out our report, I dont remember who took the certificate of. selection. We had the matter all in our own hands and decided the Question of notice &c

To the giving of which testimony of said Campbell. Evens Michi & Brown, so far as and because the same went to establish facts which are, or should be matter of record. and could only be proved there by, the Respondents there and. there objected, but the same was permitted by the Court. and Respondents there and there excepted

The Respondents offered no evidence except as above

The above contains all the evidence in the cause whereupon the Court found the issues for the relators, and thereupon the Respondents filed the following motion for a new trial

"Superior Court of Chicago

The People v. et ~~ats~~ al.
S. Hill Law et als
vs.
Robert Bibby et als
Comm^rs of Lyons

Mandamus

Now come the Respondents and move for a new trial, and a hearing of the above cause, because

1st The motion to quash the amended Writ was passed upon without argument.

2d against the objection of the Respondents incompetent and improper evidence was admitted on behalf of the relators

3d The finding of the Court was against the law and the evidence

S. S. Page
Atty for Respondents

But the Court overruled the said motion and made an order for the issuing a peremptory writ of Mandamus. to which the Respondents then and there excepted

74 And it as much as the matters aforesaid do not appear of record the Counsel for the Respondents presents this bill of Exception and prays that the same may be signed and sealed by the Court and made part of the record in said Cause, and it is done accordingly.

Van H. Higgins (Seal)
Judge &c.

State of Illinois }
Cook County . } ss

I Thomas B. Carter Clerk of the Superior Court of Chicago, within and for said County and State Do hereby Certify the above and foregoing to be a full true and correct Transcript of the Bill of Exceptions, and the several papers therein referred to; and Appeal Bond, now on file in my office; together with the several orders dated respectively the fifteenth and Eighteenth days of June A. D 1864 Entered of record in said Court, in a certain matter of Petition for a Mandamus therein, wherein the People of the State of Illinois Ex rel Killham and others are Petitioners and Robert Bailey and others are Respondents

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court at Chicago in said County this fourth day of April A D 1865 One Thousand eight hundred and sixty five.

Thomas B Carter
Clerk

Rec'd fees $26.05 / 55 Pages
Thomas B Carter
Clerk

And now come the Appellants and say that in the record and proceedings aforesaid there is manifest error in this

1 The Court erred in refusing the motion to quash the original alternative writ of Mandamus.

2 The Court erred in allowing the relators to amend the alternative writ.

3 The Court erred in refusing the motion to quash the amended alternative writ.

4 The Court erred in allowing, against the objection of the respondents, incompetent testimony on behalf of the relators

5 The finding of the Court was against the law and the evidence.

6 The Court erred in refusing the motion for a new trial

7 The Court erred in giving judgment for the relators when by law it should have been for the respondents.

By J. S. Pugh
Atty. for Appellants

Whereupon also come the Appellees by Garrison & Blanchard their attorneys and say there is no error in the records or proceedings aforesaid

Garrison & Blanchard
Attys for Appellees

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Corners of Highways

&

People ex rel

Record

Filed April 5th 1865

L. Leland

Clk