No. 12250

Supreme Court of Illinois

Norton, et al

---

vs.

Stadley

William Studley
vs Trespass.
William Norton &
James Knight

Be it Remembered that on the 28th day of December A.D 1855. came Milton T. Peters Esqr. in to the office of the the Clerk of the Circuit Court in and for the County of Sneem in the State of Illinois. and filed in Said Clerks off a precipe for Summons in the words and figures following To wit.

State of Illinois } Circuit Court
Sangamon County } January Term 1856

William Studley. }
vs } Trespass.
William Norton & } Dam. $ 200.00
James Knight }

The Clerk will please issue a Summons in the above cause.

Peters & Farwell
attys for Plff.

And on the Same day Towit 28th day of December 1855. Summons Issued in the words and figures following To wit.

State of Illinois
Bureau County } ss. The People of the State of Illinois.

To the Sheriff of said County Greeting.

We Command you that you Summon William Norton and James Knight, if they shall be found in your County, personally to be and appear before the said circuit Court of said County on the first day of the next term thereof To be holden at the Court House in the Town of Princeton, in said County, on the Second Monday in the month of January next, to answer unto William Studley, of a plea of Trespass. To the damage of the said Plaintiff, as he says in the Sum of Two Hundred dollars, and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Edward M Fisher Clerk of our said Circuit Court, and the Seal thereof, at Princeton this 28th day of December in the year of Our Lord one thousand Eight Hundred and fifty five. Edward M Fisher Clerk

Sheriffs Return on said Summons

Served by Reading to William Norton & James Knight the 4th day of January 1856. Stephen G. Paddock

Sheriff Bu Co Ills

by William Jones Dy

and afterwards To Wit. on the 4th day of January AD 1856. Came the said Plaintiff by Peters & Farewell his attorneys. and files his declaration herein in the words and figure following To wit.

State of Illinois } Circuit Court
Bureau County ss } January Term AD 1856.

William Studley }
vs } Trespass
William Norton &
James Knight }

William Studley Plaintiff complains of William Norton & James Knight. defendants of a plea of Trespass. For that the defendants on the 15th day of December AD 1855. at the County of Bureau and State of Illinois. and on divers other days and times between that day and the Commencement of this suit. with force and arms &c. broke and entered the close of the Plaintiff. in the County and State aforesaid and described as the South West quarter of Section No nine in Township No fifteen North of the Base line of range No Six east of the fourth principal Meridian and then and there with shovels pick axes and other Iron Instruments dug up turned & subverted the Earth and Soil. To wit. One acre of Earth and Soil of the said Close of the said Plaintiff. and then and there put placed and erected and caused to

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put placed and erected a bridge in and upon the said close of the Plaintiff. and other wrongs to the plaintiff then and there did. and against the peace and dignity of the People of the State of Illinois, and to the damage of the said plaintiff. in the sum of Two Hundred dollars. & therefore he brings his Suit &c

Peters & Farwell

Plffs Attys

Plea before the Hon[l] M. E. Hollister judge of the ninth judicial circuit of the Circuit Court of the State of Illinois. at the January Term of said Circuit Court for the County of Bureau begun and held at the Court House in Princeton within and for said County. on Tuesday the Fifteenth day of January in the year of our Lord One thousand Eight Hundred and fifty Six.

Present Hon[l] M E Hollister judge

Edward McFarlen Clerk

Stephen S. Paddock Sheriff.

W[m] L Wallace dist attorney

Monday January 21[st] 1856.

William Studley

vs Trespass

William Norton &

James Knight.

Now Comes the defendants by

Saylor & Stipp their attorneys and file their pleas to said Plaintiffs declaration in the words and figures following to wit: And the said defendants by Saylor & Stipp their attorneys come and defend &c and say that they are not nor is either of them guilty in manner and form as the said plaintiffs hath complained against them and of this they put themselves upon the country. Saylor & Stipp for defts

And the Plaintiff doth the like

Peters & Farwell his attys

and for a further plea in this behalf the said defendants by leave of the Court for this purpose first had and obtained say that by reason of any thing in the said declaration alledged the said Plaintiff ought not to have or maintain his aforesaid action thereof against the said defendants or either of them because they say that at the said several times when &c. there was and of right ought to have been a certain common and public highway into through and over the said close in which &c. for all the good citizens of the State of Illinois and having occasion to use the same way at the said several times when &c. the said defendants at the said several times when &c. went with shovels pick axes and other instruments dug up turned and subverted a little of the earth and soil and erected a bridge upon said highway along over and through the said close as the same

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passed over & through the Said Close so that without digging up. turning and subverting the earth & building Said bridge upon and along Said highway as the Same passed through Said Close. the Said highway would be impassable through and over the Said Close in which &c. And the defendants Say that in doing the Said digging up. turning and subverting of the earth & Soil, and building Said bridge upon Said Highway over Said Close. they did not. nor did either of them do any unnecessary damage to the Said Plaintiffs on there Occasions which are the Same supposed Trespasses in the Said declaration mentioned and whereof the Said Plaintiff hath above complained against them the Said defendants. and this they are ready to verify. wherefore they pray Judgment if the Said plaintiff ought further to maintain his aforesaid action thereof against the Said defendants or either of them.

Taylor & Lipp attys for Defts

and the Plaintiff comes by Peters & Farwell his attorneys and files his replication to Said plea in the words and figures following to wit.

and the Said Plaintiff Says that he ought not to be precluded from having & maintaining his aforesaid action against them the Said defendants. by reason of anything alledged in their Second plea by them pleaded. because he Says that at the Said Several times when &c. there was no Such Common and public

highway. into through and over the said close of the said Plaintiff for the use of all the good citizens of the State of Illinois. to pass and repass. and of right ought to be, as alledged in said defendants plea. and of this the said plaintiff prays may be enquired of by the Country.

Peters & Farwell
Plffs attys

And said defendant doth the like
Taylor & Stapp for Defts.

Pleas before the Hon^r M. E. Hollister judge of the Ninth judicial circuit of the circuit Court of the State of Illinois. at the March Term of said circuit Court begun and held at the Court House in Princeton in said County. on the twenty fourth day of March in the year of our Lord One Thousand Eight Hundred and fifty Six.

Present M. E. Hollister judge
Edward M Fisher Clerk
Stephen S. Paddock Sheriff

Be it March 29^th^ 1856.

Now comes M. S. Peters attorney for said Plaintiff and on his motion and affidavit. said Plaintiff has leave to file a double replication herein. and said

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plaintiff comes by his said attorney and files his second replication herein in the words and figures following to wit and for a further replication to Defendants 2d plea by leave of the Court had and obtained the said plaintiff says that he ought not to be precluded from having or maintaining his action aforesaid by reason of any thing alledged in said plea because he says that the highway set up by said defendants in said plea was located by the Commissioners of highways of the Town of Brawby in said County on the 3d August AD 1854 through the premises of Plaintiff described in said declaration without the damages sustained by Reason of the laying out and opening of said road being assessed by said Commissioners and their filing a Statement thereof with the Town Clerk of said Town and said damages have not as yet been so assessed or determined notwithstanding no agreement was made with the owner of said premises who was a private person in relation to said damages and said owner did not in writing release all claim to damages nor was there any such agreement or release filed in the office of the Town Clerk of said Town nor never has been and this the said plaintiff is ready to verify wherefore he prays Judgment &c

Peters & Fanwell Plffs attys

To wit on the 2d day of April 1856

Now comes the defendants by Taylor and Stiff their attorneys and file their demurer to plaintiffs second replication to defendants second plea filed herein

and having heard the argument of Counsel and the Court being fully advised in the premises, it is considered that said demurrer be sustained — whereupon on motion of Plffs attorney leave is given said plaintiff to amend his said replication, and the plaintiff by his said attorney files his amended replication herein as follows to wit,

and for a further replication to defendant D plea by leave of the Court had and obtained the said plaintiff says that he ought not to be precluded from having & maintaining his action aforesaid, by reason of anything alledged in said plea, because he says that the highway set up by said defendants in said plea was located by the Commissioners of highways of the Town of Brawby in said County on the 3d August AD 1854, through the premises of Plaintiff described in said declaration without the damage sustained by reason of laying out and opening of said road, being assessed, or any decision upon the question of said damages by said Commissioners, and their filing a statement thereof with the Town Clerk of said town, and said damages have not as yet been so assessed or determined, notwithstanding no agreement was made with the owner of said premises who was a private person in relation to said damages, and said owner did not in writing release all claim to damages, nor so was there any such agreement or release filed in the office of the Town Clerk of said Town, nor never has been, and this the said Plaintiff

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is ready to verify. Wherefore he prays Judgment &c.

Peters & Farwell

Pltffs Attys

In wit April 3d 1856.

And now come the defendants and by their said attorneys file their demmer to the amended replication to defendants Second plea. and after argument of Counsel and the Court being fully advised in the premises Considers that said demmer be overruled. and the defendants by their said attorneys withdraw their first plea filed herein and decline to answer over as to the said Second plea.

It is therefor considered by the Court that said Plaintiff ought to Recover of the said defendants his damages by reason of the premises. and doth assess the said damages at the Sum of five Cents.

It is therefor Considered by the Court that the said Plaintiff have and recover of the said defendants the said Sum of five Cent his damages assessed as aforesaid. Together with all his Costs and charges in and about his Suit in this behalf expended. and that he have execution therefor.

And the said defendants by their said attorneys pray an appeal herein to the Supreme Court. which is allowed upon the defendants filing bond in the Sum of Two hundred dollars. with J J Taylor as Security. within Thirty days.

State of Illinois
Bureau County ss. I Edward M Firken Clerk
of the Circuit Court within
and for said County in the State aforesaid. do
hereby certify that the foregoing is a true Copy of
the record in the above entitled cause, as appears
from the Records & files in my office.

In testimony whereof I have hereunto set
my hand and the Seal of said Court
at Princeton in said County this 15th day
of May A.D. 1856

Edward M Firken Clerk

Clerks fee
Copy Record 2,50
offt & Seal 35
2,85

And now come the said appellants and say
that in the record of the proceedings aforesaid
& in the rendition of the judgment aforesaid
manifest error hath intervened to their prejudice
in this, to wit, that the said Circuit Court
erred in overruling the demurrer of the
said appellants to the replication of
the appellee to the plea of the appellants
numbered two. Wherefore &c.

Steph T Blackwell
for Appt

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71.

William Studley

vs

William Marlow &
James Henight

Copy of Record

Filed May 23. 1856.
L. Leland Clerk.

William Norton & James Knight vs William Studley

State of Illinois
Supreme Court, 3d Grand Division
June Term 1856

Appeal from Bureau

Argument for Appellants

The amended Replication of Plaintiff below is bad.

1st Because it does not aver, or show, that the Plf was the owner of the land over which the Highway set up in Dfts plea, was located, at the time of the location of the said Highway.

2d Because it does not allege, or aver that the owner of the land did not waive his damages, or that he ever claimed any

3d Because it does not aver that the owner of the land appealed from the order of the Commissioners of Highways establishing the Highway in question

4th & Because it does not aver that the owner of the land over which the Highway was located sustained any damages thereby

First. The replication shows that the Road was located 3d August 1854, by the Commissioners of Highways of the Town of Bramby in Bureau County & consequently that it was established under an act entitled "An act to provide for Township Organization, in force

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April 1 1851, & approved Feby. 17 1851 -
By that law no one is entitled to damages
but the owner of the land at the time of the
location of the Road (See that act, section 6,
article 24, on page 72 of "Laws of Ills 2d
Session 1850-51") If the owner of land, over
which a Highway is located by the proper au
thority, sees proper to lie by, ~~either because~~ either
because he may think he has sustained no dam
age, or for any other reason, and make no
objection to the location ~~of his~~ of a road across
his land, does he not ~~thereby~~ waive his right
to damages? and can his grantee ~~afterwards~~
afterwards sustain trespass against a per
son who opens the road, or makes, or repairs
a Bridge therein? Although no one's
private property is to be taken for public
use, without just compensation, yet it is
not, in this case, the person whose property
has been taken that makes the complaint -
And while the law ought strictly to guard
the private property of the citizen against
unjust encroachment on the part of the pub
lic, it ought also to protect the public
against vexatious lawsuits, in a case when
~~the plaintiff~~ A have a right to suppose from the
conduct of the citizen, that he has relinquished
his right - As owns a tract of land,
the public locate a Highway thereon,
suppose A. sustain damages thereby. A
then conveys to B. Does the right to dama
ges, or in other words, the cause of action
pass to B. or does it remain with ~~B~~ A.
I understand the rule of the Common law to
be well settled, that such a right of action

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shall not pass that no person shall thus purchase a law suit - If any one is entitled to damages it must be who has sustained them - If then no one but the owner of land is entitled to damages, it is necessary that the replication should aver that the plaintiff was the owner of the land at the time of the location of the road - I understand the rule of pleading to be, that when the pleading is capable of more than one construction, that which is most unfavorable to the pleader is to be adopted - Again is it the policy of the law, in a matter so important to the public, as the construction of roads, to allow the owner of land to lie by, allow a road to be laid out & traveled, make no complaint himself, and then permit him to transfer a right to his grantee to sustain an action of trespass against any one who may be so unfortunate, as to have occasion to travel the road - I think this court ought not so to decide, unless absolutely compelled so to do by the law - And I hope to be able to show from the statute & good authority in the course of this argument, that there is, by law, no such requirement

necessity - But

2d. the said replication is bad, because it does not allege that the owner of the land did not waive his damages - Admitting then, for the sake of the argument, that the owner of the land can transfer to his grantee the right of action for damages

[12256-9]

or in other words the right to defeat a public Highway for the purpose of locating damages? Is it not necessary that the plaintiff should show that the owner had not waived his damages — This Court has in the case of County of Jackson vs Brown et al 13th Ills. page 212 "He must object in the "first instance to the location of the "road across his land, or he will be "precluded from afterwards insisting "on damages. He must claim dama "ges at the proper time; so that if the "County considers the payment of the "damages too great a sacrifice for "the benefits to be derived from the road "it may abandon the road altogether "or locate it somewhere else" This Court also say, in the case of Harris vs Hara et al, 4th Gil. page 507, near the top of the page, "A claim for dama "ges is not to be presumed, but must "be expressly made, at the proper time, "so that if the State or County thinks the "payment of damages too great a "sacrifice for the benefits to be obtain "ed by having a road, may abandon the "project or locate it some where else" This it will be recollected was in a case of prosecution for a penalty, where the rule is, that laws should be strictly construed in favor of a Deft —

It will not be presumed then that the owner of the land over which a road is located has a claim for dam

[12250-18]

ages, but much less then ought to be presumed that the grantee of the owner has, after the location of the road, acquired power him a claim for damages; and yet that presumption must be indulged, or this replication is bad for not averring that the owner had not waived his damages - I wish now to ~~to~~ call the attention of the Court to the 4th reason assigned, why the replication is not good, to wit, that it does not aver that the owner of the land actually sustained any damages - ~~[illegible]~~ Is it not most unreasonable, that a public Highway should be defeated, and a traveller subjected to damages, at the suit of a grantee of the owner of the land over which the road is located, simply because there has been no decision of the question of damages, and that in a case where the plf is not willing to aver & prove that the owner of the land actually sustained any damages. Then for them, in order to sustain this replication the Court must hold

1st that the owner of land may lie by, make no objection to the location of a Road over his land, & afterwards transfer a right to depot the Road to his grantee -

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2d that the presumption of law is, that the owner has not waived his damages, and that it is not necessary for him to claim any damages, &

3d that the presumption of law is that the owner of the land does ~~not~~ sustain damages & that therefore it is not necessary to aver that fact — While according to the statute & cases already cited the converse of these several propositions seems to be the law

I wish now to call the attention of the Court, to the 3d reason assigned, why the replication is not good, to wit, that the replication does not aver that ~~he~~ the owner of the land appealed from the decision of the Order of the Commissioners of Highways establishing the road — And I respectfully ask the particular attention of the Court to this point, because I have no doubt it is fatal to the replication, although I, unfortunately, should not be able to show it clearly —

Now if this Replication can be sustained upon any principal, it must be upon the ~~constitutional~~ principle that it is unconstitutional to take private property for the public use without compensation — I wish to call the attention of the Court to the rule on this subject, laid down by the Supreme Court of New York, in the case of Blood vs Mohawk & Hudson Rail Road Company 2d Amer ~~Rail Way~~ Rail Way Cases page 419 [12250-13] they ~~say~~ say "It has never been deemed nec-

"essary that the compensation which the consti-
"tution requires should be made for private
"property when taken for public use should
"be actually paid before entering upon or taking
"possession of the property. If legal provision
"is made for compensation, the spirit of the
"constitution is complied with, and the
"property which is required for public use
"may lawfully be entered upon and taken."
This it seems to me is at once a rule
which will subserve the interests of the
public, and secure to the citizen all
his just rights—

Now it will appear
from the laws under which this road
was located, that ample legal provision
was made for the compensation of the owners
of the land over which it was located,
and that if he has not had his damages
if any he has sustained,
it is his own fault— And he should
be allowed
not now hold the public or individ-
uals responsible for his own neglect.
An injury caused by
The Attention of the Court is now called
to the law under which the road in ques-
tion was located— It is to be found in
the act to provide for Township Organiza-
tion, Approved Feby 17 1851, ~~in the~~
beginning with Article 24th on page 76
of the "Laws of Ills. 2d Session 1849 & 51," The
1st, 2d, 3d, 4th, & 5th sections show how the
location of a Road shall be petitioned for,
advertised, & located, and the duty of the Town
Clerk to file the order. ~~The Court is~~
~~in relation to damages~~ The Co

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The 6th & 7th sections are in relation to damages & to them the attention of the Court is particularly called — The 8th & 9th sections are in relation to appeals, to which the attention of the Court is respectfully called and are in these words, to wit, "Sec. 8 Any person or per-
"sons, being owners of or agents for any tract
"of land, over which any highway, altered
"discontinued, or laid out, shall feel-
"ing themselves aggrieved by any order made
"by the Commissioners of Highways, may ap-
"peal from the same at any time within
"thirty days after the filing of such order
"in the town Clerks office. Such appeal
"shall note the time that such order was
"filed, and shall be made to three Super-
"visors of the County, neither of which
"shall be a resident of the Town in which
"said Highway is situated. All persons
"who desire to make an appeal from such
"order shall act in concert, and make
"their appeal to the same three Supervisors.
"Sec 9 Every such appeal shall be in writing
" Addressed to the Supervisors, and signed by
" the party or parties appealing. It shall
" briefly state the ground upon which it
" is made, and whether it is brought in
" relation to damages assessed by the Com-
" missioners of Highways, or in relation
" to the alteration, discontinuance, or laying
" out of the road, or whether it is brought

"to reverse entirely the determination of the
"Commissioners, or only to reverse a part
"thereof; and in the latter case it shall spec
"ify what part &c.

Now when the Commissioners filed their order to establish
ing the Road, if the owner of the land
was damaged, he could have appealed
from that order, at any time within 30
days, and could have stated the
ground of his appeal to be, that no
damages were assessed to him, & could
have thus obtained his damages; and
it appears from the statute that, that
was the express intention of the legislature
Now it may have been, and no doubt was,
the opinion of the Commissioners that the
owner sustained no damages, & that is
undoubtedly the reason why they assessed
him none. But, admitting that it
was the duty of the Commissioners, in
case they believed the owner had sustained
no damages, to file a statement saying they
assessed him none, yet if they did not
do so, the owner had as clear a right
to appeal from the order for the reason
that they had omitted to say anything about
damages, as he would have had, had they
filed such statement. Now the Court
will perceive from the language of Sec
tion 8th above quoted that it is from
the order of the Commissioners that the appeal
is to be taken, not from the statement
of damages. And the Court will also
perceive from that part of Section 7

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above quoted that the appeal is to state whether it is brought in relation to the assessment of damages, or in relation to other matters — There can then be no possible doubt then that the owner of the land had a clear right to appeal from the order of the Commissioners for the express purpose of obtaining his damages. The 17th section of the same 24th article provides how the damages, when assessed by the Commissioners, or Supervisors to whom the appeal may have been taken, shall be paid — And the 24th section of the same 24th article provides, that "whenever the Commissioners of Highways through enclosed lands &c, and their determination shall not have been appealed from, then after notice to accomplish, they shall cause road to be opened — There is no doubt from the whole law that it was the intention of the legislature, that in the very words of the 8th section before quoted "Any person, or persons, being owners &c, feeling themselves aggrieved by any order may appeal &c, whether that grievance is that the Commissioners have assessed too little damages, or have made no assessment at all — according to the statute then, the Commissioners are directed to assess damages, but if they do not do so, it points out the remedy by appeal, and that remedy is plain, adequate, & complete — This being the

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case there seems to be no reason why the Court should hold, under this statute, that there is no highway unless the damages have been assessed - it being the fault of the owners equally with the Commissioners that no assessment has been made - This Court decided, in the Case of Cunning et al vs Matthews 16th Illinois Rep., page 310, that, where a road had been laid out under the statute ~~of~~ to in force April 16th A. D. 1849 entitled "an act for township & county "organization, under which any county may "organize whenever a majority of voters "of such County, at any general election "shall so determine." approved Feby 12. 1849 found in Public laws of Ills 1849 ~~page~~ ~~in which the 4th of that act~~ page 190, evidence which showed that a road had been located but did not show that the damages had ever been assessed, was not admissible to establish the High way, unless connected with other evidence showing the assessment of Damages - The Attention of the Court is called to the difference between that act, and the act before referred to under which the road in question was located. By the act of 1849 a particular mode of the assessment of damages is pointed out, but no appeal is given - And in the Case of Cunningus Matthews the evidence offered showed that an assessment of damages had been Commenced but had never been completed -

and had been commenced by the Commissioners of Highways - The 11th section of Art. 24 of the act of 1849 provides that either the owner of the lands, or the Commissioners might commence the proceedings before a justice for the assessment of damages, and when the Commissioners commenced the proceedings, it followed that the owner could not commence; and the consequence was that the owner had no remedy, but kept his land - unless the Commissioners & others finished the proceeding, which in the case of Deming vs Chatteris they did not do -

There was by the law of 1849 an appeal from the order establishing the Highway, but not for the purpose of assessing the damages - Why did the legislature provide in the act of 1851, that the appeal might be taken from the order establishing the road for the purpose of having damages assessed, if it was not to get rid of the difficulty that the act of 1849 presented - It would seem then that the law now is, that if the owner of land, feels aggrieved, because a road has been located across his land, either because he thinks the road not required by the public good, or because his damages have not been assessed high enough, or not assessed at all, his remedy

Remedy is to appeal—

I wish now to call the attention of the Court to the following query. to wit, where the owner of land over ~~which~~ which a road is located by the proper authority, lies by & makes no objection that his damages have not been assessed & suffers people to travel it, is it not an implied license at least, to the public to travel it, and are they not at liberty to travel it until the license is revoked— If so the replication is bad because it does not allege any notice of the revocation of the license to the defendants.

Lastly We are of the opinion that the replication is bad, because it may be, that every fact alleged in it, may be true, and yet the road set up in Defendants plea ~~&~~ which it professes to answer, may still exist— that is, the replication only alleges evidence ~~which~~ which tends to prove, that the road set up in the plea is not a legal road, but which does not conclusively prove it— Now it might be, that every fact alleged in the replication may be true, and yet there may be a Highway there by a dedication thereof to the public — Such dedication need not be by writing it may be verbal, or the damages may have

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been released in many other ways besides the method pointed out by the statute — The replication ought to have been a traverse of the plea.

All which is respectfully submitted

Taylor & Stiles for
appellants.

William Norton
& James Knight
vs
William Study
argument for
appellants

Filed June 21. 1856
L. Leland
Clerk

Wm Norton et al
vs Error to Bureau Co
Wm Studley

The defendant in error insists in answer to the first point made by pltffs in error that the replication should allege that the plaintiff was the owner of the land at the time the highway was laid out; that the Statute expressly declares that unless the damages are assessed the road shall not be opened worked or used, that there was no highway through the premises until such an assessment had been made, and that it would be strange indeed that if there was no highway through these premises while held by the original owner that as soon as he conveyed the premises that there would be a public highway through the premises when there were none before.

As to Pltffs in errors 2d Point. The law is imperative that the damages shall be assessed before the highway is worked or used and the owner is not required to object to opening of the highway as under the road laws in force before the township Organization law & the decisions he cites were made in reference to those laws.

As to Pltffs in Error 3d point. There was no Order made in reference to pltffs damages to appeal from & to appeal in regard to the expediency of the road would not bring up the subject of damages, but the appeal would be confined to a review of the question adjudicated by the Comrs of highways, and as to the question whether damages had been sustained or not would not determine whether the public needed the highway or not, & the Supervisors on appeal in regard to the expediency of the road could not assess damages because they are confined to subjects of the appeal

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As to Pltffs in Error 4th Point, The question whether damages had been sustained could not be tried by the Circuit Court, but is alone determinable in the way pointed out by Statute,

5 as to whether Defendants below might not have had license. I answer that the plea sets up a highway & not a license or dedication, and the replication is in fact a denial of the plea of highway & would be liable to special demurrer but not to general demurrer,

The only objection raised to the decision of this Court in 16 Ills, 310 not being in point is that the law of 1849 did not give an appeal on the assessment of damages & either party could apply for an assessment, the last objection is in favor of the Deft in error because by the law of 1851 the ~~applicati~~ assessment could alone be made at the instance of the Comrs of highways, & how the question of appeal could affect the question whether an assessment should be made I cant see & besides even under the law of 1849, the Board of Supervisors could review the question of Damages

Milton Peters
for Deft in Error

Wm [illegible]
vs
Wm Shelly
Suggestions by Deft in err

Filed July 8. 1858
L Leland
Clerk

STATE OF ILLINOIS, Supreme Court, } ss. **The People of the State of Illinois,**

To the Sheriff of the County of Bureau ——— Greeting:

BECAUSE in the record and proceedings, and also in the rendition of the judgment of a plea which was in the circuit court of Bureau ——— county, before the Judge thereof, between William Studley Plaintiff & to William Norton & James Knight ———

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

as we are informed by their complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the state of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said William Studley ———

that he be and appear before the Justices of our said Supreme Court, at the next term of said court, to be holden at Ottawa, in said state, on the Second Monday in June next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said court shall order in this behalf; and have you then there the names of those by whom you shall give the said Studley ———

notice, together with this writ.

WITNESS, the Hon. ~~Samuel H. Treat,~~ Walter B. Scates Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 23d day of May in the Year of Our Lord One Thousand Eight Hundred and Fifty-six.

L. Leland
Clerk of the Supreme Court.
By J. D. Rice Deputy.

L12250-2

William Norton et al

vs

William Studley

Scire Facias

1 Service	50
22 Miles Travel	110
Return	10
	170

Filed June 4. 1856.

L. Leland

Clerk.

STATE OF ILLINOIS, SUPREME COURT,

To June Term, 1856.

Appeal from Bureau.

William Norton and James Knight *vs.* William Studley.

Abstract of the Record.

Trespass *q. c. f.* in the Bureau Circuit Court by appellee against appellants.

The declaration contains one count, in the usual form.

Pleas. 1. Not guilty, and issue thereon, (afterwards withdrawn.)

2. That the *locus in quo* was a public highway.

Replication to second plea, that a highway had been located over the close in question, but damages not assessed and paid to appellee, who was the owner of said close, &c.

Demurrer to this replication, which was sustained, and leave given to appellee to amend.

An amended replication was thereupon filed in these words, viz. :

"And for a further replication to defendant's 2d plea, by leave of the Court had and obtained, the said plaintiff says, that he ought not to be precluded from having or maintaining his action aforesaid by reason of anything alleged in said plea, because he says that the highway set up by said defendants in said plea was located by the Commissioners of Highways of the town of Bramby, in said county, on the 3d August, A. D. 1854, through the premises of plaintiff, described in said declaration, without the damage sustained by reason of laying out and opening of said road being assessed or any decision upon the question of said damages by said Commissioners, and their filing a statement thereof with the Town Clerk of said town, and said damages have not as yet been so assessed or determined, notwithstanding no agreement was made with the owner of said premises, who was a private person in relation to said damages, and said owner did not in writing release all claim to damages, nor was there any such agreement or release filed in the office of the Town Clerk of said town, nor never has been, and this the said plaintiff is ready to verify ; wherefore he prays judgment, &c."

To this replication appellants demurred, and the cause was heard upon said demurrer, and judgment rendered for appellee, the Court assessing his damages at *five cents ;* from which judgment this appeal is taken.

The only error assigned is the overruling of the demurrer.

STIPP & BLACKWELL,
For Apellant.

[13950-23]

Norton
vs
Shelby

71

William Norton et al

vs

William Studley

79

1856

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12250