No. 12231

Supreme Court of Illinois

People, ex. rel.

---

vs.

Cary EA et al

71641 7

The People upon relation of Rees Morgan.
vs.
John Cuyler.
Enos Brown &.
William Irwin.
Comm's of Highways &c

Supreme Court.

Application for Mandamus.

Argument against the allowance.

The Relator applies for a mandamus to compel the above named Commissioners of Highways to open, through the lands of Thorne and Champlin, three several public roads. which they alleges exist. viz. 1st a County Road known as the Ottawa and Dayton road. 2d A State-Road known as the Ottawa and Naperville Road & 3d a State-Road known as the Ottawa & State Line Road, terminating in Madison, in the State of Wisconsin. It is an admitted fact that there is now pending and undetermined in the Lasalle Circuit Court a Bill of Injunction filed by Thorne against the Commissioners of Highways above named, to restrain them from opening the two first named roads. and that they are now under the operation of that Injunction, allowed by Justice Caton. A Mandamus will not be granted to compel the Commissioners to disobey that injunction, quod the two first named Roads. while the matter is in litigation, and the injunction not dissolved.

4 Hill 581.

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For it must appear that the persons against whom the mandamus is to be directed, are under a duty to act, and have it in their power to perform the duty.

12 Barb. 217.

Nor will a mandamus issue, when it appears, that Thorne and Champlin (the parties to be effected by the writ) are not before the Court; and all persons, are proper to be before the Court, whose duty it is to open these roads, if they exist.

12 Barb. 217.

U. S. Dig. Vol. 13 p. 476 § 22

5 Texas Rep. 471.

But we maintain that none of these Roads have any legal existence whatever.

The Power to appropriate Lands for Public roads, belongs to the Sovereign power of a State, and is there vested originally, as well from necessity, as from the right of eminent domain. It is a power incident to State sovereignty alone. No authority less than the Legislative power can take lands for public roads, and no other person or body politic can exercise this power, unless expressly and fully clothed with power so to do, derived from either a written constitution, or from Statute. And as this power has its foundation in public necessity, in derogation of the private rights of property of the citizen, to protect

which is one of the chief aims of the State, this power must be, in all respects, cautiously exercised, and strictly pursued.

Upon this point a distinguished Court holds this language.

"When statutory powers are conferred upon a Court of inferior jurisdiction, and a mode of executing those powers is prescribed, the course pointed must be pursued, or the acts and judgments of the Court are coram non judice and void."

5 Blackford 462.

Another says. "The authority of the County Court to order public roads to be laid out, is a special delegation of power, and must be strictly pursued, or all its acts are absolutely void".

Walker (Miss) 75.

And that the power is strictly pursued must appear from the Record.

11 Mass. 447.
2 Pick 162
5 " 492
3 " 408
2 " 151.

When a County Court failed to fix the time when a road was to be opened (when required by law so to do) the objection was held fatal to the Road.

15 Conn. 83.

The owner is only bound by a road when it is laid out in pursuance of law.
4 Iredell 318.
34 maine 9

We contend that a certain, definite width is absolutely essential to the existence and validity of all roads whatsoever, and that this width must be fixed by the power which establishes the road; and further, that the power establishing the road, must order the road to be opened a certain width, and that the width must somewhere appear of record. Sound reason, universal law, and the acts of the Legislature of our own State from 1819 when the first Road Law was enacted up to this time, every one of them, have required these essential requisites, as we shall proceed to show.

The Court of Connecticut say.
"From the record in evidence, it appears that the supposed highway was a line extending in length, but without breadth, or any limits bounding its surface.
A highway which is a public right of passage over another man's ground, like a grant from an individual, must be defined with reasonable certainty.
The public must have the means of knowing how far they may travel without becoming trespassers, and the individual, to what extent, his land may be occupied by others. But here, there are no limits

to the right of passage, nor to the incumbrance on the land of another, nor any possibility of ascertaining the extent of either. A mathematical point is as fit a representative of a tract of land conveyed, as a mathematical line is, of a highway."

7 Conn. 127.

The North Carolina Court say. "What is a public road ought not to be varying and uncertain, but determinately fixed in some authentic manner. That is requisite, as well in order to ascertain the quantity of land which the public appropriates to its use, and the measure of compensation to the proprietors, as to determine the powers and duties of the overseer and the hands.

The law requires the track of the road, necessarily including its dimensions, to be judicially established."

11 Iredell (Law) 96.

The Indiana Court say. "The establishment of a road whose width is not defined, is void"

8. Blackford 208.

Again. "The Statute authorizes the Board doing county-business, to establish highways of a "necessary width not exceeding 40 feet". Desirable as it may be to sustain the proceedings of these courts, we are not at liberty to sanction so wide a departure from their authority. The Commissioners were not empowered to establish a road of undefined breadth.

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Unless the limits of the highway are
depined on both sides, it is impossible
for the proper officer to know how to open
or repair it, or for the public to understand
their rights. The commissioners had as much
power to establish a highway more than
40 feet wide, as they had to ordain one of
no prescribed breadth. Their order establish-
ing the road in question was unauthorized
and void."

White vs. Conover 5 Blackford 462.

The Pennsylvania Courts say, all their
decisions being upon the 4th § of Act of 1836.
which is in these words, viz:

"If the Court shall approve of the report
of the viewers, allowing a road, they shall
direct what breadth the road so approved
shall be opened, and the whole proceedings
shall be entered of record, and thenceforth
the road shall be taken, deemed and al-
lowed in law as a public road or highway
or private road, as the case may be."

"No road can be considered finally estab-
lished, until the width is fixed by the
Court, and an order made by them,
directing it to be opened of a certain
breadth, therein to be specified"

3 Wharton 105.

"The Court must fix the width — the
viewers have no such right"

5 Penn. State Rep. (Barr) 101

"The Court who order a road to be opened are, at the same time, to order the width of it." 1 Sergt. & Rawle 487.

"The omission to fix the width of a public road, is fatal. The width must be fixed when the Report of the viewers is confirmed, and before the order to open it. The reason is obvious - The owner ought to have a right to determine whether he will resist or not - He might resist a road of 50 feet, and would not one 20 feet wide"

3 Watts & Sergt. 559.

"The law requires the Court to exercise its discretion under the Statute, and fix the width. Because in some neighborhood the amount of travel may require broader roads than in other localities, where the travel is less.

The width also the law requires to be recorded. For all persons interested have a right to examine it, and where this is enjoined on the Court, by Statute, its omission is fatal"

5 Penn. State Rep (Barr) 515-

Fully to same point - 1 " " " " 356.

"The use of an order for opening a road, is to justify the road-Officers in trespass, where the proceedings might be irregular"

18 Missouri Rep. 357.

"It is the duty of the Court to exercise the discretion vested in them, and enjoined on them by law:

If one rule suited all roads, that rule might as well have been fixed by the Legislature itself, as by the Court.

If no order for the breadth is made when they approved the Report of the viewers, the road cannot be deemed and taken to be a lawful public highway".

4 Penn. State Rep. 337.

Fully up to same point - 4 Watts & Sergt. 39.

The record of a road, which designates the course and distance, and quantity of land taken, shows the road was 2 rods wide. Although the record did not show on its face the width of the road, it furnished the means of arriving at that fact with certainty by giving the quantity of land taken.

5 Wendall 580.
13 " 310

Where the width can be ascertained by computation, it is good. For that id certum est, quod potest certum reddi.

So also, it might be ascertained by construction. The description of 70 acres in the S. W. corner of section 130 is good: for the S.W. corner of the section is a base point, from which two sides of the land shall extend an equal

distance, so as to include, by parallel lines the 70 acres. From this base point, the section lines extend North and East, so as to fix the boundary South & West: the east and North sides only are to be established by construction, and this can be done with certainty.

2 Ohio Rep. 327.

The doctrines thus plainly laid down, to my mind, are conclusive to establish the point, that the two first named roads in this case do not exist; for there is no pretence of any record width to either of them.

But the counsel for the relator, says, that although the record furnishes no indication of any width, yet the minimum width fixed by law, is the width, and to support his position he cites the opinion of Justice Spencer, in 2 Cowen's Rep. 179. where he says, that in case the records are silent as to the width, the road will be presumed to be 4 rods, the statute providing, that roads "shall not be less than 4 rods wide".

The opinion of Judge Spencer in this case is a mere dictum, without any reason assigned for it, and stands solitary and alone, wholly unsupported by other authority. It is contradicted by the principle as to certainty laid down subsequently in the 2 cases in Wendall before referred to, and the case fails wholly to meet

the overwhelming and conclusive reasoning of the Pennsylvania Court in the case cited, as also the Connecticut and Indiana Courts, upon the grounds they severally take, to show the necessity and reason why the greatest certainty in width should appear on the record.

But even if this court should conceive this case to be good law, it does not follow that it is in point to the case at bar.

That opinion is predicated on a construction of the New York Statute.

The Statute is in town and in our Office.

The language of it is this.

§ 67. "And be it further enacted. That all public roads laid out by the Commissioners of any town, shall not be less than four rods wide, and all private road shall not be more than three rods wide".

This Court will perceive, that for public roads, there is a minimum width, but no maximum: and in the case of private roads there is a maximum, but no minimum.

We presume the Court held, that the words "shall be not less than 4 rods wide" was equivalent to saying, that they should be 4 rods wide, unless ordered to be a greater width by the Commissioners. Now we submit to the Court, if the width of the new York case was not fixed absolutely (in the absence of other order) by the

terms of the Statute itself, and required no presumption of law to make it so? and besides their Statute was entirely silent on the subject of recording the width of roads.

But suppose the law, in case where there was a minimum width and no maximum did presume and establish the minimum width; because it is possible that the law could so presume; but would the law raise such presumption in regard to maximum width, where it alone was given (as in Indiana, and in this State in 1819), and say, that where no width appeared on the record, the maximum width was to be established? *

Certainly not; for the law can evidently raise no such presumption, and by all authority, in such case, the width must appear of record or the road fails. And now we submit, if the law gives a minimum and a maximum, both, and a discretion to establish between them, as in the case at bar, and no width is established on the record, does it not stand precisely in the same position, as the case, where the law only gives a maximum width, or where neither maximum or minimum was given, as in the early Pa. cases. We think it does, and the law has as much reason, where the record is silent, to take the maximum as the minimum width, by presumption.

We conceive it an apparent impossibility for the law to raise a presumption, in such case, at all, i.e., where there is a maximum and a minimum both given

* In the case in 1 Sergeant & Rawle 489, The maximum width (50 feet) under the Statute decisive of that case was only given; and no minimum; and the road failed.

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The presumptions of law are certain. It is absurd to say, that the Law, ipso facto, in such case, will presume thirty feet, thus taking upon itself, and usurping the office of the Commissioners, and yet allow that the possibility of the road to be 80 feet, if perchance the Commissioners should choose to exercise the discretion vested in them by the Law itself, to fix it otherwise.

The case cited, from 11 Iredell 96 as corroborative of the case in 2 Caine 179. instead of supporting the position of the relator's counsel, is dead the other way.
The Jury in that case, had fixed the width at 20 feet, but the Inquisition to assess the damages had not made report of the width.
The Statute, under which that case came up, (as appears from the report of the case) fixed the minimum width at 20 feet, but did not establish any maximum width. precisely as under the New York Statute in the case in 2 Caine.
In answer to the case supposed by counsel for the relator, where the Statute was, that no road should be more than 4 rods wide, and the public authorities established a road 5 rods wide where he asks, if it would not be good for a 4 rod road, we say, it would be no road at all – the whole pro-

ceedings would be a nullity plainly – nor does the Kentucky case referred to, sustain any such position, nor squint towards it.

And if the Ottawa & Dayton road is void ab initio, then the use of the public (unless it amounted to a prescription, of which there can be no claim here) and their labor on the road cannot establish it – If "clearing through timber and brush" will establish a road of the width cleared, there is little use of any other law on the subject of width.

The case of Ferris vs. Ward 4 Gilman 499. is cited by the relator here, to show that if the centre line of the road was surveyed, and returned by the Supervisors, did open the road 50 feet, then this is a road of 50 feet –

We can find nothing in that case from which the most vivid imagination can deduce any such conclusion. The Court say, that certain preliminary steps in the location of a road (such as the petition of the signers as the Court mentions*) need not be proved by record evidence, the Statute not requiring them to be recorded. But does the Court say, that the width of a road is one of those useless preliminaries, not necessary to be proved, or that they will be presumed? Certainly not: such a conclusion is in the face of the theory

*as had been previously decided in regard to such non-essentials in 4 Gilman 4:
" " 10:

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case itself, for there the record expressly contained an order establishing that road 50 feet wide.

The court further decided, that a road was considered established, and (in contemplation of law) opened; when the report of the viewers was confirmed, but no where intimates, that it would be established in a case where no road appeared either in the report of the viewers, or the order of confirmation of their report.

The point made in that case by counsel was, that there was no record evidence to show, that the supervisor was notified by the court, that the road was opened - and the Court say, this was not necessary - the Statute did not require it. and the validity of the road could not be contested on any such ground, when the road had actually been opened, worked & used for a long time -

That case also shows, that damages may be claimed, at a proper time. Now if the view of this relator is correct, how could damages be claimed? how could it be ascertained how much the State was to pay, or the owner receive, where there was nothing to show how wide the road was to be, or how much land was to be paid for? Is this width to lie dormant in the breast of the Commissioners, or

be found

in the verbal directions to the Supervisor only? The idea is absurd in the extreme.
In the case in the 15th Ills. 543. the court simply decided upon what was a good location - i.e. what was good for courses and distances -
The point made here was not raised in any way, or passed upon by the Court - The question of width was, in no way, presented.

The law which must test the validity of the Mauvaise Raise Road, is the Act of June 1. 1831.

Laws of 1831. Page 158.

The 11th section of that Law provides, that "All County roads shall be first surveyed, and perfect maps and report and return made to the Court: the road being established, the report shall be recorded at length, and when any road shall be established, it shall be the duty of the Court to say and determine on the width of the same, not less than 30 nor more than 50 feet".

Now what does this section mean.
This act of 1831. was amendatory to the act of 1827.
Let us look to this latter act, which sheds light on the former.
The 12th section of the act of 1827 provides that "The County Commissioners' Court may lay out new roads, alter or vacate

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old public roads, except State roads. All roads when ordered to be opened shall not be less than 20 feet nor over 50 feet".

Laws of 1827 page 340.

Now is it not obvious, that in order to make a valid road under this law, that there should be

1st A survey, map and report of survey.
2d The whole must be recorded.
3d A definite and certain width to be "determined" and "laid" by the Court
4th. An order for the opening of the road a certain definite and determined width.

The record of this road shows a total failure to comply with the requirements of this law - as the court will perceive on an examination of it -
Can there be any doubt of this law requiring the Co. Commis Court. to fix some definite width on the record?
It does not do so, and upon the authority of the Pennsylvania cases upon a similar statute in this respect, the omission is fatal to the road.
Again, this idea of fixing the width on the record is not a new one to the Illinois law -
The Law of March 29th. 1819. Sec. 14. provides that. "It shall be the duty of the Court to order roads to be

opened a necessary width not exceeding 60 feet, and cause a record thereof to be made, and such road shall thenceforth be deemed a public highway".

The "Revised Statutes. 1845 p. 487 § 33. provides. (and is an argument by analogy)

"All roads shall be surveyed, and a plat, with the courses and distances thereof, returned with the report of the viewers to the commissioners court, which shall be recorded and filed. The commissioners court, on the return of the report and plat, shall determine and establish on record, the width of the road, making the main leading roads 4 rods wide, and none less than 30 feet-".

This conclusively shows, that the policy of our law, and its requirements, from the beginning almost of our State legislation, is with the construction we seek to give to the law of 1831.

The law of 1835 § 9. p. 129. supports the same view. providing that, "No road ordered to be opened shall be less than 30 nor more than 50 feet".

We think there is another objection equally fatal to the Ottawa & Dayton Road. viz:

The law of 1831. was unconstitutional in not making any provision whatever for the assessment or payment of

damages to owners of land that might be taken for roads under that law, nor was there any general law of the State (at the time this road is alleged to have been laid) making any such provision in regard to damages — We only need state this proposition, as it commends itself to all persons to prevent encroachments on the ~~guarantees of the Constitution~~ natural rights of the citizen.

Must not there be some law, making compensation for damages for private property taken, that the Constitution ~~is~~ providing for such compensation? Revised Statute 1845 p 38. § 11.

~~Is not the right to damages independent of a written constitution?~~

2d We say the Ottawa and Naperville Road (State Road) has no legal existence.

This road was located under a special act of the Legislature, approved January 16. 1837. Laws of 1836-7 page 229.

This law empowered three commissioners therein named, "to view, survey, mark and locate" a road from the Court House in Ottawa, by certain given points, to Naperville, "on the nearest and best route".

It further provided that these commissioners, or a majority of them, should meet on the 1st day of May next thereafter, or within 4 weeks from that time, at Naperville, and after being duly sworn, faith-

fully to discharge the duties required of them by the act, they should "locate" said road, on the nearest and best route and as soon as practicable thereafter, should cause a map of said road to be made, and filed in the Clerk's Office of the County Commissioners court of Lasalle, Kane & Cook counties, and further provided that "said road should be kept in repair as other public roads are"

These are substantially the provisions of this Law.

The records of the Co. Comm's Court of Lasalle county show the report of these commissioners, from which report it appears that they had "viewed, surveyed marked and located" said road, as provided by the Law, giving courses and distances only, accompanied with a map of the survey: but it no where appears, that they were duly sworn as provided by the act, nor that they met and acted within the time limited by the Law.

The records further shows, that upon the report being filed, the Co. Comm's Court of Lasalle Co. subsequently (and wholly without authority of Law, as we shall presently show) entered an order, confirming this report, and undertaking to establish this as a State road.

No width for the road appears in the report of the three commissioners named

by the Legislature, nor on the map filed, nor in the order of the County Comm'rs Court confirming the report, and establishing the road. nor in the law. No provision was made in that act, for damages, nor were any ever assessed, nor was there any general law of the State on the subject of damages, in such case, in force at the time.

It is undeniably the duty of the Judiciary to construe strictly (almost as penal statutes,) all laws appropriating property for public uses; and while voluntary grants or dedications to public purposes by individuals, are justly construed liberally in favor of the public, such rule of construction is palpably inapplicable to appropriations by the public, which are forced by law. And though public policy might have dictated the propriety, of our Courts upholding roads laid in the earliest history of our legislation, and not to declare them void on account of trivial irregularity in the proceedings, and though our Courts to this end, have gone lengths, which we modestly doubt the policy of, in the long run, yet we believe, this Court will hesitate before sanctioning such gross omissions, as are apparent in the roads in question, nor do we believe that public policy, at the present time, will justify any such precedent as the relator here asks at the hands of this Court.

In regard to this State road. we deny that the Act of 1837. delegates any power to the commissioners named to fix any width whatever to this road, and we contend that they were only empowered to "locate" the road — or in other words, to fix the courses and distances — to establish the mathematical line on the ground, in the straightest or nearest, and best manner.

We deny, that the County Commissioners court had, by any law, the authority to fix the width of a State-road, or to lay, vacate or alter a State-road, unless specially empowered by law. for that purpose.

We know this court will not (for the mere purpose of giving some effect to essentially defective legislation, as in this instance) say the legislature intended, that this road should have a width; unless that intention can be clearly deduced from the language employed, according to well settled rules of construction on the import of the words.

Every court, where the common law is known (except where expressly forbidden by Statute) has decided, that in a will, where lands are devised to A. for the term of his natural life "only", "and no longer", with remainder to the heirs of A., by the Rule in Shelley's case the fee is given to A. thereby, and not

an estate for life, and the heirs take nothing. Although in case of a devise, courts go far to carry out the intent of the testator, yet the intent must be governed by arbitrary rules of construction. So here.

Here the power delegated is only a power to locate, and nothing more. The Pennsylvania Court says:

"When Commissioners are authorized to lay out and mark a road, there might be strong ground for saying, that they may regulate the width of it: for there can be no road without width. But there has been an established construction to the contrary. These expressions have been used in a great many laws, and under it, the Commissioners can only designate the course of the road."

1 Serjt & Rawle 487.

It is said in the same case, that "they may fix the width, if the power is given to open and keep in repair as other public roads". That is (meaning no doubt) that where the power to open is given, and the general law fixes a certain width: and not otherwise.

In the law in question, the power to open is not given, and although in cases of county roads, they may open (the duty being imposed on them by law, and in fact a necessary incident to their authority in regard to county roads): yet in regard to State roads,

which are specially excepted in all the road laws* (as the court will perceive by the references to them already made), they have no power to "lay out, alter or vacate" state roads, and the order, which the laws referred to, makes it their duty to make, in regard to opening, plainly refers, by the terms of the laws, to county roads alone; and over state roads, they have no power whatever, except that "general superintendence" (spoken of in all the Road laws ever passed in this state) in regard to working upon them, and keeping them in repair &c.

It may be contended, that the Law of 1837 in question, provides that this road "shall be kept in repair, as other public roads are", and from this language the power to open is implied -

But in full answer, we say, that this provision imposes no new duty, and delegates no additional power above what the Commissioners Court had necessarily without it, by virtue of the power of "general superintendence" before alluded to.

But if in this we err, and this court should hold the power to be implied, then we answer "what of it"? It has never been exercised, and a width given, either by the 3 Commissioners, or by the County Commis Court, and certainly was not fixed by the Court itself.

* And is excepted in the Law of 1835

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It is true, that the Law of 1837, directs a map to be filed in the Office of the clerk of the County-Commissioners Court, but from this, it can hardly be pretended that any authority was given thereby to the County-Comm's Court. It only fixed a place for the deposit of the proceedings.

Again it does not appear, that the Commissioners were sworn, or met as required by law.

For authority to show, that the record must show that the commissioners were sworn previous to their entering on their duty to view the ground, we cite as directly in point.

1 Monroe R.p. 57
1 Littell " 196
1 A. K. Marshall " 453
1 Penrose & Watts 207
5 Halstead " 242.

We are not contending, that the acts of the viewers would be void, if they omit to state in their report, that they were sworn. It may appear from the certificate of the Officer swearing them. But we do contend, that the fact must some where appear, and will not be presumed. It is not one of those things which the Law will presume to have been done, because the person in authority already, cannot be

presumed to omit an act, which it is his duty to do.

The cases referred to, 1 Green 154 and other cases cited by the relator on this point, either show by certificate of the officer swearing, or in some other mode, that they were sworn, and the other cases show that the person was already in authority, before the presumption will be made in his favor; but here, it took the oath to vest any authority in the viewers, and without it, they had no authority to act, and hence it must affirmatively appear, and will not be presumed.

Nor can it be presumed on account of the court confirming their report, which the law will presume to have been satisfactorily shown to them, or they would not have confirmed.

Is not this presumption only made in favor of the regularity of the proceedings of a judicial character only? — Did not the court act in this behalf only ministerially?

But if in this we err, and the act was a judicial one, then as a full reply, we say, that the action of the county court in this instance was not authorized by law, but was a silly usurpation of power, not needed, nor effecting any thing in the way of curing defects in the proceedings of the viewers, and was wholly extra judicial —

3d

In regard to the State Road from Ottawa to Madison, Wisconsin, we see no defect in it, unless there is validity in the objection, that the law itself makes no provision for compensation to the proprietors of the land- and on that account is not constitutional.

No body wants this road - The relator wants a road to Dayton, and this road is held as a sword over the heads of Thorne and Champlin, to force them to stop their resistance to the Dayton Road, well knowing, that this sword is their only hope to accomplish their object, and that the opening of it will not do any body any good, but would be ruinous to Champlin & Thorne.
This proceeding presents this strange aspect. The relator himself just recently released from an injunction, and now defending himself from numerous actions of Trespass quare clausum fregit (for the same lands, where these roads are claimed, he claims a right to lay out State roads) now pending in the Lasalle Circuit Court, comes before this Court to have two State-roads and one County-road opened through one small farm- roads enclosed for nine years past without a murmur, and with no more work done on these lands than one man could do in a single hour, and the travel at no time confined to these "mathematical" tracks, but taking the "range" of the Prairie We believe this Court will refuse the writ.

O. C. Gray.

People ex rel. &c.

vs.

John Caryca et al.

Argument of O.C. Gray against the allowance of the mandamus.

To the Hon the Justices of the Supreme Court of the State of Illinois.

The People upon the rela of Rees Morgan } Application for a writ of Mandamus.

Rees Morgan of the Township of Dayton

Your relator respectfully shews that John Curyea, Enos Brown & William Irwin now are the Commissioners of highways, (duly elected & qualified) of the Township of Dayton in La Salle County, which said County has adopted the law in relation to Township organization & organized under it.

That said Commissioners fearful that they may be liable as trespasers for so doing refuse to open & work the public highways hereinafter mentioned across the premises hereinafter described.

That at their September term AD 1831 the County Commissioners Court of La Salle County (the petitioner application being made therefor) made the following order. "That there be a road viewed leading from the Public Square in Ottawa by J Green's Mills to intersect the Chicago road near John Green's and that Luther S Robbins, William Richey & Joseph Cloud be appointed Commissioners to locate & survey said road the nearest point & to the aforesaid points.

That at the March term of said Court Joseph Cloud & Luther S Robbins two of said Commis

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sioners made the report hereinafter mentioned

That at said March term of said Court the following order was made by said Court.

Ordered by the Court that the report of Joseph Cloud and L S Robbins viewers of a road leading from the Public Square in Ottawa by John Greens Mill to intersect the Chicago road at John Greens and that the aforesaid Road be established as a public highway and that their report be entered upon the records of this Court which is in the words & figures following

"To the Hon the County Commissioners Court of La Salle County.

"We the Commissioners appointed to view & survey a road from Ottawa to Greens Mill thence to intersect the Chicago road at or near Greens, report to your Honorable body that we have surveyed & located the road as follows. Beginning at the Public Square in Ottawa & running. (Here follows a statement of the courses & distances) All of which we submit to your consideration"

Joseph Cloud
L. S. Robbins

That at said March term said Court also made the following order & entered the same of record.

"Ordered by the Court that William Madden be appointed Supervisor of the road from Ottawa by Greens Mill to where it intersects the Chicago road

That said road so established was immediately thereafter used by the Public & worked by said Supervisors & his Successors and in places where it passed through timber & brush the width was indicated by cutting a path to the width of fifty feet and this indication of its width as appropriated & used by the Public was as early as 1833 And the Public & Public Authorities Continued without interruption to use & work said road till interrupted by Richard Morris as hereinafter mentioned

That on the 16th of January 1837 an act of the Legislature of this State was passed which acts will be found on page 229 of the acts of 1837

Under this act the Commissioners therein named proceeded to attend to their duties & on the 6th day of March AD 1838 & at the March term of said Court Benjamin F Fridley & Isaac D Wallace two of the said Commissioners Made the following report

The report consists of a plot of the road giving the Courses & distances And the Court House in Ottawa way is staked on the plot at one end thus

Court O House At the bottom of the plot is the following.

" 3831. ch & 50 links from Naperville Cook County to Ottawa La Salle County or 47 miles & 71 ch and 50 links.

I hereby certify the above to be a true & correct Survey according to the best of my knowledge and belief of a road authorized by the Legislature

of the State of Illinois on the 16th of January 1837
to be made from Naperville Cook County to Ottawa
La Salle County   Almon Ives. Surveyor

We the undersigned Commissioners appointed & authorised by the Legislature of the State of Illinois on the 16th of January 1837 do hereby certify that we have received & caused the above survey to be taken & marked & have located the same as a State road leading from Naperville in Cook County through a part of Kane County to Ottawa in La Salle County & have authorised three maps thereof to be made & one filed in the clerk's office of the County Commissioners Court in each of the above said Counties

B F Fridley
I. P. Hollock

Which said report was filed by the clerk of said Court on the 6th day of March AD 1838, & at said March term of said Court & on said 6th day of March the said Court made & entered of record the following order

This day the report and map of a State road located by R M Scott Isaac P Hollock & Benjamin F Fridley from the Court House in Ottawa by Grand Mills William L Dunavans, Vital Vermetts, Georgetown George Hollenbacks, William Harris's Edward G Ament's & from thence to Naperville was handed in to the Court by Almon Ives Esq. And it appearing

to the satisfaction of the Court that the said Commissioners have complied with all the requisitions of the act authorizing the location of said road, the said report & Plat are accepted and approved by the Court and ordered to be filed.

Said road last mentioned was so surveyed that the ~~East~~ line of the Survey of this & of the County road before mentioned here precisely at the same place accross the land of Richard Thorne which is hereinafter described

Said two roads so crossing at the same place pass accross a tract of land now enclosed of which Richard Thorne is now seized & which is described as follows. The South West & also the South East quarters of Section Thirty one in Township Thirty four North of Range four East of the 3d P.M.
Said lands were parcel of the lands donated by the General Government to the State of Illinois & were conveyed by the Trustees of the Illinois & Michigan Canal to said Thorne in the year 1851 & from the time of the appointing viewers on the County road up to the time when said road was fenced accross as hereinafter stated was unenclosed prairie land.

Said Thorne took possession of & fenced accross said road in the month of 1865 & 6 under the following circumstances, to wit Heavy Canal land & title in the Trustees of the Illinois & Michigan Canal, Having Commenced Building a fence indicating an intention to fence accross said road John Green

1/2231-17

and William Stadden remonstrated with him. when he said that he had not sufficient fencing material to fence out said road at that time but that if he was permitted to fence across said road until the next Spring he would then throw open the road & fence the same Under such circumstances the road was fenced & the travel turned around the land occupied by said Horne And since then the said Horne has insisted upon keeping up his fence & others interested have endeavored to use it as a road Until the year 1846 or the latter part of the year 1845 no objection was made by the present or prior owners of said land now owned by said Horne to the opening & using & working said roads by the public & public authorities

After the laying & location of said roads the public authorities & the public used & worked said roads without interruption or molestation And the said State road was in places where the same passed through timber or brush was cut & cleared out to the width of fifty feet & in places it was fenced by parallel fences fifty feet apart. & from the time of the approval of said report the road has been used by the public as a road fifty feet wide Wherever its width has been indicated by cutting & clearing or fencing as aforesaid & it is now fenced at that width & it was at the time it was fenced across by said Horne, in many places between Ottawa & the line of the County of La Salle & in the

other Counties through which it pass.

Your Relator further shows that on the 27th day of February A.D 1841 the Legislature of this State passed an act which will be found on page 249 of the acts of 1841. Under this act the Commissioners therein named proceeded to attend to the duties therein mentioned & on the 6th day of September A.D 1841 and at the September Term of the County Commissioners Court of La Salle County the said Commissioners made the following report & which as recorded with the order preceding it is as follows.

"This day the report of Eli Barns Jessee C Kellogg & John Eastabrooks of a State road from Ottawa & the State line in a direction to Madison the seat of Government of Wisconsin Territory was made to the Court which report & also a Map of said Road after being examined by the said Court was accepted & approved by the Court & ordered to be filed & recorded and is in the words & figures following to wit.

To the Honorable the County Commissioners Court of La Salle County in the State of Illinois

The undersigned Eli Barns, John Eastabrooks and Jessee C Kellogg by an act of the Legislature of the State of Illinois entitled an act to locate & change certain State roads approved February 27 A.D 1841 appointed to view Barns & locate

[1223148]

a State road from Ottawa in La Salle County thence Northerly through Somanac timber, Squaw Grove to Sycamore the County Seat of De Kalb County thence by Genoa post office to Belvidere the County Seat of Boone County thence to the State line in a direction to Madison the Seat of Government of Wisconsin Territory. Would most respectfully report that we met at Ottawa August 5th AD 1841 and were severally sworn faithfully & impartially to perform the duties required of us by law as said Road Commissioners before M J Pendergrast an acting justice of the peace within & for the County of La Salle & State of Illinois and duly certified to be such acting justice of the peace by a certificate from under the hand & seal of the Clerk of the County Commissioners Court of said County of La Salle after which we proceeded to view & locate said State road to wit Commencing on the west bank of Fox River on the North side of the acqueduct in the Town of Ottawa thence N 148 rods - N 17° E 36 rods North 35° E 122 R. N 42° E 72 R. N 10° E 2 miles. (Here follow the further courses & distances) and after giving the last course & distance the report concludes. "To the Illinois State line near Beloit Wisconsin Territory. Whole distance in Winnebago County being eleven miles & 163 rods Whole distance of said road from Ottawa to State line being eighty two miles & 276 Rods All of which is respectfully submitted

Eli Barnes
Jesse C Kellogg
John Easterbrooks
} Commrs to view & locate said road

*

* And on said 6th day of September AD 1841 & at said September term of said Court said Court made & entered of record next to & below said report the following order. "Ordered that said road be established as a public highway & opened four rods wide"

Said Road to located pays across a tract of land now inclosed of which John C Champlain is seized & of which he became seized by ~~deeds~~ by a conveyance from J P M'Gregor who obtained title in 1851 in ~~the year~~ January 1853, by deeds from Michael Ryan. This land which is described as follows viz the North West fractional quarter of Section Thirty one Township Thirty four North of Range four East of the 3d P.M. & situated in said Dayton Township was also parcel of said lands donated by the General Government to the State of Illinois to aid in the construction of the Illinois & Michigan Canal & was conveyed by the Trustees of the Illinois & Michigan Canal to Michael Ryan in October 1848

Up to & before the time the same was fenced by said Champlain the same was uncultivated prairie land. & the same was fenced by said Champlain in the month of May a.d. in the year 1854 Immediately after the making said report of said locating Commissioners the public & public authorities took possession of used & worked said State road. There was ~~no~~ work done on said road in 1851 by the public authorities on the said tract of land. ~~those being the crops of the~~ as the relator believes ~~done thereon~~ No objection has been made by the present or prior owners of said land till about the time the same was fenced as aforesaid by said Champlain, to the opening & using said road across said land. No damages have been applied & paid to the present or any prior owner of either of the tracts of land hereinbefore described.

Your relator therefore prays that an alias

notice writ of Mandamus may be issued Commanding said Commissioners of highways to proceed to discharge their duties by opening said several roads for the use of the public through said respective enclosures or ~~Show Cause~~ to Show Cause why they should not do so Ales Morgan

State of Illinois
La Salle County } ss

On this twenty seventh day of July AD 1854 personally appeared before me John Green who being duly sworn states that he has heard the foregoing petition read & that the same is according to the best of his knowledge & belief true in substance & in fact

L. Leland Clk. S. C.

State of Illinois
La Salle County } and now come the said John Carya Enos Brown and William Train by their Attorney Richard Stadden and waive issuing of the alternative writ and desire the Court to Consider the facts stated in the foregoing petition as though they were stated in the return of an alternative writ and as and for a return thereto

Richard Stadden Atty for Pets

State of Illinois }
La Salle County }

And the said Relator by Glenn & Cook & Leland his Attys says that the said return & the Matters & things therein contained are not sufficient in law to bar & prevent the relator from having his writ of peremptory Mandamus.

Glenn Cook & Leland
per the Relator

R

The People ex rel &
Rees Magan
vs
John Carpia, Enos
Brown and William
Irwin

Fichs July 28. 1855.
L. Leland Clk.

The People ex re
Rees Morgan
vs
John Cuyea et als

Argument for the relator

It is to be presumed that the ~~steps which~~ precede the Order of the Commissioners Court establishing the road were regular.

1 Gilm 4 & 10
4 " 499
XV Ill 543

Unless the owner objects to the road & claims damages about the time of its location the claim is waived

4 Gilm 499
XIII Ill 209

At the time of laying out all these roads the land now owned by Champlin & by Thorne was State land & the laying out thereon was done under the authority of the Legislature of the State a purchaser from the State cannot complain of a prior laying out a road by the State on its own land.

Repeal by two of three road viewers good

XV Ill 256
Acts of 1831 Sec 11 p 160

[12231-22]

As to the roads from Ottawa to Dayton & from Ottawa to Napierville being ~~void &~~ invalid because no width were established we say.

1st If the return furnishes no indication of any width. Then we say the road should be considered as of the minimum width fixed by law. The acts of 1827 & of 1835. See Gales Stat. p 591 Sec 12 & p 596 Sec 9. (The said 12 Sec applying to ~~the County~~ Ottawa & Dayton road & the 9th Sec to ~~the State~~ Ottawa & Napierville Road) are that "no road when ordered to be opened shall be less than 30. nor more than 50 feet wide. The authorities in those States where the law does not fix the minimum width of the roads are not applicable here under our Statute. There is a case in New York precisely in point 2 Cains reports 179. It appears that by the New York Statute public roads were to be not less than four rods wide & the Court in that case say that where the Commissioners are silent as to the width they will intend the road to be 4 rods wide. Whether the Statute fixes the Maximum ~~&~~ width does not appear nor can the Statute under which the action was made be found in town. But whether there is a limit as to the maximum width or not is not undertaken is immaterial surely. We think therefore that after the public have used this County road about fourteen years. & without molestation have expended money in making & keeping it in repair a technical difficulty of this kind ought not to deprive them of the least width of road allowed by law. We also refer to the 11th of Dodd's Law R. 94 as in point. Suppose the Statute were that no road should be

more than 4 rods wide & the Public Authorities should establish a road five rods wide. would it not be a good road to the width of four rods, deducting 1/2 a rod from each side. This would seem to be so in Kentucky where the greatest strictness ~~seems~~ is required in proceedings in relation to the location of roads. 1 Littell Select cases 168 The act in Pennsylvania requires the width to be fixed & entered upon the records 5 Barr 515 ~~W & S p 899~~. The minimum width is not fixed 1 S&R p 489. So in other States.

But we insist that the Ottawa & Dayton & the Ottawa & Naperville roads are shown to be good roads of the width of 50 feet. It does not clearly appear by the acts of 1827 & 1835 how the width of the public roads is to be established. (This is made certain by the 33 Sec of the act of 1845 Rev Stat p. 487) Perhaps it should be inferred from the express provision that all roads when ordered to be opened shall not be less than 30 feet wide i.e. that the County Commissioners should establish the width to which it should be opened ~~by an order~~.* There is however no express provision that an order establishing the width shall be entered of record in the acts under which these roads were laid out. In the case of Ferris vs Ward ~~Wyatt~~ 4th Gilm 499 it was objected that there was no order for the opening the road, & the Court say ~~there~~ that it does not ~~seem~~ seem necessary that any record evidence of these steps should be preserved. We insist upon the authority of this case that if the center line of the road was surveyed & returned & the supervisor actually did open the road to the width of 50 feet and that if it was used occupied & worked

* By the 11th Sec of the act of 1831 the County Commrs were to fix & determine the width but whether by an order entered of record or by direction to the Supervisor or in some other manner does not appear

[12231-23]

by the public & Public authorities as a fifty feet wide road without objection for 16 years that it is a good road of that width. The facts are that the County road was cleard out through the timber & brush to the width of 50 feet the State road was also so cut out & its width at places along its route was indicated by fencing it out to the width of 50 feet. By the 16 Sec page 592 & the 13 Sec page 597 Gales Stat. "it is provided that the County Commissioners shall cause the road to be cut out and opened at the expense of the County. When the road labor shall have been insufficient. If roads as old & long used as these are to be closed up because there is no record evidence of the width we may well repeat the remark of the Court in the case of Reilly vs Brown 1 Gilm 10 "Should such a rule be adopted most if not all of the public roads in the older Counties might be shut up to our inconvenience & injury" In the case in the XV Ill 543. it is evident that there was no record evidence of the width. The actual location of the road was the matter to be enquired into & ascertained. & do we not in this case these facts from which the inference is plain that these two roads were actually 50 feet wide & that they were so actually located & established. A postponement of 50 feet in places is of 50 feet all the way. because the road should be considered as of the same width. Like a postponement of part under a deed of the whole it extends to the other

In relation to the objection that it does not appear that the Commissioners Reilly & Wallace were sworn or that they met at Naperville on the 1st day of May & each 4 weeks thereafter we say. That when a person or authority is required to do a certain act which could not

be omitted without a neglect of duty the performance of it will be presumed. And in support of this we refer to

11 Ills 494 — 1 Greene's Iowa repts. 158
7 John 549 — 19 John 345
3 Scam 457
2 " 568
1 Hill 249

It is ~~[illegible]~~ however of no practical importance whether this second string to the bow - this State road - is good or not the County road & the State road are at the same place. & there is no requirement of law that viewers of a road shall be sworn. There seems to be but the one objection to the County road. & that we believe we have shown untenable.

We are unable to perceive any irregularity in the other road. the one from Ottawa to the State line. It appears to be technically accurate & four rods wide. One that would answer in Kentucky. or any other State where they hold the laying out a road to be one of those Statute proceedings ~~in~~ in relation to which every "i" must be dotted & every "t" crossed. The return then which we believe sets up the exact facts in the case is as we think insufficient & that the demurrer thereto should be sustained and the Commissioners of highways ordered to open the Ottawa & State line road four rods wide. & the other two fifty feet or thirty feet wide as the court shall determine believing however that they are fifty feet wide

~~Glover Cook & Leland for Petitioners~~

As to the ~~unconstitutionality~~ unconstitutionality of the act of 1827 we say that it was amended before the Ottawa & Dayton road was laid out so that it did provide a way for assessing damages See Acts of ~~1831~~ 1831 p 160 Sec 8 so that it is unnecessary to examine whether it would have been without such a provision

2 Kent 339 note c

Glover Cook & Leland for the Relator

12

The People ex re
Ross Morgan
vs
John Cuyler et als

Argument for the Relator.

Glover Cook & Leland
for Relator

Filed July 31, 1851
L Leland Clk

34/3.50
10.2

State of Illinois
La Salle County } ss The People of the State of Illinois
To John Green Richard Hadden Rees Morgan
John Caryea Enos Brown & William Irwin
and your workman laborers servants and agents
each and every one of them Greeting

Whereas it has been represented to the
Judge of our Circuit Court in and for the county
of La Salle in a certain cause depending in said
Circuit court wherein Richard Thorne is complain-
ant and you the said John Green Richard
Hadden Rees Morgan John Caryea Enos Brown
& William Irwin are Defendants on the part of
the said complainant that you the said defend-
ants are committing good damage waste and
destruction on the lands of him the said compl-
ainant lying and being in said county & State

We therefore in consideration of the premises
aforesaid do strictly enjoin and command
you the said Green Hadden Morgan Caryea
Brown Irwin and your workman laborers
servants and agents and each and every one
of you that you do from henceforth absolutely
and entirely desist from ploughing upon working
upon a supposed road leading from Ottawa
to Naperville through the south west quarter
and the south east quarter of section thirty one
(31) in township thirty four (34) of range four
(4) east of the third principal meredian the
lands of him the said Richard Thorne and
from paping over on foot with horses cattle or
carry through the said land on said supposed
road as well as from committing any other or
further waste spoil or injury to the herbage

[1831-05]

growing trees or crops or fences on the said premises or any part thereof until our said court shall make other order to the contrary

And hereof fail not under the penalty of law and have the Rule direct

To the Sheriff of said county to Execute

Seal Witness Philo Lindley Clerk of said court and the seal thereof at Ottawa this 16th day of April AD. 1855.

P. Lindley Clerk

(Endorsement on back of writ)

Executed this writ by leaving ~~this~~ a copy of the same at the usual place of residence of the within named defendants with a member of their family over the age of 10 years April 18th 1855

J. Warner Sheriff

By T. Thorn Deputy

Serm Fee $3.10 Copy $3.00 32 mi 1.66

Filed May 11. 1855

J. H. Nash, Clerk

State of Illinois

La Salle County ss I John H. Nash clerk of the circuit court do hereby certify that the above and foregoing is a full true and complete copy of the writ of Injunction issued in the cause of Richard Thorne vs John Green & others as the same appears now on file in my office

Witness my hand and the seal of said court this 3 day of August AD 1855

John H. Nash Clerk

By P. Lindley Depy

No 144
People &c
v
Curyea et al

The People upon the
Relation of Reese Morgan
vs.
John Cunya Enos
Brown & William Irwin
Town of Dayton
Commissioners of Highways

Points & authorities for the Defendants.

The Road from Attawa to Dayton is not a good Road because no width was ever established by Law It seems to be well settled that a Road without any width a mere Mathematical line is not Sufficient.

The Court is refered to the following Cases on this Subject 7th Conn. 125. 13 Wend. 310 5 Watts & Sargent 559. 4 Barn 337 5 Barn 575 5 Blackf. 462. 8th Blackf. 208

There was never any order of the Court to open the road, and Consequently People Could never tell how much of their lands was going to be taken, and they would not know how to Lay in a Claim for damages, nor for how much.

The State Road from Attawa to Napperville has a great many defects, 1st there is no breath to it 2d the Commissions were never Sworn 3d they did not meet at Napperville in the time they were required by Law to do. 4th only two of them acted. The Proceedings in relation to Roads ought to be regular and there ought to be great Strictness required because it is a Proceeding by which a mans land is taken away from him & given to the Public. These men only authorised to act within 4 weeks after the 1st of May. and it ought to appear that they had acted according to authority. In Support of this Position. that they should appear to have acted within

[illegible]

them authority and according to Law. See Yeates 1 Littell 196 1st A. K. Marshall 453. 5 Halsted 242

As to all the Roads see argue that it should appear that the owners of the Land actually knew that they were Locating or had Located them. before they objected. So they could have had an opportunity to object. unless this appears their not objecting ought not to be considered a waiver of Claim for damages.

The Act of Feb 1847 under which the ~~Dayton~~ Ottawa & Dayton Road was laid out was unConstitutional because it did not provide a way to make Compensation to the owners of Land Taken for Roads.

Richard Stader Atty for Defts

No 144

The People upon the relation of Rusa Morgan
vs
John Curiya Enos Brown & William Irwin Road Coms

Defts Answer

12

People ex. rel. &c

vs

John Cunyea & als.

104 on Court docket

1855

12 R Dr

1855

12231