


No. 13509

Supreme Court of Illinois

Taylor.

vs.

Marcey.

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 63.

Taylor
vs

Marcy

795 09

1861

Repaired

Supreme Court April 1st 1860

Jay vs Macy } Mo to set aside order
of removal

In support of the motion we suggest that
the Bill of exceptions does not appear in any
way to have ever been made part of the
record. In order to give the judge judicial
power to sign & seal a bill of exceptions
after some time, there should be an entry ^{of record}
of some kind. Whether there was time
given cannot rest in part & be found
as a matter in pais. The record should show the
exceptions properly taken.
The record was filed in this case & the order
of removal taken on the same day. The case
had not got warm in the dock before
it was off. Such eager snappings, ~~at~~ after
justice ought not to be unreasonably encouraged.
There ought to be a reasonable admittance
of speed & deliberation in the conduct of
causes by litigants.

If the appellee had good reason to believe
there were no exceptions in the case upon which
error could be assigned, he could hardly
have anticipated an order of removal for
want of a finding in many imaginary cases
when none in fact existed. I sh

266 63-130

Jaynes as Muz

Suggestions on Mo
to set aside some
of unused —

Filed May 3, 1860
L. Leland
Clerk

State of Illinois
William Taylor } Supreme Court
appellant } 3^d Circuit
vs } April Term
Eliot Muey } A.D. 1860

To Joseph W. Selmer
Attorney for the
Appellant

Take notice
that on the 3^d day of May
A.D. 1860 I shall move
the Court to set aside the
decret heretofore taken and
to have the jury met of
usual business in the above
case when & where you are
required to be and appear
and rest said application
if you deem

Done &c

B. F. Park
Supt City

State of Illinois }
Peoria County } Benjamin F. Parks
being first deputy Sheriff on duty
does depose and say that he saw
a notice of which the foregoing is
a copy, on Joseph W. Helms the attorney
of William Taylor at the City of
Huron Peoria County Illinois
by handing the same to him
on the 30th day of April A.D. 1860

Inw & Subscribed

before me this }
2^d day of May }
A.D. 1860 }

B F Parks

Wm Miller

Notary Public



State of Illinois }
Rene County } Benjamin F. Parks
being first duly sworn on oath
does depose and say that he has
been the attorney of Robert Muey
the appellee in the above case
and that there has been three jury
trials in said case and one
hearing before this Court; That
this opponent tried the case for
said Muey at the last January
term of the Rendell County Court
and that after a verdict
was rendered for the defendant
below, a motion for a new
trial was made no exceptions
were taken and no time to
file a bill of exceptions was
asked or demanded in the
hearing of this opponent; That an
appeal was made and this
opponent got the impression at
the time from some remark
made by some of the present
attorney who represented Logan
that no bill of exceptions
would be filed and the only
object of the appeal was
delay

That some weeks after
Court adjourned this opponent
went to Chicago the County Seat
of Rendell County - and

No bill of exceptions was ever shown
to this appellant as his client, and this
appellant understands the same that
no notice was ever served on him
that a bill of exceptions, had been
as was to be presented to the
circuit-judge, This appellant further
states that he has never made any
agreement of any name or kind
with the opposing counsel in regard
to extending the time of filing any
bill of exceptions that no bill
of exceptions was filed during
the ~~term~~ term of the Record
in Court for A D 1860 and for
some weeks after, and no order
giving them time was entered of record
as is shown by the Record of said
Court-records attached marked N.

And this appellant further states
that he believes that the only action
which could be taken in the case by
this court upon the record as it stands
when last seen by this appellant
was simply to allow a motion
to dismiss an appeal and the
record marked N. was made
out in pursuance to the denials
of this appellant as stated above
and this appellant & his counsel seek
to better conditions of the record
supposed that he could correct
his error in regard to the
time in which he should
make such motion to dismiss

And appeal, when this appeal
was informed by Joseph W. Helme
Esq, that he had obtained the
case, which information was
obtained on the 30th of April
AD 1860, at the City of Anson
when this appellant was informed
that a bill of exceptions had
been obtained and that the Court
of this appellant Macey had been
defeated and his case removed
for non-jurisdiction ^{in view of}
upon such bill of exceptions ^{obtained by}
Hobbs.

This appellant asks that his
order of removal and final judgment
may be set aside and that the
said Debbent Macey may be reinstated
in this Court in the same manner
as though no such order of removal
had been entered of record herein
and also for the purpose of showing
how said case came into this
Court wrongfully and in violation
of the laws of this Court as this
appellant verily believes,

Given & Subscribed

of the nature of

Dec. 27th May 1860

Wm. Miller

Notary Public

B. F. Puckey



Wm Taylor

Ellis Macey

Trespass

Kendall County Circuit
Court Jan. Term A. D. 1860

Minutes of the Court

2 Jury Trial 3 Verdict not guilty - no for
New trial over 2 Juries - 11 Appeal Allowed on
pleas entering into Bond in the penal sum of
of \$500. with John Small as surety in 60 days
as of this Term

Jan. 18th 1860

This day came the plaintiff in
his own proper person as well as by Helms and
Smith his attorneys and the said Defendant
by Parks and Watson his attorneys as well as
in his own proper person also came and
thereupon the issues in this cause being joined
it is considered by the Court that a jury also
come and thereupon came the following named
persons of a jury to wit - Addison H. Allen
Charles Daufwisch Henry Hornley 2^d Truman
B. Hathaway Peter O'Brien Isaac K. Green
Wm L. Hubbard Harmon A. Allen John Holtsacker
Walter S. Hays Richard R. Harris and Stephen
H. Brown each of whom were severally chosen
voted and sworn and after hearing

the Evidence and receiving the instructions
of the Court retires in Charge of an officer
to Consider upon this Verdict

January 11. to 1811.

This day the parties appear
by their attorneys J. G. S. and the Jury J. G. S.
also come into Court and pray as the Jury
find the Defendant not Guilty - and therefore
came the plaintiff by Smith one of his attorneys
and moves the Court for a new Trial herein
which said Motion was thereupon overruled by
the Court and it is considered by the Court
that the Defendant recover of the plaintiff
the Costs by him in this behalf Expended
and that he have Execution thereon And
Afterwards again came the Plaintiff by his
attorney J. G. S. and pray an appeal to the
Supreme Court which said Appeal is granted
upon Plaintiff entering into Bond to Defendants
in the penal sum of five Hundred Dollars with
John D. as surety in six days from this
date

- True Copy of all proceeding had in
this cause at the same Term of said Court A. D. 1811

Attest Seal of Court Court. G. M. Hollenback
clerk

Knew all men by these presents
that A William Taylor as principal
& John Samuel as surety of the County of
Kendall & State of Illinois are held and
firmly bound unto Elbert Macey of the same
County & State in the special sum of five
thousand Dollars for the payment of which well
& truly to be made we do bind ourselves & each of
us of our heirs Executors administrators and assigns
jointly severally & jointly by these presents with our
hands and seals dated at Dewey this 27th day
of February A. D. 1860

The condition of the above obligation
is such that whereas in a certain suit had
at the January Term of Kendall County
Circuit Court A. D. 1860 wherein William
Taylor was plaintiff & the said Elbert Macey was
Defendant in an action of trespass upon
Real Property the said Elbert Macey did
veron a judgment for Cash against the
said William Taylor from which said
Judgment the said William Taylor
did at the time of receiving said
Judgment pray an appeal to the Super-
ior Court of the State of Illinois which
was allowed at the time Now if

the said William Taylor shall prosecute
his said appeal with speed & without
delay & shall pay the said Judgment
& all costs which have or may
accrue & all interest and damages
in case the Judgment shall be affirmed
in the said Supreme Court then
the above obligation to be void otherwise
to remain to remain in full force and
effect

Wm Taylor Seal
John Smith Seal

True Copy of the original
sent now on file in my office
attest the seal of the Cir Court of
said County

G. H. Allen Seal
G. H. Allen

Filed July 27, 1840.

G. M. Allen Seal
G. M. Allen

~~266~~ 65-15

Taylor vs Mowry

Affidavit of
B. F. Parks -

Filed May 8, 1860
L. Deland
Clerk



Supreme Court Term Decr Aprm 1860

266
William Taylor)
vs) Appeal
Albert Macy)

And now comes the said Appellee
Macy by Seland Seland & Parks
his attys & says that there is no such
error in said record & proceedings as
is in the allegations of errors alleged
wherefore he prays an affirmance of
said verdict

Seland Seland
for Appellee

To P.K.L.

No to strike bill of exceptions from file before
forming error of rule to be in error. ^{of what origin} otherwise not
all I get back.

63

Taylor, Alfred
to
Marcey Appleton

Filed April 14, 1861
Shelton
C. W. S.

No 266

Supreme Court

Taylor vs Marcy — Mo to set aside ^{order} for reversal for non joinder in error

The Appellant by Mr. Helme suggests that the order should not be set aside

The Record was filed on the morning of the 3^d day of the term, with errors assigned. and at the motion house a rule for joinder in error on the 4th day of the term, entered

On the afternoon of the 3^d day the case was called by the Court on the regular call of the docket, and by the practice of the court, the appellant was under the necessity of defaulting or hearing ex parte or waiting until the cause would be reached on the 2^d call of the docket. He chose to have the cause reversed then, for non joinder & it was done

In this condition the cause stood for two weeks and then the appellee moves to set aside the default, and the following grounds are presented each of which is deemed insufficient

I
That the default was entered on the same day on which the Record was filed of this the appellee can not complain unless the appellee had come within a reasonable ^{time}

If the appellee had come on the next day and moved the court to set aside the default as was done in the continuances entered on the same day in 267 + 268 - the ruling in those cases sitting under continuances would apply here.

Suppose this default had not been taken on the first call of the Docket but the rule for a joinder had been left standing for three days and then on motion of Appellant the reversal had been ordered for nonjoinder, would any cause of complaint exist - The law does not require a vain thing, and as in fact the Appellee paid no attention, till 10 days after the rule for ~~nonjoinder~~ ^{joinder} had expired, he was not in any ^{way} damaged by the entry having been made, at the regular call instead of the next day at the expiration of the rule.

II That the Bill of exceptions was ^{not} providently signed, and ought to be in the Record - and that without the Bill of exceptions there was no error in the Record.
The appellant answers this + protests that the Bill of exceptions is all regular and if that question should ever come

before this ^{Court}, he will shew by Affidavits
- that the statements in the affidavit of
B F Parks on that subject are very far
from a true history of that matter

But the appellant contents him-
-self, so far as this motion is con-
-cerned by saying that at the utmost
the statements only amount to this,
that in point of law there is no
error in the Record -

Appellant suggests, that it is not
cause for setting aside a default
for non foundation in error, to allege
that there is no error in the Record
It is too late for Appellant to say that

III That the attorney for the appellee
supposed that the appeal was taken
for delay and would not be prosecuted
He answers that he had no good
reason to suppose any such thing
and shows no fact on which he would
have any right to rely as a ground
of inattention - He says that he sup-
-posed from ~~some~~ ^{some} ~~remark~~ of some remark
of some lawyer representing Taylor
that no bill of exceptions would be filed

He does not tell what that remark was
nor who made it-

And suppose there was no bill
of exceptions in the Record and never
had been, still the Orders are all regular
The appeal was regularly taken
The bond filed in time

Parker's examination & knew that was so
The Record was regularly filed as required
by the Statute And the errors were specified
and abstracted
A Rule allowed regularly for joinder
in error. That rule expired without
any joinder

The Order of reversal was
regularly entered and two weeks
afterwards the court is asked
to set the same aside, because the
default was entered on the third day
of the term instead of the fourth, which
really made no difference to the
Appellee - next because there
was really no error in the Record
and third because the Lawyer for Appellee
(who by the way, does not appear to have
been employed in this Court by the
Appellee till after the default).
Supposed the appeal would
not be prosecuted

It is true that this cause has been tried
Three times in the Court below
& once in this Court. The first verdict
was for Defendant and was so gross
a violation of right & the law, that
the Circuit Court set it aside
without costs. The second
verdict was for the Plaintiff
& Plaintiff had judgment and this
was over ruled in this Court on the
ground that one or two of the instructions
were in some respects objectionable
but which might have been varied
in accordance with the facts and
the objectionable parts left out, and
answered the Plaintiffs purpose equal-
ly as well. And in the last trial the
verdict was for the ^{Defendant} Plaintiff, but
this was wrongously had as we verily
believe. The controversy relates to a
Road and affects much larger
interests than are shown in the
Record and no injustice can be
done by giving us another
trial

This is a singular case it would
seem, to justify the Defendants com-

set in his remarks about "eager
snappings after Justice" He would
reverse the Maxim that the law
favors ^{or encourages} the vigilant, and would
ask extraordinary and "unreason-
able encouragement" to the "Sleepy"
"vigilantibus non dormientibus seruiunt leges"

Belton & Dickey
for App't

~~286~~ 68

Taylor vs. Harvey

Suggestion of
Appellant against
Mo. to set aside ver-
dict

Modified by Cur.
Lawrence

United States of America
State of Illinois } 38.
Kendall County }

Plas before

The Hon. Madison E. Hollister Judge of the
Ninth Judicial Circuit of the State of
Illinois and presiding Judge of the Kendall
County Circuit Court at a Term thereof
begun and held at the Court House in
Osceola in said County on the 9th day of January
A. D. 1860 being the second Monday of said month
and the year of the Independence of the United States
of America the Eightth month
Present,

The Hon. M. E. Hollister Judge as aforesaid
N. Bushnell Esq. State Attorney
G. W. Hollenback Clerk
W. Murphy Sheriff
Attst., G. W. Hollenback Clerk

Be it remembered that hereof to wit,
on the 9th day of August A. D. 1855 there was filed in
the office of the Clerk of the Circuit Court of aforesaid
a precept in writing in in certain matter in the
words following to wit,

page 1

William Taylor

Kansas Circuit Court

vs
Elihu Macey

TRESPASS

The Clerk of Kansas
Circuit Court will

please issue a summons in favor of William Taylor
Plaintiff and against Elihu Macey Defendant
in an action of TRESPASS Damages Five hundred
Dollars

Helmut Smith

Atty for Plaintiff

Filed Aug. 7th 1855

J. W. Croston C.

The writ issued as above directed with
the Sheriff's return entered there is in the words and
figures following to wit

State of Illinois) ss
Randall County) The People of the
State of Illinois to the
Sheriff of said County - Greeting.

We command you, that
you summon Albert Marey if he shall
be found in your County, personally to be and
appear before the Circuit Court of said County
on the first day of the next Term thereof - to
be holden at the Court House in Oswego,
in said County, on the 3^d Monday of September
next, to answer unto William Taylor in a
plea of Trespass, to the damage of the said
Plaintiff as he says, in the sum of five
hundred dollars, - and have you then
and there this writ, with an endorsement
thereon, in what manner you executed the
same



Witness, John M. Brothers Clerk
of said Court, and the Seal
thereof at Oswego - in said County
this 9th day of August - in the year of our
Lord, one thousand eight hundred and fifty
five

John M. Brothers
Clerk

The Sheriff's return endorsed on the back of said writ is in the words and figures following to wit;

Served by reaching to the within named Albert Marcy this 3^d Day of Sept, A. D. 1855,

W. M. Day Sheriff
per. J. D. Kennedy, Deputy
Filed this 13th day of Sept. 1855.
J. M. Crothers

And Afterward to wit on the same day to wit on the 7th day of September A. D. 1855 William Taylor the Plaintiff filed in the office of the Clerk of the Court by and for said Plaintiff his declaration against the said Albert Marcy the Defendant and is in the words and figures following to wit,

4

State of Illinois } ss
Mendall County } Of the September Term of
Mendall Circuit Court, in the
Year of our Lord one thousand
eight hundred and fifty five
William Taylor plaintiff in this suit by
Helm & Smith his Attorneys complains of Albert
Marcy defendant in this suit, being summoned

in a plea of Trespass - For that the said
Defendants, on the first day of May, in the
Year of our Lord one thousand eight hundred
and fifty five - and on divers other days and
times, between that day and the day of the
commencement of this suit - with force and
arms, broke and entered the close of the
said plaintiff situate in the County of
Hendall and State of Illinois, and then
and there broke open broke to pieces damaged
and despoiled divers to wit, five pairs of
bars, of the said plaintiff of great value
to wit of the value of fifty dollars, then & there
standing and being in said close and with
feet in walking trod down trampled upon
consumed and spoiled the grass and
corn of the said plaintiff of great value
to wit of the value of fifty dollars, then &
there growing and being in said close and
with Cattle to wit Horses Mares, Geldings, Cows
Oxen and Sheep eat up and depastured the
grass, corn, wheat, and Oats of the said
plaintiff of great value to wit of the value
of fifty dollars, and also seized took despoiled
and carried away the rails posts and boards
of the said plaintiff to wit, five loads of

Boards, five loads of Rails, five loads of
Posts of great value to wit of the value of
two hundred dollars. By means of which
said several premises; the said plaintiff
was greatly annoyed and disturbed in
his possession during all the time aforesaid
and hindered and prevented from carrying
on his necessary affairs & business to wit
at the County of Kendall aforesaid and
other wrongs to the said plaintiff then and
there did, to the great damage of the said
plaintiff contrary to the form of the
Statute in such case made and provided
and against the peace and dignity of the
People of the State of Illinois, whereupon the
said plaintiff saith he is injured and hath
sustained damage to the amount of five
Hundred dollars, and therefore he brings
suit &c

Helm and Smith Atty
for Plffs

Filed Sept 9th 1855

J. M. Crothers Clerk
per Jensen, Deputy

And afterwards to wit on the 19th day of
September A. D. 1855 The Defendant Elbert Marcy
filed in the office of the Clerk of the Circuit Court of
said County his plea therein and the same are in
the words and figures following to wit,

Elbert Marcy }
acts }
William Taylor } Kendall Co. Circuit
Court, September Term
A. D. 1855

And the said Defendant by Parks his
attorney comes and defends the force and
injury, when &c., and says that he is not
guilty of the said supposed trespass -
above laid to his charge or any or either
of them or any part thereof in manner
and form as the said Plaintiff hath above
thereof complained against him and of
this he the said Defendant puts himself
upon the Country &c.

7
D. F. Parks
Defts Atty

And for a further plea in this behalf
as to the breaking and entering of the
Plaintiffs close and committing

The said several trespasses in Plaintiffs
declaration mentioned &c, the said defendant
says Actio Non because he says that the
time of the committing the said several
trespasses when &c, There was and of right
ought to have been a certain common
and public Highway into, over, through and
along the said close in which &c for all the
Citizens of this State, to go, return, pass
and repass on foot and with Cattle and
Carriages, at all times of the Year, at their
free will and pleasure, Wherefor the said
Defendant being a Citizen of this State and
having occasion to use the same way, at the
said several times, when &c, went passed and
repassed on foot and with Cattle and Carriages
into over and through the said close of
the said Plaintiff in said Highway as he
lawfully might, and in so doing the
said defendant then and there broke out
and removed certain Rails and Posts that
then and there obstructed the free passage
over along and through the said close of
the said close, of the said plaintiff in
said Highway as aforesaid and then and
there the said Defendant in walking

And with his Cattle and Carriages then
and there necessarily a little trod down
the grass &c, doing no unnecessary damage
which on the said several supposed
Trespasses in Plaintiffs declaration
mentioned and this the said defendant
is ready verify wherefore he prays
Judgment and e

Parks, Defts - City

And for a further plea in this behalf
the said Defendant says, actio non, because
he says that before and at the time of the
committing of said several supposed
Trespasses to wit, on the 5th day of
March A. D. 1853 Henry H Jenkins & Jenkins
A Harbans and A Scott, then and there
being the owner in fee simple of a certain
piece of land and then and there also
being in possession thereof to wit, the said
close of the said plaintiff, then and there
quit claimed and released all claim
and title to a certain strip of land
into, along, and through the said close
of the said Plaintiff, and had the said
release so made, filed in the Town, ^{Clerks}
Office of said Town in which the

said close of the said Plaintiff is
situated and said Land so released
by the Highway commissioner of said Town
opened and declared by said commissioner
a public Highway and in and by such
release said persons aforesaid gave to
each and every person, Citizen of this
State, the right to pass along through and
into the said close of the said Plaintiff
of all of which said Plaintiff had notice
and the said Defendant being a Citizen
of this State and having occasion to go
pass, and repass, over into along and
through said close of the said Plain-
tiff. Then and there had occasion to
pass over said road which had been
so released to the public and in pass-
ing necessarily a little trod down the
grass &c. and then and there took down
and removed certain bars and fences
which obstructed the free passage over said
road doing no unnecessary damage which are
the said several supposed trespasses of which
the Plaintiff complains and this the said
Defendant is ready to verify wherefore he
prays Judgment &c

B. H. Parks
Depts. Atty.

Filed Sept 19th 1855

John M. Prothers
Clerk

And afterwards to wit, on the 11th day of
Dew. W. 1856 the Defendant herein filed
with leave of the Court his fourth amended
plea to the plaintiffs declaration herein and
is in the words and figures following to wit,

Albert Marcey

ads

Kendall County Circuit Court
William Taylor) June Special Term A. J. 1856

And for a further plea in this behalf the
said Defendant says re: no because he
says that herefore to wit, on the 29th day of
December A. J. 1855 a petition duly signed
by to wit, twelve legal voters, living within
11 three miles of said proposed road was
presented to the Highway commissioner of the
Town in which the said close is located
that notice of the presentation of said
petition was published by putting up
written notices thereof in three of the

~~Public~~ most Public places of said town for twenty days, prior to the presentation to said Commissioner that afterwards to wit on the 5th day of March A. D. 1853, the said Highway Commissioner of said town in which said close of the said Plaintiff is located proceeded to examine the ground over, through, and along said close of the said Plaintiff and the owners of said close at that time to wit Henry Jenkins and Celestia Jenkins having released all claims for damages by reason of the opening of said proposed public Highway over said close. The said Highway Commissioner then and there having full power and authority so to do then and there caused a survey and plat of a public Highway to be made and then and there ordered & directed a Public Highway to be opened over along and through said close four rods wide and afterwards to wit on the 12th day of March A. D. 1853, said Highway Commissioner filed such order for a road and the survey and plat thereof in the Town Clerks Office of said Town, and afterwards to wit on the 9th day of April A. D. 1853 an appeal was taken from the said order of the Highway Commissioner of

Said town to three Supervisors of said County of Kendall, not one of said Supervisors then and there being of the said town in which said close of the said Plaintiff, is located and afterward to wit on the 14th day of November A.D. 1853 upon hearing said appeal said Supervisors affirmed said order of said Highway Commissioner declaring said route over, along, and through to said close of the said Plaintiff a public Highway and Henry Jenkins and Celestia Jenkins who then & there having the legal and lawful possession of said close of the said Plaintiff and being part owners thereof then and there opened a road over through and along the close of the said Plaintiff and said route over along and through the close of the said Plaintiff becomes and was and now is and of right ought to be a Public Highway and would and by virtue of such order of said Highway Commissioner each and every person Citizen of this State had a right to pass & repass on foot and with Cattle and Carriages over along and through said route so declared as Public Highway. And the said Defendant after the making of said order as aforesaid and

the opening said road and before the commencement of this Suit having occasion to pass over along and through said public Highway which is over along and through said close of the said plaintiff then and there necessarily a little trod down the grass &c and then and then took down and removed certain panels of fencing which obstructed his free passing along and through said Public Highway through the said close of the said Plaintiff, doing no unnecessary damage as he lawfully might, which are the said several supposed trespasses whereof the said Plaintiff hath above thereof complained and this he is ready to verify wherefore he prays Judgment &c.

B. H. Parks
Deft's Atty

Filed June 11th 1856

John M. Prothers
Clerk

And afterwards to wit on the 6th day of
October A. D. 1857 the Plaintiff herein by Nelson and
Smith his attorney filed in said Court his replication
to the plea of the Defendant in the words and figures
following to wit,

State of Illinois
Kendall County Circuit Court

William Taylor

vs
Elbert Maizey } and the said Plaintiff as to
the said plea of the said
Defendant by him first above pleaded and in
which he puts himself into the line

And the said plaintiff as to the said
plea of the said Defendant by him secondly, thirdly and
fourthly above pleaded saith that he the said
plaintiff by reason ~~thereof~~ of anything by the
said Defendant, in those pleas alleged ought not
to be barred from having and maintaining his
aforesaid action ~~thereof~~ against him the said
15 Defendant because he says that at the time
of committing the said several trespasses in the
said plaintiff's declaration mentioned there was not
a common and public Highway into over and
through and along the said Close of the said
plaintiff in which & for all the Citizens of this

State to go ~~and~~ pass and repass on foot
and with Cattle and Carriages or in any other
Manner at all times or any time of the Year at
their free will and pleasure as in said places
Alleged and that the said Defendant at the
said several times when &c of his own wrong
and without Cause or right by him in said
places Alleged Committed the said several
Trespasses in said Declaration mentioned
and in said places attempted to be justified in
Manner and form as the said Plaintiff hath
above thereof Complain'd against the said Defendants
and that the said Plaintiff pray may be enquired of
by the Country &c

Wm. H. H. atty

And I give with the like
Packs for Letters

Filed Oct. 4, 1854

G. H. Hollenback.

Deed

And afterwards to wit, on the Tenth day of
January A. D. 1859 there was filed in the Office
of the Clerk of the Circuit Court of said County
a certain Certified Transcript of Record proceed-
-ings had in the Supreme Court for the Third
Grand Division of the State of Illinois in this
Cause and it in the words and figures following
that is to say;

At a Supreme Court Regular and held
at Ottawa at and Tuesday the twentieth day of April in
the Year of Lord one thousand eight hundred and
fifty eight within and for the Third Grand Division
of the State of Illinois

Present the Honorable John D. Eaton Chief Justice
" " Sidney Russel Associate Justice
" " Pickens H. Hooker Associate Justice

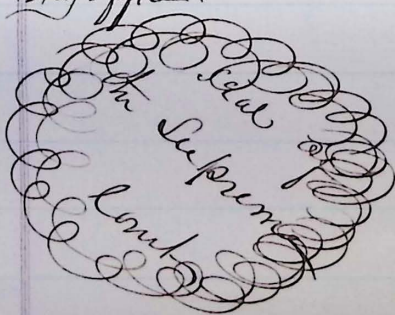
Saturday Jan 5, 1858.

17 Elisha Macey
v. William Taylor } Appeal from Kenosha
On this day again came
the said parties and the Court
having diligently examined and inspected as well the
Record and proceedings aforesaid as the matters and

thing therein assigned for Error and being now sufficiently advised of and concerning the premises and of the opinion that in the Record and Proceedings aforesaid and in the rendition of the Judgment aforesaid there is Manifest Error,

Therefore it is Considered by the Court that for that Error and others in the Record and Proceedings aforesaid the Judgment of the Circuit Court in this behalf rendered, be voided, annulled, set aside, and wholly nothing esteemed, and that this Cause be remanded to the Circuit Court for such other and further proceedings as to law and justice shall appertain. And it is further Considered by the Court that the said Appellant recover from the said Appellee his Costs by him in this behalf expended and also he have Execution therefor.

Dorango Deland Clerk of the Supreme Court of the State of Illinois do hereby certify that the foregoing is a true Copy of the final order of ^{the} said Supreme Court in the above entitled Cause of record in
18 My office.

The seal of the Supreme Court of Illinois, featuring a central emblem surrounded by the text "The Supreme Court of Illinois" in a circular arrangement.

On Testimony whereof I have set my hand and affixed the seal of ^{the} said Court at Ottawa this 6th day of January in the Year of our Lord and thousand eight hundred and fifty nine. D. Deland - Clerk of the Supreme Court
by E. B. Rice Deputy

And Afterward to wit, on the 12th day of
April in the Year of our Lord one thousand eight
hundred and fifty nine the same being the sixth
Judicial day of the April Term A. D. 1859 of
the Kent and County Circuit Court the following pro-
ceeding ^{among others} was had and entered of Record in said
Court to wit,

William Taylor

v.

Elbert Macey

Trespass

This day came the parties ^{and}
by agreement this Cause
is continued.

And Afterward to wit on the Tenth day of
January in the Year of our Lord one thousand eight
hundred and sixty the same being the second Judicial
day of the Kent and County Circuit Court of the January
Term thereof for the Year A. D. 1860 then in Session
19 at the Court House in Orange in said County for the
transaction of Business the following among other
proceeding was had and entered of Record to wit

William Taylor

v.
Elbert Macey

Trespass

This day came the plaintiff in his own proper person as well as by Helms and Smith his attorneys and the said Defendant ~~by Cook and Metzger his attorneys~~ as well as in his own proper person also came and appeared the issues in this cause being joined it is considered by the Court that a Jury also come and appeared and the following named persons of Jury to-wit; Addison H. Allen Charles Dauphin Henry Hemmelt, Truman R. Hackaway Peter D. Bryan Isaac K. Young of Ohio L. Hubbard Harrison A. Allen John H. Bennett Charles H. Braden Richard R. Harris and Stephen W. Brown Each of whom were duly chosen selected and sworn and after hearing the Evidence and receiving the instructions of the Court retired in charge of an Officer to Consider upon their Verdict.

20 And Afterward to-wit on the 11th day of January A. D. 1860 the same being the 1st judicial day of the Term of the Court aforesaid the following proceedings among others were had and entered of Record to-wit;

William Taylor

v.
Elihu McCoy

Deceased

This day the parties appear by their attorneys
Aforesaid and the jury Aforesaid also come into Court and
say "We the jury find the Defendant Not Guilty" and thereupon
Came the Plaintiff by Smith one of his attorneys and moves
the Court for a new Trial herein which said Motion was
overruled by the Court - And it is considered by the Court
that the Defendant recover of the Plaintiff the Costs by him
in this behalf Expended and that he have Execution
thereof. And Afterward again Came the Plaintiff by his
Attorney Aforesaid and pray an Appeal to the
Supreme Court which said Appeal is allowed
upon Plaintiff's entering into Bond to Defendant
in the sum of five thousand Dollars with
John Dammell as surety in sixty days from this date

William Taylor }
v. } Tresspass
Ellen Shacey }

Be it Remembered
that on the trial

of the above entitled Cause of action the Plaintiff to sustain this action introduced one Orrin Taylor who being duly sworn on oath said that he knew the parties Plaintiff and Defendant, that some time in June A. D. 1880 the Defendant pulled down the Plaintiffs fence in two places, that at each place where the fence was pulled down there were three or four panels of fence pulled down, that the panels were made of Boards and the Boards were 14 or 16 feet long making two spaces in the different places when the Defendant pulled down the Defendant Plaintiffs fence of three or four rods wide each that some of the Boards were badly split up and nearly destroyed and that they were thrown over the ditch fence and that the damage was at least fifty cents.

22

That the place where said fences were pulled down was in Muscatel County Illinois
On Cross Examination witness stated that he saw the fence after it was pulled down and the Boards split up and he called the

Defendant about it and Defendant said he had pulled it down because it was in the road and he knew the Roads over the fence when they then were and if they were put up again he would make even wood of them

The Plaintiff then introduced William Ryan who was sworn and who testified that the premises when said fence was pulled down then belonged to the Plaintiff and that the Plaintiff was then in possession of the same and that the Plaintiff purchased the same in the fall of A. D. 1834.

On Cross Examination Witness stated that there had been a time some years previous when Samuel Jenkins lived upon the premises which Plaintiff purchased but who had since deceased, that said Decedent Samuel Jenkins wanted a road when said fence was pulled down and said Jenkins built his fence in reference to that road. The witness also stated on the direct Examination & returned testified that the place where said ~~fence~~ ^{road} was intended to be laid out and which at the time of the trespass being committed had been fenced out by Samuel Jenkins in his lifetime with reference to a road being laid out ^{of the same} ~~that~~ had been abandoned before Taylor purchased the same.

25

That he ~~had~~ cut wheat right at the place
when the trespass was committed the summer
before the Plaintiff purchased the same, that he
never knew of any road labor being put upon
said Road, that at the time of the Trespass
being committed all the fields were in one con-
-tinuous field, that there was no road fenced out
and travelled and used as a public
Road within a half a mile or more of
the place when the trespass was committed -
without there being a Gate at each end of the
Road the Plaintiff then offered his Deeds of said
premises in Evidence which were testified to by the
witness Ryan as conveying the lands where said
Trespass was committed and the same were permi-
-tted to be read to the Jury which said Deeds are in
the words and figures following that is to say;

This Indenture Made this eighteenth day of March
in the year of our Lord one thousand Eight hundred
and fifty three Between John M. Jenkins
of the Town of Brooklyn of said County in the
State of Wisconsin a son of and heir at law
of Samuel Jenkins late of the County of Kendall
in the State of Illinois now deceased & Mary
Anne Jenkins wife of said John M. Jenkins
party of the first part and William Scott of
the County of Kendall State of Illinois party of the
second part - Witnesseth that the said party of
the first part - for and in Consideration of
the sum of one thousand and sixty five
Dollars to them in hand paid by the said
party of the second part - (the Receipt whereof is
truly acknowledged) have remised release sold
conveyed and quit Claimed, and by these presents
do remise release sell convey and quit Claim
unto the said party of the second part his
heirs and assigns forever All the following
described lot ~~piece~~ or parcel of land situate
24 lying and being in the said County of Kendall
said State of Illinois and known and distinguished
as the west half of the North East Quarter and lot
Number one of the North West Quarter of Section
seven in Township thirty seven of Range first

in the District of Lands subject to Sale at
Chicago Illinois containing one hundred and
Sixty acres - Also a certain other piece or parcel
of Land situate in said County of Kendall being wood-
-land & being part of the North East Quarter of the South
East Quarter of Section five Township thirty seven
North of Range six East of the third prin-
-cipal Meridian - and bounded as follows
beginning at the North West Corner of said lot running
South seven degrees East twenty Chains, then a North
Eighty three degrees East eight Chains and fifty links
then a North Nineteen degrees and forty minutes
west twenty Chains and thirty five links then
South Eighty three degrees west nine Chains
to the place of beginning containing thirteen
and sixty four hundredths acres of Land
to be the same more or less - It being the true
intent and meaning of their parents to convey
all the right title and interest of the said John
M. Jenkins of in & to said premises as one of
the Heirs at Law of said Samuel Jenkins
deceased and the right of dower of the said
Mary Ann as wife of the said John M. ~~Jenkins~~
to have and to hold the same together with
all and singular the Appurtenances and privileges
thereunto belonging or any way ^{thereunto} Appertaining

and all the Estate rights title interest and Claim
 Whate'er of the said party of the first part either
 in Law or Equity to the only proper use benefit and
 behoof of the said party of the second part his
 heirs and assigns forever. And the said party
 of the first part for themselves their heirs Executors
 and administrators do covenant and agree
 to and with the said party of the second part
 his heirs and assigns that he will warrant
 and forever defend the aforesaid premises to be
 free and clear of all Claims or Claims of all
 and Every person or persons Claiming or to Claim
 by Church or man or them or either of them and
 none other. In Witness Whereof the said
 party of the first part has hereunto set their
 hands and seals the day and Year first
 above written

Sealed and Delivered
 in presence of

James M. Clark
 John C. Jordan

John M. Jenkins
 Mary A. Jenkins

26

State of Wisconsin }
 County of Clark }
 I James M. Clark Judge
 of the County Court in and
 for said County, and State aforesaid do hereby certify

that John M. Jenkins & Mary Ann Jenkins who are
personally known to Me as the Real persons whose
Names are subscribed to the ~~Deed~~ deed
appeared before Me this day in person and
acknowledged that they Executed and Delivered
the said Deed as their free and Voluntary
act for the uses and purposes therein set forth.

And the said Mary Ann Jenkins wife of the said
John M. Jenkins having been by Me Examined
separate and apart and out of the hearing of her
Husband and the Contents and Meaning of the said
Deed having by me made known and Explained
to her she acknowledged that she had freely and
Voluntarily Executed the same and relinquished
her down to the Lands and tenements therein men-
tioned without Compulsion of her said Husband
and that she did not wish to retract the same.

Given under my hand this Eighteenth day of
March in the year of our Lord one thousand
eight hundred and fifty three

James M. Clark

County Judge of
Sank County
Wisconsin

State of Wisconsin }
 Sauk County } ss
 I, George Mutius Clerk of
 the County Court of said
 County do Certify that James M. Cook Esq. the
 Person who signed the foregoing Certificate of Acknowledg-
 ment and before whom the same was taken
 was on the Eighteenth day of March A. D. 1853, the
 Medical Judge of the County Court of said
 County, duly qualified according to Law - I also
 Certify that the foregoing Deed is Executed and
 Acknowledged in accordance with the Laws of
 this State

In testimony whereof I have hereunto
 set my hand and affixed the
 Seal of said Court at the Clerk's
 Office this 18th day of March A. D. 1853
 George Mutius

Clerk of the
 County Court

Filed March 29th 1853 at 3 o'clock P.M. and
 Recorded in Book Pages 317 - 318
 John M. Corwin Clerk Circuit
 Court & Officer Recorder & Sheriff
 County Ill. - per H. Gray 5/4

This indentures made the fifth day of December
 in the Year one thousand eight Hundred and fifty
 four between William Scott and Jane Scott
 his wife being heirs at Law of Samuel Jenkins
 late of Kendall County Illinois now deceased
 parties of the first part, and William Taylor of
 the County and State aforesaid parties of the
 second part, Witnesseth that the said parties of
 the first part, for and in consideration of the
 sum of five Hundred dollars, lawful money
 of the United States of America to them in
 hand paid by the said party of the second part
 at or before the sealing and delivery of these
 presents the receipt whereof is hereby acknowledged
 have aliened, remised, released, conveyed and
 confirmed and by these presents do alien remise
 release convey and confirm unto the said party
 of the second part and to his heirs and
 assigns forever all that certain Lot and parcel
 of Land situate in the County of Kendall
 and State of Illinois, known and distinguished
 as the west half of the north east quarter and
 Lot number one, of the north west quarter of
 Section seven in Township thirty seven of Range
 six in the District of Lands subject to Sale at
 Chicago Illinois, containing one Hundred


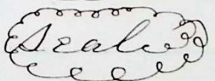
and sixty acres, also a certain piece or parcel of Land Situate in said County of Kendall being Wood Land being a part of the north east fourth of the South east quarter of Section five Township thirty seven north Range six east of the third principal meridian and bounded as follows beginning at the north West corner of said Lot Running South seven degrees East twenty Chains, thence North Eighty three degrees East eight Chains and fifty links thence North nineteen degrees and forty minutes West twenty Chains and thirty five links. thence South Eighty three degrees West five Chains to the place of beginning containing thirteen acres and Sixty four Hundredths of an acre of Land It being the true intent and meaning of these presents to convey all the right title and interest of the said William Scott & Jane Scott as heirs at Law of Samuel Jenkins deceased; the said Jane Scott being the daughter of said Samuel Jenkins deceased and also all the right title and interest of John M Jenkins in said premises who was also one of the heirs at Law of said Samuel Jenkins deceased and the right of dower of Mary Ann Jenkins wife of the said John M. Jenkins. and also all the right title

And interest of said Jane Scott wife of said
 William Scott including her dower right as
 well as all her other rights and interests in said
 premises together with all and singular the
 Tenements hereditaments and appurtenances
 therunto belonging, or in any wise appertaining
 and the reversion and reversions remainder
 and remainders rents issues and profits
 thereof; and also all the Estate, right title interest
 of said parties of the first part in property
 possession claim and demand whatsoever, as well
 in Law as in equity of the said party of the first
 part of in or to the above described premises
 and every part and parcel thereof with the
 appurtenances; To have and to hold all and
 singular the above mentioned and described
 premises together with the appurtenances unto
 the said Party of the second part his heirs and
 assigns forever; And the said parties of the first
 part, for themselves their heirs executors and
 administrators do hereby covenant promise
 and agree to and with the said party of the
 second part his heirs and assigns that they have
 not made, done committed executed or suffered
 any act or acts thing or things whatsoever
 whereby or by means whereof, the above mentioned

and described premises or any part or parcel thereof now or at any time hereafter shall or may be impeached charged or incumbered in any manner or way whatever.

It is understood by and between the Parties to these presents that the said party of the second part buys and holds the above bargained and described premises subject to the dower of Plectia Jenkins the Widow of Samuel Jenkins ~~deceased~~ late of said County of Kendall now deceased.

In witness whereof, the said Parties of the first part have hereunto set their hands and Seals the day and Year first above written

Wm Scott 
Jane Scott 

Sealed and delivered
in the presence of
William Crvin
Wm Ryan

State of Illinois }
Kendall County }
32

I William Crvin a Justice of Peace in and for said County State aforesaid do hereby certify that William Scott and Jane Scott his wife who are

personally known to me as the real persons whose names are subscribed to the above Deed appeared before me this day in person and acknowledged that they executed and delivered the said deed as their free and voluntary act for the uses and purposes therein set forth.

And the said Jane Scott Wife of the said William Scott having been by me Examined Separately and apart and out of the hearing of the said Husband and the Contents and Meaning of the said Deed having been by me made known and fully Explained to her acknowledged that she fully and voluntarily Executes the same and relinquished her dower to the Lands and tenements mentioned as well as all her other rights and interests in the same without Compulsion of her said Husband and that she does not wish to retract the same - Given under my hand and seal this 5th day of December A. D. 1854

William Erwin
 Justice of the Peace

33

Filed March 12 1855 at 12 o'clock P. M.
 and Recorded in Book 4, pages 442 & 443
 C. M. Crothers Clerk by Clerk
 The Office Recorder Humboldt Mo
 in witness whereof

This Indenture, made this twenty third day of April in the Year of our Lord one Thousand Eight Hundred and fifty five between Henry Jenkins of the County of Mendall and State of Illinois, party of the first part; and William Taylor of the County and State aforesaid, party of the second part, - Witnesseth that the said party of the first part, for and in consideration of the sum of three Hundred and fifty dollars to him, in hand paid by the said Party of the second part, (the receipt of ~~which~~ which is hereby acknowledged) has remised, released, sold, conveyed and quit claimed, and by these presents do give, release sell convey and quit claim unto the said party of the second part, his heirs and assigns forever, - All the following described lots or parcels of Land situate lying and being in the County of Mendall and State of Illinois; One piece is known and designated as the west half of the Northeast quarter of Section No. seven (7) in Township Thirty seven (37) North, of Range No Six (6) East of the third principal meridian, containing Eighty acres of Land be the same more or less - The other piece is known and designated as a part of the Northeast quarter of the ~~said~~ Northeast quarter of ~~said~~

4

Section No five (5) in said Township, and is bounded as follows to wit: Beginning at the Northwest corner of the said Northeast quarter of the said Southeast quarter of said Section No five — Thence Southerly along the West line of the said Northeast quarter of the said Southeast quarter of said Section, Eleven (11) Chains and twenty seven (27) links — Thence Easterly on a line parallel to the North line of said quarter, Six (6) chains and ninety seven (97) links — Thence Northerly to a stake on the said North line of said quarter which stake stands five (5) chains Easterly from the said Northwest corner of the said Northeast quarter of the said Southeast quarter of said Section — Thence Westerly along said North line five (5) chains to the place of beginning, containing Six (6) acres and Seventy-five Hundredths of an acre of Land, be the same more or less — — I do have and to Hold the same, together with all and singular the appurtenances and privileges therunto belonging or in any wise therunto appertaining, and all the Estate, right title interest, and claim whatsoever of the said Party of the first part, either in Law or Equity

Speed appeared before me this day in person and
acknowledged that he executed and delivered
the said deed as his free and voluntary
act for the uses and purposes therein set
forth - given under my hand this Twentieth
third day of April in the Year of our
Lord one thousand Eight Hundred and fifty
five

Archibald Sears

Justice of the Peace

Filed June 5, 1855 at 10 'p. A. M. and Recorded
in Book P, pages 42 & 43 - J. M. Prothers

Clerk Our Court ex
officio Recorder Kendall Co Ills per
Pennesson Sept

Know all men by these presents that Harvey
Burrell and Margarett Burrell his wife of the
County of Kendall and State of Illinois in Con-
sideration of Five hundred dollars to them paid
do by these presents Grant bargain sell and convey to
William Taylor of the County of Kendall and State of
Illinois all the following described lands situated in
the Town of Little Rock County of Kendall and
State of Illinois and described as follows
to wit, The South East quarter of the North East
quarter of Section Number Seven (7), Township Number
(3), thirty seven North of Range (4), Six East of
the third principal Meridian containing forty
acres by Government Survey. To have and
to hold the same together with the privileges and appur-
tenances thereto belonging or in any wise appertaining
and the profits and revenues remainder and remainders
rents issues and profits thereof to the above named Grantee
his heirs and assigns forever and do warrant
~~and defend~~ the same to be free from all incumbrance
whatever. In Witness Whereof we have hereunto set our
hands and seals this sixteenth day of June
A. D. 1855
Signed Sealed and Delivered } Harvey Burrell Esq
in presence of } Margarett Burrell Esq
W. H. Prosser

State of Illinois
Knox County

I, W. H. Erdreich a Notary Public
in and for said County and State
do hereby Certify that Henry Reumill who
is personally known to me as the real person whose
Name is subscribed to the Annexed Deed appeared before
me this day in person and acknowledged that he Ex-
ecuted and delivered the said Deed as his free
act and deed for the uses and purposes therein
set forth - And the said Margaret Reumill wife
of the said Henry Reumill having been by me
Examined Separately and Apart and out of the
hearing of her Husband, and the Contents and
Meaning of the said Deed having been by me
Made Known and Explained to her she acknowledged
that she had freely and Voluntarily Executed the same
and relinquished her Dower to the lands and tenements
therein mentioned without Compulsion of her said
Husband and that she does not wish to retract
the same - In testimony whereof I have hereunto
set my hand and affixed my Notarial Seal this

Sixteenth day of June in the
Year of our Lord one thousand
Eight Hundred and fifty five

Wesley H. Erdreich
Notary Public



Filed June 23, 1855 at 10⁴² A.M. &
Recorded in Book P. page 74
D. M. Crocker

Chas. C. Lamb & Co. -
official Reader of Records
by Mrs. M. C.
Sumner

The Defendant to prove his case then introduced
C. J. Lincoln who being sworn testified that he
was the Town Clerk of Little Rock Township
that the Book here presented was the Record of
the Town of Little Rock. The Defendants then offered
the Records of the Town of Little Rock in relation
to said Road in Evidence but the same were objected
to by Plaintiff. But they were permitted by the Court
to go to the Jury - a copy of which Record is
as follows - which is duly Certified by the Town Clerk
of Little Rock

First the Petition for a Road.

Second the order of the Commissioners of Highways
of the Town of Little Rock and the Survey and Release of Damages

Third the Appeal and the decision of the Superior
All of which except the Release of Damages were
admitted by the Court

The Defendants then produced the
original Release of Damages and proved that the signatures
of Henry Jenkins, Celestia Jenkins and William Deane
were true and genuine and then offered the same in
Evidence which were permitted to go to Jury All of
which Records and the Release of Damages are
in the words and figures following to wit:

" Road Petition "

" To the Commissioners of Highways of

of the Township of Little Rock in the County of
Hendall and State of Illinois

The undersigned legal voters of the Town
of Little Rock and who reside within three miles
of the proposed route for a road hereinafter mentioned
and described respectfully represent to your body that it
is necessary and proper that a Road should be laid
out upon the following described route to wit,

Beginning at the new travelled Galena Road
on the line between Alanson Fairbanks and Luke Gates
thence south along the line of Luke Gates Alanson
Fairbanks J. Wilson Andrew or Archibald Scott
the line of Samuel Jenkins James Beato Sarah
Scott Henry Perkins and the Tyler lot, to the
South east corner of Henry Perkins land, thence
along the line of John Murray and the Tyler lot
to the West side of land belonging to the heirs of
John Samuel thence south along the line of
the heirs of John Samuel John Murray and John
Jones to the South west corner of said Samuels
land thence through John Jones land to the
North west corner of Poley Jones land thence
41 Along the line of John and Poley Jones to
land belonging to Thomas R. Neal thence southwardly
along the line of Thomas R. Neal Poley Jones
and Sederiah Lincoln to the South West corner of

said line of said land thence east along the line
of Edward Lincoln and Poley Jones to the
Road leading from Britt to Simonauk.

And also a Branch leading from the road
at the North East Corner of Henry Jenkins land and
running west along the line of Henry Jenkins
Elbert Macey and thence of Samuel Jenkins
to the South West Corner of the last named Jenkins
land. The Undersigned therefore respectfully request
that you will cause said route to be surveyed
and such proceedings to be had as is by law in
such cases provided. Little Rock Dec. 27th 1852.

J. H. Brady

S. W. Oriatt

Rich. Glass

Elbert Macey

Ephraim Beck

Henry Jenkins

Wm. Scott

Eli Samuel

John Samuel

John L. Macey

John Jones

Ed. M. Benedict

C. J. Culver

Byrd I. Ryburn

Orville Colburn

James Scott

Archibald Scott

Samuel Scott

Andrew Scott

Poley Jones

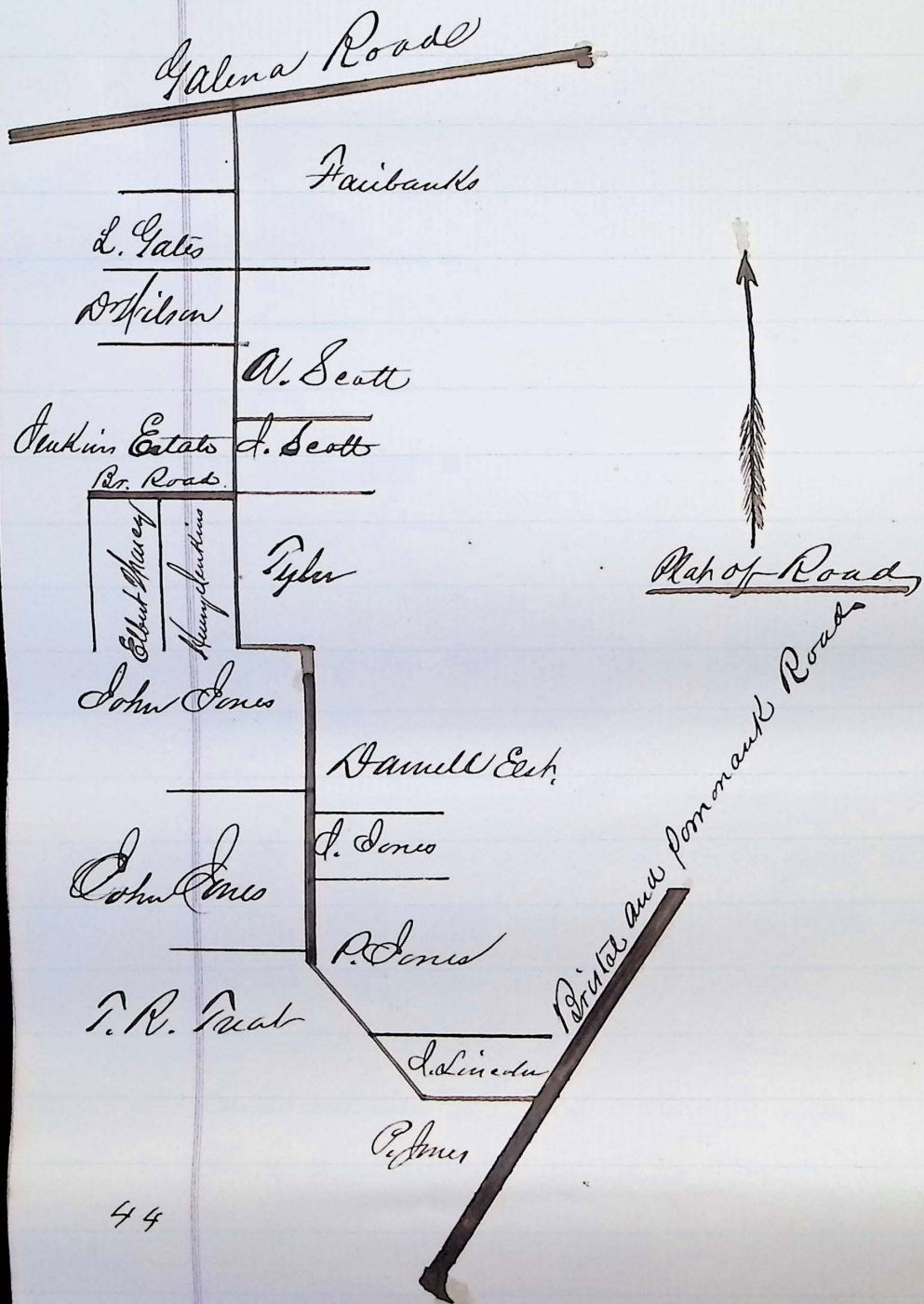
42

County of Kendall
Town of Little Rock

The Commissioners Request
The Undersigned Commissioners

of Highway in and for the Town of Little Rock and
County aforesaid on application by Petition did on the
fifth day of March Inst. Cause a Survey to be made
of the following route to wit beginning at the Galena
road on the line between L. Gates and W. Fairbanks and
running southerly on land of said Gates and Fairbanks
and others to a point in the Bristol and Simonauk Road
on the line dividing the lands of Pleg Jones
and Edward Lincoln being the same route described
in said Petition which survey is as follows,

Beginning at a Stake Standing in the center of the
Bristol and Simonauk Road on the line between
the lands of Pleg Jones and E. Lincoln running
thence south Eighty two degrees fifteen minutes west
twenty seven chains and fifty one links to the south
west corner of said Lincoln farm thence North fifty
seven degrees thirty five minutes west on the line
between said Lincoln and P. R. Treat thirteen chains
thence same course between the lands of said Treat
and P. Jones, twenty five chains and fifty one
links thence North six degrees and forty five minutes
West between said lands four chains and ninety
seven links to the south East corner of John Jones
lands thence North seven degrees thirty minutes
West between the lands of P. Jones and L. Jones
eighteen chains and thirty seven links thence same



run through lands of J. Jones sixteen Chains and
thirty seven links to the southwest corner of lands
belonging to the Estate of John Darnell thence same
course between the lands of said Estate and of A. Jones
seven Chains forty five links thence ~~same course~~ ^{same course} ~~Eighty two~~
~~degrees thirty Minutes~~ ^{between said Estate} and lands of John Perry forty
Chains thence south Eighty two Degrees thirty Minutes
west between the lands of said Perry and of
H. Tyler twenty Chains to said Tylers south west
corner thence North seven Degrees thirty Minutes
west between the lands of said Tyler and Sarah
Scott James Scott A. Scott A. Fairbanks
on the East side and the lands of Henry Jenkins
Estate of Saml. Jenkins D. Nelson and Luke Gates
on the West one hundred and forty three Chains
to the center of the Galena Road. Also a branch
leaving the above road at the North East corner of
Henry Jenkins Land and running thence westerly
on the Government Survey between the lands
of Henry Jenkins and Elisha Harney on the South
side and Estate of Saml. Jenkins on the north
side forty Chains to the southwest corner of
said Estate (a part of which is heretofore filed)
And the undersigned being of opinion that it is
necessary and proper that such road be laid out

It is therefore ordered that a road four rods wide
be located and laid out according to said Survey
and the same is hereby declared ^{to be} a public Highway

We would also report that the owners
of lands over which said Road passes have consented
that except T. R. Treat and Jedediah Lincoln whose
damages are assessed as follows To T. R. Treat
No Damages, To Jedediah Lincoln No Damages

Given under our Hands and seals this 12th
day of March A. D. 1853.

Jedediah Schuman } Commissioners of
A. Faubanks } Highway for the
New Highway } Town of Little Rock

Release of Damages

County of Kendall

Town of Little Rock

A. Highway having been
laid out on the day of
the date herof by William C. Humming Jedediah
Schuman and Alanson Faubanks Commissioners
of Highway for said Town on an Application by
Petition through certain lands owned by
us. Commencing at a point in the now
travelled Galena road on the line between --
A. Faubanks and S. Yates and running

South on the line between ^{said} ~~Barbours~~ and L. Gates
W Scott heirs of Sam^r Jenkins and then to the
South East Corner of Mary Jenkins lands thence East
along the lines of John Tunny and the Tyler
lot to the West side of lands belonging to the heirs
of John Dammell thence South along the lands
of said Dammell Estate J. Tunny and J. Jones to the
North West Corner of said Dammell land thence South
through lands of J. Jones to the North West Corner of
of J. Jones lands; thence along the line of J. Jones
and J. Jones to lands belonging to C. R. Treat
thence Southwesterly along the lands of said Treat
J. Jones and J. Lincoln to the South West Corner
of said Lincoln's lands thence East along the lands
of said Lincoln and Poley Jones to the Road
leading from Priest to Semonant.

And Also a Branch leaving this road
at the North East Corner of H. Jenkins land
and running West along the lands of H. Jenkins
Elbert Hays and the heirs of Sam^r Jenkins to
the South West Corner of the last named Jenkins
47 lands. Now therefore know all men by these
presents that We the undersigned for and in
consideration of the advantage and benefit
to be derived by us respectively and the public
generally do hereby release all claims to damages

by reason of falling out of said Road.
Witness our hands and seals this 3rd day
March A.D. 1853,

John P. Jones Seal	Yves Scott Seal
Andrew Scott Seal	Sarah Scott Seal
Peleg Jones Seal	Henry Jenkins Seal
Alanson Fairbanks Seal	John C. Tamm Seal
Elbert Macey Seal	Celesta Jenkins Seal

Surveyors Report

To the Honorable Commissioners

of Highways of the Town of Little Rock - Report of
a survey as made by the undersigned from
near Peleg Jones' to the Galena Road near
Alanson Fairbanks and more particularly described
as follows to wit, Beginning at a stake standing
in the center of the Bristol and Somonauk road
and on the line between the lands of Peleg Jones
and Frederick Lincoln running then on South Eighty
two degrees and fifteen Minutes west twenty seven
Chains and fifty one links on said line to
the south West Corner of said Lincoln's farm, then on
North forty seven degrees and thirty five Minutes west
on the line between the said Lincoln and J. H. Treat
Nineteen Chains thence same course between the
lands of said Treat and Peleg Jones twenty five

Chains and fifty one links to a state lines North
six Degrees and forty five Minutes west between said
lands from Chains and ninety seven links to the
South ~~West~~ ^{East} Corner of John Jones land then a
North seven Degrees and thirty Minutes west between
the lands of Pleg Jones and John Jones sixteen
Chains and thirty seven links then a same course
through the lands of said John Jones sixteen Chains
and thirty seven links, to the South west corner of
lands belonging to the Estate of John Wornell,
thence same course between the lands of said Estate
and those belonging to John Jones seven Chains and
sixty four links thence same course between
said Estate and land belonging to John Tunny of
forty Chains, thence South Eighty two Degrees and
thirty five Minutes west between the lands of John
Tunny and those of Agnes Tyler Sack Scott -
James Scott Andrew Scott and Mary Fairbanks
on the East side and the lands of Henry Jenkins Estate
of Saml Jenkins D. Wilson and Luke Yates on the
West one hundred and forty two Chains to the Center
of the Galena Road. Also a Branch leaving the
above road on the North East Corner of Henry Jenkins
land running thence westerly on the Government Survey
between the lands of Henry Jenkins and Eben Hacey on
the South side and the Estate of Samuel Jenkins

of the South of the South West Corner of N. Tyler
land is wrongly and injudiciously laid
out

2nd Because Copies of the Petition for laying
out said road were not posted up in accordance
with the law in such case made and provided

3rd Because No Notice was given of the time
and place when and where the Court would act
in the Matter

4th Because the order Replat Survey and plat
are each indefinite and uncertain and are not
made in accordance with with the Statute in
such case made and provided

5th Because the Damage which will be
sustained by the Individual taking this Appeal
if said Road be opened were not assessed
by said Comrs in accordance with the laws
in such case made and provided.

6th Because by the ^{said} Order and determination
private property will be taken for public purposes
without a reasonable Compensation in Violation
of the Constitution of the United States and
in Violation of the Constitution and laws of
this State

7th Because a Branch Road is laid out, whereas no such
Road is authorized by the Laws of this State.

8th Because said Branch is essentially a private Road and is therefore not laid out in conformity to the Statute in such Cases made and provided
9th And Because one of the Comrs who assisted in laying out said Road (Allan or Fautants) over a part of whose lands said road is laid out - formerly opposed the laying out of said road but was afterwards paid a liberal Compensation for permitting said Road to be laid out over his premises and now under his oath of office refuses to allow damages to divers persons over whose lands said road is laid out.

In Consideration of the above reasons and divers other wrongs by the said Comrs done in the premises the undersigned take this appeal in relation to the Assessment of Damages and also in relation to the laying out of said Road by said Comrs and ask that the determination of said Commissioners be entirely reversed

Done at Little Rock
April 19th 1853

James Scott Jr.
David Logg
Thomas R. Cook
Orlish Lincoln

Decision of Appeal
He the within

Named Supervisors of Maunsey Sewage and Sewerage
before whom the aforesaid Appeal was brought by the
within Named James Scott Jr. and others did Appoint
in answer to their prayer the 3rd day of Nov, 1853, -
for the hearing of said Appeal at the House of Frederick
Lincoln at 10 o'clock A. M. and on the said day appointed
Met for consideration of the same, O. C. Johnson and
Wm. D. Bacon, being present Adjourned to Nov. 14th
two weeks on which day Morris Gray being present
the other two absent Adjourned to Friday the 18th
on which day all three were present to wit, O. C. Johnson
Morris Gray & Wm. D. Bacon proceeded to the investigation
of the Matter presented in said Appeal, and after
hearing all the proofs and Allegations and reasons offered
for and against said Road and Everything Connected
with said Appeal, and after viewing the proposed
road as located by the Com^{rs} of Highways for the
Town of Little Rock do find and declare as our
determination that we acquiesce with said Com^{rs},
in laying out said road and we do further find and
award to Thomas R. Neal the sum of seventy five
Dollars Damage and to Frederick Lincoln the
sum of seventy five Dollars Damage which amounts
of Damages we do verily believe the said Th. R. Neal
and Frederick Lincoln do sustain in consequence
of said Road passing over their Land.

The others who joined in the said Appeal not
being in our Estimation entitled to any Damages
in consequence of laying out said Road

Done at Little Rock Nov. 19th 1853

Olin L. Johnson } Defendants of
Morris Gray } Oswego Mansway
Amos B. Bacon } and Kendall

The Defendant has introduced Henry
Dunkins who said that he was a son of Samuel
Dunkins deceased. That the land on the north
side of the Road marked upon the plat of the
Branch Road belongs to Saml Dunkins Estate at
the time of laying out said road that the land
a part of the way on the south side of said Branch
Road belongs to the ^{Deft} ~~Deft~~, as is shown by said
plat - That Withee was administrator and Celestia
Dunkins was administratrix of Samuel Dunkins
Estate at the time of laying out said Road -
and Branch Road - That Samuel Dunkins left a
widow and four children that Celestia Dunkins was his
5-4 widow and Henry Dunkins John Dunkins Samuel
Dunkins and Saml Scott who Morris said William
Scott was his only children that said Samuel
Dunkins died without making any will - That

Witness purchased the interest of Thomas Jenkins
in the Jenkins Estate and that William Scott purchased
the interest of John Jenkins in said Samuel Jenkins
Estate that the purchase from John and Thomas Jenkins
was after ^{the} signing of the Release by the said Celeste
Jenkins Mary Jenkins and William Scott. That William
Scott and witness sold and conveyed to William Taylor
by deed in the Winter and Spring after the Road was
laid out that Thomas Jenkins and John Jenkins were
not in the State when the Road was laid out, that
Mary Jenkins & Celeste Jenkins were in the possession
of the Jenkins Estate at the time the Road was laid
out that the fence was pulled down near where
the Branch road opened into the Main road that the
fence stood about eight feet into the Main road that
Samuel Jenkins ^{at some times} intended to have the Branch Road
and had built a rod fence with reference to the
same - that people some times when coming through
the fields travelled on said Branch Road, and some
times travelled in other places. That at the time Puff
Taylor got the possession of the land it was in the
winter and the fences were down when the Branch
road opens into the Main road that there had
been a fence there before but it was down when
Taylor got the possession. That the Main -
Road had a Gate opposite Andrew Seath and a

gate or two on the other side of plaintiff's premises
on Cross Examination witness stated that he did
not know when the line of the Main road was
that he did not see the lines run and never
knew when the line of the Road was that ^{it} was only
his opinion that the fence stood eight feet in the
Road

Rebecca Jenkins was then produced by Deft.
who stated that she was the Widow of Samuel Jenkins
deceased that she signed the Release - Her Husband
had at one time built his fence with reference to the
Branch Road then was no objection that she knew
of to laying out said Road on the part of Jenkins
of Jenkins Estate that she and her son Henry had
possession of the Jenkins Estate at the time the road
was laid out that the land had been divided by
order of Court before that time by the Heirs of Jenkins
Estate and the Widows down set off - - -

- - - On Cross Examination Witness said
she never saw the Heirs of Jenkins Estate that
is John Jenkins and Thomas Jenkins for some
time before said Road was laid out and ~~was~~ ^{did}
56 Not know whether they objected or not she never
heard them object, did not know as they knew that
said Road or Branch Road was to be laid out
or was laid out when they sold ^{and} conveyed the

also stated that James Scott was one of the heirs of the Jenkins Estate and wife of William Scott had James had never signed Release. That Thomas and John Jenkins were also heirs of the Jenkins Estate that they had neither of them signed the release of damages.

That his portion of land set off to her was on another part of the farm and did not come down to the place where the trespass was committed.

Witness also testified that James Scott owned land immediately opposite the place where said fences were pulled down ^{which belongs to plaintiffs} and he had never signed the Release.

Andrew Scott being produced and sworn by defendant testified that he knew the place where said fence was pulled down that it was at the place where the Branch road opens into the Main Road that one part of said fence that was pulled down was ^{across} what is called the Main road and one part across the Branch road where it opens into the Main road. That that there were Bars at each of the places where the fence was pulled down sufficient for teams and wagons to pass, that he thought the fence when it was pulled down across the Branch Road was in the Main road that he was Park Master that year and he believed that Road

57

Labor was put upon said Chain Road.

On Cross Examination the Witness stated that he does not know whether the fence ^{that} was pulled down across the Branch Road was in the main Road or not he never saw the line of the Road run and he never saw any stakes or any other marks to designate the location of said road that he cant say that there was any other work done on that road until after the trespass was committed except what he did in front of his own house in bridging a Gorge for his own convenience. That there was a gate on said Main Road some 3 or 4 rods beyond his house across said Main Road during the whole summer of 1855 and another gate or two on said Road after passing plaintiffs premises from my house that there was no way of getting through on said Main Road in the summer of 1855 except by opening gates - -

Which was all the Evidence on the part of the said Defendant and the said Plaintiff and no other Evidence being offered by either party Next the Plaintiff asked the Court to give the following instructions to the jury; ————— " ————— "

1 If the Jury believe from the evidence that the Defendant threw down the fence or bars of the Plaintiff, and has shown no authority or justification for so doing the Jury will find for the Plaintiff

2 If the Jury believe from the evidence that the Defendant broke down the fence on Land in possession of the Plaintiff and passed over said land with his Teams and Cattle, the Defendant in order to justify such trespass on the ground that the place was a common and public Highway laid out in 1853 is bound to show that the Damages sustained by reason of laying out or opening said road were ascertained either by agreement between the owners of the land and Commissioners of Highway or assessed by the Commissioners after notice given by the Commissioners to the parties of the time and place where they would act on the question of damages that they might be present if they wished so to do, or that their Damages were released by the owners " "

3

That to afford a legal presumption that the road in question was a Public road giving the Defendant a right to pass over it and remove obstructions from the fact of its having been travelled, it must appear from the evidence that it has been travelled by the public as a Highway and recognized and kept in repair as such by the commissioners and others whose duty it was by Law to open and repair Public roads.

4.

That before the public have a right to open and use a road laid out by the Highway commissioners it must appear from the evidence that the Damages of the Several owners of the Land over which it passes have been agreed upon between the commissioners and the owners or assessed by the commissioners after giving notice to said owners of the time and place when and where such assessment was to be made thereby giving them an opportunity to be heard, or that the right of way secured to the Public by the release of the owners filed in the Town Clerks Office

60

5 Assessment of Damages, or securing the right of way by agreement Assessment or release is not to be presumed to be done without evidence of the fact and the burden of proof is on those claiming the right of way to prove that the Damages have been ascertained by agreement or assessed as the Law directs, or that the owners have released the same " "

6 If the Jury believe from the evidence that Samuel Jenkins died owning real estate and without making a will, leaving James, Henry, John, and Thomas Jenkins his children and heirs at Law they were tenants in common of said real estate, and the release of one tenant in common of the right of way can not extend beyond his own claim for Damages and can not effect the right of his, or tenant

61
7 If the Jury believe from the evidence that the Defendant was so isolated or shut in that he had no road out from his premises the Law provides or

way for him to obtain a private or cart road, but he has no right in Law on that account to open a road for himself or pass over the premises of other persons without permission or right established according to Law " "

8 That to constitute or establish a road as a public road by dedication it is necessary that the owner grant the Land to the public for that purpose and that it has been accepted by the public and recognized by them as such

4 That although the Jury might believe from the evidence that the road in question was properly laid out and the Public had a right to pass over it - yet if they believe that the Defendant in the removing the obstructions committed unnecessary damage, he is liable in the action to the Plaintiff for such damages. " "

62 The Plaintiff by his purchase succeeded 10 to all the rights vested in his grantors in reference to the Land in question at the execution of the Deeds of Conveyance " "

11 That Pelesta Jenkins as the Widow and
Administratrix of Samuel Jenkins, although
in possession of the premises, when the road
was laid could not without authority from
the several owners do any act which would
bind them in reference to said Road "

12 William Scott could release nothing
more than the interest he had in the premises
at the time he signed the release, and if the
Jury believe from the evidence that all
the interest he had in the premises when
he signed the release was by right of his wife
the fee being in her his release would not
affect her rights unless she joined in the
release and acknowledged the same before
some Officer authorized to take such acknowl-
edgment separate and apart from her husband

13 If the Jury believe from the evidence
that after signing the release William Scott
obtained the interest of John Jenkins and
conveyed the same to the Plaintiff, then the
Plaintiff succeeded to the rights of John Jenkins
and the question of damages in the
premises " " "

The Court then instructed the Jury as follows for Defendant

1 If the Jury believe from the Evidence that the Land, composing said Contested Road route was not ^{an} enclosed or Cultivated field and that the Parties having possession thereof opened the Road then it was not necessary to give sixty days Notice in order to open said Road.

2 If the Jury believe from the Evidence that Saml. Jenkins was the owner of the land in his lifetime and while he owned the land fenced out and granted to the Public a right of way over the lands in Controversy on what is called "The Branch Road" and that said Grant of a road by Jenkins before the same was ^(made) ~~(made)~~ by Jenkins was accepted by the Highway Commissioners of said Town of Little Rock then that would constitute a Highway by dedication and the Defendant would be justifiable in pulling down all obstructions which interfered with said right of way.

Revised)

3 If the Jury believe from the Evidence that there was a legally laid out Highway and opened by the Parties interested and that the same after being laid out and opened was obstructed and that Money the Defendant only took such obstructions

4

out of said Road; doing no unnecessary damages
then they should find for the Defendant,

Of the Jury believe from the Evidence that Taylor
only succeeded to the interests of Henry Jenkins ^{and}
4 William Scott and John Deering to Taylor
Scott and Henry had released all Claims for
damages to the Public then that is a fact which
the jury may consider in determining whether
the place where the alleged trespasser were committed
was in a public Highway.

5 The acceptance of land dedicated by an
owner of land to the public for a Highway may be
shown by use by the public by travel or by
acts of public officers in repairing the same.

Therefore if the jury believe from the Evidence
that the land in question upon which said fence
stood was dedicated by its owners to the
public for a highway and was used by the
public for a highway and that the Plaintiff
built said fence on the Highway then the Defendant
has a right to remove and throw down the fence

6 5
Of the Owner of land over which it is
proposed to construct a road Claims are

Assessment of Damages he must in the first instance when opportunity is given object to the location of the road across his lands or he will be precluded from afterwards insisting upon damages - 11th Ed. page 497. - 13 Ill. page 211.

6 The jury are instructed that a dedication for a Highway may be proved in various ways. It may be proved by written Grant by long and uninterrupted use or by the act and declarations of the owner of the premises. If the jury believe from the Evidence that Saml. Quinlan Deceased in his lifetime was the owner of the Grounds, dedicated the same to the Public for a Highway and was accepted by the Public as a Highway and the fence in question was situated in such Highway the jury will find for the Defendant.

7 The jury are further instructed that the public are entitled to the whole road and a person has no right to place an obstruction on any part of a public Road

66
8 The jury are further instructed that no particular length of time is

Necessary for Evidence of Dedication if the act of
dedication be unequivocal it may take place in-
-mediately and therefore the jury believe from the
Evidence that the owners of the land in question
dedicated the Ground in question to the Public by
moving their fences back and using the Ground
for a Highway and if the Public accepted
the Ground so dedicated by travelling on the
same or repairing the same and there was
such dedication and acceptance from the Plaintiff
purchased the same then he took it with such in-
-convenience and he would have no right to resume the
possession as against the Public.

As the giving of which instructions for said
Defendants, by the Court, the Plaintiff then and
then Excepted -

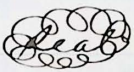
The Jury found a Verdict for
the Defendants - Whereupon the Plaintiff moved
the Court for a New Trial Verdict for the following
reasons,

1st. The Court Erred in receiving the
Defendants Testimony in relation to laying out
said Road particularly the Report of the Com.
of Highway

2nd The Court Erred in giving Defendants instructions.

3rd. The Verdict is against the Law and the Evidence.

The Motion for a New Trial was overruled by the Court. To the overruling of which Motion by the Court the Plaintiff then and there Excepted and pray that his Bill of Exceptions may be signed and sealed by the Court and made a part of the Record herein which is done

M. E. Hollister 
Judge &c.

And afterwards to wit on the 27th day of February A. D. 1860 the Plaintiff herein filed in the office of the Clerk of the Circuit Court aforesaid in his own proper person his Appeal Bonds which is in the words and Figures of following to wit;

"Know all men by these presents that I William Taylor as principal and John D. Smith as surety of the County of Kendall and State of Illinois are held and firmly bound unto Elbert Macey of the same County and State in the special sum of five hundred Dollars for the payment of which well and truly to be made we do bind ourselves and each of our heirs Executors administrators and Assignes jointly, severally and firmly by these presents - Witness our hands and seals, dated at Chicago this 27th day of February A. D. 1860

The condition of the above obligation is such that whereas in a certain suit tried at the January Term of Kendall County Circuit Court A. D. 1860 wherein William Taylor was plaintiff and the said Elbert Macey was Defendant in an action of Trespass upon Real Property the said Elbert Macey did recover a Judgement for Costs against the said William Taylor from which said Judgement the said

William Taylor did at the time of rendering
said Judgement pray an appeal to the Supreme
Court of the State of Illinois which was allowed
at the time - Now if the said William Taylor
shall prosecute his said Appeal with effect and
without delay and shall pay the said Judgement and
all Costs which have or may accrue and all
interest and Damages in Case the Judgement shall
be affirmed in the said Supreme Court then the above
obligation to be void otherwise to remain in full
force and Effect

Wm Taylor 
John Samuel 

Filed July 2nd 1860

G. H. Hollenback

Clerk

State of Illinois
Newell County

Geo J. George M. Hollenback

Clerk of the Circuit Court
in and for said County do hereby Certify that the above
sub foregoing is a full and complete transcript and Copy
of all papers Remaining on file in my office in the
Matter in which William Taylor is Plaintiff and Elbert
Macy is Defendant in an action of Trespass and
that the proceeding herein given as being entire of
Record in said Court in said Cause are all of
the proceeding had and entire of Record in said
Court in said Cause

In Witness whereof I have hereunto
set my hand and the seal of said
Court at Oswego in said County
the 6th day of April A. D. 1870.

G. M. Hollenback

Clerk

~~Henry A. ...~~

~~William Taylor~~

~~W. Macey~~

~~T. ...~~

~~Tram ...~~

~~Smith~~
att'y

Supreme Court of Illinois, Third Division.

April Term, A. D. 1860.

William Taylor, Appellee,

vs.

Edbert Marcy, Appellant.

}
}
} Appeal from
} Kendall.

Afterwards, to wit, at the said term of the court aforesaid, comes the said appellant, by Joseph W. Helm, his attorney, and says, that in the record and proceedings aforesaid there is manifest error, in this:

1st. The court below erred in admitting incompetent testimony on the part of the defendant.

2nd. The court below erred in giving the instructions, and each of them, asked by the defendant.

3rd. The court below erred in refusing the plaintiff's motion for a new trial.

4th. The court below erred in giving judgment for the defendant, when by the law of the land judgment ought to have been given for the plaintiff.

And the said appellant prays that the judgment aforesaid may be reversed, set aside, and altogether for naught held.

W. Helm
for Appellant

~~266~~ '63 - 130

Supreme Court.

William Taylor

vs

Elbert Marcy

} 3^d Division

} April Term 1860

Record -

W. H. Hume

for appt

Filed Apr. 14, 1860

L. Keland
C. H.

#10. pl. Hume

Breese J.

This case seems from the allegations of the bill to be this. The appellee being a creditor of the Lexington Fire Life and Marine Insurance Co. sued out an attachment which was levied by the Sheriff Church on a vessel called "Buena Vista" as the property of the company, that the sheriff put her in the possession of Norton Rogers & Nixon, to be run either for his and their joint benefit or for their benefit alone, that Norton & Co. during all the seasons since the vessel came into their possession ran and used her for the carriage of merchandise lumber and other cargoes & freight for hire & that in such business she was worth had earned or ought to have earned over and above expenses of navigating her \$2500 in each of the years they had the possession, that is, during the seasons of 1852-3-4, 5 and 1856 and up to the time of filing the bill and were still doing so - that in those years she had earned or should have earned \$13000 which ought to be applied to the payment of complainant's (Appellee's) judgment; that the complainant has no means of ascertaining these facts without a discovery from Church Norton & Co. and each of them, that they neglect and refuse to account for the earnings or to bring them into court or to produce the vessel to answer the

judgment claiming that the earnings and property are subject to the payment of the judgment and costs; that Norton & Co claim to have sold the vessel but to whom or for how much he is ignorant.

These are the principal allegations in the charging part of the bill and they are followed by the prayer that the defendants may each of them answer under oath "whether the Buena Vista her anchors chains rigging and sails were not attached by said Church as sheriff upon the writ of attachment in favor of complainant & and taken into his possession and whether he did not let or put the same & when into the hands or possession of said Norton & Co. and whether she has not been run by them or by their agent or direction and whether they have sold her and to whom and on what terms and conditions and for how much and in what trade and for what freight she has been run and for what amount of freight she has earned since said letting &c with the prayer for proofs "and that your orator may have such other & further or different relief in the premises as to equity and good conscience may seem meet." It will be observed no relief of any kind is prayed by the bill to which the prayer for other and

1 1 1 1

further and different relief could apply and it was therefore demurrable for want of form had the point been made; there is no specific prayer that the proceeds of this vessel be applied to the payment of this judgment yet that is manifestly the scope and purpose of the bill and we can carry out that purpose if the prayer of the bill does not forbid. That it does not is evident. The Court could decree according to the case made by the bill they correspond. We do not understand by these allegations of the bill, as the ~~appellants~~ ^{appellants} seem to understand, that the appellants claim the legal title to the vessel attached, but rather, as the general ownership was in the defendant in attachment, he had an equitable interest by means of his levy to the extent of his judgment and the sheriff had a special property in the vessel subject to the rights of all contending parties, and if the vessel was not produced to satisfy his judgment but was let out or hired to others by the sheriff he was entitled to an account for her net earnings and to have his judgment paid out of them, or, if sold, out of the proceeds of the sale. This seems to us to present a plain case for the interposition of a court of Equity one of whose familiar subjects of jurisdiction & cognizance is the execution of trusts and altho a court of law might in

a circuitous and expensive mode afford a rein-
-edly by garnishment yet it would not be so
searching and effectual as Chancery could
apply. It cannot be denied that the affeller
acquired a lien on the vessel by his writ of at-
-tachment, that when the sheriff took it into
his possession he became a trustee as well for
the ~~affeller~~ as for others who might have an
interest in her. The sheriff was bound to
account for the property and, if he put it
out of his power to produce it to be sold under
the execution, and, in violation of law and
his duty, placed it in the hands of these part-
-ies who have made earnings by the use of
her and have sold her and cannot pro-
-duce her to satisfy the execution, we think
a case has arisen to call into exercise the
powers of a Court of Chancery which by a
searching examination of the consciences of
the parties implicated in the transaction can
procure a full discovery of all the facts neces-
-sary to be known. The appellants admit that
they are the receptors of the sheriff, his servants,
responsible to him only, and between whom &
the affeller there is no privity either of contract
or estate. The sheriff being the trustee for all
concerned in the goods attached, if they pass into
the hands of his servants ^{for safe keeping} or otherwise shall it be said
a Court of Chancery has no power to compel them

to account to the parties interested. It requires neither priority of contract or of estate for such purpose. The power of the Court attaches to the trust property and it or its avails can be pursued into the hands of any and all persons who may have disposed themselves of it. When the vessel was hired or let to Nixon & Co. it was property in trust and any party interested in it may compel a discovery as to the disposition of it. The cases cited by the appellants counsel and their argument to the effect that there is no priority of contract between them and the appellee shows that a suit at law could not be maintained against them by the appellee. The act of the sheriff in thus disposing of this vessel was a wrong act, and those appellants participating in it are in the condition of all other persons who enter into an unlawful transaction with one who is interested by law with a fund for the benefit of others. All such parties may be properly joined as defendants to a bill in Chancery to discover the proceeds of the trust and to compel an account. All persons implicated in a breach of trust fraud or other illegal act may be made parties altho they may have no interest in the subject.

We do not regard this as a creditor's bill either

in form or substance and therefore the objection that no mutuality of dealings is shown can have no influence. It is a bill to get at the proceeds of property on which the appellant had an equitable lien whilst in the hands of the sheriff and which he by his own wrongful act put into the possession of his co-defendant who made large profits by the use of it and then sold it for a large sum of money. In 2 Story, Eq. Juris., 595, the principle is stated on which the bill can be sustained. When a trustee or other person standing in a fiduciary relation, makes a profit out of any transaction within the scope of his agency or authority, that profit will belong to his cestui que trust; for it is a constructive fraud upon the latter to employ that property contrary to the trust and to retain the profit of such misapplication; & by operation of equity the profit is immediately converted into a constructive trust in favor of the party entitled to the benefit. Nor is the doctrine confined to trustees strictly so called. It extends to all other persons standing in a fiduciary relation to the party whatever that relation may be. But upon the ^{grounds of} fraud as well as trust the jurisdiction of Chancery in this case cannot be questioned. In regard to frauds actual or constructive Courts of Equity have adopted

broad and comprehensive principles in exer-
-cising their remedial justice in favor of in-
-nocent persons who are sufferers by it without
any fault on their own part. For this purpose
they will convert the offending party into a
Trustee and making the property itself subser-
-vient to the proper purposes of recompense by way
of equitable trust or liens, and a fraudulent
purchaser will be held a mere Trustee for the
honest but deluded and cheated vendor. Id.
698. We do not well see how the parties could be
reached except by a proceeding in Chancery
where this vessel its earnings and avails can
be subjected to the appellee's equity. The appellee
has no legal title to the vessel, nor is there any
any privity of contract or of estate between
him and the appellants which he can assert
in a court of law and his remedy must of
necessity be in equity. These views sustain the
ruling of the court in allowing the exceptions
to the appellants answer. On their being al-
-lowed and the answer adjudged insufficient
the appellants were allowed ^{with} time in which
to file a further answer which they did not
choose to do and on their failure the bill
was taken for confessed and the matter re-
-ferred to a master who on proof being heard
reported to the court on which the decree passed.

This was all regular and in strict conformity with the statute. The amount found is sustained by the proof. The refusal of the Court to set aside the default was a matter of discretion in the Superior Court, but if it was not it is one of the essential requisites when a default of this character is sought to be set aside that the motion shall not only be founded on an affidavit but a full and perfect answer shall accompany it.

We have looked into this answer and find it obnoxious to several of the exceptions taken to the first answer. It does not show an account of the dealings with the vessel from the time she came into their hands - nor of the sale to Boyce & Piske - or of the \$5500 they paid for her - nor do they show what her earnings were after Boyce & Piske sold her. On a rule for further answer a party files a defective or insufficient answer at his peril. The decree of the court below is affirmed

Opinion of Judge Brewer