

No. 12218

Supreme Court of Illinois

Guptail, et al

vs.

Teft

State of Illinois)
County of Cook) S. S.

Pleas before the Honorable John M. Wilson
Judge of the Cook County Court of Common Pleas within and
for the County of Cook and State of Illinois at a regular
Term of said Cook County Court of Common Pleas begun
and held at the Court House at the City of Chicago, in said
County and State on the first Monday being the fifth day of
February in the year of our Lord One thousand eight hundred
and fifty five, and of the Independence of the United States the
Seventy ninth.

Present the Honorable John M. Wilson Judge
Daniel Mc Gray Prosecuting Attorney
James Andrew Sheriff
Attest Walter Kimball Clerk.

Be it Remembered that heretofore to wit on the
first day of September A. D. one thousand eight hundred
and fifty four came Jonathan Telf, Plaintiff in this suit by
Farnsworth & Burgess his Attorneys, and filed in the Office of
the Clerk of said Cook County Court of Common Pleas, his
Declaration in this cause, against John Gustaf, Guy Adams
and Shepherd Spalding, Defendants in this suit, which said
Declaration is in words and figures as follows, to wit.

In the Cook County Court of Common
Pleas. Of September Term C. D. 1854

State of Illinois,
County of Cook S. S.

Jonathan Jeffs Plaintiff in this suit by his
Attorneys Fainsworth & Burgess comes and complains of
John Upfel, Guy Adams and Shepherd Spalding who are
summoned &c in a plea of Trespass For that the said
Defendants on the First day of July in the year of our Lord
one thousand eight hundred and fifty four and on divers
other days and times between that day and the commencement
of this suit to wit in the Township of Hanover & County of
Cook with force and arms &c broke and entered a certain
close of the said Plaintiff called the farm of the said
Plaintiff situate on Section No thirty one (31) in the
said Township of Hanover and County of Cook, And
also then and there broke down prostrated and destroyed
a great part to wit three hundred rods of the fences
of the said Plaintiff and belonging to the said close and
broke the boards rails and posts and destroyed the
lumber whereof the same was built and comprised, and
with feet in washing trod down trampled upon consumed
and spoiled the grass and corn and grain of the said
Plaintiff of the value of Ten hundred dollars there then
growing and being in the said close and with cattle to
wit with horses mares geldings cows oxen and Sheep eat
up and depastured the grass corn & grain of the said
Plaintiff of great value to wit of the value of Ten hundred

dollars there growing and being in the said close and other wrongs to the said Plaintiff then and there did to his damage One thousand dollars & therefore he brings this suit,

And thereafter to wit on the sixteenth day of February A.D.
Eighteen hundred and fifty five the said Defendants John
Baptist by Blackwell their Attorney filed their
Plas in the Office of the Clerk of said Court, in words and
figures as follows to wit

John Luptail, Guy Adams
Shepherd Spaulding . . .
at
Jonathan Telft . . .

In the Cook County Court
of Common Pleas, Of the
Term of February A.D. 1855

And the said Defendant John Gaptail, for further Plea, in this behalf, by leave of the court says Plaintiffs action non because he says that the said close in the said Declaration mentioned is situate at and within road district number ten (10) in the town of Hanover in the said County of Cook, that the said Town was at the time when the same was organized under the Act of the General Assembly of the State of Illinois approved February 17th A. D. 1851 entitled an act to provide for Township organization that on the tenth day of June A. D. 1854 Andrew Spitsen, S. W. Campbell and Christopher Gohl were Commissioners of Highways in said Town of Hanover duly elected and qualified and then and there by virtue of their

said Office, and according to the force of the Statute
aforesaid had the care and superintendence of the
Highways and Bridges in said Town with power to lay
out new Highways and to regulate and alter preexisting
Highways in said Town, and cause the same to be
repaired kept open, and free from obstructions, that on the
said 10th day of June, the said Defendant was Overseer
of Highways in said Road district number Ten (10) in
the said Town of Hanover duly chosen and qualified as
such, that it then and there became and was the duty of
this Defendant as Overseer of Highways to open new Highways
and remove all obstructions to preexisting highways within
his said District when thereunto required by the said
Commissioners of Highways. That on the said 10th day of
June the said Commissioners of Highways made and delivered
to this Defendant an Order in the words and figures following
to wit:

" To John Hospital Overseer of
Road District No 10 Town
of Hanover "

Hanover June 10th 1854.

" Sir - Complaint having been made to the Commissioners
of Highways in and for the Town of Hanover, Cook
County, that the Highway running on the line between
Sections Thirty (30) and thirty one (31) is obstructed by
a fence owned by Jonathan Jeff Sr., and he having
been legally notified to remove the same, and not having
complied you are hereby Ordered by the undersigned "

Commissioners of Highways for the Town of Hanover aforesaid
to remove or cause the same to be removed said fences
within Twenty days after the receipt of this Order

Andrew Spitzer }
Christophe Schli } Commissioners of
J. M. Campbell } Highways.

And the said Defendant avers that the said Highway
described in said Order was the same identical close in the
said Declaration mentioned the said close being then and
there part and parcel of an Enclosed field and the said
Defendant further avers that in obedience to said Order he
did at the time when he break and enter upon the close
in the said Order and in the said Plaintiffs declaration
mentioned and pull down the said fence of the said
Plaintiff and removed the same from off the said close or
highway as he lawfully might do for the cause aforesaid,
and in so doing he the said Defendant with feet in
walking did a little injure the herbage and grass corn
and grain then standing and growing upon the said close
and did a little break the boards rails and posts of
which said fence was erected, doing then and there no
unnecessary damage to the said Plaintiff which are the
same supposed trespasses in the said Declaration mentioned
And this the said Defendant is ready to verify & wherefore
he prays judgment &c

Blackwell, P. d.

And the said Defendants Guy Adams and Shepherd Spaulding
for further Aid in this behalf by leave &c say Plaintiff

action, because they say that the said close in the said Declaration mentioned is situate at and within road district number ten (10) in the town of Hanover in the said County of Cook that said town was at the time when it was organized under the Act of the General Assembly of the State of Illinois approved February 17th A.D. 1851 entitled 'An Act to provide for Township Organization' that on the tenth day of June A.D. 1854, Andrew Spitzer, S. N. Campbell and Christopher Schlo were Commissioners of Highways in the said Town of Hanover duly elected and qualified and then and there by virtue of their said Office and according to the form of the Statute aforesaid had the care and superintendence of the highways and bridges in said Town with power to lay out new highways and to regulate preexisting highways in said Town and cause the same to be repaired, kept open, and free from obstructions that on the said tenth day of June the said Defendant John Gupfel was overseer of highways in said road district number ten (10) in the said Town of Hanover duly chosen and qualified as such, that it then and there became and was the duty of the said Defendant John Gupfel as Overseer of Highways to open new highways and remove all obstructions to preexisting Highways within his said district when thereunto required by the said Commissioners of highways, that on the said tenth day of June A.D. 1854 the said Commissioners of highways, made and delivered to the said defendant John Gupfel an Order in the words and figures as follows to wit:

"To John Giptol Overseer
of road District No. 10 Town
of Hanover".

Hanover June 10th 1854

"Sir, Complaint having been made to the Commissioners
of Highways in and for the Town of Hanover book be
"that the highway running on the line between section
"Thirty (30) and thirty one (31) is obstructed by a fence
"owned by Jonathan Tefft Sen, and he having been
"legally notified to remove the same and not having
"complied you are hereby Ordered by the Undersigned
"Commissioners of highways for the town aforesaid to remove
"or cause the same to be removed, said fences within
"twenty days after the receipt of this Order

Andrew Spulser

Christophe Sohle

S. W. Campbell

Commissioners
of Highways.

And the said Defendants aver that the said highway
described in said Order was the same identical close in
the said declaration mentioned, the said close being then
and there part and parcel of an enclosed field And the
said Defendants further aver that they were male inhabitants
of the said town of Hanover and of the said road district
number ten (10) over the ages of Twenty one years and
under the ages of fifty years and as such bound by law
to render road labour in said district when thereunto
required by the overseer of highways at least two days
in each and every year, and the said Defendants aver

that after the receipt of said Order by the said Defendant John Gustol, he the said John Gustol so being overseer of Highways in the said Road district number ten (10) notified and requested these Defendants to aid and assist him in the execution of the said Order And these Defendants aver that the said John Gustol under and by virtue of the order aforesaid and these Defendants under the Command and authority of the said John Gustol as aforesaid did at the said time when he break and enter upon the close in the said Order and the said Plaintiffs declaration mentioned and pull down the said fence of the said Plaintiff and remove the same from off the said close or highway as they lawfully might do for the cause aforesaid and in so doing they the said Defendants with feet in walking did a little injure the herbage and grass and corn and grain then standing and growing upon the said close and did a little break the boards rails and posts of which said fence was erected, doing then and there no unnecessary damage to the said Plaintiff which are the same identical supposed trespasses in the said declaration mentioned and this the said Defendants are ready to verify &c. Wherefore they pray judgment &c.

Blackwell P. d.

And thereafter to wit on the said sixteenth day of February in the year aforesaid the said Plaintiffs by their said Attorneys, filed in the Office of the Clerk of said

Court ~~there~~ Demurred to said Plea in words and figures as follows to wit

book born Pleas

Jeffs

Cuptel et al } And the said Jeffs as he said Amended Pleas of said Defendant Cuptail & to each of them says that the same is insufficient in law and he demurs thereto, wherefore he prays judgment &c.

And as to the said Amended Plea of said Aldams & Spalding he says that the same is insufficient in law and he demurs thereto, wherefore &c.
Farnsworth P.B.

Jeffs Atty's

And the said Cuptail & Guy Aldams & Shepherd Spalding join in demurrer.

P.B.:

Blackwell.

Judgment of the Court on the foregoing Demurrer inserted on the last page of this Record, being page 11. And afterwards to wit on the second day of March being one of the days of the February Term of said Court Eighteen hundred and fifty five the following proceedings were had in said cause and entered of Record to wit

Jonathan Jeffs

(vs)
John Cuptel, Guy Aldams Trespass.
and Shepherd Spalding.

And now again come the said Plaintiff by Farnsworth and Burgess his Attorneys and the default of

said Defendants having been heretofore at this time entered
herein And to enquire of the said Plaintiffs damages It
is Ordered that a Jury come and thereupon come a Jury
of good and lawful men to wit
A. J. Sewell, William Sawyer, E. B. Kingsley, John Dyer
J. D. Carpenter, H. B. Bridges, Charles Douglass, M. G. Pratt,
Franklin Emery, R. G. Cook, Theodore Hubbard, and
William Justice who being duly sworn diligently to enquire
of and true ascertains make of the said Plaintiffs damages
to the sum of One hundred and sixty dollars, after hearing
the evidence adduced by said Plaintiff and instructions of
the Court, retire to consider of their Verdict, and afterwards
come into Court and say to the Jury assess the said
Plaintiffs damages to the sum of One hundred and
sixty dollars,

Therefore it is considered That the said Plaintiff do
have and recover of the said Plaintiff do have and
recover of the said Defendants his damages of one hundred
and sixty dollars in form aforesaid by the Jury here
ascertained and also his costs by him in this behalf
expended and have execution thereof.

And afterwards to wit on the Twenty second day of February
being one of the days of the February Term of said Court
Eighteen hundred and fifty five the following proceedings
were had in said cause and entered of Record to wit.

Jonathan Jefft

(ut)

John Giffitt, Guy Adams
and Shepard Spaulding }

This day again came the said parties
by their Attorneys, and after argument of Counsel heard
on the said Plaintiffs demurrer to defendants second and
third Pleas by them pleaded herein, the Court being now
fully advised in the premises sustains said demurrer,
and thereupon the said Defendants abide by the decision of
the Court in sustaining said demurrer, and also with-
draw their first Plea from the Files in this cause And
thereupon said Defendants being three times called in open
Court come not nor does any person for them but make
default which is on Motion of said Plaintiff ordered to
be taken and entered of Record.

In the Supreme Court

And now Come the said
Plaintiffs in error by his attorney
to say that in the record of the
proceedings and in the rendition
of the judgment aforesaid Manifest
error hath intervened to their prejudice
in this to wit

1 The said Court erred in rendering
judgment for the plaintiff below
upon his demurrer to the plea
of the said plaintiffs in error.

2 In rendering judgment for
the defendant in error when
by the tenor of the law of
~~the~~ said Court judgment might
have been for the plaintiffs
in error. Wherefore &c

Blackwell p. q.

And the said Jeff by his Atty Jamesworth
Bourne comes & says there is in said judg
ment & proceedings no error wherefore he
prays judgment for Jamesworth Bourne
for left in error

State of Illinois
County of Cook S.S.

Jonathan Telft . . .
John ^{vs} Gupfel, Mary Eldam
and Shepard Spaulding. .)

I Walter Kimball Clerk of the Cook County
Court of Common Pleas within and for said County
and State Do hereby Certify that the foregoing are true
Copies of the Declaration, Amended Pleas and Demurrer
in this cause, now on file in my Office, and also of
the Judgment entered of Record therein, in said Court.

In testimony whereof I have hereunto
subscribed my name and affixed the seal
of said Court, at Chicago, in said County
this Eighth day of June A. D. 1855.



Jonathan Jefft
 W.
 John Gueptol and others

Transcript.

Filed July 2 - 1855.
 L. Keland Clk.

One point in this case seems to me
conclusive that is that no road can
be opened until the damages are paid
waived or released. R.S. 489. S. 38-

Statute 51. p 72 S. 6-

The roadway is laid, the court
may issue their order to open it, judicially
determine these facts & yet no right
to open it unless the damages are
provided for - This is an additional fact
that the party must aver in his pleading

Sup. court - June Term 1855-

John Gaptail et al

vs

Jonathan Jefft.

}

Error to Cook Court Pleas
defts Brief 1 Arg. 5-

The proposition that the defendants
set out with is the rule laid down in
Savacool vs Brighton 5 Wend. Rep. 170. approved
by our Sup. court in Barnes vs Barber 19. 401

A Ministerial officer is protected in the
execution of process, whether the same
issue from a court of limited or general juris-
diction, although such court have not in
fact jurisdiction in the case - provided that
on the face of the process it appears that the
court has jurisdiction of the subject matter
and nothing appears in the same to apprise
the officer but that the court has also juris-
diction of the person of the party to be affected
by the process -

Now to apply this rule laid down to
the present case each of the conditions
presupposed thereby must be true of it -
that is -

1st

That the overseer of highways is a
ministerial officer of the character therein
alluded to -

2^d

That the Board of Commissioners of
Highways are courts of limited or general
jurisdiction -

3 &

That the order set out in the plea is
process -

(over)

4th That said Board has power to issue process

5 That on the face of what is called the process in this cause sufficient appears to give the board jurisdiction of the subject matter + nothing appears there or alimona (1 Gil 406) to apprise of want of jurisdiction of the person -

6

What is a ministerial officer -

2 Braville Law Sec. 128. An officer of justice charged with the execution of the law, and hence termed a ministerial officer -

2 Braville 143 what is done under the authority of a superior, opposed to judicial as the sheriff is a ministerial officer bound to obey the judicial commands of the court -

on examining this decision, its whole tenor & scope will be found to include and have relation only to such officers who receive from a court, or from some person or body of men who for the time being have judicial authority powers, a warrant or authority to do a particular act, requiring them to return to the power that issues it or to some other person an official account of their action under it -

That this is the case the quotation made from Miller 30, Moravia vs Sloper on page 175 clearly shows,

If we turn to the act. 1849-c 64 et seq. we find no authority for issuing any warrant, or process of any description, returnable to any person, or at any time -

The mere "lawful orders" are what the party is to execute,

Secondly The Board of Commissioners of highways are not courts of any kind whatever their ~~actings~~ are not the judgments of a court of any description. They may partake more or less of a judicial character, but they do not come within the meaning of the word court. see 1. Gil 10. on page 18 "The laying out & opening of roads is not an exercise of judicial power. The same view is also taken in 2 Hill Rep N.Y. 24 - In the Matter of Mount Morris square. This is simply an exercise of the right of eminent domain - delegated to the Town authorities - as well might any Rail Road agent or surveyor ~~obtain~~ the order of his superior the rail Road company to enter & take possession of land as conclusive upon the party whose lands he is taking as the owner in this case plead the order of the court

24
The 3^d & 4th points may be considered together,

What is process as ~~by~~ this case interpreted - It is the mandate of a court provided & required by law. to be by it issued directed to its ministerial officer requiring him to do some act, either in the commencement, prosecution of a suit, or to execute the final judgment therein which judgment is neither or substantially set out in it to which the only return of the officer by law is. either that he has or that he cannot execute it and not that the court has no right to issue it.

Now refer to the *Savageol & Wroughton* case, *Barus vs. Barber*, In every case there alluded to the above definition will apply -

The case the counsel for the plaintiff on the strongest is *Maack vs. Furnham* ^{9 J. 229} as growing out of Road laws very similar to our Township organization, but ~~make~~ mark the same distinction runs through that case, the law provided for the issuing of a warrant, on the complaint of the highway owner, ^{justice to issue & the} & required the constable to execute it - so on a complaint for a criminal offence upon oath, the justice must issue his warrant, & the constable must obey it - But this is a singular application of that case to say that a com^{ee} of highways may issue a warrant, which the law nowhere provides for which will protect the persons acting under it from being entred illegal -

It says they shall give directions for
repairing highways; cause highways to be
kept in repair, which of course would
include the right to remove obstructions
to cause fences when they have laid roads
through enclosed fields to be removed if
C.W. 634. the owner does not in 60 days after written
notice given as provided by statute -
but not a word about process or warrant
or any sort of a mandate to any person
as their officer, which he is required by
law to do & make return to them

Again, it is impossible from
the plea in this case to ascertain what
of several descriptions of highways this is
If it is one opened by them, ~~for~~ the notice
is to be given by them, if not but in any
other manner, then it was just as
much the duty of the owner to open
with or without their order - see
sect. 4, p. 65. Stat. 49/1851 - & could it be
for a moment contended that the owner could
say I find this to be a highway & accordingly
open it & by this simple bare assertion
justify his trespass -

But with the case of *Black vs Freeman*
^{*Black & Saunders vs Freeman* 8 Ann 230}
9 J. 225. & *Freeman vs Cornwall*, 10 J. B. 470
show that the complaint by the owner as
required by the statute has been made, ~~but~~
which gave them jurisdiction to act - the justice
in issuing his warrant would have to show
this fact upon its face - but in this case
that is not pretended how or when these
commissions of highways admitted

this locus in quo for a highway, or that they
are ~~not~~ it is not shown -

The order neither recites or substantially
sets out any finding by them, ~~and~~
~~provides for no return by the officer~~
of the several & various facts upon which it

~~The conclusion seems inevitable~~
~~that this ^{order} is not process & that the Board~~
~~have no power to issue the such process~~
was lawful for them to issue it -

a writ ^{of execution} that did not state a judgment
to be rendered would be a nullity - so in this
case this should state by whom laid out
when, ^{& its right & other description} that the damages have been paid or
released, that the party has been notified

6W 634 - sixty days in writing all prerequisites to
be done, now admitting that all these
facts could be judicially determined to
exist ^{when occurred} by the commissioners does the order
recite them -

It says complaint has been made that
the highway is obstructed - what kind of a
highway this is, whether a public or private or
~~low~~ State road or how far obstructed, it does
not say - (9 J.P. 360.) Consequently the party to
~~acknowledge it~~ & know what he acts he can
do under it must go to the records of the
county or town to ascertain the character
and extent of the obstruction, ~~his~~ in other
words, his warrant tells him only part of
what he has to do - Now there is not a case that
the counsel has cited but the process in the
hands of the officer precisely defines under
the law, the acts to be done by the officer & he
must go no farther to find out - his writ is alone

both his authority ~~this~~ guide. But in this case the counsel call a mere direction or order, not required by law to be made process justifying the person acting is under it when the person who ~~suits~~ is to act under it. ~~He knows not what he has~~ from the face of the process could only learn that he must go to a certain place & do every thing else entirely in the dark.

The counsel in this case evidently suits to gain this order the effect that ~~a proper ad prolocution~~ proceedings under in *Spicer vs State* 9 pp. 359 - would have had & the remarks of the court there ^{upon such a case} will equally apply in this case upon the question of "obstruction" that is that its nature & extent must clearly appear -

But the last application of this proposition is the strongest of all -

That the commissioners can judicially find & conclude all the words by such finding that a certain tract of land ^{has} ~~been~~ ^{as a highway} laid out by State Town or county authority that a particular fence obstructs it that they have notified the party to remove it - that such notice was in writing & served sixty days, & thereupon direct the owner of highways to remove such fence that their ~~dis~~ order is in his hands & as to all who act with him conclusion evidence of those facts. & a full justification the pleadings admit that this is an unclouded field - so that we get rid of all

so that there are no presumptions as in
1 Gil 10-

The evidence that a road has been opened
is provided by statute both before & since the
Township organization law - The courts
in addition to this new evidence have said
1 Gil 10 that user as a public highway
coupled with the acts of public officers
having charge of highways - shall be
evidence of the opening of roads subject
to explanation - But this is a com-
parison with within other defendant
suits to substitute for the evidence
provided by law the mere say so
of the commissioners of highways -

But the difficulty with the Hfs in
error in this matter is that they fail entirely
in attending to the distinction every
where laid down, between courts acting
under the provisions of the law establish-
ing them for the administration of public
justice generally - and those of special
where such courts act in special limited
manner, or where certain acts & things
are required to concur to give ^{having} judicial power. The power to
act judicially - & that as to the first
class they take jurisdiction it will be
presumed, & that as to the last the
particular facts must be alleged which
give jurisdiction & they must be alleged
by all persons in pleading the proof

This distinction will appear on reference to adjacent cases -

Mills vs Martin - 19 Johns. 7 - a case in which a deputy marshal of the United States sought to justify the taking of property under process ^{provided by law} against plaintiff from a court martial. The only allegation in the averment was "that the court martial was duly organized & convened by general orders issued pursuant to acts of congress -

And the court held it clearly insufficient that it was a material & transcendental fact how the court was organized -

Now in this case how was the court or tribunal organized that laid out this road did they acquire jurisdiction of the subject matter, in the mode for the time being pointed out by the Statute - If a U.S. Marshall cannot justify without showing jurisdiction are we asking too much of an overseer of high ways to do it -

Croger vs Cropper 3 J.P. 242 -

reference in 11 Johns Rep 163

In setting out an involuntary debtors discharge by way of plea, it was merely alleged the said defendant being an involuntary debtor having conformed in all things to the direction of the Statute" but not setting forth how it was held clearly bad -

Sharp vs ^{Spier} ~~Spier~~ - 4 Hill Rep. 186

grew out of proceedings to lay a tax & enforce it by sale of land where the land had been sold & ejectment brought -

The court say page 88- Defendant insists that the petition conferred jurisdiction on the trustees to lay out a well & pump district in provided they should judge that a majority of the persons interested to be benefited had signed, that by granting the petition and proceeding with the work, the trustees as-
judicated upon the question & determined that a majority had petitioned & that this judgment is conclusive upon all persons so long as it remains unreversed -"

And in that case they had issued their decree the land to be sold so in this case they com- issued their warrant & directed the party to lay the line down in either case it was carrying an adjudication into execution - But what does the court reply -

"It is impossible to maintain that in this matter the trustees are sitting as a court of justice with power to conclude any one by their determination - True they are called upon to decide for themselves whether a case has arisen in which it was proper for them to act. But they acted at their peril - They could not make the occasion by resolving that it existed -"
"If the petition had been sufficient & the trustees had thus acquired jurisdiction to act then whether they would proceed or not was a question addressed to their discretion, & their decision could not be reversed in this court nor any other

11
In this case whether the proceedings upon which this writ was obtained a highway was sufficient to give jurisdiction to the power that undertook to do so. is a material & favorable fact, especially in a case ~~about~~ where it is admitted that the ~~road~~ ^{land} had not been used as a public highway - and then says so. or any one upon whom upon their say so - does not conclude the party from traversing it -

Sherman vs Ballou -

8 Con 305 - That letters of guardianship issued by a court having general power over the subject matter but not in the manner pointed out by law are void & afforded no protection to persons acting under them -

See also 11 Gil

Sakri vs Hudson, 6 Con 224 -

That in a declaration upon a judgment account in a surrogate's Court it is necessary to show the facts giving him jurisdiction

"Such summary proceedings are contrary to the course of the common law. The surrogate's court is entirely the creation of the statute. It should be shown to the court therefore affirmatively that the surrogate has power to make the decree, that the facts upon which he acted gave him jurisdiction of the subject matter of the person

Furman vs Cornwall 10 JR. 470-

a suit before a justice in which the pleadings are not made & ~~the~~ what is necessary to allege in a plea can only be in fraternal drawn - but the case is ^{where} an overseer of the highways is expressly vested by law with the power of adjudication & required by law to adjudicate upon a given point, the evidence in the case shows that he did so - & for so doing he was sued -

Now if the plea in this case had set up the fact that the overseer of highways or the com^{rs} had adjudged this locus in quo to be a highway ~~showed~~ & shown how & where they did it, this case might be applicable - but this they do not pretend to do, they do not aver it to be a highway - but merely a warrant issued ^{by the com^{rs}} directing them to open ~~the~~ locus in quo as a highway had the parties set up the fact that a highway was duly laid out & that all steps had been taken to entitle the party to open it or could but have traversed ~~the~~ such facts. or could not have gone behind their finding of the authorities who had the power to open a road where they have exercised that power -

The case of 3 Johns 474 - shows also that the party had made the adjudication as required by law -

But not to multiply cases I refer the court to Smith's leading cases Han & Wallaces notes page 707 - where the law on this part of the case is fully laid down -

on Page 708 - the rule same as that set up by Off in v. v. is where a person who justifies is an officer bound to execute its mandates it is sufficient if they fall within the general scope of its powers but every case alluded to is one where a court of justice established by law has issued a process recognized by law to an officer bound by law to execute that process -

1 Selw 384 court use similar language

W. J. Burroughs

Sup Court

Guptail et al.

^{vs}
Japp

Lefts Print
dang-

JOHN GUPTAIL,
GUY ADAMS, and
SHEPHERD SPAULDING,
vs.
JONATHAN TEFT.

In the Supreme Court Illinois,
Third Grand Division,
June Term, 1855.

Error to the Cook County Court of Common Pleas.

Declaration in Trespass, *quare clausum fregit*, for breaking and entering a certain close, in the town of Hanover, in said county of Cook, situate on section 31, and breaking down, prostrating, and destroying 300 rods of fencing; and breaking the boards, rails, and posts; and destroying the lumber whereof the same was made; and trampling down the herbage, &c. Damages, \$1000.

PLEAS.—1. General issue. 2. The following special pleas:—

And the said defendant, John Guptail, for further plea in this behalf, by leave, &c., says plaintiff *actio non*, because, he says, that the said close in the said declaration mentioned, is situate at and within Road District number ten, (10) in the town of Hanover, in the said county of Cook; that the said town was, at the time when, &c., organized under the act of the General Assembly of the State of Illinois, approved, Feb. 17th, A. D., 1851, entitled, an act to provide for township organization; that on the 10th day of June, A. D., 1854, Andrew Spitzer, S. N. Campbell, and Christophe Sohle, were Commissioners of Highways in said town of Hanover, duly elected and qualified, and then and there, by virtue of their said office, and according to the force of the Statute aforesaid, had the care and superintendence of the highways and bridges in said town, with power to lay out new highways, and to regulate and alter pre-existing highways in said town, and cause the same to be repaired, kept open, and free from obstructions; that on the said tenth day of June, the said defendant was Overseer of Highways in said Road district, number ten, (10) in the said town of Hanover, duly chosen and qualified as such; that it then

and there became, and was, the duty of this defendant, as Overseer of Highways, to open new highways, and remove all obstructions to pre-existing highways, within his said district, when thereunto required by the said Commissioners of Highways; that on the said tenth day of June, the said Commissioners of Highways made and delivered to this defendant, an order, in the words and figures following, to wit:—

To John Guptail, Overseer of Road District, No. 10, Town of Hanover:—

HANOVER, JUNE 10TH, 1854.

SIR:—Complaint having been made to the Commissioners of Highways in and for the town of Hanover, Cook county, that the highway running on the line between the sections thirty, (30) and thirty one (31), is obstructed by a fence owned by Jonathan Teft, senior; and he having been legally notified to remove the same, and not having complied, you are hereby ordered by the undersigned, Commissioners of Highways for the town of Hanover aforesaid, to remove, or cause the same to be removed, said fence within twenty days after the receipt of this order.

ANDREW SPITSER,
CHRISTOPHE SOHLE, } *Commissioners of*
S. N. CAMPBELL, } *Highways.*

And the said defendant avers, that, the said highway described in said order was the same identical close in the said declaration mentioned; the said close being then and there, part and parcel of an inclosed field; and the said defendant further avers, that, in obedience to said order, he did at the time when, &c., break and enter upon the close, in the said order, and in the said plaintiff's declaration mentioned, and pull down the said fence of the said plaintiff, and removed the same from off the said close, or highway, as he lawfully might do, for the cause aforesaid; and in so doing, he, the said defendant, with feet, in walking did a little injure the herbage and grass, corn and grain then standing and growing upon the said close, and did a little break the boards, rails, and posts of which said fence was erected, doing then and there no unnecessary damage to the said plaintiff, which are the same supposed trespasses in the said declaration mentioned, and this the said defendant is ready to verify, &c. Wherefore, he prays judgment, &c.

BLACKWELL, P. D.

And the said defendants, Guy Adams and Shepherd Spaulding, for

further plea in this behalf, by leave, &c., say plaintiff *actio non*, because they say that the said close in the said declaration mentioned, is situate at and within road district number (10) in the town of Hanover, in the said County of Cook, that said Town was, at the time when, &c., organized under the act of the General Assembly of the State of Illinois, approved February 17th, A. D. 1851, entitled "An act to provide for Township organization," that on the 10th day of June, A. D. 1854, Andrew Spitsier, S. N. Campbell, and Christophe Sohle, were Commissioners of Highways in the said town of Hanover, duly elected and qualified, and then and there by virtue of their said offices and according to the form of the statute aforesaid, had the care and superintendence of the highways and bridges in said town, with power to lay out new highways and to regulate pre-existing highways in said town, and cause the same to be repaired, kept open, and free from obstructions; that on the said tenth day of June, the said defendant, John Guptail, was overseer of highways in said road district number ten (10) in the said town of Hanover, duly chosen and qualified as such, that it then and there became, and was the duty of the said defendant, John Guptail, as overseer of highways, to open new highways and remove all obstructions to pre-existing highways within his said district when thereunto required by the said Commissioners of Highways; that on the said tenth day of June, A. D. 1854, the said Commissioners of Highways made and delivered to the said defendant, John Guptail, an order in the words and figures as follows, to wit.:

To John Guptail, Overseer of Road District No. 10, Town of Hanover:—

HANOVER, June 10, 1854.

SIR:—Complaint having been made to the Commissioners of Highways in and for the town of Hanover, Cook Co., that the highway running on the line between section thirty (30) and thirty-one (31), is obstructed by a fence owned by Jonathan Tefft, Sen'r, and he having been legally notified to remove the same, and not having complied, you are hereby ordered by the undersigend, Commissioners of Highways for the town aforesaid, to remove, or cause the same to be removed, said fence within twenty days after the receipt of this order.

ANDREW SPITSER,	}	<i>Commissioners of Highways.</i>
CHRISTOPHE SOHLE,		
S. N. CAMPBELL,		

And the said defendants aver that the said highway described in said

order, was the same indential close in the said declaration mentioned, the said close being then and there part and parcel of an enclosed field; and the said defendants further aver, that they were male inhabitants of the said town of Hanover, and of the said road district number ten (10), over the ages of twenty-one years and under the ages of fifty years, and as such, bound by law to render road labor in said district when thereunto required by the overseer of highways, at least two days in each and every year; and the said defendants aver that after the receipt of said order by the said defendant, John Guptail, he, the said John Guptail, so being overseer of highways in the said road district number ten (10), notified and requested these defendants to aid and assist him in the execution of the said order; and these defendants aver that the said John Guptail, under, and by virtue of the order aforesaid, and these defendants, under the command and authority of the said John Guptail as aforesaid, did at the said time, when, &c., break and enter upon the close in the said order, and the said plaintiffs declaration mentioned, and pull down the said fence of the said plaintiff, and remove the same from off the said close or highway, as they lawfully might do, for the cause aforesaid, and in so doing, they, the said defendants, with feet, in walking, did a little injure the herbage and grass, and corn, and grain, then standing and growing upon the said close, and did a little break the boards, rails, and posts, of which said fence was erected, doing then and there no unnecessary damage to the said plaintiff, which are the same identical supposed trespasses in the said declaration mentioned, and this the said defendants are ready to verify, &c. Wherefore they pray judgment, &c.

BLACKWELL, P. D.

Plaintiffs demurred to each of the said special pleas, in which defendants respectively joined.

Interlocutory judgment upon demurrer for plaintiffs general issue withdrawn, jury empannelled assessed the plaintiffs damages \$160.00. Final judgment.

ERROR ASSIGNED.

In sustaining plaintiffs' demurrer to the said defendant's pleas.

BLACKWELL, BALLINGALL & UNEDRWOOD,

For Plaintiffs in Error.

John Quftad et al }
 v
 Jonathan Ieft }

The two special pleas are a bar to the action.
 upon this principle

That a ministerial officer is protected in
 the execution of the process of a court of limited
 jurisdiction, where it shows upon its face that
 the court had jurisdiction ~~of~~ of the subject
 matter, and nothing appears to offend him, that
 the court had not also jurisdiction of the person
 of the defendant, or of the particular cause
 in controversy.

Barnes v Barber 1 Gilm R 401.

Saxacool v Boughton 5 Wend R 170.

State v Weed. 1 Foster N.H. Rep 262.

The following cases, I conceive to be in
 point, ~~on principle~~

Beach et al v. Farnham 9 John R. ~~324~~ 331. 229. - 231.

Library edition p 228.

Chegaray v Leubus 1 Selden R. ~~35~~ 376.

Jurisdiction of the subject matter is conferred
 upon the Commissioners of highways

Laws 1854. p. 64. Article 22. Sec. 1.

The overseers of highways ^{are} ~~is~~ required to "execute
 all lawful orders of the Commissioners of highways."

The lawful character of an order is to be determined according to the general principles of law, upon the principle that no greater attention of the Common Law is intended, than is plainly expressed in a statute.

This order is valid upon its face, and according to the authorities, is a prohibition of the trespass complained of.

The remedy of the plaintiff below is against the Commissioners of Highways, and not against these defendants.

The Court will examine Laws 1851. c. 76. Art 24. Sec 24. as to the power of the Comrs of Highways to issue an order in this particular case.

R. S. Mackwell

P. S.

That the power of the Comrs of Highways is judicial vide

6 US Cond R 419.

11 John R 158.

1 G Linn R 4 & 10

11 John R 114.

9 John R 230-1

120

Capitane et al

et al.

et al.

Filed July 27, 1854
S. L. and Co.

120

John Guptil et al.

vs

Jona. Sept

120

122/8

Costs taxed

1855