

No. 14679

Supreme Court of Illinois

Hiner

vs.

People

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

People's Causes.

No. 10

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

IN SUPREME COURT OF ILLINOIS,

Third Grand Division,

April Term, A. D. 1864.

HENRY S. HINER, }
 } ERROR TO STARK.
 } *vs.*
THE PEOPLE, &C. }

This was an indictment for obstructing and continuing to obstruct a public road, 1st and 2d counts for obstructing, and 3d count for obstructing and continuing an obstruction. The indictment was found at the March Term, A. D., 1861, and tried at the May Special Term, A. D. 1863, of the Stark County Circuit Court, before A. L. Merriman, Judge. Defendant found guilty, fined one dollar, and now sues out this writ of error.

ABSTRACT OF RECORD.

Rec. page 1

At the Nov. Term, 1861, of the Stark County Circuit Court, the Grand Jury returned into court an INDICTMENT, in the following words, to wit:

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The Grand Jurors, chosen, selected and sworn, in and for the County of Stark, aforesaid, in the name and by the authority of the people of the State of Illinois, on their oaths present that Henry S. Hiner, late of the County of Stark, aforesaid, on the 16th day of August, in the year of our Lord, one thousand, eight hundred and sixty-one, at and within the County of Stark, aforesaid; in and across a Public Road,

running from West Jersey, in a due east course to the east line of Township twelve North of Range five East of the fourth Principal Meridian, on the south side of the south-west quarter of section Thirteen, in said Township, then and there did, unlawfully, with force and arms, erect and build a fence, thereby, then and there obstructing the said public road; and then and thereby said fence and obstruction rendering the said public road inconvenient to pass, contrary to the form of the Statute in such case made and provided; and against the peace and dignity of the same People of the State of Illinois.

And the Grand Jurors aforesaid, in the name, and by the authority of the people aforesaid, upon their oaths aforesaid, do further present that the said Henry S. Hiner, on the said sixteenth day of August, in the year of our Lord 1861, at and within the County aforesaid, in and across the Public Road running on the south line of the south-west quarter of section thirteen, in Township twelve North of the base line of Range five East of the fourth principal meridian, then and there did unlawfully, with force and arms, erect and build a fence, then and there obstructing the said public road; and then and there, by the said fence and obstructions, rendering the said public road inconvenient to pass, contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the same people of the State of Illinois.

And the Grand Jurors aforesaid, in the name and by the authority of the People aforesaid, upon their oaths aforesaid, do further present that the said Henry S. Hiner, on the said sixteenth day of August, in the year of our Lord 1861, at and within the County of Stark aforesaid, in and across a public road running from West Jersey, in a due east course, to the east side of Township twelve North of the base line of range five East of the fourth principal meridian, on the south side of the south-west quarter of section thirteen, in the Township aforesaid, then and there did unlawfully with force and arms erect and build a fence, thereby then and there obstructing the said public road. And the said Henry S. Hiner, from the said sixteenth day of August, in the year of our Lord 1861, continued said obstruction in and across said public road, until the day of the finding of this Indictment, thereby, during all that time, rendering the said public road inconvenient to pass, in the County of Stark, aforesaid, contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the same people of the State of Illinois.

6 The Cause was continued by agreement and Defendant recognized
to the March term 1862.

7 There was no Term held in March, but at the special May Term
1862, of said Court, there was a trial on said Indictment, and the Jury
8 being unable to agree, were discharged and cause continued on a
9 general order of said Court continuing all cases not otherwise disposed of.

10 At the November term, 1862, the cause was continued generally.

11 On the 19th day of May, 1863, being the second day of the special
May term of the said Court, the Cause came on for trial, and on the 21st
12 of May aforesaid, the Jury returned into court with the following Ver-
dict, to wit:

"We the Jury find the Defendant guilty, in manner as set forth in
the Indictment."

Defendant entered motion in arrest of judgment, which was overruled
by the Court. He then entered a motion for a new trial, which was
also overruled. The Court then assessed a fine of one dollar and costs
upon the defendant, and made the following order:

"Therefore it is considered by the Court that the said people of the
State of Illinois, have and recover of and from the said defendant the
said sum of one dollar for their fine, together with their costs and
charges in this behalf. &c."

13 Defendant prayed an appeal, which was allowed—bond and bill of
Exceptions to be filed in ninety days.

BILL OF EXCEPTIONS.

The People, to maintain the issues on their part, introduced as a
witness:

ELLIS DWYRE, *who testified as follows:*

15 "I know the road in controversy. I lived a mile and a half south

of it. I believe there was a track there or near there, when I moved into the County. There were tracks there at a number of places by Hiner's (the said defendant) on the prairie, north of White's fence. It was fenced up south of Hiner then. William Porter lived there at that time. I do not know that I could say that the main travel run along the fence or not. I know of a road being surveyed there seventeen or eighteen years ago. I was one of the viewers on the road. Jesse Emery and Carson Berfield were with me. I was one of the parties to view the road there and locate it. We chained it through. I do not know who carried the chain, but I think it was William Eckley. We measured with a surveyor's chain. We run the road *near* where it now runs. There was a fence south of Hiner's line. There was a fence a part of the way. We run the road where we supposed the section line to be. The road I think was run upon or near the same place where the traveled track now is. We commenced the survey at or near Trickle's mills. I think we struck the section line before we reached West Jersey. We run upon the line until we came to a big slough near Finley's. It was fenced up on the south except one 80, which is the 80 Mr. Twist is on. I know of a road being worked by the Supervisors—I do not know as I can tell how soon after we surveyed it.—There were bridges built. I saw them work upon the road a number of times after I was there. The road was worked upon the line of travel as it is now, I guess. I think there was a number of tracks across the prairie near the place. I left that neighborhood six (6) years ago this spring. I know when Hiner fenced up along there. He fenced it six or eight years ago. The land was fenced up on the east side. There was a road on the west side of Hiner's land. I think when Hiner built his fence he placed it on the line with the other fence. I helped build some of the fence. I think he set his fences out as the road now is. I think he gave his share of the ground for the road. I have not been down there since I moved away. I did not hear Mr. Hiner make any claims that the line was any further south than the line of travel was. He (Hiner) built a picket fence. It was a road considerably used by the public.

[5.]'

[Here the witness was shown a plat and survey of the road in controversy, commencing at Trickle's mill and ending near Cox's mill, a copy of which is hereto attached and made a part of this Bill of Exceptions, marked "Exhibit A."]

17 We started at or near Trickle's mills and moved north-easterly until we reached the section line, as we supposed. We chained along the section line without reference to any particular track. The slough was some fifty rods east of the south-west corner of Hiner's (defendant's) land. Since the road was laid out the bridge has been changed. I think the road was bridged in two or three different places. We run on what we understood to be the section line, according to the plat. In traveling over the route, we sometimes run in the track and sometimes did not. We laid the road on the section line after we reached it until we came to Finley's corner, then we made a jog north on the township line. The surveyor marked out the line and we followed him. We ran north of the fences and about where the road now is. The reason we followed the surveyor was that we supposed he was on the section line. We had the surveyor there for that purpose. This Report, Plat, and Survey, marked "Exhibit A," is correct. The signature is mine, and we located the road according to the plat and survey. When Mr. Hiner (the defendant) fenced in his land he fenced across the track at different places over which we passed when viewing the road.

And the people, to further maintain the issue on their part, introduced as a witness,

JOSEPH ECKLEY, who testified as follows to wit:

I know about the road at the time it was laid. I lived at the time on the east half of the Porter farm. There was a fence put on the north end of that place in 1839. William Porter, Levi Eckley and myself put it there in the fall of 1839. At the time this fence was put there, there

18 were corners plain to be seen, at the N. W. corner of the Porter farm also at the half mile corner east of that, there were mounds with stakes in them. The fence was set in far enough south so that we could range through. The fence was set in somewhere near a rod and a half or two rods. There was a fire broke out and burned the west end, as far as this slough [the witness pointing to said slough described on plat herein before referred to in this Bill of Exceptions, marked "Exhibit A."] There was a corner at the section corner, and a corner which was called the half-way corner; this was east a half mile. There was a mound at the section corner in 1839. There was a rise of ground there. It looked as though there might have been sods piled up there. There was a stake in it, that is what I mean, plain to be seen. About the time the fence was built there were not people enough to make a track. I saw Mr. Berfield survey that line. He first set his compass at the N. W. corner of sect. 24 and then ran east $\frac{1}{2}$ mile to a corner. This point was a little north of east of a straight line. Here he set his compass and sighted through. There was a mound here which had a stake in it in 1839. [Witness was here shown a Plat hereto attached, marked "Exhibit B." and made a part of this Bill of Exceptions, and pointed to a point marked on the random line in said plat.] At this point I know this is on the random line, but you cant prove that it was ever rectified. We run on through the Township line where there was an old post. It was what we call a burr oak post. [The witness pointing to a point shown on the random line at the end of the random line intersecting the township line between T. 12 N. 5 E. and 12 N. and 6 E.]

19 The slough was bridged just as it happened. After the road was laid it seems to me there was some volunteer work upon the bridge. The road was always worked the same as any other road, when I lived there eight years ago. I worked on it myself, under the Supervisors, and others did too. I do not remember that ever I saw Hiner work there. I do not recollect of seeing any person at work upon this part of the road in controversy. The first fence, I put up there. I did not help put up the fence that was burned down. Wm. White lived on the west half of

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the quarter at the time the road was laid out there. I suppose Henry Hiner built some fence there before I left there. The road was used a great deal.

And the people, to further maintain the issue on their part, introduced as a witness,

JAMES HULSIZER, *who testified as follows, to wit:*

I was along when the road was laid out from where I live to the township line; was with the viewers. There was a traveled track along there. I believe they carried a chain along the section line. I could not tell how far they chained from the fence. They chained along by the fence until they came to Carter's. I mean the fence on the south side of the road and on the south side of Carter's farm. I know of work being done on the road. I think the bridge was put as near the old line of travel as could be and the bridge on about the same place now; perhaps a little variation. This is my impression. The same road is traveled now as was then, with some deviation before it was fenced up. I do not think I ever saw Mr. Hiner work upon that road. When they [the viewers] came to the corner where Mr. White lives [the section corner, the N. W. 24] they set their compass and chained along the north side of his fence, till they came to the corner $\frac{1}{2}$ mile east of that, or the middle corner, and ran east again.

20 At the half way corner there was a stake. They chained along on the south side of the road about as it is now, and just north of the fences. The fence on the north side of the Porter quarter [N. W. 24] are about in the same place now as then. I suppose there is a bend in the road at the middle corner; but for years after it was laid I never noticed it. I do not know anything about Hiner fencing up there. He occupied the land north of the fence. When the fence was first put there, he left the road open. He left land out for a road. I do not know when it was. I do not know he left the land out for a road from anything he said. There was a stake

in the 4 section corner, which I suppose I broke down myself, one night when I was coming from Lacon or Henry, I do not know which. I have no recollection of the viewers setting any stakes along the line. My impression is that they did, somewhere along the route, but I will not swear they set any along Hiner's line.

And the people, further to maintain the issue on their part, introduced as a witness,

EDWARD TRICKLE, *who testified as follows, to wit:*

21 I settled in this county in April, 1837. It was in Putnam county at that time. I carried chain when George A. Charles made a survey of the land in controversy. He commenced at the north east corner of section twenty-four. He run what they called a west direction. I do not know whether it was direct west or not. He started on the township line and run west. When they got about half way through the section, Charles was ahead. We halloed to him and told him that we was out. He said I guess not. We told him to come and count the stakes. He came back and counted the stakes, and said we was out, and that there must be a corner here somewheres; and he went considerable north and west of where we was chaining and claimed he had found the corner. It was north of our trail, some three or four rods. We followed the surveyor. He (the surveyor) called it a corner. I do not know whether he called it an original corner or not. There was a little mound there. There were other little mounds there that looked as much like mounds to me as that. I had no acquaintance with corners then. It was in a flat, wet place. The wire grass had grown up and formed kind of sods that looked to me as much like mounds as the one he took for a mound. There was no mound or appearance of one that I saw on the straight line where we were chaining at the place where we stopped and said we were out. There

was no stake in the mound when we found it. There was no hunting for a stake at that time. Charles put one in it. I helped put in a bridge. It might have been about its length higher up the slough. It was after Porter fenced. It must have been after the road was laid. I was ordered by the supervisor to work the road. He would not have had any authority to build the bridge before the road was laid. I worked upon it there opposite Mr. Colthar's. I think we built the other bridge a little higher up than it is now, but within the bounds of the present road, to the best of my recollection. The road has been worked since it was laid out, the same as other roads. I worked under supervisors, and others did, at different times. I was along there about the time Mr. Hiner built his fence.

22 It seems to me they had drove four or five posts before they got into the traveled track; then they got entirely across it, to the south. They came into it again before they got to the slough. I believe Mr. Hiner commenced to build his fence a little north of the south side of Updike's fence.

And the people, further to maintain the issue on their part, introduced as a witness,

GEORGE A. CHARLES, *who testified as follows, to wit:*

I was surveyor of Kucx County between 1835 and '40. I have made surveys both in 12-five and 13 five. I do not remember surveying the lines upon this plat in particular. [Exhibit "B" was here shown to the witness] I remember of surveying lands in 12-five about the year 37 or 8. Mr. Trickle was along. I think if I set a corner I set it where the original mound was, but I have no recollection except what was my custom as surveyor. If I stated as Mr. Trickle says I did, that it was an original mound, I stated the fact. If I had any doubt as to a mound being an original mound, I always dug for the stake. If I did not look for a stake

23 I must have been certain it was an original mound. A professional surveyor can easily tell an original mound from one made by ants or from a natural mound or inequality. A person not skilled in these mounds Might not be able to distinguish them. There is a difference in mounds made by surveyors, according to the season of the year when the survey was made. The Government in their surveys make no deflective lines according to the field-notes, across from one section corner to the other; but these lines should always be straight, but sometimes they do deflect. The field notes are not always reliable. The original corners often do not range, and do not agree with field notes. There are variations of the compass, and when they first run across a section they run what is called a random line from the west to the east, and this may bear north of the the true section line. They make a minute of the number of degrees north, and then go back and correct the line at the half section corners. I recollect of surveying land for Mr. Ogle and for Mr. Powell and another, but have no recollection of surveying this particular tract. The record I made would show whether I found the mound or not. I have not the record of the survey with me. Surveyors should always run to original Corners and have no right to change them if they do make crooked lines. I remember the corners in this town weee distinct. I often found mounds which were true beyond question, when persons along with me, with no experience could not distinguish them at all.

And the people, further to maintain the issue on their part, introduced as a witness,

LEVI ECKLEY, *who testified as follows, to wit:*

I have known something of the land in controversy. I helped Mr. Porter put up the fence. There was an inside fence I helped move out. We began at what was said to be a corner, and stuck a stake. Mr.

Porter measured off a rod and a half south, as room for what we called a road. We measured off at the other end of the fence, about the same distance. I do not think we built the whole half mile. Mr. Porter commenced measuring from the half-mile corner; that is, the N. E. corner of the N. W. 4 of section 24. I think there was a little stake stuck, at what
 24 had the appearance of a little mound. This was in 1839. I do not remember about Charles being out to survey that line. There was a fence put up on the west. Porter put a cabin about that time. I do not think the fence we put there varies far from where the fence is now. Immediately after the fence was built the travel commenced to run there, and ran then about where it is now excepting when they went round the wet places towards Arnold's and Walnut Creek. The Arnolds settled in there three or four years before. After they came in there, there was travel along this route. We put in a little bridge right opposite Mr. White's. It would wash away once in a while, then the travel would go up the slough. When the bridge was out we crossed where best we could. We put the bridge in before 1845. I think the bridge that was put in there was not far from the bridge is now. I have traveled along there frequently, with the exception of two years I was away. The fence stands very near where we first put it up. Colthar's was fenced up previous to 1845. We built the bridge in 1839 or 40 about eight yards north of the fence. Two or three years after we built a bridge 8 or 10 rods north of that. After that the public authorities built the next bridge. This last bridge was built about 15 feet north of the fence, on the south side of the road.

The people, further to maintain the issue on their part, called as a witness,

WILLIAM WHITE, *who testified as follows, to wit:*

I moved in May in 1845 upon that ground, was in the settlement in

25 1841. I do not know when he [Porter] fenced. When I first knew the quarter it was fenced in. I came in August, 1840 to Illinois. It was a rail fence. I set a paling fence inside of it south. As well as I can recollect, when the ground was solid the road run pretty close to the fence. By the slough near Updike's it run a little north. When I first came on there, it was not very far from where tis now. There was a bridge. I got in the way of running up the slough wherever I could find a track. There were temporary bridges fixed in different places, and afterwards there was a bridge built under the authority of Mr. Miller: The road is about the same place only when it varied of north in crossing the slough. The road was laid out in 1845. After it was laid out there the road was worked. In 1861 it was not worked. That was the year that Mr. Hiner, the defendant was Pathmaster. He refused to work the road on account that he said he did not think it was a legal road. I think the bridge must have been within three or four feet of where it is now. The width of that road is forty feet. There has been a number of bridges built there, since the road was laid out. The bridges was all near the same place, and I think, within the bounds of the road. North fence of Mr. Colthar's was made when I came there in 41. My house is tolerable near this road, I think about 33 feet from where my fence stands to the door. It has been kept a public road since 1845. I believe there was a bridge above the fence about ten rods, near the spring. Mr. Hiner made a paling fence and left out the road as it now is, about ten years ago. At the time he was building it, I did not hear him make any complaint. I did not see him measure it. I understood him to say he was leaving out two feet more than Updike. Mr. Twiss has a hedge, Colthar has one and I have one, on the south side of the road. My hedge has been there four years. The others has been there longer. I saw Hiner, the defendant, building fence there, about the third of May, 1861. He came there with a band by the name of Toothacre and built a fence across the road. It was at the east end, and that included all the track. The obstructions was there a short time torn up and put in about half a dozen times. The bridge was torn up by Mr. Hiner and Mr. Rogers. The last

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time it was shut up it was in harvest. I went over there and asked him what he was up to. He said he was minding his own business. I said it would make trouble. He said that was what he wanted; he said nothing about a line; he said nothing about the road being south of the line. Mr. Toothacre was present. Hiner said if I didn't look sharp he would get my fence out of the way. I did not hear him say it myself; I understood he had said it. I was not in a passion; he might have been. I was interested, because if that was the line of the road I would have to move my fence. [The witness was here asked a question whether the defendant had not told him he could not help it if it did make a fuss? which witness replied that the defendant might have said so, but he did not recollect it that way.] There was a rail bridge put in before the old one, near where the old one was in the year '45. If the line made by Otman be the true line, then the obstruction was not in the road. I was present a part of the time when Otman run the line.

[Here the witness was asked by the Council of the defendant if he saw the corner that Otman placed at the south-east corner of the defendant's farm; or if he assisted in setting it. He said he saw the corner and helped something about setting it. He did not know whether it was to get the stone over the fence or what it was.]

The road was always worked as any other road. I worked myself on it, under supervisors. I saw Hiner work on the road at one time.

And the said people, further to maintain the issue on their part, presented

WILLIAM CARTER, who testified as follows:

I lived on the south half of the S. E. quarter of Sec. 13—12 north and 5 east. I think I settled upon it in '38 or 9. I fenced along there the next spring. When I fenced there, I fenced as the corner was said to be

set. I saw a stake there, they said was the corner. Powell fenced up to the corner. Porter's fence stood a little south of Powell's fence, and after Berfield surveyed, Mr. Colthar moved his fence in a little from the road. The survey was made in '48. I saw a stake at the half-mile corner—N. E. corner of N. W. 24—in 1838 or 1839, at the east end of Porter's fence. The fence joined it. When Berfield surveyed through there we found a brick which Eckley said he put there for the corner. This
 28 brick was two or three steps north of the fence, right in the middle of the road, and about where I saw the stake in '38 or '39, and about the middle of the road now. The road runs near where it has done since it was laid out; and there was travel along that line in the same general direction before it was laid out. It was worked every year I know, till I went away 7 years ago.

The people further to maintain the issue on their part, introduced as a witness,

JONATHAN TWISS, *who testified as follows:*

I know the road in controversy. I own land adjoining it. I lived there nine years. I live south of Carter's on section 24, on the E. half of the north east quarter. The road has been used and worked as a public road. I was Pathmaster and worked upon the road four years ago. The defendant worked under me. They repaired the bridge four years ago. The flood carried off the bridge and we set it back. I know of the road being shut up and stopped the travel. We could not well pass along that road. This was done two years ago. I bought of John Moffit. The north fence is a hedge fence and has been there ever since I was there. Hiner helped to repair the bridge after it was carried away. It was five years ago since I was Pathmaster. The road now runs where it did ever since I have lived there.

The people further to maintain the issue on their part, introduced as a witness,

O. BAKER, *who testified as follows:*

29 I live on the 80 east of W. White's—east half of the north-west quarter of section 24. I worked on the road under McKinstry four years ago. Never saw Hiner work there. The obstructions were placed there two years ago last May. This obstruction remained there from May till after Court set last fall. The bridge was torn up. I believe the road was used as much as any other common road if not more. These obstructions were placed there two years ago last May. I know where Otman's lines are. If the road is upon the line run by Otman, then the obstructions are not in the road. I live on the west half of the north-west quarter of section 24. I do not own the land and have no interest in it.

The people further to maintain the issue on their part, introduced the witness,

CARSON BERFIELD, *who testified as follows:*

I was County Surveyor for about 14 years. I was first elected County Surveyor in 1839, and was acting as such in '45. I have surveyed the lines in dispute. The first time I was ever called upon was to run an 80 acre lot for Powell—the W. & N. E. of 24, it was in the Spring of '39 or '40. I think Joseph Eckley was not along at that time. We were measuring this 80 acre lot. I find that line was too long. [The witness here referred on the plat marked "Exhibit B," to the line running north and south between the N. W. and S. E. quarters of section 24, 12 N. and 5 E.] On the north side, just over the fence there was a corner. There appeared to be a mound there as upon the other corners, but not so large. Mounds vary. I ran to the corner as recognized by Charles, taking a

30 common variation on east and west line, the mound would be 100 links north of a straight line. I often find discrepancies between field notes and the actual courses. I was there at the time this road was laid out, from the starting point shown on the plat marked "Exhibit A," run a north-east course until we came to a section line and set stakes, marking the variations. Then we run on a section line till we struck the township line, as shown on the plat. I do not recollect whether actually set stakes at the corners of the quarters. I think it was my custom to do so and my opinion is we did. I intended to lay the road on section line. In surveying we run along the traveled track. We run along north of the fences. We run this half section line which is about 100 links north of straight line. I confess I did not like the looks of the corner, it was rather smaller than any of the rest, still it seemed to be a mound. But I felt bound to recognize that as the corner, as I understood Charles had recognized it. In running the line of the road we run north of the fence, on the south side of the road, on through the disputed part, and took down the variations, and then I came to plat the road, the thought occurred to me "shall I notice these variations?" I knew there would be trouble here some time and probably would be all straightened out; so I marked it straight. The field notes always call for straight lines from one section corner to another. But sometimes I have found cases where it appeared
31 that they were not corrected, the half section corner on the random line. We intended that the exact line of the quarter was to be the centre of the road. In viewing, it was sometimes on one side and sometimes on the other that we went.

A plat and survey of the road and report of the viewers, marked "Exhibit A," was here shown to the witness.

I recognized a signature to the report as mine. I intended this plat to correctly mark the courses, distances and variations of the road as actually laid by us. I marked the variations as they appear on the plat, to show that we laid the road upon the line. There was a traveled track along there when I made the survey, and we run along in the general direction of the track about where the traveled track now is: This is the

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line we run on, and there we located the road. I always looked on the deflected line as the original survey. I intended to lay the road on the line and did lay it on what I understood to be the line. I noted the deflection at the time, but did not note it on the plat I made. The travel has been on the road since then about where we laid it. My opinion is we set a stake at the disputed corner and also $\frac{1}{4}$ mile east and west of there. The plat shows a straight line. But we actually surveyed the road on the deflected line.

The people further to maintain the issue on their part, introduced as a witness,

WILLIAM ECKLEY, *who testified as follows:*

32 I was chain bearer at the time we surveyed the road. We set a stake at the point where we started, and set stakes till we struck the section line. Its my impression that we did not set any stakes afterwards. We chained from about 8 or 10 feet from Mr. White's door. There was some few rails north of White's house. There were roads in a good many places. We did not keep the same distance north of the fence. We did not try to keep in the road old or keep out of it. We were in and out.

Which was all the evidence offered by the people, to maintain the the issue on their part.

And the said defendant, HENRY HINER, to maintain the issue on his part, introduced as a witness

MILES A. FULLER, *who testified as follows:*

I am acting Clerk of the County Court of Stark County, State of Illinois, and as such Clerk have charge of the records and papers belonging to said office. The original petition for a County road, commencing at the Lafayette road near S. Trickle's Mill, and running easterly and signed by Phylander Arnold and others, I found among the papers in my office, a copy of which is hereto attached, to this bill of exceptions marked "Exhibit C."

The said defendant here introduced the said original petition as evidence, which is in the words and figures as stated in "Exhibit C," above referred to, and was read in evidence.

The record book here shown to the court is one of the record books belonging in the office of the County Clerk. I find the following entry:

The witness here read from said record book and entry of which "Exhibit D" hereto attached and made part of this bill of exceptions is a true copy.

33 I find among the papers in my office a report of Carson Berfield Ellis Dwire and Jesse Emery, viewers appointed to locate the road described in said petition of Phylander Arnold and others, with accompanying oaths, plat, survey and field notes, a certified copy of which is hereto attached, marked "Exhibit A," the original of which was read in evidence on said trial.

I find also an entry upon the records of said County Commissioners' Court. The witness here read in evidence an entry from said record, of which "Exhibit E" is a true copy, and which is made a part of this bill of exceptions.

The witness here produced a book called a road record and said:

"This is one of the record books in my office," and read in evidence, a record of the report of the viewers of the road described in "Exhibit A"

with the order of the Hon. County Commissioners' Court thereon, a certified copy of which is hereto attached, made a part of this bill of exceptions, marked "Exhibit F."

The father of the said defendant came and examined the records about a year before the alleged obstructions of the road in controversy for the purpose of ascertaining the true location of this road. I recollect of the defendant calling and making an examination of these records, but whether before or after these obstructions I cannot say, but I think it was before.

35 The defendant further to maintain the issue on his part, introduced the witness,

WILLIAM NOWLAN, *who testified as follows:*

I am acting Surveyor, have been over a year. I made an examination of the survey of the line run by Otman. It was four rods from the centre of the road to the stone on Colthar's corner, which was pointed out to me by Christopher Hiner and George Updike, as being placed there as a corner stone, by the authority of the County Surveyor Otman. I made a plat showing the record of my examination, and the deflected line, as the road now runs. If the straight line indicated on this plat is the true section line then the alleged obstructions is not in the Highway. I measured the distance from the corner of Hiner's the said defendant's fence to the stone, on a straight line, placed as a corner by Mr. Otman, and found that the defendant Hiner had left out for a road, a little over twenty feet north of the said straight line.

The witness was here shown a plat which is hereto attached and made a part of this bill of exceptions, marked "Exhibit B," and said:

I made this plat to show my examination of the lines. The plat

shows a greater deflection than actually exists, as the plat is proportioned. I made it so that it might show plainly. I have not the record of Otmans survey. I have books here which purport to be copies of the original field notes. The field notes of the Government survey call for a straight line from section corner to section corner. In surveying they run a random line from the west side of the section to the east and set a temporary stake at the half section corner. when surveyors come out on the section line they note the variations of the compass and examine the field notes and measure the distance to the original corner. The under surveyor should then go back to the temporary stake set on the random line and move it south one half the distance shown by the variations. If I should find a stake or mound on a deflected line for a half mile corner, I should want good evidence that it was an original stake or mound before I would recognize it as such. The field notes and the original surveys do not always agree, and we find corners at other places than indicated by the field notes. And lines are not always straight if we run to original corners.

The defendant, further to maintain the issue on his part, introduced the witness

CHRISTOPHER HINER, *who testified as follows:*

I was present when Mr. Otman made the survey a little less than three years ago this month or next month. I procured him to come and make a survey, at the request of the defendant and others, of section 13 twelve north and five east. I was present the first day. They commenced the survey at the south-west corner of section 24, and run through to the north-west corner of section 24, then they went north to the n. w. corner of section 13 then they run south to the section corner of 13 and 24, then

37 they run east 80 rods and set a stake, then they run on through to the township line and set stakes every 80 rods, then they chained south to find how much they had missed the corner. Then they went north to a witness tree and found the N. E. Corner of section 13. Thence they run south to the S. E. corner of section 24, and run north to the section corner of 13 and 24, then they went west to the first stake on the random line and corrected and set the stake a little east and south, thence west to the second stake on the random line and corrected and set a stone a little east and south of the stake, it being the south-east corner of Updike's land. Then they went west to the third stake and corrected and set a stone east and south of the stake, it being the south-west corner of Updike and the south east corner of the defendant's land. Some two or three days before the foregoing survey was made, my son, the defendant requested me to go and examine the road record in the County Clerk's office, to ascertain the true location of the road in controversy. I went and found according to the record in the County Clerk's office that said road was located on a straight line running east and west between section 13 and 24. I went back and related the fact to the defendant. Some time before my son (the defendant) fenced in his land he came to me and told me he did not think the line between section 13 and 24 was right. I was present when John Dixon commenced driving posts for the defendant, my son, and stayed until they drove up to the slough. My son, the defendant was there. He said he would set his fence here for the present and as soon as he was able he would have the lines run and set the fence where it ought to be.

38 The defendant further to maintain the issue on his part, introduced the witness,

JAMES AYERS, *who testified as follows:*

I was one of the chain bearers on Otman's survey. The stones were taken along in a wagon for corners. Otman run the line through between sections 13 and 24 (after having run around the section line of 13 and a good part of 24.) I saw where Mr. Otman authorized the corner stone at the south-east corner of Updike's land set, and saw the defendant and George Updike and some one else, commence digging a place to set the stone. We went on ahead to correct the next corner west. I did not see them place the stone at the half section corner, but the next corner west was the last corner we had to correct. It was the south-east corner of the defendant's land and we stayed there and saw them set the corner stone where Mr. Otman directed them to do it. Mr. Baker and Mr. White were present and made no objections, and Mr. Baker helped to take the stone out of the wagon.

39 The defendant, further to maintain the issue on his part, introduced the witness

THEODORE WHITTEN, *who testified as follows:*

39 I was one of the chain bearers in Otman's survey. We first corrected and set a stake at the N. W. corner of Mr. Twiss' land. It was set by the direction of Mr. Otman, the surveyor. The next we set at the half section, as my recollection serves me. It was a little over a chain inside and south of the hedge. Mr. Baker was present at the corner. I recollect a stone was set there. I heard no dissatisfaction expressed: I seen all the stones after they were set.

39 The defendant further to maintain the issue on his part, introduced the witness,

GEORGE W. UPDIKE, *who testified as follows:*

I was present most of the time when Mr. Otman surveyed the line in controversy. I was present when Mr. Otman went back on the random line and corrected the corners. I saw the place where Mr. Otman directed Mr. Twiss and Wm. S. Hiner to set a stake and saw them set it. I was present and saw the place where Mr. Otman directed us to set a stone at the half section corner and Hiner the defendant and myself set it where it was directed to be put. Mr. Baker assisted either in getting the stone out of the wagon or setting it, I don't know which. I was present and saw Mr. Otman direct us to set the stone at the corner of my father and defendant's land. The defendant, myself and some one else set it where we were directed to set it. Mr. Otman and Mr. Ayers, Mr. Whitten and Mr. Hiner (the defendant's father) and Mr. White were present and seen the stone set.

The defendant further to maintain the issue on his part, introduced the witness,

JOHN MCKINSTRY, *who testified as follows:*

40 I was pathmaster 4 years ago this summer. The defendant forbid my working the road anywhere along his line. The road was not in the right place where it ought to be and he did not want it plowed and scraped up, and I did not work any along where his land was. The defendant did not work any on that road. I lived on the road running west to West Jersey:

The defendant, further to maintain the issue on his part, introduced the witness

WILLIAM ROGERS, *who testified as follows:*

I live a half a mile north of the road in controversy. I lived right on it ten or twelve years ago. It was 40 feet, more or less, from the centre of the road to White's house. The line of travel by Hiner's land varied. It was at different places. There was a place where they went around the hill that was five or six rods from the fence. White's 80 was fenced in $\frac{1}{2}$ way across east side. The hauling was all north of the fence sometimes nearer and sometimes further. The old bridge was inside of Hiner's fence. Previous to Hiner's fencing, the hill was not worked or traveled. Hiner fenced in some places over the traveled track. When I first came there was a bridge further up the slough, about seven steps from where the bridge is now. When the defendant fenced he took in this bridge. I am not positive about a track further up. There was a log bridge, split timber, and had the appearance of bee'n worked up a temporary thing. A year ago last spring I saw a part of a log in the slough and track crossing. I helped Hiner build the fence and helped to stake it off to drive the posts. The defendant said then that he was not satisfied with the line as it run there, but that he would set it there for the present, but as soon as he was able he would get it surveyed and put it where it ought to be. I was there at the time when Mr. Otman surveyed it. Otman's survey was three years ago. I saw all the stones set. I cant say as Mr. Coalter was present. White helped some where the corner was between Baker and White. I dont know if it was worked or not, before Hiner fenced. I heard Baker tell Jackson Lawrence that he had some of Updike's land, but he was willing to pay for it. The different corners were set by the direction of Mr. Otman the surveyor. I dont know where the bridge stood before I moved there. There was a temporary bridge higher up, and the remains of an old bridge lower down. The same year I moved there, a new bridge was built right where

it is now. The bridge washed away since. The bridge might have been put there by public authority and I not known it. I dont know of Whites helping to put the stone in or help take it out of the wagon. I know he helped some. As I am no surveyor I dont know whether corner was right or not. I made no objections to the corner and said nothing at all upon the subject.

The defendant to maintain the issue on his part introduced the witness

WILLIAM OGLE, *who testified as follows:*

42 Brother Howard and myself both moved here in the fall of '36. My brother bought three 80s, lying, one quarter on the N. E. of 13, and the N. half of the S. E. of 13. Early in the spring of '37 my brother got George A Charles, of Knox County to come and survey the land for him. This piece of land was a part of Knox County at that time. Myself and Mr. Silliman were chain bearers. We commenced surveying at the N. E. corner of what is now called West Jersey Township, and run south some two miles to the N. E. corner of section 13. Here we found a witness tree, thence west a mile to the N. W. of 13 and found a corner. Thence south a mile to the south-west of section 13 and found a corner. These corners were all plain to be seen. Then we run east 160 rods and set a stake, and we all looked around for some time but could not discern any corner. This was early in the spring of '37. The grass was all burnt off and you could discern an object at quite a distance. I was interested in finding a corner for my brother's land and was more particular than if it had been for myself, and we could discern nothing that had any appearance of being an original mound. I was there at that corner over half an hour. Then we run on through to

[26]

the township line, and then we chained a little south and finally found the corner, after some search. Then we went back to this stake where we could not find any corner and set a corner. I had no experience in looking for corners. I did not hear the surveyor say whether he had found a corner or not. He said nothing on the subject. I could not see anything that looked to me like a corner where we stopped. I do not swear positively there was no corner; all I say is I could see none, and the Surveyor found none.

43

Which was all the evidence in the case, and thereupon the Court instructed the Jury on behalf of the People as follows to wit:

[27]

43

PEOPLE
vs.
HENRY HINER.

} INDICTMENT FOR OBSTRUCTING ROAD.

The Jury are instructed on the part of the people, that if they believe from the evidence, beyond a reasonable doubt, that the defendant is guilty in obstructing the road mentioned in the Indictment, in the manner and form as therein charged, they should find the defendant guilty, and so return their verdict, and the Court will fix the punishment.

3 The Jury are instructed that the actual line where the road was located and surveyed—provided the location was by proper authority—is the true line of the road, whether the plat and survey filed in the County Court, shows it to be there or not. And if the Jury believe from the evidence, that the road in controversy was actually surveyed and located where it now is, and where the defendant obstructed it, then that is the true road, although the plat may show it to be in a different place.

And the said defendant asked the Court to instruct the Jury as follows to wit:

THE PEOPLE vs. HENRY HINER	} <i>The Court instructed the Jury on the part of the defendant as follows:</i>
---	--

- 1 Unless the Jury believe from the evidence, beyond a reasonable doubt, that the defendant is guilty in manner as charged in the Indictment, they will find the defendant not guilty; and the prosecution must prove every fact necessary to convict the defendant, with the same certainty that they are bound to prove the main fact of his guilt; and every fact not thus established must be dismissed from the minds of the Jurors.
- 2 If the Jury shall find that any one of the material facts proved is inconsistent with the defendant's guilt, then they must find the defendant not guilty.
- 3 It is admitted by the people that no public highway exists at the place of the alleged obstruction by prescription, or the use of the same by the people as a traveled way, for twenty years. The Jury therefore are instructed that unless they believe from the evidence, that the alleged obstruction was placed in a public highway, legally laid out, and located and opened by the proper public authorities they will find the defendant not guilty; unless they believe from the evidence that at the time defendant fenced his land, he intended to give the land left out by him to the public, and afterwards placed obstructions in the same, as charged in the Indictment; and his own declarations made by him at the time he so fenced along the said alleged highway, are proper evidence to show what his intentions were.
- 4 Unless the Jury believe from the evidence that it has been clearly proved that the viewers when they surveyed and located the road in con-

troversy, marked by stakes, mounds or other visible signs or monuments, the route of said road over the defendant's land, then the plat, survey and field notes are the best evidence of its true location.

[31]

Surveyor Otman and Nowlan, is the true and correct line dividing sections 13 and 24, and that the County Commissioners' Court, in 1845 located and established the road in controversy upon the said section line, being the centre of such road, and that said defendant did not place any obstructions within said road so located and established by the County Court they will find the defendant not guilty, unless they further believe from the evidence, that such obstructions was within a lawful public highway.

8. If the Jury believe from the evidence that defendant by mistake, or in ignorance as to where the true line of the road was at the time he built his fence, put the said fence along an old track of public travel, and expressed his doubt as to where the true line was, then such act of building said fence, affords no presumption that the defendant acquiesced in the use of said track as a public highway, or that he intended to dedicate the same to the public for a road.

When the Court modified the 5th instruction by inserting the following words, to wit:

And thereupon the said defendant, by his counsel entered his motion for a new trial, for the following reasons:

BECAUSE,

- 1st, the Court gave improper instructions upon the part of the people.
- 2d, because the Court modified the 5th instruction asked for by deft.
- 3d, because the verdict is against evidence.
- 4th, because the verdict is against law.
- 5th, because the verdict is against both law and evidence.

Which said motion, on being considered by the Court, is overruled.

To the overruling of which said motion, the said defendant by his counsel then and there excepted, And thereupon the said defendant, by his council comes and moves the Court for arrest of judgement, for reasons stated in his written motion, as follows:

50	STATE OF ILLINOIS, STARK COUNTY,	}	ss. Stark Co. Circuit, May special term, A. D. 1863.
	THE PEOPLE & C. vs. HENRY S. HINER	}	<i>Indictment for Obstructing Road &c.</i>

The said defendant again by his counsel comes and moves the Court in arrest of judgement,

BECAUSE

There is under the Statutes of the said State of Illinois, no such criminal offense as that charged in the said Indictment, and

Because in a criminal case a general verdict of guilty without refer-

ring to the particular count in the indictment, cannot be sustained.

Signed CLIFFORD, Atty. for Deft.

Which said motion is overruled by the Court; to the overruling of which said motion, the said defendant, by his counsel then and there excepted, and thereupon said Court entered a judgement upon said verdict, and fixed the amount of the fine against said defendant, at one dollar and costs. To the rendering of which said judgement upon said verdict, said defendant by his counsel then and there excepted, and prays that this, his bill of exceptions, be signed and sealed by the Judge of the said Court and made a part of the record of this court, which is done.

Dated Sept. 5th, 1863.

Signed

A. L. MERRIMAN. [L. S.]

ASSIGNMENT OF ERRORS.

1. General Error.
2. The Court erred in admitting parol evidence to contradict the location of the road as stated in the report of the viewers and the plat and survey.
3. The Court erred in giving the instructions given on behalf of the People.
4. The Court erred in modifying defendant's instructions.
5. The Court erred in overruling the Defendant's motion in arrest of judgment.
6. The Court erred in overruling Defendant's motion for a new trial.

CLIFFORD & INGERSOLL,

Attorneys for Appellant;

N. 83½°	E.	170	Perches.	
N. 71½°	E.	160	"	
East		100	"	
"		320	"	
"		320	"	
"		320	"	
Nort		3	"	5 links
East		213	"	
S. 80°	E.	50	"	
N. 56°	E.	205	"	
N. 35°	E.	212	"	
N. 11°	W.	76	"	
N. 8°	E.	100	"	
N. 15°	W.	28	"	
7 m's 37 perches				

ENDORSEMENT.

Road from Trickle's mill to Cox's mill. Reported June term 1845,

STATE OF ILLINOIS, }

COUNTY OF STARK. }

ss.

Clerk's Office, County Court.
Toulon, Aug. 18, 1863.

I, Miles A. Fuller, Clerk of the county Court of said County, do certify that the foregoing is a full, true and correct copy of the report of the view and location of a road therein described, as appears from the files of my office.

In witness whereof, I have hereunto set my hand and affixed the
[L. S.] seal of said Court, this 18th day of August, A. D. 1863.

MILES A. FULLER, Clerk.

"EXHIBIT A," *Referred to in annexed Bill of Exceptions.*

STATE OF ILLINOIS, }

March 24th, 1845.

STARK COUNTY. }

I, John Berfield, a Justice of the Peace, in and for the County of Stark, do certify that on this day personally appeared before me Jesse Emery, Ellis Dwire, and Carson Berfield, and were duly sworn to discharge their duties road viewers of a certain road as follows, viz.: Commencing at the La Fayette road near Trickle's mill, and running easterly to the section line between sections 16 and 21, at the nearest suitable point; thence to follow said line east to intersect the road leading from Toulon to Prince's (mill) bridge. Thence on the nearest and best route to a bridge on Indian Creek, on S. 17; from thence to Cox's mill.

Given under my hand and seal, this 24th day of March, 1845.

JOHN BERFIELD. [L. S.]

Justice of the Peace.

[37]

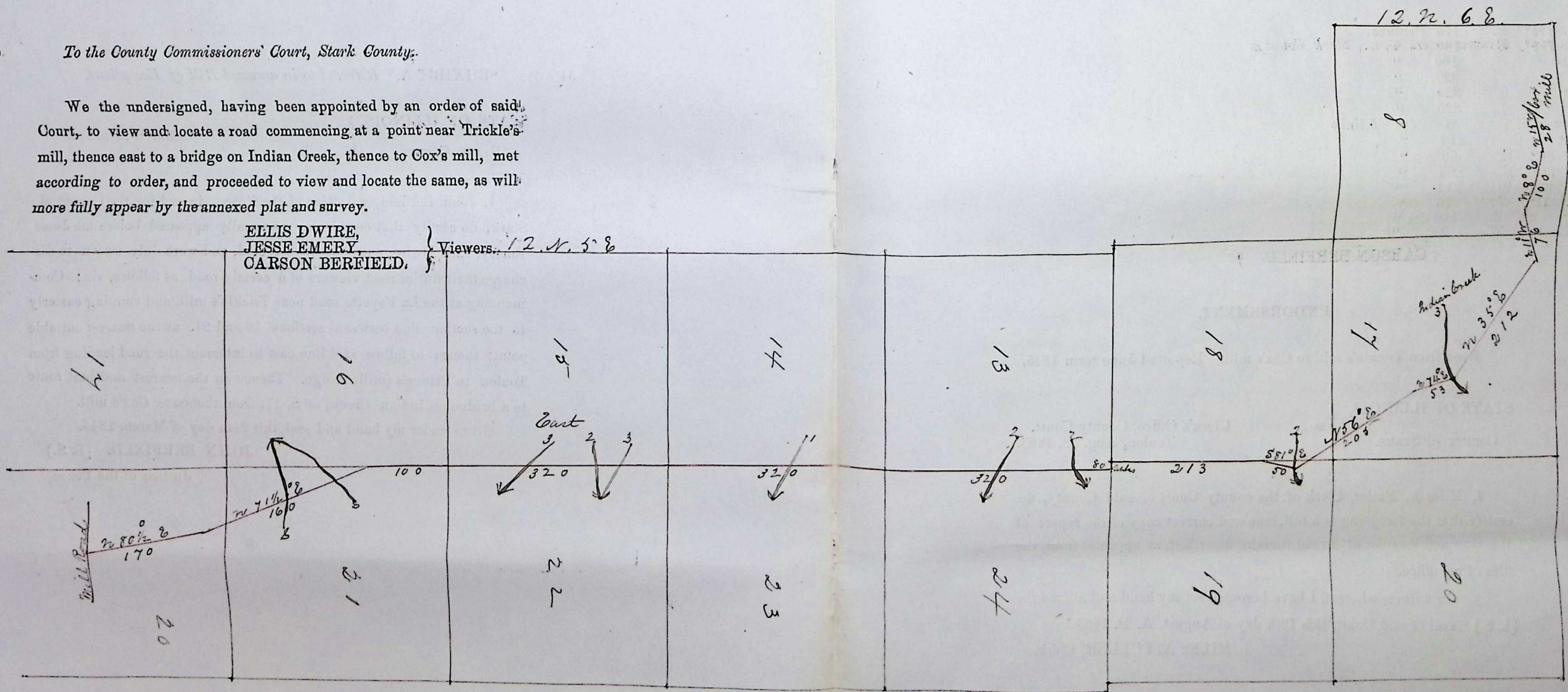
55.

To the County Commissioners' Court, Stark County.

We the undersigned, having been appointed by an order of said Court, to view and locate a road commencing at a point near Trickle's mill, thence east to a bridge on Indian Creek, thence to Cox's mill, met according to order, and proceeded to view and locate the same, as will more fully appear by the annexed plat and survey.

ELLIS DWIRE,
JESSE EMERY,
CARSON BERFIELD.

Viewers. 12. N. 5. 8



58 "EXHIBIT C," *Referred to, in foregoing and annexed Bill of Exceptions.*

To the Honorable Commissioners of the County of Stark, in the State of Illinois:

We the undersigned petitioners would ask of your Honorable body the location of a County road, commencing at the Lafayette road near S. Trickle's mill and running easterly to the section line between sections 16 and 21, at the nearest suitable point; thence to follow said line east to intersect the road leading from Toulon to Prince's bridge; thence on the nearest and best route to a bridge on Indian Creek, on S. 17, from thence to Cox's mill. We deem such road to be necessary for the public good, and respectfully submit our case to the Commissioners, hoping that our request may be granted.

Dec. 31st, 1844.

Signed by Philander Arnold and 34 others.

59

ENDORSEMENT.

Petition for Road from S. Trickle's mill to Toulon road and to Indian Creek bridge and Cox's mill; March, 1845. Viewers, Carson Berfield, Ellis Dwire, Jesse Emery; to meet in two weeks at John Berfield's.

STATE OF ILLINOIS, }
COUNTY OF STARK. } ss.

Clerk's Office, County Court.
Toulon, Aug. 18, 1863.

I, Miles A. Fuller, Clerk of the County Court of said county, do certify that the foregoing is a true and correct copy of a petition for a road therein described, as the same appears upon the files in my office.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said Court, the date last above written.

MILES A. FULLER, Clerk.

60 "EXHIBIT D. and E," referred to in the foregoing bill of exceptions.

STATE OF ILLINOIS, }
STARK COUNTY. }

County Commissioners' Court, begun and held at the Court House in the town of Toulon, on Monday the third day of March, 1845; present F. W. Emery, L. S. Derrance, and Joseph Palmer, County Com's, Oliver Whitaker Clerk and John W. Henderson Sheriff. On Tuesday the 4th day of March 1845, being the second day of the aforesaid term of the Court, the following, among other proceedings were had:

On the Petition of Philander Arnold and 34 others, praying for the location of a new road, commencing on the Lafayette road, near S. Trickle's mill and running easterly to the section line, between sections 16 and 21, at the nearest suitable point; thence to follow said line east to intersect the road leading from Toulon to Prince's (mill) bridge; thence on the nearest and best route to a bridge on Indian Creek, on S. 17; from thence to Cox's mill. And it appearing to the satisfaction of the Court, that due notice was properly posted up, at least 20 days previous to the application for the same, and John Finley having deposited with the Clerk the sum of five dollars, it is therefore ordered by the Court that Carson Berfield, Ellis Dwire, and Jesse Emery be appointed viewers on the above named route; and that they be required to meet at the house of John Berfield Esq., on the third monday Inst., or so soon thereafter as practicable, and proceed to view the same according to law.

STATE OF ILLINOIS, }
STARK COYNTY. } ss.

Report of a new road from Trickle's mill to Cox's mill, as aported by Carson Berfield, Ellis Dwire and Jesse Emery; accepted and ordered to be spread upon the Road Record, and an order to the several Supervisors to open the same, 40 feet wide.

L. S. DORRANCE, JOSEPH PALMER & Co. Com's.

Clerk's Office, County Court.
Toulon, Aug. 18, 1863.

In testimony whereof, I have hereunto set my hand and affixed the
[L.S.] seal of said Court, the date last aforesaid.

MILES A. FULLER, Clerk.

62 "EXHIBIT C," Referred to in foregoing and annexed Bill of Exceptions.

To the County Commissioners' Court, Stark County.

We the undersigned, having been appointed by an order of said Court, to view and locate a road commencing at a point near Trickle's mill, thence east to a bridge on Indian Creek, thence to Cox's mill, met according to order, and proceeded to view and locate the same, as will more fully appear by the annexed plat and survey.

ELLIS DWIRE,
JESSE EMERY,
CARSON BERFIELD. } Viewers.

N. 83½°	E.	170	Perches.
N. 71½°	E.	160	"
East		100	"
"		320	"
"		320	"
"		320	"
Nort		3	" 5 links
East		213	"
S. 81°	E.	50	"
N. 56°	E.	205	"
N. 35°	E.	212	"
N. 11°	W.	76	"
N. 8°	E.	100	"
N. 15°	W.	28	"
7 m's 37 perches			

63 Orders made to Supervisors to open the above named road 40 feet wide, June 7th, 1845.

STATE OF ILLINOIS, }
COUNTY OF STARK. }

I, Miles A. Fuller, Clerk of the County Court, within and for said County, do hereby certify that the foregoing is a full and correct copy of the record of the report of the location of a road therein named, as the same appears upon the road records of my office.

In witness whereof, I have hereunto set my hand and official
[L. S.] seal, this 18th day of August, A. D. 1863.

MILES A. FULLER, Clerk.

Which said Bill of Exceptions and Exhibits thereto annexed and forming part of said Bill of Exceptions, is endorsed in the words and figures following, to wit:

"Let the time for filing the Bill of Exceptions be extended till the 9th day of September, A. D. 1863.

Signed A. L. MERRIMAN, Judge."

Filed in the office of the Clerk of the Stark County Circuit Court, this 7th day of September, A. D. 1863.

P. M. BLAIR, Clerk.

[44]

64

STATE OF ILLINOIS, }
STARK COYNTY. } ss.

I, Patrick M. Blair, Clerk of the Circuit Court, in and for said County, in the State aforesaid, do hereby certify that the above and foregoing is a full, true and correct transcript of the files and record of said Circuit Court, and proceedings had therein, in the cause of the People of the State of Illinois against Henry S. Hiner, (Indictment for obstructing road) as the same appears of record and on file in said Circuit Court.

[L. S.]

In witness whereof I have hereunto set my hand and affixed the seal of said Circuit Court, at my office in Toulon, in said County, this 15th day of January A. D. 1864.

PATRICK M. BLAIR, Clerk.

Fee of Clk. Cir. Court for Record, advanced by Deft.	\$16.00
Printers' fee on foregoing	\$55.00

P.D. 10 17
Hiner

^{us}
The People
Abstract of
Record.

Filed April 9, 1864

J. Seaman

State of Illinois } Supreme Court
Third Grand Division } April Term 1864

Henry S. Wiener } Error to Stark
 as }
 The people &c. }

Clark said Court
 will please issue writ error in
 said cause

to oblige

Higginson Br. P.

v S. D. Huterbaugh

altys for Cliff in Eng.

Peru Apr. 7, 1864

Mr. Clark

Please find enclosed
\$16 costs advanced in this cause.
Docket the cause.

9864.

S. N. S.

P.D. 111 17

Henry S. Hooper

¹⁰³
The People

Receipt

Filed April 9, 1864

J. L. Linnell CM

Supreme Court
State of Illinois

Thus named Decision
April Term 1863.

Henry S. Brown, ⁱⁿ Defendant in Error

The People of the
State of Illinois

Plaintiff in Error

And now comes the

said Defendant in Error by the
Shallenbeger their Attorney and says
that there is no error in the record
and proceedings aforesaid or in
the judgment aforesaid and
says that the justice of said Supreme
Court may proceed to confirm as well
the record and proceedings aforesaid
as the matter above assigned for
error and that the judgment
aforesaid in favor aforesaid may
be affirmed.

A. Shallenbeger
for Defendant in Error

Joiner in Error

By J. S. Jones

Attorney

After

in

The people

found in some

State of Illinois
Stark County 3^{ss}

Monday November 4th A.D. 1861

Stark County Circuit Court

November Term A.D. 1861

Pleas and Proceedings had before the Circuit Court of Stark County in the sixteenth judicial Circuit in the State of Illinois at a regular term of said Circuit Court begun and holden at the Court House in the Town of Toulon in said County on Monday the fourth day of November in the year of our Lord one thousand eight hundred and sixty one the same being the first Monday of said Month

Present Hon Amos L Merriman Judge of said judicial Circuit
Alexander McCoy States Attorney for said judicial Circuit
Elisha Greenfield Sheriff of said Stark County
Patrick M Blair Clerk of said Circuit Court

And afterwards, to wit on Wednesday the 6th day of November A.D. 1861 the same being the third day of said term of said Circuit Court as aforesaid the following among other proceedings were had and entered of Record in said Circuit Court in the words and figures following, to wit;

The Sheriff returned into Court the Venue issued by order of the Board of Supervisors of Stark County and to him directed whereby it appears that the following named persons were by the said Board of Supervisors selected and by the said Sheriff summoned to attend at the present term of this Court as Grand Jurors, to wit
Jacob Young, Edmund Nixon, Sedgwick R Hagen, Nelson F Atkins,
James C Egbert, John Turnbull Theodoro Pulhamus, Isaac Spencer,
Theodoro F Hurd, John Spurs, Isaac L. Hart, Carlton & Fox,
Stephen Ordaway Daniel Phoenix, Henry A Holst, George Nicholas

Jeese Cox, William Moore, Henry Colwell, William H. Pilkington
William B. Armstrong, Andrew Oliver, Joseph Perry.

And now the Grand jurors aforesaid being called by the Clerk all answer to their names except John Speers and Carlton & Fox both of whom for good cause to the Court here shown are excused from attendance as Grand jurors at this Term of the Court. It is thereupon ordered by the Court that the Sheriff summon two Salesmen to serve as Grand jurors in the place of those excused and thereupon the said Sheriff summoned Michael Nowlan^{2d} & Nathan Lankford to serve as such jurors. And now come the said Salesmen and the Grand jury being now complete it is ordered by the Court that William B. Armstrong act as Foreman of said Grand jury.

And now the said Grand jurors being first duly sworn according to Law and charged by the Court as a Grand jury retire to consider of their presentments and Indictments.

And afterwards, to wit on the 7th day of November A.D. 1861 the same being the fourth day of said term of said Circuit Court the following among other proceedings were had and entered of Record in said Circuit Court, to wit: the words and figures following, to wit:

And now again on this day come the Grand jury into Court and being called all answer to their names and thereupon present here to the Court the following Bill of Indictment as a true Bill, to wit:

The People of the State of Illinois

v.



Indictment for obstructing Road

Henry S. Hiner

And now it is ordered by the Court that capias issue for the said defendant Henry S. Hiner and that he be held to bail in the sum

of one hundred dollars

Which said Bill of Indictment so presented by the Grand Jury as aforesaid with the endorsements thereon is in the words and figures following, to wit;

State of Illinois } Of the November Term of the Stark County Circuit Court
Stark County ss } in the year of our Lord 1861

The Grand Jurors Chosen selected and sworn in and for the County of Stark aforesaid in the name and by the authority of the people of the State of Illinois, on their oaths present, that Henry S. Hiner late of the County of Stark aforesaid on the sixteenth day of August in the year of Our Lord one thousand eight hundred and sixty one, at and within the County of Stark aforesaid in and across a public road running from West Jersey in a due East Course to the East line of Township Twelve North of Range Five East of the fourth principal Meridian on the South Side of the South West Quarter of section Thirteen in said Township, then and there did unlawfully with force and arms erect and build a fence thereby then and there obstructing the said public road and then and there by said fence and obstruction rendering the said public road inconvenient to pass contrary to the form of the Statute in such case made and provided and against the peace and dignity of the same people of the State of Illinois

And the Grand Jurors aforesaid in the name and by the Authority of the People aforesaid upon their Oaths aforesaid, do further present, that the said Henry S. Hiner on the said sixteenth^{day} of August in the year of Our Lord 1861 at and

within the County aforesaid in and across a public road running on the South line of the South West Quarter of section thirteen in Township Twelve North of the base line of Range Five East of the fourth principal meridian then and there did unlawfully with force and arms erect and build a fence ~~a fence~~ then and there obstructing the said public Road, and then and there by said fence and obstruction rendering the said Public Road inconvenient to pass, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the same people of the State of Illinois

And the Grand jurors aforesaid in the name and by the authority of the people aforesaid upon their oaths aforesaid do further present that the said Henry S. Hiner on the said sixteenth day of August in the year of our Lord 1861 at and within the County of Stark aforesaid in and across a public road running from West Jersey in a due East Course to the East side of Township Twelve North of the base line of Range Five East of the fourth principal meridian on the South side of the South West Quarter of section thirteen in the Township aforesaid then and there did unlawfully with force and arms erect and build a fence thereby then and there obstructing the said public road And the said Henry S. Hiner from the said sixteenth day of August in the year of Our Lord 1861 continued said obstruction in and across said public road until the day of the finding of this Indictment thereby during all that time rendering the said public Road inconvenient to pass in the County of Stark aforesaid contrary to the form of the

Statute in such case made and provided and against
the peace and dignity of the same people of the State of
Illinois

At M^o. Coy
States Attorney

(Endorsed) "Obstructing Road"

People

vs

Henry S. Hines

At True Bill W^m B. Armstrong Foreman of the Grand Jury

"Witnesses for prosecution"

"W. Carter, Jonathan Trist, W^m White, Ellis Drives,
James Hulsizer, Joseph Eckley, John Coltar, John Finley,
Carson Berfield, Levi Eckley."

(Endorsed) "Capias"

"Bail \$100"

"A. L. Merriam, Judge"

"Filed Nov 7th 1861 P. M. Blair Clk"

And afterwards, to wit, on the 8th day of November A.D. 1861 the same
being the fifth day of the said term of said Circuit Court as
aforesaid and the Court being then judicially sitting the following
proceedings were had in said Circuit Court in the ^{3rd} Case of the People of the
State of Illinois against Henry S. Hines defendant and entered
of Record, to wit:

The People of the State of Illinois

vs

Indictment for Obstructing Road

Henry S. Hiner

And now on this day comes Henry S. Hiner the said defendant in person and the said People also appearing by A. McCoy their States Attorney where the said defendant enters a plea of not guilty herein. And now by agreement it is ordered by the Court that this Cause be and stand Continued for hearing and trial to the next term of this Court and that the said defendant be discharged from Custody on his own recognizance in the sum of one hundred dollars for his appearance at the next term of this Court.

And now on this day comes the said defendant Henry S. Hiner and in open Court acknowledges himself to owe and be indebted to the People of the State of Illinois in the penal sum of one hundred dollars to be levied of his goods and Chattels lands and tenements as the law directs

Yet upon this Condition that if he the said Henry S. Hiner shall personally be and appear before the Circuit Court of the County of Stark in the State of Illinois on the first day of the next term thereof to be holden at the Court House in the Town of Toulon in the County of Stark and State of Illinois on the second Monday in the Month of March next then and there to answer and abide the action of said Circuit Court in a certain bill of indictment preferred against him the said Henry S. Hiner in said Circuit Court by the Grand Jury of said Stark County for the crime of obstructing a public Road and not depart the Court without leave then this Recognizance to be void and of no effect; but otherwise to remain in full force and virtue

Page 7.

There were no proceedings had in said Circuit Court at the March Term thereof A.D. 1862 the judge of said Court not being in attendance

Proceedings at a Special Term of the Circuit Court of the County of Stark in the sixteenth judicial Circuit of the State of Illinois began and held at the Court House in the Town of Towson in the County of Stark and State of Illinois on the third Monday in the Month of May in the Year of Our Lord One thousand eight hundred and sixty two it being the nineteenth day of said Month

Present the Honorable Amos L. Merriam judge of said judicial Circuit
Alexander McCoy States Attorney for said judicial Circuit
Elisha Greenfield Sheriff of said Stark County and
Patrick M Blair Clerk of said Circuit Court

And afterwards, to wit on the 20th day ^{of May} A.D. 1862 the same being the second day of said Term of said Circuit Court last aforesaid and the Court being then judicially sitting the following proceedings were had in said Court and entered of Record in said cause, to wit;

The People of the State of Illinois

vs

Henry S. Hiner

Indictment for Obstructing Road

And now on this day this cause came on to be heard and the said People appearing by Alexander McCoy & M Thallentger their Attorneys And the said defendant also appearing in person as also by G. A. Clifford & N. Powell & Thomas J Henderson his Attorneys When it is ordered by the Court that a jury come to try this cause Whereupon come

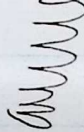
twelve good and lawful jurors to wit; David Nicholson, Sewell Smith, William A Smet, John Sware, Thomas Rofs, Harmon Phenix, Joseph H Wilber, Frederick F Smith, Anderson D Perry, Samuel G Avery James W, Rogers; and Joseph Woodward who are duly empaneled and sworn according to law as a jury to try this Cause and a true verdict to render according to the law and the evidence

And afterwards, to wit, on the 31st day of May A.D. 1862 the same being the third day of said term of said Circuit Court last aforesaid further proceedings were had in ^{said} Cause and entered of Record in said Cause as follows, to wit;

The People of the State of Illinois

vs

Henry S. Hines



Indictment for obstructing Road

And now on this day the jury empaneled & sworn in this Cause on yesterday having heard the evidence herein the arguments of Counsel and the instructions of the Court thereon retire to consider of their verdict

And afterwards, to wit, on the 32nd day of May A.D. 1862 the same being the fourth day of the term last aforesaid and the Court being then judicially sitting further proceedings were had and entered of Record in said Cause as follows, to wit;

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The People of the State of Illinois

vs

Henry S. Hines

Indictment for Obstructing Road

This day came the jury impaneled and sworn in this Cause and the said People appearing by S. M. Coy this States Attorney & W. Shallenberger assisting And the said Defendant also appearing in person as well as by his said Attorneys And thereupon the jury aforesaid being inquired of by the Court whether they have agreed upon a verdict in this Cause answer that they have not and further say here to the Court that they cannot agree Whereupon it is considered by the Court that the jury aforesaid be and they are hereby discharged from further considering of a verdict in this Cause

And afterwards, to wit; on the 27th day of May 1862 the same being the last day of said Term last aforesaid said Cause was continued under a general order made by said Court and entered of Record as follows, to wit;

And now it is ordered by the Court that all Causes in action in this Court that have not been otherwise disposed of during the present Term of this Court be and the same are hereby ordered to stand Continued to the next term of this Court

Proceedings at a Regular Term of the Circuit Court of the County of Stark in the sixteenth Judicial Circuit of the State of Illinois began and held at the Court House

in the Town of Toulon in the County of Stark and State of Illinois
on the first Monday in the Month of November in the year
of Our Lord one thousand eight hundred and sixty two &
same being the third day of said Month

Present The Honorable Amos L. Merriman Judge of said Judicial Circuit presiding
Olishaw Greenfield Sheriff of said Stark County
Patrick M Blair Clerk of said Circuit Court

And afterwards, to wit; on the fourth day of November A.D. 1862 the
same being the second day of the term last aforesaid further
proceedings were had in said Circuit Court and entered
of Record in said Cause as follows, to wit

The People of the State of Illinois

vs

Henry S. Steiner

Indictment for Obstructing Road

On this day it is ordered by the

Court that this Cause be and stand Continued to the next
term of this Court

Proceedings at a Special Term of the Circuit Court of the
County of Stark in the sixteenth Judicial Circuit of the State of
Illinois began and held at the Court House in the Town of Toulon
in the County of Stark and State of Illinois on the third Monday
in the Month of May in the year of Our Lord one thousand
eight hundred and sixty three it being the eighteenth day
of said Month. Present the Honorable Amos L. Merriman Judge
of said Judicial Circuit Presiding - B Frank Fuller Sheriff of said
Stark County and Patrick M Blair Clerk of said Circuit Court

And afterwards, to wit, on the 19th day of May A.D. 1863 the same being the second day of the term last aforesaid further proceedings were had in said cause by said Court and entered of Record therein as follows, to wit,

The People of the State of Illinois

v^s

Indictment for Obstructing Road

Henry S. Henier

On this day came the said People by ^{their attorney} M. Shallentger for this cause and the said defendant appearing in person as also by G. A. Clifford his attorney and both parties being now ready for the trial of this cause it is ordered by the Court that a jury come to try this cause when come twelve good and lawful men, to wit, Isaac Spencer, Perry Minn, Read Spencer, Laton Lyon, Thomas Beall, Addison P. Webster, Isaac Thomas, Nathan Inard, Henry Seely, Albert Stephens, Harvey B. Harris, and James Griffin who are duly sworn and empaneled according to law as a jury to try this cause and a true verdict to render according to the law and the evidence

And afterwards, to wit, on the 21st day of May A.D. 1863 the same being the fourth day of the term last aforesaid further proceedings were had in said Court in said cause and entered of Record therein as follows, to wit,

The People of the State of Illinois

vs

Henry S. Hines

Indictment for Obstructing Road.

And now on this day the jury sworn and empaneled in this Cause, on Tuesday, having heard the evidence herein, the arguments of Counsel and the instructions of the Court by order of the Court retire to consider of their verdict:

And now on this day the jury sworn and empaneled in this Cause after due deliberation return into Court and they being now called all answer to their names and present to the Court here their verdict in this Cause by which verdict they say "We the jury find the defendant guilty in manner and form as set forth in the Indictment" And thereupon comes the said defendant by his said Attorney and moves the Court in arrest of judgment and for a new trial of this Cause Whereupon it is considered by the Court that the said motions in arrest and for a new trial of this Cause be and the same are hereby overruled. And now the Court being fully advised in the premises doth assess the fine of the said defendant at the sum of one dollar & costs.

Therefore it is considered by the Court that the said People of the State of Illinois have and recover of and from the said defendant the said sum of one dollar for their fine together with their costs and charges in this behalf and that they have execution thereof.

And now on this day again comes the said defendant by his said Attorney and prays an appeal to the Supreme Court of this State Whereupon it is considered by the Court that said defendant be allowed an appeal in this Cause to the Supreme Court upon his entering into and filing Bond with security to be approved by the Clerk of this Court within ninety days from this date and by agreement

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the Bill of Exceptions^{is} to be made up and filed with the Clerk of this Court within Ninety days from this date

And afterwards, to wit; on the 15th day of August A.D. 1863 an Appeal Bond was filed in said Cause in the Office of the Clerk of said Circuit Court which said Appeal Bond was endorsed as filed and approved by the Clerk of said Circuit Court and which said Appeal Bond and Endorsement Thereon are in the words and figures following, to wit;

Know All Men by these presents, that Henry S. Henier as Principal and James Ayers and George Updyke as securities are held and firmly bound unto the People of the State of Illinois in the Penal sum of One thousand dollars for the payment of which well and truly to be made we hereby bind ourselves our heirs executors and administrators jointly severally and firmly by these presents, Witness our hands and seals this 8th day of August A.D. 1863

The Condition of the above obligation is such that whereas at the May Special Term A.D. 1863 of the Circuit Court of the County of Stark in the State of Illinois judgement was rendered against the above named Henry S. Henier and in favor of the said People of the State of Illinois in a certain action pending in said Court, An Indictment against the said Henry S. Henier for obstructing the Public Highway for the sum of one dollar and Costs of suit And Whereas the said Henry S. Henier has removed said action to the Supreme Court of the State

of Illinois in the 3^d Grand Division By Appeal Now Therefore
 if the said Henry S. Hiner shall duly prosecute said Appeal
 with effect and in case said judgement shall be affirmed
 By said Supreme Court shall well and truly pay and satisfy
 said judgement together with the Costs that have accrued
 or may accrue + interest and all damages, then this obligation
 to be void. Otherwise to remain in full force and effect

Henry S. Hiner *Seal*

James Ayers *Seal*

George W. Dyke *Seal*

(Endowment) Filed in the Circuit Court of Stark County and approved
 by me this 15th day of August A. D. 1863.

P. M. Blais Clk

And afterwards, to wit on the 7th day of September A. D. 1863 a bill
 of exceptions in said cause was filed in the office of the
 Clerk of said Circuit Court which said Bill of Exceptions is in
 the words and figures following, to wit;

State of Illinois

Stark County *3^d*

Stark County Circuit Court

May Special term A. D. 1863

The People of the State of Illinois

vs

Henry S. Hiner

Indictment for Obstruction and Continuing Obstruction of Highway

Be it remembered that on the trial of this cause at the said May Special Term A.D. 1863 to wit, on the 19th day of May of the year aforesaid, the said People to maintain the issues on their part introduced as a witness Ellis Dwyre who testified as follows;

I know the road in controversy, I lived a mile and a half South of it, I believe there was a track there, or near there when I moved into the County. There were tracks there at a number of places by Hiner, (the said defendant) upon the prairie on the North of Whites fence. - It was fenced up South of Hiner then, William Porter lived there at that time. - I do not know that I could say that the main travel, run along the fence or not - I know of a Road being surveyed there seventeen or eighteen years ago - I was one of the viewers on the road - Jesse Emery and Carson Berfield were with me - I was one of the parties to view the road there, and locate it - We chained it through - I do not know who carried the chain, but I think it was William Dekley. We measured with a surveyors chain - We run the road near where it now runs - There was a fence South of Hiner line - There was a fence a part of the way - We run the road where we supposed the section line to be - The road I think was run upon or near the same place as the travelled track now is, We commenced the survey at or near Trickle's Mills. I think we struck the section line before we reached West Jersey - We run upon the line until we came to a big slough near Finleys - It was fenced up on the South except one 80 which is the 80 now Twist is on - I know of a road being worked by the Supervisors I do not know as I can tell how soon after we surveyed it -

There were bridges built, I saw them work upon the road a number of times while I lived there - The Road was worked upon ~~the~~ ^{the} of travel as it is now I guess. I think there was a number of tracks across the prairie near the place. I left that neighborhood six (6) years ago this Spring - I know when Hiner fenced up along there - He fenced it six or eight years ago - The land was fenced up on the East side - There was a road on the West side of Hiner's land. I think when Hiner built his fence he placed it on the line with the other fence I helped build some of the fence I think he set his fences out as the road now is - I think he gave his share of the ground for the road - I have not been down there since I moved away. I did not hear Mr Hiner make any claims that the line was any further South than the line of travel was - He (Hiner) built a Picket fence. It was a road considerably used by the Public.

(Here the witness was shown a plat and survey of the road in controversy commencing at Trickle's Mill and ending near Box's Mill) a copy of which is hereto attached and made a part of this Bill of Exceptions

Marked Exhibit A!!)

We started at or near Trickle's Mills and moved North Easterly until we reached the section line as we supposed. We chained along the section line without reference to any particular track. The slough was some fifty rods East of the South West Corner of Hiner's (the defendant's) land. Since the road was laid out the bridge has been changed. I think the road was bridged in two or three different places. We run on what we understood to be the section

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line the section line according to the Plat
 In travelling over the route we sometimes run in the
 track and sometimes did not. We laid the road on
 the section line after we reached it until we came to
 Finley's Corner, then we made a jog North on the
 Township line. The Surveyor marked out the line and we followed
 him. We ran North of the fences and about where the road
 now is. The reason we followed the Surveyor was that we
 supposed he was on the section line. We had the Surveyor
 there for that purpose. This Report Plat and Survey marked
 exhibit "A" is correct, And the signature is mine and we
 located the Road according to that Plat and Survey.
 When Mr Hiner (the defendant) fenced in his land he
 fenced across the track at different places over which
 we passed when viewing the road.

And the People to further
 maintain the issue on their part introduce as a witness
Joseph Eckley who testified as follows, to wit;

I know about the road at the time it was laid, I lived
 at the time on the East half of the Porter farm. There was
 a fence put on the North End of the that place in 1839 -
 William Porter, Levi Eckley, and myself put it there in
 the Fall of 1839. At the time this fence was put there
 were corners plain to be seen. At the NW corner of the Porter
 farm also at the half mile corner East of that there were
 mounds with stakes in them. The fence was set in far
 enough South so that we could range through. The fence
 was set in somewhere near a rod and a half or two rods

There was a fire broke out and burned the West end as far as this slough (the witness pointing to ^{the} slough described on Plat hereinbefore referred to in this Bill of Exceptions marked Exhibit "A") There was a corner at the section corner, and a corner which was called the half way corner, this was East a half mile There was a mound at the section corner in 1839

3

There was a raise of ground there. It looked as though there might have been sods piled up there. There was a stake in it. That is what I mean plain to be seen. About the time the fence was built, there were not people enough to make a track

3

I saw Mr Burfield survey that line. He first set his compass at the NW corner of Sect 24. and then ran East $\frac{1}{2}$ mile to a corner. this point was a little North of East of a straight line. here he set his compass and sighted through. there was a mound here which had a stake in it in 1839 (Witness was here shown a Plat hereto attached marked exhibit "B" and made a part of this Bill of Exceptions and pointed to a point marked on the random line in said Plat) At this point. I know this is on the random line. but you can't prove that it was ever rectified. We run on through to the Township line where there was an old post. it was what we call a Burr Oak Post (the witness pointing to a point shown on the random line at the end of the random line intersecting the Township line between T. 12 N. 5. E. and 12. N and 6. E.)

The slough was bridged just as it happened. After the road was laid it seems to me there was some volunteer work upon the bridge. The road was always marked the same as any other road when I lived there eight years ago.

I worked on it myself under the Supervisors and others did to. I do not remember that ever I saw Hiner work there - I do not recollect of seeing any person at work upon this part of the road in controversy - The first fence I put up there - I did not help put up the fence that was burned down - Mr White lived on the West 1/2 of the gr at the time the road was laid out there - I suppose Henry Hiner built some fence there before I left there. The road was used a great deal -

And the people to further maintain the view on their part introduce as a witness James Hulseiger who testified as follows, to wit;

I was along when the road was laid out from where I live to the Township line - was with the viewers - There was a traveled track along there - I believe they carried a chain along the section line - I could not tell how far they chained from the fence - They chained along by the fence until they came to Carters I mean the fence on the South side of the road, and on the South side of Carters farm - I know of work being done on the road - I think the bridge was put as near the old line of travel as could be and the bridge on about the same place now - perhaps a little variation

43 This is my impression. The same Road is traveled now as was then with some deviation before it was fenced. I do not think I ever saw Mr Hiner work upon that road - when they (the viewers) came to the corner where Mr White lives (the section corner the NW. 24) they set their compass and chained along the North side of his fence till they came to the corner 1/2 mile East of that or the middle corner and

ran East again - at the half mile corner there was a stake - They chained along on the South side of the road about as it is now and just North of the fences - The fences on the North side of the Porter quarter (M & 4) are about in the same place now as then - I suppose there is a bend in the road at the middle corner but for years after it was laid I never noticed it

I do not know anything about Hiner fencing up there - He occupied the land North of the fence - When the fence was first put there he left the road open, He left land out for a road - I do not know when it was - I do not know he left the land out for a road from anything he said - There was a stake in the $\frac{1}{2}$ section corner which I suppose I broke down myself one night when I was coming from Lacow or Henry I do not know which - I have no recollection of the viewers setting any stakes along the line - My impression is they did somewhere along the road but I will not swear they set any along Hiners line -

And the People further to maintain the issue on their part introduced as a witness Edward Trickle who testified as follows, to wit:

I settled in this County in April 1837, it was in Putnam County at that time, I carried chain when George B. Charles made a survey of the land in controversy He commenced at the North East corner of section twenty four He run what they called a West direction I do not know whether it was direct West or not He started on the Township line and run West When they got about half way through the section Charles was ahead we halved to him and

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told him that we was out - he said I guess not - We told him to come and count the stakes - He come back and counted the stakes - and said we was out and that there must be a corner here somewhere and he went considerable North & west of where we was chaining and claimed he had found the corner, it was North of our trail some three or four rods, we followed the surveyor. He the surveyor called it a corner. I do not know whether he called it an original corner or not, there was a little mound there, there were other little mounds there that looked as much like mounds to me as that. I had no acquaintance with corners then. It was in a flat wet place, the wire grass had grow up and formed kind of cods that looked to me as much like mounds as the one he took for a mound. There was no mound or appearance of one that I saw on the straight line where we were chaining at the place where we stoped and said we were out. There was no stake in the mound when we found it. There was no hunting for a stake at that time - Charles put one in it. I helped put in a bridge it might have been ^{about} its length higher up the slough, it was after Porter fenced - It must have been after the road was laid. I was ordered by the Supervisor to work the road, he would not have had any authority to build the bridge before the road was laid. I worked upon it there opposite Mr Colthans. I think we built the other Bridge a little higher up than it is now but within the bounds of the present road to the best of my recollection - the road has been worked since it was laid out the same as other roads. I worked under Supervisors and others did at different times

I was along there about the time Mr Hiner built his fence, it appears to me they had drove four or five posts before they got into the traveled track, then they got entirely across it to the South, they came into it again before they got to the Slough. I believe Mr Hiner commenced to build his fence a little North of the South side of Updikes fence.

And the People further to maintain the issue on their part introduced as a witness George A Charles who testified as follows, to wit:

I was Surveyor of Knox County between 1835 & 40 I have made Surveys both in 12 fire & 13 fire. I do not remember surveying the lines upon this plat in particular (Exhibit 'B' was here shown to the witness) I remember of surveying lands in 12 fire about the year 37 or 8 Mr Trickle was along I think if I set a corner I set it where the Original Mound was, but I have no recollection except what was my custom as Surveyor. If I stated as Mr Trickle says I did that it was an original mound I stated the fact. If I had any doubt as to a mound being an original mound I always dug for the stake. If I did not look for a stake I must have been certain it was an original mound. A professional Surveyor can easily tell an original mound from one made by ants or from a natural mound, or inequality. A person not skilled in these mounds might not be able to distinguish them.

There is a difference in mounds made by Surveyors according to the season of the year when the survey was made. The Government in their surveys make no deflective lines according to the field notes, across from one section corner to the other.

but these lines should always be straight, but sometimes they do deflect. The field notes are not always reliable - the original corners often do not range and do not agree with field notes. There are variations of the compass and when they first run across a section they run what is called a random line from the West to the East, and this may bear North of the true section line they make a minute of the number of degrees North & then go back and correct the line at the half section corners. I recollect of surveying land for Mr Ogden & for Mr Powell & another but have no recollection of surveying this particular tract; the record I made would show whether I found the mound or not. I have not the record of the survey with me. Surveyors should always run to original corners and have no right to change them if they do make crooked lines - I remember the corners in this town were distinct. I often found mounds which were true beyond question when persons along with me with no experience could not distinguish them at all.

The People further to maintain the issue on their part called as a witness Levi Eckley who testified as follows, to wit; I have known something of the land in controversy. I helped Mr Porter put up the fence, there was an inside fence I helped move out, we began at ^{what} was said to be a corner and stuck a stake. Mr Porter measured off a rod & a half South as room for what we called a road. we measured off at the other end of the fence about the same distance. I do not think we built the whole half mile. Mr Porter commenced measuring from the half mile corner that is the N.E. corner of the N.W. 1/4 of section 24. I think there was a little stake stuck at what

had the appearance of a little mound this was in 1839. I do not remember about Charles being out to survey that line, there was a fence put up on the West. Porter put a cabin about that time. I do not think the fence we put there varies far from where the fence is now immediately after the fence was built the travel commenced to run there and ran then about where it is now excepting when they went round the wet places towards Arnolds + Walnut Creek, the Arnolds settled in there three or four years before after they came in there there was travel along this route, we put in a little Bridge right opposite Mr White's it would wash away once in a while then the travel would go up the slough When the Bridge was out we crossed where best we could. We put the Bridge in before 1845 I think the Bridge that was put in there was not far from the Bridge is now. I have traveled along there frequently with the exception of two years I was away. The fence stands very near where we first put it up. Colthans was fenced up previous to 1845 We build the bridge in 1839 or 40 about 8 yards North of the fence two or three years after we built a Bridge 8 or 10 rods North of that, after that the public authorities built the next bridge This last bridge was built about 15 feet North of the fence on the South side of the road ~

The People justice to maintain the issue on their part called as a witness William White who testifies as follows, to wit; I moved in Mayⁱⁿ 1845 upon that ground was in the settlement in 1841 I do not know

(7)

When he (Porter) fenced When I first knew the quarter it was fenced in. I came in August 1840 to Illinois. It was a rail fence, I set a paling fence inside of it South as well as I can recollect when the ground was solid the road run pretty close to the fence, by the Slough near Updikes it run a little North, When I first came on there it was not very far from where tis now there was a Bridge I got in the way of running up the Slough whenever I could find a track. There were temporary bridges fixed in different places and afterwards there was a bridge built under the authority of Mr Miller The road is about the same place only where it varied of North in crossing the Slough The road was laid out in 1845 After it was laid out there the road was worked In 1861 it was not worked that was the year that Mr Hiner the defendant was pathmaster He refused to work the road on account that he said he did not think it was a legal road I think the bridge must have been within three or four feet of where it is now The width of that road is 40 feet - There has been a number of bridges built there since the road was laid out - the bridges was all near the same place & I think within the bounds of the road - North fence of Mr Coalters was made when I came there in 41 - My house is tolerable near this road I think about 33 ft from where my fence stands to the door It has been kept a public road since 1845 I believe there was a bridge above the fence about 10 rods near the Spring Mr Hiner made a paling fence and left out the road as it now is about ten years ago At the time he was

building it I did not hear him make any complaint. I did not see him measure it. I understood him to say he was leaving out two feet more than Updike. Mr Swift has a hedge - Coalter has one and I have one on the South side of the road. My hedge has been there four years the others has been there longer. I saw Hiner the defendant building a fence there about the 3^d of May 1861 he came there with a hand by the name of Toothacre & built a fence across the road, it was at the East End and that included all the track. The obstructions was there a short time torn up & put in about half a dozen times. The bridge was torn up by Mr Hiner & Mr Rogers. The last time it was shut up it was in harvest. I went over there and asked him what he was up to. He said he was minding his own business. I said it would make trouble. he said that was what he wanted he said nothing about a line. he said nothing about the road being south of the line. Mr Toothacre was present. Hiner said if I didnt look sharp he would get my fence out of the way. I did not hear him say it myself I understood that he had said it. I was not in a passion, he might have been. I was interested because if that was the line of the road I would have to move my fence.

The Witness was then asked a question whether he defendant had not told him he could not help it, if it did make a fuss? which witness replied that the defendant might have said so but he did not recollect it that way.

There was a rail bridge put in before the old one near

where the old one was in the year 45. If the line made by Otman be the true line then the obstruction was not in the road. I was present a part of the time when Otman run the line.

Here the witness was asked by the Counsel of the defendant if he saw the corner that Otman placed at the South East corner of the defendants farm or if he assisted in setting it? He said he saw the corner & helped something about setting it he did not know whether it was to get the stone over the fence or what it was.

The Road was always worked as any other road. I worked myself on it under supervisors. I saw Hines work on the road at at ~~one~~ one time.

And the said People, to further maintain the issue on their part presented William Carter who testified as follows

I lived on the South half of the S E quarter of sec 13 - 12 North & 5 East. I think I settled upon it in 38 or 9. I fenced along there the next spring. When I fenced there I fenced as the corner was said to be set. I saw a stake there they said was the corner. Powell fenced up to the corner. Porters fence stood a little South of Powell fence. And after Burfield surveyed Mr Coalter moved his fence in a little from the road the survey was made in 48. I saw a stake at the half mile corner N E corner of Tm. 24 in 1838 or 1839. At the East end of Porters fence - the fence joined it. When Burfield surveyed through there we found a brick which Eckley

said he put there for the corner this brick was 2 or 3 steps North of the fence right in the middle of the road and about where I saw the Stake in 38 or 39 and about the middle of the road now The road runs near where it has done since it was laid out - and there was travel along that line in the same general direction before it was laid out It was worked every year I know till I went away 7 years ago.

The People further to maintain the issue on their part introduced Jonathan Triss as a witness who testified as follows.

I know the road in controversy I own Land adjoining it. I lived there nine years. I live South ^{on the E half of the North East quarter} of Carters on section 34. The road has been used & worked as a public road - I was Pathmaster & worked upon the road four years ago. The defendant worked under me - they repaired the bridge 4 years ago - the flood carried off the bridge & we set it back I know of the road being shut up & stoped the travel we could not well pass along that road, this was done two years ago. I bought of John Moffit. The North fence is a hedge fence & has been there ever since I was there - Hiner helped to repair the bridge after it was carried away - it was five years ago since I was Pathmaster. The road now runs where it did ever since I have lived there.

The People further to maintain the issue on their part introduced O Baker as a witness who testified as follows;

I live on the 80 East of N White East

Page 29.

half of the North West $\frac{1}{4}$ of Sect 24. I worked on the road under McKinstry four years ago. Never saw Hiner work there. The obstructions were placed there two years ago last May - this obstruction remained there from May till after Court set last fall. The bridge was torn up. I believe the road was used as much as any other common road if not more. These obstructions were placed there two years ago last May. I know where Otman's lines are - if the road is upon the line run by Otman, then the obstructions are not in the road. I live on the N $\frac{1}{2}$ of the NW $\frac{1}{4}$ of section 24. I do not own the land and have no interest in it.

The People further to maintain the issue on their part introduced the witness Carson Berfield who testified as follows

I was County Surveyor for about 14 years. I was first elected County Surveyor in 1839 & was acting as such in 45. I have surveyed the lines in dispute. The first time I was ever called upon was to run an 80 acre lot for Powell the N $\frac{1}{2}$ NE of 24 it was in the Spring of 39 & 40. I think Joseph Eckley was not along at that time. We were measuring this 80 acre lot. I find that line was too long (the witness here referred on the Plat marked 'Exhibit B' to the line running North & South between the N.W. & S.E. quarters of sec 24. 12.5 & 52). On the North side just over the fence there was a corner. There appeared to be a mound there as upon the other corners but not so large. Mounds vary

I ran to this corner as recognized by Charles - taking a common variation on the East & West line the mound would be 100 links North of a straight line. I often find discrepancies between field notes & the actual courses.

I was there the time this road was laid out from the starting point shown on the plat marked "Exhibit A" run a North East Course until we came to a section line & set stakes marking the variations. Then we run on a section line till we struck the Township line as shown on the plat. I do not recollect whether actually set stakes at the corners of the quarters. I think it was my custom to do so and my opinion is we did. I intended to lay the road on section line. In surveying we run along in the traveled track. We run along North of the fences. We run to this $\frac{1}{2}$ sec line which is about 100 links North of straight line. I confess I did not like the looks of the corner. it was rather smaller than any of the rest still it seemed to be a mound. But I felt bound to recognize that as the corner as I understood Charles had recognized it. In running the line of the road we run North of the fence on the South side of the road on through the disputed part & took down the variations & then I came to plat the road. The straight occurred to me shall I notice these variations I knew there would be trouble here some time & probably would be all straightened out. So I marked it straight. The field notes always call for straight lines from one section corner to another but sometimes I have

found Cases where it appeared that they were not corrected the half sec corner on the random line we intended that the exact line of the quarter was to be the Centre of the road In viewing it was sometimes on one side & sometimes on the other that we went - A plat & survey of the road & report of viewers marked "Exhibit A" was here shown to the witnesses.

I recognized a signature to the report as mine I intended this plat to correctly mark the courses distances & variations of the road as actually laid by us I marked the variations as they appear on the plat It is marked on the plat to show that we laid the road upon the line There was a traveled track along there when I made the survey and we ran along in the general direction of the track about where the traveled track now is this is the line we ran on and there we located the road I always looked on the deflected line as the original survey I intended to lay the road on the line and did lay it on what I understood to be the line I noted the deflection at the time but did not note it on the plat I made The travel has been on the road since then about where we laid it My opinion is we set a stake at the disputed corner and also $\frac{1}{2}$ mile East and West of there The Plat shows a straight line but we actually surveyed the road on the deflected line

The People further to maintain the issue on their part introduced as a witness Williams Eckley who testified as follows

I was chain bearer at the time we surveyed the road. We set a stake at the point where we started & set stakes till we struck the section line. Its my impression that we did not set any stakes afterwards. We chained from about 8 or 10 feet from Mr Whites door. There was some few rails North of Whites house there were roads in a good many places. We did not keep the same distance North of the fence. We did not try to keep in the old road or keep out of it. We were in and out,

Which was all the evidence offered by the People to maintain the issue on their part. And the said defendant Henry Hiner to maintain the issue on his part introduced Miles A Fuller as a witness who testified as follows.

I am acting clerk of the County Court of Stark County State of Illinois & as such clerk have charge of the records & papers belonging to the said office - The original petition for a County road commencing at the Lafayette road near S' Trickers Mill & running Easterly &c signed by Phylander Arnold & others I found among the papers in my office copy of which is hereto attached to this bill of exceptions marked "Exhibit C".

The said defendant here introduced the said original petition as evidence, which is in the words & figures as stated in "Exhibit C" above referred to & was read in evidence.

The record book here shown to the Court is one of the record books belonging in the office of the County Clerk - I find the following entry - The witnesses here read from said record book and entry of which "Exhibit D"

(9)

hereto attached and made part of this Bill of Exceptions is a certified copy

I find among the papers in my office a Report of Carson Burfield Elis Dwire & Jesse Emery viewers appointed to locate the road described in said petition of Phylander Arnold & others, with accompanying oaths plat survey & field notes a certified copy of which is hereto attached marked "Exhibit A" the original of which was read in evidence on said trial

I find also an entry upon the Records of said County Commissioners Court. The witness here read in evidence an entry from said Record of which "Exhibit B" is a true copy & which is made a part of this Bill of Exceptions

The witness here produced a book called a Road Record & said - this is one of the Record Books in my office - and read in evidence a Record of the Report of the viewers of the Road described in "Exhibit A" with the order of the ^{then} County Commissioners Court thereon, a certified copy of which is hereto attached made a part of this Bill of Exceptions marked "Exhibit C"

The father of the said defendant came & examined these records about a year before the alledged obstructions of the road in controversy for the purpose of ascertaining the true location of this road. I recollect of the defendant calling & making an examination of these records but whether before or after these obstructions I cannot say; But I think it was before

The defendant further to maintain the issue on his part introduced the witness William Norlan who testified as follows

I am acting surveyor have been over a year I made an examination of the survey of the line run by Otman. It was four rods from the center of the road to the stone on Coalters Corner which was pointed out to me by Christopher Hiner & George Updike as being placed there as a corner stone by the authority of the County Surveyor Otman. I made a plat shewing the Record of my examination and the deflected line as the road now runs. If the straight line indicated on this plat is the true sec line then the alleged obstruction is not in the Highway. I measured the distance from the corner of Hiner's the said defendants fence to the stone on a straight line placed as a corner by Mr Otman and found that the defendant Hiner had left out for a road a little over twenty feet North of the said straight line.

The witness was then shown a plat which is hereto attached & made part of this Bill of exceptions marked "Exhibit B" and said - I made this plat to shew my examination of the lines - The Plat shews a greater deflection than actually exists as the plat is proportioned - I made it so that it might shew plainly - I have not the Record of Otman's Survey. I have books here which purport to be copies of the original field notes - The field notes of the Government Surveys call for a straight line from sec corner to sec corner - In surveying they run a random line from the West side of the sec to the East and set a

temporary stake at the half sec corner. When surveyors come out on the sec line they note the variations of the compass and examine the field notes and measure the distance to the original corner. The under surveyor should then go back to the temporary stake set on the random line & remove it South one half the distance shown by the variations. If I should find a stake or mound on a deflected line for a half mile corner I should want good evidence that it was an original stake or mound before I would recognize it as such. The field notes and the original surveys do not always agree and we find corners at other places than indicated by the field notes - and lines are not always straight if we run to original corners.

The defendant further to maintain the issue on his part introduced the witness Christopher Hiner who testified as follows

I was present when Mr Otman made the survey a little less than three years ago this month or next month. I procured him to come and make a survey (at the request of the defendant & others) of sec 13 Twp 6 North & five East. I was present the first day. They commenced the survey at the South West corner of sec 24 & run thence to the N.W. corner of sec 24. Then they went North to the N.W. corner of sec 13. Then they run South to the section corner of 13 & 24. Then they run East 80 rods, and set a stake. Then they run on.

through to the Township line and set stakes every 80 rods. Then they chained South to find how much they had missed the corner. Then they went North to a witness tree & found the NE corner of sec 13. Thence they run South to the SE corner of sec 13. Then they went South to the SE corner of section 24 & run North to the Sec Corner of 13 + 24. Then they went West to the first stake on the random line and corrected & set the stake a little East & South. Thence West to the second stake on the random line & corrected & set a stone a little East & South of the stake it being the South East Corner of Updike's land. Then they went West to the third stake & corrected & set a stone East & South of the stake it being the South West Corner of Updike & the SE corner of the defendants land. Some two or three days before the foregoing survey was made my son the defendant requested me to go & examine the Road Record in the County Clerk's office to ascertain the true location of the road now in controversy. I went and found according to the Record in the County Clerk's office that said road was located on a straight line running East & West between Sec 13 + 24. I went back & related the fact to the defendant. Some time before my son (the defendant) fenced in his land he came to me & told me that he did not think the line between sec 13 + 24 was right. I was present when John Dixon commenced driving posts for the defendant my son & stayed until they drove up to the slough. My son the defendant was there & he said he would set his fence here for the present and as soon as he was able he would

have the lines run and set the fence where it ought to be.

The defendant further to maintain the issue on his part introduced the witness James Ayres who testified as follows -

I was one of the chain bearers on Otman's Survey. The stones were taken along in the wagon for corners. Otman run the line through between Sec 13 & 24 (after having run around the section line of 13 & a good part of 24). I saw where Mr Otman authorized the corner stone at the SE corner of Updikes land set and saw the defendant and George Updike & some one else commence digging a place to set the stone. We went on ahead to correct the next corner West. I did not see them place the stone at the half sec corner but the next corner West was the last corner we had to correct. It was the SE corner of the defendant's land and we stood there & saw them set the corner stone where Mr Otman directed them to do it - Mr Baker & Mr White were present and made no objections and Mr Baker helped to take the stone out of the wagon.

The defendant further to maintain the issue on his part introduced the witness Theodore Whitten who testified as follows -

I was one of the chain bearers in Otman's Survey. We first corrected and set a stake at the NW corner of Mr Trists Land - It was set by the direction of Mr Otman the surveyor. The next we set at the half sec as my recollection serves me, it was a little over a chain inside & South of the hedge

Mr Baker was present at that corner I recollect a stone was set there - I heard no dissatisfaction expressed I seen all the stones after they were set

The defendant further to maintain the issue on his part introduced the witness George W Updike who testified as follows

I was present most of the time when Mr Otman surveyed the line in controversy I was present when Mr Otman went back on the random line & corrected the corners I saw the place where Mr Otman directed Mr Swift & Wm. Hiner to set a stake & saw them set it. I was present & saw the place where Mr Otman directed us to set a stone at the half sec corner & Hiner the defendant & myself set it where it was directed to be put. Mr Baker assisted either in getting the stone out of the wagon or setting it I don't know which I was present & saw Mr Otman direct us to set the corner stone at the corner of my father & Defendants land

The defendant myself & some one else set it where we were directed to set it. Mr Otman & Mr Ayers Mr Whitten & Mr Hiner (the defendants father) & Mr White were present & seen the stone set.

The defendant further to maintain the issue on this part introduced the witness John McKinstry who testified as follows

I was Pathmaster 4 years ago this summer - the defendant forbid my working the road any where along his line, the road was not in the ^{right} place where it ought to be and he did not want it plowed

+ scraped up and I did not work any along where his land was. The defendant did not work any on that road. I lived on this road running West to West Jersey.

The defendant further to maintain the case on his part introduced the witness William Rogers who testified as follows:

I live a half^a mile North of the road in controversy. I lived right on it 10 or 12 years ago. It was 40 feet more or less from the centre of the road to Whites House.

The line of travel by Hiners land varied, it was at different places. There was a place where they went around the hill that was five or six rods from the fence. Whites 80 was fenced in $\frac{1}{2}$ way across East side. The hauling was all North of the fence sometimes nearer & sometimes further.

The old bridge was inside of Hiners fence. Previous to Hiners fencing the hill was not worked or traveled. Hiners fenced in some places over the traveled track. When I first came there was a bridge further up the slough about seven steps from where the bridge is now. When the defendant fenced he took in this bridge. I am not positive about a track further up. There was a log bridge, split timber and had the appearance of been worked up a temporary thing. A year ago last Spring I saw a part of a log in the slough & track crossing. I helped Hiners build the fence and helped to stake it off to drive the posts. The defendant said then that he was not satisfied with the line as it run there but that he

would set it there for the present but as soon as he was able he would get it surveyed and put it where it ought to be. I was there at the time when Mr Otman surveyed it. Otman's Survey was made three years ago - I saw all the stones set. I can't say as Mr Coalter was present. White helped some where the corner was between Baker & White. I don't know if it was worked or not before Hiner fenced. I heard Baker tell Jackson Lawrence that he had some of Updike's land but he was willing to pay for it. The different corners were set by the direction of Mr Otman the surveyor. I don't know where the bridge stood before I moved there. There was a temporary bridge higher up & the remains of an old bridge lower down. The same year I moved there a new bridge was built right where it is now. The bridge washed away since. The Bridge might have been put there by public Authority and I not know it. I don't know of White's helping to put the stone in or help take it out of the Wagon. I know he helped some. As I am no surveyor I don't know whether corner was right or not. I made no objections to the corner and said nothing at all upon the subject.

The Defendant to maintain the issue on his part introduced
 the witness
William Ogle who testified as follows

Brother Howard and myself both moved here in the Fall of 36. My brother bought three 80⁰ laying one quarter on the NE of 13 - and the N half of the South East of 13. Early in the Spring of 37 my brother

got George A Charles of Knox County to come & survey the land for him - This piece of land was a part of Knox County at that time. Myself & Mr Silliman were chain bearers. We commenced surveying at the NE corner of what is now called West Jersey Township and run South some two miles to the NE corner of Sec 13. There we found a witness tree - thence West a mile to the NW of 13 & found a corner. Thence South a mile to the SW of 13 & found a corner. These corners were all plain to be seen - Then we run East. 160 rods and set a stake & we all looked around for some time but could not discern any corner. This was early in the Spring of 37 - the grass was all burnt off and you could discern an object at quite a distance. I was interested in finding a corner for my brother's land and was more particular than if it had been for myself. And we could discern nothing that had any appearance of being an original mound. I was there at that corner over half an hour. Then we run on through to the Township line & then we chained a little South & finally found the corner after some search. Then we went back to this stake where we could not find any corner & set a corner. I had no experience in looking for corners. I did not hear the surveyor say whether he had found a corner or not. He said nothing on the subject - I could not see anything that looked to me like a corner where we stopped. I do not swear positively there was no corner. All I say is I could see none & the surveyor found none.

which was all the evidence in the case and thereupon the Court instructed the jury on behalf of the People as follows to wit

People

vs

Henry Huer

Indictment for Obstructing Road

Given The jury are instructed on the part of the People that if they believe from the evidence beyond a reasonable doubt that the defendant is guilty in obstructing the road mentioned in the indictment in the manner and form as therein charged they should find the defendant guilty and so return their verdict and the Court will fix the punishment

3. The jury are instructed that the actual line where the road was located and surveyed provided the location was by proper authority is the true line of the road whether the plat and survey filed in the County Court shews it to be there or not. And if the jury believe from the evidence that the road in controversy was actually surveyed and located where it now is, and where the defendant obstructed it then that is the true road although the plat may shew it to be in a different place

4 The monuments or corners, ran to by the surveyor in surveying the road, and the staking and laying out of the road, must always control in determining the location of the road, and the field notes and plat returned by the surveyor are but

matter of description which serve to assist in determining the place where the road was actually located -

5 In determining the boundaries of lands in this State the Original mounds or monuments must govern as to the location of the line although the line may by following such original mounds be made a crooked or deflected line - and if the original mounds have once been discovered and recognized by a County Surveyor as original corners, a County Surveyor who might be subsequently elected, would have no right to disregard such original corners and establish a different line though such a line might be a straight one -

6 If the jury believe from the evidence that Berfield actually surveyed and located the road on the deflected line under proper authority - that would be the true line of the road although the true section line might be south of that - The actual survey and staking and viewing of the road upon the ground where it is laid constitutes the location and the markings and lines made by the surveyor and viewers upon the plat do not constitute the location of the road - provided the road was actually opened upon such line

7 The defendant may dedicate a portion of his land for the use of the public as a road and this dedication may be proved by the acts & acquiescence of the defendant in allowing the public to use his land as a road,

and if the jury believe from the evidence that the defendant by fencing his land up to the road, or other evidence which may satisfy them that said defendant dedicated his land to the public as a road - and that he for a long time acquiesced in the use of the land by the public as a road he could not afterwards legally fence up said road and obstruct the travel on the road

If the jury believe from the evidence, that the viewers by competent authority located the road on the deflected line and that afterwards, and up until the time it is alleged the defendant placed the obstructions in the road, the public used and traveled on such road as a public highway, then the presumption is that the road was legally opened on such line.

to the giving of which said instructions the said defendant by his ^{counsel} then & there objected. But the said court notwithstanding said objections overruled the same to which overruling of said objections said defendant by his counsel then and there excepted - And the said defendant asked the Court to instruct the jury as follows to wit:

The People

vs

Henry Hiner

The Court instructs the jury on the part of the ^{defendant} as follows:

1 Unless the jury believe from the evidence beyond a reasonable doubt that the defendant is guilty in manner

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as charged in the indictment they will find the defendant not guilty and the prosecution must prove every fact necessary to convict the defendant with the same certainly that they are bound to prove the main fact of his guilt; and every fact not thus established must be dismissed from the minds of the jurors

2 If the jury shall find that any one of the material facts proved is inconsistent with the defendants guilt, then they must find the defendant not guilty

3 It is admitted by the People that no public highway exists at the place of the alleged obstruction by prescription or the use of the same by the People as a traveled way for twenty years, the jury therefore are instructed that unless they believe from the evidence that the alleged obstruction was placed in a public highway legally laid out and located and opened by the proper public authorities they will find the defendant not guilty, unless they believe from the evidence that at the time defendant fenced his land he intended to give the land left out by him to the public and afterwards placed obstructions in the same as charged in the indictment and his own declarations made by him at the time he so fenced along the said alleged highway are proper evidence to show what his intentions were

Page 47 4 Unless the jury believe from the evidence that it has been clearly proved that the viewers when they surveyed and located the road in controversy marked by stakes mounds or other ^{visible} signs or monuments the route of said road over the defendants land then the plat survey and field notes are the best evidence of its true location.

5 Though the viewers and surveyors may in fact have travelled or run upon a deflected line over the defendants land yet if they did not mark the route by stakes, monuments or other visible signs showing where they laid the road and in their report and survey they state they viewed and located the road according to the plat and survey then the plat + survey will show the true route and location of said road

The Report of road viewers plat surveys and field notes of the surveyor in viewing and locating roads at the time the road in controversy was alleged to have been laid out were required by law to be returned into the office of the Clerk of the County Commissioners Court and they thereby became a part of the public records of the County for the use of the public and all such reports plats and surveys and other records relating to the road in controversy as have been used in evidence in the case are proper evidence of the facts stated in them and cannot be contradicted or destroyed by verbal evidence of witnesses nor can the same be explained except there is doubt or uncertainty as to the meaning of the language of the same or omissions therein And the jury are instructed to disregard all evidence which is in

When the Court modified the 5th instruction by inserting the following words, to wit;

"This instruction is given as qualified by the instructions given for the prosecution in reference to the question of actual location of the road" - -

After Argument by the Counsel the jury retired to consider their verdict And on the 21st day of May 1863 of the Special May Term aforesaid returned into Court with the following verdict - "We the jury find the defendant guilty in manner and form as set forth in the indictment"

And thereupon the said defendant by his Counsel entered his motion for a new trial for the following reasons

Because

- 1st The Court gave improper instructions upon the part of the People
- 2^d Because the Court modified the 5th instruction asked for by Deft
- 3^d Because the verdict is against evidence
- 4th Because the verdict is against law
- 5th Because the verdict is against both law & evidence

Which said motion upon being considered by the Court is overruled - to the overruling of which said motion the said defendant by his Counsel then & there excepted And thereupon the said defendant by his Counsel comes & moves the Court for arrest of judgment for reasons stated in his written motion as follows;

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State of Illinois
Stark County 3^d J^d

Stark Co. Circuit

May Special Term A.D. 1863

The People vs
Henry S. Hines

Indict, for Obs. Road &c

The said Defendant again by his Counsel comes
and moves the Court in arrest of judgement.

Because

There is under the Statutes of the said State of Illinois
no such Criminal offence as that charged in the said
Indictment &

Because in a Criminal Case a general verdict of
guilty without referring to the particular Count in the
indictment cannot be sustained

(Signed)

Clifford
Atty for Def^t

Which said motion is overruled by the Court - To the
overruling of which said motion the said defendant
by his Counsel then & there excepted & thereupon said
Court entered a judgement upon said verdict & fined
the amount of the fine against said defendant at one
dollar & costs

To the rendering of which said
judgement upon said verdict said defendant by
his Counsel then & there excepted. And prays that
this his Bill of exceptions be signed & sealed

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by the judge of the said Court & made a part of
the record of this Court which is done

Dated Sept 5. 1863

(signed)

A. S. Merriam



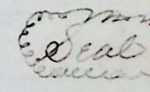
"Exhibit A" referred to in annexed Bill of Exceptions.

State of Illinois
Stark County

March 24th 1845

I, John Purfield a Justice of the Peace in and for the County of Stark do certify that on this day personally appeared before me Jesse Emory Ellis Dwine & Carson Purfield and were duly sworn to discharge their duties road viewers of a certain road as follows viz: Commencing at the La Fayette road near Trickles Mill and running easterly to the section line between Sections 16 and 21 at the nearest suitable point thence to follow said line east to intersect the road leading from Toulon to Princes (Mill) Ridge thence on the nearest and best rout to a bridge on Indian Creek, on S 17 from thence to Coxes Mill.

Given under my hand and Seal this
24th day of March 1845

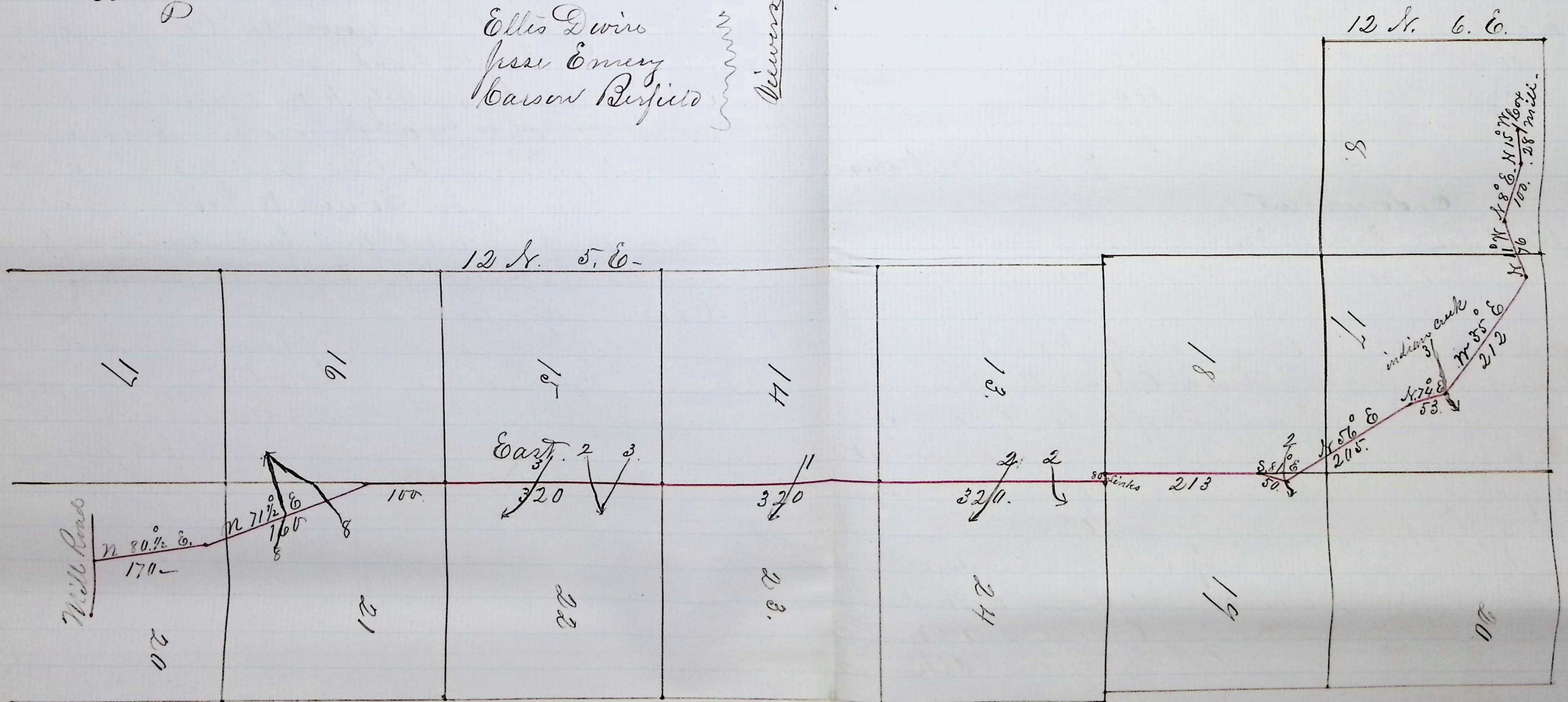
John Purfield 
Justice of the Peace

To the County Commissioner Court
Stark Co.

We the undersigned having been appointed by
an order of said Court to view and locate a
road commencing at a point near Trickle
Mill thence East to a bridge on Indian Creek
thence to Boxer Mill and according to order and
proceeded to view and locate the same as will
more fully appear by the annexed plat and
survey

Ellis Dwire
Jesse Emery
Carson Purfield

Viewers



S. $80\frac{1}{2}^{\circ}$ E.	170.	Piches	
N. $71\frac{1}{2}^{\circ}$ E.	160	"	
East-	100	"	
"	320	"	
"	320	"	
"	320	"	
North	3	"	5 Links
East-	213	"	
S. 81° E.	50	"	
N. 56° E.	205	"	
N. 35° E.	212	"	
N. 11° W.	76	"	
N. 8° E.	100	"	
N. 15° W.	28	"	
7 Mile. 37 Piches			

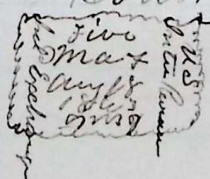
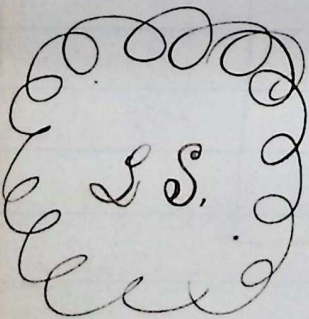
(Endorsement)

Road from Trickels Mill to Coxes Mill
Reported June Term 1845.

State of Illinois } Clerk's Office County Court -
County of Stark } Tolar August 18. 1863.

I Miles A Fuller Clerk of the County Court of said County do certify that the foregoing is a full true and correct copy of the report of the view and location of a road therein described as appears from the files of my Office.

In Witness whereof I have hereunto set my hand and affixed the seal of said Court this 18th day of August A.D. 1863.
Miles A Fuller Clerk



(45)

Witness tree *orig* *cont*

Stamps

720

See 13.

319-3 1/2

SN 1/4

$N\frac{1}{2}$ & $N\frac{1}{4}$

H S Hiner

Uso dyke

S E. 1/4

J Ayres

Stark
2

Road

Randow line
----- Road

Stora

Slower

White

$$8x \mid \frac{1}{4}$$

S. E. 1/4

Dec 24

319-3 1/2

3224

5/10/22

11 Exhibit B¹¹ referred to in the foregoing & annexed
Bill of Exceptions.

"Exhibit: C." referred to in the foregoing & annexed Bill of Exceptions.

To the Honorable the Commissioners of the County of Stark in the State of Illinois: We the undersigned petitioners would ask of your Honorable body the location of a County road commencing at the Lafayette road near S. Trickell's Mill and running Easterly to the Section line between sections 16 & 21 at the nearest suitable point thence to follow said line East to intersect the ^{leading} road from Toulon to Punces Bridge thence on the nearest and best route to a bridge on Indian Creek on S 17. from thence to Cox's Mill. we deem such road to be necessary for the public good and respectfully submit our case to the Commissioners hoping that our request may be granted. Dec 31st 1844.

Signers Names
 Philander Arnold
 Thomas Lamberton
 E. M. S. Lyon
 Royal Arnold
 Dennis Morris
 Stephen Trickell
 Serton Morris
 John R. Round
 John Bishop
 Ellis Dwire

Signers Names
 Lewis Finch
 George Eckley Jr
 Wm White
 James B. Witter
 John Berfield
 Howard Oglo
 Calvin Powell
 Washington Colwell
 O. C. Williams
 Henry Williams

John Riggan Jr
 William Ackley
 Jacob & Hazen
 Samuel Leigh
 John Pratt
 Samuel G. Wright
 David Sturges
 Carson Barfield

Wilson Finley
 James Hedley
 Robert McClanahan
 John Emery
 J W Emery
 Wm Carter
 John Finley

(Endorsements.)

Petition for road from near & Trickle's Mill to Toulon
 Road and on to Indian Creek Bridge & Cox Mill. March 1845
 Viewers Carson Barfield Ellis Dewire Jesse Emery
 To meet in two weeks at John Barfield.

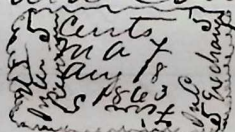
State of Illinois
 County of Stark

ss. Clerk's Office County Court

Toulon August 18, 1863

I Miles A Fuller Clerk of the County Court of said
 County do certify that the foregoing is a true and
 correct copy of a petition for a road therein described
 as the same appears upon the files in my Office -
 In Testimony whereof I have hereunto
 set my hand and affixed the Seal of
 said Court this date last above written
 Miles A Fuller Clerk

L.S.



"Exhibits D & E" referred to in the foregoing Bill of Exceptions

State of Illinois

Stark County } County Commissioners Court began
and held at the Court House in the
town of Toulon on Monday the third day of March.
1845. Present - F W Emery, L. S. Dorrance & Joseph
Palmer. County Comm^s. Abner Whitaker Clerk & John
W Hornedusan Sheriff

On Tuesday the fourth day of
March 1845, being the second day of the aforesaid
Term of the Court the following among other proceedings
were had =

On the petition of Philander Arnold and 34
others praying for the location of a new road commen-
cing at the Lafayette road near S Trickels Mill and
running Eastward to the section line between Sections
16 & 21 at the nearest suitable point thence to follow
said line east to intersect the road leading from
Toulon to Princes (Mill) Bridge thence on the nearest
and best route to a bridge on Indian Creek on S 17
from thence to Loper Mill and it appearing to the
satisfaction of the Court that due notice was properly
posted up at least 20 days previous to the application
for the same. And John Finley having deposited with
the Clerk the sum of five dollars It is therefore ordered
by the Court that Carson Purfield, Ellis Devine
and Jesse Emery be appointed viewers on on the

above named route and that they be required to meet at the house of John Berfield Esq on the third Monday Inst- or so soon thereafter as practicable and proceed to view the same according to law.

"Exhibit: E."

State of Illinois }
Stark County } County Commissioners Court began
and held at the Court House in Toulon
on Monday June Second AD 1846. Present J W. Emery
L S. Dorrance and Joseph Palmer County Commis-
sioners. John W Henderson Sheriff and C Whitaker
Clerk.

Report of a new road from Trickels Mill to
Coxes Mill as reported by Casson Berfield, Ellis
Dwinn and Jesse Emery accepted and ordered to
be spread upon the road Recd and an order to
the several Supervisors to open the same 40 feet
wide

L. S. Dorrance } County
Joseph Palmer } Commissioners

State of Illinois } Clerk's Office County Court
County of Stark } Toulon August 18. 1863-
I Heiler A Fuller Clerk of the County Court within and for said
County do certify that the foregoing is a full true and correct
copy of the Record of the proceedings of the County Commissioners Court
relative to the location of the road therein named as appears from
the Records in my Office. In Testimony whereof I have hereunto set
my hand and affixed the seal of said Court the date
last aforesaid.

L S

Heiler A Fuller Clerk

"Exhibit F" referred to in the foregoing & annexed Bill of Exceptions

To the County Commissioners Court
Stark County

We the undersigned having been appointed by an order of said Court to view and locate a road commencing at a point near Trickels Mill thence East to a bridge on Indian Creek thence to Coxes Mill met according to order and proceeded to view and locate the same as will more fully appear by the annexed plat and survey.

(Signed)

Ellis Devire

John Emery

Leason Buford

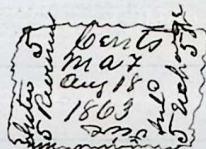
Viewers

N	80 $\frac{1}{2}$ ° E.	170	perches	
N	71 $\frac{1}{2}$ ° E	160	"	
East		100	"	
East		320	"	
East		320	"	
East		320	"	
North		3	"	5 Links
East		213	"	
S	81° E	50	"	
N	56° E	205	"	
N	35° E	212	"	
N	11° W	76	"	
N	8° E.	100	"	
N	15° W	28	"	

7 miles 37 Perches

Orders made to Supervisors to open the above named road 40 feet wide June 7th 1845-

State of Illinois }
County of Stark }



I Miles A Fuller Clerk of the County Court within and for said County do hereby certify that the foregoing is a full and correct copy of the record of the report of the Location of a road therein named as the same appears upon the road records of my Office.

L. S.

In Witness whereof I have hereunto set my hand and Official Seal this 18th day of August - A.D. 1863

Miles A Fuller Clerk

Which said Bill of Exceptions (and exhibits thereto annexed forming part of said Bill of Exceptions) is endorsed in the words and figures following, to wit;

" Let the time of filing this Bill of Exceptions be extended
" till the 9th day of September 1863 "

(signed)

"A. L. Merriman"
"Judge"

" Filed in the Office of the Clerk of the Stark County Circuit Court
" this 7th day of September A.D. 1863 "

" J. M. Blair clk "

State of Illinois

Stark County

I Patrick M. Blair Clerk of the Circuit Court in and for said County in the State aforesaid do hereby certify that the above and foregoing is a full true and correct transcript of the files and Record of said Circuit Court and proceeding had therein in the cause of the People of the State of Illinois against Henry S. Henier (indictment for obstructing Road) as the same appears of Record and on file in said Circuit Court

In Witness Whereof I have hereunto set my hand and affixed the seal of said Circuit Court at my office in London in said County this 15th day of January A.D. 1864

Patrick M Blair Clk



Recd of Clk Cir Ct
for Record & Return
7 Dec 7/16 22

State of Illinois } Supreme Court
Third Grand Division } April Term A.D. 1874

And now comes the plaintiff in error, and says that in the record, & proceedings of record there are manifest errors, to wit:

1. General error,
2. The Court erred in admitting parol evidence to contradict the location of the road as stated in the report of the viewers and the plat and survey
3. The Court erred in giving the instructions given on behalf of the People
4. The Court erred in modifying the defendant's instructions.
5. The Court erred in overruling defendant's motion for a new trial
6. The Court erred in overruling defendant's motion in arrest of judgment

Said plaintiff in error therefore prays that said judgment be reversed - for costs, etc.

S. D. Puterbaugh & Ingersoll
Atty for Plff in error

P.D. No. 10

17

~~The People~~

at

Heaven

The People
Record

Filed Apr. 9. 1864.

L. Veland

Ch.