No. 12579

Supreme Court of Illinois

Marcy

vs.

Taylor

71641 7

Elbert May
vs
William Ray

Marcy

244

1858

12579

#

Prepaid.

Page No 1

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

Pleas before the Hon.
Madison C. Hollenbeck Judge
of the Ninth Judicial Circuit
of the State of Illinois and presiding
Judge of the Kendall County Circuit
Court at a term thereof begun and
held at the Court House in the
Village of Newgo in said
County on the 5th day of October
in the year of our Lord one thous-
-and Eight Hundred and fifty seven
Present the Hon. M. C. Hollenbeck Judge aforesaid
Washington Bushnell Esqr. State Attorney
Jonathan Raymond Sheriff

Attest
George M. Hollenback Clerk

Be it remembered that heretofore to wit on
the 7th day of August A.D. 1857 came Helme
and Smith and filed in the Office of the Clerk of the
Circuit Court of the County of Kendall and State of
Illinois a certain Precipe in writing for a writ
of Summons to issue in certain Matter said Precipe
in the words following to wit

[12579-1]

No. 2

William Taylor
vs
Elbert Marcy

Kendall Circuit Court
Trespass

The Clerk of the Kendall Circuit Court will please issue a summons in favor of William Taylor Plaintiff & against Elbert Marcy defendant in an action of Trespass damages five Hundred Dollars

Allen & Smith
Attys for Plff

Filed Aug 7th 1855
P. M. Crothers

And afterward came the said William Taylor by Allen & Smith his Attorneys upon the 7th day of September A.D. 1855 and filed in the office of the Clerk of said Court his Declaration in the Cause aforesaid in the words following to wit, to-wit

State of Illinois } ss
Kendall County }

At the September term of Kendall Circuit Court in the year of our Lord one thousand Eight Hundred fifty five

William Taylor plaintiff in this suit by Allen & Smith his Attorneys Complains of Elbert Marcy defendant in this suit being summoned in a plea of Trespass for that the said defendant on the first day of May in the year of our Lord one thousand Eight Hundred and fifty five and on divers other days & times between that day and the day of the commencement of this suit

No 8

with force and arms broke and entered the Close of the said plaintiff situate in the County of Kendall and State of Illinois & then and there broke open broke & fences damaged and despoiled divers to wit five panes of bars of the said plaintiff of great Value to wit of the value of fifty Dollars then standing & being in the said Close and also ten panels of fence of the said plaintiff of great Value to wit of Value of fifty dollars then & there standing & being in said Close & with feet in walking ~~wood~~ down trampled upon consumed and spoiled the grass and Corn of the said plaintiff of great Value to wit of the Value of fifty dollars then and there growing & being in said Close and with Cattle to wit Horses Mares Geldings Cows Oxen & Sheep Eat up & depastured the grass Corn and Wheat & oats of the said plaintiff of great Value to wit of the Value of fifty dollars and also seized took despoiled & carried away the rails posts & boards of the said plaintiff to wit five loads of Boards five loads of Rails five loads of posts of great Value to wit of the Value of two thousand dollars by means of which said several premises of the said plaintiff was greatly annoyed and disturbed in his possession during all the time aforesaid and hindered and prevented from carrying on his necessary affairs & business to wit at the County of Kendall aforesaid and other wrongs to the said plaintiff then and there did to the great damage of the said plaintiff contrary to the form of the statute in such case made

[12579-3]

No 4

& provided & against the peace & dignity of the people of the State of Illinois wherefore the said plaintiff saith he is injured and hath sustained damages to the amount of five thousand dollars & therefore he brings suit &c

Helm & Mills attys
for Plff

Filed Sept. 7th 1835
S. M. Crothers Clk
p Senen Dpty

And afterwards Came the Sheriff Henry M. Day Sheriff of Kendall County aforesaid by Joseph D Kennedy Deputy and returned into the office of the Clerk of said Court aforesaid a certain writ of summons in the cause aforesaid on the 13th day of September A.D. 1835 ~~in the words and~~ together with the return of said Sheriff in the words and figures following to wit;

State of Illinois }
Kendall County } ss

The People of the State of Illinois
to the Sheriff of said County

Greeting

WE Command you that you summon Elbert Macey if he shall be found in your County personally to be and appear before the Circuit Court of said County on the first day of the next term thereof to be holden at the Court House in ~~the~~ Ottawa in said County on the 3d Monday of

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September next to answer unto William Taylor in a plea Trespass to the damage of the said plaintiff as he says in the sum of five thousand Dollars. And have you then and there this writ with an endorsement thereon in what Manner you Executed the same

Witness John M. Crothers Clerk of said Court and the seal thereof at Oswego in said County this 7th day of August in the year of Our Lord One thousand eight Hundred and fifty five

Seal

John M. Crothers Clerk

Served by reading to the within named Elbert Marcy the 3d day of September AD 1855

Fees 1 service .50 16 miles .80 1 return 10 = $1.50

R. M. Day Sheriff

pr. C. D. Kennedy Dfty.

Filed this 13 day of Sept. 1855

J. M. Crothers

And afterward on the 19th day of September AD 1855 the same being one of the days of the September Term AD 1855 of said Court Came the said Defendant Elbert Marcy by B. F. Parks his attorney and files in said Court his plea in said Cause in the words and figures following to wit

No 6th

Elbert Marcy } Kingsaw Cty Cir
vs } Court September
William Parker } Term A.D. 1855

1st plea

And the said Defendant by Parks his attorney Comes and defends the ~~wrong~~ force and injury when &c and says that he is not guilty of the said supposed Trespass above laid to his Charge or any or Either of them or any part thereof in manner and form as the said Plaintiff hath above thereof Complained against him and of this he the said Defendant puts himself upon the Country &c and this he is ready to verify Whereon he prays Judgement of the said Plaintiff ought to have and Maintain his aforesaid action thereof against him &c

Parks Atty for Deft

2d plea

And for a further plea in this behalf as to the Breaking and entering of the Plaintiffs close and Committing the said several Trespasses in Plaintiffs declaration Mentioned &c the said Defendant says actio non because he says that before and at the time of the committing of the said several trespasses when &c there was and of right ought to have been a certain common and public Highway into, over and through and along the said close in which &c free for all the

No 7

Citizens of this State to go return pass and repass on foot and with cattle and carriages at all times of the year at their free will and ~~accord~~ pleasure. Wherefore the said Defendant being a Citizen of this State and having occasion to use the same way at the said several times when &c went passed and repassed on foot and with cattle and carriages into over and through the said close of the said plaintiff in said highway as he lawfully might and in so doing the said Defendant then and there took out and removed certain rails and posts that then and there obstructed the free passage over along and through the said close of the said close of the said Plaintiff in said highway as aforesaid and then and there the said defendant in walking and with his cattle and carriages then and there necessarily a little trod down the grass &c. doing no unnecessary damage which on the said several supposed trespasses in plaintiffs declaration mentioned and this the said defendant is ready to verify. Wherefore he prays Judgment &c.

Parks Defts atty

3d plea

And for a further plea in this behalf the said defendant says actio non. Because he says that before and at the time of the committing of said several supposed trespasses to wit on the 5th day of March AD 1838 Mary W Jenkins & Jenkins A. Fairbanks and A. Scott then

and there being the owner in fee simple of a certain piece of land and then and then also being in possession thereof to wit the said Close of the said plaintiff then and then quit claimed and released all claim and title to a certain strip of land for a road into along and through the said Close of the said Plaintiff and had the said release so made and filed in the Town Clerk's office of said Town in which the said Close of the said Plaintiff is situated and said land so released was duly accepted by the Highway Commissioners of said Town and opened and declared by said Commissioners a Public Highway and in and by said Release said premises aforesaid gave to each and every person Citizens of this State the right to pass along through and into the said Close of the said plaintiff of all of which said plaintiff had notice And the said Defendant being a Citizen of this State and having occasion to go pass and repass over into along and through said Close of the said Plaintiff then and then had occasion to pass over said road which had so been released to the Public and in passing necessarily trod down the grass &c and then and then took down and removed certain bars and fences which obstructed the free passage over said Road doing no unnecessary damage

a little

Which all the said several supposed trespasses of which the Plaintiff complained and this the said defendant is ready to verify wherefore he prays Judgment &c

Filed Sept. 19th 1855 John M. Crothers clerk

B. F. Davis Defs atty

No 9

And afterward to wit on the 21st day of September A.D. 1855 the same being one of the days of the September Term of said Court aforesaid the following among other proceedings were had and entered of Record to wit,

William Taylor
vs
Elbert Marcy } Trespass

This day this Cause is continued by agreement of parties

And afterward to wit on the 10th day of June A.D. 1856 the same being one of the days of the June Special Term A.D. 1856 of said Court the following proceedings among other were had and entered of Record to wit

William Taylor
vs
Elbert Marcy } Trespass

This day came the Parties by their attorneys and the Court having heard the parties in relation to the demurrer to the defendants fourth and fifth pleas by him herein pleaded, sustains the same to the said fourth and fifth pleas. It is therefore considered by the Court that Plaintiff recover of defendant his costs about his demurrer to each of said fourth and fifth pleas in this behalf expended and that he have execution therefor

S120TTB

No 10

And afterwards to wit on the 11th day of June A.D. 1856 the same being one of the days of the June Special Term of said Court aforesaid Came the said Defendant by Parks his Attorney and filed in said Court his fourth Amended plea in said Cause pleaded in the words and figures following to wit,

4th plea

Elbert Marcy
adg. } Kendall County Cir Court
William Taylor } June Special Term A.D. 1856

And for a further plea in this behalf the said Defendant says actio non because he says that heretofore to wit on the 27th day of December A.D. 1852 a petition duly signed by, to wit, twelve legal voters living within three miles of said proposed Road was presented to the Highway Commissioners of the Town in which said Road is located That Notice of the Presentation of said Petition was published by putting up written notices thereof in three of the most public places of said Town for Twenty days prior to the presentation to said Commissioners that afterwards to wit on the 5th day of March A.D. 1853 the said Highway Commissioners of said town in which said Road of the said plaintiff is located proceeded to Examine the ground over through and along said Road

No 11

of the said Plaintiff and the Owners of said Close at that time to wit Henry Jenkins & Celesta Jenkins having released all claim for damages by reason of the opening of said proposed public Highway over said Close The said Highway Commissioners then & there having full power and Authority so to do then and there caused a survey and plat of a public Highway to be made and then and there ordered and directed a public Highway to be opened over along and through said Close four Rods wide and afterwards to wit on the 12th day of March A.D. 1853 said Highway Commissioners filed ~~said~~ such Order for a road and the survey and plat thereof in the town Clerks Office of said town

And afterwards to wit on the 9th day of April A.D. 1853 an appeal was taken from the said order of the Highway Commissioners of said Town & then Supervisor of said County of Kendall not one of said Supervisors then and there being of the said Town in which said Close of said Plaintiff is located and — afterwards to wit on the 19th day of November A.D. 1853 upon hearing said appeal said Supervisors affirmed said Order of said Highway Commissioners declaring said route over along and through said Close of said Plaintiff a public Highway and Celesta Jenkins and Henry Jenkins who

No 12

then and there having the legal and lawful possession of said Close of the said Plaintiff and being said Owners thereof then and then opened a road over through and along the Close of the said plaintiff and said road over along and through the Close of the said plaintiff became & ~~was~~ now is and of right ought to be a public Highway and under and virtue of ~~said~~ such Order of said Highway Commissioners each and Every Person Citizen of this State had a right to pass and repass on foot and with Cattle and Carriages over along and through said road so declared a public Highway. And the said Defendant after the making of said order as aforesaid and the opening said road & before the Commencement of this suit having occasion over along and through said public Highway which is over along and through said Close of the said Plaintiff then and there necessarily a little tried down the grass &c and then and then took down and removed certain bars and fences of fencing which obstructed his free passing along and through said public Highway through the said Close of the said Plaintiff doing no unnecessary as he lawfully might which are the ~~said~~ several supposed trespasses whereof the said plaintiff hath above thereof complained and this he is ready to verify Wherefore he prays Judgment &c

4th amended plea Filed June 11th 1856 B. F. Parks Deft Atty
Jno M. Bruhn Clk

No 13

And afterwards to wit on the 12th day of June A.D. 1836 the same being one of the days of the June Special Term A.D. 1836 of said Court the following proceedings among others were had and Entered of Record to wit;

William Taylor
vs
Elbert Marcy } Trespass

And now on this day came the Plaintiff by Nelson and Smith his attorneys and the Defendant by Paddock his attorney and this cause was called for Trial & issue being Joined it is ordered that a Jury also come and thereupon came the following named Jurors of a Jury to wit Jabez Parkhurst Thomas J. Phillips C.B. Chapin S. W. Whitney John Newell James Stafford W.R. Hall O.L. Roberts Charles Dayfont & Daniel Platt S. B. Grooms and Wright Gleason who were severally Chosen selected & sworn & having heard the Evidence & Received the instructions of the Court retire under charge of an Officer to consider of their Verdict and afterwards return into Court with the following Verdict We the Jury find the defendant not Guilty of Charges in plaintiffs declaration which is ordered to be entered and thereupon comes the plaintiff by his Attorney and Enters his motion for a New Trial

And afterwards to wit at the Said Term — Special Term of said Court to wit on the 13th day of Jan A.D. 1836 the same being one of the days of said Term of said aforesaid the following among other proceedings were had and entered of Record to wit,

William Taylor
vs
Elbert Marcy } replevin

This day came the Parties again by their attorneys and the Court being fully advised in relation to the motion of Plaintiff for a new trial, the same is sustained by the Court and a new Trial granted.

And afterwards at the April Term of said Court A.D. 1837 to wit on the 7th day of April A.D. 1837 the same being one of the days of said Term of said Court the following among other proceedings were had and Entered of Record to wit,

William Taylor
vs
Elbert Marcy } Trespass

This day this Cause is Continued and it is adjudged by the Court that Plaintiff recover of Defendant his Costs in behalf expended and that he have Execution therefor

No 15

And afterwards to wit on the 6th day of October A.D. 1837 the same being one of the days of the October Term A.D. 1837 of said Court came the said plaintiff by Helm & Smith his attorneys and filed his replication to defendants pleas in the words following to wit that is to say:

State of Illinois
Kendall County } ss
Circuit Court

William Saylor
vs
Elbert Maxey

And the said Plaintiff as to the said plea of the said Defendant by him first above pleaded and in which he puts himself upon the Country doth doth the like.

And the said plaintiff as to the said pleas of the said Defendant by him secondly thirdly & fourthly above pleaded saith that he the said Plaintiff by reason of any thing by the said Defendant in those pleas alleged ought not to be barred from having & maintaining his aforesaid action thereof against him the said Defendant because he says that the time of the committing of the said several Trespasses in the said Plaintiffs declaration mentioned there was not a common & public Highway into over & through and along the said close of the said plaintiff in which &c

No 16

for all the citizens of this State to go pass and repass on foot and with Cattle & Carriages or in any other Manner at all times or any time of the year at their free will and pleasure as in said pleas alleged and that the said Defendant at the said several times when &c of his own wrong and without the cause or right by him in said pleas alleged Committed the said Several Trespasses in said Declaration mentioned and in said pleas attempted to be justified in manner and form as the said Plaintiff hath above thereof complained against the said Defendant and this the said Plaintiff prays may be inquired of by the Country &c

Smith Pls Atty

And Defendant doth the Like

Parks for Deft

Filed Oct. 6th 1837

Geo M. Hollenback Clerk

And afterwards on the same day last aforesaid to wit the 6th day of October A.D. 1837 before the said Court aforesaid at the Term aforesaid the following proceedings among others were had and entered of Record to wit,

William Taylor

vs } Trespass

Elbert Marcy

This day

No 17

Came the Plaintiff by Milton Smith his Attorney and the Defendant by Parks his Attorney and the issues in this Cause being Joined it is Ordered by the Court that a Jury also come and thereupon came the following Named persons as a Jury to wit

Orville E. Judson
James W. Wilsey George S. Minor James D. Wagner James C. Roach George Parker S. S. Needham Thomas Rodney William A. Fessenden William Barnes Phineas Smith and James H. Pearson

Who were Each severally Chosen tried and sworn.

And afterward to wit on the 7th day of October A.D. 1857 the term being one of the days of the Term of said Court aforesaid the following among other proceedings were had and Entered of Record to wit

William Taylor
vs } Trespass
Elbert Marcy

And now on this day again came the parties by their respective attorneys and the Jury ~~aforesaid~~ aforesaid also come and after hearing the Evidence and receiving the Instructions of the Court retired in charge of an Officer to consider their Verdict and afterward come into Court and say

No 18

We the Jury find the issues in this cause joined for the Plaintiff and assess his damages at fifty cents which is ordered to be entered of Record

It is therefore considered by the court that Plaintiff recover of Defendant his costs in this behalf expended and that he have execution therefor And thereupon came the Defendant by Parks his attorney and enters his motion for a new Trial herein and the court having heard the Parties in relation to Defendants motion for a new Trial and after being fully advised in the premises overruled Defendants motion for a new Trial herein and thereupon again came the Defendant by Parks his attorney and prays an appeal to the Supreme Court of the State of Illinois which appeal is granted Conditioned that he enter into bond in the penal sum of three Hundred Dollars with Henry Perkins as security within thirty days

And afterwards to wit on the same day to wit on the 7th day of October A.D. 1857 came the said Defendant by Parks his attorney and filed in said Court an appeal bond in said cause in accordance with the Ruling of said Court in the words and figures following to wit:

Know all men by these presents that

No 19

We Elbert Marcy and Henry Perkins of Kendall County and State of Illinois are held and firmly bound unto William Taylor in the penal sum of three Hundred Dollars for the Payment of which well and truly to be made we bind ourselves our heirs and legal representatives jointly severally & firmly by these presents Witness our hands and seals this Seventh day of October A.D. 1857

The Condition of the above obligation is such that whereas at the October Term of the Kendall County Circuit Court begun and held at Oswego in said County on the 5th day of October A.D. 1857 the said William Taylor did recover a Judgement against the above bounden ~~William~~ Elbert Marcy in an action of Trespass on the Clausum fregit for fifty cents besides Costs from which said Judgement said Marcy has prayed an Appeal to the Supreme Court of the State of Illinois. Now if the said Marcy shall well and truly pay said Judgement costs and damages in case said Judgement is affirmed, then the above obligation to be void otherwise to remain in full force and Effect.

Elbert Marcy (Seal)
Henry Perkins (Seal)

Dated October 7th 1857
W M Hollenbeck Clerk

[12579-10]

No 20

Now afterwards, by agreement of the Parties, to wit on the 31st day of December A.D. 1857 The same being one of the days in Vacation after the October Term A.D. 1857 of said Court Came the Defendant by B.F. Parks his Attorney and filed in said Court his Certain Bill of Exceptions in said Cause in the words and figures following to wit,

William Taylor
vs
Elbert Macey
} Trespass

Knedall County Cir. Court October Term A.D. 1857

Be it Remembered that upon the trial of the above entitled cause the Plaintiff to substantiate his Cause introduced one Orin Tyler who being duly sworn on oath said that he knews the Parties plaintiff and defendent.

Some time in June A.D. 1855 Defendent pulled down fence belonging to plaintiff said he would smash it into oven wood the damage was perhaps fifty

On Cross Examination

He stated that he did not see the Defendent pull down the fence But saw the fence after it was down all he knows about its being pulled down was what Macey the Defendent told him. He said he pulled it down there was a rose there laid out by the

No 21

Highway Commissioners and the fence was in the Road He said in the same Connection two rods of Land belonging to him and had a right there the Road was travelled before the Purpose The main Road. The Branch Road was also travelled some Plaintiff Travelled upon the main road had no other Road the main Road and branch Road were laid out at the same time. Taylor took possession two or three years ago that the fence was pulled down where the Branch went into the main Road about two Rods was pulled down. That Plaintiff was in possession of Land when the fence was ~~pulled~~ torn down

William Ryan ~~testified~~ being sworn says

Plaintiff purchased premises in fall of A.D. 1834 took possession of part in ~~the~~ fall the balance in the Spring of A.D. 1835 It was what is called the Jenkins Estate The same owned by Samuel Jenkins Dec'd at the time of Taylor purchase. Macy told me he tore down the fence and gave as a reason that it was an Road. He claimed it as a Road. He said it was laid out by the Highway Commissioners

On Cross Examination

He said he considered it a road

No 22

and had a right to take the fence away main Road had been travelled some time before the Trespass the Property originally belonged to the Jenkins Estate William Scott sold a part to Plaintiff along said road and Henry Jenkins sold the other part that it was in Rendolph County State of Illinois. Which was all the Evidence offered on the part of Plaintiff and the Plaintiff here rested his case

The Defendant to prove his case then introduced one Lewis Steward Who being sworn said he was formerly Clerk of Little Rock — Township. That he knows the Book of Town Records of Little Rock Township. That the Book here presented was town Clerks Book of of Little Rock. And he knows it was the Town Record of Little Rock Township he had been Town Clerk and knew the Record book.

That John D. Wollite was Town Clerk he is a Brotherinlaw of Wollite. That Wollite the Town Clerk was in the State of Iowa had been absent about six weeks and would not return until two or three weeks

The Defendent then offered the Records of the Town of Little Rock in relation to said Road a copy of which Record is as

No 23

follows which is duly certified to by the Town Clerk of Little Rock

First the Petition for a Road

Second the Order of the Highway Commissioners of Little Rock and the Survey and a release of damages

Third the Appeal and the decision of the Supervisors all of which Except the Release of damages were admitted by the Court.

The defendant then produced the original release of damages and proved that the signatures of Henry Dunkin Celestia Dunkin William Scott were true and genuine and that they were the only persons at the time in possession of the Land when the Trespass was committed and then offered the same in Evidence which was permitted to go to the Jury

Copy of the Record

Road Petition

To the Commissioners of Highways of the Township of Little Rock in the County of Kendall & State of Illinois

The undersigned legal voters of the said Town of Little Rock & who reside

V 024

within three miles of the proposed route for a Road hereinafter mentioned & described respectfully represent to your body that it is necessary and proper that a Road should be laid out upon the following described route to wit;

Beginning at the new travelled Galena Road on the line between Norman Fairbanks & Luke Gates thence south along the lines of Luke Gates ~~and~~ Alanson Fairbanks & Nelson Andrew or Archibald Scott the Heirs of Samuel Jenkins James Scott Sarah Scott Henry Jenkins & the Dyler lot to the South East corner of Henry Jenkins land thence East along the lines of John Penney & the Dyler lot to the West side of land belonging to the heirs of Ichy Daniel thence south along the lines of the Heirs of Daniel John Penney & John Jones to the south west corner of the said Daniels land thence through John Jones' land to the North West corner of Peleg Jones' land thence along the lines of John & Peleg Jones to land belonging Thomas R. Peat thence South Easterly along the lines of Thos. R. Peat Peleg Jones & Jedediah Lincoln to the south West corner of said Lincolns land thence East along the line of Jedidiah Lincoln & Peleg Jones to the Road leading from Bristol to Smonanck. and also a branch leaving this Road at the North East Corner of Henry Jenkins

No 25

land and running West along the lines of Henry Jenkins Elbert Marcy & the heirs of Samuel Jenkins to the South West Corner of the last named Jenkins land

The undersigned Citizens respectfully request that you will cause said Route to be surveyed & such proceedings to be had as by law in such cases required Little Rock Dec 27th 1852

D. B. W. Brady	John C. Jones
S. A. Ovitt	James M. Benedict
Rich Blow	O. J. Culver
Elbert Marcy	Burd J. Rylum
Ephraim Buck	Orville Colburn
Henry Jenkins	James Scott
Sam Scott	Archibald Scott
Chas Danell	Sarah Scott
John Danell	Andrew Scott
John C James	Peter Jones

County of Kendall } ss
Town of Little Rock } Commissioners Report

We the undersigned Commissioners of Highways in and for said Town of Little Rock & County aforesaid on application by petition did on the fifth day of March inst cause a survey to be made of the following route to wit Beginning at the Galena Road on the line between L. Gates & A. Fantault

[12599-13]

No 26

and running Southerly on Land of said Gates & Faulkner & others to a point on the Bristol and Somonauk Road on the line dividing the Lands of Peleg Jones & Zedediah Lincoln being the same Route described in said Petition which survey is as follows

Beginning at a Stake standing in the Centre of the Bristol & Somonauk Road on the line between the Lands of Peleg Jones & Z. Lincoln Running thence South Eighty two degrees fifteen Minutes West twenty seven Chains fifty one links to the South West Corner of said Lincolns farm thence North forty seven degrees thirty five Minutes West on the line between said Lincoln & J. R. Great seventeen chains thence same course between the Land of said Great & P. Jones twenty-five Chains fifty one links thence North six degrees forty five minutes West between said Lands one Chain ninety seven links to the South East Corner of John Jones land thence North seven degrees thirty Minutes West between the lands of P. Jones & J. Jones sixteen Chains thirty seven links thence same course through land of J. Jones sixteen Chains thirty seven links to the South West Corner of Lands belonging to the Estate of John Varnell thence same course between the lands of said Estate & of J. Jones seven Chains

No 27

forty five links thence same course between said Estate & lands of John Penney forty Chains thence south Eighty two degrees thirty Minutes West between the Lands of said Penney & of N. Tyler twenty chains to said Tyler's south west Corner, thence north seven degrees thirty — Minutes West between the lands of said Tyler and Sarah Scott & Jos. Scott & Scott A. Fairbanks on the East side & the Lands of Henry Jenkins Estate of Samuel Peakes Dr. Nelson & Luke Yates on the West one thousand and forty three chains to the Center of the Galena Road —.

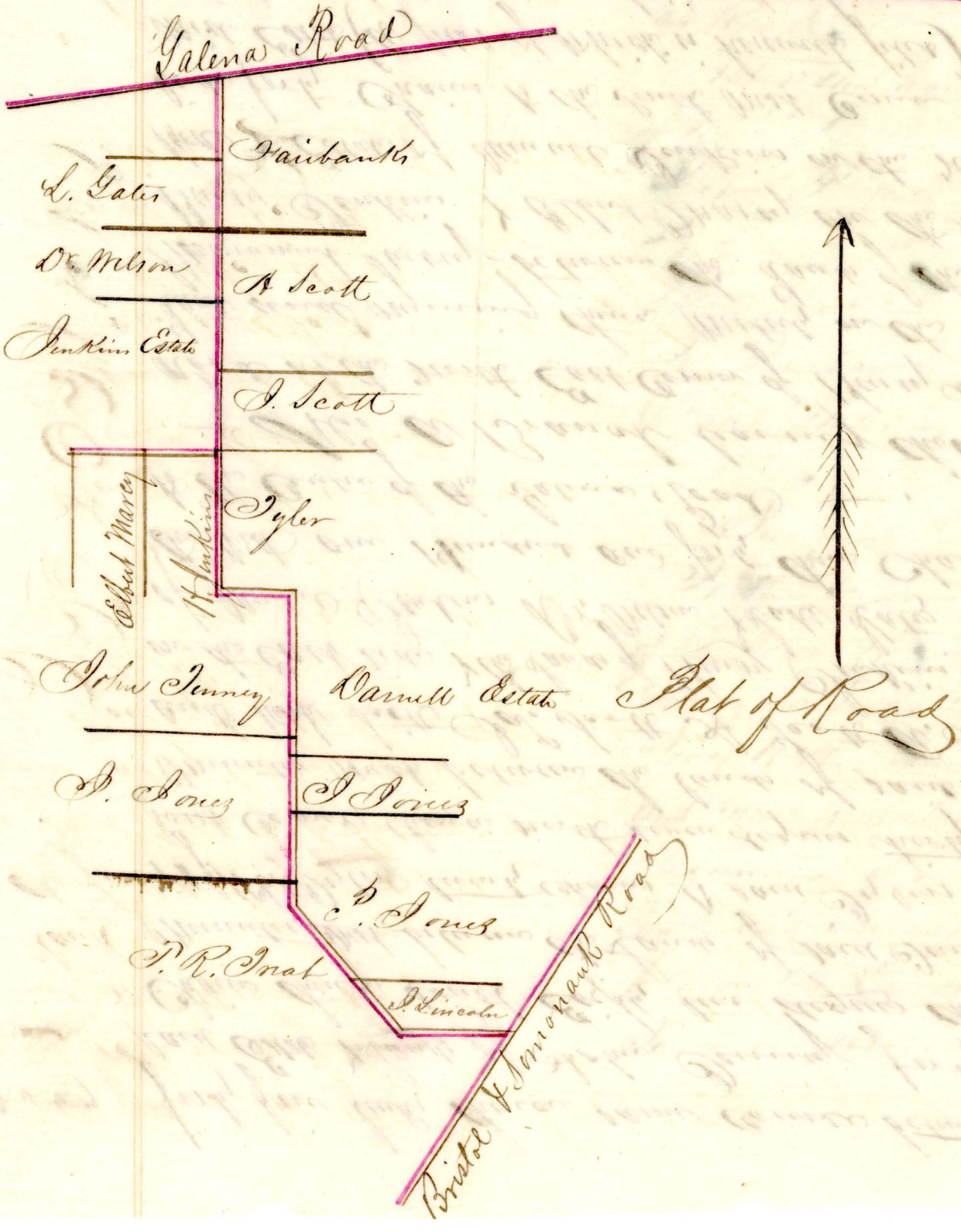
— Also a Branch leaving the above Road at the north East Corner of Henry Jenkins Land and running thence westerly on the — Government Survey between the Lands of the said Henry Jenkins & Albert Massey on the South side & Estate of Samuel Jenkins on the North side forty Chains to the South West Corner of said Estate (A plat of which is herewith filed)

And the undersigned being of opinion that it is necessary and proper that such Road be laid out it is therefore ordered that a Road four Rods wide be located & laid out according to said Survey & the same is hereby declared to be a public Highway —. We would also report that the owners of the Lands over which said Road passes have consented thereto Except J. R. Neal & Jedediah Lincoln — whose damages

Lv 28

are assessed as follows To T. R. Treat No damages
To Frederick Lincoln no damages
Given under our hands & seals this 12th day of
of March A.D. 1853

Josiah Lehman } Commissioners
A. Fairbanks } of Highways for
Wm T. Manning } the Town of Litchfield



Release of Damages

No 29

County of Kendall } ss

Know ye Settle Roll A Highway having been laid out on the day of the date hereof by William P. Manning Josiah Lehman & Alanson Fairbanks commissioners of Highways for said Town on an application by Petition therefor through certain Lands owned commencing at a point in the now Travelled Galena Road on the line between A. Fairbanks & L. Gates & Running South on the line between said Fairbanks & L. Gates A. Scott heirs of Saml Perkins and then to the south East Corner of Mary Perkins land thence East along the line of John Penney to the Tyler Lot to the west side of land belonging to the heirs of John Daniell thence south along the lands of said Daniells Estate J. Penney & J. Jones to the north west Corner of said Daniells land thence southerly through lands of J. Jones to the South West Corner of P. Jones land thence along the line of J. Jones & P. Jones to lands belonging to D. R. Treat thence southeasterly along the lands of said Treat P. Jones & J. Lincoln to the Southwest Corner of said Lincolns land thence East along the lands of said Lincoln & Peleg Jones to the Road leading from Bristol to Lemonweir and Also a branch leaving the Road

L12579-18

No 30

at the North East Corner of N. Jenkins Land and running west along the Land of N. Jenkins Albert Marcy & the Heirs of Samuel Jenkins & the South West Corner of the Last named Jenkins Land

Now therefore Know all men by these presents that We the undersigned for and in Consideration of the advantage and benefit to be derived by us respectively & the public generally do hereby release all Claims & damages by reason of laying out said Road.

Witness our hands and seals this 5th day of March A.D. 1853

John P. Jones (Seal) William Scott (Seal)
Andrew Scott (Seal) Sarah Scott (Seal)
Peleg Jones (Seal) Nancy Perkins (Seal)
A. Paubanks (Seal) John C Penney (Seal)
Albert Marcy (Seal) Celista Jenkins (Seal)

Surveyor Report

To the Honorable Commissioner of Highways of the Town of Little Rock. Report of a survey made by me under your direction from near Peleg Jones to the Galena Road near Alanson Paubanks and now particularly described as follows to wit; Beginning at a stake ~~standing~~ in the centre of the Bristol and Simonds Road and on the line between the Lands of Peleg Jones & Jeremiah Lincoln Running thence South Eighty

No. 31

two Degrees and fifteen Minutes West twenty seven Chains & fifty one links on said Line to the South West Corner of said Lincolns farm thence North forty seven Degrees & thirty five Minutes West on the Line between the said Lincoln & O. R. Neal nineteen Chains thence same course between the Lands of said Neal & Peleg Jones twenty five Chains & fifty one links to a Stake thence North sixty Degrees & forty five Minutes West between said Lands four Chains & Ninety-seven links to the South East Corner of John Jones Land thence North seven Degrees & thirty Minutes West between the Lands of Peleg Jones & John Jones sixteen Chains & thirty seven links thence same course through the Lands of said John Jones sixteen Chains & thirty seven links to the South West Corner of Lands belonging to the Estate of John Daniell thence same course between the Lands of said Estate & those belonging to John Jones seven Chains & forty four links thence same course between between said Estate & land belonging to John Tenney forty Chains thence South eighty two Degrees & thirty five Minutes West between the Lands of John Tenny & those of Royal Tyler Sarah Scott James Scott & Alanson Fairbanks on the East side & Nancy Jenkins Estate of Saml Jenkins Dr. Wilson & Caleb Gates on the West side one Hundred & forty three Chains to the Center

No 32

of the Galena Road, Also a Branch leaving the above Road at the North East Corner of of Henry Jenkins Land, Running thence Westerly on the Government Survey between the Lands of Henry Jenkins & Elbert Macey on the South side & the Estate of Saml. Jenkins on the North Side forty Chains to the South West Corner of said Estate. The above Courses were Reckoned from the Present Magnetic Meridian

Little Rock March 10th 1853

(Signed) Lewis Steward Surveyor

State of Illinois
Kendall County } ss

We Morris Gray Supervisor of town of Oswego
" Oliver C. Johnson " " " " Na-au-say
& Wm. B. Le Baron " " " " Kendall
in the County of Kendall & State of Illinois

We the Undersigned being the Owners and agents of lands over over which a certain Road has been laid out by the Commissioners of Highways of the Town of Little Rock in the County & State aforesaid the Report and order of which of which Road was filed by the said Comr. in the Office of the Town Clerk of the Town of Little Rock aforesaid on the 12th day of March A.D. 1853. feeling ourselves aggrieved by the determination

No 85

of said Commissioners do hereby appeal to you from said Order & determination on the following grounds to wit,

1st because that part of the Road lying South of the South West Corner of H Tyler's land is wrongfully & injudiciously laid out

2d Because copies of the petition for laying out said Road were not posted up in accordance with the Law in such cases made & provided

3d Because no Notice was given of the time & place when & where the Com'rs would act in the matter

4th Because the Order Report survey & plat are each indefinite & uncertain & are not made in accordance with the Statute in such cases made & provided

5th Because the damages which will be sustained by the individuals taking this appeal if said Road be opened have not assessed by said Commissioners in accordance with the Laws in such cases made & provided

6th Because by the said Order & determination private property will be taken for public purposes without a reasonable compensation in violation of the Constitution of the United States & in violation of the Constitution & laws of this State

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

No 34

8th Because said Branch is essentially a private Road & is therefore not laid out in conformity with the Statutes in such cases made and provided

9th And because one of the Comrs who assisted in laying out said Road (Alanson Fairbanks) over a part of whose land said Road is laid formerly opposed the laying out of said Road but was afterwards paid a liberal compensation for permitting said Road to be laid out over his premises & now under his oath of office refuses to allow damages to divers persons over whose lands said Road is laid out.

In consideration of the above Reasons & divers other wrongs by the said Comrs done in the Premises the Undersigned take this appeal in relation to the assessment of damages & also in relation to the laying out of said Road by said Comrs and ask that the determination of said Commissioners be be entirely reversed

Dated at Little Rock
April 19th 1853

Jas. Scott Jr
David Cox
Thos R. Peat
Jedediah Lincoln

Decision of Appeal

We the within named Supervisors of Navigation Oswego & Rendall before whom the appeal

No 35

appeal was brought by the Petition Named James Scott Jr & others did appoint in answer to their prayer the 3rd day of Nov 1833 for the Hearing of said appeal at the House of Jedediah Lincoln at 10 O'clock A.M. And on said day appointed met in consideration of the same O. C. Johnson & Wm B. LeBaron being present adjourned to Nov. 17 two weeks on which day Morris Gray being present the other two absent adjourned to Friday Nov. 18 on which day all three being present Viz. O. C. Johnson Morris Gray & Wm B. LeBaron proceeded to the investigation of the matter presented in said appeal & after viewing the proposed Road as located by the Comm.s of Highways for the Town of Little Rock do find and declare as our determination that We acquiesce with the said Comrs in laying out said Road & we do further find and award to Thos. R. Treat the sum of seventy five Dollars damages & to Jedediah Lincoln the further sum of seventy five Dollars damages which amount of damages we verily believe the said Thos. R. Treat & Jedediah Lincoln do sustain in consequence of said road passing over their Lands The Others who joined in the said appeal not being in our Estimation entitled to any damages in consequence of laying said Road

Done at Little Rock Nov. 17th 1833

Olivie C. Johnson } Superviser
Morris Gray } of Highways
Wm B. LeBaron } Oswego & Hendell

No 36

State of Illinois
Kendall County, } ss I do hereby certify that
Town of Little Rock } the foregoing is a true copy
of the Road Petition the Commissioners Report the
Release of Damages the Surveyors Report & Plat
the Appeal & the Decision of Appeal the same relating
to a certain Road therein named & Recorded in
the Record Book of the Town above named
Witness My hand this 17th day of Dec. 1853

John F. Hollister
Clerk of said Town

The Defendant then introduced Henry Jenkins
who said he was son of Samuel Jenkins deceased that
the Land on the North side of the Road marked upon
the plat as the Branch Road belonged to Samuel
Jenkins Estate at the time of laying out said
Road that the Land on the South side of said
Branch Road belonged to Defendant Nancy
and Witness That Henry Jenkins the
Witness & Celestia Jenkins were administrator
and administratrix of Samuel Jenkins
Estate at the time of laying out of the branch
and main Road That Samuel Jenkins left
four Children and a wife to wit Celestia —
Jenkins his wife his Children Henry Jenkins
John Jenkins Thomas Jenkins Jane L. Scott
the wife of William Scott who signed the Release

No 37

that Henry Jenkins purchased the interest of Thomas Jenkins in the Jenkins Estate and that William Scott purchased the interest of John Jenkins in the Estate of Samuel Jenkins That said purchase of Thomas & John Jenkins was about the time or a little after the signing of the Release to the Highway Commissioners signed by William Scott Henry Jenkins & Celestia Jenkins that William Scott and Henry Jenkins the Witness sold and conveyed to William Taylor by Deed in the Winter or Spring after the Road was laid

That Thomas Jenkins and John Jenkins were not in the State at the time of laying out the Road that Henry Jenkins and Celestia Jenkins had possession of the Land at the time of the laying of the Road that the fence was pulled down where the branch Road opens into the main Road that the fence stood about Eight feet in the main Road About two Rods was pulled down at the Opening of the Branch Road into the main Road that Samuel Jenkins in his lifetime intended to have the Branch Road he have built a fence along the whole line of the branch road to make way for it that the fences a portion of the way upon the opposite side of the branch Road had been built with Reference to a Road that his father had got up a petition for a Road

No 84

then that he had built his House ~~fronting~~ fronting on the Branch Road that said Branch Road had been travelled before the Commissioners had laid it out and after they had laid it out and also the Main Road that after the Commissioners had been on and laid out the Road the Main Road and the branch Road was immediately opened the whole of the Branch Road and all of the Main Road in the Vicinity when the fence was pulled down and people commenced travel on the same and both Roads were opened and there was some travel on them at the time Taylor took possession of the Land. When Taylor got possession he fenced up the Branch Road by putting ~~up~~ a pair of bars a crop the branch Road when the Lane opened into the Main Road that the Main Road is now all opened that Taylor has no other Road but the Main Road that he has opened the Main Road and built his fences with reference thereto

On Cross Examination he Stated that he did not know when the line was of the Main Road only what he was told that his father never had any Trouble with Marcy about the Road all the Trouble they had was about a Collar. That he measured and found the fence pulled down was Eight feet in the Main Road

No 25

Direct Resumed

There was no obstructions or fences in the main Road or Branch Road when Taylor got possession but the same was opened and travelled and some work had been done on the main Road

Celestia Jenkins said She was the widow of Samuel Jenkins deceased She signed the Release Her Husband had made his fences with reference to the Branch Road had built on the same. No objection as far as she knew to laying out of said Road on part of the Heirs of Jenkins Estate The Branch Road and main Road was opened and travelled at time of Taylors purchase. She and her son Henry Jenkins had possession of land, at time of laying of Road & Released the damages

William D. Henning said he was one of the Highway Commissioners who laid out the Road that no objection was made to the Road by the Heirs of Jenkins Estate but all who were present signed it and that the Branch Road and the main Road ~~Road~~ was opened in ~~the main Road~~ the vicinity of the Trespass at the time of laying out the same and had been travelled some

on Cross Examination he said
That there was a large Common field
fenced round the Road but no fences
in the vicinity of the ~~Road~~ Land where
Trespass Committed the New Road is
all opened now

On direct Examination Resumed
The Branch Road on Perkins side
was all fenced at the time we laid out the
Road. Was fenced for a road The Original
petition Survey and Order which are
in the Record were here shown to witness
and he stated they were the Original papers
upon which the Highway Commissioners
acted

Which was all of the Evidence upon
the part of the Defendant offered and the
Defendant here closed his Case

The Plaintiff then introduced Henry
Perkins. Said two deeds Copies of which
are herein Copied one from Henry Perkins
to William Taylor and one from William
Scott & wife to said Taylor That the deeds
described the Lands where the Trespass was
Committed

No 37

William Scott & Wife Filed Mch. 15th 1855 @ 12 m.
Deed to
William Taylor

This Indenture made the fifth day of December in the year one thousand Eight Hundred and fifty four Between William Scott & James Scott his wife being heirs at Law of Samuel Jenkins late of Kendall County Illinois now deceased parties of the first part and William Taylor of the County and State aforesaid party of the second part. Witnesseth that the said parties of the first part for and in consideration of the sum of Fifty Hundred dollars lawful money of the United States of America to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents the Receipt whereof is hereby acknowledged have aliened remised released conveyed and confirmed and by these presents do alien remise release convey and confirm unto the said party of the second part and to his heirs and assigns forever all that certain lot and parcel of Land Situate in the County of Kendall and State of Illinois known and distinguished as the West half of the North East Quarter and lot Number one of the North West quarter of Section Seven in Township Thirty Seven of Range six in the District of Landes Subject to Sale at Chicago Illinois containing one Hundred & Sixty acres also a certain piece or parcel of Land Situate in said County of Kendall being

[12574-21]

No 38

Woodland being a part of the North East fourth of the South East quarter of section five Township thirty seven North Range six East of the third principal Meridian & bounded as follows Beginning at the North West Corner of said Lot Running south seven degrees East twenty chains thence North Eighty three degrees East Eight chains & fifty links thence North nineteen degrees & forty minutes West twenty chains and thirty five links thence south Eighty three degrees West five chains to the place of beginning containing thirteen acres & Sixty four hundredths of an acre of Land It being the true intent & meaning of these presents to convey all the right title & interest of the said William Scott & Jane Scott as heirs at law of Samuel Jenkins deceased the said Jane Scott being the daughter said Samuel Jenkins deceased & also all the right title and interest of John M. Jenkins in said premises who was also one of the heirs at law of said Samuel Jenkins deceased and the Right of Dower of Mary ann Jenkins wife of the said John M. Jenkins and also all the right title and interest of said Jane Scott wife of said William Scott including her dower right as well as all her other Rights & interest in said premises

hereditaments
tenements, and
No 89

Together with all and singular the appurtenances thereunto belonging or in any wise appertaining and the reversion & Reversions Remainder & Remainders rents issues & profits thereof and also all the Estate right title interest of said parties of the first part in property possession claim and demand whatsoever as well in law as in Equity of the said parties of the first part of in or to the above described premises and Every part and parcel thereof with the appurtenances To Have & to Hold all and Singular the above mentioned and described premises together with the appurtenances unto the said party of the second part his heirs and assigns Forever

And the said parties of the first part for themselves their heirs Executors and administrators do hereby covenant and ~~agree~~ promise and agree to and with the said party of the second part his heirs and assigns that they have not made done committed Executed or suffered any act or acts thing or things whatsoever whereby or by means whereof the above mentioned and described premises or any part or parcel thereof now are or at any time heretofore shall or may be impeached charged or encumbered in any manner or way whatsoever It is understood by and between the Parties to these presents that the said party of the second part buys & holds the above bargained & described premises subject to

No 40

the Dower ~~right~~ of Clarissa Jenkins the widow of Samuel Jenkins late of said County of Kendall now deceased

In Witness Whereof the said parties of the first part have hereunto set their hands & seals the day and year first above written

Sealed and Delivered
in the Presence of

Wm Ewin
Wm Ryan

Wm Scott (Seal)
Jane Scott (Seal)

State of Illinois
Kendall County } ss

I William Ewin a Justice of the Peace in and for said County in the State aforesaid do hereby certify that William Scott & Jane Scott his wife who are personally known to me as the Real persons whose names are subscribed to the above & are appeared before me this day in person & acknowledged that they Executed and delivered said Deed as their free and voluntary act for the uses and purposes therein set forth & the said Jane Scott wife of the said William Scott having been by me Examined separate & apart & out of the hearing of her said Husband and the contents & meaning thereof having been by me made known and fully Explained to her acknowledged that she had freely & voluntarily Executed the same and relinquished her dower to the Lands and tenements therein mentioned as well as all her other rights & interests in

the same without compulsion of her said Husband and that she does not wish to retract the same

No 41

Given under my hand and seal this fifth day of December A.D. 1834

William Irwin
Justice of the Peace

Henry Jenkins
Deed to
William Taylor

Filed June 5th A.D. 1855 10½ o'c A.M.

This Indenture made this twenty third day of April in the year of Our Lord one thousand Eight Hundred and fifty five

Between Henry Jenkins of the County of Kendall and State of Illinois party of the first part and William Taylor of the County & State aforesaid party of the second part Witnesseth that the said party of the first part for and in consideration of the sum of Three Hundred and fifty Dollars to him in hand paid by the said party of the second part the Receipt of which is hereby acknowledged has remised release sold conveyed and quit claimed and by these presents does Remise release sell convey and quit claim unto the said party of the second part his heirs and Assigns forever All the following described lots or parcels of Land situate lying and being in the County of Kendall and State of Illinois one Piece

No 42

is known is known and designated as the West half of the North East quarter of Section Number seven (Viz) Township Thirty seven (37) North of Range six (6) East of the third principal containing Eighty acres of land be the same more or less

The other piece is known and designated as a part of the North East Quarter of the South East Quarter of section Number five (5) in said Township and bounded as follows to wit Beginning at the North West Corner of said North East Quarter of said South East Quarter of said section No five thence Southerly along the West line of the said North East Quarter of said South East Quarter of said section Eleven (11) Chains and twenty seven & five links thence Easterly on a line parallel to the North line of said quarter six (6) Chains and ninety seven (97) links Thence Northerly to a stake on said North line of said Quarter which stake stands ~~on the said North line~~ five (5) Chains Eastery from said North West Corner of the said North East Quarter of the said South East quarter of said section Thence Westerly along said North line five (5) Chains to the place of beginning containing six (6) acres and seventy five Hundredths of an acre of land be the same more or less

To have and to hold the same together with all and singular the Appurtenances and privileges thereunto belonging

3

No 43

ordain anyloise thereunto appertaining and all the Estate right title interest and Claim whatsoever of the said party of the first either in Law or Equity to the only proper use benefit and behoof of the said party of the second part his heirs and assigns forever And the said party of the first part for himself his heirs Executors and Administrators does covenant and agree to with the said party of the second his heirs and Assigns that he will warrant and forever Defend the aforesaid premises to be free and clear of all Claims or Claims of all and every person or persons Claiming or to Claim by through or under him and none other

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written

Sealed and Delivered in
Presence of
Archibald Sears

Henry Dunkins (Seal)

State of Illinois
Kendall County } ss

I Archibald Sears a Justice of the Peace in and for said County & State aforesaid do hereby certify that Henry Dunkins who is personally known to me as the real person whose name is subscribed to the above deed appeared before me this day in person and acknowledged that he Executed & Delivered the said Deed as his free and voluntary act for the uses and purposes therein set forth. Given under my hand this 23d day of April in the year of our Lord one thousand Eight Hundred & fifty five

Archibald Sears
Justice of the Peace

[12579-24]

No 24

Which was all the Evidence offered on the part of Plaintiff or Defendant and no other Evidence being offered the Court instructed the Jury as follows

Instruction for Plaintiff

1 The action of Trespass is a possessory action depending on the Possession and if the Jury believe from the Evidence that the Defendant committed the Trespasses complained of on land in the possession of the Plaintiff it is immaterial so far as his right to recover in this case is concerned whether he had title to the premises or not

"Given"

2 If the Jury believe from the Evidence that the Defendant broke down the fence on land in the possession of the Plaintiff and passed over the said land with his teams & cattle the Defendant in order to justify such Trespass on the ground that the place was a common and public Highway laid out in 1833 is bound to show that the damages sustained by reason of laying out or opening said Road were ascertained either by agreement between the owners of the land & Commissioners of Highways or assessed by the Commissioners after notice given by the Commissioners to the parties of the time & place where they would act on the question of damages that they might be present if they wished so to do or that the Damages released by the owners

"Given"

3d

No 45

That to afford a legal presumption that the Road in question was a public Road giving the Defendant a right to pass over it and unless obstructed from the fact of its having been Travelled it must appear from the Evidence that it has been Travelled by the public as a highway and recognized and kept in repair as such by the commissioners and others whose duty it was by law to open and repair public Roads

"Given"

4th

That before the public have a right to open and use a road laid out by Highway Commissioners It must appear from the Evidence that the damages of the several owners of the Land over which it passes have been ~~fixed~~ agreed upon between the Commissioners and the Owners or assessed by the Commissioners after giving notice to said owners of the time and place when & where such assessment was to be made thereby giving them an opportunity to be heard or that the right of way secured to the Public by the Release of the Owners files in the Town Clerks office

"Given"

5th

Assessments of damages on securing the right of way by agreement apcpment or release is not to be presumed to be done without Evidence of the fact and the burthen of proof is on those claiming the right of way to prove that the damages have been ascertained by agreement

"Given"

[12577-25]

No 46

or appeared as the law directs or that the owners have released the same

6th I do say below from the Evidence that Samuel Jenkins died owning Real Estate and without making a will leaving Sam Henry John & Thomas Jenkins his Children and heirs at Law They were tenants in common of said Real Estate and the Release of one tenant in common of the Right of way cannot Extend beyond his own Claim for damages and cannot effect the right of his Cotenant

"Given"

7th That to constitute ~~and~~ or Establish a road a public Road by dedication it is necessary that the Owner grant the land to the Public for that purpose and that it has been accepted by the Commissioners recognized by them and worked & kept in Repair by them & others whose duty it was to Repair Public Roads

"Given"

8th The Plaintiff by his purchase succeeded to all the Rights vested in his grantors in Reference to the Land in question at the Execution of the Deed of Conveyance

"Given"

9th That Celestia Jenkins as widow and administratrix of Samuel Jenkins

No. 9 "Given"

Altho' in possession of the premises when the Road was laid could not without authority from the several owners do any act which would bind them in reference to said Road

10th "Given"

That although the Jury might believe from the Evidence that the Road in question was properly laid out and the public had a right to pass over it — yet if they believe that the Deft. in removing the obstructions committed unnecessary damage he is liable in this action to the Plaintiff for such damages

To the giving of which instructions and each of them the Defendant then and there Excepted

The Defendant asked the Court to give the following instructions

No 1 "Given"

If the Jury believe from the Evidence that Samuel Jenkins was the Owner of the Land in his life time & while he owned the Land fenced out and granted to the Public a right of Way over the Lands in controversy on what is called the Branch road and that said grant of a road by Jenkins before the same was worked by Jenkins was accepted by the Highway Commissioners of said Town of Little

[13579-86]

No 28

Rock then that would constitute a highway by dedication and the Defendant would be justifiable in pulling down all obstructions which interfered with said right of way

No. 2

"Refused"

The Jury are instructed that the Records of the Town of Little Rock introduced before the Jury are prima facie evidence that the Road was laid out and declared a highway and if the Jury further believe that the Owner and occupant of said land adjacent to said line of Road opened said Road and used it as a public Highway That would constitute a highway and the burthen of proof would be upon the Plaintiff to show that ~~the~~ some one or more of the precedent steps in such road ~~petition~~ proceeding were irregular or illegal and in the absence of such proof they should find for the Defendant so far as relates to the question whether it was a legal road or not

No 3

"Given"

If the Jury believe from the Evidence that there was a legally laid out ~~Hig~~ highway and opened by the parties interested and that the same after being laid out and opened was obstructed and that Mercy the Defendant only took such obstructions out of said road doing no unnecessary damages then they should find for the Defendent

No 29

No. 4

"Refused"

The Jury are further instructed that the presumption of Law are that the Highway Commissioners have performed their duties and that their acts in laying out and declaring said Road a Highway are legal and the burthen of proof is upon Taylor to show that such proceedings are not regular and legal and in the absence of Every proof rebutting such presumption the jury so far as relates to the legality of said Road should find for the Defendant

No 5.

"Given"

The Jury are further instructed that the title to land cannot be proved by parol The deeds being the best Evidence all be produced

No 6

"Given"

If the Jury believe from the Evidence that the Plaintiff has only the possession of Henry and Celestia Jenkins and Claims possession under them or from them only thus he takes possession subject to all prior & former grants which they had made and comes only into the right which they possessed & no more

No 7

"Given"

If the owner of Land over which it is proposed to construct a road claims an assessment of damages he must in the first instance if notified object to the location of the Road across his land or he will be precluded from afterwards insisting upon damages

[12879-25]

No. 8

"Given"

If the Jury believe from the Evidence that Henry Jenkins and Celestia Jenkins were in possession of the land upon which the Road is located and have an interest therein and that they released all damages to which they were entitled by reason of laying out of said Road and that they caused permitted and suffered said road to be opened and remain open as long as the same remained in their possession and that such release of damages and order opening said Road had been duly filed in the Town Clerks office of said Town and that subsequently Taylor the Plaintiff only came into the possession & rights of Celestia and Henry Jenkins under them with notice of such grant and release to the public the he came into possession subject to the rights only of Henry & Celestia Jenkins and his possession was subject to such release and grant to the public of said Road and the Defendent had a right to pass and repass over said road as against him said Taylor and remove all obstructions therein

(Qualification) But it is for the Jury to determine from the proofs in the case whether Taylor came into the possession of the Lands in controversy under Celestia & Henry Jenkins or under Thomas Jenkins & his sister Mrs. Scott

No. 9
"Given"
No. 51

If the Jury believe from the Evidence that the land comprising said contested road Rents was not an enclosed or cultivated field and that the parties having possession thereof opened the road then it was not necessary to give sixty days notice in order to open the same

No. 10
"Refused"

If the Jury believe from the Evidence that Henry Jenkins & Celesta Jenkins had possession of and were part owners of the premises over which said road was laid out have released their damages and dedicated the same to the public for a Highway then so far as relates to the interest of the said Henry & Celesta ~~Jenkins~~ in said land until such Order making said Highway is reversed or obstructed then so far as relates to their interest the action of Trespass cannot be maintained and in the absence of proof shewing a dissent of the said Jenkins or the Highway the Plaintiff cannot maintain his action of Trespass in other words if the land is possessed in common by several individuals one cannot sue in person for Trespass but all must join as plaintiffs

No 8-2

No. 11
"Refused"

That if the Plaintiff only had part Possession of said property and held possession jointly with other then he cannot sue in his own name only but must sue in the name of all parties who hold said possession in common in order to maintain his action of Trespass

No 12
"Refused"

If the Jury believe from the Evidence that the road was a legally laid out road and although passing through enclosed and cultivated fields, yet if the parties in possession of such fields and owners of the same had opened and travelled the same in the locality where the said Trespass is alleged to be committed for a considerable length of Time and Taylor afterwards came into possession of the same and placed obstructions across said road then Macy had a right to pull down the same doing no unnecessary damage and it was not necessary to give sixty days notice to open the same

Which was refused by the Court and the Defendant then and there Excepted

The Jury found a verdict for the Plaintiff for fifty Cents damages Whereupon the Defendant moved for a new Trial for the following Reasons

First The Court Erred in rejecting Testimony

Second The Court Erred in giving Plaintiffs instructions and also in refusing Defendants instructions

Third The Verdict is Contrary to law and Evidence

No 5-8

Which Motion for a New Trial was overruled by the Court & the overruling of which Motion the Defendant then and there Excepts and prays that this his bill of Exceptions may be signed and sealed by the Court and made a part of the Record herein

M. E. Hollister

Judge of said Court (Seal)

State of Illinois } ss
Kendall County }

I George M. Hollenback Clerk of the Circuit Court in & for said County in the State aforesaid do hereby Certify that the foregoing is a true and perfect and correct Transcript of all proceedings process and papers in said Court in the Case of William Sayler vs Albert Macy in an action of Trespass and that the said proceedings appear in the Order in which they occurred and the papers in the order in which they were filed in said Court And that Entries of Record and the same are all the proceedings had and all the papers remaining on file in my office pertaining to said Cause

In Witness Whereof I hereunto set my hand and affix the seal of said Court at Oswego in said County the 22d day of February in the year of Our Lord one thousand Eight ~~thousand~~ and fifty Eight

George M. Hollenback
Clerk

Supreme Court, 3d Division – Apr. Term 1858

Elbert Marcy
vs. } Appeal from Kendall
William Taylor } Co. &c –

Now comes the said appellant, by Leland & Leland, & B. F. Parks his attorneys, & says, that in the record & proceedings in said cause, there is manifest error, in this, to wit:

1st – The Court erred in giving plaintiff's instructions –

2d The Court erred in refusing defendants instructions,

3d – The verdict is contrary to the law & Evidence – And the Motion for a New trial should not have been overruled. Wherefore, for these & other errors apparent on the face of the record, said appellant prays that the judgment of the Court below be reversed annulled, set aside & held for naught.

Leland & Leland, & B. F. Parks
for appellant

[12579-30]

244.

Elbert Mearcy
vs.
William Taylor

Appeal from Kendall

Record & ~~Assignment~~
of errors -

Filed April 22, 1858
L. Leland
Clk

Fee. $15

L & L. F. B. Parks for
appelts

STATE OF ILLINOIS, SUPREME COURT,

APRIL TERM, A. D. 1858.

ELBURT MARCY, Appellant, vs. WILLIAM TAYLOR.

Appellant's Brief.

First Point. The second, fourth, fifth, and sixth instructions on the part of Plaintiff, given, are obnoxious to the following objections. They say notice must be given. No notice required by law; see *Session Laws of* 1851, *Township Organization Act,* Article 24, Sec. 6th. The party claiming damages must make the claim in proper time or will be precluded; 1 *Gilman* 10, on question of damages, also Ferris vs. Ward, 4 *Gil.* 499, Sanguman vs. Brown 13th, Ill. 207.

Second Point. The second instructions and also the fourth instructions for defendant contain correct propositions of law applicable to the evidence and the case; Nealy vs. Brown, 1 Gilman 10, 4 Gilman 499.

Third Point. The public had at least, in the premises upon which said trespass was committed, the interest of Celestia Jenkins, Henry Jenkins and William Scott, and Taylor had the interest, if any therein, of Thomas Jenkins and John Jenkins. He took the possession away

from the public; the public were using for a road, Taylor took it away. He sues in trespass for pulling obstructions out of said road, owned and possessed in common by Taylor and public. Could he maintain trespass against a citizen passing thereon. The citizen for the purpose of using the road, had all the rights of the public, could he be sued in trespass. Could one tenant in common sue alone any person in trespass. See the following authorities: 1 Chitly's Pleading 75, 3 Sanders Pleading and Evidence, marginal page 1133, and authorities there cited. If they could be sued seperately it is under Statute, and they must declare and alledge so as to bring themselves within the provisions of the Statute. That is not done.

The right to a part of the land in controversy was absolutely vested in the public, upon which the trespass was commited The public had an older and better title to part of said land than Taylor. They held it for the purposes of a highway and they had the right to use it for that purpose. Marcy was using it for that purpose, and he might use it. His title in any contingency to the large part was better than that of Taylor. The land was not divided. Under the law could Marcy be sued by Taylor.

Fourth Point. Taylor succeeds only to the interest of Henry Jenkins and William Scott. They are his grantors. But before they sold to Taylor they had released to public for a road. That road was made a public record in

the town. It was filed in town clerk's office. The road was all opened by Henry Jenkins before Taylor purchased. Now I ask how can Taylor, under these circumstances claim the right to sue the defendant, Marcy.

If Taylor relies on possession the public had possession, Taylor wrongfully took it from them, and then upon that possession sues those whom he had deprived of that possession wrongfully and recovers against them. The public had possession for a road. He deprived them of that, fenced it up, Marcy pulled it down to travel in road.

Fifth Point. In the Court below the only point made was, that Taylor succeeded to the interest of John and Thomas Jenkins. That they had not released under the decision of this court referred to in the first point made. Could John and Thomas Jenkins make any objection to the road, had they sued. The petition was duly published, they had at least constructive notice. Their agents had full knowledge of it. They signed the release. No objections were made at the proper time, and are they not under the law as laid down by this Court, concluded from claiming damages.

The Plaintiff did not prove thas he was the owner of the interest of John and Thomas Jenkins. There is no evidence of a conveyance by them at all. If there is any evidence tending to prove this fact, there is certainly none to show that they conveyed to Scott and Henry Jenkins, after the latter two signed the release of dama-

ges. If it was before, then the Plaintiff was not in a position to object to the road, because the damages had not been assessed; again, the claim for damages would not pass by a deed.

Sixth Point. The verdict was against both law and evidence. The verdict was clearly wrong. Taylor without any right whatever, shuts up a public road. It is taken away and he sues and recovers in trespass. If any thing could be grossly and at the first blush wrong, it seems to me the verdict in this case is.

B. F. PARKS,

Attorney's Brief.

BEACON Printing and Bookbinding House, Aurora, Ills.

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Elbert Nancy

v

William Taylor

Argument

&

Brief

Filed May 6, 1858

S. Leland

Clk

STATE OF ILLINOIS, SUPREME COURT,

APRIL TERM, A. D. 1858.

ELBURT MARCY, Appellant, vs. WILLIAM TAYLOR.

Appellant's Brief.

First Point. The second, fourth, fifth, and sixth instructions on the part of Plaintiff, given, are obnoxious to the following objections. They say notice must be given. No notice required by law; see *Session Laws of* 1851, *Township Organization Act,* Article 24, Sec. 6th. The party claiming damages must make the claim in proper time or will be precluded; 1 *Gilman* 10, on question of damages, also Ferris vs. Ward, 4 *Gil.* 499, Sanguman vs. Brown 13th, Ill. 207.

Second Point. The second instructions and also the fourth instructions for defendant contain correct propositions of law applicable to the evidence and the case; Nealy vs. Brown, 1 Gilman 10, 4 Gilman 499.

Third Point. The public had at least, in the premises upon which said trespass was committed, the interest of Celestia Jenkins, Henry Jenkins and William Scott, and Taylor had the interest, if any therein, of Thomas Jenkins and John Jenkins. He took the possession away

from the public; the public were using for a road, Taylor took it away. He sues in trespass for pulling obstructions out of said road, owned and possessed in common by Taylor and public. Could he maintain trespass against a citizen passing thereon. The citizen for the purpose of using the road, had all the rights of the public, could he be sued in trespass. Could one tenant in common sue alone any person in trespass. See the following authorities: 1 Chitly's Pleading 75, 3 Sanders Pleading and Evidence, marginal page 1133, and authorities there cited. If they could be sued seperately it is under Statute, and they must declare and alledge so as to bring themselves within the provisions of the Statute. That is not done.

The right to a part of the land in controversy was absolutely vested in the public, upon which the trespass was commited The public had an older and better title to part of said land than Taylor. They held it for the purposes of a highway and they had the right to use it for that purpose. Marcy was using it for that purpose, and he might use it. His title in any contingency to the large part was better than that of Taylor. The land was not divided. Under the law could Marcy be sued by Taylor.

Fourth Point. Taylor succeeds only to the interest of Henry Jenkins and William Scott. They are his grantors. But before they sold to Taylor they had released to public for a road. That road was made a public record in

the town. It was filed in town clerk's office. The road was all opened by Henry Jenkins before Taylor purchased. Now I ask how can Taylor, under these circumstances claim the right to sue the defendant, Marcy.

If Taylor relies on possession the public had possession, Taylor wrongfully took it from them, and then upon that possession sues those whom he had deprived of that possession wrongfully and recovers against them. The public had possession for a road. He deprived them of that, fenced it up, Marcy pulled it down to travel in road.

Fifth Point. In the Court below the only point made was, that Taylor succeeded to the interest of John and Thomas Jenkins. That they had not released under the decision of this court referred to in the first point made. Could John and Thomas Jenkins make any objection to the road, had they sued. The petition was duly published, they had at least constructive notice. Their agents had full knowledge of it. They signed the release. No objections were made at the proper time, and are they not under the law as laid down by this Court, concluded from claiming damages.

The Plaintiff did not prove thas he was the owner of the interest of John and Thomas Jenkins. There is no evidence of a conveyance by them at all. If there is any evidence tending to prove this fact, there is certainly none to show that they conveyed to Scott and Henry Jenkins, after the latter two signed the release of dama-

ges. If it was before, then the Plaintiff was not in a position to object to the road, because the damages had not been assessed; again, the claim for damages would not pass by a deed.

Sixth Point. The verdict was against both law and evidence. The verdict was clearly wrong. Taylor without any right whatever, shuts up a public road. It is taken away and he sues and recovers in trespass. If any thing could be grossly and at the first blush wrong, it seems to me the verdict in this case is.

B. F. PARKS,

Attorney's Brief.

BEACON Printing and Bookbinding House, Aurora, Ills.

244.

Elbert Mercy

vs

William Eagler

Argument & Brief

Filed May 6. 1858.

L. Leland

Clerk

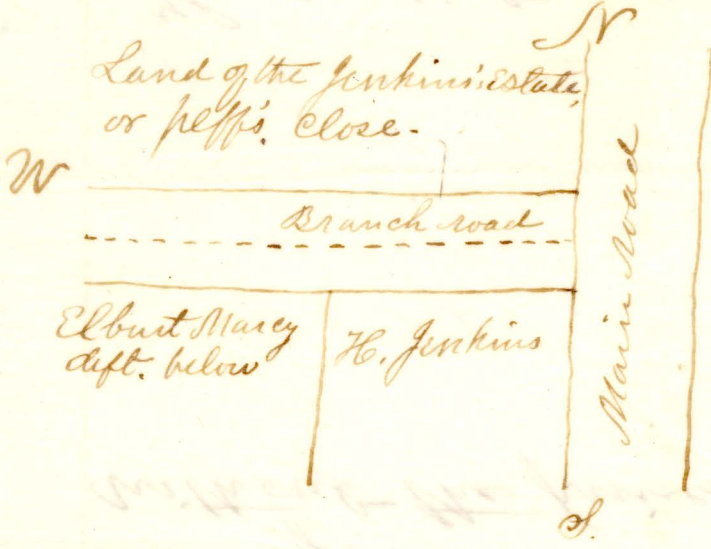
Elbert Macy
vs
William Taylor

Argt for Appellants

Although there is a verdict in this case, there is no judgment for the amount of the verdict, but only a judgment for costs. The plaintiff to be entitled to costs which are a mere incident to a judgment for damages, should also have had a judgment for damages. He cannot have the incident without the principal thing.

The verdict was against the evidence. The evidence shows the regular laying out of a main road & a branch, the portions of which necessary to be examined for the purposes of this case,

are represented by the following plat –



There is no question about the main road. The evidence shows that the plaintiff below has himself dedicated this road to the public – that since the laying out it has been used by the public & is fenced out & acquiesced in by the plaintiff. The only questions are, 1st. whether the branch road had become a public highway at the time of the alleged trespass, & 2d –

Whether the place of the trespass was on the close of the plaintiff & not in a highway.

I propose first to concede that the branch road was not a public highway, & then show that the plaintiff should not have recovered.

The reasons are,

1st. That the evidence shows that the place of the trespass was in the main road at a place eight feet east of the east end of the branch road & in the main road - that is, the west fence of the lane fenced for the main road is eight feet east of the west line of the road, making the place where the fence was thrown down, in the main road.

2d. The evidence is, that two rods of the fence were down on the west line of the main road, at a place between

the north & south lines of the branch road, ~~out the said west line~~ - that is, if the place of throwing down the fence was far enough west, to be west of, or on the west line of the main road, - but, aside from the declaration of the defendant below, there is nothing to show which two rods of the four rods of fence across the end of the branch road were thrown down except that from the declaration of the defendant that he had a right to two rods, made at the time of his admission that he threw it down, it is evident that it was the southerly two rods, & that it was really on the land of Henry Jenkins, because the branch road was on the line between the land of the plaintiff on the north & that of the defendant & Henry Jenkins on the south, & it is evident that the centre line of the road was the boundary line between the proprietors on the north & those on the south. (see dotted line on plat.) If then, the plaintiff below had extended the East fence of his enclosure south across the branch road,

& joined it to the north fence of the enclosure of Henry Jenkins & the defendant threw down the south two rods of the fence so placed by plaintiff across the branch road. The defendant did not commit a trespass on the close of the plaintiff, but his close would only extend south to the centre line of the road, & not to the south line of the road.

It is probable, though there is nothing expressly said about it, that the fence which the deceased had placed along the north line of the branch road, had been taken away by plaintiff, & his east & west fences extended south across the road to the north fence of the defendant & of Henry Jenkins.

But, the branch road was a good road. The land owned by the plaintiff at the time of the trespass, at one time belonged to Samuel Jenkins deceased, & the evidence shows very clearly a dedication by him of the north half or northerly

[12579-40]

two rods of the branch road during his life. He had fenced it out by a fence on the north line of the road & had ~~built~~ built his house fronting on the branch road.

It is true that this was before, & in anticipation of, the laying out, but surely, an offer to the public authorities, & fencing it out for a road, followed up by an acceptance & laying out by the Commissioners, & an acquiescence in the use of the road after it was laid out by his heirs, would make a good dedication, & Taylor afterwards becoming the owner of the north two rods of the road, could not revoke it.

Again, the whole title to the whole of the plaintiff's land passed through the widow of Samuel Jenkins, Henry Jenkins, & William Scott & wife, after they had released all claim to damages.

Samuel Jenkins left a widow & four children viz; Henry, Jane wife of William Scott, John & Thomas.

The interest of John & Thomas passed to Scott & Henry, & Scott & wife, Henry & the widow sold to the plaintiff.

It does not clearly appear whether Henry Jenkins & Scott owned the interest of John & Thomas at the time of the release of damages by them, or whether they got it after the release.

If, at the time of the release, the whole interest was in those who released the damages, & of course, the road was a public highway as against those claiming through those who released - but, would it not be the same though Henry Jenkins & Scott released the damages first, & acquiesced in the road as a public highway & afterwards bought the interest of John & Thomas to land in a highway they had dedicated to the public? We insist - that, if Scott & Henry had once acquiesced in the road by receiving their damages & permitting it to be used, they did not acquire the right to the damages of John & Thomas by a-

[12579-41]

deed of the land, so they could shut up the road & prevent the use of it by the public, & that no such right passed through them to the plaintiff. The right to these damages would no more pass to them the right to damages for a trespass committed prior to the execution of the deed.

Whatever may be the case as to the north half of the road, the south half or southerly two rods was a good highway of that width, & the plaintiff could not have stopped the defendant from using the road of that width, & it ~~very~~ ~~very~~ very clearly appears that he was obstructed in the use of the south half, & from the south half removed an obstruction as he lawfully might.

*

If the title of Thomas & John passed through Scott & wife & Henry down to the plaintiff so as to ~~have~~ leave him ~~them~~ as to the interest of the former two in the same condition they would have been in if they had not sold at all, then the road as to the south half of it being valid & as to the undivided half of the north half it would be good, and the defendant as one of the public had the right to use the land in the road in common with the plaintiff as to the north half, & had a perfect right as to the south half, & the action of trespass by one tenant in common cannot be maintained against another tenant in common who has an equal right to the possession, & John & Thomas if they had not sold, could not have maintained trespass against one of the public which had an equal right to the possession & use of the land. Their remedy, if any, must be something else besides trespass quare clausum against

[12579-43]

a person acting under the rights of a co-tenant. So, whether the act of trespass was on the north half or on the south half of the branch road, or on the main road, it cannot be ~~mentioned~~ maintained.

Could John & Thomas have maintained trespass against Scott & Henry for any act done by the latter on the land owned by them all, if there had been no sale & no road, especially for an act that the latter as tenants in common would have had a right to do, to wit; to take down the fence & pass across the land.

Whatever view the Court may take of the question of the verdict being against the evidence, the law as applicable to the facts of this case, was not laid down right.

The 1st instruction is not correct, because, though the plaintiff may have included the land of Henry Jenkins & of the defendant in his enclosure by extending his east & west fences south, so as to join the north fence of the defendant & Henry Jenkins as before mentioned, he ~~the~~ could not maintain trespass for any act done by the defendant on the south two rods in width of the road on his own land or on that of Henry Jenkins, whether this was in a highway or not, because, he would have been wrongfully in possession of this strip of land. He should have been lawfully or properly in possession, or should have had a right of possession. A mere tortious possession obtained by trespass will not entitle the possessor to sue the real owner of the land.

Again, if this be the law as applicable to this case, then, whenever a person fences up a road & obtains possession of the land in the road, trespass can always be maintained by the possessor against one who throws down the fence in the road. He could, if in possession of the road, maintain trespass against one who removed the obstruction from the road whether he had title to the ~~road~~ premises in the road or not, as although the public had the title to the right of way.

The 2d instruction is obnoxious to the same objection as that made to the last, & to the further objection that it is laid down as the law that a public highway cannot be established unless the damages were agreed upon or assessed or released.

There is evidence tending strongly to show a dedication of the road by Samuel Jenkins & an opening & using of it during his lifetime, & an acquiescence in such use by his descendants before the plaintiff obtained title. And it also clearly appears that the south half of the branch road at any rate by the dedication of the defendant & Henry Jenkins, was a highway, & that the defendant had the right to remove obstructions from this part of the road; and the evidence also tends to show that it was on the south two rods, that the removed obstruction was placed. There were a good many ways in which the defendant might have been justified in removing the obstruction from the place where he did on the ground that there was a highway there without an assessment of damages. The locus in quo may have been far enough east to have been in the main road & probably was according to the evidence.

[12579-44]

Could the plaintiff close up the main road now & maintain trespass against one who removed the obstruction?

Although by the statute referred to in the case of Norton vs Stadley 17 Ill. 556 the road cannot be opened & used by the public till the damages are assessed or agreed upon or released, yet it does not follow that when the owner has permitted it to be opened & used by the public, that he or his grantees ~~could~~ can, after it has been so opened & used, & after the business of the country has accommodated itself to the road so opened & used, & fences & houses have been built with reference to it, shut it up again. This provision of the statute does not, surely, cut off all dedication or prescription & permit the owner or his grantees at any subsequent time to close up a road which has been opened & used. ~~of~~ because the damages have not been assessed or otherwise adjusted

The objection to the 6th instruction, is this — Although the release by one tenant in common does not affect the others, yet, if two of the tenants in common had bought out the other two before the two purchasers released the damages, the whole of the damages would have been released. And if the two purchasers before the purchase, released their damages & permitted the road to be opened & used, & fences & buildings to be built with reference to it, they could not, after having done so, buy the interest of the other two & thus shut up the road they had permitted to be opened & used. Could they have permitted the road to be opened & used several years & fences, houses & barns to be built on it, & thus buy in the interest of some owner of an undivided interest in the land ~~under~~ in the road & shut it up? This would be a great fraud.

If the deed would pass the claim for damages under such circumstances, it ought not to convey a right to interfere

[12579-48]

& shut up a road, they had once permitted to be opened & used. It should be considered a purchase subject to the easement acquired by the public with their consent.

The 7th is not right. There may be an acceptance of a dedication by the public by a public user without an acceptance by the Commissioners of Highways, or without any working or repairing the road. Indeed, the acceptance of the dedication would precede the working & repairing it & may be complete without any work or repairs being done on it. The public authorities should not work & repair the road till after it was dedicated or given to them. These acts are merely evidence of an acceptance, but not necessary evidence of it. If the owner should fence out a strip of land & say to the Commissioners, "take this as a public highway" &

they should say "we take it for that purpose" the dedication or gift & acceptance would be complete.
The road so dedicated might require no work or repairs for years & the donor could not take it back after it had been used as a road, & the business of the neighborhood had accommodated itself to it.

The jury were instructed that all these things were necessary, & yet part of the facts might have been enough to have satisfied the jury that there was a dedication.

The 2d instruction for the defendant which was refused should have been given. The record of the proceedings with the additional fact that the owners & occupants of the land opened the road & used it as a public highway, would make it a highway. Here are all the ingredients of a dedication - a location or description of the land granted for a road -

a consent on the part of the owners that it might be used for such purpose, - & an opening & user by the public for that purpose.

The 12th instruction ~~was~~ of defendant was improperly refused.

This is based on the hypothesis that the road was well laid out, & that the owners had opened it, & that it had been travelled for a considerable length of time before Taylor obstructed it. Enough has already been said on the subject of the applicability of the case of Norton vs Shadley to the case of a road which had been opened & used with the consent of the owner of the land.

There may be objections to the giving or refusing other instructions, but, it is believed that the above views will apply to the others.

Leland & Leland
for Appellant

244 = 104

Macy vs Taylor

Argt for appellant

Filed May 11 1888
S Leland
Clk

Elbert Marcy
vs
William Taylor

Brief for Appellee

As to Plaintiffs first point:

If there is no judgment there is nothing to appeal from and nothing to reverse or affirm and the Appellant should be turned out of Court.

There is no judgment for costs on the final hearing; There is a judgment for costs at the term before, but that was the costs of a continuance, which was granted upon Appellants motion therefor at his costs

It is alledged that the verdict is contrary to the Evidence for two reasons:

1st Because the case shows that the plaintiff below had himself dedicated the road to the public -

[12579-48]

I answer:

There is no evidence of such a dedication -

There is evidence that the tract was fenced out there, but whether for private accomodation or public use does not appear

2 - It is said, that the evidence shows that the place of the trespass was in the main road -

I answer: There is conflicting evidence upon that point and the court will not disturb the verdict of the Jury upon it

Defendant had no right to tear down the fence of the plaintiff, even if it was a little in the road, without first giving him notice to take it down -

The Branch road was not a legal road -

It is clear that the damages

to be sustained by Jane Scott were never released or paid in any manner.

There was no release by Thomas Jenkins or John Jenkins. It does not affirmatively appear that they had conveyed their interest in the estate to Henry Jenkins, Scott at the time of the release of damages by them: This should have been made to appear by those affirming the legality of the road.

It is idle to say, that because Henry Jenkins & Scott released any claim of damages, which might be done to lands which they then owned, that they are estopped from setting up a claim for damages to interests which they subsequently acquired, because they may have donated to the Town five dollars it does not follow that they can be compelled to give ten —

It is said that if the road was opened before they bought the

[1254949]

right to damages did not pass to them by their purchase

Let us see:

Before the sale to Scott & Henry Jenkins, Thomas & John Jenkins owned a certain right or interest in that land, not subject to a right of way on the part of the public at all, their damages not having been paid or released, of course they had a right to fence up the road if any body opened it. By their deed to Scott & Henry Jenkins, they conveyed precisely the same right to them, they became the owners of the land subject to no easement, and if any one tore down the fences he was a trespasser.

I do not deem it necessary to discuss the point that there might have been partly a road & partly not a road, so as to leave the public & plaintiffs tenants in

common —

As to the First Instruction: the effect of it is misstated by the Counsel for the Appellant, —
The Court do not instruct the Jury that if a person is the tortious possession of land he has a right to sue the real owner who comes upon the land; but simply so far as the question of title is concerned possession is sufficient to enable the plaintiff to maintain the action & this is the law —

The reference to the third instruction given for the defendant will show that I have placed the proper construction upon the instruction given for the Pltiff —

[125 79-80]

The Second Instruction is not open to the objection taken to it by the appellant –

That instruction refers to a laid out road. This phrase has a legal & technical meaning, which was well understood and the instruction has no reference to a road the right to which had been acquired by dedication, and not by the laying out of the road –

The 6th Instruction is objected to yet it seems to me to be clearly right

The 7th Instruction states, that to make a public road by dedication, the road must have been accepted by the public & used as other roads are –

or in others words, it should not have been abandoned.

It is said by the counsel for the appellant that the road might have needed no repair.
To that I answer; it would then have been kept in repair according to the language of the instruction.
Clearly if the public had once received it, but had afterwards abandoned it neglected to keep it in repair, the dedication would have been at an end.

It is insisted that the P. Instruction asked for by the Deft. is law:
I insist that it is not & that it should not have been given. There is no pretence of any evidence that after the road was laid out by the Town authorities that all the owners of

[12579-51]

this land opened the road — Some of the heirs of Samuel Jenkins were absent from the state at the time and one was a feme covert. The fact that some of the occupiers owners of land had opened the road, could not affect the rights of the others —

It would have been erroneous to have given an instruction based upon the hypothesis that all the owners of the land had consented to the opening of the road, when there is no evidence tending to show that they had all done so, besides to conclude the owners of the land here should have been a release of the damages or abandonment of the same as the law contemplates, merely suffering the road to be opened does not amount to a release —

The proof of all the facts to show a legally established road was upon the plaintiff and among

those facts were the payment of damages or a release by the owner of the land.

The same remarks apply to the 12th Instruction asked by the Defendants.

Glover Sleady
for Appellees.

[12579-52]

Marcy

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Taylor

Brief for

Appellee

Filed June 1, 1858

S. Leland

Clk

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