

FORMS

AND

# INSTRUCTIONS

FOR

ESTABLISHING, RELOCATING, ALTERING AND VA-  
CATING COUNTY ROADS.

Prepared for the use of County Officers, Road  
Supervisors and others interested  
in the Public Roads.

By

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## FORMS AND INSTRUCTIONS.

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The object in preparing the following forms and suggestions, has been to present to some extent, the great amount of litigation in regard to public roads. Hardly a term of court passes in this judicial district that the legality of some road is not questioned, making large and useless bills of cost to the taxpayer, until it has almost become a conviction in the minds of the people that they have no legal roads.

When we consider that a large proportion of the public revenue annually raised, is appropriated to the establishment and maintenance of public highways, the importance of the subject is more fully realized.

## ESTABLISHING ROADS.

It should be borne in mind that in establishing public roads, private property is taken for public use, which can be done only by due process of law—hence the necessity of conforming to the statutes as nearly as possible.

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Boards of county commissioners are courts of inferior and limited jurisdiction, and have not the same presumption in favor of the legality of their proceedings as courts of record. For this reason the record should be full and explicit, especially regarding all facts necessary to give the Board jurisdiction to act.

The first step to be taken by any person or persons, desiring the establishment of a county road, is to give notice of an application to the board of county commissioners for that purpose, which may be in the following form :

FORM I.  
ROAD NOTICE.

Notice is hereby given to all persons concerned, that application will be made to the board of county commissioners of . . . . . County, Washington Territory at the next regular session of said Board to be begun and holden at . . . . . , on the . . . . . day of . . . . . 188 . . . . . , to establish a county road. Beginning at (*here specify where the road is to begin*) ; thence running (*here give course and name intermediate points if any*) ; terminating at (*here name place where road terminates*)

Dated at . . . . . County, W. T.  
this . . . . . day of . . . . . 188 . . . . .

SIGNED.

Add names if desired. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

This notice is in the nature of an advertisement, and although it does not appear to be necessary that

it shall be signed, yet it may be very properly, by one or more of those petitioning for the road.

The notice must be published the full period of thirty days prior to the meeting of the board, by posting one copy at their place of meeting and three copies in public places in the vicinity of the proposed road.

The next step will be to prepare and circulate a petition for the road, and file it with the board before its next meeting. As a remonstrance with a greater number of qualified signers than there are signers to the petition will defeat the road, and make the sureties liable for the costs, those desiring the establishment of the road will govern themselves accordingly in securing signers to the petition. The petition may be in the following form:

FORM II.  
PETITION.

To the board of county commissioners . . . . . county, Territory :

The undersigned, householders of . . . . . County, residing in the vicinity of the proposed road hereinafter described, petition for a county road to be laid out and established as follows: Beginning at (*here state where road is to begin*;) thence running (*here give course and intermediate points, if any*) ; terminating at (*here name place where road terminates.*)

Dated at . . . . . County, W. T.,  
this . . . . . day of . . . . . , 188 . . . . .

(Signed by at least twelve householders.)

One or more of the petitioners should be prepared at the next session of the board with proof of publication of notice, qualification of petitioners and with a bond for costs.

The Bond may be in the following form:

FORM III.

BOND FOR COSTS, TO ACCOMPANY PETITION.

KNOW ALL MEN BY THESE PRESENTS: That we, . . . . . as principal, and . . . . . as sureties, are held and firmly bound unto . . . . County in the full sum of two hundred dollars, for the payment of which we jointly and severally bind ourselves, our heirs, executors, administrators and assigns firmly by these presents.

Witness our hands and seals this . . . . day of . . . . 188 .

Whereas, the above bounden . . . . and others, did on the . . . . day of . . . . 188 , present to the board of commissioners of . . . . county, a petition for laying out and establishing a county road, (*here insert a full description of the road as appears in the petition.*) The condition of this obligation is such that if the above bounden . . . . will pay all costs and expenses that may be incurred by reason of the view and survey of said road. If the county commissioners refuse to grant and allow the prayer of the petition, then this obligation to be null and void ; otherwise to remain in full force and virtue.

Signed, sealed and delivered }  
in presence of } ss.

..... } L. S.  
..... } L. S.  
..... } L. S.

The petition and notice must be sufficient under the law, and proof must be made to the satisfaction of the board that notice has been published thirty days prior to the application—one at the place of meeting of the board, and three in public places in the vicinity of the road ; and that at least twelve of the petitioners are householders residing in the vicinity of the road.

These facts are jurisdictional and will not be presumed, but must be found by the board and such finding made of record, until this is done the board has no authority to act.

A householder is a person at the head of a family—keeping house with his family or those whom he is supporting.

Any person interested in the laying out of a county road may sign the petition; but at least twelve signers must be qualified under the law.

The term vicinity, with reference to the residence of petitioners, and place of posting notices, is any place along or near the line of the proposed road, but the place of posting notices must be public.

At the session of the board designated in the notice the commissioners will proceed to examine the petition, and if found sufficient receive proof of the qualifications of the petitioners and posting of notice.

It would seem that the chairman may swear any person or persons having knowledge of the facts, and the board receive oral testimony with regard to petitioners being householders, and qualified as to residence and of the due posting of notice.

The commissioners may be satisfied from their personal knowledge as to the qualifications of petitioners.

A convenient method of proving publication of notice is for one of the petitioners, or other person, to preserve an exact copy of the notice and endorse an affidavit thereon, which may be in the following form:

FORM IV.

FORM FOR AFFIDAVIT OF PUBLISHING NOTICE.

Territory of Washington. } ss.  
..... County.

....., being duly sworn, on oath says that he is a citizen of ..... County over the age of 21 years; that on the .... day of ....., 188 , he posted correct and true copies of the foregoing notice in three public places in the vicinity of the proposed road, described in said notice, to-wit: (*here name the places*), and also one at the place of meeting of the board of county commissioners of said county, to-wit, at (*here name the place where the board meet, as on the door of the County Auditor's office.*)

SIGNED.

Subscribed and sworn to before me  
by ..... this .... day of ..... 188

.....

If not proved in some other manner, proof of qualification of petitioners may be made by affidavit in the following form:

FORM V.

FORM FOR AFFIDAVIT OF QUALIFICATION OF PETITIONERS.

Territory of Washington. } ss.  
..... County.

....., being sworn, on oath says that he is a citizen of ..... County, over the age of 21 years, and has personal knowledge of the place of residence and legal qualifications of the persons whose names are signed to the petition, hereto attached; that twelve of said petitioners, viz: (*here give the names of at least twelve of the petitioners*) are householders residing in the vicinity of the said proposed road. SIGNED.

Subscribed and sworn to before me  
by ..... this .... day of .... 188

.....

Should the board find that due notice has not been given, or that a sufficient number of qualified petitioners have not signed the petition, they should reject the same and end all further proceedings in the matter. The record of rejection may be in the following form:

FORM VI.

FORM OF RECORD FOR REJECTION OF ROAD PETITION.

In the matter of the petition of ..... and others for the establishment of a county road from ..... via ..... to ....., the board finding that due no-

tice of the application to the board to lay out said road has not been given (*or state any reason for the rejection, as failure to furnish bond for costs, want of sufficient qualified petitioners, etc.*) it is ordered by the Board that said petition be and is hereby rejected.

If the board find the proceedings regular, they will make an order approving the petition and appoint three viewers and a surveyor to locate the road.

The viewers must be disinterested householders, residents of the county.

Persons who have signed the petition or whose residence or property is so situated as to make them interested for or against the location of the road, are disqualified to act as viewers.

The time and place of meeting of the viewers should be fixed in the order of appointment. The order of of the board receiving the petition and appointing viewers may be as follows:

#### FORM VII.

##### ORDER OF BOARD ON PRESENTATION OF PETITION.

In the matter of the petition of . . . . . and others, presented to the board, praying for the establishment of a county road (*here insert precise description of the road set forth in the petition*). The board having taken proof and heard testimony in regard to said petition, and from the evidence produced find as follows:

FIRST.—That at least twelve of the petitioners are householders of the county and reside within the vicinity of the proposed road.

SECOND —That notice was give by advertisement posted at the place of meeting of the board and also at three public places in the vicinity of the proposed road, thirty days previous to the presentation of the petition, notifying all persons concerned that application would be made this session of the board for the establishment of said road.

THIRD.—That a bond for payment of costs and expenses of the view of the road was filed and approved by the board. Therefore it is ordered that . . . , . . . and . . . , three disinterested householders of the county, are hereby appointed viewers, and . . . , a surveyor of said road.

It is further ordered by the board that said viewers and surveyor are hereby directed to meet at the place of beginning of said proposed road as set forth in the petition on the . . . day of . . . 188 (*or on their failing to meet on said day, within five days thereafter*) and view, survey, and lay out said road as prayed for in the petition, and the auditor is hereby directed to furnish . . . one of the petitioners with a certified copy of this act of the board.

The petitioners should see that a duly certified copy of this order is procured from the auditor and placed in the hands of one of the viewers, and the viewers and surveyor notified of their appointment at least five days before the time fixed by the board for their meeting, otherwise they might not act. These are directory proceedings, and if the order is placed

in the hands of one of the viewers by any means before the time of meeting, and the viewer should proceed to act, the law would be complied with. The viewers and surveyor should meet at the place and at the time fixed by the board, or within five days afterward, as their authority to meet at any other time is doubtful.

The viewers should each take an oath or affirmation to discharge the duties of their appointment faithfully and impartially, which may be administered by the surveyor or either of the viewers who has been sworn. They will then take to their assistance two suitable persons as chain bearers, and one marker, and proceed to view, survey and lay out the road as described in the order, as near as may be.

It is doubted if the viewers have any authority to depart far from the route named in the petition and order, for the reason that persons whose lands are so appropriated would have no notice of their action, or opportunity to remonstrate or file claims for damages.

The viewers should take into consideration the utility, expense, convenience and inconvenience which would result to individuals as well as the public in establishing a good road, upon substantially the route named; and unless the road can be so established, they should report adversely. The surveyor, under the direction of the viewers, should survey the road and cause the same to be conspicuously marked throughout, noticing the angles and distances. Sec.

5 road laws 1879 should be carefully considered and followed, as it is not the intention of this pamphlet to dispense with the use of the road law, but to explain and furnish forms for it.

When the work is finished the surveyor should, without delay, make out a certified return of the survey and a plat of the road and deliver the same to one of the viewers.

The surveyor's return and certificate may be in the following form :

FORM VIII.

SURVEYOR'S RETURN AND CERTIFICATE.

To the board of county commissioners of . . . . county, W. T.

The undersigned having been appointed by the board dated . . 188 surveyor to survey a county road beginning at (*here set forth the road as described in the order*) hereby certify that the following is a true and correct return of the survey of said road as made by me under the direction of the viewers to wit; (*here set forth the survey as made; giving the starting point, course, distances, notes of points established, termination of the road etc.*) and that herewith is a correct plat of said road according to said survey.

Dated this . . . . day of . . . . .  
 . . . . 188 . . . . . surveyor.

The viewers will make out and sign a report in favor or against establishing the road, giving their reasons therefor.

If two of the viewers report in favor of the road, it

will be sufficient. but there seems to be no reason why a minority report of one cannot be made. The viewers will then cause the report and the surveyor's plat and survey to be delivered to the county auditor without fail before the next session of the board of county commissioners.

The viewers report may be in the following form.

FORM IX.

REPORT OF ROAD VIEWERS.

To the board of county commissioners for . . . . county Washington Territory.

The undersigned viewers appointed by your board at its . . . . session to view and locate a road (*here insert precise description of the road as set forth in the order*) present the following report; we met on the . . . . day of . . . . 188 and after having been first duly sworn by . . . . to faithfully and impartially discharge the duties of our appointment: we took to our assistance . . . . and . . . . two suitable persons as chain bearers and . . . . as marker, and proceeded to the place of beginning of said road as designated in your order, and viewed, surveyed and laid out said road as directed, as near as in our opinion a good road can be made, at a reasonable expense. For a more full and complete description of our work we refer you to the field notes, survey and plat of said road by the surveyor, herewith presented. Our opinions are in favor of the establishment of said road for the following reasons: (*here give reasons*) or, our opinions are against the es-

tablishment of the road (*here give reasons*).

Respectfully submitted.

Dated at . . . . this . . . . . }  
 day of . . . . 188 . . . . . } Viewers.  
 . . . . . }

Persons opposed to the establishment of the road should prepare and sign a remonstrance and file the same with the board at the same meeting when the report of the viewers is received; and be prepared with proof of qualifications of remonstrators. Any person interested in the matter may remonstrate, but to defeat the road a greater number of householders residing in the road district, or district to be established through which the road is to be laid, must sign the remonstrance than have signed the petition.

The statute does not in terms provide that the remonstrators shall be householders, neither does it provide that they shall be of age; nor make any qualification necessary, except residence, but the writer of this is of opinion that the intention of the law-makers was, that the qualification of the remonstrators should be the same as that of the petitioners.

The remonstrance may be in the following form:

FORM X.

REMONSTRANCE.

To the board of commissioners for . . . . County, Washington Territory:

The undersigned householders of . . . . County, residing within the road district or districts of the proposed road described as follows: (*here insert precise*

*(description of the road as appears in the petition) respectfully remonstrate against the establishment of said road. (if desirable, here insert reasons why road should not be established.)*

Dated at . . . . . this day of . . . . . Names.  
 . . . . . 188

At this session of the board the report of the viewers should be publicly read twice and acted upon. The action of the board at this time is decisive of the road and should be carefully considered. If the remonstrators outnumber the petitioners the commissioners have no discretion, but must refuse to establish the road. In computing the number of remonstrators and petitioners, the board should consider only householders residing in the district or districts, through which the road is to pass. Notwithstanding the report of the viewers is adverse, the commissioners may establish the road; but as such action would be out of the usual course, the commissioners should proceed with caution, and only establish a road when an adverse report of the viewers has been filed, from the facts and evidence upon the face of the viewers report and the surveyors return.

Where there is any controversy as to the number of legally qualified petitioners and remonstrators the board should make careful investigation and may receive evidence upon the question.

Should there be claims for damages filed, the board cannot establish the road at this time, but should ap-

point viewers as hereafter directed.

If no remonstrance outnumbering the petition has been filed, and no claim for damages made, it then becomes a question entirely within the discretion of the board whether to establish the road. When the board act legally, in good faith, without oppression, their action cannot be controlled by the courts (*Sherman vs. Buick* 32 Cal. 241.)

The commissioners should consider the expense of making the road and the utility, convenience, and inconveniences which would result to individuals and the public; the words of the statute are "public utility." If the board decide against laying the road on these grounds or upon any of the grounds before stated, they shall make an order refusing to establish the road, stating the ground of their action. Form No. 6 may be modified to meet the case.

In case of refusal to lay the road, the board will pay the costs incurred, and notify the bondsmen and sureties of their liability, if the costs are not repaid to the county, suit should be brought on the bond.

If the board decide to establish the road their order may be in the following form.

FORM XI.

ORDER OF BOARD ESTABLISHING ROAD.

. . . . . one of the viewers appointed by the board at its . . . . . session 188 to view and locate a road (*here insert the precise description of the road as set forth in the petition*) having on the . . . . . day of . . . . . 188 , delivered

to the county auditor, the report of said viewers in writing, together with the plat and certified return of survey of the road by . . . . . surveyor, and said report stating the opinion of the viewers to be in favor of the establishment of said road, and the report having been read publicly twice at the same meeting by direction of the board, and no remonstrance with a greater number of remonstrators than there are names on the petition being presented, nor any petition for damages having been filed, and the board being satisfied that such road will be of public utility; it is ordered by the board that said report, plat and survey be and they are hereby approved and accepted by the board, and the auditor is hereby directed to record the same in the road book of the count , and from henceforth said road shall be considered a public highway; and it is further ordered by the board that the supervisor of roads for the road district in which said road is located is hereby directed to open said road according to law. And the Auditor is hereby directed to furnish said supervisor with a certified copy of this order and action of the board.

If the proceedings had confer authority upon the board to establish the road and they are of the opinion that the road will be of public utility, but claims for damages have been filed, they should delay action on the report of the viewers, and appoint three disinterested householders of the county to view the road where it runs through the lands of the claimant

or claimants and assess damages. This order may be in the following form:

## FORM XII.

## ORDER APPOINTING VIEWERS TO ASSESS DAMAGES.

In the matter of the proposed road petitioned for by . . . . . and others beginning at (*here insert description of road as shown by petition*) it is ordered that the report of the viewers, surveyor's return and plat of said road be received, but claims for damages for laying out said road having been filed by (*here insert names*) it is ordered that . . . . . and . . . . ., three disinterested householders of said county are hereby appointed viewers to view said proposed road and assess damages. Said viewers shall meet on the . . . . day of . . . . 188 , or at such time as they may agree upon, and after having been duly sworn to discharge their duties faithfully and impartially, shall view the proposed road the whole distance it runs through the premises of said claimant or claimants and assess and determine how much less valuable such premises of the claimant, or claimants, would be rendered by opening said road, and report the same to the board at their next meeting.

A certified copy of this order should be delivered to one of the viewers, and the others notified of their appointment, without delay. The statute does not point out who shall furnish the viewers with this order, but unless it is done, by some other person, the petitioners should cause the same to be furnished the

viewers.

The viewer receiving the order should notify the others.

The viewers should examine the matter carefully and endeavor to do justice by all parties.

In estimating damages they should take into consideration the benefit which such road will be to the premises as well as the damages resulting from laying the road.

The amounts which in the viewers opinion should be paid each claimant, will be separately stated in their report, and the same filed with the board before their next meeting.

The following form may be used.

FORM XIII.

VIEWS REPORT UPON ASSESSMENT OF DAMAGES.

To the board of commissioners of .....county.

The undersigned viewers appointed by your board at its .....session in 188 to view and assess the damages which would be sustained by (*give names of claimants*) if the proposed road described in said order should be laid through their premises present the following report. We met at ..on....day of ....188 and after being duly sworn by..... to discharge the duties of our appointment faithfully and impartially, we proceeded to view said proposed road the whole distance through the premises of the claimants (*give names*) and assessed and determined the damages which in our opinion said claimants

would sustain by reason of the opening of said road, that we have assessed and determined and it is our opinion that the premises of .....would be rendered .....dollars less valuable by opening said road.

(*If it is determined that the premises of any claimant would not be rendered less valuable by opening the road*) say that we have determined and it is our opinion that the premises of .....would not be rendered less valuable by the opening of said road.

Signed this....day of....

....188.... } Viewers.  
 .....  
 .....

If the board is satisfied that the assessment of damages are just, and the road of sufficient importance to warrant the payment of the same, they should order them paid and establish the road, if however, the board is of the opinion that the road is not of sufficient importance to warrant payment of the damages assessed, they may make an order refusing to establish the road, until the expense or damages or such part as they think proper shall be paid by the petitioners. In case the board is satisfied the assessments are unjust from being too low, (*the claimant refusing to accept the same*) or too high ; or if the claimant refuses to accept the same awarded by the viewers ; there seems to be no reason why the board may not, under subdivision 5, 6 Sec. 11 P. 305, Acts 1869, settle and adjust the matter with the claimants and pay them accordingly.

The board may defer final action in establishing the road for this purpose.

Whenever final action is taken and the road established, an order to that effect should be made by the board, and the same with the viewers report, surveyor's return and plat entered in the road book. Form No. 11 heretofore given may be used, adding such further proceedings as have been had.

Sections 35 and 26, road laws of 1879, have been construed to be prospective in their operation by the District Court of the Third Judicial District.—*Pierce vs. Smart*, Feb. term, 1880.

In so far as they provide that notice may be omitted they would undoubtedly be held void, as being in conflict with the Constitution of the United States, which provides, that "no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."—*Art. 5, Amen. Con. U. S.*

Laws of 1863 required all orders and proceedings touching roads to be recorded in the road book. Laws of 1879 do not seem to require such record; but as due notice and a sufficient petition are indispensable to the establishment of a legal road; there seems to be no objection to recording the notice or proof of notice, or both, and the petition in the road book, as well as all orders of the board touching the road.

#### TO ALTER, VACATE AND REVIEW.

To alter, vacate or review public roads the same re-

quirements as to notice, petition and bond must be complied with as in establishing new roads.

#### *Secs. 2, 3 and 14. Road Laws 1879.*

By carefully examining the statutes on the subjects any person familiar with the proceedings for establishing roads may adapt the appropriate forms heretofore given to these purposes.

Sec 11, laws 1879, provides for restoring and straightening roads where their beginning or true course has become uncertain. This section does not specifically require notice and petition. And where a survey and establishment on the old line is sought, there seems to be no objection to the board of commissioners causing this to be done, whenever in any manner it comes to their knowledge that the same is necessary. But where it is sought to change the route of the road by straightening it, their action is in the nature of an alteration, and on account of any such change, would require petition and notice, that remonstrance and claims for damages may be filed.

The review provided for in this section is contemplated only in cases where legal roads already exist, and make valid roads before illegal.

#### VACATING ROADS

For vacating roads, notice, petition and bond are required, to give persons opposed an opportunity to remonstrate; and for security for costs of review in case the road is not vacated.

## ALTERING ROADS.

In altering roads there seems to be no objection to uniting a petition for vacating an existing road; and laying out a new one, in the same petition. Where both are on the same general route, and an alteration only is sought, the notice and petition should accurately describe the parts of road to be vacated, and the line where the new road is to be laid.

Where a public road runs through the lands of any person or persons who desire to turn such road through another portion of their lands, they may petition the board of county commissioners therefor. In these cases no notice need be given; the petition should describe the change desired and need be signed by persons interested only. A bond should be given for costs; whether the route of the road is changed or not the petitioners must in all cases pay the costs; and the road will not be changed until the petitioners have opened the new road, and made it in all respects equal to the old one.

Where it is sought to turn the road upon lands other than those of the petitioners, the case is one of alteration and must be by petition and notice.

## PRIVATE ROADS.

As in other cases a person or persons whose lands are so situated as to have no communication with any public road, may make application in writing to the county commissioners at any regular term, for a road leading from such premises to some convenient road—

the application may be in the form of a petition, which shall set forth the facts upon which the application is based, and should describe the place of beginning, route and termination of such proposed road.

Fifteen days notice should be given of the application, by posting notices in three public places in the district where the proposed road is to be located.

No bond is mentioned in the statute, but as the applicant is to pay all costs, and if the road is opened all claims for damages, a bond in the sum of two hundred dollars should be required. Among the duties of the viewers is that of giving at least three days notice to all persons through whose lands such road is to be located; this should be strictly complied with, and returned with the names of the persons, in the viewers report.

In case of non-residents, it is thought it will be sufficient to post written notices on the lands of persons to be effected. The commissioners may appoint a surveyor when necessary.

If the board is satisfied that the report of the viewers is just, they may establish the road, upon payment by the applicant, of the costs and damages, and not otherwise.

If payment if not so made the board should pay the costs of review, and proceed on the bond for indemnity. These roads are of a quasi-private nature; are thirty feet wide; gateways may be allowed by the viewers; yet no public money can be expended upon

them ; but they are public with regard to the right, of all persons, to their use.

It is in exceptional cases only, that these proceedings will be resorted to.—See Sections, 15, 16, 17, *Road Laws* 1879.

#### APPOINTMENT OF SURVEYOR.

In all cases when a surveyor is to be appointed, any competent surveyor may be selected, but it will be well to ascertain before appointment, if such person will act, as the county surveyor only is compelled to make such survey.

#### DUTY OF VIEWERS.

Viewers are compelled to act, under a penalty for refusal or neglect.

In all cases of laying out, altering or vacating roads, when due notice has been given, and the proper petition filed, the board have acquired jurisdiction of the subject, and all persons to be effected, are then bound to take notice of the action of the board, while acting within the authority given by the Statute. For this reason it is believed that in any case where viewers have failed to act, new viewers may be appointed at a subsequent meeting of the board.

#### NOTICE.

In all cases where notice is required the full statutory period is necessary. One day less than this renders the notice of no effect; for example: to give thirty days notice, the day on which the notice was posted will not be counted, as the law does not con-

sider the fractions of a day, and as thirty days notice will not have been given until twelve o'clock at night on the thirtieth day, it follows that the day following the thirtieth day will be the day on which all parties should be required to take notice of the petition.

#### NEW ROADS.

After a road has been established by the board, the supervisor of the district has full power to open the same, using the means authorized in opening older established roads, with an additional two days extra work from each person who signed the petition.

The auditor will furnish such supervisor with a list of the names of the petitioners.

The provision of the statute relative to the duties of road supervisor is very broad and sweeping, and it would seem that if such supervisor did not keep the county roads in his district in good repair, would subject him to a criminal prosecution; but the supervisor is empowered under the law, in addition to the annual tax levy, to call out those living in his district to work upon the roads until the same are in good repair.

There is no better criterion of the thrift and prosperity of a community than that they have good substantial roads kept in a passable condition.

The ancients understood this, as evidenced by their renowned highways, some of which although fifteen centuries have passed away since they were built are still in use and now traveled.

—A man by the name of Charles Green, was drowned yesterday while crossing a slough on the river bank at The Dalles, Or., preparatory to sailing.  
—Dolores Vastler, about twenty-one years

BUTTE COUNTY }  
vs. } No. 8,433.

BOYDSTUN. }  
This was a proceeding to condemn a strip of land belonging to the appellant for a road in the county of Butte.

Mainly, two questions have been argued and submitted for consideration, namely: 1. Whether the proceeding has been properly brought in the name of the county. 2. Whether the appellant's land has been appropriated by a proper judgment of condemnation.

A county is a public corporation, endowed with capacity to acquire real property within its limits for roads and highways, etc. (Sec. 360, C. C.) It is also an integral part of the State, and entitled, as an agent of the State, to the control and management of the roads and highways within its jurisdiction. It is therefore a person in charge of a public use, and may exercise the right of eminent domain in behalf of the use. (Sec. 1,001, C. C.) But it cannot exercise the right except in the manner provided by Title VII, C. C. P. Like any other condemning party, it is bound to show that the requirements of the statute which permits it to take private property for public use have been fully complied with. Hence it must, in any proceeding initiated by it for that purpose, show affirmatively that the property which it proposes to take is to be applied to a public use; that it is necessary to take it for that purpose, and that the compensation to which the owner of the property is entitled has been ascertained and assessed according to law. And each of these things must affirmatively appear in the record of the proceedings to have been found as facts by the verdict of a jury or the finding of the Court, and to have been confirmed by the judgment of the Court. (Sections 1241-51-52, *supra*.) If not so found and adjudged the proceeding will be void. For private property cannot be taken from an owner against his consent, except for a public use, after just compensation for it has been ascertained, assessed and adjudged, and is ready to be paid. (Sec. 1253, *supra*.)

Such compensation consists of the whole value of the property to be taken and the damages which may result to the remainder of the land injuriously affected by reason of the taking, less the amount of any benefits which the proposed improvement may be to the owner. What such damages may be, will, of course, depend upon the circumstances of each case. But under all circumstances the owner is entitled to the fair market value of the land proposed to be taken, to be estimated at the commencement of the proceeding to condemn (Sec. 1,249, *supra*); and, in addition, to the remainder of any damages for the consequential injury to the remaining portion of his land after deducting benefits.

In ascertaining the amount of such damages all the circumstances which naturally injure the property of the owner, in consequence of taking part of it for a public use, should be taken into consideration—such as depreciation in value, difficulty of access, difficulty of carrying on business, danger of fire and increased necessary expenses in the way of building fences and the like. Injuries speculative and remote should, of course, be excluded. (Cooley's Con. Lim., 566.)

Applying these principles to the proceeding under consideration, we think the appellant was entitled to prove, as an element of damages, that the proposed taking of a portion of his land for public use would impose upon him the necessity of fencing the remaining portion of his land. If that necessity resulted from the taking, it would be an injury for which he would be entitled to damages, and the ruling of the Court in *Scott vs. Scott*, 1 Penn., S. C., 503; *Sacramento vs. Moffat*, 6 Cal., 74.) But the entire proceeding is insufficient for the purpose of condemnation. By the record it appears that the case was heard and determined by the Court without a jury, and the Court made and filed a finding of facts, which is not in the record. It has been stipulated, however, that the finding sustains the material allegations of the complaint, and upon it, "as conclusions of law, the Court finds: That the opening of said private road and the condemnation of said land belonging to said R. W. Boydston, and herein sought to be condemned, is absolutely necessary for the purpose of opening said road, and that said road should be laid out and opened, and said land condemned for such purpose upon the payment to said R. W. Boydston, according to law, the sum of \$150 and that each party hereto should

and as thirty days notice  
at twelve o'clock at night  
so that the day following  
that day on which all parties  
notice of the petition.

ADS.

published by the board, the  
has full power to open the  
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years since they were built are

of the location, general route and termini of the proposed road, and of the several parcels of land proposed to be taken, and the names of the owners, it contains no allegations of the right of the plaintiff to condemn as required by Sections 1, 241-44, C. C. P., or of the value of the lands or of the sum of the compensation to which the owners are entitled. In the absence from the complaint of any allegations of such material facts a finding "which sustains the material allegations of the complaint" is therefore, wholly insufficient. (Ladd vs. Meyer, 51 Cal., 277.) and does not respond to the issues made in the proceeding. There was, therefore, no finding and no judgment of a necessity to take the appellant's land for the use of the public, no finding and no judgment that the land was to be applied to a public use, and that the compensation to which the owner was entitled, had been ascertained and assessed according to the requirements of the law. A finding or judgment that the land sought to be condemned is necessary for the purpose of opening the road, is not a finding or judgment that it is necessary for a public use. "A finding," says the Supreme Court of Michigan in *Mansfield vs. Clark* (23 Mich., 519), "that the taking is needful to the proposed enterprise is not the same as a finding that it is for the use or benefit of the public." The report of the jury or commissioners must distinctly cover this point in every case; and they cannot properly make one which will warrant the taking of the land, unless satisfied not only that the particular land is needed for the construction of the work, but also that the work itself is one of public importance." See also, *Renslaer vs. Davis*, 43 N. Y., 137; *Grand Rapids vs. Van Driel*, 24 Mich., 416.

Until there is such a finding and judgment rendered in a proper proceeding, under the Code, there can be no appropriation; and every step in the proceeding must be taken strictly according to law. It is well settled, that whenever the property of an individual is to be divested by proceedings against his will, there must be a strict compliance with all the provisions of the law which are made for his protection and benefit. Those provisions must be regarded as in the nature of conditions precedent, which must not only be complied with before the property-owner is disturbed, but the party claiming authority under the adverse proceeding must affirmatively show such compliance. (Cooley's Con. Lim., 523.)

judgment and order reversed.

McKRE, J.

We concur in the judgment:

ROSS, J.

McKINSTRY, J.

— The gang of robbers that robbed the store readily cuts glass.  
— An inexhaustible quarry of blue marble has been discovered near The Dalles, in Polk county, Or. It is susceptible of receiving a high polish, and when dried is so hard that it is departed.  
— Stanislaus Montgomery was arrested at Los Angeles Saturday, for robbery at Pomona. He played trump and disappeared, leaving a barrel of oil of blankets. Some \$60 was missing after his departure.  
— A banquet was given at Vallejo Saturday night at the Bernard House by one hundred citizens to Hon. S. G. Ellhorn, who takes the place of United States District Attorney Teare on Monday.  
— Stanislaus Montgomery was arrested at Los Angeles Saturday, for robbery at Pomona. He played trump and disappeared, leaving a barrel of oil of blankets. Some \$60 was missing after his departure.  
— An inexhaustible quarry of blue marble has been discovered near The Dalles, in Polk county, Or. It is susceptible of receiving a high polish, and when dried is so hard that it readily cuts glass.  
— The gang of robbers that robbed the store

This Territory is a new country, fast settling up, and it is of the greatest importance not only to us, but the future, that our public highways should be carefully established—that we may not after having expended years of labor and large sums of money on them; have them declared null and void through some defect in the initiatory proceedings.

### SUPREME COURT OF OREGON.

Stephen Minard, app., vs. Douglas County, res.

**PUBLIC HIGHWAYS—PROCEEDING TO LAY OUT—NOTICE—HOW AND BY WHOM SERVED.**—When a petition for laying out a highway was presented to the county court and the notice of the application given to interested parties was not signed by the petitioners, and the proof of service stated that the notice was posted in three public places, without stating where those places were. Held, that the laying out of a highway through the land of a private owner, is a taking of private property for public use; that the notice required by the statute was in the nature of process and should have been signed by the petitioners; and that a notice signed "A. P. Kennedy, attorney," was a nullity.

BY THE COURT, WALDO, J.

This is an appeal from the judgment of the circuit court for Douglas county, dismissing a writ of review directed to the county court of said county, acting as a board of county commissioners.

On the first day of September, 1879, a petition was presented to said court acting as a county board, signed by the requisite number of freeholders, praying said court to lay out and open a road upon a route therein described, and the following copy of notice and proof of service was filed with the petition:

"NOTICE.—All persons concerned are hereby notified that application will be made to the county court of Douglas county, Oregon, at the next session, for laying out and locating a county road beginning at the northeast corner of the town of Looking Glass, in section 35 in township 27 S, in range 7 W, in same county and state; thence north to the southwest corner of Peter Burns' lot, in section 36 in said township and range; thence in an easterly course on the line and grade of the Coos Bay military wagon road, as now traveled, to the west line of Stephen Minard's fence, thence around the foot of the hill on the original survey line and grade of said Coos bay wagon road to the South Umpqua river at Owen's ferry, opposite the town of Roseburg.

(Signed),

"A. H. KENNEDY,  
Attorney for Applicants."

July 28, 1879.

"State of Oregon, County of Douglas—

"A. H. Kennedy being first duly sworn, upon his oath says: I gave notice by advertisement posted at the place of holding county court, and also in three public places in the vicinity of said proposed road thirty days previous to the presentation of said petition (in the notice hereto annexed mentioned) to the county court, notifying all persons concerned that application will be made to said county court at their next session for laying out a county road as in said notice mentioned, a true and correct copy of which notice is above set forth.

(Signed),

"A. H. KENNEDY,"  
Subscribed and sworn to before me this 1st day of September, 1879. (Signed) T. R. SHERIDAN,  
County Clerk."

Upon such petition and notice such proceedings were had by the county court that, on the 8th day of January, 1880, the said proposed road was ordered to be opened and declared to be public a highway.

On the 7th day of April, 1880, the appellant, a land owner, of whose land had been taken for the use of the road, presented his petition for a writ of review to the circuit court for Douglas county, and a writ was thereupon issued, directed to said board, commanding them to certify their proceedings to said circuit court, and upon a hearing upon the return to said writ, judgment was rendered dismissing the writ, from which said judgment appellant appeals to this court.

The appellant is a party entitled to a writ of review of the action of the county court. 5 Oregon, 280.

Some objection was made to the fact that the case was entitled as against the county court of Douglas county, and not as against the county. But the application for the writ was an ex parte proceeding, and the act of the petitioner in entitling his petition as against the county court of Douglas county, was mere surplusage. Ruff vs Phillips, 50 Geo. 130. The writ was directed to the representatives of the county of Douglas, and notice of appeal was directed to and properly served upon said county, so that in this court the county of Douglas may well be treated as the party respondent. The principal question arises upon the sufficiency of the notice and service to give the court jurisdiction.

Sec. 3, Gen. Laws of Oregon, page 721, requires that when a road is presented for the action of the county court, it shall be accompanied by satisfactory proof that notice has been given by advertisement posted at the place of holding county court, and also in three public places in the vicinity of said proposed road, notifying all persons concerned that application will be made at the next session of the county court for laying out said road.

The laying out and opening of a public road through the land of a private person is a taking of his property for public use, and notice must be given him of the proceeding. Says Campbell, C. J., in Strachen vs Drain Commissioners, 39 Michigan, 170, "We must hold as was held in Swan vs Williams, 2 Mich., that although the statute is silent on the subject of notice, its necessity is implied when private property is invaded.

In Langford vs Ramsey county, 15 Minn., 375, it was laid down by McMillan, J., that an act of the legislature "to locate and establish a state road from the city of St. Paul, in the county of Ramsey, to the city of St. Anthony, in the county of Hennepin," and appointing three commissioners to determine the damages to owners of land taken for the road, without notice to such owners, was void."

"In all judicial, or quasi judicial proceedings affecting the rights of the citizen, it is a fundamental principle that he shall have notice." (Cahoon vs. Coe, 57 N. H. 598. See also, State vs Road Commissioner, 12 Vroom, 89; Dickey vs Tennyson, 27 Mo. 161; Abbott vs. Lindonbower, 42, Mo. 161; Corliss vs. Corliss, 8 Vt, 389; Howard vs Hutchinson, 10 Maine, 355; Siefert vs Brooks, 34 Wis. 584; Lancaster vs Pape, 1 Mass. 86.)

These cases show the importance of notice to the owner whose land is taken for public use. The pro-

ceeding is in its nature judicial, and a day in court is a matter of right in all judicial proceedings.

The office performed by such notice is explained in Dupont vs Highway Commissioners, 28 Michigan, which was the case of a laying out of a highway, alleged to be void, among other reasons, because the record failed to show that notice had been given to interested parties. "The notice," says Cooley, "is in the nature of process." See, also Siebert J., "is in the nature of process." See, also Siebert vs Linton, 5 W. Va., 57; Wolford vs Letancon, 4 Colorado, 117; Schneider vs. McFarland, 2 N. Y., 462; Cruger vs. Hudson River, Railroad Co., 12 N. Y., 200; Cruger vs. City of Chicago, 40 Ill., 146.)

In the theory of the common law all power of judicature flowed from the crown, and courts had no power to compel a party to appear, or to proceed to the determination of a cause, until the king, by his original writ, had issued his command to the sheriff to summon the defendant before them. Here "the state is the sovereign by whose power alone the citizen can be compelled to appear in its courts to answer an action brought against him." (Curtis vs McCullough, 3 Nevada, 210; Curry vs Hinman, 11 Ill., 420.)

Hence the notice in this case being in the nature of process to bring a party before a tribunal exercising judicial powers, must be given by some one authorized by the state to give it. What the party notified obeys is not the command of the party who gives the notice, but, through him, of the state, whose agent he is.

In Potwinie's appeal, 31 Conn., 381, 384, the court say: "In legal proceedings, and in respect to public matters, the word notified is generally if not universally, used as importing a notice given by some person whose duty it was to give it, in some manner prescribed, and to some person entitled to receive it or be notified."

Notice, in such a case, means more than knowledge. Actual knowledge cannot even be shown, and must be laid out of the case altogether. It means the formal process emanating from the source, and served in the manner, prescribed by the statute. (Id., Toland vs County Commissioners, 13 Gray, 12). The advertisement is the process, and the posting in the public places is the service.

In Case vs Humphrey, 6 Conn., 139, Hosmer, C. J., says: "The service of writs in general is required to be made by a known public officer, and it is not an unwarrantable inference that the safety and security of the citizen is interested in the prevention of any unnecessary departure from this principle." The process, thus, not only emanates from a recognized legal source, but is served by a known public officer, and its authenticity is thus doubly secured. But in a case like this, where the service is wholly constructive, the virtue supposed to lie in the manner of service is gone, and the facts disclosed on the face of the process itself furnish the evidence that it is genuine legal process. That this evidence could, also, be annihilated, and the paper thus shorn of nearly every attribute that distinguishes process, still exert the power to summon a party before a legal tribunal, is a proposition, it is believed, that cannot be supported on principle, nor by authority founded on principle.

Turning now to the statute, we find that the petition must be signed by the petitioners, and that such petition, when presented, must be accompanied by proof that notice has been given to all interested parties. The parties moving in the proceeding are the petitioners, and it is clear that they are authorized by the statute to give notice, because they are compelled to furnish proof that notice has been given. This necessarily implies, in the absence of other provision, that they are authorized to give the notice. "Whenever a power is given by a statute, everything necessary to the making it effectual, is given by implication." (Pat. Dwarries on Statutes, 123.)

This much plainly appears: That the authority of the petitioners to give the notice is as effectually supplied by intendment as though it had been given by express words. "That which is implied in a statute is as much a part of it as what is expressed."

Now, whoever asserts more than this—whoever asserts that the statute which authorizes the petitioners to give notice, also authorizes one not a party to the proceeding or a public officer—any indifferent person, as it may please his inclination to invest himself with the sovereign power of the state, in this particular, must show affirmatively where and how that power is to be found. It is certain it must be gotten from the statute, if at all, by implication.

It is said that the statute does not require any particular person or persons to give the notice, and therefore any person may give it. But at the first step in the construction of this statute we find the petitioners invested with this power. We find that the notice which these parties are empowered to give is in the nature of process to bring a party into court; and, further, that no person can exercise such power unless specially authorized, which, as to the petitioners, as we have seen, is deduced from the statute by necessary implication; and the petitioners are entirely competent to give the notice. Hence, if such power is found in the statute by implication, it cannot be a necessary implication in the sense of implying that which is necessary to make the act effectual. But by what other or less degree of implication can it be found there? Where a plain, simple, sensible construction has been given to a statute, nothing more can be incorporated into it by implication. And, further, since the statute requires notice to be given, it must be the duty of somebody to give it. It cannot be the duty of a stranger. It must therefore be the duty of the petitioners; and hence the proposition that the statute does not require any particular person to give the notice is shown to be untrue.

In addition to all this let it be remembered that "statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for if the parliament had had that design, it is naturally said they would have expressed it." (Pot. Dwarries, 185) and the case for that construction of the statute which limits the power to give notice to the petitioners, we believe to be unanswerable.

The able counsel for the respondent, among other cases, cited Wright vs Wells, 29 Ind., 354, which was an appeal from an order of the board of county commissioners abolishing a highway. It seems that the statute required notice of intention to present a petition, to be given "by publication three weeks successively, in a newspaper published in the county, or by posting up notices in three of the most public places in the neighborhood of the highway." Objection was made rather to the affidavit filed as proof of service than to the form of the notice itself. As to this point the court merely say, "it is proper to notice an objection made in argument to the notice itself, claiming that it was void, because not signed by one or more of the petitioners. We do not think a signature to the notice is required by the statute." The case shows that the counsel admitted that the notice would have been in due form if signed by one of the petitioners. This admitted away any case he might have made. No good reason can be given why signing by but one petitioner should be sufficient. We might very well acquiesce in the decision so far as it passed upon the objection actually made. But if the case is to be regarded as holding that under a statute like our own, the notice need not be signed by the petitioners, or signed at all, it is entitled to little weight. In another part of the case the court held that the county board acquired jurisdiction, where the only proof of service shown by the record stated no more than that due notice had been given.

In the State vs. Officer, this court, upon a much stronger case for the record, decided the other way. If the case was not good authority in State vs. Officer, it ought not to be considered controlling authority in the case now before the court.

The case of the People vs. Carpenter, (24 N. Y. 86,) arose under an act of the legislature of New York, entitled "an act to vest in the board of supervisors, certain legislative powers, and relates to the alteration of the boundaries of towns, or to the erection of new towns. The second section of the act provided that notice in writing of the intended application to divide a town, subscribed by at least twelve freeholders of the town to be affected, should be posted in five of the most public places of the town, four weeks previous to the intended application, and a copy of such notice should also be published in the county newspapers. The notice published in the newspapers did not contain the names of the twelve freeholders. The court say, on this point, that the statute did not require the notice published



**OPINION OF HON. ELWOOD EVANS.**

*To the Honorable Board of County Commissioners of King County:*

GENTLEMEN:

At the August term, 1880, of the County Commissioners' Court \$250 was appropriated for improving the county road from Samamish river to Newcastle, and the road supervisor and one of the Commissioners were authorized to let the contract to the lowest responsible bidder. Luke McRedmond was contracted with at the sum of 14 cents per rod, for the improvement ordered, and now presents his bill for \$116, approved by the supervisor.

At the session of the Legislative Assembly of 1875, of the Territory of Washington, were passed two special road laws applicable to King County, to wit: "An act to regulate the collection and disbursement of road and road poll tax in King County," approved Nov 12, 1875, (See page 212) and an act entitled, "An act authorizing the County Commissioners of Pierce, King and Cowlitz Counties to appropriate money for the improvement of public roads." (See page 197, laws of '75.)

By the first named act road tax was made payable in money. Sec. 5 made the tax collected a common road fund, to be distributed by the County Commissioners. "Due regard to the common good of the County" was to be observed in the division of the funds among the several districts (Sec 6, id.) The second named act authorized an annual appropriation of \$2000 out of the General County Fund Sec 2 authorized the expenditure of such appropriation by supervisors under the direction of the Board of County Commissioners.

If these laws have not been repealed by the passage of the general road law of 1879 (See laws '79, Sec 72, p 69), the appropriation by the Board at its August term, 1880, and the contract with Mr McRedmond were lawful and proper under the two acts cited. To my mind it is clear that the Commissioners acted in good faith and upon the opinion that those two laws were in force. The contractor acted with equal good faith, and his claim is equitable. Were I asked if the County Commissioners, in August, 1880, or now, could make such appropriation or contract, I should answer in the negative. But as the County has em-

ployed this party upon the faith it could so do, and he has bestowed labor by which the County is to be profited, I recommend the allowance of the bill.

I may be pardoned for adding that the general road law of 1879 modified by the powers of the Commissioners as prescribed in Sec 84 of the general revenue law of Nov 14, 1879, controls the amount of funds which may be expended upon the county roads, viz: "It shall not exceed six mills on every dollar of taxable property," together with the road poll tax. Nor can the County make appropriations, the law regulating that the several road districts are entitled to the tax levied and collected therein.

Respectfully submitted.

ELWOOD EVANS,

Pros. Atty., 3d Jud. Dist., W T.

**In the Matter of the "Beach Road."**

OPINION:

TO THE COMMISSIONERS OF KING COUNTY:

Notice of the action of your board at November term, asking me to "examine into the matter of the encroachment of the Seattle & Walla Walla railroad company with their railroad upon the county road known as the beach road act; and file a written opinion with the board as to whether said King county can hold said railroad company responsible for damages, &c," is before me for answer. As this is a question of considerable moment and necessarily involves the legality of said 'beach road,' I will examine that proposition first.

The records of the board of county commissioners show the following:

"PETITION FOR BEACH ROAD."

We, your petitioners, pray that your honorable body at your next regular term, proceed to lay out and establish, commencing at foot of Main street in Seattle; thence east along said street to 7th or 8th street; thence south along said street to the south line of said town site; thence

in a southerly direction along, or as near as practicable the meanderings of the north line of J. Moss land claim; thence in a southerly direction on the most practicable route, so as to cross the Dawahish river at or near the northeast corner of James Bush land claim; thence southerly on the best and most practicable ground so as to intersect the county road leading from Alki point.

Signed, J. B. Hinds and 18 named, and 26 others.

Petition dated Feb. 13th, 1862, and recorded in the road book No. 1, pages 48 and 49.

Petition ordered received Nov. 3rd, 1862, and F. McNatt, P. Dunfield and John Martin appointed viewers.

Report of viewers recorded in book No. 1, pages 49, 50 and 51; report to-wit:

Proceeded April 23, 1863, and find main start to 5th impracticable, and running across the town site as petition; thence following the meandering of the bay to the north line of the improved lands of John J. Moss; thence southerly along or near the foot of the hill, until thirty rods or more south of the stone quarry; thence on a straight line as near as practicable so as to cross the pasture fence of J. Williamson and at or near the bars on the trail, continuing on a straight line, entering the plowed ground; thence to county road. Recommend the establishment of the road. Signed by viewers.

Report ordered accepted May 4th, 1863, and road established. Journal, page 61.

The petition for this road was filed and viewers appointed under the statutes of 1859; laws 1858-9, page 8.

The road was viewed, the report filed and order establishing the road was under the statute of 1863; laws 1863, page 510.

An examination of the road books show that the following matters have been therein recorded to-wit:

1st, The petition.

2d, The order to receive petition and report of viewers.

3rd, The report of viewers.

4th, The acceptance of report.

The act of 1863 repeals all acts inconsistent with its provisions.

Both acts provide that board may alter, establish or vacate any regular meeting. § 2.

Both declare they shall not establish, alter or vacate, unless they shall be satisfied that 20 days public notice has been given, of intent to apply and time when application will be made; section 3; and that a majority of the citizens are in favor; section 3.

The board shall cause clerk to enter their action upon all roads in a book to be called the road book.

The act of 1865, section 4, makes a very material change in the section.

By act of 1859, no road established, should be opened until the same be entered in the book.

But per act of 1863, section 4, the road shall not be opened 'or declared a legal road' until the same, that is, the action of the board shall be fully recorded in the road book.

This road book shall contain:

1st, Petition, (if any.)

2d, Report of viewers.

3rd, Description of the road.

4th, Copy of the survey, (if any.)

5th, All orders and proceedings touching the same.

In the absence of the amendment of section 4, acts 1863, it might be conceded that the entries in the road book were, in so far as to all matters not jurisdictional, merely directory.

But we are met in the amended laws with the express declaration that no road shall be deemed a legal road until the same shall be fully recorded in said road book.

Note what shall be recorded in the road book as per direction of section 4.

Their action upon all roads, all the records concerning the roads at present, established.

Then section 5, as we have seen,

To be returned to



details the special matters to be recorded; these two sections, 4 and 6 must be constructed together, and grouping them we have this view.

The board shall cause the clerk to enter in the road book their action upon all roads which they shall establish; such entries shall contain:

- 1st, The petition, (if any.)
- 2d, The report of the viewers.
- 3rd, A description of the road.
- 4th, Copy of survey, (if any.)
- 5th, Claims for damages, (if any.)
- 6th, With all orders and proceedings touching the same; and no road hereafter established shall be deemed a legal road until such record be fully made. No doubt the final order establishing the road, should appear in the road book, and an order so material is made mandatory by the 4th and 5th sections, acts of 1863, page 511.

We may not enquire why such records are mandatory, for the legislature has by special amendment, so declared.

I am therefore of the opinion that under the statutes of 1863, no road could be established as a legal road, unless the orders appointing the viewers and the final endorsers to the establishing of the road be entered in the road book.

But again the board of commissioners is a court of inferior jurisdiction. There is no presumption in favor of the legality of its proceedings unless it appear fully that it had acquired jurisdiction in the manner prescribed by law.

The state vs. Berry, 12 Iowa, 60. Thompson vs. the county, 2 Oregon, 40.

The facts necessary to confer jurisdiction must appear on the face of the record.

Thompson vs. the county, 2 Oregon, 34.

In the matter of establishing roads, there is no doubt, but under section 3, 1863, one jurisdictional fact is the giving of notice, such notice as it were, is the summons or process to bring the matter before the board; the rule and notice as to jurisdiction is well laid down by the supreme court of Iowa thus:

"The notice required by law was necessary to confer jurisdiction. Unless it appear to have been given, jurisdiction will not be presumed."

If the record recite that the notice was given, or that the court decided that notice was given, it will be prima-facis sufficient. If the record fails to show notice, and fails to show that the board passed on the question of notice, it will be insufficient.

State vs. Anderson, 39 Iowa, 275.

The law declares that until the board is satisfied, that such notice was given, they can establish no road.

The record here is wholly silent on the subject; there is nothing upon the whole record tending to show notice, nor tending to show that the question of notice was before the board.

It is not apparent from the whole record, that the board had authority or jurisdiction to establish this road.

Hence upon this point, I am satisfied that there was no legal road established by the order of May 1863.

In August, 1874, a petition was presented to the board, asking for the relocation of the road from Seattle to Foster's ferry on black river. The petition for relocation cannot be found, nor does it appear on the road book; but as section 2, pamphlet 1877, does not provide for the relocation of roads, I am of the opinion that the action of the commissioners in this matter did not establish a legal road.

In August, 1877, a petition for review of the road was presented, and action had upon it.

The power to review is given by sections 11 and 12, pages 7 and 8, pamphlet 1877; law now in force.

Such review may be had per statute 11, where the place of beginning as true course of any public road shall become uncertain, from any cause; and in order to review, there must have been a public road legally established; then the purpose is to find the correct corners and straighten the road so as to conform to the survey as originally made; but unless the road has been legally

established, ne review can make it a legal road.

The petition of 1877 makes no such case as contemplated by the statutes, and hence the proceedings under that petition did not make the road a legal one; and had this been a proper place for review, it was necessary that persons appointed to review should be householders, and this appears in no part of the record.

Hence I conclude that there was no legally established road by the action of the board in 1877.

This road has been used and traveled as a public highway substantially on the line it now is for many years; but from all the testimony at hand, I am convinced that it cannot

be sustained as a public road either by dedication or prescription.

There is one more question bearing upon this road as follows.

"An act to legalize and make valid the location of county roads," approved Nov. 9, 1877; (road laws, pamphlet, page 40.) This act has been construed by Judge Greene in the case of *Pierce vs. Smart*, as being prospective in its operations; hence it would not cure any defects or omissions in the location of this road.

Respectfully,

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