No. 14540

Supreme Court of Illinois

Gentleman

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vs.

Soule

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Di[redacted]on.

No. 97

1450

Lewis

vs

[illegible]

[illegible]

97

SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ABSTRACT OF RECORD,

AND

BRIEF

OF PLAINTIFF IN ERROR.

LEWIS SOULE, FOR HIMSELF AS WELL AS THE COUNTY OF LA SALLE,
vs.
WILLIAM GENTLEMAN.

ERROR TO KENDALL.

Filed apr. 28-1863,
L. Leland
Clk.

OTTAWA, ILL.:
PRINTED AT THE REPUBLICAN OFFICE.
1863.

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1863.

STATE OF ILLINOIS....THIRD GRAND DIVISION:

AND SUPREME COURT THEREOF,

TO APRIL TERM, A. D. 1863.

LEWIS SOULE,
FOR HIMSELF AS WELL AS THE COUNTY OF LASALLE,
vs.
WILLIAM GENTLEMAN,
} ERROR TO KENDALL.

This was a *qui tam* action for obstructing the public highway, brought by plaintiff against defendant before a Justice of the Peace, in the County of LaSalle, and appealed to the Circuit Court of that County, and thence brought by a change of venue to this Court.

Complaint, That William Gentleman, on the 15th day of January, A. D. 1861, at and within the County of LaSalle and Town of Grand Rapids, did unlawfully, &c., obstruct a certain public road, then and there running from what is known as Brown's Ford, on the Illinois River, to a point on the Illinois Timber Road near the corner of said Gentleman's barn, and running over, across and upon the S. W. fr. qr. and N. W. fr. qr. of Sec. 18, 33 North, R. 4, and South West frac. quarter of Section 7, Township and Range aforesaid, by placing brush therein and a fence

on and across the said public Road, which said obstructions so as aforesaid placed in said public road by said Gentleman, then and there rendered the same dangerous and inconvenient for the public to pass and repass over and upon, contrary to the form of the statute in such case made and provided; wherefore, &c.

14 Trial by jury, who found as follows: "We, the jury, find the defendant guilty as charged in the complaint, and assess a fine against the said defendant, in favor of the said plaintiff, for the sum of ten dollars." Which said verdict is entered of Record.

Motion for a new trial overruled, and exception by defendant.

16 Bill of exceptions as follows:

Samuel Milligan testified as follows: I came to the County in 1830. First crossed the Ford in '31. It was well known from Bloomington to Chicago, it became fordable in June. In 1832, I worked land of Major Campbell, south of Illinois River and 2 miles from the ford; during harvest I crossed twice a day. At the bank of the river the track was confined to a few rods in width; from there it run south and branched off in different directions. There was as much travel on it then as any road in the country. Afterwards Brown built a cabin there; the east end of it was some six feet on the track. The troops crossed there in

17 '32. The travel went up east of Brown's cabin, from there bore a little east, run up past where Gentleman' house now stands, I should think a little west from where his barn is. I didn't pass up there for 6 or 7 years until a year ago last Spring; then I thought the travel upon the bluff was in pretty much the same place as in 1832, but on the bottom it was entirely different, running to the west of Brown's cabin instead of the east. This change was made some 15 years ago; before the land sale of '35. I heard a conversation between Richey and Brown and his wife: Richey said to Brown—"What in the name of sense are you going to stay here for?" Mrs. Brown said—"Oh, we'll keep a hotel and make some dimes off the road." The ford came out of the river at different places on the south side in early years; it went across the point of the island, and from thence to the south bank of the river. Some years afterwards they crossed on the ripple above the island. After passing south of Brown's house, the track forked, one fork going south to the bluff, and the other

bearing off west across the mouth of the ravine and up the bluff on the west side of it, and the travel went both ways; there were

18 perhaps one or two wagons a week. Brown and I worked on the track between his house and Gentleman's; we did it for our own convenience. The present track is several rods west of where we worked. The travel in 1832 was on the old Indian Trail that run south. The present track on the bottom is 10 rods west of the track in '32. I've traveled there but very little, sometimes once or twice a year, sometimes not at all.

Cross Ex. The old track from the ford bore S. E., and passed to the east side of the Brown house, and then directly to a point in the bluff about 4 rods west of a little ravine that, in after years, the track went up the bluff in; from there it went direct to Gentleman's house. After it was changed into this little ravine, it was traveled in that track 7 or 8 years, and then it was changed to a new place; this was about 15 years ago. About that time they began to travel the upper ford about the ripple, and from there the road bore off towards the East, went up the bluff (Billy

19 Moore road); there was also a track that went from this ford down the river bank and around to the west of the Brown house.

Plaintiff then read in evidence a patent from the United States to Ephraim Dimmick, for the S. W. frl. qr. Sec. 18, T. 33, N. of Range 4, E. of 3d P. M., containing 100 80-100 acres, dated Oct.

20 1st, 1839.

Ephraim Dimmick. I am the man named in the Patent; went to live on the land in 1834. Brown had made a small improvement there in 1833, and I bought the improvements of him. Brown was in possession of land, claiming a right to it when I bought him out. Brown said, in speaking of the bottom tract, that there would always be a road there, and pointed out a patch where he intended to plant an orchard, and said the road would run by it.

Question by pl'ff: "State when you purchased from the United States the land described in the Patent."

21 Def't objected. Court overruled objection, and def't excepted.

Answer: I purchased the land of the United States in 1835.

I know the ford across the Illinois river and the road leading south from it across Section 18. I crossed it in 1833. The track

passed east of Brown's cabin. Brown was there and told me there was a track up the bluff leading off west of the ravine to South Ottawa, and I took that road with my family. The road passed also South up past where Gentleman's house is, a little west of it. Brown's cabin was on the N. W. frac. quarter of 18. People going off South took this last track; those going to South Ottawa took the west fork. I lived on the SW¼ up to 1836 or '37, and then rented to Alexander. When I lived there I used to work
22 the road; I fixed a place to cross a rivulet some 15 rods south of my house (the present Gentleman house) in 1834 or '35; I repaired the road down through the timber; I considered it a public road in 1834 and '35; I had no other idea. I afterward sold the land to Gentleman. I regarded the land as a public highway; 'twas not in any enclosure I had on the land. I also worked with Brown between my house and his. In 1834 I was talking with Brown at his house, and he said there would always be a road there on account of the ford. I supposed when I worked the track south of my house, that there was a public highway there and worked on it to make the travel easier.

Def't objected to all evidence of Dimmick in relation to working on the road, and also the statements in relation to the existence of a highway, and asked the Court to exclude it. The Court overruled objection, and defendant excepted.

Question by Pl'ff: "State if you know when Brown purchased said N. W. frac'l quarter of Sec. 18, 33, 4, from the United States."

Def't objected. The Court overruled, and def't excepted.

Answer: I believe Brown got a pre-emption right for that land
23 in 1834. I acquiesced in there being a public highway there. I left the land in 1836. The ford crossed the river around by the head of the Island. There was as much travel on it as on any road up to the time I left.

Cross Examined. From 1836 to 1839, I crossed 5 or 6 times; since 1839, not at all. Plat of Sec. 18, &c., shown witness (Exhibit A), and he traced thereon the line B B B B, and stated to the jury that said line represented the track from the ford across Sec. 18, as it was traveled in 1833, as near as he could recollect.

Josiah E. Shaw. I came to this country in 1828, and knew what was called the ford road. In going from my house to the

ford we passed along where Gentleman's stone fence now is, and
24 along down west of where his house and barn now are; it was the most of a thoroughfare we had. For 12 years I did not travel it more than once a year, and for the last 2 years not at all. In 1835 the roads forked a little S. of Brown's house, one going south and the other west of the ravine; the loaded teams coming from the South went that way. From '38 to '45, I never found any obstructions in the way. In 1844 we could not ford at all. Some years we would commence fording in June and continue till Fall.

Cross Examined. I forded by the head of the island, and then followed the track marked by Dimmick; this was the old line of travel; after that it was changed. The track first went close east of Brown's house; then it was fenced up, and the track went around east of the field; this was 20 years ago. After that there was more fencing done and we went round west of the field; this was 15 or 16 years ago. The place where the old track came down the bluff is 8 or 10 rods east of where the present one comes down.

25 Isaac H. Fredenburgh. I came into the country in 1828; first traveled the road in 1834, and off and on every year since except '49 and '50, I used to hunt up that way every Fall. Some 40 or 50 rods north of Gentleman's barn the roads forked, one track went off east of the barn, the other west, and so around by the head of the ravine to South Ottawa. On the bottom the track was east of Brown's house, and from there there were tracks traveled all through the timber. The track east of the house was afterwards fenced and the travel went east of the field; after a while Brown made a large field and the travel had to go west of it.

Cross Examined. I used to own the ferry at Ottawa, and run it; but I used to cross the ford every Fall and hunt in that timber. I think the road around east to the field was a better road and more traveled than the one to the west of it, and the Billy More road was a main traveled track for a long time.

Cyrus Shaver. I came into the county in 1830 and crossed the ford in the Fall; at that time there was no track there—nothing
26 but an old Indian trail going off to the south. There was a log house where Gentleman's house now stands, and a small inclosure. The Indian trail went just west of the house; from there

to the river; in 1831, as folks came in the country, there got to be quite a track there. I crossed it considerably up to 1835; since then not much and some years not at all. The ford is 1 1-2 miles from Ottawa.

Cross Examined. I crossed it about two years ago. I can't tell how the present track compares with the old one; 'tis so long ago that I have not charged my memory with it. I should think that it comes out about as it used to by Gentleman's barn; that part of the road south of the barn has been fenced up for 20 years, and down on the bottom the track is considerably further west than it used to be.

Ezra Kellogg. Came into the county in 1839; crossed the ford that Fall, and crossed again in 1832. I was on the road a year ago last Fall; think it pretty much the same place except further west; it varies on the bottom and on the bluff. During the summer of 1840, 10 or 12 teams passed over it every day. Within last four years I think there has been as high as 100 teams run the road in a day. I saw Gentleman with 3 or 4 of his hired
27 men, at work on the track some three or four years ago; they were ploughing and scraping on the hill.

Cross Examined. Gentleman had grain on the bottom and barn on the bluff at the time, and may have been fixing the hill for his own convenience; could not very well haul his grain without fixing it. From '32 to '40 I did not pass over the road at all; from '40 to '53 not more than a dozen times.

William Moore, (preliminary examination by deft't). I live in the town of Grand Rapids and have property there subject to taxation. Last Fall, at town meeting, the town voted $100, and as much more as might be necessary, to carry on this suit; the amount was to cover the costs in case the plaintiff got beaten, as well as the other expenses of this suit.

Defendant objected to the testimony of Moore being given. The court overruled the objection, and defendant excepted.

I live ¾ of a mile east of Gentleman's and have for nine years; have known the ford since '35; of late years has been heavy travel in the Summer season—from ten to a hundred teams a day. I saw Gentleman and four or five others at work on the road four
28 or five years ago; don't know whether it was public work or not.

For some years the weight of travel went by the upper ford, then east along the river, then up the bluff on the line between Sections 17 and 18. This was known as the Billy Moore road. Those that went up by Gentleman's barn, went in about the same track they now do. There was considerable travel there till Gentleman fenced.

Cross Examined. The Billy Moore road was traveled for six or seven years, until I fenced it up, and the weight of travel went that way; but the old track was open so anybody could go through that wanted to; the land north of the timber road was all opened. The east red line on the map shows the Billy Moore road. The land south of the timber road has been fenced up for 15 or 20 years, and for 10 or 12 years the fences have been such that a person coming from the ford and desiring to get off south would have to go west to South Ottawa or East to the section line, in order to get through. From '36 to '43, I traveled the road two or three times a year; in '44 not all. There has been various roads to the ford; one came in east of Gentleman's barn and touched the old track between the barn and the bluff, then bore off around east of Brown's house and field, and then entered the ford at the old track. These two points were the only ones that came to-
29 gether; they started from the timber road 50 rods apart. At the time I spoke of seeing work done on the road, it was an understanding among the neighbors to fix it; I asked three or four to come. A day or two before this I had asked Gentleman if we could go there and fix the road. I don't remember his answer, but we went there and he went along, and while we were fixing it Gentleman said he intended to shut it up as soon as he was able. I heard him say the same thing on two or three different occasions. I know Carter; he lived in the Brown House on the bottom. He lived there two or three years; he built a fence from the west line of the Brown field west to the Town line; it run across the track that run down on the west side of the Brown house; there was a gate in it that I passed through twice; one of the times it was shut. I think it was eight years ago that Carter built the fence; I believe that the fence was standing when Gentleman bought the land; it was during this time the fence stood there, that the main track went by Billy Moore's road.

H. G. Templeton. I have traveled the ford considerable since '49; it continued to be a main traveled road until 1856, when the bridge was built; there has been considerable travel since. Some 15 years ago I was warned by Abraham Trumbo to work on the road: he was then Path Master. We worked where the track went down the bluff. There had been many changes in the road
30 at different times. After we got on the bottom we beat around over it in different places, as piece after pieee was fenced up; the fence at the bluff varied it six or eight rods; remember of fences obstructing the track, and some times some trees down in the road, and once of a gate in a fence built by Carter; the gate at the time I went through it was unhinged and standing by the side of the road. There was always more or less travel on the Gentleman road every year since I came to the County till Gentleman fenced it up last Spring. About 15 years ago Jim Brown fenced a large field on the bottom, and the south line of it ran directly across the track that was then traveled; the fence was so close under the bluff that we had to go down in a new place; if a person had taken down the fence and followed along the old track, he would have been traveling in Jim Brown's field from the bluff to the river. The south west corner of the field was 10 rods west of where the old track came down the bluff; we had to work a new track before we got down the bluff; there never had been any travel over this new track before this time. 20 years ago I rented the old Brown place on the bottom; before that time there
31 had been two enclosures between which the track passed; I joined the two fields together by fencing directly across the old track, and the travel had to go off east of the field.

John Shepherd. I crossed the ford in 1838; from '38 to '42, I crossed it three or four times a year. From '42 to '48 I crossed it every week during the fording season; during this time there was no variation in the travel. I started in near where the barn is and went down west of the field to the ford. I helped raise Gentleman's barn, and fell off of it. I don't think the barn was placed on the track.

Cross Examined. I don't know anything about the travel on the Billy Moore road, nor anything about Jim Brown's fence across the track.

And on part of the Defendant, the following witnesses were called, sworn and examined:

Mr. Lovejoy. I came to the country in 1849; crossed the river at the ferry and went to Gentleman's House; 2 or 3 days after that I went with Gentleman to Ottawa, for the purpose of getting my Goods; we went with an empty wagon; starting from his house, we went east on the timber road about 80 rods, and then struck off north-east to the section line, down to the bluff; then took a bend around easterly, and back about to the north-east quarter of section 18; and from there followed the river bank till we came to the upper ford and crossed the river. The road we struck into was called the Billy Moore road. I have known the ford ever since that time. The main travel to the ford continued to go that way, until Moore fenced his land on section 17; then we worked a new track along Moore's west line down to the river, so on to the upper ford. This continued to be the main traveled road to the ford, until Nattinger fenced up some 4 or 5 years ago, and the travel commenced to go around by Gentleman's barn and along down west of the Brown house; for the first year or two of this travel they went up the river and crossed at the upper ford, and then fixed the lower ford at the head of the Island and crossed where they now do. There was no public travel west of the Brown house, from the time I came to the County to 5 or 6 years ago. I never saw one wagon going that way; during that time I crossed the ford very frequently and never saw any. I hunted frequently through that timber, and am sure I would noticed the track if there had been any.

The Defendant then read in evidence to the jury a certified copy of an order of Commissioners of Highways, on file in the office of the Clerk of the Town of Grand Rapids, which was in words and figures as follows, to-wit:

[COPY.]

The undersigned, Commissioners of Highways for the Town
41 of Grand Rapids, in the County of LaSalle, on the application of Sam'l R. Lewis, Josiah Dewey, Thos. Medell, Wm. H. Harris, Wm. Gentleman, Joseph Bishop, David Pembrook, Otis O. Wakefield, John Medell, Richard Hardin, C. K. Lovejoy, John Shaw, persons liable to be assessed for labor on the highway in

said town, did, on the 2d day of July, instant, cause a survey to be made of the following route, to-wit: Beginning on the Danville Road, near Joseph Ebersol, and running north between section 31 and 32, to the Illinois river; thence down the river to the ford, as near as practible, being the same route mentioned on application of the persons aforenamed, which survey is as follows, to-wit:

Field notes of a road surveyed July 2d, 1851, for the Commissioners of Highways, by Wm. H. Price, beginning in the Danville Road, 20 rods north of the house of Joseph Ebersol; thence due north 136 poles to the east and west line between Township 32 and 32 north, Range 4, to the corner of Section 5, 5, 31 & 32; thence north 1280 poles (along Section line) to N. E. corner of Section 18, Township 33;

Thence, W. 71½, N. 60 poles;
" " 59, " 58 "
" " 76, " 20 "
82, 33 "
1451

} on and near the River bank,

To Brown's ford, or 4 miles 135 rods. Note of the location of Resident Land owners, see accompanying plat.

WM. H. PRICE, Surveyor.

And the undersigned being of the opinion that it is necessary and proper that said road be laid out: It is therefore ordered that a road four rods wide be located and laid out according to said survey, and the same is hereby declared to be a public highway. Given under our hands and seals, at Grand Rapids, July 7th, 1851.

EMERY JONES,
TYLER FORREST, } Commissioners of Highways.

STATE OF ILLINOIS,
LA SALLE COUNTY,
Grand Rapids,

The undersigned, Clerk of the Town of Grand Rapids, does hereby certify the foregoing is a correct transcript from the original papers on file in my office. Given under my hand the 21st day of January, A. D. 1862.

D. S. EBERSOL, Town Clerk.

Mr. Lovejoy further testified that said Road described in said order, was opened along down the Section line between 17 & 18, to the north-west quarter of said Section; from thence along the river bank to the upper ford; that it was traveled for several
43 years substantially on said line, and was worked in some places by the public authority. He further testified that he was with the surveyors when said road was located, and considered it a public road and worked it as such.

David Pembroke. I came to the County in 1825, and crossed the ford at head of the island; then followed the Indian trail that went off West of the ravine; continued to travel this track until 1829; there was no other track traveled at that time. In 1829, I went away and stayed till after the Sauk War, in 1832. I then crossed the ford and traveled the same track. After the Sauk War, people began coming into the country. There got to be considerable crossing at the ford. I stayed here until 1835, and the main travel continued to go West of the ravine; there may have been a few teams up by Gentleman's barn, but I don't remember of any. The settlements mainly were about South Ottawa. In '35, I went away and stayed till '42; then came back and have been here ever since. In 1842 the travel coming in from the
44 South and East, struck across the present Timber Road about 50 rods East of where Gentleman's barn is, and bore north-west through the timber, until they got 50 or 60 rods north of the barn; then it bore north-east to Nattinger's line, where it went down the bluff in a little ravine like, and then bore off northwesterly to the river, passing just east of Brown's cabin on the bottom, crossing the ford at the head of the island. This was the main traveled track, east of the ravine, and continued so till Jim Brown fenced his large field in 1847. The south fence of this field was close under the bluff, and ran directly across the track so that the travel could not go down in the old place. A year before this there had been a track broken through in the neighborhood of the section line, and some travel had been going that way; and when Brown fenced across the old track all the travel went on this section line road, and continued to go there for 8 or 9 years; this was the track known as the Billy Moore road, and people traveling it took the upper ford. This was the best road we ever had

to the ford, and accommodated the public better than any other. During the time it was traveled, the old track by Gentleman's barn was entirely forsaken. I passed through the timber and across that old track frequently, and noticed that it was grown up with grass and brush. For the first few years after '42, there was
45 some travel coming in from the South which passed over vacant land west of the town line, and kept on till it struck the old Mechanicsville road west of the ravine, and followed that to the ford; this travel has been cut off for 11 or 12 years. The present track has only been traveled 4 or 5 years by the public, and has been made during that time; during the last year the travel to the ford has gone down the old Mechanicsville road and struck through Ford's lands to the river.

James Alexander. I came into the county in 1836, and have known the ford ever since and up to '48, I was in the habit of crossing very frequently. In 1838 I lived on Green's Point, and cultivated a field where Gentleman's house now is, and went over and back nearly every day in the year. The ford was nearly where it is now, from there it went around east of Brown's old field, and then bore off west across the mouth of the ravine and up what has been called the Mechanicsville road; when it got upon the bluff the road forked, one taking towards South Ottawa and the other leading off south. I took the Mechanicsville track and this last fork whenever I went over with a wagon; when I
46 went on foot I used to follow the track till up towards the bluff, and then strike up through the timber and passed where Gentleman's barn now is. I took this route because it was shorter, but there was no track then sufficient for the oxen to follow. There may have some wagons passed that way, but not enough to make a track. From '38 to '48 there was no travel west of Brown's house. In '39 and '40 I lived in South Ottawa. Up to '48 I was in the habit of buying cattle and driving them across the ford. During the last 2 or 3 years of that time I drove them by the Billy Moore road.

Samuel Lewis. I first crossed the ford in 1835. Came in from Sandy and went back the same way. I was at the raising of Gentleman's barn 16 years ago; it was placed directly over the old track that I used to travel in 1835. The year after the barn

was built, Gentleman built a barn yard, and that also crossed the old track of 1835, and the south-west corner of the field was ten rods west of where it crossed; the present traveled track is still further west of this fence. The people began travelling the Billy
46 Moore road as early as 1846 or '47, and continued to do so until 4 or 5 years ago. The first year after the travel was shut off from the Billy Moore road, it kept along the timber road to a point some 50 rods east of Gentleman's barn, and took an old track that used to be traveled several years before, and struck off north-west till it came to the present track, and kept down that west of Brown's field and house till it came to the river and the Nattinger fence, up his land, and they began to go around west of Gentleman's barn; during the time the Billy Moore road was traveled it was the main traveled road to the ford, and accommodated all the travel from the south and east. During the last season the travel has again sought the old Mechanicsville road down the bluff, and then turned off to the river, keeping on Ford's 20 acre lot. Ford threw it open for public travel. They crossed the river a little below the old ford, making up for the head of the Island.

47 Abram Trumbo. Have lived in LaSalle County 31 years, within 4 miles of the ford. The Mechanicsville road was the first one that was traveled; the main track went that way for some years, then people began to get in off at the south, and struck for Gentleman's barn, and went to the ford. Soon Section 20 was fenced up, and they had to go further east, and struck the old road 50 rods north of the barn. Between that point and the barn it wasn't traveled for 15 years. This cut-off track (C. C. C) ran northwesterly till it struck the old track 50 rods north of the
48 barn, and it went down the bluff 30 rods east where the present track does. People from the west and south-west took the Mechanicsville road west of the ravine. Those coming from the east and south-east took this cut-off. In '47 Jim Brown fenced his field, and the fence ran across the track under the bluff, so that they could not pass there any more, and they went around by the Billy Moore road, and the main travel continued to go by this road for 9 or ten years. I never called out Templeton to work on the road where he said I did. I was path master one

year. It was a year or two after Jim Brown fenced I called out Templeton to work on the road, but not at the place he says, nor on the ford road at all; but it was upon the timber road, near Billy Moore's. I never had any work done on the ford road at all.

Cross Examined. Have lived in Grand Rapids since 1834. For the first 7 or 8 years of that time we used to travel the old road by the barn, and passed just east of Brown's house on the bottom. (Witness here pointed out on plat the track marked B. B. B. B.) Then Gentleman fenced his land south of timber road some 20 years ago, and we went diagonally across the quarter east of Gentleman's. About the same time Brown's two old
49 enclosures on the Bottom were fenced up together, and we went around to the east of the field. The track was traveled for 3 or 4 years. (Witness points out the track on the plat as the one marked C. C. C. C.) Jim Brown enclosed his large field. The south fence was built across the track, so close under the bluff that we could get down it there. Then the travel went by the Billy Moore road for 9 or 10 years. During this time the road up by the bluff was not in use. The western travel went by the Mechanicsville road. For the last 10 or 12 years there has been no way to get out south or south-west unless you took the timber road to South Ottawa, and went from there, or else went east as far as the Billy Moore road, and out that way. Gentleman's house was built in the old track of 1834. Jim Brown's fence also crossed it. Also, Gentleman's barn and calf pasture. The travel by the Moore road lasted for 9 years; during that time the road up by the barn was disused, trees were filled in it; there was no track there. The cut-off track went further east than the old '34 track. It was east of it all the way.

James Brown. Crossed the ford before the Sauk war. In an early day the Mechanicsville road was the best of the two. The
50 track up by the barn was traveled some. Starting up from the river, it passed east of our house, and south to the bluff, at the bottom of which it was 10 rods east of the present track, and on the top of the bluff 5 or 6 rods east of it. It ran directly under Gentleman's barn. His barn yard and calf pasture were also across that track. The north-west corner of the calf pasture is

three or four rods west of the old track. I fenced the field on the bottom in 1847; the fence on the south line was built close under the bluff; and directly across the old track. The west end of this fence is 8 rods west of the track; from this point to the river the old track went right through; the field that I made in '47 and down by the house, was at least 18 rods east of the present track. The present track is 2 or 3 rods west of the west line of the field I made in '47. After I made this field, the travel went on the Billy Moore road. From '42 to '53 there was no one traveled on the old track except Gentleman and me, and occasionally a neighbor. During that time there was no travel went up west of my field, except that which took the Mechanicsville road.

Cross Examined. (Question by Plaintiff's Counsel.) When did your father buy the land where he lives?

Objected to by Defendant. Overruled by the Court, to which
51 ruling Defendant then and there excepted.

Ans. He bought the land in December, 1834. I lived there from the Sauk war until 1840. During that time the travel went east of the house. The Mechanicsville was the best of the two roads. I worked on the bluff with Templeton at the time he speaks of. It was in '47 or '48. I was not warned out by Trumbo. I worked out my tax that year under Trumbo, upon the timber road towards Billy Moore's. The upper ford which was used in connection with Billy Moore's road was 80 rods east of the old ford on the south bank, and 20 rods on the north bank.

Ambrose Trumbo. Crossed the ford in 1830. In '31 there got to be a track coming in from Anderson's ford on Covel Creek. That ran through where Gentleman's calf pasture now is, and descended the bluff 20 rods east of where the present track does. On the bottom it went through the field that Jim Brown afterwards made, and east of Brown's house. I drove up and down the Mechanicsville road in 1832. Twenty years ago Gentleman
52 fenced south of the timber road, and stopped the Anderson ford travel. It then went west of the town line, and down the Mechanicsville road to the ford, until 10 or 12 years ago, when it was fenced up. The Billy Moore road began to be traveled in '45 or '46, and was the main traveled track until 4 or 5 years ago.

During that time the road by Gentleman's was not traveled by the public. The cut-off road (C. C. C. C.) began to be traveled in 1835. None of the track was on the same land as the present track.

Cross Examined. The travel last summer went down the old Mechanicsville road, and turned off down the river; crossed over the head of the island.

Miles Coleman. First knew this ford 16 years ago last spring. I came from the west up towards Gentleman's Barn. They were just raising it. Could see no track there. Inquired for the ford road, was directed to strike through the brush, and I would come to it. I struck in west of where they were raising, and took a northwesterly direction, and came to the track from 30 to 60 rods north of the barn, and followed it down to the ford. It went down the bluff about where the middle of Jim Brown's south fence was. Afterwards at and from there bore down east of Brown's house. The point where it went down the bluff was 20 rods east of the west line of Jim Brown's field. I lived in Brown's house 18 months; during that time the main travel went by the Billy Moore road. Some few came down the Mechanicsville road, but there was no travel down by Gentleman's barn. That track was full of cord wood and brush that I put in. I frequently hauled grain to Chicago, and always went down the Mechanicsville road.

Cross Examined. When I lived on the Brown place I cut some wood on the bottom, and hauled this up on the bluff on the Mechanicsville road. That that I cut upon the bluff I hauled out by Gentleman's. The land was all unenclosed timber land.

Richard Hardin. Came to the country in 1843, and traveled the cut-off track (C. C. C.) down to the ford. Went down the bluff 10 or 15 rods east of the present track. Gentleman's barn was placed over the old track that ran off south. The barn yard
53 and calf pasture were built across the track we traveled in 1843. The travel all went around by the Billy Moore road; this continued to be the main traveled road for 8 or 9 years.

Jesse Drake. First knew the ford in 1844. Came in from Anderson's ford, and went down to the ford by the cut-off track, (C. C. C.) Went back by the Mechanicsville road. Jim Brown's

fence was built across the track so that we could not go down that way any more; then went by the Billy Moore road. Eight years ago I hauled lumber, and went by the Billy Moore road.

Defendant here closed his case, and Plaintiff called, as a witness

W. F. Whitmore. I am County Surveyor of LaSalle County. Made the plat shown the jury. The cut-off track (C. C. C.) is, at one point, on the same ground as the present track.

Cross Examined. At the point where they come together, they occupy a space of about a rod to a rod and a half wide. Made the survey for the Commissioner of Highways, which has
54 been read in evidence, on part of Plaintiff. When I made it, Gentleman's fence, running west of the barn, was all finished except a length or two where the track turned off towards the ford.

Thorne Howland. In 1854 I fenced off the southern travel which came in west of the township line. I traveled on the Gentleman road every year from 1844.

H. G. Templeton. I think I went down the track by Gentleman's barn in '49 or '50. Don't remember of seeing any cord wood in the track. Saw some wood scattered around on the bluff in '47 or '48.

Cross Examined. I never saw the fallen tree spoken of by Coleman, nor the wood corded up in the track. If they were there during a whole season, I don't think I could pass there without knowing it was there. I traveled the Gentleman road every year since I came here.

Billy Moore. I think I passed down the road by Gentleman's barn during '49 and '50, but don't remember of seeing any trees across the track.

Cross Examined. I have only a general recollection of having passed there every year, and several times a year, from the time I moved up there till Gentleman fenced it up.

This was all the evidence in the case.

55 Plaintiff then offered the following Instructions:

(Given.) 1st.—If the jury believe from the evidence that the

Defendant did fence up and obstruct a public road at the place, and on the lands described in the within Complaint in this cause, eighteen months prior to the commencement of this suit, and that said road so obstructed was a legal public road, existing either by prescription or dedication, or both, as set forth herein in the Plaintiff's Instructions, they will find the Defendant guilty.

(Given.) 2d.—If the jury believe, from the evidence, that the public have used and traveled on the road in controversy, as a public road for the period of twenty years without interruption, before the Defendant so fenced up and obstructed the same, if proven, then this affords a conclusive presumption that said road is a legal public road, existing by prescription, if the jury believe, from the evidence, that the public who so used and traveled upon said road for said period did so use and travel it, claiming a right to do so adversely and exclusively, and not as under a permission from the owners of the land, and the said owners not objecting to such use and travel, being in a position to object to such use and travel.

56 (Given.) 3d.—Although the right of the public to use and travel a road existing by prescription, as stated in the 2d Instruction, cannot be raised against the consent of the owners of the land, yet it is not necessary in law that such consent should be express and implied. Consent is sufficient. And if the jury believe, from the evidence, that the public have used and traveled upon the road in question for the period of twenty years without objection from the owners of the land, then the jury are warranted in finding such implied consent on the part of the owners of the land, and to raise a presumption of consent, and even of a grant from such acquiescence in such uses.

4th.—A right of way can be acquired by the public by prescription, as against the sovereign power, or as against the United States over land owned by them as well as against individuals.

(Given.) 5th.—The public is an ever existing grantee, capable of taking dedications of land for public uses as a highway, and the interests and accommodation of the public is a sufficient consideration to support such dedication. In order to make a legal public road by dedication, two things only are necessary, namely: first, the act of dedication by the owner of the land; and secondly, the acceptance of it on the part of the public. The act of dedicatiion may be to the general public, and limited only by the wants of the community or by the act of dedication.

(Given.) 6th.—The act of dedication is a question of intention
57 on the part of the owners of the land, and may be proved by any acts or declaration on the part of the owner, tending to show that he intended to dedicate to the public use, or by express consent, or implied consent, which may be presumed from an acquiescence for a great length of time in the public use and travel of the land, when the owner is in a position to object, as a public road, and no definite term is required by law to constitute a dedication.

(Given.) 7th.—In order to make an acceptance of a dedication legal on the part of the public, it is not necessary that the public authorities should repair or bestow any public labor on a road dedicated to the public. It is sufficient in law to make a valid acceptance, that the public use and travel it as a public highway.

(Given.) 8th.—After a dedication to the public of the rights to travel over and use the land of the owner for a public road, and an acceptance of the same by the public by use and travel of the road as such, then such dedication is irrevocable, and binds the owner of the land and all persons claiming under him, and no act or dedication of such owner or subsequent purchaser of the land can have the effect to revoke or invalidate such public road.

(Given.) 9th.—If the jury believe, from the evidence, that the public have used and traveled the route in dispute as a public road, for the space of twenty years, without interruption or ob-
58 struction, and adversely to the right of the owner of the land, and that such travel has been for said period on the same general line of travel, then the public have acquired the legal right to such road; and the fact, if proven, that such travel at different times in said period was varied, and was not always in the same beaten track, will not defeat the right of the public to such road.

(Given.) 10th.—Although the jury may believe, from the evidence, that the road in dispute as traveled may have varied several rods at different times, and was not always in the same beaten track, but was sometimes traveled in one track and sometimes in another, but always followed the same general direction, points, and general line of travel, such facts, if proven, will not, in law,

defeat the right of way in the public, whether acquired by prescription or dedication.

(Given.) 11th.—Even although the jury may believe, from the evidence, that the parties have ceased to use and travel upon the road in dispute from nine to fifteen years, yet if the jury believe, from the evidence, that the public had, prior to the non-use, acquired the right of way either by prescription or dedication under the preceding instructions, that would not, in law, amount to an abandonment of such road by the public, unless the proof shows that the public intended to abandon said road, and had acquired the right to use and travel some other legal public road in
59 lieu of it, or the necessity for such road had ceased to exist. But before the public can be charged with an abandonment of a road, the proof to establish it must be strong enough to establish another line of road, if such other line is necessary for the public.

12th.—Positive evidence of a fact is entitled to more weight, at the hands of the jury, than negative evidence of the same fact.

To the giving of each and every of said Instructions Defendant then and there objected. The Court overruled said objections as to said 1st, 2d, 3d, 4th, 5th, 6th, 7th, 9th and 12th Instructions, and gave the same to the jury, to which ruling of the Court Defendant then and there excepted.

The Court, at the request of Defendant, qualified the 8th Instruction as follows: "But it may be abandoned by the public by non-uses, on acquiring another road in lieu of it, or on the necessity for the road ceasing to exist." And the 10th and 11th, as follows: "But the points between which these varying tracks or routes run must be the same, and if they have not substantially common termination at each end, the travel on one cannot enure to the benefit of the other."

To the giving of said 8th, 10 and 11th Instructions, and each of them as qualified, Defendant objected. The Court overruled said objection, to which ruling of the Court as to said Instructions Defendant then and there excepted.

Defendant requested the Court to qualify the 2d, 3d, 4th, 6th and 9th Instructions given to the jury on part of Plaintiff, as follows: "But where lands are lying open and undivided, no pre-

sumption in favor of a road can arise from mere travel by the public, until circumstances induce owners to enclose: and the consent of the owner cannot be implied under such circumstances simply because such travel is unobjected to." The Court refused to qualify the same as aforesaid, to which ruling of the Court Defendant then and there excepted.

61 Defendant requested the Court to qualify the 3d Instruction given to the jury on the part of Plaintiff, as follows: "But if the jury believe, from the evidence, that the route in question was over open and unenclosed lands, and such route needed repairs, and such repairs were not made by the public authorities when so needed, as they did other roads in the vicinity, this is a circumstance to be considered by the jury in determining whether the public claimed the right to travel over the route adversely to the rights of the owners." The Court refused to qualify the same as aforesaid, to which ruling of the Court Defendant then and there excepted.

Defendant requested the Court to qualify the 7th Instruction, given on the part of the Plaintiff, as follows: "Unless it appears from the evidence that the road needed repairs, and then if such repairs were not made, and the public authorities did not exercise control over the road as they did over other roads in the vicinity, the mere travel by the public would not be sufficient of an acceptance on the part of the public."

The Court refused to qualify the same as aforesaid, to which ruling of the Court Defendant then and there excepted.

Defendant then offered the following Instructions:

(Given.) 1st.—A public road can only be established in three ways; 1st, by being legally laid out by the public authorities; among the requisites of which, are the assessment of damages and payment of such damages to the owner of the soil.

2d.—By prescription. 3d.—By dedication. And unless the jury believe, from the evidence, that the road in controversy has been established by one of said methods, they must find for the Defendant.

62 (Refused.) 2d.—That there is no evidence in this case tending to show that the road in controversy has ever been legally laid out by the public authorities.

(Given.) 3d.—Before the jury can find that the route in controversy is a public highway by prescription, they must believe, from the evidence, that the public have traveled over the route uninterruptedly, and adversely to the rights of the owner of the land, for the space of 20 years prior to the 17th day of July, 1860.

(Given.) 4th.—If the use of the route in controversy was not by the *public*, but merely by a few individuals of the neighborhood, and the use was only occasional, and was not adverse to the rights of the owner, and the township, county, or district authorities did not exercise any control over it, and failed to repair it when repairs were needed, as they did other roads, the jury must find for the Defendant upon the question of prescription.

63 (Given.) 5th.—The people of the town of Grand rapids being desirous to obtain a highway through the land of the Defendant, may do so by having such highway laid out by the public authorities, and having the damages appraised and paid to said Defendant before opening said highway; but they cannot, because said land is left open by the owner, enter upon the land, and, without the express or implied consent of the owner, convert said land to a public highway without paying for the land: and length of time, however long said land may be traveled over and used without the consent of the owner, is not sufficient to establish said land as a public highway.

The Court qualified said 5th Instruction as follows: "This is the law so far as the question of dedication by the owner of the land as a public highway is concerned."

To the ruling of the Court in refusing to give the same as asked and the qualification aforesaid, Defendant excepted.

(Refused.) 6th.—No presumption of a right of way by prescription can arise in favor of the public, in consequence of mere travel over open and unenclosed lands without objection from the owner, but the use by the public must be shown to have been adverse to the rights of the owner, and upon claim of right of way, and also to have been uninterrupted for the space of 20 years.

(Given.) 7th.—In order to establish a public highway by *dedi-*
64 *cation*, these things must concur: 1st, the owner of the land,

must offer the right of way to the public, or do some act indicating an intention to dedicate the land to the public. 2d. The public must accept the offer of such way, and unless they do so accept, the route does not become a public highway; and at any time before such acceptance, the said owner or his grantees may revoke the offer.

(Given.) 8th.—If the jury believe, from the evidence, that the route in question has been offered by the owners of the land to the public for a public highway, and if they further believe from the evidence that, after such offer, the route was not used by the *public*, but merely by a few individuals of the neighborhood, and the use was only occasional, and the township, county, or district authorities failed to repair it when repairs were needed as they did other roads in the vicinity, the jury will be justified in finding that said route has never been accepted by the public for a public highway; and without such acceptance said route could not become a public highway by dedication.

(Given.) 9th.—Whenever a route has been established as a public highway by prescription or dedication, the public may abandon it by non-user, on acquiring the right to travel another road in lieu of it; or they may abandon it by non-user when necessity for the road has ceased to exist, and upon such an abandonment it ceased to be a public highway.

(Refused.) 10th.—If the jury believe, from the evidence, that a route for a public highway was, at one time, offered to the public by the owner of the land in question, over said land, and that subsequent to said offer a fence was built across said route, and has remained there for 20 years, and that a barn and barn yard were built over and across said route, and have remained there for 16 years, and that a fence was built across another part of said route, and has remained there since 1847, and also that a calf pasture was built across another portion of said route, and has remained there for the last 7 or 8 years; and if they further
65 believe, from the evidence, that during the time the said obstruction remained upon said route as aforesaid, the public or public authorities made no effort to control said route, or use it as a line of travel, they will be fully justified in finding that said route has not been accepted by the public for a public highway.

(Refused.) 11th.—If the jury believe, from the evidence, that a road leading from the timber road down to the ford in question, upon or near the route of the old Mechanicsville road, has been opened by Ford, the owner of the land, and has been traveled and worked by the public ever since as a traveled road to said ford, they will be justified in finding that such route has become a public highway by dedication.

(Refused.) 12th.—And if they find the dedication of the road referred to in the preceding Instruction, and further believe that said route has been traveled by the public in lieu of the old track claimed to have been dedicated by Dimmick, and that the public ceased to use said old track, these facts are proper to be considered by the jury on the question of an abandonment of the old Dimmick track.

(Given.) 13th.—If the jury believe, from the evidence, that for a period of 8 or 10 years the public did not use the route claimed to have been dedicated by Dimmick, and that they ac-
65 quired the right to, and did, travel the road known as the Billy Moore road during said time in lieu of the old track, using it for a ford road, these facts would tend to show an abandonment of the old track; and, if abandoned, it then ceased to be a public highway.

(Given.) 14th.—If the jury believe, from the evidence, that the township authorities of Grand Rapids ordered to be opened and did open and work, and the public did travel the road described as the Billy Moore road, claiming the same to be a public highway, and that the owner of the land over which the said road passed knew that the public so claimed said highway, and acquiesced in said travel and work by the public, these are facts to be considered by the jury in determining whether the said route has become a public highway by dedication.

(Given.) 15th.—If the jury believe, from the evidence, that the old trail was dedicated to the public by Dimmick, and accepted by the public, and if they further believe that the barn built by Gentleman was placed directly across said road, and that said road was, at the time of the commencement of this suit, still obstructed by said barn, and that said obstruction was placed there over 18 months prior to the 17th day of July, 1850, then they

must find for the Defendant for obstructing such road; and they cannot find for the Plaintiff for obstructing such road, because the Defendant has built a fence to the westward of said road, across another road.

(Refused.) 16th.—The description of the road, alleged by the complaint to have been obstructed, is material, and must be
67 proved as alleged; and if the jury believe, from the evidence, that the road in controversy does not run between the points described in the complaint, but between other and different points, the jury cannot find against the Defendant in this cause, for obstructing such other road not described in said complaint.

The Court refused to give said 2d, 6th, 10th, 11th, 12th and 16th Instructions, to which ruling of the Court Defendant then and there excepted.

Verdict for Plaintiff. Motion for new trial. Motion overruled. Excepted to by Defendant.

For plat of Ford road and vicinity, see record page 68.

Certificate of Clerk of Kendall County to truth of transcript of record.

Errors Assigned.

Now comes the said William Gentleman, Plaintiff in Error, by Glover, Cook & Campbell, his attornies, and says that, in the Record and proceedings aforesaid, and in the rendering of judgment aforesaid, there is manifest error in this, to wit:

1st. The Court erred in admitting improper evidence on the part of the Plaintiff below.

2d. The Court erred in refusing to admit proper evidence on the part of the Defendant below.

3d. The Court erred in refusing to allow the Defendant below to cross examine generally the witness, Amos Ebersole, called, sworn and examined by Plaintiff below.

4th. The Court erred in giving to the jury the said Instructions, and each of them, asked by the Plaintiff below.

5th. The Court erred in refusing to give the qualifications to the said Plaintiff's 2d, 3d, 4th, 6th and 9th Instructions, as asked

by Defendant below, and in refusing to give each of them severally.

6th. The Court erred in refusing to give to the jury the said 2d, 6th, 10th, 11th and 16th Interrogatories, and each of them, as asked by the Defendant below.

7th. The Court erred in overruling the said motion for a new trial.

8th. The verdict was against the weight of the evidence, and the Court erred in rendering judgment aforesaid in manner and form aforesaid.

GLOVER, COOK & CAMPBELL,
For Plaintiff in Error,

LEWIS SOULE, FOR HIMSELF, &c.
vs.
WM. GENTLEMAN, PLFF. IN ERROR. } ERROR TO KENDALL.

POINTS FOR PLAINTIFF IN ERROR.

This was an action brought by the Plaintiff, Lewis Soule, for himself and the County of LaSalle, vs. the Defendant, William Gentleman; the Plaintiff alleging that the Defendant below, on the 15th of January, A. D. 1861, in the County of LaSalle, and Town of Grand Rapids, unlawfully, &c., obstructed a certain public road, "from Brown's ford, on the Illinois River, to a point on the Illinois Timber Road, near the corner of said Gentleman's barn, and running over, across and upon the S.W. fr. qr. and N.W. fr. qr. of Sec. 18—33—North, R. 4, and South-west frac. quarter of Section seven, in Township and Range aforesaid," by fencing the same, and placing brush therein, &c.

The jury, upon the trial of the case, (which had been taken by change of venue from LaSalle County to Kendall,) found for the Plaintiff, and judgment was entered by the Court.

The Defendant asks for a Writ of Error and Supersedeas from the Supreme Court.

I.

The first error assigned is, that the Court below admitted improper evidence on the part of the Plaintiff.

By reference to the Abstract, marginal page 20, it will be seen that Plaintiff had read in evidence a Patent to E. Dimmick, for the S.W. fr. qr. 18—33—4, dated Oct. 1st, 1839. The said Dimmick was called as a witness, and asked when he purchased from the U. S. the land described in the Patent, and stated that it was in 1835, and exception was taken.

This was clearly incompetent. If the Patent did not show the date of purchase, a certificate of entry would; and such certificate is made evidence by the Statute.

1 *Purple, Stat.* 255, *Sec.* 8.

Possession of the land might be proved by parol, but the purchase from the United States could not.

Dimmick claiming title through the United States, by conveyance made in 1839, is estopped from setting up title in himself prior to that time by mere possession.

There was but one way by which he could show that he pur-

chased the lands prior to the date of the Patent, and that by certificate of purchase.

No purchase of lands can be proved by parol, except under particular circumstances a resulting trust may be so proven.

Enos v. *Hunter*, 4 *Gilm.*, 211.

Marginal page 22.

Dimmick states that he lived on the land up to 1837, (two years before the date of the Patent,) and worked on the track, and considered it a public highway.

This was objected to by Defendant, and received by Court.

It is liable to the same objection; there was no proof that he owned the land then, except his statement, which was incompetent evidence, and of course he could not dedicate a road on it, which was all this proof tended to show.

Marginal page 23. Witness Dimmick, in answer to question of Plaintiff, said "I believe Brown got a pre-emption right for the N.W. frac. qr. of 18—33—4 in 1834.

The pre-emption right of Brown could not be proved in this way; and if it could, the pre-emption right would not authorize him to dedicate a highway, certainly not under the title matured in him, which was not the case.

The proof was further incompetent, as it did not tend to show title.

Dimmick was allowed to state what Brown and Brown's wife said about the probability of there being a road over it, without in any way locating the road.

Marginal page 22.

Of course the only tendency of this evidence was to mislead the jury, and induce them to believe that the road was dedicated over one-quarter by Brown, and over the other by Dimmick, when neither of them are shown to have owned the land, and therefore could not legally make a dedication.

Marginal page 34.

The Court allowed to be read to the jury a certified copy of certain papers in the office of the Town Clerk of Grand Rapids, for the purpose of showing an acceptance by the public of the road in question.

The road described in said certified copy was described therein as in Section eighteen (18), Town thirty-three, Range five (5), and the road in complaint as on Section eighteen, Town thirty-three (33), Range four (4).

Of course the paper did not tend to prove anything whatever, in regard to the road in question, and ought not to have been read in evidence.

Marginal page 51.

James Brown, in answer to a question by Plaintiff's Counsel said,—"my father bought the land where he lived, in 1834, December." This was an attempt to prove title, and bolster up the statements of old man Brown and his wife, testified to by Dimmick, and which were relied upon by Plaintiff to show a dedication of the road.

I need not argue or cite authorities to show that this was not proper proof.

II.

The third error assigned is, that the Court refused to allow the witness, Amos Ebersole, called, sworn, and examined by the Plaintiff, to be cross examined by the Defendant.

Abstract marginal page 39.

Amos Ebersole, called by Plaintiff, and signature of Daniel Ebersole proven by him, and then he was asked if the road described in a paper that had just been read to the jury, was all in the town of Grand Rapids, and answered that it was all within the limits of said town. Defendant then proposed to cross examine said witness generally, but the Court would not allow him to do so.

This was certainly error, for the rule is well established that

where a witness is called, and sworn, and examined at all, the opposite party has the right to cross examine him generally.

See Phillips on Evidence, page 397.
1 *Greenleaf, Sec.* 433 *et seq.*

III.

The 4th error assigned is, that the Court erred in giving to the jury the Instructions asked by Plaintiff below.

Before discussing the questions arising upon the Instructions, we call your attention to the facts of the case, in order that the questions arising upon the Instructions may be more clearly presented.

The road in question is claimed to exist by prescription or dedication, or both.

The only proof of dedication is the testimony of Ephraim Dimmick.

He says, in relation to the N.W. frac. ¼ of 18, occupied by old man Brown, that Brown in 1833 told him there would always be a road there, and pointed out a place where he intended to plant an orchard, and said the road would run by it. This was not a dedication by Brown, because

1st. Brown was not then the owner of the ¼; his son says he purchased it in 1834, and we insist that there is no legal evidence showing that he ever had the title.

2d. It was not the same road that is claimed, as will be seen by reference to the map attached to the Record. The old track, as marked by Dimmick, is designated B. B. B. B.

The road in controversy is marked "Road to Brown's ford as laid by Commissioners of Highways, Dec'r 3d, 1860.

An inspection of the map will show that the two roads did not touch each other but in one spot where they crossed.

Dimmick says the conversation took place at Brown's cabin, and at that point the road Brown spoke of, and which is marked on B. B. B., is 525 east of the road sought to be opened.

This is all the proof of a dedication on the N.W. ¼.

In relation to the S.W. ¼, Dimmick says—"I fixed a place to cross a rivulet some 15 rods *south* of my house (the present Gentleman house). I repaired the road down through the timber in 1834 and '35. I considered it a public road; had no other idea."

This is not a dedication of the *road in controversy* for several reasons:

1st. There is no legal proof that Dimmick owned the land at that time; the United States conveyed it to him in 1839.

2d. Dimmick was not speaking of the road in controversy. The road of which he spoke was no part of it on the same ground as the road claimed, except where the two crossed down near the river. The road claimed in this suit ends in the timber road, on a line 150 feet west of Gentleman's Barn.

See Map.

The road spoken of by Dimmick ran under where the barn now stands.

See testimony of Sam Lewis, Record page 46.
Also, Jim Brown, page 50.
Ambrose Trumbo, page 51.
Richard Hardin, " 53.
Also testimony of Niles Coleman, Record page 52.

3d. This trial was had in 1862. The barn was built 16 years before, and Ambrose Trumbo, page 51, testifies 1st, to this road spoken of by Dimmick, and shows conclusively that it was an entirely different road from the one claimed.

He then testifies that what he called the "cut-off road," marked C. C. C. C. C. on the map, began to be traveled in '35.

It will be seen that this road is an entirely different road from the one sought to be opened. And that, from '46 till 4 or 5 years ago, the road by Gentleman's was not traveled by the public.

4th. If any track was dedicated, it was the one marked B. B. B. B. Gentleman's barn was placed over that track 16 years ago, and from that time till the present that track has not

been used; and from 1845 until 4 or 5 years ago, no track near the barn has been used.

The only proof tending to show an acceptance by the public of that old track, is the fact that, at one time, but not later than '45, there was some travel upon it, the land then lying unenclosed and common. And that Dimmick, at one time, worked some on it, 15 rods south of what is now claimed to be the south end of the present road, but not under the direction, or at the request of any public officer.

But there was no such dedication as would bind Gentleman when he became the owner of the land by purchase from Dimmick, in 1836. There was no record of any road there: there was no pretence of any notice to Gentleman at the time of his purchase that any road had been dedicated to the public.

The only notice which he had was, the implied notice arising from the fact that over land lying unenclosed and common, there was a traveled track; this was not sufficient notice to him of any dedication to the public.

In Warren v. *Jacksonville*, 15 *Ill.*, 236,

the Sup. Ct. says—"No inference or conclusion will be drawn in this State against the owner of land lying unenclosed, which is traveled over, to establish an easement in favor of the public.

The testimony of Lovejoy, page 40, together with the documentary evidence on pages 41 and 42, show that the town authorities, in 1851, opened a road down to the same ford from the same timber road, at a point one-half a mile east of this road, and this, too, at a time when all the witnesses say the Billy Moore road (over which it was laid) was the main traveled track to the ford.

We think that it clearly appears that there was no dedication of the road; but even if there was, the fence, which Gentleman is complained of for erecting, was 8 to 10 rods west of the only track which is claimed to have ever been dedicated.

Was there a road by prescription?

The first track from the ford was the track marked on map A. A. A. A., and was traveled exclusively, from 1825 for several years. This is called by the witnesses the Mechanicsville road.

See David Pembroke, page 43.

This was the only road traveled in 1838; see testimony of James Alexander, page 45.

If any track up by Gentleman's barn was traveled between those times, it had become wholly obliterated in 1838.

The next track spoken of by the witnesses, is the one marked B. B. B., running up by Gentleman's barn, and this track may have been traveled some in '33, '34, and '35; but, according to Alexander, was not traveled nor distinguishable in 1838.

Abram Trumbo also testifies to the same fact, page 47.

Gentleman fenced up the road marked B. B. B., south of his barn, in 1840.

See Amos Ebersole, p. 48.
Also, Trumbo, p. 47, *Alexander and Pembroke.*

and then the travel went on what is called the "cut-off track," marked on the map C. C. C. The road marked B. B. B. was not traveled for 15 years after this. See Trumbo, p. 47.

This cut-off track was used till '47, when it was fenced across by Jim Brown, and the travel then went on the Billy Moore road, and this continued to be the main traveled track till 4 or 5 years ago, when Moore fenced it up, and then, for the *very first time*, the travel began to pass over the track claimed in this case, and surveyed by order of the Road Commissioners.

See Lovejoy, page 40.
" *Pembroke,* " 45.
" *Sam. Lewis, p.* 47.
" *Abram Trumbo, page* 48.
" *Jim Brown,* " 50.
" *Ambrose Trumbo,* " 51 *and* 52.
" *Niles Coleman,* " 52.

We say this evidence proves conclusively that the road in controversy was not traveled at all till 4 or 5 years ago. If it is not proven conclusively, there is certainly an immense amount of ev-

idence tending very strongly to do so, which will answer our purpose as well.

It is also shown that when the travel did commence to go on this track, 4 or 5 years ago, Gentleman proclaimed his intention to shut it up as soon as he was able, and the neighbors, when they repaired it a little by private labor, first asked Gentleman's permission to do so.

In view of the facts above stated, we ask your attention to the Instructions.

The 3d Instruction for Plaintiff, record page 56, is in direct contravention with the doctrine of 15 Ill., 236.

Warren v. *Jacksonville.*

The land around this road was lying entirely unenclosed and common until Gentleman fenced it up, for which fencing this suit was brought.

That case says—"No inference or conclusion will be drawn in this State against the owner of land lying unenclosed, which is traveled over, to establish an easement in favor of the public."

The last part of the Instruction says:—

"If the jury believe, from the evidence, that the public have used and traveled upon the road in question for the period of 20 years, without objection from the owners of the land, then the jury *are warranted* in finding an implied consent on the part of the owners of the land, and to raise a presumption of consent, and even of a grant from such acquiescence in such cases."

Either the Instruction or the decision is not law.

See also Colvin v Bennett 17 Mass 564.
Hart v Voss 19 Mass 365.
Curtis v Kibler 14 Barb 523.
Pearsall v Post 20 Mass 121.
Martin v People 23 Ill 395.
Daniels v People 21 Ill 442.
Maxey v Taylor 19 Ill 634.

The 6th Instruction is liable to the very same objection.

The Court refused to qualify those Instructions in accordance with what we believe to be the law.

The qualification asked is on page 60 of record, and is in the very words of the decision.

The qualification asked to the 3d Instruction, pp. 60 and 61, are the law, and should have been given.

Lewiston v Proctor 27 Ill 418.
Martin v People 23 do 395.
Daniels v People 21 " 442
Maxey v Taylor 19 " 634
Akerman v Ashley 17 " 363
Denion v People 17 " 416

The 7th Instruction is not the law, as applied to unenclosed and common lands, and roads over them needing repairs; and the qualification, which appears on page 61 of record, ought to have been given.

See Authorities last citation

The 8th Instruction is not the law, as given.

If an owner of land dedicates a road to the public, and subsequently sells the land to a purchaser who has no notice in any way of such dedication, the purchaser will not be bound thereby.

The 9th and 10th Instructions could have had no effect but to mislead the jury in this case as to the law.

Here were 4 traveled tracks leading to the ford; two of them were a mile, none of them were upon the same ground, and only touched the track of the road now claimed where they crossed it.

It is not the law that, if a man consents that a road may run on one side of his house, that therefore the public have a right to run the road on the other side of his house; or if he consents that a road may run in one place, that therefore the public have a right to a road 500 feet distant, as is claimed in this case, merely because the road starts from the same place, and runs in the same general direction.

The consideration for giving the right of way may have been a particular location of the road, and the value thereof to the owner of the land.

If Brown gave a right of way for a road on the east side of his house, that did not authorize the public to run the road in another place, 500 feet on the west side of his house, even if such track followed the same general direction, points, and general line of travel.

We admit that the right of way would not be defeated by turning out of the traveled track to avoid obstructions, or temporary difficulties in the travel; but as applied to the facts existing in this case, where all the witnesses agree that no two of the traveled tracks occupied the same ground in any part of their length, and where the divergence is so great as shown by the map, the rule stated in the Instructions is not the law. It will be readily seen that if this road is established by dedication or prescription upon this evidence, that either and all of the other 4 traveled tracks are far more certainly and conclusively established.

The 12th Instruction is not law, as applied to this case.

The evidence of the Defendant clearly shows that there was no track where this road was claimed to be, for 9 or 10 years from 1838; that the track was overgrown with brush. Coleman states that he corded wood in it; that he felled a bee tree across it, which lay there for a year; and their means of observation were certainly much better than those of the witnesses for the Plaintiff, some of whom think there was a traveled track there some portion of the time.

This is precisely within the case

The Great Western R. R Co. v. *Hawks*, 25 *Ill.*, 241.

The evidence of Coleman, Trumbo & Alexander was as positive testimony as that of Billy Moore—

Defendant's 2d Instruction ought to have been given.

There was no record evidence of a road.

Whatever record evidence there was, was in relation to a road in *Range five*, and that did not establish a road, but only purported to *mark out* a road claimed to have been formerly established. People v Judges of Cortland 24. Wend 491.

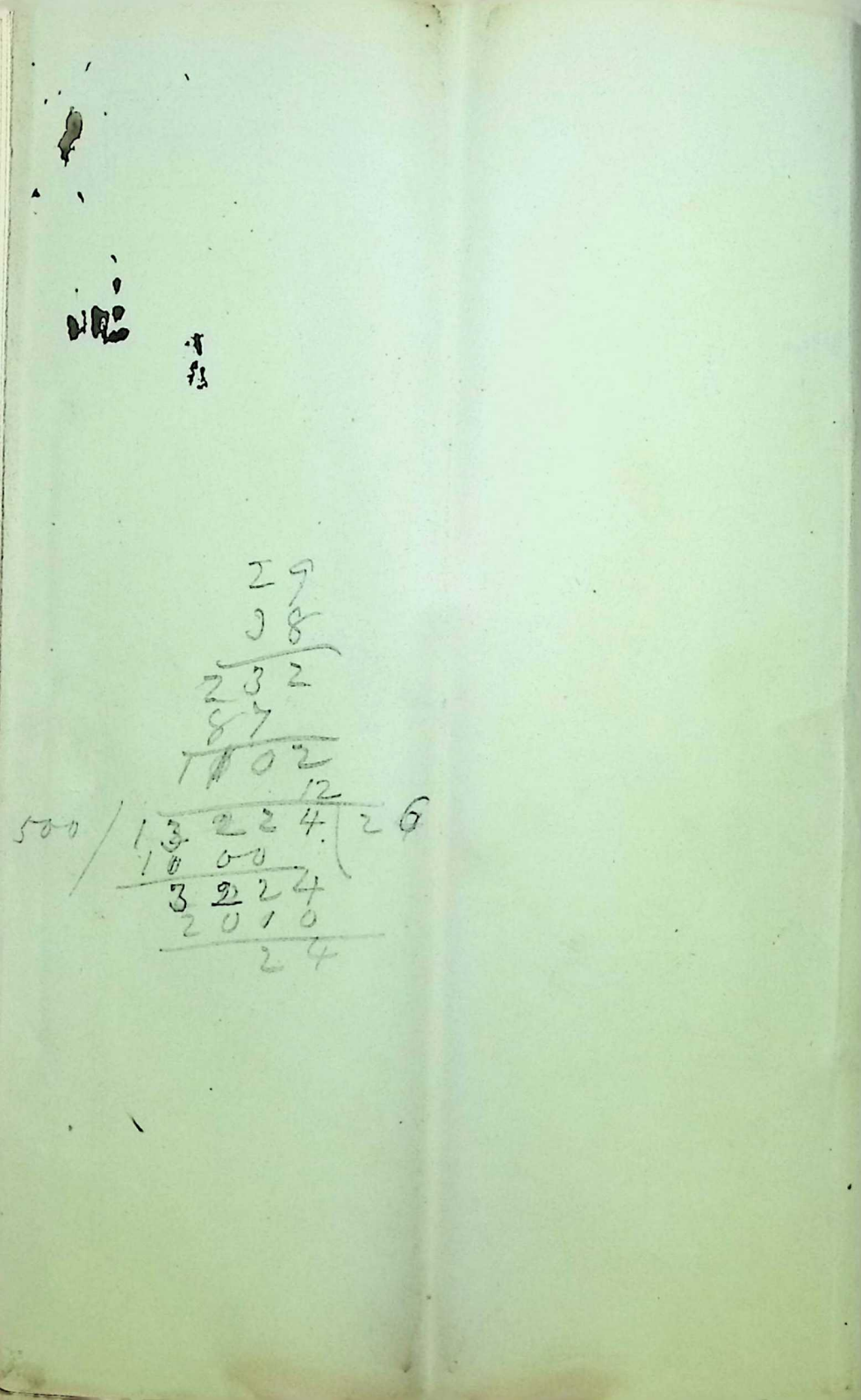
The complaint here is in regard to a road in Range 4.

The 6th Instruction asked by Defendant ought to have been given.

25 Ill. 153. 15 *Ill.*, 236. 23. Ill. 395.

The 16th Instruction asked for by Defendant ought to have been given.

GLOVER, COOK & CAMPBELL,
For Plaintiff in Error,



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SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION.
APRIL TERM, A. D. 1863.

ARGUMENT

FOR

PLAINTIFF IN ERROR.

By GEO. C. CAMPBELL, Attorney.

WILLIAM GENTLEMAN
vs.
LEWIS SOULE.

ERROR TO KENDALL.

Filed June 3d 1863
L. Leland Clk

OTTAWA, ILL.:
PRINTED AT THE REPUBLICAN OFFICE.
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1863.

WILLIAM GENTLEMAN,
Plaintiff in Error,
vs.
LEWIS SOULE, for Himself and La Salle County,
Defendant in Error.
} Error to Kendall.

ARGUMENT FOR PLAINTIFF IN ERROR.

If the Court will look at the map attached to the Record in this case, they will observe several lines traced across section eighteen in different colors. Those lines show the different tracks which have at various times been traveled by the public across said section. I shall carefully examine the testimony of each witness, and show to which of these several tracks they refer and endeavor to ascertain the length of time and during which years each was traveled, and so ascertain whether either of them have become public highways by prescription; and also whether either of them have ever been dedicated for a highway.

I.

The heavy black line marked "Road to Brown's Ford, as laid by Commissioners of Highways Dec. 3d, 1860," shows the route now claimed as a public highway by the plaintiff below.

Samuel Milligan, the first witness for plaintiff below, testified (Abstract, p. 2,) that he came to the country in 1831 and crossed the ford; that the track ran south from the river and then branched in different directions. Afterward Brown built a cabin there, and *the east end of it was some six feet on the track*; then afterward the travel went up east of the cabin, (this cabin is shown by black square near river marked "Brown's house used to stand,") then bore a little easterly and run up past where Gentleman's house now stands (near south end of map and marked Gentleman's House); I should think a little west of where his barn is (barn just north of house and marked "Barn").

There can be no doubt that this evidence refers to the track laid down upon the map in yellow.

Witness further says he didn't pass there for several years, till the spring of '60, and then thought the travel on the bluff was pretty much in the same place as 1832, *but on the bottom entirely different*, and the change was made 15 years ago.

In 1832 heard Mrs. Brown say to Richey, "We'll keep a hotel and make some dimes off of the road."

This was of course the road described by Milligan as being traveled then, *the yellow line*, and would not of course dedicate the black line on the other side of the house and 500 feet to the west of it. And Brown didn't own the land then, even if the testimony of James Brown, his son, (page 19 of Abstract,) is admissible, for he swears that his father purchased the land in 1834, and this conversation was in 1832.

Witness further states "that after passing south of Brown's house the road forked, and one fork (marked on map in green) went up west of the ravine and travel went both ways, perhaps one or two wagons a week. Brown and I worked on the track for our own convenience (this was on the yellow track) several rods east of the present track. *I've traveled there but very little, sometimes once or twice a year and sometimes not at all.*"

Cross-Examined.—"About 15 years ago they began to travel the upper ford on the ripple (the dotted line across the river farthest to the east); from there the road bore off toward the east and went up the bluff." (This is the Billy Moore road laid down in blue.)

We have no hesitation in asserting that there is part of the evidence of this witness that shows the black track to be a highway either by prescription or dedication.

The next evidence was a patent to Ephraim Dimmick for S.W. fr. ½ of Sec. 18—33—4, dated Oct. 1st, 1839. This is the tract on which Gentleman's house and barn stands. The map shows it to be divided by the timber road running from Ottawa easterly, laid down in black, and marked "Road to Ottawa as now travelled," and it was on the north line of this road that the fence was built by Gentleman which prevented travel from turning off to the north, and passing down, on the black line to the ford; and this is the only obstruction shown to have been placed in the track.

Ephraim Dimmick testified: "I am the man named in the patent, and went to live on the quarter in 1834. Brown had made a small improvement there in 1833, and I bought him out. Brown said in speaking of the tract on the bottom, (on the N.W. ¼, Sec. 18,) that there would always be a road there, and that it would run by where he was going to plant an orchard." This must of course have been either the yellow or green track, as no others were there in 1833, when Brown made the statement; and that is no dedication by Brown of the black track across the N.W. ¼ of 18; nor of any track, for this was in 1833, and Brown didn't own the lands till 1834.—(See James Brown, page 19 abstract.)

The witness then stated—"I purchased the lands of the United States, in 1835."

The patent was dated Oct. 1st, 1839. If it did not show the

date of purchase, a certificate of purchase is made evidence by law, and would show it.

1 *Purp. Stat.*, 255, *Sec.* 8.

And where any record, certificate or paper is made evidence by statute, it is the best evidence, and parol is inadmissible.

H. & B. Plank Road v. *Brundage*, 13 *How. Pr.*, 448.

Witness further stated: I crossed the ford in 1833; the track passed east by Brown's cabin, and then forked. I took the fork that went west of the ravine (Green track). People going to South Ottawa took this track; those going off south, went up by Gentleman's house. I lived on the S.W. ¼ of Sec. 18, up to 1836 or 1837, and during this time I fixed a place to cross a rivulet, some 15 rods south of my house, (at point marked X on yellow track.) I also repaired the road down through the timber. This was in 1834 or '35. I then considered it a public road; it was not in any enclosure I had on the land. I sold the land to Gentleman. Brown said there would always be a road there, on account of the ford. The ford crossed the river at the head of the island.

Cross Examined.—From 1836 *to* 1839, *I crossed five or six times, and since then not at all.*

Witness then, at the request of defendant below, traced on the map the *yellow line*, and said that that line represented the track from the ford across section 18, as it was travelled in 1833.

So it is evident that all of the acts and statements of Brown and Dimmick relate solely to the yellow track, which the plaintiff's own witnesses show was the *only* track east of the ravine at that time; and the very strongest construction that ought to

be put upon them is, that they were *offers* on the part of Brown and Dimmick to dedicate the *yellow track*, and no other, for a highway.

In the course of the consideration of the testimony, we shall see that this offer was never accepted by the public.

No prescriptive right is shown by the evidence of Dimmick, for he swears he has n't passed over the road since 1839.

Josiah E. Shaw testified:—That he came to the country in 1828, and knew the ford road. In going from my house (south west of ford 5 or 6 miles), I passed along where Gentleman's stone fence now is (south-westerly from G.'s house), and along down west of where his house and barn is, and so to the ford. In 1835, the road forked south of Brown's cabin, and one fork went up west of the ravine. (This last is the Green fork.)

The loaded teams went that way. For twelve years I did n't pass over the road more than once a year, and the last two years not at all. From 1838 to 1845, I found no obstructions in the way; in 1844, we could not ford at all."

It will be observed that the witness does not speak of a single variation in the road during his direct examination, but when cross examined, says—

"I crossed the river at the head of the island, and followed the track marked by Dimmick (yellow track). The track was just east of Brown's house, and then twenty years ago it was fenced up there, and the track went around east of the field, (light red line on the bottom, east of Brown's cabin.) Fifteen or sixteen years ago there was more fencing done, and we had to go *west* of the field."

This is the very first mention of any travel west of Brown's field, and subsequent witnesses show that it only continued one year, or two at the longest, and then the travel all went by the Billy Moore road (laid down on map in blue), and continued there uninterruptedly for ten years.

Witness further stated the place where the old track went down the bluff, is eight or ten rods east of where the present one comes down.

According to witness Shaw, then, the yellow track was fenced across at Brown's house twenty years ago, and again, fifteen years ago, and the public sought new lines of travel each time. Does this look as though the public accepted that yellow line as a public highway? There is not the slightest evidence that any other line was ever offered then by anybody.

Isaac H. Fredenburgh testified (page 5 abst.):—"I first travelled the road in 1834, and off and on every year since, except '49 and '50. Used to hunt up that way every fall. Some fifty rods north of Gentleman's barn the roads forked, and one went off east of the barn, and one west, and so on around to South Ottawa." He evidently refers here to the old yellow line west of barn, and the part of red line running diagonally from it at the point near the half section line between the N.W. ¼ and S.W. ¼ of Sec. 18. The map shows that at this point the two tracks approached each other closely, and when the red track was first made, in '40 or '41, both were probably travelled to some extent.

Witness further states:—"On the bottom, the track passed east of Brown's house, *and from there there were tracks travelled all through the timber.* The track east of the house was afterward fenced, and the travel went around east of the field, (light red line east of Brown's cabin.) After a while, Brown fenced again, and the travel had to go west of the field." This is the same fencing spoken of by Shaw as being 20 & 15 years ago.

Cross Examined.—"The track east of the field was more travelled than the one west, and the Billy Moore road (blue track) was the main travelled track for a long time."

The Court will see that there cannot be a highway *west of Brown's house* claimed by *prescription*, for no travel went that

way before the fencing spoken of by Shaw and Fredenburgh *fifteen years ago;* nor can it be claimed by dedication, for the yellow line *east of the house* is the only one in existence at the time of the alleged dedications.

Cyrus Shaver testified (abst. page 5):—"I crossed the ford in the fall of 1830. *There was no track there then*; only an Indian trail leading off south. There was a log house where Gentleman's house now is, and a small enclosure, *and the trail went just west of the house.* In 1831, as folks came into the country, there got to be quite a track there. I crossed considerably up to 1835, since then not much."

This testimony is important, as showing that the yellow line passing as it does close west of Gentleman's house, is rightly located, for this track followed the Indian trail, and the witness locates that as just west of the house. He stated that he had not travelled it since 1835, and don't know how the present road compares with the old one.

Ezra Kellogg testified (page 6 of abstract):—"I crossed the ford in the fall of 1839, and again in 1842." He then speaks of the amount of travel on the road, but does not locate it at all. "I saw Gentleman, with three or four of his hired men, at work on the track three or four years ago; they were plowing and scraping on the hill."

Cross Examined.—"Gentleman had Grain on the bottom, and a barn on the bluff at that time, and may have been fixing the track for his own convenience. He could not very well haul his grain without it. From '32 to '40, I didn't pass over the road at all, and from '40 to '53, not more than a dozen times."

This testimony is important, for if only three or four years ago this road was in such a condition, that Gentleman couldn't haul his grain over it without turning out with three or four of his hired men to plough and scrape the hill down, it fully corroborates the testimony of several of the witnesses of defendant be-

low, who swear that the present track (the black line) was never traveled until within the last four or five years, and has been wholly made during that time.

William Moore testified (abstract page 6):—"I have known the road since 1835. I saw Gentleman and four or five others at work on the road four or five years ago; *don't know whether it was public work or not.*" (This was a lie and he knew it, and it ought to damn his testimony.) "For many years the weight of travel went by the upper ford, then east along the river, and up the bluff on the line between Sections 17 and 18." (This is the blue line on the map.) Those that went up by Gentleman's barn (only Brown and Gentleman, as all the testimony shows), went in about the same track they now do.

"There was considerable travel there till Gentleman fenced." I must say that this is the most sneaking attempt of an interested witness to swear a road through, that it has ever been my ill fortune to meet with.

Cross Examined.—"The Billy Moore road (blue line) was travelled six or seven years till I fenced it up, and the weight of travel went that way; but the old track was still open; 'twas all open land north of the timber road." (The timber road is the black line running across the map, from east to west.) "There have been various roads to the ford. One came in east of Gentleman's barn, and touched the old track between the barn and bluff, then bore off east around Brown's house and field, and entered the ford at the old track. These two points were the only ones where they came together, and they started from the timber road, fifty rods apart." (This is the red line laid down on the map.) "*At the time I spoke of seeing work done on the road, it was an undertaking among the neighbors to fix it. I asked three or four to come. A day or two before, I had asked Gentleman if we could go there and fix a road. I don't remember his answer, but he went with us, and while we were fixing it, said he should shut it up as soon as he was able. I heard him say the same thing two or three different times.*"

Now it seems to me that this evidence of plaintiff's own witness, that we succeeded in wresting from him much against his will, shows the origin of this road. According to Billy's own showing, the travel had all been going by the blue line for many years, and he fenced it up, and then all at once he becomes extremely anxious about a road to the ford to take the place of the one he had fenced off, and therefore went to Gentleman and asked his permission to fix a road down through his land. Billy himself invites the neighbors to come and help him, and goes down to the spot, and Gentleman went with them, and allowed them to fix a place so that they could get up and down the bluff, but expressly stated that he should fence up and stop the travel as soon as he got able.

This evidence establishes two facts beyond controversy:

1st. That neither the witness Moore, nor any of the neighbors with him, thought that they or the public had or claimed any right to a road there (on black line).

2d. That there was no travelled track there at that time, and this is another circumstance corroborating the testimony of the defendant's witnesses, who swear that there never was any travel there till about five years ago, and that the road has been wholly made since that time.

Witness Moore further stated:—"that he knew Carter, who lived in the Brown house on the bottom two or three years; he built a fence from the west line of Brown's field to the town line; there was a gate in it that I went through twice. The fence was standing when Gentleman bought the land, and while this fence was standing, the main travel went by the Billy Moore road (blue track)."

If the track went west of Brown's field at all, when Jim Brown fenced the bottom, fifteen years ago, this fence of Carter's went right across it, and the main travel was going by the Billy Moore road all the time it was there. And even Billy Moore, who has

such a strong determination to travel this deserted way, only passed through the gate twice while it stood there.

H. G. Templeton testified (abstract page 8):—"I travelled the ford considerably since 1839. It continued to be a main travelled road till 1856; there has been considerable travel since. Some fifteen years ago, I was warned by Abram Trumbo, who was path master, to work on the road." (Trumbo denies this *in toto*, abstract page 17.) "We worked where the track went down the bluff. There had been many changes in the road at different times. On the bottom we beat around in different places, as piece after piece was fenced up. I remember of fences across the track, and of trees down in the road, and a gate in a fence of Carter's. There was always more or less travel till Gentleman fenced, last spring (spring of 1861)."

The Court will observe that this witness does not locate any particular line of travel, but speaks of the ford generally, and the travel on it. By ford road, he evidently means all of the different tracks that at different times travelled across section 18; for upon being

Cross Examined, he says:—"About fifteen years ago, Jim Brown fenced a large field on the bottom, and the south line of it ran directly across the track that was then travelled; the fence was so close under the bluff that we had to go down in a new place. *If a person had taken down the fence, and followed the old track, he would have been travelling in Jim Brown's field from the fence to the river.*"

This evidence clearly refers to the fencing off of the travel upon both the yellow and red tracks from the bluff to the river, fifteen years ago, and we shall show, by defendant's witnesses, that, for ten years from that time, the only track travelled to the ford was the blue line, except that Brown and Gentleman passed on foot or horseback between their houses, and perhaps a near neighbor, like Templeton and Billy Moore, went through the Carter gate two or three times. I have marked this large Jim

Brown field, spoken of by Templeton, Fredenburgh and Shaw, as being made about fifteen years ago (from 1861), and by Jim Brown as built in 1847 by him, with a reddish line about the parallelogram, in order that it may be readily observed on the map.

Templeton further stated:—"The S.W. corner of this field was ten rods west of where the old track went down the bluff (see map), and we had to work a new track to get down; *there never had been any travel over this new track before that time.*"

Can there be any doubt that this black line, from the bluff to the river, was then, in 1847, *travelled for the very first time?*

And subsequent testimony will show conclusively that only a very small part of the travel went there then, and only for a single year; and that, from Gentleman's barn to the bluff, *the black line was never travelled till* 1856 *or* 1857.

Templeton further stated:—"that twenty years ago he rented the Brown place on the bottom; that before that, there had been two enclosures between which the track passed, and that he joined the two fields by fencing directly across the track, and the travel had to go east of this field." (This field is outlined with an irregular ink line on the map.)

John Shepard testified (abstract page 8):—"From '38 to '42, I crossed the ford three or four times a year, and from '42 to '48 crossed every week during the fording season. *During that time there was no variation in the travel.*"

I wonder what had become of the fence that Templeton swears he put across the track in 1840, (marked on map with irregular ink line.) And the fence, 3 of plaintiff's witnesses swear, was put across the track under the bluff, in 1847, (marked on map with line,) each of which, plaintiff's own witnesses swear, varied the travel so materially that they had to make entire new tracks for it.

Witness further states:—"that he didn't know any thing about

the Billy Moore road (blue track), nor Jim Brown's fence put across the track in 1847 (line). I went in by Gentleman's barn, and down the west side of Brown's field to the ford."

Plaintiff's witness, Templeton, above given, swears that in 1847, when Jim Brown fenced (reddish line), he helped make a new track to go down west of this fence, and that there never had been any track there before. So if Shepard went there, from 1838 as he swears, he simply went through the timber, and dodged about among the trees where there was no track at all, when he could just as well, and with as great ease and safety, taken the yellow or red line, where others did.

Thorn Howland.—"I came into the country in 1844; crossed the ford that year, and went up by the barn. (The barn was not built till '46 or '47: see Samuel Lewis, page 16 of abstract.) It went in about the same place as it does now. I never found any obstructions in it till Carter fenced up in 1856."

Howland does not, in this direct testimony, locate the track that was travelled in 1844, when he came, except that it was *about* where it is now up by the barn, but he attempts to carry the idea that it ran from there down west of Brown's house where the black line is, for he says, "he never found any obstructions in it till Carter fenced, in 1856." And this fence, Templeton says, "was west of Brown's field."

And it was impossible to get him to state exactly where the track he first travelled in 1844 was, but, upon being

Cross Examined, he did say:—"Before Jim Brown fenced, (this was in 1847, the reddish line,) the best road ran around east of the field, and the fence shut it off."

So that the line of this "best road" of 1844, as he calls it, was probably the yellow line down to Brown's old field, (the ink line,) and then the light red line around east of the field to the ford. I don't believe the public forsook this "best road" till they were obliged to do so by Jim Brown's fence under the bluff (reddish line).

Patrick Daily testified:—Have known the Gentleman road since 1839. (Then it was the yellow line.) Sometimes crossed once a day, and sometimes not for months. I remember the Carter fence, and gate in it. (This was not on the yellow track, but across the track made by Templeton and others in a new place, west of the Jim Brown field, fifteen years ago, in 1847.) Carter came out as I was going through; said he wanted to see if I shut the gate; that his sheep ran off, &c.

Cross Examined.—For several years the main travel went by the Billy Moore road, and the crossing was done at the upper ford (blue line).

Amos Ebersole (abstract page 9). Witness was shown the papers set out on pages 9, 10, 11 and 12 of abstract, and testified to certificate of Town Clerk to the same.

The order of the Commissioners of Highways for Grand Rapids was then read to the jury, though objected to by defendant as not relating in any way to the road in controversy, as it described a road in Range 5 instead of Range 4, where the road described in the complaint is located.

Witness Ebersole was then asked whether the road described in the report of the survey was in Grand Rapids, and answered that it was.

Defendant then desired to cross examine Ebersole generally, but the Court would not allow it, and defendant excepted. This was error. See

Phillips' Evidence, p. 397.
1 *Greenl., sec.* 433, *et seq.*
Lunday v. *Thomas*, 26 *Geo.*, 537.

The record should not have been read; 'twas the only evidence of the facts recited in it, and could not be contradicted or explained by parol, as it was attempted to be by the testimony of Ebersole.

The above are all plaintiffs' witnesses, and I believe the case might be left right here, for it seems to me certain that the plaintiffs wholly failed to make out a case. They have not shown that either of the roads laid down on the map has been travelled for twenty years, and much less worked when it needed repairs as badly as these different tracks did.

It is conclusively shown, by plaintiffs' own witnesses, that no part of the black line now claimed, was ever travelled at all before the building of Jim Brown's fence, in 1847, and then only that part from the bluff to the river was travelled, and that by a very few of the neighbors, and for a single year.

If this position is correct, the black line is not a highway by prescription, for it takes twenty years to make that out, and the plaintiff has only shown that the portion of the track from the bluff to the river was travelled one year, and then forsaken for the blue track, where the main travel went for ten years; and five years ago, after Billy Moore had fenced up that track, they for the first time commenced going around west of the barn on the black line, and have made that road since then.

As to dedication, the only dedication contended for is by Brown and Dimmick, when no tracks were travelled except the yellow and green ones; and the public never accepted the offers of dedication, if there were any.

Because the road need repairs, and they didn't make them, the neighbors had to do it.

Because they did not assert any right when Templeton fenced, twenty years ago.

Nor when Brown fenced in 1847. Nor when Carter fenced in 1856.

Because they requested leave of Gentleman to fix a place to go down west of the Brown field, after Billy Moore fenced up the blue track. But if there could be any doubt on the question, I think it is entirely overcome by the testimony of the defendant's witnesses.

Lovejoy testified (abstract page 15):—"I came to the country in 1849; crossed the ferry at Ottawa, and went to Gentleman's house. Two or three days after, I went with Gentleman to Ottawa in an empty wagon to get my goods. (This was two years after Jim Brown fenced his big field, and shut off the yellow and red tracks, and I desire the Court to observe the route taken from Gentleman's house to the ford.) Starting from Gentleman's house, we went east on the timber road (the east and west black line) about eighty rods, and then struck off north-east to the section line (this was on the west fork of blue line) down to the bluff, then took a bend around easterly, and back to about the N.E. corner of Section 18, then followed the river bank to the upper ford. The road we struck into was called the Billy Moore road (blue line). I've known the ford ever since, and the main travel went that way until Moore fenced his land on Section 17, and then we worked a new track along Moore's west line to the river, and followed the old track (blue line) from there to the upper ford; this continued to be the main travelled road to the ford until Nattinger fenced up (S.E. ¼ Sec. 18) some four or five years ago, and then the travel commenced to go around by Gentleman's barn, and along down west of Brown's house. (The black line now claimed.) For the first year or two of this travel, they went up the river and crossed at the upper ford, (small red line just along the river,) and then fixed the lower ford at the head of the island, and went where they do now. *There was no public travel west of the Brown house from the time I came into the country till five or six years ago. I never saw one wagon go that way, and I crossed the ford very frequently. I frequently hunted through that timber, and would have seen the track if there had been any.*"

I suggest to the Court that it will be seen by the map, that, from Gentleman's house to the ford, by the black line claimed, is about three-fourths of a mile, while the route taken by the wit-

ness and Gentleman, with an empty wagon, between the same points, is at least a mlle and three-fourths. And no two sane men would have taken this long road if the short one (the black line claimed) was at that time passable with an empty wagon. Can there be any stronger proof that, in 1849, the black line was not travelled at all, and was not so that it could be travelled with an empty wagon?

Defendant then read a certified copy of an order of the Commissioners of Highways of Grand Rapids, dated July 7th, 1850, ordering that a ford road be located and laid out along the east line of Section 18, and along the river bank to the upper ford, (substantially on the blue line then travelled.)

Lovejoy further testified, that the road described in the order was opened down the section line between 17 and 18, and from there along the river bank to the upper ford; that for several years the travel went on that line, and that the road was worked by the public authorities; that he was path master, and worked the road as a public highway.

I suggest that here is a very significant fact, bearing on the question of the acceptance of the alleged dedication of the old yellow line by Dimmick and Brown, and of the abandonment of that line by the acquiring of another. For this blue track was certainly dedicated by Moore, who says he owned the land, knew that the main travel went on that track for several years, and that too when he must have known that the public authorities claimed to have laid it out according to law, and worked it as a public highway. If he knew these facts, and he did, and suffered the work and travel, so adverse to his own rights, to continue for ten years, that would make a dedication of this blue track, and defendant was fully justified in claiming a total abandonment of the old yellow track by the public, if they ever had any right of a highway there.

David Pembroke testified (abstract page 15):—"I came to the country in 1825, and crossed the ford at the head of island, and

took the Indian trail that led off west of the ravine (green track); continued to travel this track till 1829. There was no other travelled track at that time. (This is fully corroborative of plaintiffs' witness, Shaver: see abstract page 5, where he says there was no track up the yellow line in 1830; only an Indian trail, and that the track began to be made in 1830.) I went away in 1829, and came back in 1832, and took same track (green track). I stayed here till 1835, and this continued to be the main travelled track during that time. There may have been a few teams up by Gentleman's barn. The settlements were mainly about South Ottawa. (The green track would be much the shortest route for them.) I went away in 1835, and came back in 1842, and have been here ever since.

In 1842, *the travel from the south and* east struck across the present timber road, some fifty rods east of where Gentleman's barn now is, and bore north-west through the timber, till they got fifty or sixty rods north of the barn, then it bore north-east to Nattinger's line, where it went down the bluff in a little ravine like, and then bore off north-westerly to the river, passing east of Brown's cabin on the bottom, and crossing the ford at the head of the island. (This line is the one laid down on the map in red.) *This was the main travelled track east of the ravine, and continued so till Jim Brown fenced his large field (lines) in* 1847. The south fence ran close under the bluff, and directly across the old track, so that the travel could not go down in the old place. (Plaintiffs' witnesses, Templeton, Fredenburgh and Shaw, say the same thing.) A year before this (1846), there had been a new track broken through near the section line (blue track), and some travel had been going that way; *and when Brown fenced,* (in 1847,) *it all went that way, and continued to do so for eight or nine years.* This was the best road we ever had to the ford; while it was travelled (from 1847 to 1856,) *the old track by Gentleman's barn was entirely forsaken. I passed through the timber, and noticed that it was grown up to grass and brush. The present track (black line) has only been travelled four or five years, and has been made during that time.*"

The above is a part of the so-called "negative evidence," referred to in plaintiffs' 12th instruction: see abstract page 24.

I consider this evidence of Pembroke's very important, as showing the exact line of travel in 1842. By reference to testimony of Amos Ebersole, abstract page 18, it will be seen that in 1840, Gentleman had placed the stone fence across the yellow track, just south and west of his house, and that is what had sent the travel off east on the red line, as described by Pembroke.

James Alexander, (abstract page 16).—"I came to the country in 1836, and knew the ford up to '48. *In* 1838, I lived on Green's Point," (that is north of Illinois River, and just across the present Fox River Bridge, in the City of Ottawa,) "and cultivated a field where Gentleman's house is." ('Twill be remembered that Dimmick says he rented to Alexander.) "I went over and back nearly every day in the year. The ford was nearly where it is now (by head of island); from there the track went around east of Brown's old field (faint red line) and then bore off west across the mouth of the ravine, and up what is called Mechanicsville Road (green track); then it forked, one going to South Ottawa, and one direct south. I took this Mechanicsville road and the south fork whenever I went over in a wagon, but when I went on foot, I followed the track up towards the bluff, and then struck up through the timber to where Gentleman's barn now is (yellow track). I took this when afoot, because it was shorter, *but there was no track there sufficient for the oxen to follow.*"

If this is not conclusive that the yellow track was not travelled in 1838, human testimony is vain. The witness passed from the ford to Gentleman's house (Dimmick's then) every day to his work, and must have known the road to and fro, and he swears positively that there was not a track sufficient for his oxen to follow, but that the green track was the travelled road. He further says:—"a few wagons may have gone up that way, but not enough to make a track."

Samuel Lewis (abstract page 16).—"I first crossed the ford in 1835 from the south, and went back the same way. I was at the raising of Gentleman's barn, sixteen years ago (in 1845); *it was placed directly over the old track that I used to travel in* 1835. (This was the yellow track that, according to plaintiffs' witness, Shaver, was first broken through in 1831, and was travelled some for a few years, but In 1838, according to Alexander, did not show sufficient track for his oxen to follow.) The year after the barn was built, Gentleman built a barn-yard fence; that also crossed the old track of 1835; the S.W. corner of it was ten rods west of the track, and the present track (black line) is still west of that corner. The people began travelling the Billy Moore road (blue track) in 1846 or '47, and continued to do so till four or five years ago. The first year after they were shut off from that line, they kept along the timber road, and took an old track that used to be travelled several years before, (red line described by Pembroke as travelled from 1842 to 1847,) and followed it till they came to the present track (black line), and then followed that line down west of Brown's field to the river; and then Nattinger fenced his land (which would cut off the red track), and they began to go around west of Gentleman's barn."

This witness agrees with Lovejoy and Pembroke exactly, and is a minute description by one of our most reliable citizens, the late County Treasurer, of the different travelled tracks of his experience.

Abram Trumbo (abstract page 17).—"I have lived in LaSalle County thirty-one years, within four miles of the ford. The Mechanicsville road was the first one travelled; the main track went that way some years, then people began to get in off south and struck for Gentleman's barn, and went to the ford. (Probably taking yellow track.) Soon Section 20 got fenced, and they had to go further east, and struck the old road fifty rods north of the barn (by taking red line from the south-east). *Between this point* (marked O on map, where black, red and yellow tracks approach very near to each other,) *and the barn, it wasn't trav-*

eled for fifteen years. This cut-off track (red line) bore northwesterly till it struck the old track, some fifty rods north of the barn, and then went down the bluff thirty rods east of where the present track does. People west and south-west took the Mechanicsville road (green track), and those from east and southeast took this cut-off (red track). In '47, Jim Brown fenced his field, and the fence ran across the track just under the bluff, so that they could not pass there any more, and then they went around by the Billy Moore road, and the main travel went that way nine or ten years (blue track). I never called out Templeton to work where he says I did. I was path master one year; 'twas a year or two after Jim Brown fenced, (that would make it '48 or '49,) and I then called out Templeton to work on the road, but 'twas not on the ford road at all, but on the timber road near Billy Moore's. I never had any work done on the ford road at all."

The above is the statement made by old man Trumbo, in his own way, without a single question being put to him, except a request that he state what he knew about these different tracks, and, I have no doubt, is a perfectly reliable history of the travel.

Amos Ebersole (abstract page 18).—"I have lived in Grand Rapids since 1834; for the first seven or eight years after that, we used to travel the old track by the barn, and passed just east of Brown's house on the bottom. (Witness here pointed out the yellow track.) Then Gentleman fenced his land south of the timber road, (the east and west black line,) some twenty years ago, (that would be in 1841,) and we went diagonally across the quarter east of Gentleman's. About the same time, Brown's two enclosures on the bottom were fenced up together, (plaintiffs' witness, Templeton, said he did it twenty years ago,) and we went around east of the field." (Witness here pointed out on the map the red track.) And further stated:—"This track was travelled till Jim Brown fenced his large field. (Brown and others say this was in 1847.) The south fence went so close under the bluff, that we couldn't get down there, and then the travel

went by Billy Moore's (blue track) for nine or ten years. *During this time, the old track was not in use. Gentleman's present house was built over the old track of* 1834. *Jim Brown's fence crossed it; also, Gentleman's barn and calf pasture. While the Moore road (blue track) was in use, nine years, the road up by the barn was disused. Trees were felled in it, and there was no track there.*

The cut-off track (red line) went further east than the old 34 track all of the way.

James Brown (abstract page 18). This was a son of old man Brown, who is claimed to have dedicated a track across the N.W. ¼ of 18, in 1833, and he lived right down by the ford in his father's log cabin, and must have known where the travel went, and how long. He says:—"I crossed the ford before the Sauk war. (This was in 1832.) In an early day, the Mechanicsville road was the best (green track). The track by the barn was travelled some (yellow track). Starting from the river, it passed east of our house, and south to the bluff, at the bottom of which it was ten rods east of the present track (black line), and on the top of the bluff five or six rods east of it.

It ran up directly under where Gentleman's barn is. His barn-yard and calf pasture are also across it. I fenced the field on the bottom in 1847. (Fence shown by reddish line.) *The south line of it was directly across the old track; the west end eight rods west of the track, and from this point to the river, the old* (yellow) *track went right through the field that I made in '47, and down by the house was at least eighteen rods east of the present track.*

The present (black) track is two or three rods west of the west line of the field I fenced in 1847. After I made this fence, the travel went on the Billy Moore (blue) road.

I lived in the house from 1840 *to* 1845, *and there was no one travelled on the old* (yellow) *track except Gentleman and me, and occasionally a neighbor. And during that time there was no travel went up west of my field, except* that which took the Mechanicsville road (green track). I worked on the bluff with Tem-

pleton at the time he speaks of; it was in '47 or '48. Trumbo was path master that year. I was not warned out by him to work there, but worked out my tax that year on the timber road near Billy Moore's. (That is the same place where Trumbo says he had Templeton work)."

It does seem to me that the testimony of Brown, Lewis, Ebersole and Trumbo must end this case, and defeat utterly any claim of the public to a highway over the black line surveyed by the Commissioners, for it seems to me to be conclusively shown that not a foot of it was ever dedicated by anybody. And they have no prescriptive right, for they have only travelled it four or five years. And there is further corroborative testimony.

Ambrose Trumbo (abstract page 19).—"I crossed the ford in 1830. In 1831, there got to be a track coming in from Anderson's ford on Covel Creek. (This is precisely the same year that plaintiffs' witness, Shaver, puts it.) It ran through where Gentleman's calf pasture is, and descended the bluff twenty rods east of where the present track does. On the bottom, it went through the field Jim Brown afterwards made, and east of the house. (This is the old yellow track.) Twenty years ago, Gentleman fenced south of the timber road, and stopped the Anderson ford travel (yellow track going south). The Billy Moore (blue) road began to be travelled in 1845 or '46, and was the main travelled track till four or five years ago. During that time, the Gentleman road was not travelled by the public. The cut-off road (red line) began to be travelled in 1835. None of the track was on the same ground as the present (black) track."

Miles. Coleman (abstract page 20).—"I first knew this ford sixteen years ago. (This would be 1845.) I came from the west (along timber road) towards Gentleman's barn; they were just raising it. I could see no track there. *I enquired for the ford road, and was directed to strike through the brush, and I would come to it. I struck in just west of where they were raising, and took a north-westerly direction, and came to the (red) track, thirty to sixty rods from the barn*, and followed this track

to the ford. It went down the bluff, about where the middle of Jim Brown's fence was afterwards, and then bore down to the east of Brown's house. The point where it went down the bluff was twenty rods east of the west line of Brown's field.

I lived in Brown's house eighteen months. Went there in 1849, *and, during that time, the main travel went by the Billy Moore* (blue) *road. Some few came down the Mechanicsville* (green) *road, but there was no travel up past Gentleman's barn. That track was full of cord wood and brush that I put in it.*

This is more of the negative evidence referred to in plaintiffs' 12th instruction.

Richard Hardin (abstract page 20).—"I came to the country in 1843, and travelled the cut-off (red) track down to the ford. Afterwards, the travel went on the Billy Moore (blue) road, and that was the main travelled road for eight or nine years."

Jesse Drake (abstract page 20).—"I first knew the ford in 1844. Came in from Anderson's ford, and took the cut-off (red) track to the ford. Went back by the Mechanicsville (green) track. Jim Brown's fence was built across the (red) track, so that we couldn't go that way any more, and then the travel went by the Billy Moore (blue) road."

Now having recapitulated all of the evidence, and commented somewhat upon its bearing, and the different tracks referred to in it, I will endeavor to give a distinct history of each track, so far as it can be ascertained from the evidence.

The first track that was travelled was the Mechanicsville road, as it is called. The river was forded at the head of the island, and from the south bank of the river the track followed the yellow line up east of Brown's cabin, and then took off westerly on the green line, and up the bluff west of the ravine.

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15 Pembroke travelled it in 1825, when he came into the country, and continued till 1835.

17 Abram Trumbo came into the country in 1830, and says 'twas the first road travelled.

18 James Brown came to the country in 1830 or 1831; says the same thing.

2 Plaintiffs' witness, Milligan, knew it in 1831.

Ambrose Trumbo travelled it in 1832.

3 Plaintiffs' witness, Dimmick, travelled it by direction of Brown's, when he came into the country, in 1833.

18 Amos Ebersole travelled it in 1834.

4 Plaintiffs' witness, Shaw, says the loaded teams went that way in 1835.

16 Alexander, who lived north of the river in 1838, and cultivated Dimmick's, now Gentleman's, field in that year, and went from ford to field every day, always travelled it when he went with his wagon, although it was nearly twice as far as up through the timber where he went when afoot.

This track was the only travelled track from 1825 to 1831.

From 1831 to after 1838, 'twas the main travelled track.

From 1841 till 1854, 'twas only travelled by those who came in west of the township line.

Since 1854, it has scarcely been travelled at all, as all the land west of town line was then fenced in, and they couldn't get through.

This old track of all is no part of it on the same ground as the (black) track claimed in this action, except where it crosses it.

It does not run between the same points, and of course no prescriptive right to it, or dedication of it, can, by any known rule of law that I am aware of, enure to the benefit of the track now claimed.

And yet the 10th instruction given for plaintiffs would certainly be understood by a jury so that they would turn the travel on it over to the credit of the claimed (black) track.

The plaintiffs do not claim a road over the ground on which this first track run, but they do thus seek, by their instruction, to have the benefit of the travel on it enure to the benefit of the (black) track they claim.

The second track ever travelled was over the yellow line.

5 Plaintiffs' witness, Shaver, says in 1830 there was no track. That there first began to be one in 1831.

17 Abram Trumbo says none in 1830, but first broke through in 1831, by the Anderson's ford travel from Covell Creek.

19 Ambrose Trumbo. Track first made in 1831.

18 James Brown says the same thing.

2 Plaintiffs' witness, Milligan, describes it in 1833, and says the troops crossed there that year—the year of Sauk war. The crossing of these troops probably made quite a well defined track, very likely equal to the green track at that time; but in '38, when Alexander's oxen couldn't follow it, it had got pretty well grown up, for all this time the great bulk of the travel was going by the green track, for the reason, as many witnesses say, that the settlements were mainly about South Ottawa, and 'twas the shortest and best track.

3 Dimmick lived on it in 1834 and '35, and left it in 1836; and during this time, plaintiffs claim, dedicated it, by working on it, thinking it was or would be a highway, and allowing people to travel it. But his testimony is, that in 1833, when he came to the country, old man Brown pointed out the green track to him as the best road, and he took that with his family.

5 Fredenburgh travelled the yellow track in 1834.

6 Billy Moore first travelled it in 1835.

16 Sam Lewis travelled it in 1835.

5 Shaw, plaintiffs' witness, says that both green and yellow track were travelled in 1835, but that the loaded teams took the green track.

15 Pembroke was here from '25 to '32; says no travel on it to his knowledge during that time, but after he came back, in 1835, a few teams went up that way, but the great heft went the green track.

16 Alexander couldn't find track enough for his oxen to follow during the year 1838, though he went over it nearly every day on foot, and had to take his wagon around by the old green track.

8 Templeton and Dick Daily say they went over it in 1839, but don't speak of the condition of the track then; they may, and probably did, go on horseback, as Alexander went on foot.

The above is enough, certainly, to determine accurately that the yellow track was first broken through in 1831, and by the crossing of the heavy wagons of the soldiers, became a well marked track in 1832, so that, when Dimmick lived on the S.W. ¼ of 18 in 1834 and 1835, and supposed there was a road there, and he and Brown fixed it for their own convenience and to make the travel easier, there was quite a track. But there can be no doubt that even at that time the main travel went by the green track.

Pembroke says it did.

Brown pointed it out to Dimmick as the best one to take.

Shaw says the loaded teams went over it in preference to the yellow one in 1835.

Alexander says he couldn't find it in 1838.

The yellow track is the one that Brown and Dimmick dedicated, if they dedicated any, in 1833 and '34, just after the troops had got it tolerably well beaten. For there were only two tracks in existence then: the yellow and the green ones, and Brown seems to have been talking about the yellow one, and Dimmick didn't own any land on any other.

Now suppose they did actually offer to dedicate this yellow track in 1833, (which they couldn't do, for neither of them, according to their own parol statements, purchased till the sales of 1835,)

Did the Public ever accept the offer?

I say they did not, and, in support of this position, will show that the public travel never took the track at all, and what there was, grew smaller each year, till in 1838 the track couldn't be found by Alexander; and while it was visible, the main travel went by the old green track. I have already called attention to the evidence of this fact.

And now I will show that the entire yellow line of travel was forsaken in 1841 for the *red line*, and continued to go there until 1847, and that the yellow line has never been resumed.

This red line is the third track.

18 Amos Ebersole says twenty years ago (1841), Gentleman fenced his land south of the timber road, and we went diagonally across the quarter east. About the same time, Brown's two old enclosures on the bottom were joined by a fence, and we went around east of that field, and the witness then pointed out the red line as the track.

8 Plaintiffs' witness, Templeton, says he did the fencing for Brown twenty years ago (1841), and that drove the travel east of the enclosure.

15 Pembroke says he went away in 1835, and came back in 1842, and then the travel took this red line, and he describes

the place where the track went down the bluff, as in a little ravine that made the descent easy.

I will here suggest that 'twas the steep ascent of the bluff on the old yellow track that was the great cause of the small travel on it; for this red track that went down the little ravine, soon got to be a well travelled route, and all the travel south and east went that way, while the west and south-west still held to the old green track.

20 Hardin came to the country in 1843, and says the red line was the travelled track then.

20 Drake says he first knew the ford in 1844, and it went that way then.

20 Coleman says he came into the country in 1845, along the timber road from the west, and found them raising Gentleman's barn; enquired for the ford road, and was directed to strike N.W. through the timber. He did so, and found the red track, and says there was no track west of that at that time.

18 Amos Ebersole,

16 Samuel Lewis,

18 James Brown,

20 Richard Harden, and

15 Pembroke,

All say they knew the old yellow track, and had travelled it, and that Gentleman's barn was built directly across it in 1845. Also, that his barn-yard and calf pasture fences were directly across it.

I think then that I have established *conclusively* that in 1841, the old yellow track was fenced across by Gentleman, just south of the timber road and by Templeton, the tenant of Brown, on

the bottom, and that the public made no claim whatever of any right to travel it, either by prescription or dedication, but sought out a new route on the red line. It does seem to me that even if there was an offer to dedicate the yellow line, the proof is entirely sufficient to show that the offer was never accepted, and if not, of course the dedication never became perfect, and it never became a highway in that way.

We have also shown that it was first travelled in 1830, and the travel wholly ceased in 1841, continuing only eleven years.—Hence 'twas not a road by prescription.

On the third track, or red line, as we have shown, the travel commenced in 1841, and that different witnesses travelled it during each of the years 1842, 1843, 1844, 1845 and 1846, and will refer to the testimony of

Jim Brown, Abstract page			18.
Amos Ebersole,	"	"	18.
Jesse Drake,	"	"	20.
Abram Trumbo,	"	"	17.
Samuel Lewis,	"	"	17.
D. Pembroke,	"	"	15.
Templeton,	"	"	8.

Who all state that Jim Brown's fence, built in 1847, cut directly across this old track, just under the bluff, so that they could not go down there, and that from that time the travel all went by the Billy Moore (blue) road for nine or ten years, and the old routes through Gentleman's quarter section were entirely forsaken.

This red track is not claimed to have been dedicated by anybody, for 'twas not in existence at the time they say Brown and Dimmick made the dedications.

'Twas not a highway by prescription, for 'twas only travelled from 1841 to 1847, a period of six years.

The 10th instruction given for the plaintiff, to which attention has already been called, would fully authorize the jury to add the travel on the yellow track from 1831 to 1841, and the travel

on the red track from '41 to '47, *making on both only sixteen years*, together, and let both enure to the benefit of the present (black) track, which is different from each of the others, and has only been travelled for the last four or five years. And this too, when there is a gap of nine or ten years between the travel on the yellow and red, and that on the black track, during which time still another track (the blue one) was being travelled.

The fourth track was the blue one, which was first travelled in 1846, and became the main and only travelled track in 1847, and continued so for nine or ten years. See

Jim Brown, *Abstract page* 18.
Amos Ebersole, " " 18.
Jesse Drake, " " 20.
Abram Trumbo, " " 17.
Samuel Lewis, " " 17.
D. Pembroke, " " 15,

And others, who tell the same story. And especially of Miles Coleman, who felled and corded wood in the old track in 1849 and '50: abstract page 20. And of Lovejoy, who came into the country in 1849, and in going with Gentleman from his house to the ford with an empty wagon, went a mile and three-fourths around by the blue track, when, if the red or yellow track had been open, could have reached the same ford by three-fourths of a mile travel.

I then assert, with perfect confidence, that from 1847, *for a period of nine to ten years, that is, up to* 1856 *or* '57, *or only four to five years before this suit was brought, this blue track was the only track to the ford, and that all others were entirely abandoned.*

Fifth and last, the black track, or the one now claimed.

This track was never travelled until after the blue track was fenced up, some four or five years ago, and has been entirely made during that time.

David Pembroke, abstract page 16, says so, and gives, among

other means of knowledge, that during the time the blue track was in use, he passed through the timber where the old tracks (yellow and red) were, and found them grown up with grass and brush.

James Alexander, abstract page 16, says there was no travel west of Brown's house from 1838 to 1848.

Samuel Lewis, abstract page 17, says the barn was built across the yellow track in 1845, and two or three years after, the calf pasture built across the red track; and that, during this time, the blue track accommodated all the travel.

Abram Trumbo, abstract page 17, says during fifteen fifteen years, there was no travel past the barn. This fifteen years includes the time the red and blue tracks were travelled.

Amos Ebersole, abstract page 18, says the blue track was travelled nine or ten years after 1847, and that the old track up the bluff was not in use; that trees were felled in it, and there was no track there.

James Brown, abstract page 18, who lived in the old house on the bottom most of the time up to 1853, says the barn was built across the yellow track of 1831; also the barn yard and calf pasture. That, in 1847, he fenced across the old tracks, and, from that time for nine or ten years, all the travel went the blue track; and that '46 to 1853, there was no one travelled the old track but Gentleman and him, and that there was no travel west of his house.

Ambrose Trumbo, abstract page 19, says the same thing.

Miles Coleman, abstract page 20, says that in 1849 and '50, he felled a bee tree across the track, and corded wood in it, and that it was not passable during that time.

Richard Hardin says the same.

Jesse Drake says the same.

Lovejoy, abstract page 13, says that in 1849 they could n't get through from Gent.'s house to the ford with an empty wagon, except by going around the blue track.

And all there is to contradict this is, that Billy Moore, Thorne Howland and Templeton say they *think* they went through that way every year during that time. I submit that, if three neighbors did manage to get through there once a year, while the *whole public travel* went the blue track, that no inference or presumption will be drawn from these occasional passages over open and unenclosed lands, as against the rights of the owner.

The dates of travel on the different tracks, then, stand as follows:—

Green Track was the only road from 1825 to 1831; the main road from 1831 to 1840; the road for west and south west travel from 1841 to 1854, and then became disused.

The Yellow Track was opened in 1830; troops crossed in 1832, and made a plain track, that was travelled somewhat until 1841; in 1841, the travel ceased upon it entirely, being fenced across by Brown's tenant at north end, and by Gentleman at south end.

The Red Track, in 1841, was first broken through, and was, up to 1847, the only travelled track west of ravine.

The Blue Track was opened in 1846, and from 1847 to 1856–7 was the only travelled track west of ravine.

The Black Track first travelled in 1856–7, and from then till 'twas shut up in 1861, and made during that time.

Treating the facts above stated with regard to each of said tracks as true, are the plaintiffs' instructions the Law?

The 2d instruction, abstract page 22, was erroneous, as tending to mislead the jury. All of plaintiffs' evidence was a studious attempt to mix up the travel on the different tracks, and let all enure to the benefit of the last one claimed, and so make out the twenty years' travel.

And taken in connection with the *3d instruction*, is certainly not the law.

The 3d instruction charges that if the public used and travelled the road in question for the period of twenty years, without objection from the owners, then the consent of the owner, and even a grant, would be implied.

I insist that the above is not the law, and that this very question has been decided in *Warren* v. *Jacksonville*, 15 Ill., 236, where this Court say: "No inference or conclusion will be drawn in this State against the owner of land lying unenclosed, which is travelled over, to establish an easement in favor of the public."

And as the qualification asked to the 2d, 3d, 4th, 6th and 9th instructions embodied this very idea, almost in the words of the Court, it ought to have been given. 'Twill be found at the foot of page 24 of abstract.

See also, on this question,

Colvin v. *Bennett*, 17 *Wend.*, 564.
Hart v. *Vose*, 19 *Wend.*, 365.
Curtis v. *Kessler*, 14 *Barb.*, 523.
Pearsall v. *Post*, 20 *Wend*, 121.
Marcy v. *Taylor*, 19 *Ill.*, 634.
Daniels v. *People*, 21 *Ill.*, 442.
Martin v. *People*, 23 *Ill.*, 395.

Then, too, each of the above instructions would lead the jury to suppose that the owner must stand in the way, and actually tell every man that attempted to pass that he could not go thro', or else he would be presumed to consent to their travelling on the land as a public highway, and ignores entirely the emphatic and effective objection made by Gentleman and Brown both, in 1841, when they fenced off both ends of the track and of Gentleman, when in 1845 he placed his barn in it; and of Jim Brown'

in 1847, when he fenced across, and completely shut it off; and of Carter, in 1856, when he fenced still further west; and of Gentleman, when he told the neighbors that they might go thro' till he got able to fence.

The same qualification was asked to the 5th and 6th instructions on the subject of dedications, and should have been given. The instructions are on pages 22 and 23 of abstract.

The 7th instruction, abstract page 22, is not the law.

Mere travel over a track is not a sufficient evidence of an acceptance of an offer of dedication, especially where that travel is exceedingly sparse, as was the case with this yellow track, the only one ever offered to be dedicated, and *more especially where the road needed repairs to make it passable at all.*

In such cases, unless the authorities repair, the proof of acceptance would be insufficient.

And on page 25 of abstract, will be found qualifications asked to plaintiffs' 3d and 7th instructions, embodying this very idea; it is as follows:

"But if the jury believe from the evidence that the route in question was over open and unenclosed lands, and such route needed repairs, and such repairs were not made by the public authorities when so needed, as they were on other roads in the vicinity, this is a circumstance to be considered by the jury in determining whether the public claimed to travel over the route, adversely to the rights of the owners."

This was refused by the Court, and we insist it is the law.

In *Proctor* v. *Lewiston*, 27 Ill., 418, Walker, J. says:—"The evidence on this point (of repairs) shows, that from the nature of the ground it was never required, and the law will not require a useless act. *Had it been necessary and never repaired, that fact with others would have been proper for the consideration of the Jury, in determining whether it was regarded by those having charge of the highways as a public road. On a question of dedication or prescription, it might be important.*

The qualification is exactly within this case, and should have been given.

In *Martin* v. *People*, 23 Ill., 396, Walker, J. says:—"If the use of the way was only occasional, and the authorities did not exercise any control over it, and failed to repair it when repairs were needed, as they did other roads in the vicinity, the jury would have been fully justified in finding for the defendant below."

In *Daniels* v. *The People*, 21 Ill., 442, Walker, J. says:—"Evidence of a dedication by the owner of the soil, and an acceptance by the public, *and its use, by travel, as a highway, and repairs made by the proper authorities*, establishes its existence."

In *Marcy* v. *Taylor*, 19 Ill., 637, Walker, J. says:—"Acceptance (of a dedication) may be shown by the user of the public by travel, or the acts of the public officers in repairing it up. But it cannot be essential that they repair, *for it might never need it.*"

This road did need them badly, as their own witnesses swear.

See also Alvord v. *Ashley*, 17 *Ill.*, 363.
Dimon v. *The People*, 17 *Ill.*, 416.

I venture to say that no case can be found in the books, where a road needed repairs year after year, as these roads did, and those repairs were never made by the public authorities, although other roads in the vicinity were, but what this fact has been deemed an important circumstance to go to the jury, and be considered by them in determining a question of prescription or dedication.

But the Court below, by its instructions given for plaintiff, and the refusal of the qualifications asked by defendant to the 3d and

7th instructions, took the consideration of this question entirely from the jury.

The 8th instruction, abstract page 23, would, perhaps, be the law, if the word "subsequent" should be inserted before "act or declaration," in the next the last line; but even then, I think, it would be too broad.

The 9th instruction, abstract page 23, is not the law, and is carefully contrived to mislead the jury.

The plaintiff well knew that no one of the tracks laid down on the plat had been travelled without interruption for twenty years, and that it could not be made so to appear from the evidence. He also knew that the only track upon which there was any pretence of dedication, was the yellow one, no part of which was on the same ground as the one claimed to have been obstructed. And this instruction was contrived to enable the jury to give this last (black) track the benefit of the travel on all the rest.

I admit the law to be, that where a public highway *already exists*, the right of the public will not be lost, and no abandonment can be claimed because the actual travelled track may vary slightly from the legal line to avoid obstacles, so long as the route is substantially upon the legal line.

And so, too, where an immature claim is in the course of ripening to an easement, some transient and unimportant variation in the line of travel, such as detours around a slough or stump, would not operate against the claim of the easement.

But where the route is essentially a different one, making a new track the entire distance, and the cause is not some natural obstacle, but an impassible barrier, *like a fence or barn erected by the owner of the soil directly upon and across the track*, then the travel on one route cannot enure to the benefit of the others.

The instruction, as given, would authorize the jury to add:

1st.—The travel on the yellow track, 1831 to 1841, ten years.

2d.—The travel on the red track, on entirely different ground, terminating fifty rods east of the yellow one, from 1841 to 1847, six years.

3d.—The travel on the blue track, nearly three-fourths of a mile to the east, from 1847 to 1856–7, nine to ten years.

4th.—The travel on the black or present track, from 1856–7 to the obstruction, four to five years.

And the jury were actually forced to do this, in order to render the verdict, for the yellow and red together were only travelled from '31 to'47, sixteen years, and then came a break of ten years that the blue track was travelled, before the travel came to the present line. And so if the blue line is left out, the twenty years of uninterrupted travel cannot be made out at all.

The instruction is not the law, upon a question of dedication. If Brown offered them the yellow line, and they did not choose to take it, they would not be authorized to take the red or the black line. The fact that he gave them a track east of his house would not give them any rights whatever on the west side, simply because both tracks came from the same ford, and both led off southerly.

The consideration of giving any route (if 'twas given), may have been its particular location.

The 10th instruction, abstract page 23, is subject to the same objections as the 9th.

The 11th instruction ought not to have been given, as it could only tend to mislead the jury, when really it was not applicable to the facts of the case.

The proof shows that the route by the barn was not opened till 1831, and that this obstruction of Gentleman's was put in in January, 1861, making twenty-nine years in all.

Now if the condition of the instruction was true, that the route was not travelled for from nine to fifteen years, of course *it could*

not possibly have become a highway by prescription prior to the non-use, as is supposed in the instruction.

The 12th instruction was not the law. It could only have been intended to give the evidence of Billy Moore, Templeton, and Thorne Howland, who each stated that they thought they had travelled down the old track every year the Billy Moore road was in use, more weight than the evidence of Coleman, who said he knew there was no travel there, for he lived in the Brown house in '49 and '50, and felled a tree across the track, and corded wood in it; and Amos Ebersole and Pembroke, who each said they passed through the timber and across the old track frequently during that time, and found it grown up to grass and brush; and of Jim Brown, who lived in his father's old house from '46 to '53, and says no one but Gentleman and he, and occasionally a neighbor, passed over it. Also of Lewis, Trumbo, Lovejoy, and Hardin, who all say 'twas abandoned.

It comes directly within the case *The Great Western R. R. Co.* v. *Hawks*, 25 Ill., 241.

The defendant's 2d instruction should have been given. Abstract page 22.

1st.—Because the only record evidence with regard to any road was an order of location for a road in Range *five*, and the complaint charged this road to be in Range *four*.

2d.—Because if the record had related to Range four instead of five, it would not have legally established the road as a public highway, but only have *marked out* what was claimed to have been formerly established, and if the claim didn't prove to be good, the marking out of the route claimed wouldn't help it.

24 *Wendell*, 491

The 6th instruction is the law, and should have been given as asked by defendant. Abstract page 26.

15 *Illinois*, 236.
23 " 395.
25 " 153.

The 10th instruction asked by defendant is the law. Abstract page 27.

It cannot be denied that, if the yellow route was offered to the public in 1833 or '34, and that afterward, Gentleman fenced the route up at one end, and Brown at the other, and these two fences remained there for twenty years thereafter, and the public during that time made no attempt to use or control the route, or travel on it, that would work an abandonment of the route, if they ever had a right to it; and certainly evidence sufficient to show an abandonment ought to be sufficient to show a non-acceptance.

The 6th instruction, abstract page 29, is the law, and should have been given.

Lewiston v. *Proctor*, 27 *Ill*,, 419.
Dimon v. *The People*, 17 *Ill*., 416.

I have considered at considerable length the different questions presented in the record, both upon the evidence and instructions, and have only further to suggest that, if under the laws of dedication or prescription, either of the tracks across said Section 18 have become a public highway, then, under the same law, this evidence will establish every one of the tracks as a highway, and all of the defendant's property be taken from him without one single cent compensation therefor, for it would be impossible to fence any ten acres together.

This case is one of immense importance pecuniarily to Gentleman, and of minor importance to the plaintiff, who, as the proof shows, is secured by the appropriation made by the Town, from all liability even for costs.

If the road is established, it will run through the defendant's land for three-fourths of a mile, and force him to keep up a mile and a half of fence without any compensation whatever.

If the public need a road to this ford, they can apply to the proper tribunal, who can lay out the road, assess the damages caused thereby, and pay them over to defendant, and open the

road. And it is not, as suggested by Counsel of defendant in error, a question whether the approach to this ancient ford shall be closed, but a question whether the cost of the land for this road, and of maintaining the fences on both sides of it, shall be divided among the public generally, who are benefitted by it, or shall all be saddled upon the plaintiff in error, who does not need the road, and is in no wise benefitted, but greatly injured by it.

I feel confident that unless it shall appear from the law and the evidence that the public have shown a clear and certain right to a highway over the land in question, that this case will be reversed. And, in this connection, will suggest that it is absolutely certain that the fence built by Gentleman, Jan. 17th, 1860, from the corner of his barn-yard westerly across this black track, did not cross or obstruct the old yellow line claimed to be dedicated, and if any route can be a public highway, it must be that one. If the variations in travel shall be thought not to be wide enough to prevent its enuring to the benefit of the old track, and thereby that track has become a highway by prescription, then I say that track was not obstructed within eighteen months prior to the bringing of this suit, and the plaintiff is not entitled to recover.

It is stated by Counsel for defendant in error, in their brief, that Gentleman has fenced up the Mechanicsville road (green track). That is not true; but, on the contrary, the proof does show that since Gentleman fenced across the black line, the travel has again sought the old green track, and followed it thro' Ford's land to the river, and that it was open and travelled at the time this suit was tried below. So that all the hue and cry about Gentleman's fencing up the last road to the ford is not true, and is only raised here to prejudice the rights of the plaintiff in error. And though it was used with marked success upon the jury below, I have no fears of its undue influence here, where law and reason will be applied to the determination of the questions presented.

GEO. C. CAMPBELL,
For Pltff, in Error.

Gentleman
vs
Sauls

No 97

Error to Kenicale

There are five distinct tracks to testifie about by the witnesses in this case and it will be necessary for the Court to look at the map attached to the record in order to understand the testimony.

1st The witness Dimmick marked the road of which he speaks on the map B. B. B.

2 The road called the Mechanicsville road is marked A. A. A.

3 The road called the cut off track is marked C C C.

4th The road called the Billy Moore road is marked D. D. D.

5th The road insisted upon in this case is marked on the map "road to Browns Store as laid by commissioners of highways Dec 3 1860"

The first track marked B. B. B. is the one testified to by Milligen in 1832. and

Kinnick in 1833. 34. & 35. and by Shaw and by Freudenburgh and by Moore.

This road continued to be travelled until 1835 when Gentlemans barn was built on his calf pasture &c

The Mechanicsville Road was also travelled during the same time

In 1835. the track was changed & the road marked b. b. b. see A. Simmons testimony The commencement of this road was more than 50 rods from the commencements of the road claimed and the map shows that the point where Gentleman fenced the road claimed is 80 rods from the Road b. b. b. and not touch the road claimed but at one point and varying from that 50 fifty rods at one point marked 950 feet.

This road or rather these roads the Mechanicsville and the cut off roads were used until 1847 see A Simmons testimony then the Billy Moore road was used 8 or 9 or 10 Years see Simmons testimony p 48

neither the road claimed nor any road was it ever travelled from 42 to 53 see Brown testimony p 50 see Timlow Testimony

the land was never cleared timber land see Coleman testimony, p 52.

From 1847 until 1852 or 3. the Billy Moore road was used. This road was a least a mile from the road claimed,

The Road B. B. B. & the cut off road C. C. C. was both fenced up for 10 or 12 Years were the only travel was by the Billy Moore road see Allens testimony

" Longley 39
" Pemberton 44
" Timlow 47 48, 49
" Ambrose Timlow 57
Coleman 52

~~Coleman 20 rods~~
~~Brown 18 rods~~

The only way that ~~this~~ a road can be
Established in one of these ways only

1st By being laid out in manner prescribed
by law

2 By Prescription

3 By Dedication

There is no pretence that this road has been
legally laid out

Feb 20. 1860 the Comrs of highways claimed
that ~~this~~ the road by prescription
on Sec 18 T 33 R 5 E but that is in Range
5. This road is in Section 4.
Besides no notice to dft is pretended
in any of these proceedings dft was
therefore wholly unapprised of them

It needs no argument to show that
the Comrs of highways can not establish
a road through my farm by
simply getting together and saying
that a road exists there by prescription
without giving me any notice of
their proceedings

People v Judges of Allegan
24 Mich 471

Was there a road by prescription

We do not deny ~~but~~ that a road may be established by prescription ~~in less~~ Dedication than 20 Years yet we affirm that if it be less than 20 Years it must have existed so long as to show that the road was used by the public adverse to the owner of the fee, and not under his permission, and the use during the time relied on to raise the presumption must have been substantially of the same road, 20 Years use of a road in one place ~~or~~ raises no presumption of a right to use another road in another place

We do not contend that it is necessary that this track should have been exactly in the same track, that such variances as ordinarily occur in travelling any road would be of no importance so for instance when the road turns to avoid an obstruction But certainly the for 10 Years road on the Billy Moore road, one mile east or the road on the Mechanicsville road ~~one~~ mile east or the road on the

Supamile

cut off road can not be used to evidence a prescriptive right to the road claimed nor can it be used to prove a dedication of the route claimed

The proof that a prescription is confined to the road claimed as the road marked B. B. B. On examination of the map will show that the road claimed & the road B. B. B. start from the Tinley road & run South, at the point of starting the roads are 15 or 20 rods apart. see Coleman's testimony on the bottom it runs ten rods east of it

See Browns testimony

The old road runs on the East side of Browns house the new road on the west side they are not the same line of travel

The road claimed was never used until 1857. It was fenced in 1861. for four years there was some travel over it while it was open once in cultivation and this is relied upon for prescription and the costs

The Constitution and the Supreme to qualify it as a Rule, was wrong

for whatever travel there was on the land while it was lying open unenclosed would not give a right of way

By dedication. Of course there can be no pretense that a dedication of one line of road on one side of a mans house or farm, Never as applied to this case helps the instruction ~~or appears to~~ tended only to mislead the Jury

We certainly had a right to insist to the Jury upon the proof in this case that this ~~road~~ road never been travelled prior to 1852. if this is so and it can not be controverted then the giving of the 6th instruction and the refusal to qualify the same as asked is clear error.

Norris vs Packwood
15 Ark 230

The Ct instruction does not the case

22 Miss 436

3 Kents Com 481

Campbell vs Wilson 3 East 284

Hill vs Cassell 4 Peck 466

Leyty vs Betsuneller Mors 49

Wood vs Drake 5 [illegible] 451

Reed Nov 2nd 1853.

J Wilson
Clerk

R.C. Cadle

Scott 91-115

Mullarman

Brief Cook

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

WILLIAM GENTLEMAN
vs.
LEWIS SOULE, who sues for himself as well as the County of La Salle. } *Error to Kendall.*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

This was an action of debt, brought under the following statute, viz:

Amendment to Chapter XCIII. Revised Statutes, 1845.

[Sess. Laws, June 22, 1852, p. 176.]

SEC. 1. That if any person or persons shall obstruct any public road, in the manner provided in section sixteen of the Act to which this is an amendment, the penalty provided for in said section may be recovered either by an indictment or in an action of debt, before any Justice of the Peace of the county in which the offence was committed; which action may be brought in the name of, and upon the complaint or information of, any person who may complain, one-half to the informer, the other half to the use of the county.

Scates Stat. p. 574.

It was tried one whole week before Abner A. Fisher, Esq., Justice of the Peace, who found against Gentleman. He appealed to the Circuit Court of La Salle county, and, on account of prejudice which he swore the people had, [certainly not against him personally, but in favor of

the road,] a change of venue was taken to Kendall county, where a jury, after a whole week's patient trial, found again against him, and he comes here by writ of error, asking a reversal.

We shall take up the errors assigned in order.

I.

The first error assigned by the plaintiff in error is, that the Court below erred in admitting improper evidence; and to sustain this assignment, he relies upon the questions put to the witnesses, Ephraim Dimmick and James Brown, Jr., in regard to the time the land, over which the road in dispute runs, was purchased from the United States.

They were upon mere collateral matters. When the different public land sales took place are matters of history.

The questions were proper to fix the precise time when possession was taken of the land. The proofs showed that Dimmick bought whatever right old man Brown had, with the improvements he had made on section 18, in 1833, and afterwards sold this to Gentleman, the plaintiff in error, and that Gentleman also derived his title to section 7 afterwards from the heirs of old man Brown, under and by virtue of whatever right he had under the United States.

The proof shows that, in 1833, old man Brown was in the actual possession of both the tracts over which the road in controversy runs, and had made improvements on the same, claiming to own the land. So far as the question of dedication is concerned, it is wholly immaterial as to whether Brown had a perfect patent title to these tracts, or had only a pre-emption right, by his possession and improvements, or had the bare possession claiming ownership. If there was a dedication either by Brown or Dimmick, or both, and both of them, or either of them, made a good dedication, it would be binding on Gentleman, who acquired his title through them, even although at the time of the dedication, their title may not have been complete, if it became perfect afterwards. It will hardly be contended that it is necessary, in order to make a dedication good, that the party dedicating must have the perfect title to land at the time of the dedication, if a perfect title is acquired afterwards. If A. owns a quarter section, holding it by a patent title, and B. is in the bare possession of an adjoining quarter section, without any title, facing upon a public road, and there is no way for A. to reach the public road except over the tract in possession of B.; in this condition of affairs B. gives A. a right of private way over his land, and B. the next year afterwards acquires a title to his tract by a patent from the

United States, it will hardly be claimed that the after acquired title will not enure to support the previous dedication.

Now if, in 1832, Brown being in possession of these lands and having improved them, claiming ownership, when asked by Richey, in the presence of the witness, S. Milligan, "What in the name of sense you are going to stay here for?" and his wife replied, without any contradiction from Brown himself, "*Oh, we'll keep a hotel and make some dimes off the road.*" evidently referring to this road which the United States troops passed over in that year, and which Milligan swears "was as much traveled on as any road in the country;" if Brown told Dimmick in 1833, as Dimmick swears he did, "in speaking of the bottom tract, [sec. 7,] *that there would always be a road there, and pointed out a patch where he intended to plant an orchard, and said the road would run by it;*" if Brown, in 1834, told Dimmick, "while he was talking with Brown at his house, and Brown said *there would always be a road there on account of the ford;*" if, in 1834, Dimmick bought from Brown whatever right he had to section 18, as he swears he did, and afterwards bought from the United States at the land sales of 1835, and Dimmick and Brown worked the road in 1834, or 1835, between their houses [Brown having bought the tract on section 7 at the land sales in 1834]; and Dimmick in the same years fixed a crossing over a rivulet near his house, [where Gentleman's house now stands,] and repaired this road also in the same years through the timber; if, we say, all these facts, coupled with the further testimony of Dimmick, "I considered it a public road in 1834 and 1835," [after he bought at the land sales from the United States;] "I had no other idea; I afterwards sold the land to Gentleman; I regarded the land as a public highway; I supposed when I worked the tract south of my house that there was a public highway there, and worked on it to make it easier,"—do not amount to a dedication by both Brown and Dimmick of the respective tracts, then we fail to discern what makes a dedication. A distinct *intention to dedicate* is clearly shown on the part of both of them.

They were the grantors of Gentleman, and all the proofs in the case showing that the public had made an acceptance of the dedication by public travel long before Gentleman bought, it is binding on him.

II.

No point is made on the second error assigned.

III.

The third error assigned by the plaintiff in error is, that the Court below refused to permit him to cross-examine the witness, Amos Ebersole, generally.

The refusal was proper. As the general course of the examination of witnesses is subject to the discretion of the judge, it is not easy to establish a rule which shall do more than guide, without imperatively controlling the exercise of that discretion; and this Court will not give countenance to an assignment of error on that ground, unless the Court can clearly see that the judge below has so abused that discretion as to deprive the other party of some substantial right.

In this case it was distinctly announced that the witness, Amos Ebersole, was only called *preliminary* to the offering in evidence of the order and proceedings of the commissioner of highways, causing the road in dispute "to be ascertained, described and entered of record in the Town Clerk's office, as a road which had been used for twenty years."

The witness then swore to the signature of Daniel Ebersole, the Town Clerk, to a certified copy of said order and proceedings. The plaintiff below then offered the same in evidence; whereupon the defendant below objected to the same going to the jury, on the ground that the road described in the complaint was over lands in range *four*, whereas, this evidence related to range *five*. But the paper showed the road to be in Grand Rapids, in La Salle County, by the heading. Still it might have left it in doubt, but it was competent to show that the road described in the order was in Grand Rapids. The Court would take notice judicially that the Town of Grand Rapids was in range four, and so the objection would be obviated. Hence the witness was properly asked the question whether the road described was in the Town of Grand Rapids. This was only preliminary to the introduction of the paper, and did not make him a general witness, so as to give the defendant below the right of cross-examination generally. If this question and answer were both stricken out, the record itself showed the road to be in range four, as we shall hereafter show.

IV.

No objection is made in the Court here, nor was in the Court below, to the plaintiff's first instruction.

The plaintiff in error asked the Court to qualify our 2d instruction.

This instruction is based on prescription, and lays down the law correctly.

The Court purposely refused to qualify it, as asked by plaintiff in error.

He asked the Court to qualify it as follows: "But where lands are lying open and undivided, no presumption in favor of a road can arise from mere travel by the public, until circumstances induce owners to inclose; and the consent of the owner cannot be implied under such circumstances, simply because such travel is unobjected to."

In support of this doctrine, he relies on Warren *vs.* Jacksonville, 15 Ill. 236, and his brief shows him to be perfectly chronic in regard to that case.

We shall have occasion, when we come to examine our instructions upon the subject of dedication, to examine the force of these remarks by this Court in the 14th Ill. 236, but will simply content ourselves now with calling the attention of the Court, in this connection, to the fact, that the case there was a pure case of dedication and not of prescription, and so the qualification asked had no application to prescription.

This instruction of ours lays down the broad doctrine of prescription to be, that where the public have used and travelled a road as a public road for 20 years, without interruption, not under permission from the owner of the land, but adversely and exclusively, and under a claim of right to do so, with the knowledge of the owner, and without objection, the owner being in a position to object, affords a *conclusive* presumption that such road is a legal public road existing by prescription.

Greenleaf, where this head of law is treated at large, says:

"In the United States, grants have been very freely presumed upon proof of an *adverse, exclusive and uninterrupted enjoyment for twenty years.* By the weight of authority, as well as the preponderance of opinion, it may be stated as the general principle of American law, that such an enjoyment of an incorporeal hereditament affords a *conclusive presumption* of a *grant* or a *right*, as the case may be; which is to be applied as a *præsumptio juris et de jure*, wherever by possibility a right may be acquired in any manner known to the law."

2 Greenleafs' Evi. sec. 539.

Again he says: "In other cases the common consent, by which this class of legal presumptions is established, is declared through the medium of the judicial tribunals, it being the *Common Law* of the land; both being alike respected as authoritative declarations of an imperative rule

of law, against the operations of which no averment or evidence is received. Thus, an uninterrupted enjoyment of an incorporeal hereditament for a period beyond the memory of man, is held to furnish a *conclusive presumption* of a prior grant of that which has been so enjoyed. This is termed a title by prescription. If this enjoyment has been not only uninterrupted, but exclusive and adverse in its character for the period of twenty years, this also has been held, at common law, as a *conclusive presumption* of title. There is no difference, in principle, whether the subject be a *corporeal* or an *incorporeal* hereditament; a grant of land may as well be presumed, as a grant of a fishery, or a common, or a *way*."

1 Greenleafs' Evidence, sec. 17.
3 Kent's Comm., p. 441 to 446.
Best on Presumptions, 103. Note M.
Coolidge *vs.* Learned, 8 Pick. 504.
Tyler *vs.* Wilkinson, 4 Mason, 397, 402.
Ingraham *vs.* Hutchinson 2 Conn. 584.
Bealey *vs.* Shaw, 6 East, 208, 215.
Wright *vs* Howard, 1 Sim. & Stu. 190 203.
Strickler *vs.* Todd, 10 Serg. & Raw. 63, 69.
Balston *vs.* Bensted. 1 Campb. 463, 465.
Daniel *vs.* North, 11 East, 371.
Sherwood *vs.* Burr, 4 Day, 244.
Tinkham *vs.* Arnold, 3 Greenl. 120.
Hill *vs.* Crosby, 2 Pick. 466.
Bolivar Man. Co. *vs.* Neponset Man. Co. 16 Pick. 241.
Ricard *vs.* Williams, 7 Wheaton, 109.
Propr's of Brattle St. Church *vs.* Bullard, 2 Metc. 363.

This Court has held, Walker J.: "It seems to be well settled, that no particular time is necessary for evidence of *dedication;* it is not, like a *grant, presumed from length of time.*"

Marcy *vs.* Taylor, 19 Ill. 634.

Again, Walker J.: "The public may acquire the right to use land for a public highway by dedication, *by user in the nature of prescription*, or by condemnation in the manner prescribed by the statute. Actual, adverse, open and uninterrupted possession of land, by a person claiming title, for the period of twenty years, confers the right to hold and enjoy the possession against the true owner. Then it follows that a user by the public of a road, as a public highway, for that period, is abundantly sufficient to create the right. In this case there was evidence of use of this road by the public for the period of over twenty years, and the jury were justified by the evidence, in finding that it was a public highway."

Daniels *vs.* People, 21 Ills. 439.

Again, Walker J.: "The question then arises, whether this road had a legal existence at the time it was obstructed by defendant. The evi-

dence of user clearly shows that it had, by prescription. No less than 9 witnesses testified to the use of the road by the public, for a period of over twenty years. And from their evidence it appears to have been continuous and uninterrupted during all that time. This period, wherever the common law obtains, has always created a *prescriptive* right, as well in the public as in private individuals. Such a right once obtained is valid, and may be enjoyed by the public to the same extent as if a *grant* existed, it being the legal intendment that its use was originally founded upon such a right."

Town of Lewiston *vs.* Proctor, 27 Ill. 414.

The Supreme Court of Pennsylvania say: "Where one has used a road over the land of another at his pleasure, without asking leave and without objection, *such user is adverse*, and after the period of twenty years, the right of way becomes absolute and indisputable."

The mere inattention of the owner of the land to the fact that an easement on it is used by another, does not weaken the force of the presumption which the lapse of time creates."

Garrett *vs.* Jackson, 20 Penn. (8 Harris) 331.

This Court say, Scates C. J., in Dimon vs. The People, 17 Ill. 422: "But while no presumptions or inferences can be made against those who have neither actual or constructive notice of such user, every one is presumed to know of and notice such use of a way over his land."

See, also, 2 Greenl. Evi. sec. 662, and notes.

The 3d instruction of the plaintiff lays down the law of prescription correctly.

This instruction is fully supported by the case of Warren *vs.* Jacksonville, 15 Ill. 236, and is in its language. In that case the Court say, Scates J.: "A right by prescription cannot be raised against the consent of the owner; but the use may be so long unobjected to as to authorize the finding of an *implied* consent, and to raise a presumption of consent, and *even of a grant*."

And so in regard to dedication. In Godfrey vs. The City of Alton, 12 Ill. 35, the Court say: "The intention of the party, manifested by express consent, or acquiesence in the user, will govern in determining whether it be a dedication."

6 Peters R. 431.

The qualification asked by the plaintiff in error to this instruction was properly refused. The qualification was based upon two doctrines, both of which are erroneous when applied to a road existing by prescription. The first is in regard to a road over open and unenclosed grounds, and claims, upon the strength of the case of Warren vs. Jacksonville, 15 Ill. 236, that no presumption of implied consent or grant on the part of the owners of the land can be indulged in, from twenty years acquiesence in the user of such public road by the public. We have already shown that this loose and unguarded language, *at most*, is only applicable to roads claimed by dedication, and has no application to roads claimed to exist by prescription.

The second is based upon the doctrine that a road cannot exist, if the road needs repairs, and was not repaired by the public authority ; or, in other words, that these facts, if proven, ought to determine whether or not the public claimed to travel over the route *adversely* to the rights of the owners.

But we have shown, from the authority of the case of Garrett *vs.* Jackson, 20 Penn. (8 Harris), 331, already cited, that the mere *user* for twenty years, without objection, is *adverse*, and we shall show conclusively by the authorities, when we come to the instructions on the subject of dedication, that *user alone*, without repairs by the public authorities, amounts to an acceptance of dedication ; and also, that it is *user alone* for twenty years without repairs, that determines whether or not a road exists by prescription.

For both reasons the qualification was properly refused.

No objection is taken or can be taken to the 4th instruction of plaintiff below. The doctrine in the instruction was only applied to prescription, but might safely have been extended to dedication, upon authority.

New Orleans *vs.* U. States, 10 Peters U. S. 662.
3 Kent's Comm. p. 556, note A.
2 Greenleaf's Evi, sec. 662.

In Alvord vs. Ashley, 17 Ill. 370, this Court say, Scates C. J.: "But he must be estopped by the acquiesence of his grantors, (*even though it be the Government*, Dimon vs. The People, 17 Ill. R. *post*,) in which case the act recited could only repel the presumption from his own act."

In Dimon vs. The People, 17 Ill. 421, this Court say, Scates C. J.: "We can make no distinction between governmental and individual

ownership, nor between non-resident and resident proprietors, as to the the operation and effect of such occupancy, claim and user upon their respective rights. They are presumed to have, and must alike take notice at their peril."

No objection is taken, nor can be well taken, to the 5th instruction of the plaintiff below, upon dedication.

It is based upon and is in the language of the following authorities:

Warren *vs.* Jacksonville, 15 Ill. 236.
Alvord *vs.* Ashley, 17 Ill. 363.
2 Greenleaf's Evi. sec. 662.

The 6th instruction of the plaintiff below, as given, is good law upon dedication. The first branch of it is based on the case of Godfrey vs. The City of Alton, 12 Ill. 35.

In that case, Caton J., says: "Such a dedication may be made by grant or other written instrument, or it may be evidenced by acts and declarations, without writing. No particular form is required to the validity of a dedication. It is purely a question of intention."

The latter branch is founded on the authority of the case of Marcy vs. Taylor, 19 Ill. 636.

Walker J. says: "A dedication for a highway may be proved in various ways; it may be established by a written grant, *by long and uninterrupted user*, or by the acts and declarations of the owner of the premises.

"But to be availing, it must be made with intent to dedicate. The mere acting so as to lead persons to the supposition that the way is dedicated, will not amount to a dedication, if there be an agreement which explains the transaction; but otherwise, if unexplained.

"Barraclaugh *vs.* Johnson, 8 Adol. & Ellis, 99.

"It seems to be settled that no particular time is necessary for evidence of dedication."

In Dimon vs. The People, Scates C. J., says: "And jurors may infer a dedication *from length of user*, and from *acquiesence* by the owner."

17 Ill, 422.

In a late English case, where much of the learning on this subject is collated, the Court holds this language:

"Public user of a road, for some time, is sufficient *prima facie* evidence of a dedication by an owner of the freehold to the public, and it is not necessary to show by whom the dedication was made."

Regina *vs.* Petrie, 30 Eng. Com. Law & Equi. 207.

Greenleaf, speaking of dedication, says: "Nor is it necessary to prove who was the owner, nor that he was a private person; for a dedication may be presumed *even against the sovereign;* and in all cases, unless the state of the property was such that a dedication of the soil was impossible. The right of the public does not rest upon a grant by deed, nor upon a twenty years possession; *but upon the use of the land, with the assent of the owner, for such a length of time, that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.*"

The issue, therefore, is a mixed question of law and fact, to be found by the jury under the direction of the Court, upon consideration of all the circumstances. The length of time of enjoyment furnishes no rule of law upon the subject, which the Court can pronounce without the aid of a jury, unless, perhaps, where it amounts to twenty years; but it is a fact for the jury to consider, as tending to prove an *actual dedication* and acceptance by the public.

2 Greenl. Evi. sec. 662.

The following cases fully support this text:

Cincinnati *vs* White, 6 Peters. 431, 437, 440.
East *vs.* Mark, 12 Jur. 332.
State *vs.* Catlin, 6 Vermont, 230.
Brown *vs.* Manning, 6 Ohio, 298. 303.
Pawlet *vs.* Clark, 9 Cranch, 331.
Olcott *vs.* Banfill, 4 N. Hamp. 537, 545, 546.
Abbot *vs.* Mills, 3 Vermont, 519.
New Orleans *vs.* United States, 10 Peters U. S. R. 662
3 Kent's Com. note A. 556.

The qualification asked by the plaintiff in error was properly refused. It claimed that no presumption of consent or intention to dedicate could be inferred from an acquiescence by the owner of land for a great length of time, where the land was open, until circumstances might induce the owner to enclose, and the case of Warren vs. Jacksonville, 15 Ill. 236, is relied upon to support this doctrine. Carried to the extent claimed

in this qualification, it would defeat every prescription; yet it will not be seriously argued, that where an owner of unenclosed lands should stand by for twenty years and see the public use and travel a road over it, without objection, that he could defeat the road by saying merely, that he did not, during the period, desire to enclose, but now that "circumstances induced him to enclose." Yet this is the force of the qualification. Construed as claimed, it would contravene every elementary writer and every case to be found on the subject of dedication.

The Court say, in such case, "we can deduce no strength of inference or conclusion from *mere* travel across it by the public, without objection from the owner."

The Court undoubtedly mean that *mere* travel is not of itself sufficient to raise a presumption of dedication, where the circumstances show no visible intention that the owner does not mean to preserve his right over it, and where the travel is permitted for the time being for accommodation of the public, and where all the circumstances manifest a design on the part of the owner to revoke the permission and resume the land.

This must be correct, for the Court say, in the same case, "such an acquiesence in the use of the public by an owner of land as clearly indicates an intention to dedicate, may warrant a jury in finding a dedication under the proof in this case."

If the language of the case means anything more than this, or means what the plaintiff in error construes it to mean, it stands wholly unsupported by authority or reason, and is overruled by the later cases which we have cited.

In Alvord *vs.* Ashley, 17 Ill. 365, the Court below gave this instruction for Ashley:

"9th. A mere permission of the owner of the land for the public to pass across the land, will *never* ripen into a prescriptive right of way; but such permission is only a *license*, and may be revoked at any time by the owner of the land."

That case was reversed, Scates C. J. saying in the opinion:

"The 9th instruction is erroneous."

17 Ill. 370.

In Dimon vs. The People, 17 Ill. 422, the Court say: "If, upon settling of the country and the enclosure of the wild lands, it be found that the early laid highways are injuriously and inconveniently laid, the proper remedy is by application to the County Courts or Township Boards, who may have the authority, not only to open and vacate, but to relocate the whole or particular portions."

The 7th instruction, as given, is sound law. Public user is a sufficient acceptance of a dedication. Neither a formal acceptance, nor repairs made by the public authorities, is necessary to make a good acceptance.

Holden vs. Trustees of Cold Spring, 23 Barb. (N. Y.) 103.

This Court held, in Marcy vs. Taylor, 19 Ill. 637, that "when it is dedicated by the public, and accepted by them, it then becomes a highway. And acceptance may be shown by user by the public, as by travel, or by the acts of the public officers in repairing or keeping it up. But it cannot be essential to the acceptance that they should repair the road, for it might never require repairs. Any other act on the part of the public, which manifests an intention to accept, such as public travel and use as a highway, is as satisfactory evidence of acceptance, as repairs by the officers."

See, also, Daniels vs. The Peple, 21 Ill. 442.

The qualification asked below was properly refused, as it was directly in the teeth of the authorities cited, and made the fact of repairs by the public officers the controlling test of an acceptance of dedication. The true distinction lies here: that whether a public road exists is one thing, but whether the public authorities are bound to repair is quite another, and they must not be confounded. The dedication to the general public is one thing; the dedication to public corporate authorities, is quite different.

Greenleaf says: "It does not follow, however, that because there is a dedication of a public way by the owner of the soil, and the public use it, the town or parish or county is therefore bound to repair. To bind the corporate body to this extent, it is said, that there must be some evidence of acquiescence or adoption by the corporation itself; such as having actually repaired it."

2 Greenl. Evi. sec. 662.

The 8th instruction of the plaintiff below is correct as given, as is also the qualification on the subject of abandonment, which was asked by the defendant below, and given by the Court as asked.

The plaintiff in error finds fault with this instruction.

We suppose the law to be too well settled to be now controverted, that after a dedication of a highway to the public, and an acceptance by them, such dedication is irrevocable and binds the owner of the land and all persons claiming under him, and that no act or declaration of such owner afterwards or of a subsequent purchaser can have the effect to revoke or invalidate such public highway. If accepted and used by the public in the manner intended, it works an estoppel *in pais*, precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use.

2 Greenl. Ev. sec. 662.
Chapin *vs.* The State, 24 Conn. 236.
Haynes *vs.* Thomas, 7 Ind. 38.
Doe *vs.* President and Trustees of Attica, 7 Ind. 38.
Regina *vs.* Petrie, 30 Eng. Law and Equi. 207.

In Marcy *vs.* Taylor, 19 Ill. 637, this Court say:

"There was evidence in this case which was proper to have been submitted to the jury to determine whether there had been a dedication by Samuel Jenkins in his life-time, and an acceptance by the public, without requiring evidence of repairs by the road commissioners. If there was such a dedication and acceptance before appellee purchased, he took it with the incumbrance, and would have no right to resume the possession as against the public."

And in Alvord *vs.* Ashley, 17 Ill., 37, they say:

"But he must be *estopped* by the acquiescence of his grantors."

Again, in Proctor *vs.* The Town of Lewiston, 25 Ill. 153, Caton C. J. says:

"The fact of dedication depended entirely upon the intention of the party who is alleged to have made it. If at the time he fenced out this strip of land, he designed it for a road for the use of the public, and the dedication was accepted by the public before his retraction, he could not subsequently change his purpose and resume the grant."

The plaintiff's 9th instruction as given, and the 10th, given with the qualification, were proper and sanctioned by reason and necessity, and the situation and custom of the country, as well as by authority.

In Alvord *vs.* Ashley, 17 Ill. 366, Ashley asked the following instruction, which was given by the Court below.

"18th. In order to create a right of way, either by prescription or dedication, the proof must show a continuous and uninterrupted use of the same travelled track, and evidence of travel sometimes in one track and sometimes in another track, *such tracks being several rods apart*, and sometimes one being used, and sometimes another; such evidence does not show either prescription or dedication."

The Court say in this case, 17 Ill. 370:

"The eighteenth is contrary to the principles laid down in Sprague *vs.* Waite, 17, Pick. R. 315, 316; and Hannum *et al. vs.* The Inhab. of Belchertown, 19, Pick. R. 313."

If this Court will look at the evidence in Dimon *vs.* The People, 17 Ill. 416, they will see that the case there was similar to the case at bar in respect to variation of travel; and yet that road was sustained. Elias Vickory swore "that there were several travelled tracks across the quarter section, but one was more travelled than the others."

Henry McFadden, a surveyor, swore to the same.

Matthew Craig swore "that there was one main track, and others not so much travelled; that a fence had been built across said main track, which, at the east line of the quarter, *diverts the travel from two to four rods from said main track.*"

Thomas N. Wells swore "that there had been several travelled tracks across the same, *extending over fourteen or fifteen rods in width;* some

travelled more, some less, depending much on the season of the year, weather, &c."

We deem these cases sufficient authority for these instructions, where the proofs showed that the travel followed the same general direction, points, and line.

The 11th instruction of the plaintiff, on the subject of abandonment, and the qualification given are good law, and are in the language of the cases.

In Champlin *vs.* Morgan, 20 Ill. 182, Breese J. says:

"The instruction was so modified as to include the idea that, upon abandonment 'the public had acquired the legal right to the use of such other line of travel,' then they should find for the plaintiff.

"We think the modification was a very necessary and proper one; for it does not follow, because the public have adopted another and different line of travel voluntarily, that they have therefore acquired the right to use such newly adopted line.

"It is true, the public can be charged with abandonment of a road, but the proof to establish it must be strong enough to establish another line as the road.

"A road is of public necessity, and is indispensable to public convenience. It cannot, therefore, be alleged that they have abandoned such an indispensable necessity, without showing they have acquired another in lieu of it.

"We think the true principle is, that a road, such as the one in question is claimed to be, laid out and established by the public authorities, must remain such until it is vacated by the same authority, or be abandoned by non-user on acquiring the legal right to another road, or the necessity for another road having ceased to exist."

Again, in a recent case, Town of Lewiston *vs.* Proctor, 27 Ill. 418, Walker, J., says:

"It was attempted to be shown that the public had acquired another and different road, which accommodated the same travel, and that this had been abandoned. In this we think the defendant has entirely failed, as the evidence abundantly shows that this road was continuously used up to the time of the obstruction. When an abandonment is re-

lied upon it must be clearly and satisfactorily proven, and that *all use* of it as a public road has ceased for a sufficient length of time, clearly *to indicate the intention. A transient or partial non-user will not suffice.* In a town like this, the mere fact that there were some streets more used than others, is no evidence of abandonment.

In all villages the streets are sufficiently numerous for the public to be accommodated in their travel by different routes; *yet that cannot be regarded as an evidence that those but little used have ceased to exist.*"

So much for the instructions on the part of the plaintiff below.

V.

We come now to examine the instructions asked by the plaintiff in error, some of which were refused by the Court, and others modified.

His 2d instruction was properly refused. It asked the Court to say that there was no evidence in the case tending to show that the road in controversy was ever legally laid out by the public authorities. This the Court could not do in the face of the Record, which the plaintiff offered in evidence. (See Record, p. 34 to 39.)

It is not true, as so roundly asserted by counsel on the other side, that this record showed a road on section eighteen (18), town thirty-three (33), range five (5), and the complaint showed a road on range *four* (4).

It is true that in the recital of the order of the commissioners of highways, establishing the road in dispute, by clerical mistake the words "Range No. Five" occur where it should be *Range No. Four;* but this Court will see, upon inspection, that when they come to the order, the commissioners of highways *order* as follows: "Now, therefore, we, the undersigned commissioners of highways in and for said town of Grand Rapids, do order that said road or highway be ascertained, described, and entered of record in the clerk's office of said town, *according to a survey which has been made under our direction by W. F. Whitmore, County Surveyor of La Salle County, as follows, to wit:*" Here follows a description of the road by courses and distances. In the report of the said surveyor, which was filed in the town clerk's office, with the order of the commissioners, and made a part of the order by the statute, we find the correct range given. It says: "I hereby report to your honorable body that, on the third day of December, A. D.

1860, under your instructions, I made the following survey, for the purpose of locating a road, running from a point near the house of William Gentleman, on section eighteen, in township thirty-three, north of range number *four*, east of the third principal meridian, in a northerly direction through part of said section eighteen and section number seven, in the same township and *range*, to a ford in the Illinois River, known as the Widow Brown's ford, to wit:" Here follows a description by courses and distances.

Besides the Court below were bound by law to notice, and did notice, the *fact* that the town of Grand Rapids, mentioned in the order of the commissioners, was in range four, and not in range five.

Article 17th, Sec. 3d of the Township Organization Law, in force then and now, in defining the powers and prescribing the duties of Commissioners of Highways, provides:

"3d. To cause such roads, used as highways, as have been laid out, but not sufficiently described, *and such as have been used for twenty years, but not recorded*, to be ascertained, described, and entered of record in the Town Clerk's office."

When this record was offered in evidence in the Court below, the Court permitted it to be read, holding it to be competent for the purpose of showing an acceptance of dedication on the part of the public authorities. We insisted then, and claim now, that the proceedings of the Commissioners of Highways under the law cited, and their final order, were *judicial*, and concluded Gentleman, unless he took his appeal as in other cases. He could appear before them, or before the Supervisors upon appeal, and show, if he could, that the road had not been used as a highway for twenty years, but failing to do so, as the Court below afterwards thought, and expressed himself to counsel, it became a road *legally* laid out by the public authorities, and so properly refused the 2d instruction.

The 5th instruction, as asked, was not law. It asked the Court to give as law that "length of time, however long the said land may have been traveled over and used without the consent of the owner, is not sufficient to establish said land as a public highway." This would have been saying, that even twenty years travel would not establish a prescription.

The modification by the Court, that "this is the law so far as the question of dedication by the owner of the land as a public highway is concerned," was very favorable for the defendant below, and if there is any error in it it is against us. We think this Court will hold, that the instruction, as asked, did not lay down the question of dedication even correctly.

The 6th instruction was properly refused. We have already abundantly shown that it does not lay down the true law of prescription, and is based wholly on a false construction given to the language of this Court, in 15 Ill. 236.

The 10th instruction was properly refused. It was calculated to mislead the jury, and besides contains false principles of law. The 7th and 8th instructions given for the plaintiff below, laid down the correct law of acceptance of dedication.

There was strong proof in this case showing dedication by old man Brown, and also by Dimmick, who sold to Gentleman. The proof further clearly shows, that although the different obstructions enumerated in the 10th instruction were made from time to time, the public still continued to travel the road substantially from a point a short distance west of the barn to a point on the river, known as the Widow Brown's Ford, and only varied as these obstructions were put in from time to time, adopting a different line of travel in some respects between the main points, to accommodate themselves in respect to the improvements made. We have already shown that evidence of dedication was fairly before the jury, and that it had been accepted by public user as a highway. This made the dedication complete and irrevocable, and it could not be defeated by any obstructions put in the road *afterwards* by Gentleman, by his grantors, or by any person else; and the question whether the public authorities did or did not interfere to remove these obstructions, in no way affected the question of *acceptance* by the public, that being the point upon which the instruction was erroneously asked.

The 11th and 12th instructions were both properly refused. They were calculated to mislead the jury, and besides had no application to the case, there being no evidence whatever to support them.

There was no evidence before the jury that any road such as is referred to in the instruction, had ever been opened by Mr. Ford, or that it had ever been worked by the public. The whole proof showed, that after Gentleman fenced up the road in dispute, and stopped thus all travel over the ford, Mr. Ford, who owned an adjoining strip, permitted the people to go over his strip in order to reach a fording on the river west of the old ford. The only witness who spoke of this travel, was David Pembroke, p. 45. He says: "During the last year, the travel to the ford has gone down the old Mechanicsville road, and struck through Ford's land to the river."

Upon that single item of proof alone, the Court was asked to direct *the jury that they would be justified in finding that Ford had dedicated* a public highway over his land, when all the proof in the case showed that it was a mere favor or license from Mr. Ford, after Gentleman had cut off all approach to the ford by any of the old roads. It would have been an outrage for the Court to rule that the facts warranted a jury in finding either a dedication or an abandonment. The 16th instruction was properly refused.

The defendant below, in his attempt to show other lines of travel east of the road in dispute, and that the public had abandoned the road in dispute, and accepted those other lines of travel or roads east in lieu of it, found himself in the unpleasant dilemma, that he had proved himself that Gentleman had obstructed these other roads on the SW. fr. qr. and NW. fr. qr. of sec. 18, 33, 4, and SW. fr. qr. of sec. 7, 33, 4, named in the complaint, and was desirous of extricating himself from the difficulty, which made his client guilty of obstruction of roads on the land described, and sought to do so by this ingenious and sophistical instruction. As applied to this case, this complaint and the evidence, it was not the law.

27 Ill. 419.
23 Ill. 396.
17 Ill. 421.

VIII.

The evidence supports the verdict.

The road in dispute, known and called by many of the witnesses, as the "Gentleman Road," commenced at the Widow Brown's Ford on the Illinois river, in Section 7, and run in a southerly direction across Sec's. 7 and 18. to a point where it intersected the Illinois Timber Road, on the bluff near Gentleman's barn, on the north side of the timber road, which runs nearly east and west.

We have shown by eleven witnesses, all among the oldest settlers in the county, Milligan, Dimmick, Shaw, Fredenburg, Shaver, Kellogg, Moore, Templeton, Shepherd, Howland and Dailey, that this road, varying somewhat it is true, on the bottom, but within the termini mentioned in the complaint, and over the lands therein described, has been used and travelled by the public, for more than 20 years.

Milligan knew it in 1833,
Shaw in 1828,
Fredenburg in 1834,
Shaver in 1830,
Kellogg in 1829,
Moore in 1835.

Templeton in 1849,
Shepherd in 1838,
Howland in 1844,
Dailey in 1839.

The proof shows that the Billy Moore road began to be travelled in 1846, and continued to be travelled for about nine years, till Moore closed it up in 1855. During these nine years it is true that the greater part of the travel went upon that road; yet the proof clearly shows that even during those years, the Gentleman road also was considerably travelled. In 1841, Gentleman fenced up the track coming from the south, from Anderson's ford on Covel Creek. Until this time all the travel went over the road in question. After this the settlements increased in Grand Rapids and other points east of Gentleman's, and in 1842, much of this travel struck into the timber at a point about fifty rods east of Gentleman's barn, going across Nattinger's land, and coming into the old road in the bottom, near the bluff, and making for the ford. This is called by the witnesses the "cut off road." This was the main, or heaviest travelled track till 1846 and 1847, when the heaviest part of the travel from the east took the Billy Moore road, which was still farther east, running on the section line between sections 17 and 18.

Many of their own witnesses prove travel on the Gentleman road near the barn.

Alexander says that in 1838 he took the Mechanicsville road, and this last fork when I went over with a wagon; when I went on foot, I used to follow the track up towards the bluff, and passed where Gentleman's barn now is.

Lewis says that the barn, 16 years ago, was placed over the "*old track that I used to travel in* 1835." In this, however, he is contradicted by Shepherd, who helped to raise the barn, fell off it, and is most likely to remember the fact, and he swears that the barn was not built on the old track.

Abram Trumbo says that the main track went by Mechanicsville for some years, "*then people began to get in off at the south* and struck for *Gentleman's barn*, and went *to the ford*."

James Brown says: "In an early day the Mechanicsville road was *the best of the two. The track up by the barn was travelled some.*"

Richard Hardin also recognizes the old road. He says: "the barn yard and calf pasture were built across *the track we travelled in* 1843.

Thorne, Howland, H. G. Templeton, Billy Moore and Patrick Dailey, who lived nearest the road, and have the best means of knowledge, swear

that the road in dispute was travelled every year by the public until *Gentleman fenced it up in the spring of 1861.*

If this road does not exist, it will be forever hereafter idle to talk about roads existing by prescription or dedication. The proof shows that it was the road leading to one of the best and earliest known fords on the Illinois river; a ford existing when the Whites first came into the country; a ford used by the aborigines "time whereof the memory of man runneth not to the contrary;" a ford made a public highway by express statute.

Scates' Statutes, p. 572.

The road in controversy was laid and travelled on the old Indian trail, as the proof shows.

The Indians had a prior title to the soil, subject only to a prior right of purchase by the United States. The Indians dedicated this road, and it is binding on the United States. The United States afterwards, in 1832, in the time of the Sauk War, also dedicated this road, using it for a military road for their own troops, and acquiescing in its use by the public, who were buying up and selling the public lands. The whites have continuously used and travelled it as a public road from 1825 to 1861.

If this road is now to be closed by the decision of this Court, we ask, where is the road by which this celebrated fording may be approached and crossed? There is none. There cannot be a pretense that the public ever acquired any right to travel the cut-off over Nattinger's land, and it has been closed for years. Billy Moore has closed up the road named after him years ago, as he had a perfect right to do, as this Court will preceive by reference to the record of it offered in evidence by the plaintiff in error.

This record cannot stand a single moment as establishing a statutory road. No notices were given; no lands nor owners are described over which it passes; no provision is made for damages in any respect whatever.

These, with many other objections apparent on the Record itself, conclusively show that the public cannot claim the Billy Moore road.

Gentleman has fenced up the Mechanicsville road. He has fenced up, south of the timber road, the road coming in from the south by Anderson's ford, and now he gravely stalks into this court, and asks them to sustain him in closing up this road, the only remaining approach to the widow Brown's ford.

This court will not do it. The various questions arising upon the proofs in the case, of prescription, dedication, public user, variation of

travelled tracks, and abandonment, were fairly and fully presented to the jury, under correct instructions as to what the law was applicable to the facts in evidence, and the jury has found in favor of the road. Complete and substantial justice has been done in the premises. The proofs warrant the verdict, and this court, we are satisfied, will not disturb it. This court has said, with the approbation of the whole public, "We are not able to sympathize with or encourage the numerous efforts that are making to overturn and destroy the public, used highways, through the various counties of this state, by exceptions to the loose and imperfect manner in which they may have been established, in the early location of roads through a new and sparsely settled country. We shall indulge no nice, stringent, or technical criticisms upon these, when in evidence, to aid in closing up used highways; nor shall we confine the evidence to this mode of proving a highway, unless it is assumed by the pleadings, but will allow resort to the usual modes of proof, by *prescription from user and dedication*, in addition to documentary proof."

Demoir *v.* The People, 17 Ill. 421.

This is but another of those numerous attempts referred to, to shut up one of the oldest and best established roads in the whole state.

We believe this Court will not sanction the attempt, but will affirm the judgment.

GRAY, AVERY & BUSHNELL,

Att'ys for Deft. in Error.

115

97

Mr. Gentleman
or
Lewis Soule

Brief & any amends
or Dft. in error

Feild May 12. 1863
L Leland
Atty

69.c.c
209cc

United States of America
State of Illinois } ss
Kendall County

Be it had before the Honorable Madison E. Wallister 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 Oswego in said County on the Thirtieth day of January in the year of our Lord one thousand eight hundred and sixty two (being the second Monday in January A. D. 1862) and of the Independence of the United States of America the Eighty sixth year

Present the Hon. Madison E. Wallister Judge
David L. Jones Esqr. State attorney
George W. Kellenback Clerk
Dwight Ladd Sheriff

Attest G. W. Kellenback Clerk.

Court opened by Proclamation

Be it Remembered that heretofore to wit on the third day of January A. D. 1862 there was transmitted from the office of the Clerk of the Circuit Court of LaSalle County in said State of Illinois to the office of the Clerk of the Circuit Court of Kendall County in said State a certified Transcript of proceedings had and entered of Record in the Circuit Court of LaSalle County aforesaid which said Transcripts was filed in the office of the Clerk of the Circuit Court of said County of Kendall and is now remaining on file

thereof appears which is in the words and figures following that is to say;

State of Illinois } ss
LaSalle County }

Be it by me the Honorable Madison E. Wallister Judge of the ninth Judicial District of the State of Illinois and the presiding Judge of the LaSalle County Circuit Court in said State, at a Term of said Court commenced and held at the Court House in Ottawa in said County the State on the first Monday in the month of November the same being the fourth day of November in the year of our Lord one thousand eight hundred and sixty one and of the Independence of the United States of America the Eighty fifth.

Present the Honorable Madison E. Wallister Presiding Judge
Abraham R. Moore Clerk
David P. Jones States Attorney
Eric L. Huntington Sheriff

Be it Remembered that on Wednesday the 6th day of November A.D. 1861 the same being one of the days of the November Term of said Court for the year 1861 an order was entered of Record in said Court in a certain Cause then pending wherein "Lewis Soules who sues for himself as well as for the County of LaSalle" was plaintiff and William Gentleman was defendant which order is in the words and figures following to wit;

Lewis Soules who sues for himself as well
as for the County of LaSalle
vs.
William Gentleman
Appeal

This day the defendant comes by Glover Hook & Campbell his attorneys, files an affidavit and moves the Court for a change of Venue in this suit which Motion is sustained by the Court

It is therefore ordered by the Court that the Venue herein be Changed to the Kendall County Circuit Court and that the Clerk of this Court Transmit to the Clerk of said Kendall County Circuit Court the papers together with a certified copy of the Record in this Cause.

State of Illinois } ss
La Salle County } I Abralom B. Moore Clerk of the Circuit Court in and for said County do hereby Certify that the above order Comprises a full and Complete Record in the foregoing entitled Cause. And I further Certify that the papers herewith transmitted and Numbered from 1 to 7 inclusive are all the papers on file in said Cause

Witness my hand and the seal of said Court at Ottawa this 28th day December A.D. 1861.

A.B. Moore Clerk

Charles N. Hook Deputy

Filed Jan 3rd 1862. W.W. Hollenback Clerk

The paper Marked "No 5" mentioned in the foregoing Certificate of the Clerk of the Circuit Court of La Salle County is in the words and figures following to wit;

State of Illinois } ss
La Salle County }

Refer A.A. Fisher Esqr.

Lewis Soule who sues for
himself as well as for the
County of LaSalle
vs.
William Guttleman

And now comes D. J.
Howland who being first duly sworn on oath deposes
& says that he has been informed & believes & so charges
the fact to be that said William Guttleman late of said
County on the 15th day of January A.D. 1861 at and
within said County & at & within the Town of Grand Rapids
unlawfully knowingly wilfully & feloniously did obstruct
a certain public road there and then running from
what is known as Brown's ford on the Illinois river
to a point on the Illinois timber road near the corner
of said Guttlemans Barn and running over across & upon
the South west frac. quarter & North west frac. quarter
of Sec. 18 — 33 North R. 4 & South west frac. Quarter
of Sec 7 — Township & Range aforesaid, by placing
brush there and a fence on & across the said public
Road which said obstructions &c as aforesaid place
in said public road by said Guttleman there and
then rendered the same dangerous and inconvenient
for the public to pass & repass over & upon contrary
to the form of the Statute in such case made and
provided whereupon &c } D. J. Howland
Dated Ottawa July 17th 1861. }

Subscribed and sworn to before me
N. A. Fisher

Filed Oct. 18th A.D. 1861. — A. P. Moon Clerk
Filed Jan'y 3d A.D. 1862. — Y. M. Kellenbarger Clerk

The paper marked "Number" "3" referred to in the Certificate of the Clerk of the Circuit Court of LaSalle County is in the words & figures following to wit;

State of Illinois } ss
LaSalle County }

Before A. A. Fichus Esqr.

Lewis Soule who sues for himself as well as for the County of LaSalle

vs

William Gentleman

} Action for obstructing a public Road

I do hereby enter myself security for costs in the above entitled cause & acknowledge myself bound to pay or cause to be paid all costs that may accrue herein either to the opposite party or to any officer of the Court or that may in any event legally accrue herein

James K. Dean

Dated Ottawa July 17th A.D. 1861.

Filed Oct 18th A.D. 1861 A.B. Moore Clerk

Filed Jan. 3d A.D. 1862 G.W. Hollenback Clerk

The paper marked "No 4" referred to in the Certificate of the Clerk of the Circuit Court of LaSalle County is in the words & figures following to wit;

State of Illinois } ss
LaSalle County }

The People of the State of Illinois to any Constable of said County Greeting — You are hereby Commanded to Summon William Gentleman to appear before me at my office in Ottawa on the 27 day of July A.D. 1861 at 1 o'clock P.M. to answer the Complaint of Lewis Soule who sues for himself as well as for the County of LaSalle —

for a failure to pay him a certain sum not Exceeding one hundred dollars and he[ ] make due return as the law directs. Given under my hand and seal this 18th day of July 1861.

A. A. Fiches
Justice of the Peace

Demand $100.00
Fees 80

Served by reading to the within named defendant July 24th 1861
Miles 25.
Mileage 16
41
G. Hill Const.

Filed Janry. 3. 1862. — G. W. Hallenbeck Clerk.

The Transcript of the Justice of the Peace being the paper marked "No. 1" referred to in the Certificate of the Clerk of the LaSalle County Circuit Court is in the words and figures following to wit,

1890 Lewis Soule who sues for himself as well as for the County of LaSalle
vs
William Gentleman
} complaint made for obstructing the Public Highway leading from Prouxford to the Timber Road on the South Bluff of the Illinois River — Bond filed and Summons issued July 18th returnable July 27th 1861 at 1 o'clock P.M.

Demand 100.00
Fees .80

Personally served July 24. by Con. Hill Fee 40 ——

Jan Subs. issued for each party to Con. Daily who returned the same duly served

July 27 — Parties appeared with their Attorneys — Bushnell & Gray for Plffs & Glover & Campbell for Defendants.

Two Witnesses Called and Examined After which by agreement of the Parties Suit Continued to August 9th at 9. O'clock A.M.

August 9th. Parties Appeared Five Witnesses Examined — Con. to August 10th at 9. o'clock A.M.

August 10 — Parties Appeared Four Witnesses Examined & adjourned to August 12th at 9. o'clock A.M.

August 12. Parties Appeared Four witnesses Examined on the Plff & Plff rested their case — Motion to Dismiss by Defendant overruled and three witnesses Called & Examined for defence & Court adjourned to August 13th at 9 o'c A.M. — August 13. Parties — Six witnesses Examined & adjourned to August 14th at 9. o'clock A.M.

August — 14 — Three witnesses Called for the defence & Case rested — One witness Called by Plff and by agreement of Parties adjourned to August 19 — at 10 — o'clock A.M.

August 19 — Parties Appeared Case Argued by Gray for Plff & by Glover & Campbell for Defendant — Time taken by the Court to Examine Authorities and After fully examining such Authorities as were presented — it is adjudged by the Court that Defendant is Guilty of obstructing a public Highway leading from Brownsford on the Illinois River to a point near Stuttsman Ramp on Section 18 in Township

Sixty three north, Range four East of the third principal Meridian as Charged in the Complaint – a Judgement is Therefor rendered against the said William Guttman for the sum of $5.00 fine and also for $5.75 Cost – August 22. 1861. –

Appealed by Defendant to Circuit Court Sept. 10 – 1861 – Bond filed

Justices Costs Pltff.			Witnesses Claiming fees		
Affidavit		25	Lyman Shaw		50
Summons		50	A. Ebersole		50
4 Subs		100	D. Farnsworth		50
Con		15	S. Danich		50
4 Subs		100	J. Brown		50
Entry 26 Min		130	W Terrill		50
Con 6 times		90	J. Shaw		50
2 Subs		50	R. S. Rowland		50
Verdict		25			$4 00
Jr for Costs		25			
Trial Docp		1600			
		22105			
Defendants Costs					
4 Subs		100			
4 do		100			
2 do		50			
		$2 x 05			
Constables fees on Summons		40			
Con Daily Services for Pltff		1345			
do for Defft		1525			
Witness fees		400			
		$5 175			
Appeal $5.00 by Defft		100			

State of Illinois } ss
LaSalle County } I the subscriber a Justice of the Peace in and for said County do certify that the foregoing transcript and the papers herewith contain a full and perfect Statement of all the proceedings and of the judgment before me in the aforesaid entitled cause A. A. Fisher J.P.

Filed Oct. 18. 1861 A. B. Moore Clerk
Filed Jany. 3 1862 G. W. Hollenbeck Clerk

The Appeal Bond in this cause marked "No 2" referred to in the Certificate of the Clerk of the Circuit Court of LaSalle County aforesaid is in the words and figures following to wit,

Know all men by these presents that we William Gentleman and Warfield Ball of the County of LaSalle and State of Illinois are held and firmly Bound unto Lewis Soule of the same County and State in the penal sum of One hundred ~~& sixty~~ Dollars current money of the United States for the payment of which well and truly to be made we bind ourselves our heirs Executors and administrators jointly severally and firmly by these presents. Witness our hands and seals this 10 day of Sept 1861.

The Condition of the above obligation is such that whereas the said Lewis Soule did on the 22 day of August A.D. 1861 before A. A. Fisher Esqr. a Justice of the peace in and for the County of LaSalle recover a judgment against the above bounden Wm. Gentleman for the sum of five Dollars fine & costs from which judgment

a

of the said Justice the said Wm. Guttleman has taken an Appeal to the Circuit Court of the said County and State — Now if the said Wm. Guttleman shall prosecute his Appeal with effect and shall pay whatsoever Judgement may be rendered by the Court on the trial or dismissal of the said Appeal then the above obligation to be void otherwise to remain in full force and effect

Taken and entered into before me } William Guttleman [Seal]
at My office this 10 day of Sept. A.D. 1861. } Warfield Ball [Seal]

A. A. Fisher J.P.

Files Oct. 18. 1861 A. B. Howe Clerk
Filed Jan. 3. 1862 S. M. Hallenbeck Clerk

The Summons of the Circuit Court of LaSalle County in this cause referred to in the Certificate of said Court above set forth and numbered "6" in said Certificate is in the words & figures following to wit;

State of Illinois } ss
LaSalle County }

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

We
Command You to summon Lewis Soule who sues for himself as well as for the County of LaSalle if to 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 Ottawa on the 4th day of November next to prosecute a certain suit which he the said Lewis Soule who sues as aforesaid hath instituted against William Guttleman and obtained Judgement before A. A. Fisher a Justice of the Peace of said County on the 22d. day of August

1861 for the sum of five Dollars besides costs from which said Judgement the said William Gentleman has taken an Appeal to the Circuit Court of said County and further to do and perform whatever the said Court may then and there consider in the premises And have you then and there this writ.

Witness Abraham B. Moon Clerk of said Court and the seal of said Court at Ottawa this 18th day of October A.D. 1861.

A.B. Moon Clerk

(Endorsed) Issued by Reading this writ to Lewis Soule this 23d. day of Oct. 1861.

Fee Search 60
10 Miles 50
1.10

E.S. Wakeman Shff.
per Crow Deputy.

Filed May 4. 1861. A.B. Moon Clerk
Filed Janu. 3. 1862 G.W. Hollenbeck Clerk

The Petition for the change of Venue in this Cause referred to in the aforesaid Certificate of the Clerk of the LaSalle County Circuit Court is — the "No. 7" is in the words figures following to wit;

Lewis Soule Etal
vs.
William Gentleman } LaSalle Co Circuit Court — Appeal

William Gentleman the above named defendant States to the Court on oath that this suit is brought to establish the existence of a road that to many persons are interested in the establishment of said road that the minds of the inhabitants of said LaSalle County

have become prejudiced against affiant upon the question involved in this suit and that upon that question the said Plaintiffs have an undue influence over the minds of the inhabitants of said LaSalle County.

He further saith that for the reasons aforesaid he fears that he cannot have an impartial trial in said suit in said LaSalle County where the same is now pending wherefore he prays for a change of Venue in said Cause

Wm Guttman

Subscribed and Sworn to before me this 6th Nov. 1861.

D.C. Cameron
Notary Public

Filed Nov. 6th A.D. 1861. A.B. Moon Clerk

Filed Janry 3d 1862. Wm Hollenbeck Clerk

And afterward to wit on the 22d day of January A.D. 1862 the same being one of the days of the January Term A.D. 1862 of the Kendall County Circuit Court sitting for the dispatch of Business in the Court House in Oswego in said Kendall County the following proceedings among others were had in said Court and entered of Record to wit;

Louis Soule who sues for himself as well as for the County of LaSalle
v.
William Guttman
} Appeal

And now comes the plaintiff by Gray & Avery his Attorneys as well in his own proper person, As the said Defendant in his own proper person as well as by Campbell & Smith his attorneys also

comes, And the issues being joined herein it is Considered by the Court that a Jury also come And thereupon Comes a Jury of the following named Jurors to wit, Henry Wormley Albert P. Brewster Charles E. Dana William Wagner John A. Wheeler Jacob W. Lilly J. M. L. Runner Colvin B. Chapin James A. Cotter Robinson Doty John L. Caveny and Francis L. Seymour each of whom are duly elected tried and sworn and the Court and Jury proceed in hearing the Evidence in this cause

And Afterward to wit on the 23d. day of January A.D. the same being still one of the days of the Term of the Court last aforesaid sitting as aforesaid the following proceedings were had in said Court in said cause to wit of Record to wit,

Louis Soule who sues for himself as well as for the County of LaSalle

vs.

William Gentleman

Appeal.

And now Come again the parties to the suit, and the Jury aforesaid, and the Court and Jury proceed further in hearing the Evidence in this cause.

And Afterward to wit on the 24th. day of January the same being still one of the days of the Term of the Court last aforesaid sitting as aforesaid the following among other proceedings were had in said Court in said cause to wit of Record to wit,

Louis Sauk who sues for himself
as well as for the County of LaSalle
v.
William Guttleman
} Appeal
And now come
again the parties
to this suit and the Jury aforesaid also come, and
the Court and Jury proceed further in hearing the Evi=
=dence in this cause

And afterward to wit on the 20th day of January
A. D. 1862 the same being one of the days of the Term
of the Court last aforesaid Setting for the dispatch of
Business as aforesaid ~~xx xxxxxxx~~ the following
proceedings were had in said Court in said cause
and entered of Record to wit;

Louis Sauk who sues for himself
as well as for the County of LaSalle
v.
William Guttleman
} Appeal
And now again
come the parties
to this suit and the Jury aforesaid also come and
after hearing the evidence and receiving the instructions
of the Court they have leave to retire and consider upon
their Verdict and afterward they return into Court with
their Verdict and say "We the Jury find the Defendant
guilty as charged in the Complaint and Assess
a fine against ~~the said~~ the said Defendant
in favor of the said Plaintiff for the
sum of Ten Dollars" which said Verdict is entered
of Record.

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And afterward to wit on the 27th day of January

A. D. 1862 the same being still one of the days of the January Term of the Circuit Court aforesaid sitting for the dispatch of Business as aforesaid the following proceedings were had in said Court in said Cause and entered of Record to wit;

Lewis Sails who sues for himself
as well as for the County of Sails
v.
William Gentleman } Appeal

And now comes the Defendant by Smith one of his Attorneys and moves the Court for a new trial herein, and thereupon comes the Plaintiff by Gray one of his Attorneys and the Court after hearing the parties in relation to the Defendants Motion for a new trial herein and being fully advised in the premises, it is Considered by the Court that said Motion be overruled and a new trial herein denied - It is therefore Considered by the Court that the said Plaintiff have and recover of and from the Defendant the sum of two Dollars Allowed by the Jury aforesaid together with their costs and charges by him in and about this behalf expended and that he have Execution therefor -. And thereupon the said Defendant by his Attorney aforesaid comes again and prays an Appeal to the Supreme Court which said Appeal is granted upon Condition that he enter into Bond in the penal sum of five hundred Dollars with Abraham Trumbo or Ambrose Trumbo as security that said Bond be filed within thirty days and that the Bill of Exceptions be filed herein within thirty days.

And Afterwards to wit on the 1st day of February A.D. 1862 after the January Term A.D.

1862 of the Kendall County Circuit Court a Bill of Exceptions was filed in this Cause in the words and figures following to wit;

Lewis Saltzman who sues for the use of the People &c
v.
William Gutthuman
} In the Circuit Court of Kendall County January Term A.D. 1862.

Be it Remembered that on the trial of said Cause the said plaintiff to Maintain the issues on his part called the following witnesses who being each duly sworn testified as follows; the testimony of each of said Witnesses are set forth after the name of each witness

Saml. Milligan — I came to the County in 1830 and first crossed the ford in 1831 — it was well known from Bloomington to Chicago — it did not become fordable till June of that year —

In 1832 I worked the land of Major Campbell on the South side of the Illinois River 2 miles from the ford and during harvest of that year I crossed the river at the ford twice a day. When the ford came out of the River on the north side the track was confined to the width of a few rods at the river Bank from there the track ran South and branched off. The East end of Browns Cabin was placed some six feet on the track there was a good deal of travel there, as much as any road in the County

The United States Troops crossed at the ford in

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1832. There was a good deal of travel there
it run up the East side of Browns house which
was a double log Cabin standing on the bottom
and then up towards the Bluff and from there bore a little
South east and run up past where Guttermans house
now stands and I should think it past a little west
of where the Barn now stands. I did not cross the
ford or travel of that track for like a dozen years
till a year ago last Spring upon the Bluff - when I
passed it a year ago last Spring the travel was
pretty much in the same place as was in 32 - but
on the Bottom it was in a different place and
ran down west of Browns house instead of the
East - this change was made ~~in 1835~~ some fifteen years
ago - In 1830 old Brown went to the Lake ~~for~~
and was drowned up the ford on his way back
before that time I heard (heard) a conversation between Richey
and Brown & his wife - Richey said to Brown "what
in the name of heaven are you going to stay here
for" Mrs Brown said "Oh! we will keep a Hotel
and make some dimes off of the Road" - on
the South side of the River there was a variation
in the coming out of the ford - in early years it
went across the point of the Island and from there
to the South Bank of the river - some years afterwards
they crossed on the riffle some ways above the
island After passing the Brown house going South
the road forked one going up the Bluff to the South
as I have described and the other bore off west
across the Mouth of the Ravine and up the Bluff
on the west side of it, and the travel went both ways
there were perhaps one or two wagons a week

passing sometimes they came past my house west of the Ravine sometimes they went this (the) way people crossing from the North side of the River going to South Ottawa went up the west side of the Ravine. Brown and I worked on the track between his house and the Gentleman house ploughed a furrow two or three rods long we did it for our own convenience the present track runs some rods west of the place we worked. The track in 1832 was right on the old Indian Trail running up to the South the present track on the Bottom is some ten rods west of the old track, in 1832 Brown had a Garden Spot fenced in with his house and a little field east of the house and the track ran between them for two or twelve years there was a lane between them. I have travelled there but very little sometimes but one or twice a year sometimes not at all

Cross Examined — The old track from the South bow S.E. and passed to the East side of the Brown house and then directly to a point in the Bluff about 4 rods west of a little ravine that in after years the track went up the Bluff from from there it went direct to Gentlemans house. After it was changed into this little ravine it was travelled in that track 7 or 8 years and then it was changed to a new place this was about 15 years ago, About that time they began to travel the upper ford about the rapids from then the road bore off to the East one up

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the Bluff (Billy Moore road) there was
also a track that went from this ford down
the river Bank and around to the west of
the Brown house. +

The Plaintiff then read in Evidence to the Jury a Patent
from the United States to Ephraim Dimick which was
and is in the words and figures following;

Certificate } The United States of America to all
No 259 } to whom these presents shall come, Greeting
Whereas Ephraim Dimick of Lasalle
County Illinois has Deposited in the General Land
office of the United States a Certificate of the Register
of the Land office at Chicago whereby it appears
that full payment has been made by the said
Ephraim Dimick according to the provisions of
the act of Congress of the 24th of April 1820—
entitled "an act making further provisions for the
sale of the Public lands" for the Lot or Land west
fractional quarter of Section Eighteen in Township Thirty
three North of Range four East in the District of
Lands subject to sale at Chicago Illinois Con-
taining one hundred acres and Eighty hundredths
of one acre according to the official plat of the
Survey of said lands returned to the General
Land office by the Surveyor General which
said tract has been purchased by the said Ephraim
Dimick. Now Know ye that the United States
of America in Consideration of the premises and
in Conformity with the several acts of Congress
in such case made and provided, Have Given
and Granted and by these presents do give and

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Grant unto the said Ephraim Dennick and to his heirs the said tract above described to have and to hold the same together with all the rights privileges immunities and appurtenances of whatever nature thereunto belonging unto the said Ephraim Dennick and to his heirs and assigns forever. In testimony whereof I Martin Van Buren President of the United States of America have caused these letters to be made Patent and the seal of the General Land Office to be hereunto affixed. Given under my hand at the City of Washington the first day of October in the year of our Lord one thousand eight hundred and thirty nine and of the Independence of the United States the Sixty fourth

By the President Martin Van Buren

By M. Van Buren Jr Secy.

A. W. Garland Recorder of the General Land Office

Ephraim Dennick said I am the Dennick named in said Patent I went to live on the land in 1834 in the fall Brown had made a small improvement on the land in 1833 a log house and small field East or South of it I bought his improvements claim of him and paid him three Hundred Dollars for the same Brown was in possession of the land claiming a right to it at the time I purchased his right Brown said with reference to track in the bottom there would always be a road there & pointed out a patch where he intended to plant an orchard and said the road would run by it. Plaintiff by his

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Counsel then asked said witness the following question; "State when you purchased said land described in said Patent from the United States"?

The Defendant by his Counsel then & there objected to said question & to the witness answering the same — The Court overruled the objection & required the witness to answer the same — To which ruling of the Court the Defendant by his Counsel then and there Excepted

Answer, I purchased said land of the United State in 1835. — I knew the ford across the Illinois River and the ford road leading from it off South across said Section Eighteen I crossed this ford in the fall of 1833 and passed up the Road, the track passed East of Browns log Cabin on the Bottom, Brown was then at his Cabin and told me there was a track up the Bluff leading off west of the Ravine to ward South Ottawa — I went up the West road to Ottawa with my family — The Road up the Bluff passed by where Gattmans house now is a little to the west —. Browns Cabin on the Bottom was on the north west fractional quarter of said Section Eighteen and the track went just to the East of it on the same quarter.

People going across the ford & off South took this track up the Bluff those going to South Ottawa took the West fork — I lived on the land up to 1836 or 37 — & then rented the land to Alexander — While I lived there I used to work this Road I fixed a place to cross

the middle some 15 rods South of My house, that House Stood when Guttman was house, now does this was in 1834 or 1835 — I fixed it many times on the same ford road I repaired the road down through the timber as the owner of the land — I considered it a public road in 1834 & 1835 I had no other idea — I sold the land afterward to Guttman — I regarded the land as a Public highway, It was not in any enclosure that I had on the land — I also — worked with Brown between my house and his which was on the Bottom — In the year 1834 I was talking with Brown at his House & he said there would always be a road there on account of the ford — I supposed when I worked the track South of my house that there was a public highway there, and worked on it to make the travel Easier.

To all of the aforesaid Evidence in relation to working on said Road and to the Statements of said witness & of said Brown & each of them in relation to the Existence of a public highway over said land the Defendant then and there objected & asked the Court to Exclude the same from the consideration of the Jury, The Court overruled said objection & refused to exclude the same from the consideration of the Jury — To which ruling of the Court the Defendant by his Counsel then & there excepted.

Plaintiff by his Counsel then asked said witness the following question "State if you know when Brown purchased said North West fractional

quarter of Section Eighteen Town thirty three Range four from the United States"? The Defendant then and there objected to said question & to the same being answered by the witness - The Court then & there overruled the said objection and allowed said witness to answer said question - To which ruling of the Court the Defendant then and there Excepted -.

Answer - I believe that Brown got a pre-emption right for that land in 1834. - I acquiesced in there being a public Highway there - I left the place in 1836. The road across the River was round by the head of the Islands and went Straight up South there was as much travel on it as any road up to that time I left.

Cross Examined - From 1836 to 1839 I crossed 5 or 6 times a year Since 1839 not at all - The Map or Plat of said Section 18 Town thirty three Range four East of 3d P.M. Marked Exhibit A. attached to this Bill of Exception & signed & sealed by the judge of said Court as a part thereof was then Shown to the witness and said witness traced there the line marked B. B. B. B. and stated to the Jury that said line represents the track from said ford across said Section Eighteen as the same was travelled in 1833 - as near as he could recollect.

Josiah E. Shaw - I came to this Country in 1828 - I knew what was called the ford road - In going from my house to said ford we went

along where Guttmans Store fence now is then went west of where his house is & barn & north to the ford - It was the worst of a thor=
=oughfare that we had - The road was on the old Indian Trail - For 12 years I did not travel over it once a year, & for the last two years not at all - In 1875 the roads forked a little south of Browns house - one fork going south & the other round west of the Ravine - I never found any obstruction in it from 1878 to 80 - the loaded teams coming from the south went that way - In 1876 the river was not forded at all - Some seasons we would commence Cross=ing in June and Cradled till fall.

Cross Examined - I went across the ford by the head of the Island on the dotted line laid down on the map and then followed I should think the track Marked by Minnick, this was the old line of travel, after that the road was changed a little & when I last crossed it, it went west of the house in instead of East. The first went close East of the House, then that was fenced up and we went East of the field then it was fenced again and we went around west of the field. this first fencing was some 20 years ago and the last 15 or 16 years ago. From where the old track came down the Bluff to where it now comes is some 8 or ten rods. I live 4 or 5 miles south of the ford

Isaac A. Fudenberg testified.

I. came into the County in 1828 and first traveled this road in 1834, I have traveled it off & on ever since except the years 349 & 50 and last year, I used to hunt up that way & very well I Know Guthmans Dam, The tracks I traveled forked down 40 or 50 rods north of it, one track went off east of the dam & the other up west of it and around by the head of the Ravine & around to South Ottawa on the Bottom, The tracks went on the East side of Browns house. There were tracks traveled in every direction through the timber, the track east of the House was fenced and then the road went East around east of the field After while Brown made a larger field & then the track had to go west of the House & field, I never was up there without being teams passing, the present road goes up the Bluff at pretty near the same point that it used to in early days. I Know Carter he lived on the Brown place, I Know the Billy Mann road there was a great deal of travel on it several years

Cross Examined — I used to own the ferry at Ottawa & run it but I used to cross the ford very well & hunt in that timber, I think the road around East to the field was a better road and more traveled than the one to the west of it & the Billy Mann road was a main traveled track for a long time. +

Lyman Shaw testified — I came into the County in 1830 and crossed the ford that fall, At that time there was no traveled track there but only an old Indian Trail going off to the

South. Then was a log house where Gentlemans House now Stands and a Small inclosure. The Indian Trail went just west of the House, from there to the River, in 1831 as folks came into the Country there got to be quite a track there. I crossed is considerably up to 1835 since then not much and some years not at all. The ford is 1½ miles from Ottawa,

Cross Examined— I crossed it about 12 years ago I cant tell how the present track compares with the old one tis so long ago that I have not Charge my Memory with it. I should think that it comes out about as it used to by Gentlemans Barn that part of the Road South of the Ravine has been fenced up for 20 years & down on the bottom the track is considerably further west than it used to be.

Ezra Kellogg— I came into the Country in 1829 & crossed the ford that fall and then not again until 1832. The United States Troops crossed there in 1832 they took the right hand road leading up west of the Ravine, the most of them, If they had wagons, these went up by where Gentlemans barn is. I was over that Road a year ago last fall and think it is pretty much the same place as it used, it except that it is further West. It runs a little at the bottom & at the Bluff. The travel on this road never ceased. During the Summer of 1840 ten or a Dozen teams passed over it every day. The last few years I think sometimes a hundred teams passed over

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it a day across the ford. I saw Gutteman at work with 2 or 3 of his hired men on the track 3 or 4 years ago they were ploughing and scraping on the Hill.

Cross Examined — Guttman had grain on the Bottom and a Barn on the Hill, at the time I saw him fixing the Bluff and I saw not certain but that he told me he was fixing it for his own convenience he could not say will have his grain up without fixing it, from '32 to '40 I did not cross that road at all and from '40 to '53 not over a dozen times

William Moore — Preliminary Examination by Defendants Counsel — I live in the Town of Grand Rapids and have property there subject to taxation. Last fall at Town Meeting the Town voted $100. and as much more as might be necessary to carry on this suit the amount was to cover the Costs in case the Plaintiff got beaten as well as the other expenses of the suit.

The Defendants by his Counsel then and there objected to the Evidence of the said Moore being given in said Cause for the reason that said Moore was directly interested in said suit. The Court overruled said objection and allowed said Evidence to be given to the Jury to which ruling of the Court then the Defendant Excepted, and said Moore testified as follows — I have lived 3/4 of a Mile East of Mr. Guttemans for 9 years I have known the ford since 1835, of late years there has been heavy travel in the Summer Season, from ten to a hundred teams every day. I have done labor done on that road

Gentleman was there and 4 or 5 others. I don't Know whether it was public labor or not it was 4 or 5 years ago. Gentleman cut some poles and put them in the Road. For some years the wright of Trail went by the Upper ford and east along the river and up the Bluff on the section line between 17 & 18 this was the track known as the Billy Moore road those that went up by the Barn, went on pretty much the same track as they do now and for all of these years there was considerable public travel on this Gentlemans road, until Gentleman fenced,

Cross Examined— This Billy Moore road was travelled for 6 or 7 years until I fenced it up the wright of Trail from the ford went that way but the old track was open to any body could go through that wanted to. The land north of the timber road was all open then, the East & a line on the map shows the old Billy Moore road, the land South of the timber road had been fenced up for 15 years first, and for 10 or 12 years the fence has been such that a person coming from the ford, and desiring to get off to the South would have to go west to South Ottawa or East to the section line in order to get through, From '35 to '45 I travelled the Road 2 or 3 times a year in '44 not at all, there has been various routes to the ford several times one came in East of the Barn it touched the old track at a point between the Barn & the Bluff & then bore around to the East of the Brown house & field and entered the ford at the same point as the old track these two points were the only ones where the two routes were upon the same grounds, they started from the

timber road about 50 rods Apart, at the time I spoke of being work done on the road it was an understanding among the Neighbors to fix I asked Jon 4 to come a day or two before I had asked Gentleman if we could go then & fix the Road I dont remember the Answer he made but we went and he went along - at the time we were fixing it Gentleman said that he meant to shut it up as soon as he was able I heard him say so on two or three different occasions - I Know Carter he lived in the Brown house on the Bottom. He lived there 2 or 3 years he built a fence from the west line of the Brownfield west to the Town line it run across the track that run down on the west side of the Brown house there was a gate in it that I passed through twice one of the times it was shut, I think it was 8 years ago that Carter built the fence, I believe that the fence was Standing when Gentleman bought the land it was during this time the fence Stood there that the main trunk went by Billy Mores road.

A. G. Templeton Sworn - I have lived in the County about 20 years - I have travelled the ford considerable since 1839 3/4 of the Crossing was done there it continued to be a main Travelled road until 56 when the Bridge was built there has been considerable travel since, I was path Master in that district about a dozen years ago, we did not Know where the roads were there, we did not Know we had any, we worked when we thought it would help the travel some 15 years ago I was warned by Abram Trumbo who was then path master to work on the ford road the place where we

worked went down the Bluff there has been a good many changes in the road at times. The Barn I should think it was about 10 feet of where it used to be, at the Bluff ~~where~~ some 40 feet from where it used to be After we got on the bottom we beat around over it in different places as fence after fence was fenced up - the fence at the Bluff varied it 6 or 8 rods. I remember of fences obstructing the track, and sometimes some trees down in the road and once of a gate in a fence built by Carter the gate the time I went through it was unhinged & standing at the side of the road, there was always more or less (public) travel on the Gentleman road every year since I came to the County till Gentleman fenced it up last Spring. +

Cross Examined — About 15 years ago Jim Brown fenced a large field on the Bottom, the fence on the South line of the field ran directly across the track that was travelled there and was so close under the Bluff that we could not go down in the same place. if a person had taken the fence down when it crossed the old track and then followed along the old track he would have been travelling right through Jim Browns field down to the line the South west ~~Corner~~ Corners of the field was 10 rods west of where the old track came down the Bluff & we worked on the Bluff in a new place so as to let the travel down it and around to the west side of the field this work was done the year Jim. Brown fenced or the year after And there has been no travel over the Spot we worked until after we ~~cut~~ cut a new track. I dont remember who it was that worked with me 20 years ago I went the old Brown place and

built a fence which joined the two fields of Browns between which the Track passed before that this fence ran directly across the old track and turned the travell to the East of the field.

John Shepherd Esqr – I crossed this ford in 1838 Coming from Pontiac to 38 to 42 passed it 3 or 4 times a year, from 42 to 48 I lived on Township line, and travelled it Every week during fording season. Ten or fifteen teams at a time Stopped at my house over night from Pontiac going to Ottawa & they passed over the same line of road. the most travelled was west of Browns house on the Bottom but I have passed on both sides of it. during this time there was no variation in the travel. since 48 I have not been on the road at all. during the time I travelled it I Started in near the when the Barn now is and went down west of the field to the ford I helped raise Gentlemans Barn & fell off of it. I saw Stubs across that had been cut to put the Barn on I dont think the Barn was placed on the Track. I never crossed the ford at the head of the Island but always the upper ford

Cross Examined – I dont Know any thing about the travel of Billy Morris road I dont Know any thing of travel by the little ravine nor anything about Jim Browns fence across the track.

Thorne Howland – I came into the County in 1844 & Crossed the ford in that year up by the Barn the Road is in about the same place as it is now There was considerable Travel on the Gentleman road

went year from 1844 till Gentleman fenced it up last Spring. I never found any obstruction Except the Carter gate. In the Bottom I believe it passed on both sides of his house from 44 to 54 that road was travelled most that it has been since Carter built a fence there in 1856 and ever three or 4 years I had a talk with him the time he was building it about shutting the gate, I asked him if he was going to stop the travel through there he said no and wanted to know if the People would make any trouble or recognize it enough to shut the gate. I told him that I did not know about them but I would shut it I do not think the gate was kept up that season I passed through afterwards and it was open Carter said he only wanted to make a temporary & Cheap fastening

Cross Examined - I was over the route in August last, in my talk with Carter I concluded he wanted the gate kept shut. Before Jim Brown made his fence the best road ran around to the East of the field this fence shut off our travel that way and we had to travel. I crossed the ford 12 times in 1844.

Patrick Daily Says - I have been in the County since 1839 and have been Constable for the last 14 or 15 years I have known the Gentleman Road since that time. It has been a much travelled road during that time. Sometimes I have crossed it twice a day and sometimes not for a month I know the enclosure Carter had there I remember going through the gate there once, Carter answered

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was passing through and said he came to see if I had shut the Gate, I told him I had Carter said the Sheep ran off to the Neighbors fields and he counted the Gate up till he could get lumber to fence, the Gate was up only one season and I had no difficulty in getting through at any time, I never saw any Lock on it. There is a fence running across the present travelled track just west of Gentlemans Barn, Gentleman told me he was going to put one there and the next time I passed by I saw it.

Cross Examined — For some years the travel went by the Belly Mountain road during that time the main travel went that way, but during all this time there was always more or less travel on the Gentleman Road, and there they crossed by the Upper ford This upper ford was above the head of the Island they crossed on the riffle, I understood Carter to say that he intended to make a lane as soon as he got able.

The Plaintiff then Called Amos Ebersol and shewed him what purports to be a certified Copy of Certain papers on file in the office of the Town Clerk of the Town of Grand Rapids and asked him to State who was said Town Clerk of said Town on the 20th day of January A.D. 1862 — witness replied D.S. Ebersol and further testified that he was acquainted with his signature and the signature attached to said Certificate was his. The Plaintiff then offered said Certified Copy of papers as Evidence to the jury as tending to shew an acceptance by the public the Defendant

by his Counsel then & there objected to the same being given in Evidence, the Court overruled said Objection and suffered the same to be read to the jury to which Ruling of the Court the Defendants then and there Excepted and the said Certified Copy of said papers was then and there read to the jury the words & figures following to wit,

State of Illinois
LaSalle County
Town of Grand Rapids } Whereas it Appearing to the Commissioners of Highways in and for the said Town that a road or Highway leading from a point near the House of William Gentleman on Section eighteen in Township No. thirty three North of Range No. five East of the third principal Meridian in a northerly direction through part of said Section Eighteen and Section No. seven in the same Township & Range, to a ford in the Illinois River known as the Widow Browns ford, has been used for such highway or Road for twenty years, and it further appears to said Commissioners of Highways that said Road or Highway is still at this time is Used as such road or Highway has never been recorded Now Therefore we the undersigned Commissioners of Highways in and for the said Town of Grand Rapids, do order that said Road or Highway be ascertained described and entered of Record in the Clerks office of said Town according to a Survey which has been made under our direction by H. F. Witmer County Surveyor of LaSalle County, as follows to wit, Commencing at a point on said Sec. Eighteen from which the South West corner of

Wm. Smithmans Barn bears north sixty four 64½° Degrees East 121 links, and running from said point North fifteen Degrees 15° west two Hundred & Nineteen (219) links from thence North five 5° Degrees East 719 links to a point from which a dead Black oak fifteen inches in diameter bears North five 5° Degrees East forty five 45 links from thence north fourteen (14) Degrees East 284 links to a point from which a Black oak tree Twenty four inches in diameter bears North fifty seven 57° Degrees west 18½ links from thence North five & half 5½ degrees East five Hundred & sixty four 564 links to a point from which a white oak tree Eighteen inches in diameter bears north fifty three and one half 53½° West sixteen links (16) from thence North nine 9° degrees west (644) six hundred and forty four links from thence North seven 7° Degrees west six hundred & sixty Eight (668) links to a point on a hill side from which a Black oak tree twelve inches in diameter bears North sixty 57° degrees west forty links and a Burr oak tree twelve inches diameter bears North seventy six 76° degrees East seventy two links 72. from thence north fifty two 52° degrees west down the Bluff three Hundred & five links (305) to a point from which a burr oak tree (10) ten inches in diameter bears north fifty one 51° Degrees East Eighteen 18 links from thence north three (3) degrees west twenty five hundred and fifty (2550) links to the Illinois River at the ford known as the Widow Brown's ford and we do further order that the line of said Survey be the center of said Road or highway and that the

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same be and is hereby declared to be a public Highway of the Width of four Rods Given under our hands this 20th day of Feby 1860

Abl Campbell
Henry Brock
Ransom Palmer
} Commrs Highways for the Town of Grand Rapids

To the Commissioners of Highways in & for the Town of Grand Rapids LaSalle County & State of Illinois, I hereby report to you Hon. Body that on the third day of December A.D. 1860 under your instructions I made the following Survey for the purpose of locating a road running from a point near the House of William Gentleman on Section Eighteen in Township thirty three North of Range No. four East of the third principal Meridian in a Northerly direction through part of said Section Eighteen and Section No. seven in the same Township and Range to a ford in the Illinois River known as the Widow Brownford & wit, I commenced at a point on said Sec eighteen from which the South west Corner of William Gentlemans Barn bears North sixty four & one half degrees East one hundred & twenty one links and runs from said point North 15° fifteen Degrees west two Hundred & nineteen links (219) from thence North 5° five Degrees East seven hundred and nineteen (719) links to a point from which a dead Black oak fifteen inches in diameter bears South five 5° Degrees East forty five links (45) from thence North fourteen Degrees 1/2° East two Hundred & Eighty four links (284) to a point from which a

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Black oak tree twenty four inches in diameter bears North fifty three degrees (53°) West Eighteen & one half links (18½) from Chimney north five & one half (5½°) East five Hundred & sixty four links (564) to a point from which a white oak tree Eighteen inches in diameter bears north fifty three & one half (53½°) Degrees west sixteen links (16) from Chimney north 9° Nine Degrees west six hundred & forty four (644) links from Chimney north 7° seven Degrees west six hundred & sixty Eight (668) to a point on the hill side from which a Black oak tree twelve inches in diameter bears north sixty seven deg. 67° west forty links and a Burr oak twelve inches in diameter bears north seventy six degrees East seventy two (72) links from Chimney north fifty two 52° Degrees west down the Bluff three Hundred & five (305) links to a point from which a Burr oak tree two inches in diameter bears North fifty one 51° Degrees East eighteen links from Chimney north three 3° Degrees west twenty five Hundred & fifty (2550) links to the Illinois River at the ford known as the Widow Browns ford

I do hereby Certify that the plat attached hereto is a correct representation of said Survey

Ottawa Dec. 5th. 1860

W. H. Witman

County Surveyor of LaSalle County Illinois

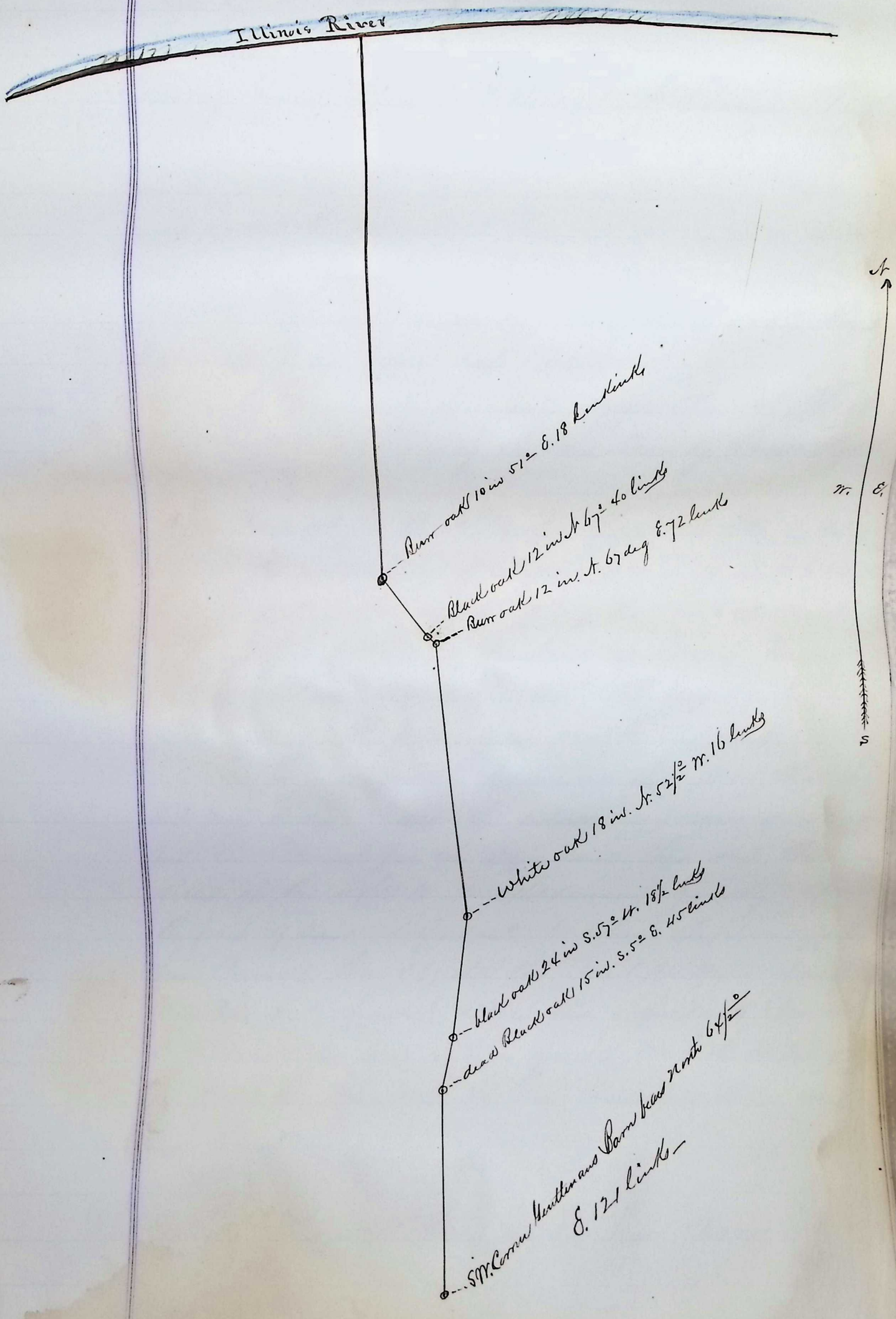
Copy of Surveyors plat of Road to Browns ford Filed in my office Feb. 25th. 1861.

J. W. Porter

Town Clerk.

"Space in Bill of Error.

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Illinois River
Burr oak 10 in 51° E. 18 Links
Black oak 12 in N 67½ 40 Links
Burr oak 12 in. N. 67 deg E. 72 Links
White oak 18 in. N. 52½° W. 16 Links
Black oak 24 in S. 57° W. 18½ Links
dead Black oak 15 in. S. 5° E. 45 Links
SW. Corner Hutchinsons Barn bears North 64½°
E. 124 Links
N.
E.
S.

State of Illinois
La Salle County
Town of Grand Rapids } I Daniel S. Ebersol Clerk
of said Town of Grand Rapids
do hereby certify that the above is a true and correct
copy of all the papers and Records in my office in re-
-lation to the Road therein mentioned.

Given Under My hand and seal this
20 — day of January 1862

D. S. Ebersol Town Clerk
of the said Town of Grand Rapids

The Counsel for the Plaintiff then asked the witness
Ebersol the following question. "State if you whether
the Road described in the report of the Jurors read
to the Jury is situated in the Town of Grand Rapids":
Answer — It is all within the limits of said Town
— this was before the papers were read to the Jury.

The Counsel for the plaintiff then stated that he
did not desire to ask the witness any more questions
and the Counsel for the Defendant then and there in-
-sisted upon the right to Cross-examine generally upon
the part of said Defendant to which the plaintiff by
his Counsel then objected the Court sustained said
objection and refused to allow the Defendants Counsel
to Cross-examine said witness generally to which ruling of
the Court the Defendant by his Counsel then and
there Excepted.

The Plaintiff here rested his Case.

And the Defendant to maintain the issues on his part called the following witnesses who testify as hereinafter set forth after the name of each of said Witnesses.

Wm Lovejoy – I came to the Country in 1849 crossed the river at the ferry and went to Guttemans House – 2 or 3 days after that I went with Guttemans to Ottawa for the purpose of getting my Goods we went with an empty wagon, starting from his house – we went east (of his house) on the timber road about 80 rods and then struck off north East to the section line (where we went) + down to the Bluff then took a bend around easterly and back about to the north East quarter of section 18 and from then followed the river bank till we came to the upper ford & crossed the river (there) The road we struck into was called the Billy Moon road I have known the ford ever since at that time. The main travel to the ford continued to go that way until Moon fenced his land on section 17 then we worked a new track along Moons west line down to the river so on to the upper ford. (This Continued to be the main traveled road) This Continued to be the main traveled road to the ford until Nattinger fenced up some 4 or 5 years ago and the travel Commenced to go around by Guttemans Barn and along down west of the Prices house, for the first year or two of this travel they went up the River and Crossed at the upper ford and then fixed the lower ford at the Head of the island and crossed where they now do. There was no public travel west of the Brown House from the time I came to the County to 5 or 6 years

ago. I never saw one wagon going that way, during that time I crossed the ford very frequently and never saw any I hunted frequently through that timber and am sure I would noticed the tracks if there had been any there

The Defendants Plaintiff then read in Evidence to the Jury a certified Copy of an Order of Commissioners of Highways on file in the office of the Clerk of the Town of Grand Rapids which was in words and figures as follows to wit;

Copy.

The Undersigned Commissioners of Highways for the Town of Grand Rapids in the County of LaSalle on the application of Saml. R. Lewis Josiah Dewey Thos. Medell Wm. K. Harris Wm. Guttaman Joseph Bishop David Sanborn Otis A. Wakefield John Medell Richard Hardin L. K. Senior John Shaw persons liable to be assessed for labor on the Highways in said Town did on the 2nd day of July instant cause a survey to be made of the following route to wit. Beginning in the Danville Road near Joseph Ebersols running north between sections 31 & 32 to the Illinois River thence down the River to the ford as near as practicable being the same route mentioned on the application of the persons aforenamed which survey is as follows to wit;

Field Notes of a road survey July 2nd 1851 for the Commissioners of highways by Wm. K. Price beginning in the Danville road 20 rods north of the House of Joseph Ebersol thence due North 136 poles to the East & West line between Townships 32 & 33 North Range 4 E of the Fourth

Section S. 6. 31. N. 2 — thence north 1280 poles (along section line) to N. E. corner of Section 18 Township 33 — Thence N. 71½ W. 60 Poles
" " 59 " 58 "
" " 76 " 20 "
" 82 " 35 " } on and near the River Bank.
1451 to Brownsford or 4 Miles 135 rodes.
State of the location of Resident Land owners see accompanying Plat

Wm. H. Price Surveyor

And the undersigned being of the Opinion that it is necessary and proper that said road be laid out. It is therefore ordered that a road four rods wide be located and laid out according to said Survey and the same is hereby declared to be a public Highway. Given under our hands & seals at Grand Rapids July 7th 1851

Emery Jones
Tyler Bennett } Commissioners of Highways.

State of Illinois
Kankakee County
Grand Rapids } The Undersigned Clerk of the County of Grand Rapids does hereby Certify the foregoing is a correct Transcript from the original papers on file in My office given under my hand & the 21st day of January A.D. 1862.

D. S. Eberson County Clerk

Mr. Sawyer further testifies that said Road described in said Order was opened along down the Section line between 17 & 18 to the north west Quarter of said Section from thence along the river bank to the upper ford that it was travelled for several

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yeard substantially on said Line land, and was worked in some places by the public Authority he further testified that he was with the surveyors when said road was located and knew where it was, that he was each Month a year or two after said Road was located and Considered it a public road and worked it as such.

David Pembroke – I came to the Country in 1825 & crossed at the ford which was then at the head of the Island. I follows the Indian Trail which ran off east of the Ravine. I stayed in the Country I or 4 year and continued to travel the same track until 1829 there were few People in the Country then and they all travelled the same track there was no other one during that time. In 1829 I went South & stayed till the Sauk war 1832 during that year I came back & crossed the ford & travelled that track west of the Ravine. After the Sauk war in 1832 people began to come into the Country, and there got to be considerable crossing at the ford I stayed here until 1835 up to '35 the main travel went by the main Road the Settlements were near Lower Ottawa or there-abouts, and took that road in Crossing the ford, and up to '35. I don't remember of any travel up by Gentlemans Run there may have been occasionally a team. In 1835 I went to Rock River and stayed till '42 and then came back & have been here ever since. In '42 the travel coming in from the South & East struck across the Prairie timber road about 30 rods east of

when Guttemans Barn is, it bore Northwest through the timber until they got 50 or 60 rods North of the Barn then bore N.E. to Nettingers line then went down the Bluff in a little ravine like, then bore off Northwestwardly and passed just east of Browns Cabin on the Bottom from then it went down the River crossing the ford at the head of the Island. This was the main traveled track east of the ravine & continued to be so until Jim Brown fenced his large field in 1847. The South fence of this field was close under the Bluff and ran directly across the track so that the Travel comes not go down in the old place. A year or so before this there had been a track broken down through in the neighborhood of the section line ans. some travel had been going that way, when Brown fenced across the other track it turned all the travel over on the section line and it continued to go there for 5 or 6 years this track was called the Billy Moon road and people travelling it crossed by the upper ford. This Billy Moon road was the best one we ever had to the ford and I think accommodates the public better than any other and during the time it was travelled this old track by Guttemans Barn was entirely forsaken. I passed through the timber and across that old track frequently and noticed that it was grown up with Grass and brush for the first few years after '42 then was some traces coming in from the South which passes over the vacant land west of the Town line. and kept down the

it Struck the old Mechanicsville road west of the Ravine and took down that to the ford this track has been fenced off 10 or 12 years. The present track west of the Ravine has only been travelled 4 or 5 years by the public and has been made during that time. during the last season the track to the ford has gone down the old Mechanicsville Road, and struck through Fords lands down to the river crossed over to the Islands into the old lower ford, this land of Fords is 20 acres along the Ottawa Shore line.

James Alexander — I came into the County in 1836 and have known the ford ever since, up to '48 I was in the habit of Crossing it very frequently in 1838 I lived on Gipsy point and cultivated a field of Dimmick near where Guttman house now stands & went over it back nearly every day during that year. The ford was nearly where it is now, and from there the track went around East of the old Brownfield up towards the Bluff from there it bore off west across the Mouth of the Ravine and up what has been called the Mechanicsville road when it got to the top of the Bluff the road forked one fork taking towards South Ottawa and the other leading off South I took the Mechanicsville track and the last fork I was the one I travelled whenever I went over with a wagon very frequently however I went on a foot and then used to follow the track to the foot of the Bluff and then strike up through the timber

passed near where Gentlemans Barn now stands. I took this route because it was shorter but there was no track through there sufficient for the Oxen to follow. There may have been a few scattering wagons that passed that way but not enough to make a track the great Bulk of them went West of the Ravine. from 38 to 48 there was no travel west of Browns Cabin on the Bottom, I lived in South Ottawa in 39 or 40 and up to 48 was in the habit of buying cattle & driving them across Chaffeys and during the last 2 or 3 years of that time I drove them down by the Billy Moon road.

Samuel Lewis — I first crossed the ford in 1835 came in from Sandy went back the same way I was at the Raising of Gentlemans Barn 16 years ago it was placed directly over the old track that I came to travel in 1835 the next year he built a barnyard and that also crosses the old track and 8 or ten years ago he fenced in a Calf pasture of several acres just north of the barn this also crosses the old track & extended 4 or 5 rods to the west of it. Witness here marks on the map this Calf pasture marked at the corners x x x x — Have seen the fence built by Jesse Brown under the Bluff this fence also crosses the old track of 1835 and the S. W. corner of the field was at least 10 rods west of where the fence crosses the old track. The present travelled track is still west of this fence. The people began travelling the Billy Moon road as early as 1846 or 47 and

Continued to do so until 4 or 5 years ago. The first year after it was shut off from the Billy Moore road the travel kept along the timber road to a point some 50 rods east of Gustemans Dam and took an old track that used to be travelled several years ago and struck off North west till it came to the present track and kept down that west of Browns field & house till it came to the river and the Stattinger fences cut his land and they began to go around west of Gustemans Dam during the time the Billy Moore road was travelled it was the main travelled road to the ford, and accommodated all the travel from the South and East. During the last season the travel has again taught the Old Mechanicsville road down the Bluff and then turned off to the River keeping on Govts 20 acre lot. Ford there it open for public travel they crosses the river a little below the old ford making up for the head of the Island

Abram Smuts dep— I have lived in LaSalle County for 21 years— within 2 miles of the ford. The Mechanicsville road was the first one that was travelled the main travel went that way for some years and then people began to get in off at the South and struck for Gustemans Dam and went to the ford— Soon Section 20 was fenced up and they had to go further east and struck the old road 50 rods north of the Dam and between that point and the Dam it wasn't travelled for 15 years and was grown up to weeds and brush.

This Lot off tracks (C.C.C.) runs North westerly till it struck the old track 50 rods north of the Barn and it went down the Bluff 20 rods east to where the present track does, people from the west and South west to or the Mechanicsville road went up the Ravine those coming from the East and South East took this Cut off. in 47 Jim Brown fenced his field, and the fence runs across the track just under the Bluff so that they could not pass thru any more and they went around by the Billy Moon road and the main travel continues to go by this road for 9 or 10 years. I never called out Templeton to work on the road. when he said I did. I was path Master one year it was a year or two after Jim Brown fenced. I called out Templeton to work on the road but not at the place he says, nor on the ford road at all but it was up on the timber road near Billy Moons I never had any work done on the ford road at all

Thos Abbott says — I have lived in Grand Rapids ever since 1834. 5 Miles South and one mile east of Ashford. For the first 7 or 8 years of that time we used to travel the old track by the Barn & passed just east of Browns house on the Bottom Witness here points out on the plat the tracks Marked B. B. B. B. Thos Guttman fenced his land south of Lumbis road some 20 years ago and he cut diagonally across the quarter East of Guttmans and about the same time Jim Browns two old enclosures on the Bottom or fenced up

* Should be "over" Error in Rule 48

together and we went around to the East of the field this track was travelled for 3 or 4 years. Witness points out this track on the plat as the one marked C. C. C. C. When Jim Brown enclosed his large field and the South fence was built across the track, and as close under the Bluff that we could not get down it then and then the track went by the Billy Moon road which was travelled for 9 or 10 years and during this time the road up by the Bluff was not in use. The western track went by the Mechanicsville road, for the last 10 or 12 years there has been no way to get out South or South west unless you took the timber roads to South Ottawa and went from there, or else went east as far as the Billy Moon road and out that way when Gentlemans house was built it was placed in the old track of 1853 & Jim Browns fence also crossed it also Gentlemans Barn & Calf pasture. The track by the Moon road lasted for 9 years and during that time the road up by the Barn was discovered two corn fields in it and it was grown up then we no tracks there, the cut off track went further East than the old track it came very near it in one place but was East of it all the rest of the way

Jim Brown ——— I crossed the ford before the Land war, I saw the fence of the Brown that Built the log House on the Bottom in early day the Mechanicsville road was the best of the two, the track up by the Barn road was

=ellers house, Starting up from the River it passes East of the House and struck to the Bluff at the Bottom of which it was 10 rods East of the present track and on the top of the Bluff 5 or 6 rods East of it, It ran directly under Gentlemans Barn his barn yard & Calf pasture was also across the track, the north West Corner of the Calf pasture is three or four rods west of the old track. I broke the field on the Bottom in 1847. The fence on the South line was built down under the Bluff and directly across the old track the west end of this fence is 8 rods west of the track from this point to the River the old track Went right through the field that I made in 47 and down by the House was at least 18 rods East of the present track. The present track is 2 or 3 rods west of the west line of the field I made in 47. After I made this field the public travel went on the Hilly Mound road I lived in the House on the Bottom from 46 to 53 & during that time there was no one travelers on the old track Except Gentleman & me and perhaps occasionally a Neighbor and during this time there was no track went up west of my field except that which took the Mechanicsville road and of the years between 46 and 53 I did not live in the House but was there off and on during the year

Cross Examined Question by Plaintiffs Counsel When did your father buy the land which he sold?

The Defendant by his Counsel objects to the witness answering said question. The Court overruled said

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objection, and allowed said witness to answer said question, to which ruling of the Court the Defendant then and there Excepted and the witness Answered as follows he bought the land in December 1834 and further testified, I lived there from the last time until 1840, during that time the travel went East of the House. I calculated to fence it up if I lived and afterwards did so. The Mechanicsville Road was altogether the best one of the two, I did most of my hauling that way. I worked on the Bluff with Templeton the time he speaks of it was either in 47 or 48, I was not present and by Grumbo but Templeton & I agreed to work on the Hill together for our own convenience, I worked out my tax that year under Grumbo upon the timber road towards Billy Moores. The appropriation which was used in connection with Billy Moores road, was 80 rods East of the old ford on the South Bank and 20 rods on the North Bank.

Ambrose Grumbo — I crossed the ford in 1830. In 31 there got to be a track coming in from Andersons ford on Rowel Creek that track ran down through where Cantleman Cally pasture now is and descended the Bluff 20 rods East of where the present track does on the Patton it went through the field that Jim Brown afterwards Made, and East of Brownsbanks. I know the Mechanicsville roads, and down up & down it in 1832 carrying provisions for the troops. 20 years ago Cantleman fenced South of the timber roads and stopped the Andersons ford

trail. It then went west of the town line and down the Mechanicsville road to the ford until 10 or 12 years ago, when it was fenced off. I know the Billy Brown road it began to be travelled in 45 or 46 and was the main travelled track until 4 or 5 years ago, and during that time the road by Gentleman was not travelled by the Public. I know the last off road (C. C. C. C.) it began to be travelled in 1855, None of this track was on the same lands as the present track.

Cross Examined — The trail last summer went down the Old Mechanicsville road and turned off down the river across over to the head of the Island.

Niles Coleman — I first knew this ford sixteen years ago last Spring. I came from the west up towards Gentlemans Barn, and they were just raising it. I could see no tracks there, and enquired where the ford road was, and was directed to strike through the brush, and I would come to it. I struck in just south of where they were raising. & took a Northeasterly direction through the Brush, and came to the track somewhere from 30 to 60 rods North of the Barn and followed it down to the ford. it went down the Bluff about where the middle of Jim Browns South fence was Afterwards put one from there bore down east of Browns House. The Point where it went down the Bluff was 20 rods East of the west line of Jim Browns field. Brown made this field as

47 or 48. I went to live in Brownell House in '49 and lived there for 18 Months During that time the main track went by the Billy Moore road some few came down the Michanicsville road but there was no track down by Gentlemans Barn and none could have passed there for the brush was full of Cord wood & Brush that I put in. I cut most through that timber up on the Bluff & corded it in the track. The winter before I went there I cut a large tree for a saw log and it fell directly across the track and remained there ~~during~~ through the next Summer and the next winter I cut it up. I remember the circumstance because I found a swarm of Bees in it. No tracks had been made around the Tree I lived on the Garrison place the year before I lived on Browns place, and frequently hauled grain to Chicago and always went down the Michanicsville road

Road Examining — when I lived on the Brown place I cut some wood on the Bottom I hauled this ~~wood~~ up on the Bluffs on the Michanicsville road that, that I cut up on the Bluff I hauled out by Gentlemans the land was all unimproved timber land.

Richard Hardin — I came to the Country in 1843 and traveled the cut off track (No. 6) down to the ford went down the Bluff ten or fifteen rods East of the present Track. I lived at Gentlemans house the year his Barn was raised and was at the raising the Barn was placed

over the old track that ran off south the Barn yard, and Calf pasture was also built across it. Jim Browns fence was built across the track we travelled in 1843 and then the travel all went around by the Billy Moore road, this continued to be the main travelled road for 8 or 9 years.

Mr Silas Drake — I first knew the ford in 1844, came in from Andersons ford and went down to the ford by the cut off track (C.C.C.) and went back by the Mechanicsville road. Jim Browns fence was built across the track so that we could not go down that way any more, then went by the Billy Moore road. 8 years ago I hauled the timber for my house and went by the Billy Moore road I live 3 or 4 miles south from Cuttingsville and about a mile west of the Billy Moore road.

The Defendant here closed his case and the Plaintiff to further maintain on his part called as a witness,

W. F. Whitman who testifies as follows,

I am County Surveyor of Rutland County and made the Plat which has been shown to the jury the cut off track (C.C.C.) is at one point, on the same ground as the present track.

Cross Examined — at the Point where they come together they occupy a space of about 4 rods wide in all other places the tracks are about a rod to a rod and a half wide — I made the survey for the Commissioners of Highways which has been read in evidence to the jury on the part of Plaintiff

at the time I made it Gentlemans fence running west of the Ram was all finished except a length or two just where the track turned off towards the ford.

Also Thomas Howland — In 1854 I fenced off the Southern track which came in west of the Township line, I travelled on the Gentleman road every single year from 1854.

Also Tunstetter — I think I went down the track by Gentlemans Ram in 49 & 50. I dont remember of seeing any cords wood in the track. I saw some wood scattered around on the Bluffs in 47 or 48.

Cross Examined — I never saw the fallen tree spoken of by Coleman nor the wood corded up in the track — if they were there during the whole season I dont think I could pass there without knowing it was there. I travelled the Gentleman road Every year since I came here

Also Billy Moore — I think I passed down the Road by Gentlemans during 49 & 50 but dont remember of seeing any trees across the Track Cross Examined — Only know I passed there those years from a general recollection of having passed there every year several times a year from the time I moved up there till Gentleman fenced it up.

This was all the Evidence in the case.

The Plaintiff by his Counsel then requested the Court to give to the Jury the following instructions numbered as follows Nos. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. & 12 and which were as follows,

Instructions for the Plaintiff.

1st Given

If the Jury believe from the Evidence that, the Defendant did fence up and obstruct a public road at the place, and on the lands described in the within Complaint, in this cause within Eighteen months prior to the commencement of this suit, and that said Road so obstructed was a legal public road, existing either by prescription, or dedication or both as set forth, in the Plaintiffs instructions they will find the Defendant Guilty —.

2d Given

If the Jury believe from the Evidence, that ~~that~~ the public have used and travelled over the Road in Controversy, as a public Road for the period of twenty years without interruption, before the Defendant so fenced up and obstructed the same, if proven then this Affords a Conclusive presumption that said Road is a legal public Road existing by prescription, if the Jury believe from the Evidence that the public who so used and travelled upon said Road for said period did so use and travel it, Claiming a right to do so adversely and exclusively and not as under a permission from the owners of the Land and the said owners not objecting to such use & travel, being in a position to object to such use & travel

55 3rd Given

Although the right of the public to use and travel

a road Existing by prescription as stated in the 2d instruction must be raised against the consent of the owners of the land, yet it is not necessary in law that such Consent should be Expressed. An implied consent is sufficient, and if the Jury believe from the evidence that the Public have used and travelled upon the road in question for the Period of twenty years, without objection from the owners of the land then the Jury are warranted in finding such implied Consent on the part of the owners of the land, and to raise a presumption of Consent and even of a grant from such acquiescence in such user.

Given

4th. A right of way may be acquired by the public by prescription, as against the Sovereign power or as against the United States over land owned by them as well as against individuals.

Given

5th. The Public is an ever existing grantee capable of taking dedications of land for public uses as a highway and the interests and accommodations of the public is a sufficient consideration to support such dedication. In order to make a legal public road by dedication two things only are necessary; namely first the act of dedication by the owner of the land, and secondly, the acceptance of it on the part of the Public. The act of dedication may be to the general public, and limited only by the wants of the Community, or by the act of dedication.

Given

6th. The act of dedication is a question of intention on the part of the owner of the land and may be proved by any acts or declarations on the part of the owner tending to show that he intended to dedi-

Given

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= ication to the public use, or by express consent, or implied consent, which may be presumed from an acquiescence for a great length of time in the public use and travel of the land, when the owner is in a position to object, as a public road, and no definite term is required by law to constitute a dedication.

4th " In order to make an acceptance of a dedication legal on the part of the public it is not necessary that the public Authorities should repair or bestow any public labor on a road dedicated to the public. It is sufficient in law to make a valid acceptance that the public use and travel it as a public Highway.

5th " After a dedication to the public of the right to travel over and use the land of the owner for a public road, and an acceptance of the same by the public by use and travel of the Road as such, then such dedication is irrevocable and binds the owner of the land and all persons claiming under him and no act or ~~declaration~~ declaration of such owner or subsequent purchaser of the land can have the effect to revoke or invalidate such public Road.

6th " If the Jury believe from the Evidence that the public has used and travelled the route in dispute as a public road for the space of twenty Years without interruption or obstruction and adversely to the right of the owner of the land, and that

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travels has been for said period on the same general line of travel, then the public have acquired the legal right to such road, and the fact if proven that such travel at different times in said period was varied and was not always in the same beaten track will not defeat the right of the public to such Road.

10th. Although the Jury may believe from the Evidence that the road in dispute, as travelled may have varied several rods at different times, and was not always in the same beaten track, but was sometimes travelled in one track and sometimes in another but always followed the same general direction, points, and general line of travel such facts, if proven, will not in law defeat the right of way in the public, whether acquired by prescription or dedication.

Given

11th. Even although the Jury may believe from the Evidence, that the public have ceased to use and travel upon the road in dispute for from nine to fifteen years, yet if the Jury believe from the Evidence that the public had prior to the non-use acquired the right of way in them by prescription or dedication under the preceding instructions, that would not in law amount to an abandonment of such road by the public, unless the proof shows, that the public intended to abandon said Road, and have acquired the right to use and travel some other legal public Road in lieu of it, or the necessity for such Road has

Given

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ceased to Exist; but before the public can be charged with an Abandonment of a road the proof to establish it Must be Strong enough to establish another line of Road, if such other line is necessary for the public

12th a Positive Evidence of a fact is entitled to more weight at the hands of the jury than negative Evidence of the same fact.

To the giving of said instructions and each of them the Defendant by his Counsel then and there objected. The Court then and there overruled said objection as to said 1st, 2d 3d 4th 5th 6th 7th 9th & 12th instructions and then and there gave the same to the jury to which ruling of the Court the Defendant by his Counsel then and there excepted.

The Court then and there at the request of the Defendant qualified the said 8th instruction as follows "But it may be abandoned by the Public by non-user or "acquiring another Road in lieu of it or on the necessity for the Road ceasing to Exist" and the 10th & 11th as follows, "But the points between which these varying "track or routes run Must be the same and if they "han not substantially common terminations at each "end the track or one cannot enure to the benefit "of the other." To the giving to the jury of said 8th, 10th & 11th instructions and each of them as qualified the Defendant then & there objected the Court overruled said objection and gave the same as qualified to the jury to which ruling of the Court

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as to each of said instructions the Defendant then and there excepted.

The Defendant then and there requested the Court to qualify the 2d 3d 4th 6th and 9th instructions given to the Jury on the part of said Plaintiff and each of them as follows, "But when lands are "lying open and unenclosed, no presumption in "favor of a road can arise from mere travel by "the public, until circumstances indicate assent "to enclose. And the consent of the owner "cannot be implied under such circumstances simply because such travel is unobjected to"

The Court then and there refused to qualify said instructions or Either of them as requested to the ruling of the Court in refusing to qualify said instructions each of them as aforesaid the said Defendant by his Counsel then and there excepted.

The Defendant then and there also requested the Court to qualify the third instruction given to the Jury on the part of said Plaintiff as follows, "But if the Jury believe from the Evidence that "the route in Question was over open and unenclosed "lands, and such route needed repairs, and such re- "pairs were not made by the public authorities when "so needed as they did other roads in the vicinity "this is a circumstance to be considered by the "Jury in determining whether the public claimed "the right to travel over the route adversely to the rights "of the owners". The Court then and there refused to qualify the said 3d instruction as requested and the

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Defendant by his Counsel then & there Excepted to the said Ruling of the Court.

The Defendant then & there also asked the Court to qualify the said 4th instruction given on the part of said Plaintiff as follows,

"Unless it appears from the Evidence that the "road needed repairs and then if such repairs "were not made, and the public Authorities did "not exercise Control over the road as they did "over other roads in the vicinity, the mere travel "by the public would not be sufficient of an ac- "ceptance on the part of the Public".

The Court then and there refused to qualify the said 4th instruction as requested — To the ruling of the Court in refusing to qualify said 4th instruction as asked as aforesaid the Defendant then and there Excepts.

The said Defendant by his Counsel then & there requests the Court to instruct the Jury as follows.

1st A public road can only be established in this State, 1st by being legally laid out by the public Authorities, among the requisits of which are the Assessment of damages & payment of such damages to the owner of the Soil

2nd By Prescription

3rd By Dedication

And unless the Jury believe from the Evidence that the road in Controversy has been established by one of said Methods, they must find for the Defendant.

Given

2nd That there is no evidence in in this case tending

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Given

to show that the Road in controversy has ever been legally laid out by the Public Authorities

3d " Before the Jury can find that the route in Controversy is a public highway by Prescription they must believe from the Evidence that the public have travelled over the route uninterruptedly, and adversely to the rights of the owner of the land for the Space of 20 years prior to the 17th day of July 1860.

4th If the use of the Route in Controversy was not by the Public, but Merely by a few individuals of the Neighborhood, and the use was only occasional and was not adverse to the rights of the owner, and the Township, County or District Authorities did not Exercise any Control over it and failed to repair it when repairs were needed as they did other Roads, the Jury must find for the Defendant upon the question of prescription.

5th The People of the Town of Grand Rapids being desirous to obtain a Highway through the land of the Defendant may do so by having such Highway laid out by the public Authorities & having the damages Appraised and paid to said Defendant before opening said Highway, but they cannot because said land is left open by the owner, enter upon the land, and without the express or implied Consent of the owner, convert said land to a public Highway, without paying for the land, and length of time however long said land may be travelled over and used without

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the consent of the owner is not sufficient to establish said land as a public Highway.

The Court then & there qualified the said 5th instruction before giving the same to the jury as follows;

"This is the law so far as the question of dedi-
=ication by the owner of the land as a public High-
=way is concerned".

To the ruling of said Court in refusing to give the said instruction as asked and in the qualifica-
=tion thereof as aforesaid the Defendant then & there Excep-
=ted.

6th No presumption of a right of way by Prescription can arise in favor of the Public, in consequence of users travel over open and unenclosed lands without objec-
=tion from the owner, but the use by the public must be shown to have been adverse to the rights of the owner, and upon claim of right of way, and also to have been uninterrupted for the space of 20 years.

7th In order to establish a public Highway by Dedication three things must concur — 1st The owner of the land must offer the right of way to the public or do some act indicating an intention to dedicate the land to the Public — . 2d The Public must accept the offer in such way, and unless they do so, the route does not become a public Highway, and at any time before such acceptance the Sellers owner or his Grantees may revoke the offer.

8th If the jury believe from the Evidence that the route in question has been opened by the owners of the land

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to the public for a public Highway, and if they
parties belive from the Evidence that after such offer
the route was not used by the Public, but Merely by
a few individuals of the neighborhood and the use
was only occasional, and the Township, County,
or District Authorities failed to repair it when re-
pairs were needed as they did other roads in the vicinity the Jury
will be justified in finding that said Route has never
been accepted by the public for a public Highway
And without such acceptance, said route could not become
a public Highway by Dedication.

Given

9th. Whenever a route has been established as a public
Highway by Prescription or Dedication the public may
abandon it by non-use, or acquiring the right to
travel another road in lieu of it, or they may abandon
it by non-use, when the necessity for the road has
ceased to exist, (and upon such an abandonment
it ceases to be a public Highway.)

Given

* Then Erasure was made by mistake Wm Holeman Clk

10th. If the Jury belive from the evidence that a route
for a public Highway was at one time offered to the
public by the owners of the land in question, over said
land, and that subsequent to said offer a fence was
built across said route & has remained there for 20
years, and that a Barn and Barn yard was built
on and across said route & has remained there for
16 years, and that a fence was built across another
part of said Route and has remained there since 1864
and also that a calf pasture was built across
another portion of said Route and has remained
there for the last 4 or 5 years and if they parties

Refused.

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- lieve from the Evidence that during the time the said obstructions remained upon said route as aforesaid the public or public Authorities made no effort to control said route or use it as a line of travel, they will be fully justified in finding that said route has not been accepted by the Public for a public Highway.

11th. If the Jury believe from the Evidence that a road leading from the Linton road down to the ford in question upon or near the route of the old mechanicsville road has been opened by or for the owner of the Land, and has been travelled and worked by the public ever since as a travelled road to said ford they will be justified in finding that such route has become a Public Highway by Dedication.

Refused

12th. And if they find the Dedication of the road referred to in the preceding instruction and further believe that said route has been travelled by the Public in lieu of the old track claimed to have been dedicated by Dimmick and that the public ceased to use said old track — those facts are proper to be considered by the jury on the question of an Abandonment of the old Dimmick Track.

Refused

13th. If the Jury believe from the Evidence that for a period of 5 to 6 years the public did not use the route claimed to have been dedicated by Dimmick and that they acquired the right to and did travel the Road known as the Billy Moore Road during said time in lieu of the old track, using it for a ford Road, those facts would tend to show

Refused

an Abandonment of the said old track, and if Abandoned it then ceased to be ~~was~~ a public Highway

14th If the jury believe from the Evidence that the Township Authorities of Grand Rapids ordered to be opened & did open & work, and the public did travel the road described as the Pilly Mon road claiming the same to be a public Highway, and that the owners of the land over which the said road passed knew that the public so claimed said Highway & acquiesced in said travel & work by the Public, then are facts to be considered by the jury in determining whether the said route has become a public Highway by Dedication.

15th If the jury believe from the evidence that the old trail was dedicated to the public by Merrimack and accepted by the public, and if they further believe that the Barn built by Gentleman was placed directly across said Road & that said Road was at the time of the commencement of this suit still obstructed by said Barn, and that said obstruction was placed there over 18 months prior to the 17th day of July 1860 then they must find for the Defendants, for obstructing such road and they cannot find for the Plaintiffs for obstructing such Road because the Defendant has built a fence to the Westward of said Road across another Road.

16th The Description of the Road alledged by the Complaint to have been obstructed is material and must be proved as alledged, and if the jury believe from the Evidence that the

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in Controversy does not run between the points described in the complaint, but between other and different points the Jury cannot find against the Defendant in this Cause for obstructing such other Road not described in said Complaint.

The Court then & there refused to give to the Jury the said 2nd 6th 10th 11th 12th and 16th Instructions or either of them and the said Defendant by his Counsel then & there Excepted to the Ruling of the Court in refusing to give the Jury the said 2nd 6th 10th 11th 12th and 16th Instructions & each of them Severally the Defendant by his Counsel then & there excepted.

The Jury found a Verdict for the Plaintiffs and the Defendant by his Counsel then & there entered his Motion for a new trial in said Cause. The Court then & there overruled said Motion and refused to grant to the said Defendant a new trial in said Cause. To which ruling of the Court the Defendant then and there excepts. And he prays that this his Bill of Exceptions be signed sealed & made a part of the Record in this Cause which is done.

M. E. Hollister [Seal]
Judge of the 9th Judicial
Circuit of the State of Illinois.

Filed Feby 1862
G. M. Hollenbeck Clk.

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Be it Remembered that on the hearing of this cause this plat was given in evidence to the jury and has been marked by order of the court Exhibit "A" and is referred to in the aforesaid Bill of Exceptions as such.
Mechanicsville Road Marked A. A. A. A.
Old Trail Marked by Dummies [?] B. B. B. B.
Cutoff track Marked C. C. C. C.
Billy Moore [?] Road D. D. D. D.
The lines which were in pencil on the plat have been traced with ink and the Defendant asks that this plat may be made a part of his Bill of Exceptions & signed & sealed by the judge of said Court which is done.

W. E. Hollister (Seal)

State of Illinois } ss
Kendall County }

I George W. Hallenbeck Clerk of the Circuit Court in and for said County do hereby Certify that the above and foregoing is a true perfect and Correct copy and Transcript of all the papers remaining on file in my office and all orders proceedings had and entered of Record in said Court in the cause lately pending in said Circuit Court of Kendall County in which Lewis Soule who sues for himself as well as for the County of LaSalle was Plaintiff against William Gentleman Defendant. And I further Certify that what purports to be Copies of the original papers in this Cause above set forth and Numbered respectively in the order in which they appear in this Transcript as "No 5," "No 3," "No 4," "No 1," "No 2," "No 6" and "No 7" are true copies of the identical papers in said Cause transmitted by the Clerk of the Circuit Court of LaSalle County to me on the 3d day of January A. D. 1862. and Numbered from "No 1" to "No 7" inclusive as given in his Certificate above set forth.

Witness George W. Hallenbeck Clerk of the Circuit Court of said Kendall County and the Seal thereof at Oswego in said County this 24th day of May A.D. 1862.

Geo. W. Hallenbeck
Clerk

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Let a supersedeas issue Bond $500
Cyrus K Lovejoy Surety

Errors Assigned

Now comes the said William Sandlin Plaintiff in Errors by Glover Cook & Cook & files his Attornies and says that in the Record & proceedings aforesaid and in the rendering of judgement aforesaid there is manifest Error in this to-wit

1st The Court Erred in admitting improper evidence on the part of the Plaintiff below

2nd The Court Erred in refusing to admit proper evidence on the part of the defendant below

3rd The Court erred in refusing to allow the defendant below to cross examine generally the witness Amos Eberesole called, sworn & examined by Plaintiff below

4th The court erred in giving to the jury the said Instructions & each of them asked by the Plaintiff below

5th The Court erred in refusing to give the qualifications to the said Plaintiff 2nd 3rd 4th 6th & 9th Instructions as asked by

defendant below & in refusing to
give each of them severally.

6th The Court Erred in refusing to
give to the jury the said 3rd 6th
10th 11th & 16th Instructions & each
of them as asked by the defendant
below

7th The Court erred in overruling the
said motion for a new trial.

8th The verdict was against the weight
of the Evidence & the court erred
in rendering judgement aforesaid
in manner and form aforesaid

Glover Cook & Campbell
for Plaintiff in Error

And now comes the said Louis Roulet
defendant in error, and for joinder
in Error says, that in the judgment
and proceedings aforesaid there is
no manifest error -

Ely. Avery & Buchanan
Attys for Defdt in Error

Defendant in error
Filed October 21st
1845

Gould
vs
Gunterman
et al

Feb 14, 1863
Gould
Dkt.