No. 14828

Supreme Court of Illinois

Grube

vs.

Nichols

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STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION

No. 144

J. W. Middleton & Co., Stationers, 198 La[illegible] St.

Grube
1865
Nichols

IN THE SUPREME COURT.

THIRD GRAND DIVISION

OF THE

STATE OF ILLINOIS.

APRIL TERM, A. D., 1865.

LEWIS GRUBE, Appellant,

VS

DAVID NICHOLS, Appellee.

} APPEAL FROM BUREAU.

Appellees

POINTS, SUGGESTIONS, AND AUTHORITIES, BY ~~APPELLANTS~~.

This suit was originally brought before a J. P. in Bureau County by the appellee, against the appellants, to recover the penalty provided by law, for the alleged neglect of the appellant to remove a fence made by him across a certain highway in the town of Westfield, in said County; said highway leading from Grand De Tour to La Salle, through said town of Westfield.

This suit is brought under Sections 94, 96 and 97 of the act of the Legislature approved on the 20th of February, 1861, and which will be found in the Session laws of 1861, on page 263. *Sec.* 94 of said act provides that if any person shall obstruct a highway by fencing up the same, he shall be fined $10.00, and $1.00 for every day he shall suffer such obstruction to remain after he has been ordered by a Commissioner or Overseer of Highways of the town to remove the same. *Sec.* 96 provides that such penalty may be sued for before a J. P. in the name of the town, except as otherwise provided by said act, and *Sec.* 97 provides that if the town fails to sue for such penalty within 60 days, that then such penalty may be sued for, by any legal voter of said town; in an action *qui tam.* &c.

The J. P. gave judgment against the appellant for $25.00, from which he appealed to the Circuit Court, [illegible] verdict and judgment was rendered against him for $75.00, from which he now brings the [illegible] this Court by appeal.

We apprehend that the only *real question* presented by the record, is, whether the road in question is a legal highway.

We shall, however, first notice the exceptions taken by the appellant to the ruling of the Circuit Court on the admission of testimony:

1st. On page 24 of the record. The witness, Ames, testified that he saw a man at work on a bridge, on the road in question, over Nigger creek, which had formerly been built by

private subscription. The witness was permitted to state what the man said, explanatory of the work which he was then doing, to which ruling of the Court the appellant excepted. Clearly this declaration of the workman while in the very act of working on the bridge, explaining the motive, or purpose with which he was prosecuting such work, was a part of the *Res geste*. Mr. Greenleaf, in his work on Evidence, Vol. 1, Sec. 108, says: "The principal points of attention are, whether the circumstances and declarations offered in proof, were contemporaneous with the main fact under consideration." And again in Sec. 110, he says: "They (the act and word) must be concomitant with the principal act, and so connected as to be regarded as the mere result and consequence of the co-existing motives, in order to form a proper criterion for directing the judgment, which is to be formed upon the whole conduct." This Court in *Rigges vs. Cook*, 4 *Gilm.* 336, allowed statements made on the payment of rent to be proved as a part of the *Res geste*. We think the testimony was clearly competent, but if it were not, the question can't now be raised in this Court, for the reason that the ground of the objection to the testimony does not appear in the Bill of Exceptions, which this Court in the case of *Clauser, et al. vs. Stone*, 29, *Ill.* 114, held to be necessary.

2d. On page 25 of the record, the said witness was permitted to state that appellant told him that he (appellant) had petitioned for a private road from the 40 acre lot on which he lived, to the highway in question, across an intervening 80 acre lot owned by one Fessenden. This was objected to by appellant, because the loss of such petition was not shown. There is nothing in this objection; the fact sought to be established by this testimony, was the recognition by the appellant of the highway in question. The matter of his petition for a private road to the highway was collateral to the main fact, and therefore need not be proved by the production of the petition itself. "In cases where the written communication or agreement between the parties is *collateral* to the question in issue, it need not be produced."—1 *Greenleaf Ev. Sec.* 89. Besides this it don't appear from the Bill of Exceptions that the witness was asked for the contents of such petition, or that he stated what such contents were.

3d. The Court permitted evidence to go to the Jury that the plaintiff *had voted at the elections in said town*, to which appellant excepted. We think it was not necessary for the appellee to prove that he was an elector of the town of Westfield; that whether he was such elector or not, was matter of defense. Yet we have shown affirmatively, as will be seen on page 26 of the record, that appellee lived in said town when this suit was commenced, and had so lived there for ten years—was an American citizen, over 21 years of age. This was certainly all the proof necessary to make him an elector of said town. The further fact that he voted in said town was only another circumstance tending to prove him an elector, and may be regarded as merely redundant, if it were even exceptionable.

4th. What we have said about the petition of appellant for a private road will apply also to the exception taken to the statement of the witness, Winslow R. Bruce, that appellant told him that he (appellant) had got up a petition to the legislature to vacate the road in question, as it ran over his 80 acre lot, with this further remark that the appellant himself proved *the very same fact* on his cross-examination of the witness, *James Winter*, as will be seen on page 36 of the record, which subject was not enquired of in chief. These are all the objections taken by the appellant that we deem necessary to notice.

We think it unnecessary to notice what Counsel have said about the irregularities in the proceedings, in the laying out of the highway in question; for admitting these proceedings to be *void*, we think the testimony abundantly shows that the public acquired the right of way over the appellant's premises *by dedication and user.*

What are the facts? In Aug. or Sept., 1847, a road was staked out from Grand De Tour to La Salle, on a line passing over the 80 acre lot of land on which the road was obstructed by the appellant; that the same was called "the State Road," and the public commenced immediately to travel on said line, and so continued without interruption until the same was fenced up by the appellant in the year 1856—over a period of 9 years; that from the time it was so staked out until fenced up by appellant, it was greatly traveled by the public, and regarded as one of the most important thoroughfares in Bureau County.—*Rec. p.* 25; that during all that time it was universally traveled as a public highway, worked and kept in repair by the public authorities.—Rec. p. ; that until the founding of Mendota in 1854, it was the only route by which the inhabitants of a very large region of country, extending to Rock River, could get to Peru and LaSalle, (then the only markets for the country on the line of the said road); that when the road was so staked, the country along the line of the same, through the towns of Clarion and Westfield, was unsettled prairie.—*Rec. p* 31. Subsequently the town of Clarion became settled along the line of the road, the settlers fencing out the highway up to within a few rods of the point of obstruction. Even the appellant himself having afterwards acquired the "Fessenden 80" acre lot, (over which the road passed,) fenced the same out, through said 80, (and which 80 corners with the 80 on which the obstruction was placed.—*Rec. p.* 24); that appellant, until he fenced up said road, used it solely for 8 years in hauling his grain to market.—Rec. 35; that he lived on a 40 acre lot, separated from said highway by the Fessenden 80 lot, and that whilst the said highway was unobstructed, and before he bought the Fessenden lot, he (appellant) petitioned the proper authorities to lay him a private road from his 40 acre lot to the road in question, over the Fessenden lot, saying at the same time that "*he was afraid some person might buy the Fessenden lot, and shut him out from market,*" and that he secured such private road.—*Rec. p.* 25, 26 and 36; that he worked out his road tax on said highway.—*Rec. p.* —; that he lived all the time in close proximity to the highway, recognized it himself in common with the whole country, as a public highway, and with a full knowledge of its importance to the public; that when he fenced up the highway he said to the witness, Bruce, that "*they had fixed the road around so as to make it good and passable to accommodate the people for the present, and when we get able we will fence it out.*"—*Rec. p.* 34; that he afterwads got up a petition to the Legislature, asking to have so much of the highway vacated as passed over the 80 on which the obstruction was placed.—*Rec. p.* 35 and 36; that the highway was worked within a few rods of the obstructed point on the north side, and not worked on the obstructed 80, for the reason that it was dry ground and didn't require any work to be done.—*Rec. p.* 23 and 24. The bridges south of the obstruction over Nigger creek were built by private enterprise, because the country was unsettled there and no road labor to be bestowed.—*Rec. p.* 29 and 31. The witness, *Ames*, found a man at work on one of these bridges under the public authorities—*Rec. p.* 24.

The witness, *Ames*, states that there is no public road from this obstruction to Peru or La Salle; that the town line road (relied on by appellant as being accepted in lieu of the obstructed part over his 80) *has never been opened*—*Rec. p.* 24. No road open to get through from the obstruction to any road—*Rec. p.* 25.

James Winter states that there has been no other road accepted by the public in lieu of the obstructed part; "*that everybody is dissatisfied with the obstruction except those who own the land*"; that there is no ground where a road can be made so good or so direct as the old route.—*Record* 36.

Hiram Geer states that there is no passable route from the obstruction, south; the ground on any other route is bad; old State road always passable; "*there has always been dissatisfaction since the obstruction.—Rec. p.* 37.

Edward Scammon, (for appellant.) There are two pair of bars on the "East and West Road," —*Rec. p.* 39, (the route turned over to the public in lieu of the part of the road obstructed by appellant.)

Wm. P. Phillips saw appellant build the fence across the highway on his 80 in question.—*Record p.* 37.

A. M. Olmstead was a Resident and Highway Commissioner of Westfield town in 1863, and as such Commissioner served written notice on appellant on the 3d day of Nov. 1863, to remove the obstruction in question, (see stipulation of service of notice on file and Rec. p. 38.) No suit was brought by the town of Westfield for the penalty sued for by appellee, *Rec. p.* 39. The premises described in the notice, is the same where the obstruction is placed on the highway in question.—*Rec.* 39.

Edward Scammon, (for appellant.) Old State road obstructed in Westfield for 6 miles; the obstruction by appellant has been there 5 years; heard no objection to appellant's obstruction, until after the road had been obstructed south of him, by others; the north and south, and east and west road around the obstruction of appellant, are laid out roads.

Counsel rely upon the fact that at the times of the recognition by the appellant of the road in question, that he was not the owner of the 80 acre lot on which he put the obstruction, except in the two instances: 1st. Where he explained the fencing of it up by a promise to fence out the road as soon as he was able, and, 2d, Where he petitioned the legislature to vacate the road through his premises.

We say that at the time of his purchase, the public had acquired the right of way over these premises; that the road had become notorious as "*the State Road*,"; was so reputed and accepted by the whole public; opened and kept in repair by the public authorities; in the language of the witness, *Ames*, "*was the most important road in the County*"; extending from the Rock River country to Peru and La Salle, and being the only practicable route to those markets for the vast region of country through which it passed; that it had been so traveled and worked for 8 or 9 years, when the defendant purchased the land; did he buy the 80 acre lot in question under the supposition that the public had acquired no rights there? is he an innocent purchaser? did he suppose that he was buying the land free from the incumbrance of the highway? No man knew better

than the appellant himself, the rights of the public in the premises, when he bought the land, for he had worked the road himself, under the public authorities. But Counsel say his grantor may not have known anything about the use of this land by the public ; may not have acquiesced in the use of the same, and that he (appellant) succeeds to all the rights of his grantor in the premises. Admit the proposition ; and we ask who was his grantor ? where did he live ? what was his knowledge, his acquiescence or *non* acquiescence in the public use of the road over his premises ? These are questions that are not solved by any testimony in the case. There is not in the bill of exceptions a particle of testimony on the subject. For aught that appears, the appellant bought the land from the government of the U. S. How does this leave the case with regard to his grantor ? Can his grantor occupy a better shape than the appellant, if he (appellant) had owned this land from the beginning ? We say, clearly not. If the appellant sets up any rights in his grantor to which he has succeeded, and which he (appellant) could not have asserted if he (appellant) had owned the land from the beginning ; certainly he must show affirmatively by the testimony what these rights are to which he has thus succeeded ; for no inference can be indulged to help such rights in his grantor. In the case of *Dimon vs. The People*, 17 *Ill.* 422, this Court say : "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.*" The same doctrine will be found in 2d *Greenleaf Ev. Sec.* 663. The presumption then is, that his grantor had a full knowledge of all the rights of the public in the premises. We think this effectually disposes of that point in the appellant's case.

offense of obstructing the road. No action accrued against the appellant for continuing the obstruction until he was notified to remove the obstruction ; the statute could not commence to run until such action had accrued. The action did not accrue until the 3d day of November 1863. Manifestly, then, there is no room for the statute of limitations.

It is urged that the J. P. had no jurisdiction of the case,—Sec. 96 of the act of 1861, under which this proceeding was instituted, expressly confers jurisdiction on the Justice, "*In all penalties in and by said act, where the same shall not exceed one hundred dollars, may be sued for and recovered before any Justice of the Peace.*" Although the act of fencing up the highway was done before jurisdiction was conferred on the Justice, yet the offence for continuing the obstruction was not complete until appellant was notified to open the road.

The Supreme Court of Indiana, in 11 *Pick.*, 28, hold that a statute confering jurisdiction upon a particular tribunal, of offenses previously committed, is not unconstitutional. Nor can the appellant escape liability, because the act under which this suit was brought, was passed after he fenced up the road, as this act don't create the offense, the offense existed under the act ef 1852—the act of 1861 only changing the amount of penalty, and conferring jurisdiction of the offense on the Justice.

In *Strong vs, the State*, 1 *Black, p.* 194, the defendant was indicted for perjury when that crime was punished by whipping, Before his trial the Legislature changed the penalty for perjury to confinement in the penitentiary. The defendant was convicted and sentenced to the penitentiary. Held that the law was constitutional.

We deem it unnecessary to notice what counsel have said on the subject of the Instructions of the Court to the Jury. All the instructions for the appellee will be found predicated upon the authorities above recited, or referred to, and the appellant's instructions refused by the Court, will be found in conflict with the same authorities ; and, therefore, were properly refused. The Court will see that this is the only mode by which the legality of the road in question can be tested ; all other modes of prosecution being barred by the statute of limitations. The case is one of great importance to the public, not only as involvingthe rights of a widespread community to the enjoyment of an almost indispensible thoroughfare, which they enjoyed for eight or nine years without let or hindrance. But, also, as involving the right of the public everywhere in the State, of successfully defending their rights to public thoroughfares of the country, now opened and traveled, but which may not have been laid out in conformity with all the requirements of the law, We believe that the verdict of the jury ought not to be disturbed. The testimony shows that the road remained enclosed for ninety-one days after the appellant was warned by the proper officer to open it. The jury would have been warranted in finding a verdict of $91.00. There are some technical point made by counsel which we don't think of enough importance to notice.

Without further remark we submit the case for the Appellee.

J. I. TAYLOR, *Att'y for Appellee.*

144.

Grube

No 3

Nicholz

Appellee's argument

Filed Apl. 29. 1865.

S. Acland

Clk.

State of Illinois } In Supreme Court
Third Grand Division } April Term 1865.

Lewis Gruber Appellant }
— vs — } Appeal
Daniel Nichols }

It is hereby stipulated by the parties to the above suit, that the time for filing arguments in the case, may be extended to the first day of May, 1865.

April 24th 1865.

Stipp & Grimes &
Eckels & Taylor
attys for Appellant
I. S. Taylor also for appellee

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Lewis Gruber

vs

David Nichols

Stipulation

144

Filed Apl. 24th 1865
L. Leland
Clk.

State of Illinois } In the Supreme Court —
3d Grand Division,
of April Term A.D. 1865.

Lewis Grubb, appt.

vs. } Appeal from Bureau

David Nicholz, appee.

Whereas there is a diminution of the Record in the above entitled cause in this towit: That the written Notice served by A. M. Olmstead as Road Commissioner of Westfield Township on Lewis Grubb to open the road in controversy at the point obstructed on his premises, is omitted to be copied in the Record filed in this Case, and now for the purpose of avoiding the delay of a Certiorari, It is hereby stipulated between the parties hereto that the Notice referred to by said Olmstead was in writing — correctly describing the premises of Grubb on which said obstruction was, required him to remove such obstruction, and that said Notice was signed by said Olmstead Road commissioner and was dated the 3d. day of November 1863, and that this Statement may be regarded in lieu of said Notice. Dated this 22d of April A.D. 1865.

Eckels & Kyle, Attys for Appt.

J. J. Taylor Attys for appellee

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Lewis Grubel

vs.

David Micholz.

Stipulation

Filed May 1. 1865

IN THE SUPREME COURT.

THIRD GRAND DIVISION

OF THE

STATE OF ILLINOIS.

APRIL TERM, A. D., 1865.

[redacted] } APPEAL FROM BUREAU.

May it please the Court.

Ab. Page 1. R. 1, 5. This was an action *Qui tam* originally brought by the plaintiff below, before a justice of the peace to recover the penalty for obstructing a public highway, leading from La Salle to Grand de Tour. A written complaint was filed, charging the defendant with the commission of the offense of R. 3. obstructing said highway and for continuing said obstruction, after being notified to remove the R. 4. 5. same. But in the summons he is charged with simply *obstructing* said highway. The transcript R. 5, 6. Ab. 1. of the justice of the peace shows that he was tried and convicted for obstructing said highway and R. 6. from *said judgement* the defendant appealed to the Circuit Court of Bureau county.

R. 16, 17. A trial was had in said court and the jury found the defendant guilty and assessed a fine against him of seventy-five dollars, on which the court rendered judgement.

The main questions presented by the record are.

1st. Was there a public highway at the place charged in the plaintiff's complaint ?

2nd. If there ever had been a public highway at the point claimed, has it been abandoned by the public ?

3rd. Was the offense barred by the statute of limitations ?

4th. Was the offense one over which a justice of the peace had jurisdiction ?

5th. Was the complaint sufficient in law ?

6th. Did the court admit improper testimony on the part of the plaintiff below ?

7th. Did the court give improper instructions for the plaintiff below, and refuse, and qualify proper instructions for the defendant below ?

8th. Were the verdict and judgement contrary to the evidence and the law ?

In order properly to understand the case, we will state briefly the history of the road in question, as shown by the testimony.

In 1847, an act was passed by the General Assembly of the State of Illinois, approved March

1st, 1847, and found in the session laws of 1847, page 96, by which, among other things, Berton Ayers of La Salle, *William B. Bruce* of Bureau and Daniel Baird of Lee county, were appointed commissioners to locate a State road, from the town of La Salle, termination of the Illinois and Michigan Canal, to Grand de Tour, on Rock River in Ogle county, see sec. 9 of said act.

Sometime in the fall of 1847, Daniel Baird, one of said commissioners, together with one *Winslow R. Bruce*, attempted to locate said road. Neither *William B. Bruce* nor Berton Ayers took any part in the location of said road.

At the time said road was located through the town of Westfield, all of the land over which it was located, was vacant and unoccupied. The land in controversy remained vacant and unoccupied until it was fenced up by the defendant. The land is located in the town of Westfield, and was purchased by the defendant below in 1855, and broken up, including the road, the same fall, and fenced in 1856, since which time it has been continuously fenced up. The proof fails to show that any work was ever done on said road in the town of Westfield, by the town authorities, prior to the time it was obstructed by the defendant. Some work was done on the road at a place called Nigger creek, *prior* to the obstruction by private contribution.

The defendant lived, and still lives in the town of Clarion, and the testimony fails to show, that he owns any land in Clarion, lying along side of said road. The forty on which he lives is separated by an intervening eighty, owned by a man by the name of Fessenden. See testimony of George Ames and indeed nearly all the plaintiff's witnesses.

With this statement of the case in the mind of the court, there will be but little difficulty in determining the question, as to whether or not, *there was a public highway at the place, charged in the plaintiff's complaint.*

This court has decided in numerous cases, that a public highway may be established in three ways, by virtue of statutory enactment, by prescription and by dedication.

Was, there a highway established by virtue of the act of the Assembly, appointing commissioners to locate said road? Manifestly there was not. The proof on this branch of the case as has been stated was, that *Winslow R. Bruce* and Daniel Baird in the fall of 1847 located said road and
Ab. P. 6. R. page 34. that they professed to act by virtue of the act of the Assembly of the State of Illinois, approved
Ab. 6. R. 34. March 1st, 1847, session laws of 1847, page 96. On this point the court is referred to the testimony of Winslow R. Bruce. But by refference to said statute it will be seen, section 9, that Berton Ayers
Ab. 8 R. 41 of La Salle and *William B. Bruce* of Bureau, and Daniel Baird of Lee county were appointed commissioners to locate said road.

There is no pretence that *Winslow R. Bruce*, and *William B. Bruce* are one and the same person, nor was there any testimony offered to that effect, nor, indeed, would such testimony have been competent to show that fact. There is no ambiguity in the act of the Legislature. The Legislature clearly intended *William B. Bruce* and not *Winslow R. Bruce* to act as commissioner to locate said road. The acts of Winslow R. Bruce are therefore clearly void.

But further: Berton Ayers, another of said commissioners was not present and took no part in
Ab. 2 R (23-4-6) Ab 4 R (30-1) Ab. 5, R. 31. Ab 6, R (34-5) locating said road. On this point see the testimony of George Ames, David Stanard, Albert G. Porter and Winslow R. Bruce.

The proof is, therefore, positive, that only one of the commissioners, Daniel Baird appointed by the act of '47, was present at the location of said road, and no authority is given by said act, to enable one or more of the commissioners to couple with themselves, for the execution of their duties any third person, not mentioned in the act. The commissioners appointed derived their authority

from the act of the Assembly appointing them, and they must conform strictly to its requirements.

No presumptions are indulged in their favor. *Corley et. al. vs Kennedy*, 28, *Ill.* 147. It nowhere appears in the testimony, that the commissioners, even Baird was sworn. This of itself would be fatal, even if all their other acts were valid. 7 *Sergt and Rawles* 444, 3, *Sergt and R.* 210,

It is a well established rule of law, recognized by this court, that when several persons are authorized to do a private act, *all* must join, unless the contrary is expressed, and when several are authorized to do an act of a *public* nature, they must all *convene*, but a majority in such a case may lawfully execute the power.

Baltimore Turnpike, 5 Binney 484.
McCurdy vs Guardians, 9 Serg. & R. 94.
Com. vs Canal Commissioners, 9 Watts, 466.
Cooper vs Lampeter, 8 " 123.
7 Cowen, 576.
12 Moss, 185.
1 Rawle 448.
Louk vs Woods, 15 Ill. 262.
Whether the business be public or private less than a majority cannot act.
Cooper vs Lampeter, 8 Watts, 128,

This was all the testimony offered by plaintiff below to show the establishment of the road under the act of Assembly. This court has never gone further than to say, that the introduction of the order, establishing a road is sufficient to raise, a presumption, liable to be rebutted, of such highway. 15, *Ill.* 546, 1, *Gil.* 12, 15, *Ill.* 323. Here only *parol* testimony was offered, that *one* of the commissioners, appointed by the act, attempted, in conjunction with one Winslow R. Bruce, not named in the act to locate the road but no order is shown

The plaintiff below therefore, failed to establish a highway by virtue of the statute.

It certainly cannot be contended, and indeed it was not contended in the court below, that a highway, at the point obstructed, had been established by prescription. The travel only commenced over the road in 1847, and it was obstructed by the defendant in 1855 by plowing, and in 1856 by fencing. On this point the court is referred to the testimony of Edward Grube. Ab. 8 R. 40

Was there, a highway, established at the point in question by dedication? The plaintiff in the court below relied mainly on this method of establishing a highway, and it was in this view of the case, that most of plaintiff's instructions were drawn and given.

The fact of dedication was sought to be established mainly by certain acts and admissions of the defendant below. These acts and admissions were.

1st. An application by him to the town authorities of the town of Clarion, to grant him a private way to the so called State road over an eighty acre lot, which lay between the forty on which he lived in said town, and said road.

2nd. That he had worked on said road, under the town authorities of the *town of Clarion*.

3rd. That he had hauled grain over said road to La Salle, prior to the placing of the obstruction on said road.

4th. That he had signed a petition to the Legislature of the State, to have said so called State road vacated.

5th. That he stated to Winslow R. Bruce, at the time he fenced up the road, that he would fence it out when he got able.

By referring to the testimony, it will be seen how absurd is the claim, that the defendant dedicated said land to the public. These acts must have been done by defendant below, with the *intention to dedicate.* The land is located in the town of Westfield, the defendant lived then, and still lives in the town of Clarion. At the time referred to in the first four propositions, he did not own the land in controversy, and certainly it cannot, reasonably be argued that he dedicated the land before he became the owner of it. Nor can it be reasonably argued, that even if the testimony shows, that he dedicated a portion of his land in Clarion for the use of the public, that he thereby dedicated a portion of his land in Westfield, to the public for a highway. His land in the one town being in no way connected, with his land in the other.

But the proof clearly shows, that instead of acting in a manner indicating an intention to dedicate the land, he acted in a manner indicating in the most unequivocal manner an intention *not* to
Ab. 8
R. 40 dedicate. The testimony of Edward Grube shows that immediately upon his purchasing the land, he plowed up the road, and the spring after he fenced it, and has kept it fenced ever since.

The court will also notice, that the testimony of Winslow R. Bruce, in regard to defendant petitioning for a private way was objected to by defendant on the ground that the petition, itself must be produced, which was the best evidence, or it must be shown that it was lost, or out of plaintiff's power to produce, which objection was overruled by the court and the defendant excepted. The same is true also in regard to the petition to the Legislature asking to have said road vacated.

It is, therefore, a sufficient answer to the first four of the above propositions that at the time of the alleged acts, the defendant Grube, was not the owner of the land in question. Besides this, the land was vacant and unoccupied at the time, and so remained until he purchaseed and fenced it. *Warren vs President &c., of the town of Jacksonville*, 15, *Ill.* (241—2).

This court has decided in numerous cases, that dedication is purely a question of intention, 28, Ill. 491, 25 Ill. 153, 23 Ill. 444, 19 Ill. 636, 15 Ill. 240, 13 Ill. 35.

Again the mere acting so as to lead persons to the supposition that the way is dedicated, will not amount to a dedication . Mercer vs Taylor, 19 Ill. 636

Long continued possession, adverse to the claim of the public, may be shown to repel the presumption of dedication, sought to be established, by equivocal or doubtful acts of the owner. *City of Bellville et. al. vs Stookey*, 23 Ill. 444. Certainly nine years of exclusive possession, denying to the public the use of his land, and this possession commencing with his purchase of the land, ought to be sufficient to repel the presumption of dedication, sought to be established by the equivocal or doubtful acts of the owner.

In reply to the fifth proposition, to wit : The declaration to Bruce, that he would fence it out, when he got able, it is only necessary to say, that it was a mere expression of an intention to be carried into effect at some future day, which he was under no obligation to do, and which he never did do. 23 Ill. 445, 19 Ill. 736.

II But assuming that the plaintiff established a public highway at the point in controversy, does the proof show an abandonment of said road by the public ?

This court has decided, that, "if the public have acquired the legal right to another road to answer the purpose of the road charged to be obstructed and have acquired the use of said road, it amounts to an abandonment of the road alleged to have been obstructed. *Champlin vs Morgan*, 20 Ill. 183.

It is clearly shown by the testimony, that a certain road, called by some of the witnesses the "north and south road," and by others, the "one mile road," (see plot, marked exhibit "A" and attached to the record), was laid out by the town authorities of Westfield, since the obstruction was placed on the so called State road, by the defendant, to accomodate the traveling public over the defendant Grube's land. On this point the court is referred to the testimony of John C. Oakley, Edward Scammon, Edward Grube, and James Hoover.

Ab. 5 R. 32-3 Ab 8, R 39 Ab 8, R 40

The public authorities have kept said "north and south" road in repair. It was accepted by the public, and acquiesced in, and no complaint was made by any one, for five or six years thereafter, and further, after this "north and south" road was laid out, the town authorities of Westfield refused to recognize, or open, the so called State road. See testimony of James Winter.

Ab 6 & 7, R 36

If these facts do not constitute an abandonment of the so called State road, at the place in controversy, it is difficult to see, how an abandonment can be proved. Certainly the public roads are under the control of the town authorities, and if the road is abandoned by them and another substituted in its place, that fact should have great weight in determining the question of abandonment.

III *Was the offense barred by the statute of limitations?*

Assuming that there was a public highway at the point charged to be obstructed, at the time of the fencing, has a right to recover a penalty in this form of action, been barred by the statute of limitations?

The statute limits the prosecution for any fine or forfeiture, under any penal statute to one year and six months from the time of committing the offense. 1 Purple, page 406, sec. 246. The obstruction here charged was made in the years of 1855 or 1856. This suit was commenced on the 3rd of February A. D. 1864.

Ab. 1. R. 4.

When once the statute of limitations commences to run, no subsequent event can arrest it.—*Brown et. al. vs Moore*, 26 Ill. 426.

If by the operation of law there ceased to be an obstruction, there could have been no forfeiture incurred, for permitting the same to remain, in other words for the continuing of the same.—If there was no other remedy, then the court might strain the point, and hold, that still there might be an action, for continuing the obstruction after the expiration of eighteen months.

The object of the act, granting this remedy was to give jurisdiction to the various towns in the regulation of their roads and a speedy remedy for the violation of the public easements. But this jurisdiction and remedy is limited and the towns must act within the time presented by the statute of limitations.

IV Was the offense one, over which the justice of the peace had jusdiction?

This court has decided in 19th Illinois, in the case of *Crosby vs Gipps*, page 309, that a justice of the peace has no jurisdiction of the offense of continuing an obstruction to a highway, and the same doctrine is affirmed in *Bickerdike vs Dean*, 21st Ill. (199–200).

With the above authorities, we dismiss this branch of the case,

VI The court manifestly erred in permitting the witnesses to testify in regard to the contents of the petitions, alleged to have been presented by the defendant in relation to the said road. It is a well settled rule of law, that the best evidence that the case is susceptible of must be produced.—The petitions are the best evidence of what they contain, and should have been produced or their loss accounted for, before secondary evidence of their contents should have been received. The

court overruled the defendant's objections to this kind of testimony, and permitted the witnesses
Ab. 6. R. 34. Bruce and Phillips to testify as to the contents of said petitions, to which ruling of the court the
Ab. 7. R. 37. defendant excepted.

VII The appellant insists that all of the plaintiff's instructions are erroneous, because they appear to have been prepared in an entirely different case from the one at bar, wherein the same David
Ab. 8. R. 46. Nichols is plaintiff and one Xaver Jagle is defendant, *Harris et. al. vs Miner*, 28 Ill. 138.

It is further insisted that they are erroneous because they are based on a state of facts not shown by the testimony to have existed in this case. Title in the public by prescription, or twenty years use is not contemplated expressly by the plaintiff's instruction. They are based mainly on the fact of dedication. It is shown by the testimony that from the time the road was attempted to be laid out under the act of 1847, until the purchase of the land, on which the alleged obstruction was placed by appellant, Grube, the same was vacant and unoccupied.

It may be contended that the case of *Dimon vs The people*, 17 Ill. (421–2) overrules the case of *Warren vs The town of Jacksonville*, 15, Ill. (541–2). Without adverting to the fact that in the former case, the latter is referred to and sustained, it is sufficient to say that in the case of *Dimon vs The people*, the court does not intend to go further than to hold, that as against government, and resident and non-resident proprietors, the right by prescription or twenty years user will obtain, and this is in accordance with all the numerous decisions of our Supreme Court upon the question. But the case of *Dimon vs The people*, does not controvert the principle laid down in the case of *Warren vs Town of Jacksonville*, that no inference or conclusion can be deduced from mere travel across un inclosed land so as to establish the fact of dedication.

In all the cases passed upon by our court, it is held that dedication is purely a question of intention, see 28 Ills. 491. 25 Ill. 153. 23 Ill. 444, and cases previously cited, and the court properly hold, that where the public uses the land of the owner, as a highway, in order to acquire title to the easement, the land must be in his occupancy, and the use of the public must be adverse, so as to *show* the fact of intention to dedicate from his acquiescence in such adverse use. Nothing can be deduced from his indifference to the use by the public of land which he does not apply to any practical purpose, but suffers to remain as public commons, so that as against the grantors of Grube no presumption of dedication can be indulged.

As the testimony proves, that from the *time* of his purchase Grube has persistently denied the right of the puclic over the land so purchased, and as there is no evidence whatever, tending to show that the pubic had acquired the right by dedication, the instructions are all based on facts not proved and are, therefore, erroneous.

The second instruction is erroneous, from the fact that it was not shown, that defendant Grube,
Ab. 9. R. 46. after he became the *owner* of the soil ever assented to the use of the same as a highway. On the contrary the testimony shows that immediately after he purchased the same he plowed up the space
Ab. 8. R. 40. used by the public as a highway. See testimony of Edward Grube. And no presumption is entertained against the owner of unoccupied land. *Warren vs Town of Jacksonville*, 15 Ill. (241–2): neither is it shown that the owner af the land, when vacant ever consented to its use.

The third and fifth instructions are not founded on the testimony. The rule, laid down by
Ab. 9. R. 46. this court, that dedication will be implied from long acquiescence in the use by the public, has application only to the *owner* and in cases where land has been taken that was in his occupation at the *time* of such use by the public. 17 Ill. 379, (421—2) 15 Ill. 521.

But in this case, until Grube became the owner, it was vacant, and the above rule did not then ap-

ply. 15 Ill. (421–2), and after he bought he clearly put an end to all ideas of dedication, by plowing and fencing the road. His saying to Bruce that "when we get able, we will fence it out, did not amount to a dedication, until he had *actually dedicated*, no dedication could be inferred from his intention to do so at a future time. 23 Ill.. 445. These instructions were calculated to mislead the jury, and were erroneous. *Brown vs Gerham*, 24 Ill. 63. 25 Ill. 242.

Ab. 6. R. 34.

Ab. 9. R. 47.

The fourth instruction is clearly erroneous. If its object be simply to show a road by *dedication*, then it is bad, for reasons urged in objection to the third instruction. If it be to tell the jury that the staking out the road of itself, established the road, then its bad, because it has been already shown, that but one of the commissioners appointed by the Legislature acted in locating said road, and further no order was produced, showing the establishment of such road. 15 Ill. 262, 546, 323.

Ab. 9. R. 47.

The sixth instruction is calculated to mislead the jury. It is shown by the testimony that no road was laid out, if the court concurs, in the opinion that the action of Daniel Baird and Winslow R. Bruce was illegal.

Ab. 9. R. 47.

The seventh instruction is also erroneous. All the cases show, that the public can acquire the use of the land for a highway, by only three modes, viz: Prescription, by dedication by the owner, and by condemnation in the manner prescribed by the statute, 21 Ill. 442, 17 Ill. 368, 421.

Prescription is by user for twenty years.

27 Ill. 417. 23 Ill. 396. 21 Ill. (442—3).

19 Ill. (221—2).

Dedication is a question of intention. 28 Ill. 491, and is made by grant or other written instrument, or is *evidenced* by acts, or declaration. 12 Ill. 35. In this case there is no right by prescription, nor is there any evidence of dedication, by acquiescence or otherwise. On the contrary as soon as the land was occupied the road was fenced up. This instruction was calculated to mislead the jury in the application of the above law to the facts.

Ab. 10. R. (50-1)

The eleventh instruction tells the jury that one can dedicate land for a public easement, before he owns it, and with out knowing that he ever will own it. The proof shows that all the work the defendant Grube ever did on the road in question was in a different town from the one in which the land in controversy is situated, that he petitioned for a private road, (if this proof be legally offered, which appellant denies) from other land in a different town, to the road in question, before he owned the land on which the obstruction is placed, that he joined in a petition for a vacation of the "State road" [if this proof as offered be proper, which appellent denies] before he bought the land fenced up. This instruction certainly cannot be the law. It is based on the idea of dedication, but none but the *owner* can dedicate. The grantors of Grube, only could dedicate.

Suppose Grube had never bought the land could it then be said, that because he did all the instruction contemplates he did, that his acts would bind the persons from whom he purchased. If not, then, neither could these prior acts bind him, after acquiring the title to the land. Before he owned the land, he could certainly have no intention to dedicate it and it is the intention of the owner, that makes the query for the court to determine. This instruction is a strange mixture, and leads the jury to believe, that the acquiescence of a person in the use of a *portion* of his land by the public in one town, creates *ipso facto* a dedication of all his land taken by the same line of road in its entire length, and even that which he may subsequently acquire on that line of road.

Now if the appellant has shown, that the road, as attempted to be laid out under the act of 1847, is illegal and that the acts of the unauthorized commissioners did not constitute a highway, then the

public could only acquire that right by prescription or dedication, and certainly the court will not hold that the public can wrest the land from appellant on the plea of dedication against his consent, and before he owned the land, and the instruction is not based on acts of Grube's grantors, but solely on his own.

The fourteenth instruction is bad, for reasons given in 23 Ill. 444.

We deem it unnecessary to go into any argument in relation to the instructions refused for defendant in the court below. A mere reading of the instructions is sufficient to show that they should have been given and the attention of the court is respectfully referred to them.

Ab. PP. 11-12
R. PP. (56-60)

The court ought not to have qualified the defendant's tenth instruction. The question presented was, as to whether or not the public had accepted the "north and south" road in lieu of the road in question. If they had, the convenience or inconvenience resulting from the change had nothing to do with the question. If they accepted it in lieu of the old road, it was not for the jury to say whether it "answered the same objects as the road in controversy" or not.

The court directed the jury to inquire into a matter that had no bearing on the case whatever, and therefore, directly tended to mislead the jury.

VII Were the verdict and judgement contrary to the evidence and the law?

From what has already been said, it seems too plain for argument, that the court erred in overruling defendant's motion for a new trial and for rendering judgment for said plaintiff.

The jury found the defendant guilty and assessed a fine against him of seventy-five dollars. How the jury found such a verdict is difficult to tell. The defendant was on trial for obstructing a public highway, and *not* for *continuing* an obstruction. It is true, the complaint, or what purports to be the complaint charges defendant with continuing the obstruction, but by examining the complaint, it will be seen it is of no force or effect. It is not signed by any person. It concludes to the damage of no person. No validity was attached to it in the Circuit Court, nor, indeed, in the justice court.

Ab. Page 1
R. 4-5.
R. 7-8

In the summons, the defendant is charged with *obstructing* a certain highway. The transcript of the justice, shows that he was tried and convicted for obstructing a highway, and fined twenty five dollars, from which judgement the defendant Grube, took an appeal to the Circuit Court.

Now we submit, that the Circuit Court could not try the defendant for *continuing* an obstruction to a public highway, on an appeal from the judgement of the justice of the peace for *obstructing* a public highway, This court has expressly so decided, in the case of *Crosby vs Gipps*, 19 Ill. 301. The judgement is for Seventy-five Dollars, while the statute says that for an obstruction to a public highway, the fine shall not exceed ten dollars.

But suppose the complaint is sufficient notice to the defendant below, and that the Circuit Court had the power to try him for continuing the obstruction, it is still insisted that the verdict is wrong and the judgement based upon it, is also wrong, and must be reversed.

The complaint charges defendant with the commission of two separate and distinct offenses, viz: Obstructing a public highway and continuing said obstruction after being notified to remove the same. The verdict does not show for which offense, the defendant was convicted. If he was convicted for placing the obstruction on the road, the verdict is wrong, for the penalty for that offence is a sum not exceeding ten dollars.

Besides, as has been already shown, the action was clearly barred by the statute of limitations. 1 Purple, 406 sec. 246. If it was for continuing the obstruction, the defendant was convicted, the

verdict is clearly wrong, for the same reason, that the offense is barred by the statute of limitations, besides there is no evidence as to the length of time, the obstruction was permitted to remain, after notice and before the commencement of this suit. Nor was it shown that the plaintiff was an elector of the town of Westfield at the time of the commencement of this suit. Nor was it shown that the town of Westfield had never commenced and prosecuted a suit against the defendant for said obstruction. All of which it was necessary for the plaintiff to show before he was entitled to recover. *Whitecraft et. al. vs Vandever*, 12 *Ill*; 238.

Chapman vs Wright, 20 *Ill.* 126.

Town of Lewiston vs Proctor, 27 *Ill.*(419—20)

Jarret vs Vaughn, 2 *Gil.* 138.

With these observations we submit the case, respectfully requesting your Honors to examine the record, and see if the positions we have taken are not fully sustained by the testimony and the law.

STIPP & GIBONS,
ECKELS & KYLE, } Att'ys for Appellant.

State of Illinois } In the Circuit Court
Bureau County } ss. of said County.
Be it remembered that
on the 11th day of March A.D. 1864 came
Lewis Grube of said County into said Court
and filed his Appeal Bond with Transcript
from the Docket of David Rusk a Justice
of the Peace in and for said County and the
complaint of Plaintiff, Bond for Costs and
Summons in a cause wherein David
Nichols is Plaintiff and said Lewis Grube
Defendant; said Papers herein filed
being in the words and figures following,
to wit, respectively:-

Complaint State of Illinois, Bureau County ss.
David Nichols

vs

Lewis Grube, Frederick Reith
Samuel Scammon, Edward
Scammon, Luther Scammon,
Henry Feinfeinn Havoer Jagle

Damages
100$

The said David
Nichols a voter of the Town of Westfield
complains that the said Lewis Grube
Frederick Reith Samuel Scammon,
Edward Scammon, Luther Scammon,
Henry Feinfeinn, Havoer Jagle did
on or about the first of May 1858.
commence unlawfully fencing up and
otherwise obstruct the road leading from
Grand De Tour to La Salle through said
Town of Westfield by fencing & plowing

and otherwise obstructing the same as the same passes over the E½ of NE¼ of Sec. 2. T. 17. R. 11. 4. P.M. owned and obstructed by fencing and otherwise by Lewis Grubes; also ock SW¼ of Sec. 1. T. 17. R. 11. 4. P.M. owned and obstructed by fencing and otherwise by Frederick Reith; also the W½ of Sec. 12. T. 17. R. 11. 4. P.M. owned and obstructed by plowing and otherwise by Samuel Scammon, Edward Scammon and Luther Scammon; also SE. 80 fractional 14 Ac. of Sec. 12. T. 17. R. 11. 4. P.M. owned and obstructed by fencing and plowing by Henry Feinfeinn; also the NE. 80 fractional Ac. of Sec. 13. T. 17. R. 11. 4 P.M. owned and obstructed by fencing by Havoer Jagle in the Town of Westfield County of Bureau and State of Illinois; and that the said Lewis Grubes, Frederick Reith, Samuel Scammon, Edward Scammon, Luther Scammon, Henry Feinfeinn and Havoer Jagle suffered said obstructions to remain across and in said road from that time until the present and still continue the said obstructions in the said road although they were on or about the 3d day of November 1863. by A. M. Olmstead a Road Commissioner in said Town Westfield and requested to remove the said obstructions whereby and means of the Statute in such cases; The said Lewis Grubes, Frederick Reith, Samuel Scammon,

Edward Scammon, Luther Scammon, Henry Trumfsinn and Hanover Jagle became liable to pay a fine of not exceeding $10.00 for obstructing said road and a sum not exceeding $1.00 per day for each day since they were so notified as aforesaid and the officer or agent of said Town whose duty it was to prosecute for said fine having failed to sue for the same within sixty days after the said Lewis Grube, Frederick Reith, Samuel Scammon, Edward Scammon, Luther Scammon, Henry Trumfsinn and Hanover Jagle became liable to pay the same an action *Qui tam* by means of the premises and the Statute in such case has accrued to said David Nichols to sue the said Lewis Grube, Frederick Reith, Samuel Scammon, Edward Scammon, Luther Scammon, Henry Trumfsinn and Hanover Jagle and recover of them the sum of $60.00 fine and $50.00 of which to be paid to the said David Nichols and the other half to said Town of Westfield when recovered wherefore he brings this suit

Bond for Costs

State of Illinois, Bureau County ss.

David Nichols

vs.

Lewis Gruber, Frederick Reeth, Samuel Scammon, Edward Scammon, Luther Scammon, Henry Sienfsinn Xavier Jagle

Before David Rude Justice of the Peace of said County.

Action Quitam for obstructing highway under the Statute.

I, Andrew Winters do enter myself security for all costs that may accrue in the above cases according to the Statute in such cases made and provided

Dated this 3th day of February 1864

(Signed) Andrew Winters

5

Summons

State of Illinois, } The People of the
Bureau County } ss State of Illinois.

To any Constable of
said County, Greeting"

You are hereby commanded to summon Lewis Grube, Frederick Reith, Samuel Scammon, Edward Scammon, Luther Scammon, Henry Finesine, Haven Jagle to appear before me at my office in Lamoille on the 9th day of February A.D. 1864 at 9 o'clock A.M. to answer the complaint of David Nichols in an action of debt for obstructing the highway for a failure to pay him a certain demand not exceeding $100. dollars and hereof make return as the law directs

Given under my hand and Seal this the 3rd day of February A.D. 1864

David Rude J.P. Seal

Which said Summons is endorsed as follows, to wit:"

Personally served the within by reading the same to the within named Lewis Grube, Frederick Reith, Samuel Scammon, Edward Scammon, Luther Scammon Haven Jagle, the within named Henry Finkin not found in my County Feb. 6th 1864

Mark Bailey Const.

Transcript 6

State of Illinois }
Bureau County } ss

David Nichols

vs.

Lewis Grube, Frederick Reith, Samuel Scammon, Edward Scammon, Luther Scammon, Henry Harver Jagke, Fire fesinn

Plaintiff demand $ 100.

In Justice Court before David Ruder J. P.

Action Qui tam for obstructing highway under Statute.

1864. February 5th

Bond filed for costs in the above entitled suit by Andrew Winters

1864 February 5th

Summons issued for the abovenamed defendants returnable on the 9th day of February A.D. 1864 at 9 o'clock A.M. and delivered to Constable Mark Bailey to serve.

1864 February 5th

Subpoenas issued for W. R. Bruce, A. G. Porter, Beyer Benton, David Standard Hiram Greer, M. A. McKey, N. F. Moulton, Wm J. McKey, G. R. Ames, James Winters, A. M. Almstead, Wm Phillips, J. C. Okey, Frederick Hinkle, Andrew Winters returnable on the 9th day of February A.D. 1864 at 9 o'clock A.M. and delivered to Mark Bailey Constable to serve.

February 9th 1864 Summons returned by Constable Mark Bailey served by reading to the within named Lewis Grube, Frederick Reith, Samuel Scammon, Luther Scammon, Edward Scammon.

Havoes Jack ; Henry Fivefeinn not
found in my County February 6th 1864
Mileage $2.75 Service $1.50
February 9th 1864 Subpoenas returned by
Constable Mark Bailey served by reading to
W. R. Bruce, A. G. Porter, Bezer Benton,
David Stanard, Hiram Sheer, A. M. Olmstead
M. A. Key, N. T. Moulton, , Wm J. McKey
G. R. Ames, James Winters, Wm Phillips
J. C. Okey, Andrew Winters February 8th 1864
Fees, Service $1.75 Mileage $4.30

February 9th 1864 9 o'clock A. M. Parties
appear for and proceed to trial. Defendant
by his attorney moves to dismiss suit for
want of sufficient Bond, also because the
complaint and summons served in debt
and consequently should be separate cause of
action and not a joint indebtedness.
The Plaintiff by his attorney dismisses the suit
against all of the defendants except Lewis
Grube and the Court proceeds to try Lewis
Grube for obstructing the highway on the
State Road from Granda Tour to Lasalle
in the town of Westfield in said County.
W. R. Bruce, David Stanard, A. G. Porter,
G. R. Ames, Wm Phillips, J. C. Okey, Hiram
Sheer, A. M. Olmstead were sworn and examined
on the part of the complaint, Samuel Scammon
Edward Scammon Luther Scammon were
sworn and examined on the part of the
defence. After hearing the evidence in the
cause it is considered by the Court that the

said Plaintiff have and recover of the said defendant Lewis Grube the sum of Twenty Five dollars for his demand against the said defendant with the costs of suit herein taxed at eleven dollars and ninety five cents It is also considered by the Court that the said Plaintiff pay the sum of seven dollars and five cents Constables costs and for witnesses fees for witnesses not called upon to testify and also for fees for subpoening witness as summoning parties who were dismissed at the commencement of this trial.

The following witnesses claimed fees as taxed to the defendant W. R. Bruce, David Standard A.G. Porter, G. R. Ames, William Phillips, J. C. Okey, Hiram Greer, A.M. Olmsted

The following witnesses claimed fees and which were taxed to the Plaintiff, James Winters, Andrew Winters

The following witnesses subpoenaed were taxed to the Plaintiff in this cause Bezer Benton, M.A. McKey, N. F. Moulton, James Winters, Andrew Winters

1864. February 24th the abovenamed defendant with Rufus B. Berry as his security filed his bond for an appeal to the Circuit Court which Bond was approved and appeal granted

March 11th 1864. Bond, Transcript and all the papers in the case this day filed in the office of the Clerk of the Circuit Court of the County of Bureau and State of Illinois.

Certificate

State of Illinois }
Bureau County } ss I David Rude a Justice of the Peace in and for the said County do certify that the foregoing Transcript is truly copied from the files and books of my office.

In witness thereof I have hereunto set my hand and seal this the 11th day of March A.D. 1864

David Rude J.P. Seal

2d Certificate

State of Illinois }
Bureau County } ss

I David Rude a Justice of the Peace in and for the said County do hereby certify that the foregoing Transcript and the papers herewith being Eight in number and being numbered from one to Eight inclusive contain a full and perfect statement of all the proceedings before me in said cause.

In witness whereof I have hereunto set my hand and Seal this 11th day of March A.D. 1864

David Rude J.P. Seal

Appeal Bond.

State of Illinois, Bureau County ss.

Know all men by these presents that we Lewis Grube and Rufus B. Berry are held and firmly bound unto David Nichols in the penal sum of Seventy Three dollars and ninety cents lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs and administrators jointly severally and firmly by these presents

Witness our hands and Seals this the 24th day of February A.D. 1864

The condition of the above obligation is such that Whereas the said David Nichols did on the 9th day of February A.D. 1864 before David Rude a Justice of the Peace for the County of Bureau recover a judgment against the above bounden Lewis Grube for the sum Twenty Five dollars and Eleven dollars and ninety five cents costs from which judgment the said Lewis Grube has taken an appeal to the Circuit Court of the County of Bureau aforesaid and State of Illinois. Now if the said Lewis Grube shall prosecute his appeal with effect and shall pay whatever judgment may be rendered by the Court upon dismissal or trial of said appeal then the above obligation to be void; otherwise to remain in full force and effect

Lewis Grube [Seal]

Rufus B. Berry [Seal]

Approved by me at my office this 24th day of February A.D. 1864

David Rude J.P.

Int. Rev. 50 cents

Appeal Summons

Whereupon Summons issued out of said Court in the words and figures following, to-wit;

State of Illinois }
Bureau County } ss. The People of the State of Illinois

To the Sheriff of Bureau County, Greeting:

We command you to summon David Nichols personally to be and appear before the Judge of the Circuit Court in and for said County, on the first day of the ensuing August Term thereof, to commence on the second Monday of said month, at the Court House in Princeton, to answer unto Lewis Grube upon an appeal brought into our said Circuit Court by the said Lewis Grube from a Judgment lately rendered before David Rude Esquire, against said Lewis Grube and in favor of the said David Nichols for 25 $ and Costs.

Herein fail not, and have you then and there this Writ.

In testimony whereof, I have hereunto set my hand and the Seal of said Court at Princeton, this 14th day of March A.D. 1864

L. S.

Geo. M. Radcliffe Clerk

By Cairo D. Trimble Deputy

Which said Summons was returned into said Court endorsed as follows, to wit;

Return

I have served this Writ this 26th day of May 1864 by reading the same to the within named David Nichols

Silas Battey Sheriff
By Mark Bailey Deputy

On this 30th day of July A. D. 1864 the Hon. M. C. Hollister Judge of the Circuit Court of Bureau County, in the State of Illinois, filed in the office of the Clerk of said Court the following order, to wit;

Ottawa July 30th A. D. 1864

George M. Radcliffe Esq.

Dear Sir,

At the solicitation of yourself and others, I have concluded to put off the Aug. Term of Court, and to hold a special Term on the 3d Wednesday of September A. D. 1864.

It is therefore hereby ordered that a special Term of this Court be held on the 3d Wednesday of September A. D. 1864 at the Court House in Princeton, in said County, for the trial of such business as may be brought before it, commencing at 10. o'clock A. M. of said day;

Pleas before the Hon. M. E. Hollister Judge of the Ninth Judicial Circuit of the State of Illinois, at a Special Term of the Circuit Court within and for the County of Bureau in said State begun and holden at the Court House in Princeton in said County of Bureau on the third Wednesday in the month of September (being the twenty-first day of said month) in the year of our Lord one thousand eight hundred and sixty four

Present Hon. M. E. Hollister Judge
George M. Radcliffe Clerk
Silas Battey Sheriff
and David P. Jones States Attorney

David Nichols
vs. Appeal
Lewis Grube

Now this cause being called for hearing, it is ordered by the Court that the same be set for hearing on Wednesday morning of the third week of the present Term of this Court.

And on the 15th day of said Term Ordered that Court adjourn until Court in Course

Pleas before the Honorable Madison C. Hollister Judge of the Ninth Judicial Circuit of the State of Illinois, at a Term of the Circuit Court within and for the County of Bureau in said State, begun and holden at the Court House in Princeton in said County of Bureau in said State on the second Monday in the month of December (being the twelfth day of said Month) in the year of our Lord one thousand eight hundred and sixty four

Present

Judge

Henry F. Royce Clerk

Moses G. Severin Sheriff

and Charles Blanchard States Attorney

And now on this first day of said Term are present as aforesaid, but the Hon. M.C. Hollister Judge of said Court is not present; and thereupon the Court stands adjourned at sundown of said day, until tomorrow, according to the Statute in such case made and provided

15

On the Second day of said Term, to wit:
Tuesday morning 9 o'clock December 13th 1864
Court met pursuant to adjournment
Present Hon. M. C. Hollister Judge
Henry F. Royce Clerk
Moses G. Lovenin Sheriff
and Charles Blanchard States Attorney

And on the Third day of said Term, to wit:

Wednesday morning 8 1/2 o'clock December 14th A. D. 1864 — Court met pursuant to adjournment — Present same as on Seconds day —

And

David Nichols

vs. Appeal

Lewis Grubel Appellee

Now come the parties aforesaid, the Plaintiff by Taylor his attorney and the defendant by Eckels and Kyle and Stipp and Gibons his attorneys and by agreement of said parties it is ordered by the Court that this cause be set for hearing on Thursday afternoon of the second week of the present Term of this Court.

And on the 10th day of said Term, towit: Thursday morning 8 o'clock December 22d A.D. 1864 Court met pursuant to adjournment - Present as on the Second day -

David Nichols

vs Appeal.

Lewis Grube et al

And now come the parties aforesaid by their attorneys aforesaid and on motion it is ordered by the Court that a Jury be called herein to try the issues in this cause

And a jury comes of twelve good and lawful men, towit: E. M. Johnson, Moses Forbes, William R. Olds, William Hudnut, George F. Whitley, Charles Shepherd, J. J. Newton, George E. Dorr, William H. Mason, Amos Fisher, Nathan Adams, and J. B. Shultz, who are duly elected tried and sworn well and truly to try the issues herein, and a true verdict render according to the evidence

17

And on the 12th day of said Term, to wit, Saturday morning 8½ oclock December 24th A.D. 1864 - Court met pursuant to adjournment - Present as on the second day.

David Nichols

vs. Appeal.

Lewis Grubes Apkt.

And now comes the parties aforesaid by their attorneys aforesaid and also the Jury with their verdict herein.

And the Jury by their verdict and on their oaths do say. "We the Jury do find the defendant guilty and assess his fine at Seventy five dollars.

Whereupon the defendant moves the Court for a new trial herein

On the 16th day of said Term, to wit:
Thursday morning 8 o'clock December
29th A.D. 1864 - Court met pursuant
to adjournment - Present as on Second day

David Nichols
vs. Appeal.
Lewis Grube Apltee

And now come the
parties aforesaid, by their attorneys aforesaid
for argument of the defendants motion for
a new trial herein.

And said motion coming on to be
heard, after argument of counsel, the
Court being now duly advised in the
premises, it is considered by the Court
that the defendants motion for a new trial
herein be overruled, and so ordered

It is therefore further considered and
ordered by the Court that the Plaintiff
have and recover of the defendant Lewis
Grube the said sum of Seventy Five
dollars assessed as aforesaid, together
with all his costs and charges by him
in and about his suit in this behalf
expended, and that he have execution
therefor.

Whereupon the defendant moves the
Court for an appeal herein to the Supreme
Court of the State of Illinois; which
appeal is allowed on defendant entering

14.

into bond to said David Nichols, conditioned as the law directs, in the penal sum of Five Hundred dollars with Luther Scammon and Edward Scammon as sureties; said Bond and the Bill of Exceptions herein to be filed with the Clerk of this Court, within thirty days from this date

Bond

Which said bond duly filed herein within the rule of the Court is in the words and figures following, to wit:-

Know all men by these presents that we Lewis Grube, Luther Scammon and Edward Scammon of the County of Bureau and State of Illinois are held and firmly bound unto David Nichols of the same County and State in the penal sum of five hundred 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 24 day of January A.D. 1865.

The condition of the above obligation is such, that whereas the said David Nichols did on the 29th day of December A.D. 1864, in the Circuit-Court, in the Circuit Court in and for the County and State aforesaid, recover a judgment-against-the above bounden Lewis Grube for the sum of seventy five dollars, debt- and one hundred and seven & 20/100 dollars costs from which judgment-of the said Circuit-Court the said Lewis Grube has prayed for and obtained an appeal to the Supreme Court of said State. Now if the said Lewis Grube shall duly prosecute his said appeal with effect and shall moreover pay the amount of the judgment- costs, interest and damages rendered and to be rendered against-him, in case the said

judgment shall be affirmed in the said Supreme Court, then the above obligation to be void, otherwise to remain in full force and effect.

Taken and entered into before me, at my office, in Princeton this day of January. A.D. 1865

Lewis Grube (seal)
Luther Scammon (seal)
Edward Scammon (seal)

And, to wit: on the twenty fifth day of January in the year of our Lord one thousand eight hundred and sixty five. and within the rule of said Court came the Defendant aforesaid and filed his Bill of exceptions herein, by his attorney aforesaid, in the words and figures here following, to wit:

State of Illinois } In Circuit Court
Bureau County } ss. December Term A.D. 1864

David Nichols
vs
Lewis Grube } Appeal

Be it remembered, that on the 10th day of the December Term of the Circuit Court of Bureau County, State of Illinois being the 22nd day of December, the same being a judicial day, and said Court then and there judicially sitting, this cause came on for trial and that on the trial the plaintiff to maintain the issue on his side, called George Ames who having been sworn as a witness in behalf of the plaintiff testified as follows.
I have lived in the town of Clarion for eighteen years. I have known Lewis Grube the defendant for twelve or fourteen years. He has a farm there. I live North west from Grube. I know about a State road. Wm Silas R Bruce and Mr Beard went and laid out a road. Berton Ayers was not along.

They claimed to be commissioners, & dont exactly recollect the time. They got through laying out the road on Saturday or Monday morning. I took my horse and followed the stakes down through the road, until it struck the Homer road. The evidences of the road were three stakes some ten or twenty rods apart, one in the center, I saw the stakes through from where I struck the road, the road went through an 80. owned now by the defendant. People commenced travelling within the limits of those stakes to LaSalle and Peru, when it was dry, when it was wet, they styed off and went around the sloughs. There was no sloughs one the defendants 80. There was travel on that 80 until it was fenced up. It was travelled on over the 80 for 8 years and probably more. In the course of events, after we commenced travelling there was a diverging But the travel over this 80 for eight or ten years was a great deal. They travelled from Rock River & from Dixon, Besides the inhabitants of Bureau County, travelled over this road. There was no other. Except the Homer Road. This was the only thorough fare to get to Peru and LaSalle. The authorities of the town of Clarion worked the road. I worked out my road taxes. There was no other road worked as much as this road. I worked this road myself. I worked out my road tax several times. The first work was done soon after the road was opened. On this 80 it was high ground.

and there was no work done. They have worked out taxes up to this 80. There were bridges built North of this 80. It was eight or nine years since the obstruction was made on this 80. The forty Grube lives on does not come much short of 80 rods of the Road. Grube is a farmer. I know that Grube with all the other people travelled that road when going to LaSalle. I don't know that I ever saw Grube work on this road in Westfield. He has worked on this road within half a mile of Westfield in the Town of Clarion. Grubes 80 comes with the 80 that is obstructed he fenced out a four rod road in the Town of Clarion. This Town road has never been opened There is no public road from where he has obstructed the road to go to LaSalle. There were three bridges on nigger Creek. I saw a man at work on the bridge over nigger Creek. The bridge was originally built by private contribution. The plaintiff asked the witness what the man said who was working at the bridge and what the witness said to him? to which the defendant by his counsel objected which objection was overruled by the Court and the defendant then and there by his counsel duly excepted. The witness answered. I asked McCulloch whether he was giving his work or working his taxes and he said he was working his taxes. The bridges were made of logs & planks. They were of the character of bridges at that time. From the obstruction of Grube there is no road opened to get through on

any other road. We consider this road the most important in the County. It is nine miles to Mendota. about twelve miles to LaSalle A number of them bought the land and fenced it up. some two years ago or less. he said he would open it rather than have a fuss. There had been constant travel for nine years through this 80. The travel over the road was right on the line of the road. "as near as may be" up to the time when it was fenced in the marketing season. there was 20 or thirty teams a day over this road. This road where it is obstructed is four miles north of the plank road I saw Grube work out his taxes North of the obstructed part within two or three years. Grube told me he petitioned for a bridle road from his forty in Clarion to the state road. Defendant objected to witnesses testifying any thing about said petition. without first showing that said petition was lost. the court overruled defendants objection, and the defendant by his counsel then and there duly excepted Witness proceeded. he told me the commissioners had laid him a road from his forty to the state road. Fessenden owned the ground between Grubes forty and the state road. Fessenden's eighty was unoccupied land. and he paid he was afraid some person might buy it and shut out from Market. Nichols lives in the town of Westfield. where the road is obstructed. He has a farm there which he has occupied for ten years. I never saw

him vote. He is an American citizen over twenty one years old. This suit was commenced about last Spring.

Cross examined

Dont know whether Nichols is a voter. There was Winslow R. Bruce and Berton Ayers and Mr Beard were the Commissioners. It was Baird. Berton Ayers was not along, There was none of them paid that they were commissioners that I heard. There was nothing said about their being commissioners. I was not near enough to speak with them. They were acting as men laying out a road. They drove stakes. I did not see them. I think no one ever travelled on this line before it was laid out. Before that we travelled west. The whole Country was open Prarie. when the road was laid out. After the road was laid all the travel went on the course of the new laid road. For a year and a half after the road was laid we travelled on this road. There was a beaten track along the line of this road. There was a beaten track over this eighty of Grubes I go to market at Lasall this year. Eight miles from my place to Mendota. twelve miles to Lasalle Some four or five years ago the travel went around this 80. and went through Commmons field. The Homer road leads to Lasalle. There is no way to get to the Homer Road. There is no road except to go through the fields. The plank road goes through Arlington.

Those who live at Lamoille go the Plank Road. The bridge south of town of Clarion was built by the town authorities, on the old state road. This was open Prarie when this road was laid I was a half mile away and could not recognize the men at work in laying out the road. I did not speak with them. I would not swear that Bruce and Baird laid out the road, except I understood they were appointed commissioners I dont know whether these bridges were repaired by the town authorities. The first bridges were built by private individuals, some fifteen years ago. I worked my taxes on this road, where Grube has fenced it out in Clarion. Mc Cullock said he was working out his taxes on this Bridge. McCullock told me he was going to Australia I ~~was~~ ordered me to me to work on this road not not one hundred rods from this obstruction, some fourteen years ago. The Officer was with me. I dont know that Lower was authorized to order us to work. I have a siding on the Rail Road to to ship Grain to Mendota or Chicago. The travel for grain has been changed to Mendota, for coal. the old road was necessary. The old state road was discontinued in LaSalle County. The Plaintiff then called Bezer Benton who being duly sworn testified as follows.

Since 1848 I have lived at Perkins Grove. I know this state road I went over it in the fall of 1848. I went through from Perkins Grove to LaSalle. I know the

defendant. know where he has obstructed it.
There were marks by travel and stakes. one
and a half mile from Perkins Grove we found
stakes which could be followed. At that time
it went into the Troy ~~Grove~~ Road. Dont know
when and by whom stakes were placed there.
think they were not there long. The track was
between the outside stakes. In 1850 I went
to Lasalle. There was a very good track
There was considerable travel over the road
It continued a highway from the Grove to
Lasalle, until the establishment of Mendota
as a market. I was in Lasalle four years
The road was not open all the way. when I
returned. The first obstruction I found was
at Reiths. I live about seven miles from the
obstruction. There was a piece of the stake
road, which was not opened on Bruces farm
I was commissioner the year I went to Lasalle
I have seen persons work on the road five
miles North of Grubes. we let a jole to build
a bridge on this road. This was toward the
North line of Clarion. I conversed with
Defendant about opening this road. After
going to my farm, I travelled this road up to
1860. in the year 1859 or 60 I travelled on this road
every week. The road is a very important
road. It has always been. The Peru Plank
Road is so bad that it is almost impassible
to get to Peru. and ~~as~~ it is from one and a half
to two miles nearer by the State road than the
plank road. I assisted in building the bridges,

The Country was unsettled. LaSalle County subscribed money to plank these bridges. These bridges were used by the Public. There was no other road travelled as much as this. The road is called the Grand de Tour and LaSalle State road. I have no doubt, but Grube has obstructed the road on the line where it was laid. Dont know that Nichols is a voter

Cross examined

I lived at Perkins Grove in the Spring of 1848. I lived from fifteen to seventeen miles from LaSalle, from Mendota some nine miles. Live one mile from the state road. The road has been obstructed at Grubes for some five six seven or eight years. The point of obstruction is in the town of Westfield, Defendant lives in the town of Clarion. The 80 on which the obstruction is placed, was unoccupied, vacant land, until it was inclosed by the defendant. Dont know where defendant purchased the land. think it was as early as 1857. There is a town road fenced out and worked from the place where the obstruction is placed down to the corner near Reiths. The travel goes on that road Never heard complaints of any account about Grubes obstructions until after the road was fenced South of Grube.

The plaintiff next called David Tannard who being first duly sworn testified as follows. I live in Clarion Township - Have lived there twenty five years. In 1847 in August or September

helped to plake the road Grande Tour to LaSalle. I have travelled the road from one end of it to the other. The road is now opened through the Town of Clarion. There is no communication open through the Town of Westfield. It extends or did extend about six miles through Westfield. I have been over the 80 of Defendants. we commenced it travelling it immediately. There was a visible and plain track over it in ten days after it was staked out. The public traveled this road a number of years before it was obstructed. The travel varied in different seasons of the year. The State road had the heft of the travel.

Cross Examined Winslow R. Bruce and Daniel Baird were acting as commissioners laying out the road Berton Ayers was not along, and took no part in laying out the road. The land on which the obstruction is placed is in the town of Westfield. It was vacant praria until fenced up by the defendant. Dont know when defendant bought the land. Think it has been fenced up some seven or eight years. There is a town road running North and South for about a mile from the place where the obstruction is placed.

The plaintiff next called Albert A. G. Porter who being duly sworn testified in substance as follows: I live at Perkins Grove. Have lived there for about twenty years. Was present when the road was laid by the commissioners. I travelled the road for some years after it was

laid. The track was on the line of the survey
It was as well marked as prairie roads usually are.
The road was a very important one. I live some
seven miles north of this obstruction. I have
worked on the road in Clarion, every year
since it was laid out, more or less. I think
portions of work done in Clarion was by public
authorities. In Westfield there was work
done by private enterprise. I first found the
road obstructed at Grubes field, from Grubes
until we could get on the old road was
about two miles. The state road ran through
Cammonis field. The last trip I made
through on the line of the road was five or
six years ago. My teams were through there
this fall. I believe there is a way to get
through.

Cross Examined

I surveyed this route. Winslow R. Bruce
and Daniel Baird acted. Berton Ayers was
appointed but did not act. There is a way
through there yet. by which teams get through.
Never heard of any complaints about Grube
until after others commenced to fence. It may
have been obstructed at Grubes, eight or
nine years. The importance of this road
is not now so great as formerly. Their going
for coal may generally though not always go
on the state road. But little trade from our
neighborhood with Labelle. At the time
the road was laid the county was unsettled
The Eighty in dispute was vacant prairie
I think the defendant inclosed it soon after he purchased it.

The plaintiff next called John Oakey who being sworn testified in substance as follows I live about one quarter of a mile from the State road in Westfield. Have lived there seven years. and in the neighborhood since 1848. Live about half a mile from the obstruction Mr Grube first obstructed the road. Dont know what year the fence was put up. The road was travelled for some time after it was laid out. The road was open and travelled across defendants land eight or nine years before it was obstructed A road was laid out by the Town authorities of Westfield for a mile North and South road. It is seven years since I returned. It was then fenced. The travel turned off from the old road. when the defendants obstructions was placed. and went down the North and South Road. There was also an east and west road laid out by the Town authorities of Westfield. The public were satisfied with the one mile of the change. that is with the mile North and South. I did not see him fence it up. Nichols has lived in Westfield ten years & has voted. The Defendant by his counsel objected to the plaintiffs proving himself an elector. by showing simply that he had voted. the court overruled the objection and the defendant then and there duly excepted.

Cross Examined

For seven years I have lived within a half a mile of this obstruction. There was no objection to the obstruction until after it

was obstructed further South. The people were always satisfied with the road known as the one mile road. that is the road running South from the place where the objection is placed. There are two bridges on this one mile road. It is regularly worked by the Town Authorities. It is laid out on lands of defendant and my self. It is fenced out. The difference in distance in the travel between this new road and the old state road is simply the difference between running diagonally over the eighty acres of the defendant and running on a straight line south for a mile and then running directly east to the point where the old road crossed. I never heard any objection to the Grubes obstruction until after the road was obstructed further South. The public acquiesced in in the obstruction and accepted the one mile, North and South Road in its place.

Re Examined

This East and west road has been laid for twelve or fourteen years. It goes out to the County line road.

The plaintiff next called Winston R Bruce who being duly sworn on oath testified substantially as follows. Acted as one of the Commissioners that laid this road. acted under act of the Legislature. approved March first 1847 on page 96 of Session laws of 1847. live six miles from the obstruction. laid the road where the fence is. Daniel Baird was with me.

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Berton Ayers was not with us when we laid the road. It was tracked the same season it was laid. It was travelled eight or nine years probably more. before it was obstructed. The travel increased up to the time Mendota was established. The establishment of Mendota did not do away with the necessity of the road. The further South on the road the greater damage. I had a conversation with Grube. I asked him why he fenced the road sometime after the fencing. He said they had fixed the road around to accommodate the people for the present. It was the same year or the year after. He fenced a large field. He said when we get able we will fence it out. He lived in Marion before he owned the 80 in Westfield, on which the obstruction is placed. He got up a petition to me to open a private road from where he lived to the State road. This was some four years before the obstruction. Plaintiff by his counsel then asked the witness to state what road the petition called for. Defendant objected to plaintiff showing the contents of the petition by parol without producing the petition or showing that it was lost. or out of the plaintiffs power to produce. which objection was overruled by the Court and the defendant by his counsel then and there duly excepted.
The witness then stated in answer to the question that the petition called for a road. running from where defendant lived.

to the State road. He received it and passed it over to the next board. who surveyed the road and laid it out. Defendant said he wanted the road for fear they would fence him up and cut him off from the State road.

Cross Examined I acted as one of the Commissioners to lay this road. Berton Ayers went a short distance with us from LaSalle but turned back because he said he was sick; he did not locate any part of the road while he was with us. Grube said they had fixed the road around so as to make it good as passable, and when we get able we will fence it out. I will not swear that he used the word State road, we were in conversation about the State road.

The plaintiff next called James Winters who being duly sworn testified in substance as follows. I live within a mile of this road, for ten years. that was in 1860 & 61. when it was fenced up. I lived within a mile and a half of it. He was making steak lane fence that runs across the road. He was then in possession of the eighty. when I came along, the fence was just up. I don't know what year. I did not suppose there would be any difficulty. He said the North and South road was laid out. that same North and South Road. continued over the State road. I knew it was a State road. and so did the defendant. He used to use it altogether in going

to market. He has a private road. He bought the 80 between his forty & the road and fenced the State road in Clarion The only inconvenience I suffered by the road being shut up was in going to LaSalle. I worked within 80 rods of the obstruction Martin Carley Mr Olmstead and Mr Miller are the commissioners of highways of the town of Westfield. Olmstead tried to get the others to open the road, but they never did it. I know of no other road accepted by the Public except this road. Every body is dissatisfied. except those who own the land there is no ground that can be made as good or direct as the old ~~road~~.

Cross Examined. The place where I worked on the road was in the town of Clarion never worked on the road in Westfield. I have worked north and south of obstruction, that north by town authority that south I donated. the majority of the Commissioners of highways in Westfield have refused or neglected to open the road. This ED did not require work. Had a conversation with defendant about a State road running across his 80. he got a pa petition to have that part of the State road vacated that run across his 80. He said the petition had not got in in time to have it vacated before the Legislature adjourned.

Hiram Shew was next called by the plaintiff, who being sworn testified in

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substance as follows. I live two miles north of the Obstruction of Grube. I came there in 1860 It was open when I came there. I have worked on the road every year within half a mile of the Obstruction. I dont know that the public ever acquiesced in the travel on the other road. There is no passable route from the place of Obstruction. South the ground is bad in places the old state was always passable. I regard it an important road. There has always been dissatisfaction since Obstruction William E. Phillips being next called by the plaintiff was sworn and testified in substance as follows. I live within 80 rods of the Obstruction for nine year the State road was fenced long before I bought land there. I was path master in Westfield the Spring this Obstruction was built. I had not worked the road at the time. it was fenced. I fenced the road out. Defendant got up a petition to vacate a part of the road. He told me it was to vacate one mile of the road this was before he fenced his eighty. It was to send to Springfield. The land was broken. I heard they did not accomplish any thing with the petition. I saw Grube putting up that line fence across the road. I was building fence close by. I have worked the road South of the Obstruction as an Officer.

Cross Examined. It was after the Obstruction was placed in

the road. that I worked it. I worked at nigger creek). This was in Scammons field I dont know that Grubes name was on the petition. Nichols said he got up the petition for Grube, Nichols is the plaintiff I signed the petition. Defendant asked witness who carried the petition to the Post Office. Plaintiff objected to the question. Court sustained the objection and defendant by his counsel then and there duly excepted.

Plaintiff next called Sm Olmstead who being sworn testified in substance as follows. I live on section 25, in Westfield I was highway commissioner in 1863. I have lived on that place six years. Know Grubes premises. I dont live within five or six miles from him Never travelled the road before it was obstructed. served notice on the defendant to remove the obstruction, served it at the time it bears date.

served it by delivering copy to Defendant. Witness did not know of any suit for the penalty commenced by the Town and if there had been one and satisfied he would have known it Defendant objected to the introduction of the notice Court overruled the objection and defendant by his counsel duly excepted. Premises described in notice are the same where the obstruction is. Plaintiff here rested his case Defendant called Edward Seamon who being duly sworn testified in substance as follows. I have known the place where the obstruction is for ten years The old State road is obstructed in westfield for about 6 miles. The obstruction at Grubes has been there for five years at least I never heard of any objection to the obstruction at Grubes until after the road was obstructed south of Grube. The water removed and carried away the first bridge over nigger creek the North and South road is a laid out road laid out by the Town authorities of the of the Town of Westfield. and worked by them it is a good road. The east and west road is also a laid out road and worked by the Town authorities

Cross examined There are two pairs of bars on the east & west road. The Defendant next called Edward Grube who being sworn testified in substance as follows — I am a son of the defendant. I have lived in the neighborhood

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of the obstruction some twelve years. The obstruction was placed there in 1856. Father bought the 80 in question in 1854 and broke it up the same year and fenced it the next Spring the road was plowed up in 1855. It was open prairie when Father bought it. I have heard Phillips testimony. The bridges spoken of by him I should think are from two to three rods east from the track of the old road We live in the Town of Clarion. There has been work done on the east and west by public authority I worked on it by the Pathe masters authority. Heard no complaints about obstructions at Grubes until after the obstructions were put on the road South ways. North and South road. - a good road.

Cross Ex This State road laid over the 80 when father bought it. we hauled our grain over it

The Defendant next called James Hoover. who being duly sworn testified in substance as follows. I know about old road. at the point of obstruction. Have lived there since 1854. Line of travel since 1859 has been on the new road. North & South road. Never heard of Complainants obstruction until 1859. Never traveled the road in LaSalle County. The defendant then introduced in evidence the act of the General Assembly of the State of Illinois, approved March 1st 1847 Session Laws of 1847 page 96 in which among other things it is provided (as follows:)

Act of Legislature

An Act to locate, re-locate, vacate and establish certain State roads. in force March 1, 1847

Sec. 1. That Berlon Ayres, of LaSalle County William. B. Bruce, of Bureau County and Daniel Baird, of Lee County, be, and they are hereby appointed commissioners to view, mark, survey and locate a State road from the town of LaSalle, termination of the Illinois and Michigan canal to Grand de Tour, on Rock river in Ogle County passing through Perkins' Grove, so as to strike the line between Stephen Perkins' and Jacob Bolegé's farms, thence passing through Palestine Grove to mills known as Dexter's mills, thence to the terminating point: Grand de Tour.

Sec 33. It shall be the duty of each and every board of Commissioners appointed by this act, to view and ascertain the most eligible route, and make as direct and straight location shortening the distance, as practicable, with a view to the erection of bridges across streams and water courses and the permanency of the road: and in every case they shall ascertain, as far as practicable, where damages are or will be claimed by individuals through whose lands any of the roads hereby authorized may run, and report the probable amount thereof, and the names of the owners of such lands and property, to the County commissioners' court of the County in which said lands may be situated at the time of

making their report. as now required by law: the act amending the general road law passed at the present session.

Sec 34. Said commissioners shall return a plat with the courses and distances, with such remarks in their report as they may deem material in relation to the road, for the information of the court and the interest of the public, returning a plat to each commissioners' court, of the whole road through which the same may pass, giving an entire view of the location of the whole road. which shall be filed and recorded.

Sec 35, It shall be the duty of the commissioners in each and every case, appointed in this act to locate the road or roads authorized and required by this act as soon as practicable, without unnecessary delay: and they shall report to the commissioners' courts as soon thereafter as convenient, and each and every road shall be located and reported at farthest by the first Monday in December A. D. 1847.

Sec 36. In all cases the compensation shall be as follows, viz: to a commissioner, one dollar per day: to a surveyor, two dollars: to chain-men, axemen and other hands, fifty cents per day, for each and every day necessarily

employed, exclusive of incidental expenses for provisions, forage and the hire of teams.
They shall keep an accurate account of the time employed and the amount of expenses incurred, the person to whom due, and certify the same to the court or courts as the case may require: the whole being added, each county shall allow and pay the amount due, in proportion to the distance or length of road in each County as contemplated and certified by the road commissioners a full exhibit being made to each court, which allowance shall be made by the respective courts.

Sec 37. It shall be the duty of each and every commissioners' court, through whose county any road herein authorized and established may pass, to cause the same to be opened, worked and kept in good repair, as far as the road labor of the hands in the County and the means of the county will justify and extend.

Sec 38. The commissioners court of Christian County shall, without further delay, allow and pay to the individuals who may hold the certificates of indebtedness, the proportional part of the cost and expenses, as certified and signed by the board of commissioners who some years since extended the location of the Darwin and Charleston turnpike from Charleston to Springfield through the Counties of Coles, Shelby, Macon, Christian

and Sangamon. The collector of taxes for said County is hereby authorized and required to receive said certificates of indebtedness, signed by said Board of commissioners, when presented, as far as the County revenue due from any individual shall extend on said County of Christian and the amount thereof, on presentation by him to the Court, shall pass to his credit, and subsequent collectors shall receive them in like manner as above stated.

Sec 99. In all cases of road commissioners or viewers appointed by the State or any county commissioners' court, it shall be lawful for them to be sworn in by a justice of the peace or any clerk or other officer authorized by law to administer oaths.

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The Defendant introduced the platt marked "Exhibit" to which all of the foregoing witnesses referred in their testimony and which was admitted by the plaintiff's counsel to be correct as showing the land of said defendant and the portion of the road claimed to be obstructed and the different roads, lands and creeks referred to in said testimony. This was all the testimony in the cask. The plaintiff by his counsel upon said evidence moved the Court to instruct the Jury as follows, which he did

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Plaintiffs Instructions

State of Illinois } ss
Bureau County } Circuit Court Dec Term 1864

David Nichols }
vs }
Xavier Fagle } The Court instructs the Jury for the plaintiff. } the plaintiff

1st

The legality and existence of a public highway may be established and proven either by dedication or by laying out the same in the manner prescribed by the Statute. Proof of the existence of a public highway by any one of these methods is sufficient,

Given

2d

The voluntary use of a way by the public with the ~~unqualified~~ assent of the owner of the soil, coupled with proof of the actual recognition and repair of such way by the proper authorities, is sufficient to establish such way as a public highway.

Given

3d

To show a dedication of land, on the part of the owner for the purposes of a public highway, it is not necessary to show positive acts and declarations made by him. His assent to the use of his land for a highway may be express or implied. And a dedication by him may be inferred from the length of time during which such highway is used by the public and from his acquiescence in such use, it being the law that such owner is presumed to know of and notice such use of a way over his land.

Given

4th

If the Jury believe from the evidence that a public road was staked or laid out from LaSalle to Grand de Lour in 1849; that it was used by the public as a road until obstructed by the defendant; that while so used it was worked and kept in repair by the proper public authorities and that the owner or owners of the land over which said road passed assented to such use. then such road is a legal public highway. And in determining the question of assent the Jury may infer such assent from the acquiescence of the owner or owners in such use of their land if it appear from the testimony. that they did so acquiesce.

Given

5th

If the Jury believe from the evidence that the land upon which the defendant is alleged to have placed an obstruction, was used as a public highway for ten or fifteen years with the knowledge of and without objection from the owner or owners of said land during that time, then the Jury may infer from such fact that such owner or owners acquiesced in such use. And as a matter of law. it is presumed that such owner or owners had such knowledge.

Given as qualified by defts 11th Instruction

6th

If the Jury believe from the evidence that a public road was laid out over the place of obstruction in question, that it was used and traveled by the public as such. and that it was recognized and kept in repair as such by the public

Given

authorities, then the proof of these facts furnishes a legal presumption, liable to be rebutted that such road is a public highway.

6th Given as qualified by defts 11th instruction

If the jury believe from the evidence that there was a road used by the public for the purpose of public travel, across the land alleged to have been obstructed by the defendant, and that the owner or owners of said land permitted the public to use said road for such a length of time that the public accommodation and private rights would be materially affected by an interruption of the enjoyment thereof, such owner or owners could not legally fence the road up and prevent the further use of it by the public.

8th

If the jury believe from the evidence that the public acquired the right to use the land alleged to have been obstructed in this suit, or any part of it, as a public highway before the defendant became the owner of or came into possession of said land, then the defendant took said land subject to all the rights which the public had in said lands at the time he obtained the same.

Given

9th

Proof of a partial or transient non use of a highway by reason of the travel being diverted to other roads, is not sufficient to establish an abandonment of such highway.

Given

10th

If the jury believe from the evidence that the defendant did fence up or otherwise place any obstruction in the road in controversy, in the Town of Westfield, County of Bureau and State of Illinois, prior to the commencement of this suit, and that said road is a public highway, and that within eighteen months prior to the institution of this suit, said defendant suffered ~~said~~ obstruction to remain after having been ordered to remove the same by a commissioner or overseer of highways of said Town; that the plaintiff is an elector of said Town and did not commence this suit until the expiration of sixty days after the service of such notice & that suit to recover such penalty was not commenced by said Town or by the officer or agent of said Town whose duty is to prosecute for the same, within said sixty days, then the jury are instructed to find the defendant guilty and to assess the penalty at a rate not exceeding one dollar per day for each day that the evidence, if any may show said defendant after the service of said notice up to the commencement of this suit suffered such obstruction to remain as aforesaid, not exceeding the sum of one hundred dollars.

Given

51

11th

In order for the plaintiff to recover in this suit it is not necessary for him to prove the establishment of the highway in question by any Record or paper evidence of the laying out of said highway. If he can prove a road by dedication. If the Jury shall be satisfied from the evidence that the highway in question was opened and traveled through the premises of the defendant by the public for the space of eight or nine years and was during that time worked by the public authorities such facts raise the presumption that the same is a legal highway, and if the Jury shall further believe from the evidence that whilst the said highway was so opened, traveled and worked, that the defendant traveled & recognized the same as a public highway by causeing a private road to be laid from his dwelling house to connect with the said highway, by working on the same himself under the authorities of the Town by repeatedly useing the said highway himself in going to the LaSalle market, by petitioning the Legislature to vacate the same and by acquiescence in the public use of said highway for a number of years without objection if the Jury believe from the evidence that such facts have been proved they may infer from such facts a dedication by the defendant to the public of the land for said highway as the same passed over his premises and if

Given

51

the Jury do so infer such dedication. and they shall further believe that the defendant afterwards fenced up the said highway and suffered the same to remain fenced up after being notified by a commissioner or overseer of highways of the Town in which said obstruction is situate) to remove said fence and that he was so notified within 18 months prior to the commencement of this suit and the Jury shall further believe from the evidence that no prosecution was commenced against said defendant for so obstructing said highway by the Town in which said obstruction is situated or any officer or agent authorized to bring said suit for sixty days after the defendant was so notified to remove the said obstruction. and the Jury shall further believe from the evidence that the plaintiff was at the commencement of this suit on electors of said Town in which said obstruction is situated. and that he commenced this suit after the expiration of sixty days from the service of the notice on the defendant as aforesaid on the foregoing state of facts the Jury may find the defendant guilty. and assess a penalty against him in favor of the plaintiff in any sum not exceeding one dollar for every day during which he suffered the said highway to be obstructed after he was so notified to remove said obstructions as aforesaid not however to exceed in the aggregate one hundred dollars.

52

12 The question whether the plaintiff Nichols signed or circulated for the defendant Grube a Petition to the Legislature of Illinois to have that part of the highway running over the premises in question vacated, is not a question which the jury are to regard but they should discard the same entirely from their consideration in making up their verdict in this case.

Given

13 The jury are instructed that the plaintiff is at liberty to rely upon the establishment of the road in question either by the record or by dedication as he may see proper, and although the road in question may be called the State Road, still it is proper for the plaintiff to establish the same by dedication, and if the jury believe from the evidence that the plaintiff has established the road in controversy by dedication then they must find for the plaintiff notwithstanding the road is called a State Road and notwithstanding there is no record evidence of the same.

Given

14 If the jury believe from the evidence that the Defendant knew that the public used the land in question as a public highway across the eighty acres where it is alleged he has obstructed the same, and that at the time of such user the public claimed the same as a public highway and that he permitted the public so to use the same and assented thereto

Given

53.

and agreed to fence the same out for the purpose of public travel when able, all these facts are circumstances that may be taken into consideration by the jury in determining whether or not he had dedicated the same to the public and this notwithstanding the land may have been a part of the time vacant and unoccupied.

16.

An acceptance by the public of the road in controversy may be shown by proof of their use of it by travel. It is not essential to establish such acceptance that proof should be made that at the point of the alleged obstruction the same if it were obstructed was worked and repaired by by the public authorities. provided it appear from the testimony that the nature of the ground at the alleged point of obstruction was such as not to require such repairing. and that the public used such ground by traveling over it.

Given.

54

To the giving of which instructions the defendant by his counsel. then and duly excepted. . The defendant moved the Court to instruct the Jury. as follows which the court refused to do.

56

State of Illinois } Circuit Court December
Bureau County. ss. } Term A.D. 1864.

David Nichols }
vs } Appeal in Debt
Lewis Grube } for a Penalty & others.

Defendants Instructions Refused.

Third

Refused

The fact if proven that the Defendant worked on the road in question under the direction of the road officers on land not in question in this suit is not evidence of dedication by him of the land over which the road passess on another and distinct tract of land.

Fourth

Refused

The fact that the Defendant fenced out the road in question through a tract of land owned by him in the Town of Clarion in said County of Bureau is no evidence that he intended to dedicate to the public the land over which said road passes through another tract of the Defendant's land in the Town of Westfield where he fenced up said road very shortly after he became the owner of it. if such is the evidence before the jury.

Fifth

Refused

The fact if proven, that the public travelled over and used the road in question over the tract of land in question from about the year 1847 until about the year 1856 while said land was vacant and unoccupied, without objection on the part of the Defendant, is not evidence that the defendant dedicated the land over which said road passed

57

to the public. And the mere use of the Defendants land as a highway by the public, without objection by the Defendant for a period of less than twenty years, does not in law take the land over which it passes from the defendant and give it to the Public for a highway.

Seventh

Although the jury should believe from the evidence that the public had acquired a road over the land in question, Yet if the jury further believe from the evidence that the Defendant fenced up the road in question in 1856, or about that time, that at the same time he fenced out another road over which the public traveled for 5 or six years and acquiesced for that time in the alteration made by the defendant, and accepted the new route instead of the one so fenced up by Defendant, then the plaintiff cannot maintain this action for such fencing up, nor for the continuance of it.

Refused "

Smith

If the jury believe from the evidence that the Defendant placed the obstruction in question in the road in question in the year 1867, or before that time, then the plaintiff cannot maintain this action for continuance of that same obstruction.

Refused

Twelfth

Defendants Instructions.

Although the jury may believe from the evidence that the Defendant worked on the road in question under the direction of the Public Road Officers, that he petitioned

Refused

58

and had a private road laid out communicating with the road in question; that he petitioned the legislature to vacate the road in question that he paid when he fenced up that he would fence it out as soon as he was able. Yet if the evidence satisfies the jury that he said and did these things because he supposed the road to be a legal highway. then these things are not evidence that he intended to give or dedicate the land over which the road passed to the public.

13th "
Refused

Any thing which the evidence shows that the defendant did or said, because he believed the road in question was a legal highway or because he supposed himself compelled by law, is not evidence of an intention on his part to dedicate the land over which the road passed, to the public

59

to the refusing to give such instructions defendant then and there duly excepted The defendant further moved the court to give the following instructions which the Court did with the following qualification by the Court.

Given with qualification

The Court instructs the Jury on the part of the Defendant Grube.

Tenth

If the Jury believe from the evidence that the public acquiesced in the obstructions placed in the road in question, by the defendant and that the public accepted Town road spoken of by the witnesses as the north and South road in lieu of the road in question and that the public had the legal right to use said substituted road. and did use said road. Then the public have waived their rights in the defendants land at said point if obstruction and the plaintiff is not entitled to recover.

Given

qualification

Provided the Jury believe from the evidence that the "North and South" Road answered the same objects as the Road in controversy.

To the said several qualifications added to said instructions by the Court the defendant then and there excepted.

First Given Defts Instructions

Although proof that the road in question was surveyed and staked out by persons acting as Commissioners appointed by the Legislature of Ills. that it was worked upon under the direction of the public road officers and that it was traveled and used by the Public, raises the presumption that it is a legal highway. Yet this presumption is liable to be rebutted and if the jury believe from the evidence that the persons so professing to act as commissioners were Wmilon. R. Bruce and Daniel Baird, and that the authority under which they acted, was the following act of the said Legislature, to wit: "That Berton Ayres of Lasall County, William "R. Bruce of Bureau County and Daniel Baird "of Lee County be and they are hereby appointed "Commissioners to view mark survey and locate "a State Road from the Town of Lasalle, ter- "mination of the Illinois and Michigan Canal "to Grand de Tour on Rock River in Ogle "County passing through Perkins' Grove so as "to strike the line between Stephen Perkins' "and Jacob Betege's Farms. thence passing "through Palestine Grove to mills known as "Dexters mills. thence to the terminating point, "Grand de Tour", then such presumption is rebutted ~~and~~ the said Wmilon R Bruce and Daniel Baird having no authority under said law to locate a State Road.

Given

Second
62

Given

The fact if proven that the road in question passed over the Defendants land while the same was uninclosed by him without objection on his part is not sufficient evidence that he dedicated the land occupied by the road to the public.

Sixth

Given

The Public could not acquire the land of the defendant for a road by dedication without his consent; and unless the Jury believe from the evidence that the defendant consented to dedicate the land in in question for a road to the Public, then the public has not acquired it by dedication.

Eighth

Given

If the Jury believe from the evidence that the obstruction in question was placed in the highway in question, more than eighteen months before the 3d day of February A.D. 1864 the time of the commencement of this suit, then the plaintiff cannot maintain this action against the defendant for placing said obstruction in said Road.

Defts Instructions

11th

Given

If the Jury believe from the evidence that the public only used the said Road at the point of obstruction from 1847 to 1866 and that the land was unoccupied land, lying open that the defendant or those from whom he claims, neither assented or dissented to such use by the public this fact of itself is no evidence

63 of a dedication on the part of the defendant. No inference, or conclusion from such facts will be drawn against the owner of land lying unenclosed which is travelled over to establish a public highway, in favor of the public. 15 Ills. (236-41)

15th Given. It is for the jury to say what the intent in respect to the dedication of the Defendant was, as manifested by any acts or words of his proven to the Jury.

16 Given. The jury are the judges of the credibility of the witnesses, and it is for them to say how far the testimony of any of the witnesses in this cause is to be relied on.

And the jury thereupon gave their verdict against the defendant, whereupon the defendant by his counsel moved the Court for a new trial, For the reasons.

1st That the Court had admitted improper testimony on the part of the plaintiff to go to the Jury.

2nd That the Court had erroneously instructed the Jury on behalf of the plaintiff.

3d That the Court had refused proper instructions on behalf of the defendant - and had erroneously modified those of defendants instructions that were given.

4 That the verdict was contrary to the evidence

5 That the verdict was contrary to law.

But the Court overruled said motion and gave judgment upon the said verdict of the said Jury. against the defendant. to which the said defendant then and there excepted and in as much as the matters aforesaid do not appear of record. the counsel for the defendant presents this bill of exceptions and prays that the same may be signed and sealed by the Court. and made part of the record. for said cause & it is done accordingly.

M. E. Hollister seal
Judge



State of Illinois }
Bureau County } ss I Henry F. Royce
Clerk of the Circuit Court in and for
said county in the State aforesaid do
hereby certify that the within and
foregoing is a true and correct Tran-
cript from the records and papers in
my custody of proceedings in the cause
therein named, towit. David Nichols
vs. Lewis Grube as will fully appear
by reference to said Records and the papers
remaining on file herein

Given under my hand and
the Seal of said Court at Princeton
in said County this 20th day of March
A. D. 1865. Henry F. Royce Clerk
By Cairo D. Trimble
Dep'y.

Clerk's fees	$14.50
Ctf & Seal	.35
Stamp	.05 $14.90

State of Illinois } In Supreme Court
~~Third Grand Division~~ } To April Term A. D. 1865
~~Bureau County~~ }

Lewis Emler, appellant
vs
David Nichols Appellee } Assignment of Errors.

And now comes the said Lewis Emler
comes and says, that in the record
and proceedings aforesaid there is
manifest Error in this Suit:

I The Court erred in admitting improper
testimony on the part of the plaintiff
to go to the jury.

II The court erred in giving Each and
all of the plaintiffs instructions

III The court erred in refusing defendants
3rd, 4th, 5th, 7th, 9th 12th & 13th instructions

IV The court erred in modifying defendants
10th instruction.

V The court erred in overruling defendants
motion for a new trial.

VI The verdict was contrary to the Evidence

VII The verdict was contrary to the law

VIII The court erred in rendering judgment
on said verdict

IX said judgment should have been
for defendant instead of for the plaintiff

By Stuff & Gibson & McRoberts & Kyle
attys for appellant

State of Illinois } In Supreme Court.
Third Grand division } To the June Term A.D. 1865.

David Nichols }
ats } Error to Cass
Lewis Lamb }

And the said David Nichols now comes and says that there is no error either in the record and proceedings aforesaid or in giving judgment aforesaid in manner and form as above assigned and thereupon he prays that the said judgment may be affirmed and that his costs may be adjudged to him

By

J. J. Taylor atty for appellee

East

County Line Road

93 Sec 1 93 93 Sec 12 153 Acres

80 80 160 160

Gravel Hill

Residence

Old Station

Embankment

Clarion

Old State Road

North & South 2 miles long

Exhibit "A"

North

Rail Road

Clarion River

Flat

Sandy Creek

South

Brig Elizabeth from New York Towards Wilmington

H.	H.	Courses	Winds	L.W.	Remarks on Board Wednesday the 22 - 1834
2	3		N.W.	½	Begins Hazy & Moderate Weather
4	3		SE -- S	½	5 P.M. Squally to the Westward & Hazy
6	3		South -- W.S.W.	½	Carries Away Main Top Mast Sail as Square
8	3		S by E --	1	Split the Gib and Rent it
10	3		South	Varing 1	During the Night Moderate & Hazy
12	3		S.S.W.	½	& Am all Said Lat Last Part Pleasant
2	3		S.E.	½	Lat Obs 38 - 09 North
4	3		S by E	½	

H.	H.	Courses	Winds	L.W.	Remarks and Board Thursday the 23 th - 1834
2	4		W.S.W.	½	Commences Calm & Pleasant Weather
4	4		W by S	Varing ½	2 P.M. Got a Breas as per Log & Set
6	4		W by S	½	Sail & Got Top Sail & Fore Royal
8	4		W.N.W.	½	During the Night Lying Clouds & Hazy
10	5		W by S	Varing 1	Latter Parts Stray Breas took in Top G.
12	5		W by S		Sail Do Weather
					Lat Obs 38 - 58 North

H.	H.	H.	Courses	Winds	L.W.	Remarks and Board Saturday the 24 th 1834
2	2		West	S.S.W.	1	Commences Stray Breas & Hazy
4	4		S.	South	North	& Took Ship Cape Henlopen Bearing
6	8					West by N Dist 2 miles & Stood in
8	8					Shifted in a Squal as per Log Single Reefd
10	8					Fore Top Sail Double Reefd Mainsail
12	8		S by W			& Do Moderate Let out all Reefs
2	8					& Set Fore Top Sail & Mizen Top Sail
4	8					& Reefd Mainsail
6	8					
8	8		S by W	N by E		
10	8					
12	8					

No Obs to Day

H.	H.	H.	Courses	Winds	L.W.	Remarks and Board Sunday the 25 th 1834
2	8		S by W	North		Begins Strong Gales & Thick Weather
4	8		S by W			Double Reefd Fore Top Sail & Single
6	8		S			Reefd Sail & Midnight More
8	5		S W by W			Moderate Let the Reefs out the Fore Sail
10	5					& Mainsail & Do Let All Reefs
12	5			N W by W		out & Set Top G. Sail & Jib Set Stare
2	4					Sail Main & Top Gallant Studding Sails
4	4					Latter Parts Pleasant Weather
6	4					
8	4		S by W			
10	4					
12	4					

Lat Obs 38. 58. North

1447

Lewis Gruber

vs

David Nichols

Record

Filed April 4. 1865
L. Leland
Clerk

State of Illinois. In the Supreme Court.

THIRD GRAND DIVISION.

April Term, 1865.

LEWIS GRUBE, Appellant.
vs.
DAVID NICHOLS, Appellee,
} **Appeal From Bureau.**

Record Page

1 This action was commenced originally before David Rude, a Justice of the Peace of said county. Complaint in writing was filed before said Justice, charging the defendant, together with Fred-

1 2 erick Reith, Samuel Scammon, Edward Scammon, Luther Scammon, Henry Feinfsin, and Xavoer Jagle, with obstructing the road leading from Grand de Tour to La Salle, by fencing, plowing &c. Said obstructions being placed on said road, in the Town of Westfield in said county.

Said defendants are also charged in said complaint with continuing said obstructions after be-

3 ing requested to remove the same, by A. M. Olmstead, a road commissioner in said Town. *Qui tam* action brought by plaintiff to recover the penalty for such obstructions, and continuance of the same.

Bond for cost filed, with Andrew Winters, as security.

4 Summons issued by David Rude, J. P., February 3d. 1864. Returned February 6th. 1864.

5 Suit set for trial February 9th. 1864. Judgment for Plaintiff for twenty-five dollars and costs.

6 Defendant Grube appealed from said judgment to the Circuit Court of Bureau county.

8 Cause came on for trial at the December Term of said Circuit Court, A. D. 1864 ; cause was tried

16 17 18 19 by a jury and verdict of guilty against the defendant and a fine of seventy-five dollars, was assessed against defendant upon which verdict judgment was rendered by the court; whereupon the defendant prayed and obtained an appeal to the Supreme Court of the State of Illinois upon his entering into a bond of five hundred dollars, with Luther Scammon and Edward Scammon as securities.

Bond was duly filed, in accordance with the order of Court.

20 1 Bill of Exceptions filed in accordance with the order of said Court, which Bill of Exceptions

22 is in substance as follows :

STATE OF ILLINOIS,
BUREAU COUNTY.
} ss. IN THE CIRCUIT COURT, DECEMBER TERM, A. D. 1864.

22

DAVID NICHOLS,
vs
LEWIS GRUBE.
} APPEAL.

Be it remembered, that on the 10th day of the December Term of the Circuit Court of Bureau County, State, of Ills., being the 22d. day of Dec., the same being a judicial day and the said Court then and there judicially sitting this cause came on for trial, and that on the trial, the plaintiff to maintain the issue on his side, called George Ames, who having been sworn as a witness testified

as follows :

I have lived in the Town of Clarion for eighteen years; I have known Lewis Grube (the defendant) for twelve or fourteen years; he has a farm there; I live north-west from Grube; I know about a State road; Winslow R. Bruce, and Mr. Beard went and laid out a road; Berton Ayers
23 was not along, they claimed to be commissioners; I don't exactly reccollect the time; they got through laying out the road on Saturday or Monday morning. I took my horse and followed the stakes down through the road until it struck the Homer road. The evidence of the road were three stakes; some ten or twenty rods apart; one in the centre; I saw the stakes through from where I struck the road; the road went through an eighty, owned now by the defendant; people commenced traveling within the limits of those stakes to La Salle and Peru, when it was dry; when it was wet they shyed off and went around the sloughs; there was no sloughs on the defendants eighty; there was travel on that eighty until it was fenced up; it was traveled on over the eighty for eight years, and probably more; in the course of events, after we commenced traveling there was a diverging; but the travel over this eighty for eight or ten years was a great deal; they traveled from Rock River, and from Dixon, besides the inhabitants of Bureau county traveled over this road; there was no other, except the Homer road; this was the only thoroughfare to get to La Salle and Peru; the authorities of the Town of Clarion worked the road; I worked out my road taxes; there was no other road worked as much as this road; I worked this road myself; the first work was done soon after the road was opened; on this eighty it was high ground, and there was no work done, they have
24 worked out taxes up to this eighty; there was bridges built, north of this eighty. It was eight or nine years since the obstructions was made on this eighty: the forty Grube lives on does not come much short of eighty rods of the road; Grube is a farmer; I know that Grube, with all the other people traveled that road when going to La Salle; I don't know that I ever saw Grube work on this road in Westfield; he has worked on this road within half a mile of Westfield, in the Town of Clarion; Grube's eighty corneres with the eighty that is obstructed; he fenced out a four rod road in the Town of Clarion; this Town road has never been opened; there is no public road from where he has obstructed the road to go to La Salle; there were three bridges on nigger creek; I saw a man at work on the bridge over nigger creek, the bridge was originally built by private contribution; (the plaintiff here asked the witness) what the man said who was working at the bridge, and what the witness said to him? To which the defendant by his counsel objected which objection was overruled by the Court, and the defendant by his counsel, then and there duly excepted; the witness answered; I asked McCulloch whether he was giving his work, or working his taxes? and he said he was working his taxes; the bridges were made of logs and planks; they were of the
25 character of bridges made at that time; from the obstruction of Grube, there is no road opened to get through on any other road; we consider this road the most important in the county; It is nine miles to Mendota, and about twelve miles to La Salle; a number of them bought the land and fenced it up; some two years ago or less, he said he would open it, rather than have a fuss; through this eighty, the travel over the road was right on the line of the road, "as near as may be," up to the time when it was fenced; in the marketing season there were twenty or thirty teams a day passed over this road; this road where it is obstructed is four miles north of the plank road; I saw Grube work out his taxes north of the obstructed part within two or three years; Grube told me, he pe-

titioned for a bridle road from his forty in Clarion, to the State road ; (defendant objected to witness testifying anything about said petition without first showing that said petition was lost : the court overruled defendants objection and the defendant by his counsel then and there excepted.)

The witness proceeded ; he told me, the commissioners had laid him a road from his forty to the State road ; Fessenden owned the ground between Grube's forty and the State road ; Fessenden's eighty was unoccupied land, and he said he was afraid some person might buy it, and shut him out from market ; Nichols lives in the Town of Westfield, where the road is obstructed ; he has a farm there which he has occupied for ten years ; I never saw him vote ; he is an American citizen over
26 twenty one years old ; this suit was commenced about last spring.

Cross Examined.—Don't know whether Nichols is a voter ; there was Winslow R. Bruce, and Berton Ayers and Mr. Beard were the commissioners ; it was Baird, Berton Ayers was not along ; there was none of them said they were commissioners ; I was not near enough to speak with them ; they were acting as men laying out a road ; they drove the stakes ; I did not see them ; I think no one ever traveled on this road before it was laid out ; before that we traveled west ; the whole country was open prairie when the road was laid out ; after the road was laid out all the travel went on the course of the new laid road. For a year and a half after the road was laid, we traveled this road ; there was a beaten track along the line of this road ; there was a beaten track over this eighty of Grube's. I go to market at La Salle this year. It is eight miles to Mendota, twelve miles to La Salle ; some four or five years ago, the travel went around this eighty and went through Scammons field ; the Homer road leads to La Salle ; there is no way to get to the Homer road ; there is no road except to go through the fields ; the plank road goes through Arlington ; those who live at La-
27 moile go the plank road ; the bridge south of the Town of Clarion was built by the town authorities on the old State road. This was open prairie when the road was laid ; I was half a mile away, and could not recognize the men at work in laying out the road : I did not speak with them ; I wo'd not swear that Bruce and Baird laid out the road, except that I understood they were appointed commission ers, I don't know whether these bridges were repaired by the town authorities ; the first bridges were built by private individuals, some sixteen years ago ; I worked my taxes on this road, where Grube has fenced it out in Clarion. McCulloch said he was working out his taxes on this bridge ; McCulloch told me he was going to Australia ; Tower ordered me to work on this road ; not one hundred rods from the obstruction fourteen years ago ; the officer was with me, I don't know that Tower was authorized to order us to work ; I have a siding on the railroad to ship grain to Mendota or Chicago ; the travel for grain has been changed to Mendota, for coal, the old road was necessary ; the old State road was discontinued in La Salle county.

27 The plaintiff next called Bezor Benton, who being duly sworn testified in substance :

Since 1848 I have lived at Perkin's Grove ; I know this State road ; I went over it in the fall of
28 1848 ; I went through from Perkin's Grove to La Salle ; I know the defendant ; know where he has obstructed it ; there were marks, by travel and stakes ; one and a half miles from Perkin's Grove we found stakes which could be followed ; at that time it went into Troy Grove road ; don't know when and by whom these stakes were placed there ; think they were not there long ; the track run between the outside stakes ; in 1860 I went to La Salle ; there was a very good track ; there was

considerable travel over this road ; it continued a highway from the Grove to La Salle, until the establishment of Mendota as a market ; I was in La Salle four years ; the road was not opened all the way when I returned ; the first obstruction I found was at Reiths I lived about seven miles from the obstruction ; I have seen persons work on this road. Five miles north of Grube's, we let a job to build a bridge on this road ; this was toward the north line of Clarion ; I conversed with defendant about opening this road ; I traveled this road up to 1860 ; In the year of 1859, and '60, I traveled on this road every week ; the road is a very important one ; the Peru plank road is so bad that it is almost impossible to get to Peru ; and it is one and a half, or two miles nearer by the State road than
29 the plank road ; I assisted in building the bridges ; the county was unsettled ; La Salle county subscribed money to build the bridges ; these bridges were used by the public ; there was no other road traveled so much as this ; the road is called the Gand de Tour and La Salle State road ; I have no doubt, but Grube has obstructed the road on the line where it was laid out ; don't know that Nichols is a voter.

Cross Examined.—I lived at Perkin's Grove in the spring of 1848 ; I lived from fifteen to seventeen miles from La Salle, from Mendota some nine miles ; the road has been obstructed at Grube's some five, six, seven or eight years ; the point of obstruction is in the Town of Westfield ; defendant lives in the Town of Clarion ; the eighty on which the obstruction is placed was unoccupied, vacant land, until it was enclosed by the defendant ; don't know when defendant purchased the land ; think it was as early as 1857 ; there is a town road fenced out and worked from the place where the obstruction is placed down to the corner, near Reiths the travel goes on that road ; never heard complaints of any account about Grube's obstructions, until after the road was fenced south of Grube's.

The plaintiff next called David Stannard, who being duly sworn testified in substance.

I live in Clarion township ; have lived there twenty-five years ; in 1847, in August or Septem-
30 ber, helped to stake the road from Grand de Tour to La Salle ; I have traveled the road from one end to the other ; the road is now open through the town of Clarion ; there is no communication opened through the town of Westfield ; it extends, or did extend about six miles through Westfield ; I have been over the eighty of the defendant ; we commenced traveling it immediately ; there was a visible and a plain track over it, in ten days after it was staked out ; the public traveled this road a number of years before it was obstructed ; the travel varied in different seasons of the year ; the State road had the heft of the travel.

Cross Examined.—Winslow R. Bruce, and Daniel Baird were acting commissioners, laying out the road ; Berton Ayers was not along and took no part in laying out the road ; the land on which the obstruction is placed is in the town of Westfield ; it was vacant prairie, until fenced up by the defendant ; don't know when the defendant bought the land ; think it has been fenced seven or eight years ; there is a town road running north and south for about a mile from where the obstruction is placed.

The plaintiff next called Albert G. Porter, who being sworn testified in substance.

30
31 I live at Perkin's Grove ; have lived there for about twenty years ; I was present when the road was laid out by the commissioners ; I traveled the road for some years after it was laid ; the travel

was on the line of the survey; it was as well marked as prairie roads usually are; the road was a very important one; I live some seven miles north of the obstruction; I have worked on the road in Clarion every year since it was laid out, more or less; I think portions of work done in Clarion was by public authority; in Westfield there was work done by private enterprise; I first found the road obstructed at Grube's field; from Grube's until we could get on the old road was about two miles; the State road run through Scammons field; the last time I went through on the line of the road was five or six years ago; my teams went through there this fall; I believe there is a way to get through.

Cross Examined.—I surveyed this route; Winslow R. Bruce and Daniel Baird acted; Berton Ayers was appointed but did not act; there is a way through there yet, by which teams get through; never heard of any complaints about Grube, until after others commenced to fence; it may have been obstructed at Grube's eight or nine years; the importance of this road is not so great as formerly; those going for coal may generally, though not always go on the State road; but little trade from our neighborhood with La Salle; at the time the road was laid the country was unsettled: the eighty in dispute was vacant prairie; think the defendant inclosed it soon after he purchased it.

The plaintiff next called John C. Oakey, who being duly sworn testified in substance.

I live about one quarter of a mile from the State road in Westfield; have lived there seven years, and in the neighborhood since 1848; live about half a mile from the obstruction; Mr. Grube first obstructed the road; don't know what year the fence was put up; the road was traveled for some time after it was laid out; the road was open and traveled across defendant's land eight or nine years before it was obstructed; a road was laid out by the town authorities of Westfield for a mile, the north and south road; the travel turned off from the old road, when the defendant's obstruction was placed, and went down the north and south road: there was also an east and west road laid out by the town authorities of Westfield; the public were satisfied with the one mile change, that is with the mile north and south; I did not see him fence it up; Nichols has lived in Westfield ten years, and has voted.

The defendant by his counsel objected to the plaintiff proving himself an elector, by showing simply that he had voted; the court overruled the objection and the defendant, then and there duly excepted.

Cross Examined.—For seven years, I have lived within half a mile of this obstruction; there was no objection to the obstruction, until after it was obstructed further south; the people was always satified with the road known as the one mile road; that is the road running south from the place where the obstruction is placed; there are two bridges, on this one mile road; it is regularly worked by the town authorities; it is laid out on lands of defendant and myself; it is fenced out; the difference in distance of travel between the new road and the old State road is simply the difference between running diagonally over the eighty acres of the defendant, and running on a straight line south for a mile, and then running directly east to the point where the old road crosses; I never heard any objection to the Grube obstruction until after the road was obstructed further south; the public acquiesced in the obstruction and accepted the one mile, north and south road in its place.

Re-Examined.—This east and west road has been laid for twelve or fourteen years; it goes out to the county line road.

The plaintiff next called Winslow R. Bruce, who being duly sworn, testified in substance.

I acted as one of the commissioners that laid this road, acted under an act of Legislature, approved March 1st, 1847, on page 96 of session laws of 1847; live six miles from the obstruction; laid the road where the fence is; Daniel Baird was with me; Berton Ayers was not with us when
34 we laid the road; it was tracked the same season it was laid; it was traveled eight or nine years probably more before it was obstructed; the travel increased up to the time Mendota was established; the establishment of Mendota did not do away with the necessity of the road; the further south on the road the greater damage; I had a conversation with Grube, I asked him why he fenced the road, sometime after the fencing; he said they had fixed the road around to accomodate the people for the present; it was the same year, or the year after; he fenced a large field; he said, when we get able we will fence it out; he lived in Clarion, before he owned the eighty in Westfield, on which the obstruction is placed; he got up a petition to me to open a private road, from where he lived to the State road; this was some four years before the obstruction. Plaintiff then asked the witness to state what road the petition called for. Defendant objected to plaintiff showing the contents of the petition by parol, without producing the petition or showing that it was lost, or out of the plaintiff's power to produce which objection was overruled by the court, and the defendant by his counsel, then and there duly excepted.

34 The witness then stated, in answer to the question that the petition called for a road, running
35 from where the defendant lived to the State road; we received it, and passed it over to the next board who surveyed the road and laid it out; defendant said he wanted the road for fear they would fence him up and cut him off from the State road.

Cross Examined.—I acted as one of the commissioners to lay out this road; Berton Ayers went a short distance with us from La Salle but turned back because he said he was sick; we did not locate any part of the road while he was with us; Grube said they had fixed the road around so as to make it good and passable, and when we get able we will fence it out; I will not swear that he used the words "State road," we were in conversation about the State road.

The plaintiff next called James Winters, who being duly sworn testified in substance.

I lived within a mile of this road for two years, that was in 1860 and '61; when it was fenced I lived within a mile and a half of it; he was making that string of lane fence that runs across the road; he was then in possession of the eighty; when I came along, the fence was just up; I don't know what year; I did not suppose there would be any difficulty; he said the north and south road was laid out, that same north and south road continued over the State road; I know it was a State
35 road and so did the defendant; he used to use it altogether in going to market.

36 He has a private road; he bought the eighty between his forty and the road, and fenced the State road in Clarion; the only inconvenience I suffered by the road being shut up was in going to La Salle; I worked within eighty rods of the obstruction; Martin Corley, Mr. Omlstead and Mr. Miller are the commissioners of highways in Westfield; Olmstead tried to get the others to open

the road, but they never did it; I know of no other way accepted by the public, except this road; everybody is dissatisfied except those who own the land; there is no ground that can be made as good or direct as the old road.

Cross Examined.—The place where I worked on the road was in the town of Clarion; never worked on the road in Westfield; have worked north and south of the obstruction; that north, by town authority, that south, I donated; the majority of the commissioners of highways in Westfield have refused, or neglected to open the road; this eighty did not require work; had a conversation with the defendant about a State road running across his eighty; he got up a petition to have that part of the State road vacated that ran across his eighty; he said the petition had not got in, in time to have it vacated before the Legislature adjourned.

The plaintiff next called Hiram Gheer, who being duly sworn, testified in substance.

37 I live two miles north of the obstruction of Grube; I came there in 1850; it was open when I came there; I have worked on the road every year, within half a mile of the obstruction; I don't know that ever the public acquiesced in the travel on the other road; there is no passable route from the place of obstruction, south; the ground is bad in places; the old State road was always passible I regard it an important road; there has always been dissatisfaction since the obstruction.

The plaintiff next called William P. Phillips, who being duly sworn, testified in substance.

37 I lived within eighty rods of the obstruction for nine years; the State road was opened long before I bought land there; I was path-master in Westfield the spring this obstruction was built; I had not worked the road at the time it was fenced; I fenced the road out; defendant got up a petition to vacate a part of the road; this was before he fenced his eighty; it was to send to Springfield; the land was broken; I heard they did not accomplish anything with the petition; I saw Grube putting up that line of fence across the road; I was building fence close by; I have worked the road south of the obstruction as an officer.

Cross Examined.—It was after the obstruction was placed in the road, that I worked it; I worked at nigger creek; this was in Scammons field; I don't know that Grube's name was on the pe-
38 tition; Nichols said he got up the petition for Grube; Nichols is the Plaintiff; I signed the petition.

Defendant asked witness who carried the petition to the post office. Plaintiff objected to the question; court sustained the objection, and the defendant, by his counsel, then and there duly excepted.

Plaintiff next called A. M. Olmstead, who being duly sworn testified in substance.

I live on section twenty-five, in Westfield; I was highway commissioner in 1863; I have lived on that place six years; know Grube's premises; I don't live within five or six miles from him; never traveled the road before it was obstructed; served notice on the defendant to remove the ob-
39 struction; served it at the time it bears date; served it by delivering copy to defendant. Witness did not know of any suit for the penalty, commenced by the town, and if there had been one, am satisfied I would have known it. Defendant objected to the introduction of the notice; court overruled the objection, and defendant by his counsel, then and there duly excepted.

As to character of notice served and date thereof see stipulation filed May 1st 1865

Premises described in the notice on the same where the obstruction is.

Plaintiff here rested his case.

The defendant then called Edward Scammon, who being duly sworn testified in substance.

39 I have known the place where the obstruction is for ten years; the old State road is obstructed in Westfield for about six miles; the obstruction at Grube's has been there for five years at least; I never heard of any objection to the obstruction at Grube's until after the road was obstructed south of Grube's; the water removed and carried away the first bridge over nigger creek; the north and south road is a laid out road, laid out by town authorities of the town of Westfield, and worked by them; it is a good road; the east and west road is also a laid out road and worked by the town authorities.

Cross Examined.—There are two pair of bars on the east and west road.

The defendant next called Edward Grube, who being sworn testified in substance.

40 I am a son of the defendant; I have lived in the neighborhood of the obstruction some twelve years; the obstruction was placed there in 1856; father bought the eighty in question in 1855 and broke it up the same year, and fenced it the next spring; the road was broke up in 1855; it was

40 open prairie when father bought it; I have heard Phillips testimony; the bridges spoken of by him; I should think are from two to three rods east from the track of the old road; we live in the town of Clarion; there has been work done on the east and west road by public authority; I worked on it by the path-master's authority; heard no complaints about obstructions at Grube's until after the obstruction were put on the road south of us; north and south road, is a good road.

Cross Examined.—This State road laid over the eighty when father bought it; we hauled our grain over it.

The defendant next called James Hoover, who being duly sworn testified in substance.

I know about old road, at the point of obstruction: have lived there since 1857; the line of travel since 1857 has been on the new road—the north and south road; never heard complaints about obstruction until 1859; never traveled the road in La Salle county.

The defendant next introduced in evidence the act of the General Assembly of the State of Illi-

41 nois, approved March 1st. 1847, session laws of 1847, page 96, in which among other things it is provided by section 9 of said act, sec. 9; that Berten Ayers of La Salle county, William B. Bruce of Bureau county, and Daniel Baird of Lee county, be and they are hereby appointed commissioners to view, mark, survey and locate a State road, from the town of La Salle, termination of the Illinois and Micigan Canal, to Grand de Tour, on Rock river in Ogle county, passing through Perkins' grove, so as to strike the line between Stephen Perkins' and Jacob Betege's farm, thence passing through Palestine Grove to mills, known as Dexter's mills, thence to the terminating point, Grand de Tour.

41-2-3-4 Sections 33, 34; 35, 36, 37, and 39 of said act prescribe the duties of said commissioners,

45 which sections are found on pages 41, 42, 43, and 44 of the record.

The defendant introduced the plat marked "exhibit A" to which all the foregoing witnesses referred to in their testimony, and which was admitted by plaintiff's counsel be correct, as show-

ing the land of said defendant and the portion of the road, claimed to be obstructed, and the different roads, lands and creeks refered to in said testimony.

This was all the testomony in the case.

46 The plaintiff then moved the court to give the following instructions in behalf of the plaintiff, which he did.

DAVID NICHOLS,
vs
XAVER JAGLE.

1st 46 The legality and existence of a public highway may be established and proven either by dedication or by laying out the same in the manner prescried by the statute, proof of the existence of a public highway by any one of these methods is sufficient.

2nd The voluntary use of a way by the public, with the unqualified assent of the owner of the soil, coupled with proof of the actual recognition and repair of such way by the proper authorities is sufficient to establish such way as a public highway.

3rd To show a dedication of land on the part of the owner for the purposes of a public highway, it is not necessary to show positive acts and declarations made by him ; his assent to the use of his and for a highway may be express or implied and a dedication by him may be infered from the length of time during which such highway is used by the public, and from his acquiescence in such use ; it being the law, that such owner is presumed to know of and notice such use of a way over his

enjoyment thereof; such owner or owners could not legally fence the road up and prevent the further use of it by the public.

48 8th. If the jury believe from the evidence that the public acquired the right to use the land alleged to have been obstructed in this suit, or any part of it as a public highway, before the defendant became the owner of or came in possession of said land, subject to all the rights which the public had in said land at the time he obtained the same.

48 9th. Proof of a partial or transient non-user of a highway by reason of the travel, being diverted to other roads is not sufficient to establish an abandonment of such highway.

49 10th. If the jury believe from the evidence that the defendant did fence or otherwise place any obstruction in the road in controversy in the town of Westfield, county of Bureau and State of Illinois, prior to the commencement of this suit, and that said road is a public highway, and that within eighteen months prior to the institution of this suit; said defendant suffered such obstruction to remain, after having been ordered to remove the same, by a commissioner or overseer of highways of said town; that plaintiff is an elector of said town, and did not commence suit until the expiration of sixty days after service of such notice, and that suit to recover such penalty was not commenced by said town, or by the officer or agent of said town whose duty is to prosecute for the same, within sixty days, then the jury are instructed to find the defendant guilty and to assess the penalty at a rate, not exceeding one dollar per day for each day that the evidence if any may show, said defendant after the service of said notice, up to the commencement of this suit suffered such obstruction to remain as aforesaid, not exceeding the sum of one hundred dollars.

50 11th. In order for the plaintiff to recover in this suit, it is not necessary for him to prove the establishment of the highway in question by any record or paper evidence of the laying out of said highway, if he can prove a road by dedication. If the jury shall be satisfied from the evidence, that the highway in question was opened and traveled, through the premises of the defendant by the public for the space of eight or nine years, and was during that time worked by the public authorities, such facts raise the presumption, that the same is a legal highway and if the jury shall further believe from the evidence that whilst the said highway was so opened, traveled and worked, that the defendant traveled and recognized the same as a public highway, by causing a private road to be to be laid from his dwelling house to connect with the said highway, by working on the same himself under the authorities of the town, by repeatedly using the said highway himself in going to the La Salle market by petitioning the Legislature to vacate the same and by acquiescence in the public use of said highway for a number of years without objection; if the jury believe from the evidence that such facts have been proved, they may infer from such facts, a dedication by the defendant to the public of the land for said highway, as the same passed over his premises and if the jury do so infer such dedication and they shall further believe, that the defendant afterwards fenced up the said highway and suffered the same to remain fenced up after being notified by a commissioner or overseer of highways of the town in which said obstruction is situated, to remove said fence and that he was so notified within eighteen months prior to the commencement of this suit, and the jury shall further believe from the evidence, that no prosecution was commenced against said defendant

for so obstructing said highway, by the town in which said obstruction is situated or any officer or agent authorized to bring said suit, for sixty days after the defendant was so notified to remove the said obstruction; and if the jury shall further believe from the evidence that the plaintiff was at the commencement of this suit an elector of said town, in which said obstruction is situated, and that he
51 commenced this suit after the expiration of sixty days from the service of the notice on the defendant as aforesaid, on the foregoing state of facts, the jury may find the defendant guilty and assess a penalty against him in favor of the plaintiff, in any sum not exceeding one dollar for every day during which he suffered the said highway to be obstructed after he was notified to remove said obstructions as aforesaid, and not however to exceed in the aggregate one hundred dollars.

rights in the defendants land at said point of obstruction, and the plaintiff is not entitled to recover.

Which the court qualified as follows :

60 Provided the jury believe from the evidence, that the "north and south" road answered the same objects as the road in controversy.

To said qualification added by the court to said instruction the defendant, then and there duly excepted.

The jury thereupon gave their verdict against the defendant, whereupon the defendant, by his

68 counsel moved the court for a new trial, for the reasons

1st. That the court had admitted improper testimony on the part of the plaintiff to go to the jury.

2nd. That the court had erroneously instructed the jury on behalf of the plaintiff.

3rd. That the court had refused proper instructions in behalf of the defendant and had erroneously qualified those of defendant's instructions that were given.

4th. That the verdict was contrary to the evidence.

64 5th. That the verdict was contrary to law ; but the court overruled said motion and gave judgement upon the said verdict against the defendant, to which the defendant then and there duly excepeted.

Defendants instructions, which were given are found on pages 61, 62, 63, of the record.

47-8 Plaintiff's fifth and seventh instructions were given, as qualified by defendant's eleventh instruction.

Defendant's eleventh instruction is found on page 62 of the record.

ASSIGNMENT OF ERRORS.

I The Court erred in admitting improper testimony on the part of the plaintiff to go to the jury.

II The Court erred in giving each and all of the plaintiff's instructions.

III The Court erred in refusing the defendant's 3rd, 4th, 5th,7th,9th, 12th, 13th, instructions.

IV The Court erred in qualifying the defendant's 10th instruction.

V The Court erred in overruling the defendant's motion for a new trial.

VI The verdict was contrary to the evidence.

VII The verdict was contrary to the law.

VIII The Court erred in rendering judgement on said verdict.

IX Said judgement should have been for defendant instead of for the plaintiff.

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Lewis Grube

&

David Nichols.

Abstract of

Record.

Filed April 4, 1865

S. Selmeier Clk.