

No. 13465

Supreme Court of Illinois

Proctor.

vs.

Town of Lewistown.

71641  7

Supreme Court---Second Grand Division.

JANUARY TERM, 1861.

Brief.

WILLIAM PROCTOR,
vs.
THE TOWN OF LEWISTOWN. } *Appeal from Fulton.*

Points and Brief for Appellee by Goudy, Judd & Boyd.

I.

The use of land for a highway for twenty years is sufficient to establish the existence of a public road. *Green vs. Oakes*, 17 Ill. 251; *Daniels vs. People*, 21 Ill. 439.

II.

A road by prescription over vacant and unoccupied land is good, even though owned by the government. *Dimon vs. People*, 17 Ill. 421.

III.

The appellant dedicated the land for a road in consideration of the use of the land used for the roads before 1842 within the limits of his field. The dedication is shown by his acts in building his fence, permitting travel, and the use of the road by the public. The Pff, 8th, 9th and 10th instructions are the law. *Marcey vs. Taylor*, 19 Ill. 637.

It is not essential to the acceptance of a road, that the public should repair the road, especially if it does not require repair. *Ibid.*

IV.

The road laid out in 1832 was a legal highway. The proceedings were under the law of 1827, which was the same as the law of 1835. Rev. Laws 1833, p. 542, sections 13 and 14. Laws 1835, p. . *Dumoss and al. vs. Francis*, 15 Ill. 543.

The question as to whether the road was located, opened and traveled over the *locus in quo*, was one of fact submitted to the jury, and the evidence sustains the verdict on that point.

V.

The road laid out in 1845 was a legal highway. Like the law of 1827, the proceedings will be sustained without the production of proof of the preliminary steps. Laws of 1841, p. 233, sections 2, 9, 10 and 11. *Ferris vs. Ward*, 4 Gilm. 499.

If there be error in admitting the road record for 1845 for any reason, the judgment will not for that reason be reversed, because the court, by the third instruction for defendant, directed the jury to disregard the road, for the reason that the road laid out in 1845 did not run from Main Street, the fact being that the road entered the road in controversy twelve rods west of Main Street.

VI.

A road established by public authority must remain such until vacated by the same authority, or be abandoned by non-use on acquiring the legal right to another road,

to accommodate the public travel, or the necessity for road having ceased to exist. *Champlin vs. Morgan*, 20 Ill. 183.

VII.

The fact that a road is but little used as a public highway makes it none the less a highway, but the necessity must have ceased to exist. Plaintiff's instructions, 19, 20 and 23, are the law. *Dumoss vs. Francis*, 15 Ill. 574.

The evidence shows that while the *locus in quo* was originally laid out and traveled as a road from Lewistown to Walter's ford, Bemadotte, and Hackleton's bridge, yet the village enlarging, it was used as a *street* for the accommodation of the inhabitants of the village; and prior to the obstruction a mill had been built at the corner of Main Street and the road in question, which had been approached for twelve years over the *locus in quo*; that dwelling houses had been built, fronting on the *locus in quo* as a street and without other approach, and that some of the citizens west had no other means of access to their dwellings. The travel had not ceased at any time.

The abstract is defective and omits the most material evidence on these points. See Record. pp. 24, 26, 27, 29, 32, 34, 36, 37, 38, 39, 67, 76, 77.

VIII.

The questions proposed to Samuel Brown and Lloyd Harn (pp. 26, 34,) were properly excluded. The declaration of appellant made at the time of doing any act touching the road, so as to be a part of the *res gestae*, would be evidence, but not otherwise. The questions to Brown were too general, and would call out declarations at any time prior to the trial, without regard to the occasion, and thus have an effect on the jury, whether afterwards excluded or not. The appellant obviated this objection to the question concerning rent and proved the facts: as to the other he did not. These questions to Brown were all *leading*.

The question to Harn called for a proposition *for compromise* made by appellant, without specifying time, place, or person, or asking for the statements of the officers of the town.

The statements of appellant, disconnected with acts, cannot be evidence.

IX.

The evidence offered by appellant to prove the vacation or abandonment of the road from Lewistown to Walter's ford, to Bernadotte, and to Hackleton's bridge, was excluded only as to such parts of the several roads as lay beyond the *locus in quo* and was permitted by the express decision of the court whenever offered as to the *locus in quo* and the *point of obstruction*. As to the other portions it was immaterial. It

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could not *tend* to prove vacation or abandonment, when it appeared that the public used it as a village street for ten or twelve years, and not as a road to either of those points.

But the court *did permit* evidence that the travel to Walter's ford, Bernadotte, and Hackleton's bridge, had used another route for many years. See Record, pp. 61, 62, 63, 64, 71, 74, 76.

X.

The verdict finds appellant guilty as charged in complaint. The complaint charges continuance of the obstruction for twenty days. The verdict is therefore certain.

XI.

The evidence as to the time the obstruction was continued is sufficient to sustain the evidence.

Brown (Record, p. 25,) swears fence was moved in the street by appellant in 1859, about 4 rods for distance of 60 rods, and (p. 27,) was left 25 feet wide in the narrowest place.

Harn swears (p. 33,) the road "was two or three rods wide after the fence was set out; think there would have been room for three teams to pass. I never heard of any one being obstructed by the setting out of the fence."

It appears that fence was put out by appellant (Lathbury, p. 35,); remained one day; was thrown down by Wells, officer of town; left open over Sunday only, and that injunction was served on town when fence down, (Waggoner, 37,) 30th May, 1859, and being put up after service of injunction on Monday, (Criss, p. 47,) it was fairly concluded that the fence remained up.

Bryant swears (p. 45,) that he "saw the fence *after* it had been moved.

Graham swears (p. 50,) that he surveyed the street; "that the length of the fence moved is about 50 rods. It was moved out some 23 or 24 feet," but does not remember when it was moved out. He says, "the red line represents the fence *after* it was moved," and he made the survey after the suit was commenced.

Bennet swears (p. 77,) that "after the road was set out in 1859, as complained of, there was room enough" (p. 78). "The road was left 27 feet in narrowest place. I measured it for my own satisfaction."

From these facts the jury would be justified in finding the continuance of the obstruction.

XII.

Robert Paul was a competent witness. Ills. M. F. I. Co. vs. Marseilles M. Co., 1 Gil. 37; Sawyer vs. Alton, 3 Scam., 127

XIII.

It is not the policy of courts to encourage efforts to overturn public roads. The intendments and presumptions will favor the road. Dimon vs. People, 17 Ill. 421.

XIV.

The appellant not having furnished a correct abstract according to the rules of this court, the judgment will be affirmed. Kelleher vs. Tisdale, 23 Ill. 405.

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Proctor

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Town of Lewistown

Brief of Appellee

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Filed Jan 19 67
J. M. Carney

WILLIAM PROCTOR,
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THE TOWN OF LEWISTON.

} Appeal from Fulton.

BRIEF FOR APPELLANT.

In aid of and in addition to the points made by the former brief of appellant, the appellant's counsel now adds the following points of error in the record.

1. The proof which appellant offered to make by Samuel Brown and Floyd Harn, tending to disprove a dedication of a road by appellant over the *locus in quo* was improperly excluded. Record, pages 26, 34.

2. The proof which appellant offered to make by Loyd Harn, to show where the road of which he was testifying run to, and to show that it had been closed and abandoned, was improperly excluded. Record, page 33.

3. The evidence admitted to prove the legal establishment of the old Bernadotte or Walter's Ford Road of 1831, was improperly admitted. Record, pages 46, 47.

4. The evidence admitted to prove the legal establishment of what is called the Hackleton Bridge Road in 1845, was improperly admitted. Record, pages 39 to 45.

5. The court erroneously refused to permit the evidence of the establishment of the new Bernadotte Road of 1842, to be considered in connection with the other evidence as tending to prove that it was laid out and used as a relocation and change of the old Bernadotte Road, and as a substitute for, and an abandonment of the old road: And also improperly excluded the testimony of Lyman Moore and Joseph Barclay to the same effect. Record, pages 53 to 60, 61, 63.

6. The proof offered by the appellant by the witness McNiel and others to show the change of the route over the *locus in quo* in 1852, to another route and the acceptance and use of the new route by the public, instead of the former route over the *locus in quo* and that the route over the *locus in quo* had from that time had been disused and abandoned, was improperly excluded. Record, pages 68 to 70. *Eymann vs. The People*, 1 Gilm. 4, 8; *Nealy vs. Brown*, 1 Gilm. 10, 13.

7. The court improperly excluded the evidence showing the closing and obstructions on the Hackleton Bridge Road as not tending to prove its abandonment. Record, page 75.

8. The following instructions given on behalf of the appellee should have been refused, to wit: 1, 2, 3, 5, 6, 8, 10, 16, 17, 18, 19, 20, 22, 23 and 24. Record, pages 78 to 84.

9. The following instructions refused on the part of the appellant should have been given, to wit: 9, 10, 11, 15, 16, 17. Record, pages 88 to 90.

10. The verdict was defective in not finding the number of days the alleged obstruction continued, and no judgment should have been entered on it. Record, pages 20, 23.

11. If the verdict is to be taken as finding an obstruction for twenty days, there is no evidence tending to prove an obstruction for that length of time. Witness Lathaway page 35; witness Layton page 37; witness Waggoner page 37 and 38; witness Bryant page 45; witness Cress page 47, 48.

12. Robert Paul, (see Record, pages 29 and 43,) a citizen of the town and a member of the town council, though objected to, was admitted as a witness on behalf of the town to prove the existence of the road in question. This was erroneous. The object of the suit and the effect of it, is to establish a right of way for all the people of the town over the *locus in quo*—a common right of the town. For this purpose an inhabitant of the town is not a competent witness at common law, nor is he made so by the charter of the town. Whenever a citizen of a town is admissible as a witness on behalf of the town to establish a common right for all the people of the town, it is by virtue of express statutes which are always construed strictly. *Ryder vs. Alton & Sangamon R. R. Co.* 13 Ills. 523; *Woolrych on Ways*, pages 264-267; *Odiorne vs. Wade*, 8 Pick. 518; *Jacobson vs. Fountain*, 2 John. 170; *Lufkin vs. Haskell*, 3 Pick. 356; *Moore vs. Griffin*, 22 Maine, 356; *Watson vs. Lisbon Bridge*, 14 Maine, 201; *Bristol vs. Slade*, 23 Pick. 160; *Barnett vs. School Directors*, 6 Watts and Serg. 46.

The case of *Sayer vs. the City of Alton*, 3 Scam. 127, does not conflict with the rule as above stated. In that case no question of common right was involved.

The failure to recognize or repair an alleged public road, or that it is used, not by the public, but only by a few persons is a strong ground on which to infer, there is not a public road. *Martin vs. the People*, 23 Ills. 395.

There was no evidence of the use of a road over the locus in quo for 20 years. *Daniels vs. the People*, 21 Ills. 439.

STEVENSON & KIMBALL, and BROWNING & BUSHNELL,
for Plaintiff in error.

[See over for further points and authorities.]

POINTS AND AUTHORITIES FOR APPELLANT.

1. Dedication to the public of land for a road, is a question of intention, and may be proved or disproved by the acts and declarations of the owner, and the circumstances of the case; and where dedication is sought to be inferred from permissive use, and the contemporaneous declarations of the owner are competent to explain such use, and rebut the inference of dedication. 2 Green. Ev., 662; 2 Smith's Leading Cases, 209; Nichols v. Aylor, 7 Leigh, 546; Angell on Highways, 153; 19 Ills., 636; Irwin v. Dixon, et al., 9 Howard 10, 30; Livett v. Wilson, 11 E. C. L., 57.

Godfrey v. City of Alton 12 Ill 35
Alford v. Ashby 17 Ill 363

2. Disproving existence of other convenient routes of travel does not prove the road in question, and it was error to admit such evidence.

3. It was error to attempt to confine the evidence of the condition, use, &c., of the road in question, to the *locus in quo*. When record evidence had been introduced of the Hackelton Bridge road, and the old Bernadott road, it was competent for defendant to offer evidence of abandonment, commensurate with the evidence of original location, as tending to show abandonment at the point of alleged obstruction.

4. No western terminus having been stated in the complaint, it was necessary for plaintiff to prove a road all the way from the south end of Main street to west limits of town plat. The street must either be described by its termini, or the point of obstruction alleged.

5. The adoption of a new route by the traveling public, and the acquisition of the right to such new route, constitutes in law an abandonment of the old route, and in connexion with evidence tending to show abandonment of an old road by change of travel to, and acquisition of, a new route, it is competent to prove that the public acquired a legal right to the new road sought to be proved, by dedication on the part of the owner of the land over which such new road passed, and it was error in the court below to exclude such evidence when offered by defendant. Champlin v. Morgan, 20 Ills., 183.

6. It is error to give instructions to the jury which assume any of the material facts at issue to have been proven.

7. The 1st, 5th and sixth of plaintiff's instructions were not warranted by the evidence, and were calculated to mislead the jury by assuming that the roads spoken of passed over the *locus in quo*, taking that fact from the jury.

8. The evidence does not warrant the instructions 5 and 6 on part of plaintiff, that the roads therein mentioned were legally established roads.

9. Instructions 17, 18, 19, 20, 22 and 23, given on the part of the plaintiff, were erroneous in assuming that the *locus in quo* is an existing public road, and, in fact, takes from the jury the consideration of whether the new road by Davidson's was not a re location and adoption of a new line for travel, and an abandonment of the former road.

992 *The verdict was defective in not finding the duration of the obstruction and did not authorize a judgment on it*

10. The court erred in refusing the 9th and 17th instructions asked by defendant.

11 *There is no evidence tending to show a length of obstruction to authorize the amount of the judgment entered*

N. BUSHNELL and M. S. KIMBALL,
Attorneys for Appellant.

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ABSTRACT OF THE RECORD.

Page of Record.

1 July 1st, A. D. 1859 a complaint was filed in the office of Job K. Sweet, Police
Justice in the Town of Lewistown, in the words and figures following, to-wit:
5 State of Illinois, County of Fulton,)
Town of Lewistown. }

The Town of Lewistown.)
vs. Police Justice's Court, Before Job K. Sweet, Police Justice.
William Proctor. }

T. A. Boyd, attorney for the Town of Lewistown, complains on behalf of said Town to Job K. Sweet, Police Justice, in and for said Town, that whereas William Proctor having heretofore to-wit on the 25th day of May, A. D. 1859, at and within the Town of Lewistown, County of Fulton and State of Illinois, unlawfully deposited and caused to be deposited in a certain street of the Town of Lewistown aforesaid, the said street being the road and street sixth in number south of the court house in said Town of Lewistown and running west or westerly from Main street in said Town, certain rails, timber, and wood, and having then and there unlawfully erected, or caused to be erected therefrom and therein, obstructing said street or road, a fence without permission in writing from the Supervisor of Streets of the Town aforesaid. Now the said Town of Lewistown, by her attorney, complains that the said William Proctor thereafter from and including the 9th
6 day of June, A. D. 1859, to and including the 28th day of June A. D. 1859, that is to say for the space of twenty days of twenty-four hours each, unlawfully and without permission in writing from the Supervisor of Streets of said Town, permitted the said rails, timber and wood so erected in said fence as aforesaid and obstructing said street or road to remain therein contrary to the provisions of the ordinance of the said Town of Lewistown and the Town of Lewistown claims as penalties the sum of five dollars for each of the twenty days of twenty-four hours each, the same have been permitted so to remain in and obstruct the said street.

T. A. BOYD,

Att'y for the Town of Lewistown.

1 July 1st, A. D. 1859 a warrant was issued by Job K. Sweet, for the arrest of Will-
6 7 8 iam Proctor, and returned by the officer served, on the same day.

1 Parties appeared and the cause was continued by the court till July 8th, A. D. 1859,
2 by consent.

July 8th: parties again appeared and the defendant moved to dismiss the cause. The court overruled the motion, and by consent of parties, continued the cause till August 1st, A. D. 1859.

3 August 1st, A. D., 1859: parties appeared, and the defendant below moved to dismiss for want of jurisdiction; which motion the court overruled. Defendant then filed a petition, sworn to, for change of venue, which the court refused to allow. A jury was
4 then impanelled, and the trial proceeded from day to day till August 4th, A. D. 1859, when the jury, failing to agree on a verdict, were discharged, and cause continued to August 5th, A. D. 1859, when the parties appeared and waived a jury, and agreed to trial by court, whereupon the court rendered judgment against the plaintiff below for costs.

8 9 August 10th, A. D. 1859: the plaintiff below filed an appeal bond in the office of the circuit clerk.

9 10 11 On the same day a supersedeas and appeal summons was issued from the office of said clerk.

At the September term, A. D. 1859, of the Fulton Circuit Court, the defendant below moved to dismiss the suit for want of jurisdiction, pending which motion the cause
13 was continued.

14 At the February Term A. D. 1860 of said court the defendant's motion to dismiss the suit was overruled. The defendant then moved to dismiss the appeal for irregularities in taking the same and defects in appeal bond, which motion the court overruled.

15 17 And at the same term of said court a trial was had and the Jury failing to agree upon a verdict were discharged and the cause continued.

19 At the September term of said court, this cause again coming on to be heard, a jury was impanelled and thereupon the plaintiff offered in evidence:

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19 At the September term of said court, this cause again coming on to be heard, a jury was impanelled and thereupon the plaintiff offered in evidence:

21 The Charter of the Town of Lewistown, Session Laws of 1857, pp 1038 et seq., and the amendment to said Charter.

Session Laws of 1859 pp. 635 et seq. And also from the ordinances of said Town, 21 Sec. 6 Ord. 4, which provides for imposing a fine of not exceeding five dollars upon any 22 person who without permission in writing from the Supervisor of Streets, shall continue an obstruction in any of the streets of said town, for each twenty-four hours such obstruction shall be so continued.

Sec. 7 Ord. 4 which declares all lawfully established public roads within the limits of the town to be streets.

23 Sec. 4 Ord. 13, which provides that in all cases of conviction for violation of any town ordinance the court shall assess the fine.

And the plaintiff offered in proof of said ordinances, and of their due publication the certificate of the printer and publisher of the Fulton Democrat, a weekly newspaper published in said town, of their publication in said paper three successive weeks from the 5th to the 19th of June, A. D. 1858, inclusive, together with another certificate as follows, to-wit:

Office of the Clerk of the Town Council) Fulton County,
of the Town of Lewistown.) Illinois

I, George Humphrey, Clerk of the Town Council of the Town of Lewistown, in the County and State aforesaid, do hereby certify, that the printed list of ordinances hereto attached, is a true, complete and perfect copy of the ordinances passed and adopted by the 24 Town Council of said town, at an adjourned meeting thereof held at the court house in said town on Monday, the 31st day of May, A. D. 1858, and which remain of record in the journal of their proceedings in my office.

In witness whereof I have hereunto set my hand and affixed the corporate seal of said town this 19th day of June, A. D. 1858.

L. S.

GEORGE HUMPHREY,

Clerk of the Town Council.

24 To all of which defendant objected and the court overruled the objection and allowed said ordinance, to be read in evidence, to which defendant then and there excepted.

The plaintiff then called as a withe-s, Samuel Brown, who testified as follows: I am acquainted with defendant; I know street called 6th south street; I live on that street; I know the field belonging to Mr. Proctor, on N.W. 27, 5 N. 3 E. There is a sawmill on corner of 6th and Main streets; it has been there about 12 years. The fence on north side of the field was about 4 rods from town line. I have known a road on the north of the field for about 18 years. Before Viets' addition was laid out there was a 25 field on the north side of the road. Viets' field was kept fenced till about 1845. The fence was moved out in A. D. 1859. It was moved out more than once; was moved out about four rods. The length of the fence moved out was about 60 rods.

I came here in A. D. 1837. The road was considerably traveled; was traveled up to the commencement of this suit. The road needs no repairing to keep it in passable condition. The road in question ran diagonally across the field and lots until A. D. 1842. I was supervisor of streets but resigned two weeks before the fence was moved out.

25 *Cross Ex.*—When I came here this was a vacant quarter, and people used to cross at different points and in different directions; was all vacant till Viets' addition was laid out. Mr. Proctor had some fields south-west of this, which he could only get access to by the 26 road in question. He used to get rock and timber that way also. My lot is on south line of the quarter that town is laid out on. In A. D. 1837 the road crossed the Herbert lots. Since the mill has been built, the road, some distance west, has been used for logs.

There has also been large amount of saw-dust in the road. I never knew any work done on the road. Before Mr. Proctor enclosed his field the Bernadotte and Rushville roads both crossed where the field now is. When he fenced his field he left about 4 rods between the field and the town plot. The defendant then proposed to the witness the following questions: Has Mr. Proctor, the defendant, ever claimed the land in question? Has he all the time disclaimed the right of the public in this road? State what you know of the defendant having claimed rent for any portion of this ground? To each of which questions the plaintiff objected, and the court sustained the objection, and the defendant then and there excepted.

27 *Cross Ex. Resumed.*—I know of his having rented the block occupied by logs, but we did not pay the rent. This included part of the street south of my lot. Have often seen the road blockaded by saw-logs. After Mr. Proctor made the obstruction complained of, by setting his fence out, the road was left 25 feet wide in the narrowest place. The defendant then asked the following question: Where does the Bernadotte travel go out of town? Which was objected to by plaintiff, objection sustained, and exception taken.

Re. Ex.—The defendant wished us to pay rent for the ground we had occupied by logs. We did not do it. He had fields south-west of this, and there was no way for him to get to them, except over the road in question, or through his enclosure. Viets' addition was made several years after the field was enclosed.

Charles Eskridge, called by the plaintiff, testified: I have lived here 22 years. The street west of the south end of Main street has been used ever since I have been here. I don't know when the field was fenced, I do know when the fence was lately put out in the road. The road used to come into Main street running 8 or 10 rods south of an oak tree 28 in the corner of defendants field. The road in question used to come up to Viets' fence a little east of the west end, ran along the fence to east end and then turned up into town. When the road came up to Lathbury's it scattered all around and came into town anywhere.

Cross Ex.—When I came to the county the travel went from Main street down through Proctor's field. Mr. Proctor has a field down that way, it was there when I came

to the State, if he had fenced up to Viets he would have had no access to his field, defendant could not have got to his field in any other way than by road in question.

I. G. Davidson, witness for plaintiff, testified: I know the road in controversy, and have known it 22 years, there were several roads there commencing at the west line of Proctor's field near a white oak tree below the north west corner of the field, the road crossed the field and struck the fence a little west of the south-east corner of Viets' field, 29 it ran along the field a little and then along the Herbert Lots, and there was nothing to hinder people from going to Main street.

Cross Ex.—I suppose there was no public road there. I don't know much about the travel there, I have passed through there after my cows, I have hauled sand &c up that way since 1852, I have never known the road to be worked, I have never heard anything about it till the commencement of this suit, I have passed over the road two or three times a year, the road that used to run from the south end of Main street ran diagonally across Proctor's field.

29 Robert Paull, called by plaintiff, testified: I am one of the town council of the town of Lewistown. (Defendant here objected to witness as incompetent; objection overruled, and exception taken.) I have known the road in question since A. D. 1840. The road used to come into Proctor's field 4 or 5 rods south of oak tree in N.W. corner of field, 30 and then struck across into town on a N.E. course. People have traveled the road ever since I knew it. I do not know whether it is a public road or not; I have been along it frequently; don't think I ever traveled it as far east as Main street, or even as far east as Samuel Brown's house. There has been a road there since I have been in town, about 11 years. The land is flat. There used to be a hog hole near the lower end of the road. I know an elm tree inside of Proctor's field, on east side.

Cross Ex.—When I first came to Lewistown, in 1840, I then traveled diagonally across Proctor's land; have seen the road blocked up with logs as far as Brown's stable.

John M. Lewis, called by plaintiff, testified: I don't know where the road in question runs; don't know whether it was recognized as a public road or not; think it has been traveled.

Cross Ex.—Don't know as the road has ever been worked.

31 Edward Sayre, called by plaintiff, testified: I know the road in question; I came here in June, A. D. 1841; the field was fenced in then; I was here in A. D. 1840, but can't tell how the road was then; am not positive as to whether there was a track there in A. D. 1841; have driven through there since often; but can't say how far I went; I cannot say whether the road in question was a public road or not, or whether it needed any work or not; it ran in a south-west direction.

Cross Ex.—I don't know whether the road was a public road or not; it has been obstructed by saw logs.

Lloyd Harn, called by plaintiff, testified: I know the road in question and have since A. D. 1838. Proctor's field was fenced in A. D. 1842; part of the road has been traveled since A. D. 1838. The road ran diagonally across the field; there has been travel on 32 the road up to the commencement of this suit; a few years ago there was not so much travel on the road as now; there has been no work on the road; was a hog wallow at one end of the street; are houses fronting on street.

Question by Plaintiff.—"State whether or not there is any road by which persons can get from their dwellings to the saw-mill except by this road?" Objected to by defendant, objection overruled and exceptions taken.

Ex. Resumed.—It would be the most direct road; I do not know as there was any road from Herberts on east, I used to turn up to town near Viets' corner.

Cross Ex.—The road used to cross corner of Proctor's field, and after running by Herbert's lots, angle into town. Question by defendant.—"Where did the road you have been speaking of lead to?" To which plaintiff objected, court sustained the objection and 33 defendant excepted.

The defendant then offered to prove by this and other witnesses that the road in question formerly ran to Bernadotte, and has been fenced up, closed up, and abandoned as a Bernadotte road; and also that the road in question had been re-located, abandoned and disused; to all of which the plaintiff objected, and the court sustained the objection, except as to the *locus in quo*, to which ruling defendant excepted. Question by defendant.—"Was the road of which you have been speaking, a road that led to Bernadotte?" Objected to by plaintiff and objection sustained by the court, unless the road reached Bernadotte at the N.W. corner of defendant's field.

Cross Ex. Resumed.—The road in question was two or three rods wide after defendant's fence was set out as complained of; there was plenty of room for travel; three teams could pass; never heard of any one being obstructed by the fence; have known road obstructed by saw logs from near Herbert's corner on east so teams could not pass, and never knew of any attempt to remove them.

34 Question by defendant: "Do you know of the defendant, Proctor's, offering, prior to the commencement of this suit, to give half the road clear through town, if the corporation would pay for the other half?" Objected to by plaintiff, objection sustained and exception taken.

E. D. Rice, witness for plaintiff, testified: I know what is called Sixth South street, and have for thirty years. There has been an open space there; I don't know as there has been any street. Proctor's field was fenced in A. D. 1842. Since that time there has been a traveled track on the north side of it that could be passed, but sometimes with difficulty. Until the field was fenced travel went inside of where field now is.

Cross Ex.—There was no road there in A. D. 1830. Don't think travel came up to 35 south line of town till field was fenced. I never knew any Sixth South street. I never

knew the street in question to be claimed or recognized as a road or street, by any town or township authorities, before the commencement of this suit.

John Lathbury, witness for plaintiff, testified: I know the road in question; think the fence was set out in July. I helped do it; was employed by the defendant.

Cross Ex.—The fence remained there one day, and then Mr. Wells, a corporation officer, threw it down. The field was left open over Sunday so that stock could go in. This was in the corporation of Lewistown.

36 H. L. Bryant, witness for plaintiff, testified: I know about the time the town charter was obtained; cannot tell the year. There was a board of officers elected under the charter—President and Councilmen. To all of which evidence defendant objected and excepted.

John McNeill, witness for plaintiff, testified: I have lived in this region nearly 32 years. Am not much acquainted with the road in question. When I came to Lewistown it was all woods down there. There were several tracks there. The first road was the old Rushville road, which ran across the field. There were three or four roads then. I think there was a track along the Viets property.

Cross Ex.—People used the road in going for wood, hunting cows, &c. The travel used to strike off from the road at different points, coming to town, owing to what part 37 of town people wished to come to. There was no road along Viet's field, but a cow path. I do not know of any road running east and west till the field was fenced.

Re-Ex.—The old road used to run in a south-west direction. There was no street there at all. Travel was not confined to any track. People went in every direction.

Wm. Layton, witness for plaintiff, testified: I know several roads near road in question. Think the fence was set out in June.

D. J. Waggoner, called by plaintiff, testified: Mr. Proctor got out an injunction to keep the town from moving his fence. I served the injunction. Wells was there throwing down the fence, *and working harder than I ever saw him before*. Don't know whether 38 er it stood in the road during June or not. Think the road north of Proctor's field has been used some by the public. Don't know whether it ever needed work or not, or whether it ever was abandoned. Served the injunction May 30th, 1859.

Cross Ex.—The travel that goes into the country in that direction was changed about A. D. 1853.

Cornelius Stewart, called by plaintiff, testified: I used to know a road in the south part of town; traveled it in 1837. Don't know when Proctor's field was fenced. Road used to go south-west from south end of Main street across where the field now is. I 39 was appointed commissioner, with Hulick and Lock, in 1845, to lay out a road.

Plaintiff then offered in evidence, from county records, order appointing viewers as follows: "The petition of Fitch J. Porter, and others, being presented in open court, and three dollars deposited by F. J. Porter, ordered that the prayer of the petitioners be granted, so far as to appoint Cornelius Stewart, Matthias Hulick and Benjamin Lock viewers, to review and relocate the road set forth in said petition, and make their report at the next term of this court." To which the defendant objected and excepted.

40 41 The plaintiff then read affidavits of S. C. Judd and Robert Paull to show loss of the 42 report of said viewers; to which the defendant objected and excepted.

43 The plaintiff then called Robert Paull, who testified, (to the court.) I saw the report referred to at and previous to Feb. Term, A. D. 1860 of this court, but do not know as I can state its contents; I compared the order with the report so far as to see that they corresponded; the report was only signed by Messrs Lock and Stewart; the commissioners reported that in pursuance of order of court they had proceeded to lay out a road from the court house square, south 80 rods to Proctor's line, and thence west 54 rods, and thence south-west. I examined the report and thought it was the same.

Cross Ex.—I remember talking about the report, it stated appointment of viewers and then gave courses and distances. The report of commissioners did not show what direction or how far they ran.

44 *Re Ex.*—I think the plat had the certificate of the Surveyor; I do not know whether it was part of the report or not; the report did not give the distances or courses; the plat was on the same piece of paper with the report, and I suppose was part of the report.

The foregoing evidence of Paull as to report and contents was then permitted by the court to go to the jury; to which defendant objected and excepted.

Plaintiff also offered in evidence the order of court confirming report &c., as follows: 45 "C. Stewart and Benjamin Lock, appointed at the last term of this court viewers to view and relocate a public road, made their report, which is accepted, and the plat of said road to be recorded in the road records, and said road declared a public highway and ordered to be opened forty feet in width." To which defendant objected and excepted.

Cornelius Stewart Ex. Resumed.—I was one of the commissioners; don't remember what the road was called, made a report in writing; plat was incorporated in it.

Cross Ex.—We did not run any courses till we reached the south side of town.

46 The plaintiff then offered in evidence an order in the usual form appointing William Walters, William Cozley and Joseph Barclay, viewers to view a road from Lewistown to Walters' ford on Spoon River. Also a report of said viewers made March 31st, 1831, stating that they "have viewed and marked the way for a public road commencing at the south end of Main street in Lewistown, thence a little south of west to the first branch 47 west of Lewistown, thence up the creek bluff on the west side of the creek, &c." to Walters' ford and recommending the opening of the road. And also an order of the court accepting the report of viewers and ordering that the road be opened and declared a public highway. To all of which the defendant objected and excepted.

John A. Criss, witness for the plaintiff, then testified: I do not remember when the defendant's fence was set out in the street in question; it was put out twice; Wells, Supervisor of streets, threw it down; it was put up on the Monday following.

48 The plaintiff then offered in evidence the original plat of Lewistown.

49 William H. Graham, called by plaintiff, testified: I am engineer of the P. & H. R. R.
50 I have done surveying in the sixth street South of the court house; the course of the road in question is south of west; the south line of town is about due east and west; I think the fence was moved out into the road. I ascertained the direction of the road with an instrument, the length of the fence moved is about 50 rods; it was moved out some 23 or 24 feet, there is more space left at the west end than at the east end; don't remember when it was moved out.

Cross Ex.—I don't think Proctor's old fence was precisely east and west; was employed by corporation to survey and take measurements nearly a year ago; the plat I made is substantially correct as to localities; I made it partly from the records and partly from recollection; the red line represents the fence after it was moved out. (See Plat in
51 Record). Here plaintiff rested.

52 The defendant then offered in evidence the following petition, (presented in 1842,) to-wit: "To the honorable County Commissioners of the County of Fulton, Commissioner's Court. The undersigned citizens of the county of Fulton pray your honorable body to take into consideration the disadvantages and difficulties part of the traveling community labor under in traveling the road from Lewistown to Bernadotte in its present route. Your petitioners pray your honorable body, at the next County Commissioners Court, to be holden in Lewistown, on the first Monday in March next, to appoint viewers, to review the road from Lewistown to Bernadotte, commencing on the south-west side of Main street, from thence on the nearest and best route to Cornelius Stewart's, from thence to James Stewart's, from thence to William Cozley's, from thence to William Gustine's in Tusculum, from thence to Bernadotte bridge, for which your petitioners, as in duty bound, will ever pray." Signed by Addison Prigg & 61 others. Also an order of the
55 court granting the prayer of the petitioners, and appointing Cornelius Stewart, Joseph
58 L. Sharp and Lyman Moon, viewers. Also an order confirming the report of viewers,
59 and declaring the road a public highway, and ordering the plat recorded, together with
60 the plat and certificate of surveyor. To all of which the plaintiff objected, and the court instructed the jury that the records offered were not evidence of the vacation of the old Bernadotte road, by the road authorities, but that they might be considered as evidence of the acquisition of a new road, and might be read in evidence for that purpose, to which ruling the defendant excepted.

Joseph Barclay, called by defendant, testified: I came here in A. D. 1828. Was one of the viewers of the old Bernadotte road. It ran through defendant's field. It came into town on the Rushville road. It entered defendant's field about 50 steps south of the N. W. corner. The old road has been fenced up for five years or more. I saw them laying out the new Bernadotte road. The travel that used to go over the old Bernadotte road now takes the new one by Davidson's.

The defendant then offered to prove that the old Bernadotte road had been fenced up, obstructed and disused, all along the route, ever since the laying out of the new Bernadotte road in A. D. 1842, which the plaintiff objected to, and the court sustained the objection, except as to that portion of the road between the south end of Main street and the N. W. corner of Mr. Proctor's field. To which the defendant excepted.

Ex. Resumed.—I used to be all around the thickets, but never knew of any public road near Viet's field.

61 *Cross Ex.*—It was open ground east from the corner of Viets' field; I don't remember any tracks by the Herbert lots in early days; I never knew any road near the fence; the old road did not come up by the Herbert property; think we came in to town on the Rushville road; when Proctor's field was fenced up the travel went out by Davidsons' on the new Bernadotte road; after field was fenced some travel came round the corner up old road; have known old road so obstructed that it could not well be traveled with wagons.

Ira Seoville, called by defendant, testified: I first came here in 1828. I helped make a good many of the roads that came into town at an early day; the first road across where
62 Proctor's field now is, was the Rushville road which ran S.W. from south end of town; the old Bernadotte road was laid out in 1831 and went from south end of Main street in a south-westerly direction, and was used till the new Bernadotte road was laid out; I understood that the old road was laid aside when the new road was made; travel generally took the new road; I was path master for the township two years before the vacation of the old road and worked it; have never known old road to be worked since; the old Bernadotte road ran some distance south of north line of defendant's field. I never knew any public road near Viets' field; when I was path master I knew all the roads in the township but never knew of any public road there; there were tracks all over the country.

Lyman Moon, witness for defendant, testified: I was one of the viewers of the Bernadotte road laid out in 1842. I know the route of the old Bernadotte and Lewistown travel; before 1842 we used to come into town near Proctor's field, angling into town in a N.E. direction. I think I changed my travel to the new road the summer it was laid out; it accommodated the same line of travel; the old road has been abandoned since the new one was laid out; I do not know of any one traveling it since that time. Question by defendant.—Will you state whether you as viewers were laying out a new road or relocating the old one? Objected to, objection sustained and exceptions taken.

Cross Ex.—I live in Bernadotte, 10 miles west of here.

Re. Ex.—People from Walters' ford and Plum ford come in on the new road.

John Caplinger, witness for defendant, testified: I have lived S.W. of Lewistown.

17 years. The old track used to come through what is now defendant's field, angling into town. Struck the Rushville road before it reached Main street. Roads then used to angle into town in various directions. About the time I came into the neighborhood travel changed from the old Bernadotte road to the new one by Davidson's. I have never known the old road to be worked, or claimed as a public road, since the change. I was path-master a few years ago, and worked the new road by Davidson's. The old road has been a by-way, disused and not traveled.

Cross Ex.—I don't know as there has been a traveled track on the south side of the town. There was no traveled track through to the mill before the fence was put out. After the fence was put out travel came over part of the street in question, but not all.

65 *William Taylor.*—I have lived here 30 years. I am acquainted with an old road south of town; road in question used to be called the Bernadotte road, and the Walter's Ford road. It came into Proctor's field 40 or 50 steps south of the N.W. corner, and ran eastward; ran into the Rushville road 10 rods or more before it reached Main street. I never knew of travel on the south line of town before the field was fenced. Never knew of a road east and west by Veits' and Herbert's lots till after 1842. If there was any travel I did not see it. Have never known road in question worked since new road by Davidson's was laid out.

Cross Ex.—There was not a traveled track all the way over the street in question after the fence was made. It came by the corner a few rods, and then turned into town northerly. They used to angle across into town. I don't know whether there was one rod or ten of the street in question traveled; we angled across it. A portion of this road was used 30 years ago; I cannot say whether one or ten rods of it.

Re-Ex.—I do not know as the old road used to run on the line of the street in question at all; it came across. There is no other way for Mr. Proctor to get to his fields except by the road in question.

Newton Walker, called by defendant, testified: I have been here 25 years. I know the roads on the N.W. of 27, 5 N. 3 E. I used to travel them. The old Rushville and Bernadotte roads used to come in that way. They came together 10 or 12 rods south of Viets' field. Travel used to come into town angling east of north. I never knew of any travel from Viets' corner east, to south end of Main street. I never used nor saw any east and west road there. The time I speak of was A. D. 1837 and 1838. I have 67 often seen the road badly obstructed by saw-logs. The defendant then offered to prove by witness that there is not nor ever has been a road from the N.W. corner of Proctor's field to the N.W. corner of sec. 27, 5 N. 3 E.; to which plaintiff objected; objection sustained and exception taken. Defendant also offered to prove that there was not now nor ever had been a traveled track from the N.W. corner of Proctor's field west, on the south line of the town plat, to the south-west corner of the town plat, which was objected to; objection sustained, and exception taken.

Cross Ex.—I never traveled on the south line of town except diagonally. I think the street in question has been open ever since Proctor's field was fenced.

68 *John McNeill* was then called, by whom defendant offered to prove:

1st. That in 1852 the defendant gave a strip of land for a new road in the place of that portion of the old road running over the *locus in quo*, which was accepted by the public and accommodated the same travel, and that the same travel that had formerly gone over the old road, then and continuously afterward followed the new route.

2nd. That the Hackelton Bridge road of 1845 was changed in 1852 for about a mile and a half from Lewistown out, intersecting with the old road on the top of the hill near Mr. Harns, and that the public acquired a right to this new route, and that it accommodated, and continuously since has taken the same travel that formerly passed over the old road.

3rd. Also, that about a mile and a half of the old Hackelton Bridge road next to Lewistown, including the *locus in quo*, was changed in 1852 to another route to which the public then acquired a legal right, and which has since that time accommodated and taken the same travel that formerly passed over the old route. To all of which evidence the plaintiff objected, and the court sustained the objection, except as to the evidence offered touching the abandonment of the *locus in quo*, and excluding all evidence as to the acquisition of a new route by the traveling public, and all evidence of abandonment beyond the 69 N.W. corner of Proctor's field, to which the defendant excepted.

Ex. Resumed.—I used to live here; the old Rushville and Bernadotte roads ran into town together; I did not know of any road running east and west till after Proctor's field was fenced; the old Rushville road was vacated; I helped lay out new road in 1852; we followed the new Bernadotte road to the hollow below Davidson's, then down the bottom and up the hill to Harn's, intersecting there with the old Hackelton Bridge road.

The defendant then offered to prove by witness, that the new route, last mentioned, was given for a public road by the owners of the land over which it passed, which plaintiff objected to, objection sustained and exception taken.

70 Defendant then asked witness the following questions: Has the traveling public who formerly came into Lewistown over the *locus in quo* acquired a new route which they have adopted and used instead of the old one? Objected to, objection sustained and exception taken.

Defendant also asked the following questions: Has any part of the road leading from Lewistown to Hackelton's Bridge laid out in 1845 been abandoned, and a new line of travel obtained by the public, accommodating the same traveling public? if so, state at what place? Has the road to Hackelton's Bridge laid out in 1845 been abandoned by non-use? if so where? To each of which the plaintiff objected, and the court sustained the objection, instructing the witness that he might answer to the N.W. corner of Proctor's field

of Lewistown, in the public street or road sixth in number south of the court house, in said town, and running west or westerly from Main street, in violation of an ordinance of said town, which the defendant previously erected or caused to be erected and placed therein. Then the jury will find the defendant guilty as charged in the complaint.

Given 2. It devolves on the defendant to prove a permission in writing from the supervisor of streets, if he had one, and in the absence of such proof the jury will find that he had no permission.

Given 3. If the jury find the defendant guilty of continuing such obstruction for any less time than specified in the complaint, then they will state in their verdict the number of days they find such obstruction to have been continued.

79 Given 4. A public road may be established by the action of the public authorities, in pursuance of the provisions of the statutes, or by dedication or by prescription, and proof of a public road by either of these methods is sufficient to establish the right of the public to use the same.

Given 5. The jury are instructed that the plaintiffs have proved the establishment of a legal road by the authorities in pursuance of the provisions of the statute, from the south end of Main street in Lewistown, to the ford of Spoon river near Daniel Walters' in 1831, but the jury are not to consider the said road for the purposes of this case, further westward than the *locus in quo*, that is to say, than the place where the obstruction is charged to have been committed.

Given 6. The jury are instructed that the plaintiffs have proved the establishment, in the year 1845, of a legal road by the public authorities in pursuance of the statute, from the court house square in Lewistown to the bridge at Hackelton's; but the jury are not to take said road into consideration in this case farther westward than the *locus in quo*.

Given 8. If the jury believe from the evidence that the defendant has granted the ground in controversy to the public for a road and the same has been accepted, that is sufficient to establish a public road by dedication. It is not necessary that there should be a written or express grant proven by the evidence but it is sufficient to show long and uninterrupted use and such acts of the owner of the land as unexplained by some agreement will lead persons to the supposition that the way is dedicated and the acceptance may be proved by use and it is not necessary to prove that the public authorities worked or repaired the road but any act on the part of the public, which manifests an intention to accept such as public travel and use is as satisfactory evidence of acceptance as repairs by the officers. No particular length of time is necessary for evidence of dedication.

Given 9. If the jury believe from the evidence that the public had a legal right to travel over the land of the defendant, below his north line of fence before he erected such fence, and that the defendant erected the said line of fence and inclosed his field in the year 1840, 1841 or 1842, and left the ground in controversy, at the time outside of his enclosed land for the public to travel instead of the road or roads he had fenced up, and that the public or any portion of the public have ever since until prevented by an obstruction of the defendant, used and traveled the ground in controversy as a public road, these are facts for the consideration of the jury in determining whether the defendant dedicated the ground to the public for a road.

Given 10. If the jury believe from the evidence that legal roads existed and were traveled over defendants land before and at the time he erected his north line of fence and inclosed the said roads as traveled, that would be a good consideration moving to the defendant for the grant of the land left north of his inclosure and if the land so left outside of the inclosure was accepted and used by the public instead of the other roads, then the right of the public to use the land outside and north of the said inclosure would be complete.

Given 11. If the jury believe from the evidence that all the defendant's land outside and north of his enclosure was dedicated to the public for a road, it is immaterial as to the width of the land so dedicated, except to determine whether the defendant continued the obstruction in the road as charged.

Given 12. If the jury believe from the evidence that the defendant dedicated the land in controversy to the public for a road the fact that it was convenient for the defendant to use the way for his own purposes in common with others does not at all impair the right of the public.

Given 16. If the jury believe from the evidence that the public have used the ground mentioned in complaint and where the obstruction is charged to have been continued for twenty years without interruption, even though there is no evidence as to any action as to laying out a road over such ground, then it is sufficient evidence of a road by prescription.

Given 17. Although the jury may believe from the evidence, that before 1842 the persons who desired, traveled across the point of obstruction to go from Lewistown to Bernadotte, and that before 1852 all who desired traveled across or along the point of obstruction from Lewistown to Hackelton's bridge, and since such periods respectively, all such persons and also such as traveled to or from Rushville, have used and traveled other routes, yet that does not vacate the road in controversy or produce an abandonment of it if any other portion of the public, no matter how small, continued to use and travel the road described in the complaint.

Given 18. Although the jury believe from the evidence that all the road laid out in 1831 and all of the road laid out in 1845 except such part as the jury may find covered by the obstruction, or any part of it, has been abandoned, and entirely ceased to be used, yet that does not deprive the public of the right they may have had to use the ground in controversy as a public road.

Given 19. It is immaterial how little a public road is used, it still exists unless it is not used by any person and all necessity for it has ceased to exist.

20. If the jury believe from the evidence that there is any portion of the public who
Given are accommodated by and who have used the road in controversy, who have not used the
new roads instead of the one described in the complaint, then as a matter of law they
cannot find the road described in the complaint to be abandoned.

21. The public interests are a sufficient consideration for dedication or prescription,
Given and a right to a road once vested in the public, can only be divested in the same way such
right can be created unless the same be abandoned.

22. The evidence introduced by the defendant of a new road from Lewistown to Ber-
Given nadotte, and in respect to a new road from the hill beyond Harns out of town to the in-
tersection with the Bernadotte road is no evidence of a vacation of the road in controversy
84 but is only to be considered by the jury in determining whether the ground in controversy
has been abandoned by all of the public.

23. Unless the jury believe from the evidence that all of the public have been accom-
modated by the new roads and that the road in controversy had entirely fallen into disuse
Given at the time of the continuing of the obstruction charged, then the jury cannot find the
road to be abandoned.

24. The jury are instructed that there is no evidence in this case by which any road
Given over the *locus in quo*, or through defendant's field is proven to have been vacated by the
public authorities, under the provisions of the statute of the State.

25. The jury will disregard the statements of counsel in this case, in respect to
Given matters not proven by the evidence.

26. There no evidence for the jury to consider in this case in respect to an addition
Given to the town of Lewistown south of the old town plat including the *locus in quo*, and Proc-
tor's field, and the jury are instructed to disregard any statement made by counsel in re-
85 spect to any such addition. To the giving of each of which said instructions the de-
fendant objected and excepted.

The defendant then asked the following instructions, to-wit:

1. The court instructs the jury that unless the plaintiffs have proved a legal public
Given highway all the way from the south end of Main street to the north-west corner of de-
fendant's field, alluded to in the evidence, and that the defendant did, as charged in com-
plaint, obstruct such legal road, they will find the defendant not guilty.

2. The jury are instructed that it is not enough that the evidence establishes that a
Given street of the town of Lewistown was obstructed by the defendant; but before they can
find the defendant guilty, they must be satisfied from the evidence that the obstruction
was in a street of said town of the description, and commencing at the points, specified in
the complaint.

86 3. Unless the jury believe from the evidence that the plaintiffs have proved that the
road or street in controversy was a public road or street, commencing at the south end of
Given Main street, in Lewistown, and running west to the north-west corner of Mr. Proctor's
field, as charged in the said complaint in this case, they will find for the defendant.

4. The court instructs the jury that if they believe from the evidence the road spo-
ken of by witnesses as the Hackelton Bridge road was legally laid out over a portion of the
Given alleged street in 1845, still, if they believe the public acquired a new route, not passing
over the *locus in quo*, in or about 1852, accommodating the same travel, and that all the
travel that formerly passed over the old road of 1845, then and thereafter passed over the
new route so acquired, that then the old Hackelton Bridge road was abandoned so far as
concerns the premises in dispute, and the plaintiffs can claim nothing under or by virtue
of its former location over a part of said street.

5. Mere use by the public of the premises in question as a road or street for any
87 period of time which does not establish a road by prescription, cannot establish such road
Given unless the evidence shows in connection with such use an intention on the part of the de-
fendant to give and appropriate, and that he did give and appropriate the premises for
such road and that the public have accepted such gift and appropriation.

6. If the jury believe from the evidence that previous to the date of the alleged ob-
Given structions the road or street described in the complaint had been abandoned by non-user,
and that the public had acquired a legal right to another road, or that the necessity for
such road had ceased to exist, they will find the defendant not guilty.

7. In order to establish the road in controversy by prescription, the plaintiff must
Given satisfy the jury by the evidence given in this case that the road in controversy and running
over the same ground has been used and traveled as a public road for twenty years before
the commencement of this suit.

8. The court instructs the jury that unless the plaintiff has proven by competent evi-
Refused dence in this case a legal public highway running west from the south end of Main street
to the west limit of the town plat, and that such legal road has been obstructed by the
88 defendant as charged in the complaint herein, then, and in such case they will find the
defendant not guilty.

9. The court instructs the jury that the public cannot by merely traveling in one place
Refused for twenty years or more over vacant and unoccupied land acquire a legal right to a road
over such traveled track.

10. The court instructs the jury that if they believe from the evidence that a new
road was legally acquired by the public from Lewistown to Bernadotte in 1842, or at any
Refused other time subsequent to the laying of the road spoken of by witnesses as the old Berna-
dotte road, and that the new road so acquired has accommodated and taken the same
travel that formerly passed over the road, that such acquisition of a new route and change
of travel to that route is in law a vacation of the old road.

11. If the evidence shows that the way or road over the premises in question was not

Refused recognized, used, or worked by the public as a public road or highway, they will acquit the defendant.

89 12. The court instructs the jury that unless they believe from the evidence that there
Refused was at the time of the commencement of this suit a legal public highway, leading all the way from the south end of Main street west to the west line of the corporation and that such road has been unlawfully obstructed by the defendant as charged in the complaint, then and in such case they will find the defendant not guilty.

14. The court instructs the jury that unless they believe from the evidence that the
Refused defendant herein wilfully obstructed said road in controversy, with the intention then and there so to obstruct said road then and there knowing the same to be a public highway they will find the defendant not guilty.

15. The court instructs the jury that the establishing of an alteration in a public
Refused highway is in law a discontinuance of the part altered and the jury are further instructed
90 that if they believe from the evidence that the old Bernadotte was re-located in 1852, and that by said re-location that part of the said old Bernadotte road upon which the plaintiff alleges that the obstruction was placed was altered, then they are instructed that such alteration is a discontinuance of that part altered, and the plaintiff in this cause can claim no privileges under said re-location, provided they further believe such re-location by the evidence to have been legal.

16. The court instructs the jury, on the part of defendant, that Charles Eskridge and George Washington Stoots do not constitute the traveling public, and that if they
Refused believe from the evidence that the public abandoned said route in controversy after acquiring the legal right to use another, they will find for the defendant, although the jury may further believe from the evidence that said Eskridge and Stoots afterwards continued to use said road in controversy as a footpath.

17. A road by prescription can not be acquired over vacant and unoccupied land by
Refused travel for any length of time, and the court gave the first seven of said instructions, and
91 refused the remainder, to which ruling in replying said instructions defendant excepted.

20 Oct. 3d, 1860, the jury returned a verdict of guilty.

91 Defendant below then entered his motion in arrest of judgment, and for a new trial,
92 but the court overruled said motions, and entered judgement against defendant below.
20 To which ruling of the court the defendant then and there excepted.

20 Defendant below then prayed an appeal to the supreme court which was allowed.
91 And on the 24th of October, 1860, appeal bond was filed herein.

The errors assigned are:

- 1st. That the court below erred in overruling the defendants motion to dismiss the suit.
- 2nd. That the court erred in overruling defendants motion to dismiss the appeal.
- 3d. That the court erred in allowing improper evidence to be introduced by the plaintiff.
- 4th. That the court erred in excluding proper evidence offered by the defendant.
- 5th. That the court erred in giving improper instructions on part of plaintiff.
- 6th. That the court erred in refusing proper instructions asked by defendant.
- 7th. That the court erred in overruling defendants motion for a new trial.
- 8th. That the court erred in overruling defendants motion in arrest of judgment.
- 9th. That the court erred in rendering judgement against defendant on the verdict.

STEVENSON & KIMBALL.

Att'ys for Plaintiff and Appellant.

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Proctor

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Ann of Lewistown

Abstract

Filed June 18/61

Leland

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Also Jan 8/65

W. E. Ensey
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