

12237

No. \_\_\_\_\_

# Supreme Court of Illinois

Denion

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vs.

People

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71641  7



Be it Remembered that at the September Term of  
the Circuit Court of Peoria County in the State of Illinois  
A.D. 1853, to wit, on the 19<sup>th</sup> day of September A.D. 1853  
there was presented & filed in said Court by the Grand Jury  
of said County a Bill of indictment in the words &  
figures following, to wit.

Indictment: "State of Illinois } Of the September Term of  
Peoria County } the Peoria County Circuit —  
Court in the Year of Our Lord  
1853 The Grand jurors ~~seem~~ chosen Selectors  
and sworn in and for the county of Peoria  
aforesaid in the name and by the  
authority of the people of the State of  
Illinois on their oaths present that  
Samuel Dimon late of the County of  
Peoria aforesaid on the thirtieth day  
of June in the Year of our Lord one th-  
ousand eight hundred and fifty three  
at and within the County of Peoria  
aforesaid in and across a public road  
leading from the City of Peoria and  
County of Peoria aforesaid to the City  
of Knoxville in the County of Knox and  
State of Illinois, on the Northwest quarter  
of section ten in Township Nine North  
of the base line and range seven east  
of the fourth principal meridian then  
and there did unlawfully with force  
and arms Erect and build a fence  
thereby then and there obstructing the  
said public road and then and there  
by said fence and obstruction rendering the



Said public road inconvenient to pass—  
 Contrary to the form of the Statute in such  
 case made and provided, and against  
 the peace and dignity of the same—  
 people of the State of Illinois

E. H. Johnson

States attorney

On which is & was the following endorsement

A. True Bill

Wm. M. Dodge

Foreman, Grand Jury

Proceedings in the Circuit Court in and for  
 the County of Boone in the State of Illinois  
 at a term thereof begun and held at the  
 Court house in Boone on the third Monday  
 in the month of November in the year of  
 our Lord one thousand eight hundred  
 and fifty three it being the twenty first  
 day of said month. Present the <sup>Honorable</sup> ~~Honorable~~  
 Ouslow Peters Judge, of the sixteenth—  
 Judicial Circuit in the State of Illinois  
 Elbridge G. Johnson States attorney Leonard  
 B. Cornwell Sheriff and Jacob Gale clerk

To Wit

Honorable H. M. Wead Judge of the tenth Judicial Circuit, presiding—  
 Tuesday November 29<sup>th</sup> A.D. 1853

The People of the State of Illinois

vs. { Indictment for obstructing  
 Samuel Dimon } a publick road  
 Thomas A. Welles a witness duly summoned  
 on behalf of the defendant in this case being  
 called came not but made default. Whereupon  
 on motion of the defendant it is ordered



that a writ of attachment issue against  
the said witness forthwith,  
This day came the States attorney and John  
G. Pratt on behalf of the People and the  
said Samuel Dimon came in person —  
attended by Norman H. Purple his counsel  
and upon his arraignment for plea says  
that he is not guilty in manner and form  
as is charged against him in the indict-  
ment and of this he puts himself upon  
the Country for trial, It is ordered that a  
jury be empaneled to try this issue —  
whereupon came a jury of twelve good  
and lawful men, to wit Norton Bristol  
Stephen D. Stovel Moses Stringer Jr John Houston  
Henry Beebe E. F. Bartholomew James F. Marsden  
Martin Barlow Otis Baygs William H. Smith  
Manning Drake & Erastus Reed, who being  
duly ~~sworn~~ chosen tried and sworn well  
and truly to try this issue of traverse and  
a true verdict give according to law and  
evidence the evidence not having been  
fully heard, were adjourned to meet  
the Court again to morrow morning.

Wednesday November 30<sup>th</sup> 1853

This day came the jury empaneled in  
this case on yesterday and the evidence having  
been fully heard, upon their oaths aforesaid  
do say We of the Jury do find the defendant  
guilty, whereupon the defendant entered a  
motion for a new trial in this case

Friday December 2<sup>d</sup> A.D. 1853

This day this cause came on to be heard  
on the motion of the defendant for a



new trial in this cause, on consideration whereof the Court overruled said motion, therefore it is considered by the Court that the said Samuel Dimon do make his fine to the People of the State of Illinois in the sum of one dollar for the use of Pionia County that he pay the costs of this proceeding and that execution issue against him therefor

And afterwards, the defendant filed the following Bill of Exceptions in said cause December 7<sup>th</sup> A.D. 1854 - to wit:

Bill of Exceptions The People  
vs  
Samuel Dimon } Indictment for obstructing  
Road

Be it remembered that upon the trial of this cause the People to maintain the issue on their part called Elias Vickory who testified that for the last 9 years he had known a road to be traveled across the N.W. 1/4 of Sec 10, 9 N.E. of the fourth principal meridian, that the same road continued on west to Blairfield & Knoxville and East to Pionia,

That there were several traveled tracks across the quarter section, but one was more traveled than the others, & was the main traveled track That there is now a fence across said main track it was put there some time in April or May last that Dimon told him he was going to build a fence there but that he did not know who put it there that Dimon lived on the land enclosed by



the fence, that as Supervisor he had worked on the road about two miles East and miles west of this land, Near ten years since, That no work had been done on this quarter it being Prairie land & needing none. That the Road as traveled now since the fence was built is equally good if not better than the old track.

Henry McFadden testified, that he surveyed a road across the quarter section on which defendant lives (N.W. 1/4 10, 9, N. 1/2 E) in 1850. That at that time there was a main traveled track there, the Road I surveyed run diagonally across this main travelled track, at the East side of the land the travelled track was about 8 to 12 rods North of the road I surveyed, That there were several traveled tracks on the quarter section, but one was more traveled than the others.

Matthew Craig testified <sup>that</sup> he had known a traveled road over said land seventeen years, running rather East and West that there was one main track & others not so much traveled, that a fence has been built across said main track which at the East line of the quarter directs the travel from 2 to 4 rods from said main track. To all the evidence <sup>offered</sup> to prove the existence of a Public Highway by testimony that it <sup>had</sup> ~~was~~ been used and travelled as such the defendant objected, when the



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same was offered, the court overruled the objection and admitted the evidence & defendant excepted.

Here the People rested and stated that they had closed their evidence in chief.

The Defendant then called Charles Nettell who testified that he was Clerk of the County Court that he had made through examination of the Records and files in his Office where the records & files relating to roads, are kept & that upon such examination he could not find the Record of any Road leading from the City of Provia to the City of Knoxville and that he believed no road of that description or title had ever been laid out and established.

Thomas N. Willey also called by Defendant testified that he was acquainted with the land on which defendant lived and had known it for several years, that there had been several traveled tracks across the same extending over 14 or 15 rods in width, some had been traveled more and some less, depending much on the season of the year & condition of the ground and weather, that the fence on said land is from 2 to 4 rods from one of the traveled tracks, that the road as now traveled is a better road & on better ground than the old tracks.

Levi S. Williamson called also by



defendant testified that there were a good many tracks travelled across the land, could not say how many - That at the East End or side of the quarter the fence stands nearly in the middle of one the main traveled tracks

The defendant then offered to prove that the N.W. 1/4 of Sec 10 9 N. 7 E in Boone County was Patented by the United States to Lera King on the 10<sup>th</sup> January 1818 That on the 27<sup>th</sup> Nov 1818 Lera King conveyed the same to Norman Nicholson that on the 15<sup>th</sup> July 1824 Norman Nicholson conveyed the same to Jacob B. Farr and that on the 30<sup>th</sup> July 1849 Jacob B. Farr conveyed the same to Nancy Dimon who was then and still is the wife of the defendant, and that during all the time said Road was used and traveled as a road or highway said King Nicholson and Farr were non residents of the State of Illinois & that they nor either of them ~~were~~ had ever received any compensation or damages for the using & occupying said land for the purposes of a road or highway

The Evidence then offered was excluded by <sup>the</sup> Court and the Counsel for the defendant then and there excepted to the Opinion of the Court in excluding the same

The People then offered in



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Evidence for the purpose, of rebutting  
the evidence of the defendant a petition  
which Petition among others was signed by  
defendant Appointment of Viewers  
Report Plat and Survey and order of  
the County Commissioners Court of  
Prona County establishing a regular  
legal Surveyed "Highway" from the foot  
of the bluff opposite the head of  
Main Street in the Town of Prona by  
way of Kickapoo town to the town of  
Charleston in said County, which  
said Road as Surveyed and Establi-  
-shed passed nearly East and west across  
the quarter section of land before des-  
-cribed, said road was Established  
April 15<sup>th</sup> 1842

For the same purpose of  
Rebutting the Evidence of the defen-  
-dant the People Called Geo. C. McFa-  
-dden who testified that on the 10<sup>th</sup>  
day of April 1842 he Surveyed said  
last named road over said land  
That at the west line the Surveyed &  
traveled track are nearly the same  
place but he did not know certain.  
That the residue of the Surveyed  
road and traveled track <sup>were</sup> ~~were~~ not  
the same <sup>that the traveled track was</sup>  
generally south of the Surveyed road

For the same purpose of rebutting the  
defendants Evidence the People Called  
Henry C. McFadden who testified that  
the road he surveyed over the said



land, crossed the traveled track over the same nearer to the East than the west line that the fence built on the land crossed both the surveyed road and travelled track, but whether at the same place he could not state

Seremiah Brown, <sup>also</sup> called for the same purpose testified that he was present at the time Henry McFadden surveyed said Road and that the fence ~~on~~ on said land crossed the travelled track and also the line of the surveyed Road, Whether at one and the same place he could not distinctly state

Jacob Wells also called for the same purpose testified that the fence on said land crossed both the travelled track and the surveyed road, and that it crossed both at the same place

This evidence so offered as rebutting evidence was all objected to by defendant at the time the same was offered, but the court admitted the same as rebutting evidence only and the defendant then and there excepted to the opinion of the court

Here the People again closed their testimony

The defendant then offered to prove that at the time said surveyed road was laid out and established over said quarter section of land said land was owned by Jacob B Farr



who was a citizen and resident of the State of New York, and had no notice of any proceedings in relation to the location or Establishment of said road and that no damages whatever were ever assessed or paid upon or before or after the location or establishment of said Road, over said land nor no compensation whatever were paid for locating & Establishing said road over the same also that on the 30<sup>th</sup> July A.D. 1849 said Jacob B. Farr by deed conveyed the said land to Nancy Dinon the wife of <sup>the</sup> defendant and that she is still the owner of said land under said conveyance which said evidence so offered was excluded by the Court and the defendant's Counsel then & there excepted to the opinion of the Court in excluding the same this was all the evidence offered or given in the case

1<sup>st</sup> The Counsel for the People requested the Court to instruct the Jury as follows  
 If <sup>the</sup> jury find from the evidence that the defendant did fence across and exclude the public travel from a public Highway as charged in the indictment and that said fence so obstructed said public highway that the same could not be traveled and that the public travel was compelled to follow a new track not before laid out or traveled as a public road the jury will find the defendant guilty.

2<sup>d</sup> If the jury believe from the evidence that



Defendant did fence up and obstruct  
a public road at the place alleged in  
the indictment so as to prevent passing on  
the same and that said road so obstru-  
-cted at any place or part of the obstruction  
was a legal public road they will find  
the defendant guilty - whether there may  
be another track in the vicinity equally as  
good and convenient to <sup>be</sup> traveled

3<sup>d</sup>

Any person who fences up or obstructs a  
public traveled road does so at his peril  
and if a road so obstructed is a legal  
road the one so obstructing it <sup>is</sup> liable to  
indictment and punishment for the same

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That in considering this case it is proper  
for the jury to examine the reasons and  
purports offered in evidence and if the  
jury find from such evidence and <sup>the</sup> tes-  
timony of witnesses in the case that <sup>there</sup> was  
a public road running from Peoria to  
Knoxville on the quarter section mentioned  
in the indictment and that defendant  
has any where on the line of said road  
on said quarter fenced the public travel  
from the same they will be justified in  
finding the defendant guilty

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That it is not necessary for a verdict  
for the people in this case to prove a  
legally laid out road all the way from  
the city of Peoria to the city of Knoxville  
but only necessary to prove <sup>the</sup> road  
obstructed was a legal public road on  
the quarter section mentioned and



charged in the indictment

7<sup>th</sup> It is no justification whether the public have been put to inconvenience by the obstruction or not - provided the legal highway at the place charged was obstructed so as to prevent public travel on the same

8<sup>th</sup> If the jury find it proved that defendant said he would build the fence charged and that the fence so threatened to be built was afterwards built and was ~~just~~ part of defendant's enclosure and that defendant resides on the same quarter section of land on which the fence is built this is proper evidence upon that subject for the jury to consider as tending to prove the fact

9<sup>th</sup> If a road is used and traveled by the public as a highway and is recognized & kept in repair as such by the County Commissioners & Supervisors whose duty it is by law to open and repair public roads, proof of these facts furnishes ~~as~~ a legal presumption liable to be rebutted, that such road is a public highway

To which several instructions the defendant then and there objected, but the same were given by the Court and the defendant then and there excepted to the Opinion of the Court in giving the same



1st The Counsel for the Defendant then requested the Court to instruct the Jury as follows

That no legal Public road or highway can be laid out in this State, and established as such, unless there has been a petition in due form of law presented to the proper Court, and viewers appointed to view the same; a location of the said road by such viewers, a report by them in favor of said Road and an order of the proper Court or authority, establishing the same

2d That unless they believe from the evidence that a road or highway leading from the city of Poria to the city of Knoxville as described in said indictment has been legally laid out and established in the manner mentioned in the first instruction they will find the defendant not guilty

3d That unless the People have proved that there was a legally laid out road from Poria to Knoxville as charged in the indictment they must find the defendant not guilty

4th That unless they believe from the evidence that the defendant obstructed a legally laid out and established road from Poria to Knoxville as charged in the indictment they must find for the defendant



That if the Jury believe from the Evidence that there were several traveled tracks across the Prairie near to the place where the alleged obstruction by defendant exists, that the fact that one of those tracks was somewhat more traveled than the others affords but slight evidence that it was a legally established road

That before the defendant can be convicted the People must prove to the satisfaction of the Jury that he obstructed a public Highway legally established as charged in the indictment

That unless the Jury believe from the evidence that the track mentioned by the witness was a legally laid out ~~and~~ established public highway and that the defendant by building a fence across the same obstructed said Highway they will find him not guilty

Before the defendant can be convicted the People must prove, that he built a fence across a legal Public highway as charged in the indictment

That private property cannot be taken for Public use without Just Compensation to the Owner And that if they believe from the Evidence that a road has been laid out or traveled over the land described in the indictment without



The Knowledge or consent of the owner of the same, and that he ~~was~~ has had no notice of the establishment of any such road, either actual or constructive. Such travelling over or laying out said road as to such owner is a nullity & he or any other person on his behalf may lawfully fence up the same.

10<sup>th</sup> That unless the Plaintiff has proved to the satisfaction of the Jury that the defendant obstructed a Public highway in the County of Bond as charged in the indictment they must find the defendant ~~guilty~~ not guilty.

11<sup>th</sup> That if the Jury have any reasonable doubt, that there was a legal public Highway at the place where it is alleged the same was obstructed or that the defendant built a fence across the same as charged in the indictment, they will find the defendant not guilty.

12<sup>th</sup> If the Jury believe from the evidence that <sup>at</sup> the place where the alleged fence was built there was no such road as the one described in the indictment they will find the defendant not guilty.

13<sup>th</sup> That there is no evidence before the jury of any actual survey and location



of a road through the land described in the indictment upon which the defendant in this case can be convicted.

14<sup>th</sup> That the Record evidence <sup>introduced</sup> in this case is not to be considered by the Jury for the purpose of establishing the fact of the survey and location of a road but only to rebut the Evidence given by the defendant.

15<sup>th</sup> That unless the Jury believe from the Evidence, that the Road shown by the Record and the Traveled road in relation to which the People's Evidence in Chief was given, are the same road, and that the Road was obstructed by the defendant as charged in the indictment, they will find the defendant not guilty.

16<sup>th</sup> That the fact that the Surveyed Road and the traveled tracks are running near to or crossing each other is but slight evidence that they are the same roads, <sup>which instructions 1, 2, 3, 7, 9, 13, & 14</sup> the court refused to give and the defendant then and there excepted to the Opinion of the Court in refusing to give the same.

The Jury found the defendant guilty and the defendant entered a motion for a new trial for the following reasons and affidavits filed in support of the same.



State of Illinois } The People } Indictment  
Perry County } ss ss } for obstructing  
Saml Dimon } road,

Samuel Dimon being duly sworn says  
that when the Jury retired to consider of their  
verdict in this cause there was no Officer  
sworn to attend said Jury as required  
by the 189<sup>th</sup> section of the Revised Statutes  
and that there was no agreement on the  
part of himself or his Counsel to dispence  
with the attendance of ~~said~~ sworn off-  
icer and further saith not

Subscribed & sworn to Saml Dimon  
before me this 1<sup>st</sup> Dec.  
A.D. 1853

N. H. Purple  
Notary Public  
Perry City Ills

The People }  
vs } Indictment for obstructing <sup>road</sup>  
Saml Dimon }

Defendant Enters a motion  
for a new trial for the following reasons

- 1<sup>st</sup> the verdict was against law and  
evidence
- 2<sup>d</sup> The Court gave improper instructions on  
the part of the People
- 3<sup>d</sup> The Court refused proper instructions  
asked by defendant

4<sup>th</sup> The Court refused to permit the defen-  
dant to introduce proper Evidence —



18) 2  
offered by him

5<sup>th</sup> The Court permitted the People to introduce improper and irrelevant testimony

6<sup>th</sup> When the Jury retired to consider of their verdict, they were not attended by a sworn Officer as required by law

7<sup>th</sup> The Bill of indictment was not presented or found by any legally constituted Grand Jury

8<sup>th</sup> Because Norton Bristol one of the jurors was not a resident of the county which fact was unknown to defendant until after said Jury was impaneled

Purple & Sanger  
for Deft.

State of Illinois  
Preria County } H

Samuel Dimon being duly sworn according to law says, that he is informed and believes that the Grand Jury who found the bill of indictment against him in this case were selected and summoned by the Supervisors of Preria County and he refers for evidence thereof to the Records & proceedings of the Board of Supervisors and the Verine issued in the case & makes the same part of this affidavit



affiant further states that he has been informed and believes, that Norton Bristol one of the Jurors who tried this cause is not a resident of Peoria County and that neither he nor his counsel had any knowledge of this fact until the Jury had been empannelled and a portion of the testimony had been given in the cause and further saith not

Saml Dimon  
Subscribed & Sworn to  
before me this 1<sup>st</sup> Dec,  
1853

N. H. Purple  
Notary public  
Peoria City Ill.

The Plaintiff also filed the following affidavit in opposition to said motion

People vs Samuel Dimon, Nov Term 1853 of the  
Peoria County Circuit Court  
Thomas Clark being first duly sworn doth depose and say that he was the Officer in attendance upon the jury in said case after they retired to consider of the verdict affiant further says that after said jury retired as aforesaid they were in affiant's charges as an Officer and that affiant kept them together as the law directs till they had agreed upon their verdict that no other person had any communication with said jurors till after their verdict was returned in Court and that affiant had no



further or other communication with  
~~them~~ said jurors while so under his char-  
 -ge than to ask them if they had agreed  
 upon their verdict affiant further says  
 that he is a constable in attendance on  
 this Court and that said jury retired  
 under the direction of J. G. Bryner an offi-  
 -cer of this Court who placed affiant in  
 in charge of said jury  
 subscribed & sworn to before <sup>of</sup> Thomas Clark  
 me this 2<sup>nd</sup> day of December  
 A.D. 1853 Jacob Gale clerk

The undersigned jurors in said case  
 being first duly sworn do say we have  
 read the foregoing affidavit and believe  
 the same to be in all respects true  
 State of Illinois } Norton Bristol  
 Bond County } ss John Houston  
 subscribed and sworn } Stephen B. Stowel  
 to before me this 2 day } Manning Drake  
 of Dec, A.D. 1853  
 Matthew Craig, J. P.

The Court overruled said motion for  
 a new trial and the counsel for the  
 defendant then and there excepted  
 and requested the Court to sign and  
 seal this bill of exceptions which is  
 done

H. M. Wad. Clerk



State of Illinois  
Pena County } I. Jacob Gale clerk of the  
Circuit Court of and for said County do hereby  
certify that the foregoing is a correct transcript  
of the Record of the proceedings in a certain  
Cause in said Court of The People of the State  
of Illinois against Samuel Simon on  
Indictment - As the same is of record & on file  
in my office -

In witness whereof I have set  
my hand and the seal of said  
Court at Pena this 12 3<sup>rd</sup> day  
of June A.D. 1834 -  
Jacob Gale, clerk.

Samuel Simon } Error To Pena

The People } And now comes the said Plaintiff  
and says that in the Record  
and proceedings and in the rendition of the Judgment  
aforesaid there is manifest Error in this to wit

- 1<sup>st</sup>. The Circuit Court Erred in excluding the Evidence offered  
by the Plaintiff
2. Said Court Erred in refusing the instructions ad-  
ded by Defendant below & stated in Bill of exceptions
3. Said Court Erred in giving the instructions added  
by the People
4. The Court permitted the People to give improper testimony
5. Because no Officer was sworn to attend upon the  
Jury when they retired
6. Because the Bill of indictment was not found  
by a legal grand Jury
7. Because Norton Bristol one of the

Says Circulating Motion for a new trial



Turner was a non resident of the County  
of Pima at the time of said trial which  
fact was in Pueron to Defendant below  
until after the Jury Sworn in the cause  
For these and other Reasons appeared  
in said Records the said Plaintiff in Error  
Prays that the said Judgment may be  
reversed

June 27 1854.

J. M. Purple  
Citty for Plffs in Error

#2  
Samuel Denison  
The People of Illinois

Received of Errors

1854

2. P. D.

Filed June 28, 1854.  
A. A. Keland Clerk.

12237

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